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Disparate Impact Theory in Employment Discrimination: What's Griggs Still Good For? What Not?

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DISPARATE IMPACT THEORY IN EMPLOYMENT DISCRIMINATION: WHAT'S *GRIGGS* STILL GOOD FOR? WHAT NOT?

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Is disparate impact a dead theory of employment discrimination? Definitely not. The theory itself has a more stable legal status than it did when the Supreme Court embraced it in its 1971 opinion *Griggs v. Duke Power Co.*[1] But is it thriving in litigation? It appears to be neither thriving nor dead. It has become a relatively less vital tool, compared with theories of intentional discrimination.[2] Despite the heroic effort of Congress to keep the theory from destruction by the Supreme Court through its express codification in 1991,[3] disparate impact litigation is not making a major impact in this new century.

The theme of this article is that *Griggs* and the disparate impact theory of litigation remain largely untapped resources of enormous potential for plaintiffs. A notable current example is contained in a case recently decided by the Supreme Court on different grounds; the plaintiff lost a case which might

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[1] 401 U.S. 424 (1971).

[2] Disparate impact is distinguishable from theories of individual or group disparate treatment. *See* Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15.

[3] The Civil Rights Act of 1991 provides in Section 3. Purposes:

> The purposes of this Act are
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> (1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;
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> (2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989);
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> (3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); and
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> (4) 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.

Pub. L. No. 102-166 3(1-4), 105 Stat. 1071.

have succeeded with a disparate impact theory.[4] At the same time, the theory contains pitfalls with great advantage to employers. Both sides of employment litigation need to attend more to this powerful tool and its uses and abuses.

The reasons for the underutilization of the disparate impact theory are not clear, but some possibilities include the following. First, it is a less desirable claim for plaintiffs than intent-based claims because there are no compensatory or punitive damages available for disparate impact claims. Ironically, the same statute that tried to save the theory also buried it by excluding it from the new provisions for damages. Specifically, the Civil Rights Act of 1991[5] [Act] provides for compensatory and punitive damages for claims based on intentional discrimination but relegates disparate impact recovery to the formerly available equitable relief.[6] Plaintiffs thus have an incentive to frame their actions as intentional actions by the defendants who have adversely affected their employment opportunities.

Second, the theory is underutilized because it is inherently a class-based theory and class actions are difficult, if not impossible, for private plaintiffs to undertake unless they involve the possibility of very large damage awards. The government has not undertaken many such large-scale actions in recent years, and therefore there has not been the kind of private or public commitment to attack employer practices on a large scale in the same manner as when federal antidiscrimination law was younger.[7]

Third, the world has changed in the last thirty-two years and employers now know the rules. In many ways, the *Griggs* revolution has been spectacular and employment practices across America have been influenced by the holding.[8] Employers now know that selection devices such as aptitude tests

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[4] Raytheon Co. v. Hernandez, 124 S.Ct. 513 (2003); *see infra* text accompanying notes 88-97.

[5] Pub. L. No. 102-166, 105 Stat. 1071.

[6] *See* M. ROTHSTEIN ET AL., EMPLOYMENT LAW Vol. 1 § 2.31 (3d ed. 2004).

[7] For a provocative article on the change in nature class actions in recent years from public law to private law following settlements such as those with Texaco, Denny's and Home Depot, see Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination and its Effects*, 81 TEX. L. REV. 1249 (2003).

[8] *See* Justice Department memo to Corporate Counsel, note 10, which notes that "over the past several years, an increasing number of employers have begun to use testing mechanisms that have less of a disparate impact than traditional cognitive-only exams. *See also* Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination* Laws (1992) (complaining about the effect of *Griggs* causing employers to change practices) and George Rutherglen, *Abolition in a Different Voice*, 78 Va.L.Rev. 1463 (1992) (reviewing the book).

and high school diploma requirements may trigger the obligation to validate these criteria for their ability to predict job performance or otherwise to establish business necessity. These staples of employment decisions in decades past have been replaced with more sophisticated selection devices that are less easily targeted by plaintiffs.

Fourth, disparate impact theory is under attack in some judicial quarters. Notably, the Courts of Appeal have developed a split on the applicability of the theory under the Age Discrimination in Employment Act ("ADEA").[9] These questions trace to the Supreme Court's opinion in *Hazen Paper Co. v. Biggins*,[10] where it was noted in dicta that there may be an issue of applying disparate impact analysis to ADEA cases.[11] Questions have also appeared in some circuits concerning the availability of the disparate impact theory in cases involving sex-based compensation challenges. These questions trace to the Supreme Court's opinion in *Washington County v. Gunther*,[12] where it was noted in dicta that there may be an issue of applying disparate impact analysis to sex-based compensation cases.[13]

Against these trends, however, there are pockets of increased activity involving disparate impact analysis. The Americans with Disabilities Act has

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For comprehensive discussion of the justifications and effects of disparate impact theory, *see* Pamela L. Perry, *Two Faces of Disparate Impact Discrimination*, 59 Fordham L. Rev. 523 (1991); Steven L. Willborn, *The Disparate Impact Model of Discrimination: Theory and Limits*, 34 Am. U. L. Rev. 799 (1985).

[9] Some Circuits have ruled that the disparate-impact theory is not available under the ADEA. *See* Adams v. Fla. Power Corp., 255 F.3d 1322 (11th Cir. 2001); Mullin v. Raytheon Co., 164 F.3d 696 (1st Cir. 1999); Ellis v. United Airlines, Inc., 73 F.3d 999 (10th Cir. 1996); E.E.O.C. v. Francis W. Parker School, 41 F.3d 1073 (7th Cir. 1994). Still others have raised questions about the availability of disparate impact under the ADEA. *See generally* Sitko v. Goodyear, 90 FAIR EMPL. PRAC. CASES 1576 (N.D. Ohio 2001) (collecting cases). *See also* Mack A. Player, *Wards Cove Packing or Not Wards Cove Packing? That Is Not The Question: Some Thoughts on Impact Analysis Under the Age Discrimination in Employment Act*, 31 U.Rich.L.Rev. 819 (1997).

[10] 507 U.S. 604 (1993).

[11] *Id.* at 611. In particular, the concurring opinion by Justice Kennedy, joined by Chief Justice Rehnquist and Justice Thomas, noted that the case does not involve a disparate impact theory and that the Court has never approved the use of disparate impact analysis under the ADEA. *Id.* at 617-18 (Kennedy, J. concurring).

[12] 452 U.S. 161 (1981).

[13] The issue is whether Title VII's incorporation of the Equal Pay Act defense of "any other factor other than sex" through the Bennett Amendment precludes disparate impact analysis. *See* Mullin, 164 F.3d 696 (applying same reasoning to preclude disparate impact for sex-based compensation claims under Title VII and age claims under ADEA).

supports claims under the theory,[14] and there has even been disparate impact litigation relevant to national security concerns.[15]

The last, and perhaps most important, reason that disparate impact litigation has been languishing is that its potential is not often appreciated by the practicing bar. There are many cases where a disparate impact theory might have been useful but in which none was pleaded. It is this category of cases that is of special interest, because it suggests that there could be a dramatic revival of employment discrimination cases that fail to establish intentional conduct. The most dramatic current example of this type of case is one on which the Supreme Court has just decided on other grounds.[16]

This article proceeds in Part I with a general background on disparate impact analysis. Part II focuses on the last listed reason for the obscurity of disparate impact – the failure of the bar to appreciate its potential. Part II also explores the case currently before the Supreme Court as well as prior case law under Title VII where unsuccessful plaintiffs might have profitably employed the theory. Finally, this article explores pitfalls in litigating under disparate impact theory, including the red herring fallacy and decisions that seek to limit the applicability of the concept.

I. THE DISPARATE IMPACT MODEL

The disparate impact theory of discrimination is distinctly different from claims that an employer intentionally discriminated on the basis of a protected dimension.[17] Motive is irrelevant in the disparate impact theory of discrimination. Instead, the theory is premised upon unjustified disadvantage

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[14] 42 U.S.C.A. § 12112(b)(3) (1995).

[15] *See* Cleghorn v. Emergy Dept., 813 F.2d 992 (9th Cir. 1987) (combat skills for security officers at nuclear facility); Molerio v. F.B.I., 749 F.2d 815 (D.C. Cir. 1984) (security clearance when relatives live overseas).

[16] Raytheon Co. v. Hernandez, 124 S.Ct. 513 (2003); *see infra* text accompanying notes 88-97.

[17] *See generally* Alfred W. Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 62 (1972); Joel Wm. Friedman, *The Burger Court and the Prima Facie Case in Employment Discrimination Litigation: A Critique*, 65 CORNELL L. REV. 1 (1979); Elaine W. Shoben, *Probing the Discriminatory Effects of Employee Selection Procedures with Disparate Impact Analysis Under Title VII*, 56 TEX. L. REV. 1 (1977).

caused by an employment device that disproportionately affects a group defined by race, color, religion, sex, or national origin,[18] disability,[19] and maybe age.[20]

Disparate impact must be distinguished from disparate treatment, which is a discrimination theory requiring a showing of intent. The confusing similarity in the names of these two discrimination theories is the unfortunate result of the Supreme Court's footnote in *International Brotherhood of Teamsters v. United States*,[21] in which the Court drew the distinction between *Griggs*-based impact claims and individual claims of intentional exclusion. The Court used the terms disparate impact and disparate treatment to make the distinction, and those terms have prevailed.[22]

The concept of disparate impact discrimination is an American invention that has been successfully exported to many parts of the western legal world.[23] Its legal origin was in the Supreme Court's 1971 landmark decision in *Griggs v. Duke Power Co.*[24] The issue in that case involved an employer's placement requirements black workers.[25] Historically, the employer had relegated all of its black workers to the lowest department, but after the passage of the Civil Rights Act, these new requirements replaced the former racially premised rules.[26] The new requirements were (a) possession of a high school diploma and (b) achieving particular scores on aptitude tests.[27] Because the requirements adversely affected African Americans in North Carolina at that time, they had the effect of continuing their exclusion from the desirable job categories.[28]

The district court in *Griggs* ruled Title VII requires proof of invidious motive and found none.[29] The court of appeals then held that liability could

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[18] 42 U.S.C.A § 2000e (West Supp. 2003).

[19] 42 U.S.C. § 12112(b)(6) (2003).

[20] *See supra* text accompanying note 9.

[21] 431 U.S. 324, 335 n.15 (1977).

[22] The Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (2003), use the term "adverse impact." *Griggs* itself referred to "disproportionate" ineligibility. 401 U.S. 424, 429 (1971). These latter terms are thus used as synonymous with "disparate impact."

[23] *See* Rosemary C. Hunter & Elaine W. Shoben, *Disparate Impact Discrimination: American Oddity or Internationally Accepted Concept?*, 19 BERKELEY J. EMPL. & LAB. L. 108 (1998).

[24] 401 U.S. 424.

[25] *Id.* at 427-28.

[26] *Id.* at 427.

[27] *Id.*

[28] *Id.* at 431 n.6.

[29] *Id.* at 429.

attach either to conduct that was invidiously motivated, or to unequal treatment of similarly situated individuals on the basis of a dimension covered by the Act.[30] The Supreme Court held that the Act covers more than the conduct identified by the lower courts.[31] Chief Justice Burger, writing for a unanimous Court, said that Title VII proscribes conduct that is "fair in form but discriminatory in operation."[32] When an employer uses procedures or testing mechanisms unrelated to measuring job capability, the Court said, the absence of discriminatory intent does not redeem the conduct.[33] Because the requirements disproportionately excluded African American from the desirable jobs, the Court said that the burden was then on the employer to demonstrate that its requirements were job-related and governed by principles of business necessity.[34]

In *Dothard v. Rawlinson*, the Supreme Court held that the disparate impact theory applies to gender discrimination.[35] The plaintiff challenged a minimum height requirement for prison guards in Alabama penitentiaries.[36] National statistics of height differences on the basis of gender were sufficient to establish a prima facie case of disparate impact.[37] Thus, the burden shifted to the defendant to establish the business necessity of the requirement.[38]

In the United States, the disparate impact theory of discrimination is not a sufficient basis for a constitutionally-based claim, although the concept has been accepted in Canada as a basis for a constitutional claim.[39] The United States Supreme Court held in *Washington v. Davis*[40] that a plaintiff class could not prevail with an equal protection claim under the Fifth Amendment due process clause against the Washington, D.C. police department upon a showing of the disparate impact of an aptitude test used to screen applicants for training.[41] The Court held that an employer in a constitutionally-based claim

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[30] *Id.*

[31] *Id.*

[32] 401 U.S. at 431.

[33] *Id.* at 432.

[34] *Id.*

[35] 433 U.S. 321 (1977).

[36] *Id.*

[37] *Id.* at 330-31.

[38] *Id.*

[39] *See* W.S. TARNOPOLSKY, DISCRIMINATION AND THE LAW IN CANADA 118-19 (1982); B. Vizkelety, PROVING DISCRIMINATION IN CANADA 36-37 (1987).

[40] 426 U.S. 229 (1976).

[41] *See generally* Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977); Michael Perry, *The*

cannot be liable in the absence of motive.[42] Thus, the disparate impact concept of discrimination is more limited in its application in the country that originated it than in countries to which the theory has been exported. In the United States the theory must have statutory foundations, and it is possible that the law is headed toward demanding express statutory authorization.[43] If so, disparate impact would be limited to the Americans with Disabilities Act[44] and to Title VII claims not involving gender-based wage challenges.[45]

In a disparate impact case under Title VII, the plaintiff bears the initial burden of establishing the exclusionary effect of a specific selection device.[46] Although there is no requirement to establish the employer's motivation in selecting an exclusionary device, the plaintiff's proof must be specific to establish its disproportionate impact. It is not sufficient to simply show that the employer's workforce does not mirror the racial, ethnic, and gender composition of the surrounding population.[47] Conversely, an employer cannot defend a disparate impact case with evidence of a favorable "bottom line." A "bottom line" is individuals hired whose composition matches the racial, gender, and ethnic characteristics of the applicants.[48]

Disproportionate Impact Theory of Racial Discrimination, 125 U. PA. L. REV. 540 (1977).

[42] 426 U.S. at 241-2.

[43] The Supreme Court has held that claims under 42 U.S.C.A. § 1981 require a showing of intent rather than disparate impact. Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 391 (1982). That Reconstruction Era statute makes no reference to any kind of definition of discrimination, of course, but simply refers to the right to make contracts. Another statute in employment discrimination litigation that does not make explicit reference to disparate impact discrimination is the Age Discrimination in Employment Act. 29 U.S.C.A. § 621 (West Supp. 1998). As previously noted, the Courts of Appeal are currently split on the applicability of disparate impact analysis under that statute. *See supra* text accompanying note 9.

The Pregnancy Discrimination Act [PDA], 42. U.S.C.A. § 2000e(K) (West Supp. 2003), is a counter-example. The Act does not expressly provide for disparate impact, but courts have found it a permissible tool under that Act. *See* Garcia v. Woman's Hosp. of Tex., 97 F.3d 810 (5th Cir. 1996); Troupe v. May Dept. Stores Co., 20 F.3d 734 (7th Cir. 1994). It is noteworthy, however, that the PDA simply amends Title VII to provide that discrimination on the basis of pregnancy is discrimination on the basis of sex under that Act. In this context, the PDA is perhaps best understood as simply a part of Title VII rather than a separate act. Thus, even if the Supreme Court ultimately holds that disparate impact is not permitted without express authorization, the PDA may remain an exception.

[44] 42 U.S.C.A. §§ 12101-12213 (West Supp. 1990).

[45] *See* Wash. County v. Gunther, 452 U.S. 161 (1981). *See also supra* text accompanying note 13.

[46] 42 U.S.C.A. § 2000e – 2(k)(1)(A)(i) (West Supp. 1998), amended by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

[47] Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

[48] Connecticut v. Teal, 457 U.S. 440, 451 (1982). *See generally* Martha Chamallas,

The Supreme Court has noted that proof of disparate impact is not a singular standard and must be approached on a case by case basis.[49] One method is to demonstrate the effect of the requirement on the relevant population. When a practice has an adverse impact on the group from which the employer draws employees, the impact on that population establishes the prima facie case. In *Griggs v. Duke Power Co.*,[50] the original disparate impact case, the Court cited state census figures of educational attainment by race to demonstrate that the employer's high school diploma requirement adversely affected African Americans.[51] Later, in *Dothard v. Rawlinson*, national statistics concerning the relative height of men and women established the disparate effect of a minimum height requirement for prison guards.[52]

Applicant flow is the second method by which the plaintiff may demonstrate the disparate impact of a challenged selection practice. Applicant flow analysis compares the relative pass rates of applicants on the basis of race, gender, and national origin. The Equal Employment Opportunity Commission ("EEOC") endorses this method in the Uniform Guidelines on Employee Selection Procedures,[53] which the agency uses to guide its prosecutorial discretion. To assess the sufficiency of the disparate pass rates, the Guidelines use as a rule of thumb the "four-fifths rule."[54]

Some cases have approved the four-fifths rule to assess the sufficiency of the disparity for disparate impact,[55] but others have not.[56] In *Clady v. County of*

Evolving Conceptions of Equality Under Title VII: Disparate Impact and the Demise of the Bottom Line Principle, 31 UCLA L. REV. 305 (1983).

[49] Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 995 n.3 (1988).

[50] 401 U.S. 424 (1971).

[51] *Id.* at 431 n.6.

[52] 433 U.S. 321, 329-30 (1977).

[53] 29 C.F.R. § 1607.4 (1978).

[54] The "four-fifths rule," also known as the "80% rule," finds adverse impact if the pass rate for one group is less than four-fifths of the pass rate of the highest group. For example, assume that there are one hundred male applicants and one hundred female applicants. The employer requires applicants to move a set of boxes from one area to another within a certain amount of time. Assume that seventy of the one hundred men pass the test and only thirty-five of the one hundred women pass the test. The pass rate of the men is 70% and the rate for the women is 35%. The pass rate for the women is thus only half of the rate of the men. Under the "four-fifths rule" this difference is sufficient to show adverse impact because the comparative pass rate is only one-half and not at least four-fifths. If sixty of the women had passed, however, the female pass rate would have been 60%. To compare this pass rate with that of the men, divide the 0.6 rate by the 0.7 rate. The result is 0.86, which is greater than 80% (four-fifths), which is insufficient for adverse impact under the guidelines.

[55] *See e.g.*, Firefighters Inst. for Racial Equality v. City of St. Louis, 549 F.2d 506 (8th Cir. 1977).

Los Angeles,[57] for example, the court observed that the Guidelines are not binding and do not have the force of law. The four-fifths rule has been criticized by courts and commentators, the court noted, as an ill-conceived rule capable of producing anomalous results, and trial courts need not adhere to it.[58]

The Civil Rights Act of 1991 provides that the plaintiff must identify the particular practice that causes the impact, unless it is not possible to separate the employer's practices for individual analysis. If the plaintiff establishes that the requirements are "not capable of separation,"[59] then presumably the plaintiff may demonstrate impact with the applicant flow throughout the entire process or perhaps by a general population comparison that would not otherwise be permitted. The case law has not developed the point.

Although applicant statistics are generally superior to more generalized data, they may be rejected as unreliable. Potential applicants may be deterred from making a formal application because of the employer's reputation for discrimination or because the challenged requirement is known in advance such that potential applicants who do not satisfy the requirement do not pursue the position further. In *Dothard*, the Supreme Court observed that plaintiffs need not always establish the prima facie case with comparative statistics concerning actual applicants because "[t]he application process might itself 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."[60]

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[56] Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988). For criticism of the rule, see Elaine W. Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII*, 91 HARV. L. REV. 793 (1978).

[57] 770 F.2d 1421 (9th Cir. 1985).

[58] *See also* Cox v. City of Chicago, 868 F.2d 217 (7th Cir. 1989).

[59] Section 703(k)(1)(B)(i) provides that with respect to showing that particular requirements have a disparate impact,

> the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except 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.A. § 2000e-2 (West Supp. 2003).

[60] 433 U.S. at 330; *see also* Ass'n Against Discrimination in Employment Inc. v. City of Bridgeport, 647 F.2d 256 (2d Cir. 1981). *But see* E.E.O.C. v. Joe's Stone Crab, Inc., 220 F.3d 1263 (11th Cir. 2000) (reversing the district court's acceptance of reputation evidence as explaining the disparity between women applicants for the position of server and the availability of women in this job category locally).

Disparate impact is ordinarily proven by statistics, but there are cases in which the facts permitted proof without this step. In *Garcia v. Woman's Hospital of Texas*,[61] for example, a nurse was fired when her employer learned of her pregnancy. The hospital claimed that all nurses were required to lift 150 pounds, and her pregnancy prevented lifting such weights.[62] The plaintiff established the disparate impact of the rule on pregnancy solely by introducing evidence that virtually all pregnant women would be advised by their doctors not to lift 150 pounds.[63]

Once a plaintiff has established disparate impact, the employer may defend by showing that the exclusionary device is job-related or a business necessity. The Supreme Court explained in *Griggs* that Title VII forbids the use of exclusionary employment tests unless the employer demonstrates that any given requirement has a "manifest relationship" to the job.[64] When practices have a disparate impact, the employer may defend with "business necessity." Section 703(k)(1)(A) of Title VII, as amended by the Civil Rights Act of 1991, provides:

> An unlawful employment practice based on disparate impact is established under this subchapter 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 demonstrate that the challenged practice is job related for the position and consistent with business necessity...[65]

This amendment expresses the congressional intent that business necessity is a defense in Title VII litigation and that the employer has the burden of establishing it. The Supreme Court's 1989 opinion in *Wards Cove Packing Co. v. Atonio*[66] had placed the burden on the plaintiff to show the lack of business necessity. The Civil Rights Act of 1991 returned employment discrimination law to the earlier understanding of the meaning of *Griggs* and overturned that part of *Wards Cove* by defining "demonstrate" to mean "meets the burdens of production and persuasion."[67]

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[61] 97 F.3d 810 (5th Cir. 1996).
[62] *Id.* at 812.
[63] *Id.* at 814.
[64] 401 U.S. 424, 436 (1971).
[65] 42 U.S.C.A. § 2000e-2(k)(1)(A) (West Supp. 2003).
[66] 490 U.S. 642, 659 (1989).
[67] 42 U.S.C.A. § 2000e(m); *see also* Lanning v. Southeastern Pa. Transp. Auth., 308 F.3d

Disparate impact analysis is not a heavily litigated theory of discrimination, and thus many questions remain relatively unsettled regarding the nature of the plaintiff's proof and the character of the business necessity defense. Because this avenue remains one that plaintiffs have not explored as often as they might, the next section of this article explores the kinds of missed opportunities that plaintiffs have had to use this theory in a variety of types of cases. If the theory is litigated more heavily, then many of the open questions about its applicability and its defenses will find greater resolution in the case law.

II. DISPARATE IMPACT POTENTIAL AND PITFALLS

This section explores circumstances where disparate impact theory was not invoked in cases where it might have been useful to the plaintiff and cases where it was invoked but poorly used by plaintiffs. Its purpose is twofold. First, the discussion in Part A explores cases where disparate impact was not used at all when it might have been possible to establish a claim under this theory. The purpose of the discussion is to encourage creative thinking about the application of this tool by plaintiffs' attorneys when theories of intentional discrimination fail. Then Part B is an exploration of cases when plaintiffs pleaded disparate impact but fell prey to fallacies. Its purpose is to encourage clear thinking about the nature and application of this theory of discrimination and to discourage its improper use.

A. Disparate Impact as Mighty Mouse

It is always easier to litigate cases with twenty-twenty hindsight, and that is what I will do here. This section will explore some cases in which plaintiffs unsuccessfully litigated as intentional exclusions when a disparate impact theory might have succeeded. The theme is that disparate impact is a small but powerful theory which, in appropriate circumstances, can arrive to "save the day" for plaintiffs – a legal version of Mighty Mouse, if you will.

Perhaps the most prominent case to have missed an opportunity to use disparate impact was *Furnco Construction Corp. v. Waters*,[68] which ultimately lost in the Supreme Court in 1978. All theories of discrimination were new in the seventies,[69] and this case was presented under the model of disparate

286 (3d Cir. 2002) (reviewing history of Congressional rejection of the more lenient standard in *Wards Cove*, but finding that public safety concerns still meet the stricter standard).

[68] 438 U.S. 567 (1978).

[69] The cases establishing the basic structure of discrimination cases were decided in the early 1970's. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Griggs v. Duke

treatment, when, in hindsight, it might have succeeded under a theory of disparate impact. *Furnco* involved a suit by African American bricklayers in Chicago against an employer who specialized in relining blast furnaces with firebrick.[70] The employer had separate contracts for specific jobs to reline furnaces for the steel industry and had no permanent workforce of bricklayers.[71] Rather, the job supervisor for each relining contract had authority to hire bricklayers known to be experienced and competent or recommended as highly skilled.[72] The employer had historically an all-white work force and thus the plaintiffs failed to qualify as "known" competent workers.[73] In order to meet its affirmative action obligations as a federal contractor,[74] the employer supplemented its workforce with minority bricklayers from a second list – one that didn't need to meet the "known" requirement.[75] The plaintiffs were not on the second list either, and thus were not considered for employment.[76]

The case was tried as a pretext case under *McDonnell Douglas Corp. v. Green.*[77] The district court found that the plaintiffs established a prima facie case of qualification, but Furnco's practice of hiring only persons of known quality was a legitimate nondiscriminatory reason for the plaintiffs' rejections.[78] The court of appeals disagreed and noted that Furnco could take written applications to compare those qualifications with those of other bricklayers already known to the superintendent.[79] The circuit court was focusing on the apparent irrationality of the employer's practice when it operated to exclude the black plaintiffs.[80]

The Supreme Court reversed and explained for the first time in this case that *McDonnell Douglas* had caused confusion when it characterized the defendant's burden as the production of a "legitimate business reason."[81] This phrase creates the impression that the employer's reason for the adverse action affecting the plaintiff must be rational, but in *Furnco* the Supreme Court first

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Power Co., 401 U.S. 424 (1971).

[70] *Furnco*, 438 U.S. at 569.

[71] *Id.* at 570.

[72] *Id.*

[73] *Id.* at 571-72.

[74] Exec. Order No. 11,246, 3 C.F.R. 101 (1964-1965).

[75] *Furnco*, 438 U.S. at 572.

[76] *Id.* at 570.

[77] 411 U.S. 792 (1973).

[78] *Furnco*, 438 U.S. at 572-73.

[79] *Id.* at 573-74.

[80] *Id.* at 574.

[81] *McDonnell Douglas Corp.*, 411 U.S. 792 (1973).

clarified the limited nature of the burden.[82] The Court explained that the prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."[83] Therefore, "when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, whom we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race."[84] The Court further noted that it is not the business of the courts to reform business practices, even when they appear irrational. All that is required of the Act is the absence of discrimination.[85]

How very different this case might have been if it had been litigated as a disparate impact case rather than a pretext case. The plaintiffs' attorneys no doubt thought that they could not prevail under such a theory because the employer had an acceptable "bottom line" with an adequate representation of minorities in the work force because of the second affirmative action list. This case arose before the Supreme Court rejected the "bottom line" defense,[86] so it is understandable that this obstacle would have been intimidating. But with the advantage of hindsight, including the rejection of the bottom line defense, it is interesting to consider what might have happened if this case had proceeded under the *Griggs* model.

First, the plaintiffs should not have pleaded that they were "qualified" for the job. The *McDonnell Douglas* concept of qualification in the prima facie case has always been murky, and in *Furnco* it was interpreted by the attorneys and district court judge to mean something on the order of "capable of performing the job."[87] The concept of qualification in *McDonnell Douglas* is better understood, however, as meaning that one meets the *stated* qualifications of the employer. In this case, the plaintiffs were not qualified because their quality was not "known" to the superintendent. Being "known" was a stated qualification. Similarly, the plaintiffs in *Griggs* did not plead that they were *capable* of doing the jobs they sought in some absolute sense; rather, they

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[82] The Supreme Court has since explained the nature of the employer's burden even more fully in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). *See also* Reeves v. Sanderson Plumbing Products, 530 U.S. 133 (2000).

[83] *Furnco*, 438 U.S. at 578.

[84] *Id.*

[85] *Id.* at 579.

[86] Connecticut v. Teal, 457 U.S. 440, 452 (1982).

[87] *Furnco*, 438 U.S. at 573.

pleaded that they did not meet the employer's stated requirements, such as the high school diploma. In both cases, the plaintiffs wanted to challenge the employer's concept of qualification, which is precisely what disparate impact analysis does.

Just as the high school diploma requirement in *Griggs* excluded on the basis of race, the requirement in *Furnco* of being "known" to the superintendent excluded on the basis of race. The historical exclusion of African Americans from the work force meant that the superintendent had no opportunity to "know" black bricklayers. This effect would be eventually cured by the use of the affirmative action list, where over time the superintendents would begin to have experience with some minority bricklayers and thus "know" them for purposes of qualification, but the elimination of the disparate impact through that method would take time. The disparate effect of the requirement to be "known" existed at the time of litigation and thus should have sufficed to shift the burden to the defendant to show business necessity. The apparent inability of the defendant to meet the business necessity defense may have been at the heart of the court of appeals' decision when it focused on the irrationality of the practice. Irrationality, however, is relevant only to the business necessity defense of disparate impact, and not to the "legitimate business purpose" concept in a pretext case. Therefore the plaintiffs ultimately lost in the Supreme Court.

History appears to be repeating itself with a case on which the Supreme Court recently decided. Once again we have a case litigated as a pretext case when the more fruitful avenue may well have been disparate impact. It bears a striking resemblance to the analytical problem in *Furnco*.

Raytheon v. Hernandez[88] involved a claim under the ADA. The plaintiff involuntarily resigned from Hughes Missile Systems Company when he tested positive for drugs.[89] He had been an employee for twenty-five years at the time, and he reapplied two years later after successful completion of a program of drug rehabilitation.[90] His reapplication was summarily rejected because of the company's policy that it will not rehire anyone discharged for cause.[91] The decision-maker did not even know that the misconduct was drug use, as

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[88] 124 S.Ct. 513 (2003).
[89] *Raytheon*, 123 S.Ct. at 516.
[90] *Id.* at 516.
[91] *Id.*

opposed to fighting, stealing, or other form of prohibited behavior.[92] The policy was a flat one.

The plaintiff sued on the basis that he was a qualified individual who was refused employment solely on the grounds of his record of past drug use or his perceived drug addition disability.[93] As a pretext case, the employer successfully obtained summary judgment at the trial level.[94] On appeal, the Ninth Circuit rejected the employer's position that summary judgment was appropriate because its uniform policy rebuts the inference of discriminatory motivation.[95] Rather, the Court of Appeals saw the issue as one of disability discrimination because the rule operates to bar the re-employment of a former drug addict despite successful rehabilitation.[96] The Supreme Court disagreed and found that the Ninth Circuit was functionally applying a disparate impact approach to a disparate treatment case, which was improper.[97]

The core problem appears to be that this case is more properly conceived as one in disparate impact rather than a pretext case. The plaintiff was not qualified for the job in the sense of meeting the employer's requirements. The employer requires that applicants not be previous employees severed for misconduct, and the plaintiff failed that requirement. This requirement is like the *Furnco* requirement to be "known" to the superintendent, or the *Griggs* requirement to have a diploma, and therefore is properly the subject of analysis for its impact on the protected group.

In *Hernandez*, the plaintiff's attorneys appeared to have recognized this problem belatedly. The Ninth Circuit reversed the summary judgment with respect to the pleaded claim of pretext, but affirmed the summary judgment on the disparate impact claim on the grounds that it was not pled in the complaint nor raised prior to the close of discovery.[98] It appears that the case-saving arrival of Mighty Mouse was too late.

Another line of cases in which disparate impact might have been a better avenue than pretext is the group known as the "cronyism" cases.[99] One such

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[92] *Id.*
[93] *Id.* at 517.
[94] *Id.*
[95] *Id.* at 518-19.
[96] *Id.* at 518.
[97] *Id.* at 519-20.
[98] *See id.* at 518.
[99] See Ann C. McGinley, The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race-Conscious Decision

case involved a Caucasian supervisor who promoted his Caucasian "drinking buddy" whom he knew from social occasions rather than a more qualified African American employee.[100] The African American, who had not had the same opportunities to participate in these social occasions, had no opportunity to apply for the job because no applications were sought for this casually-conducted promotion procedure. The district court judge found liability from the prima facie case coupled with the informality and secretive nature of the promotion process.[101] The court of appeals upheld the verdict and reasoned that the Act was violated because the promotion "was nothing more than a typical 'good ol' boy' appointment" that the Act intended to reach.[102] The court found that although the promotion was literally based upon preference for the social relationship rather than racial preference, there was a sufficient connection between race and the social relationship itself for satisfaction of the causal requirement in the Act.[103]

Roberts, which was decided in 1988, does not appear to be good law under standards subsequently announced by the Supreme Court. The Court has made clear that intent is the essence of a pretext case.[104] Rather, the fact pattern in *Roberts* would need to be construed as a disparate impact case. A "requirement" for this job apparently was participating in the same social events and being a "drinking buddy" of the supervisor. Like the requirement in *Furnco* that the bricklayers be "known" to the superintendent, the promotion in *Roberts* required being known socially to the decision-maker. Therefore, that requirement should be probed for its disparate impact on the plaintiff's racial group. Relevant evidence would be the racial composition of the guests at these social events and the racial identification of the decision-maker's "drinking buddies." Such evidence does not have the same clarity as the racial composition of those with a high school diploma, but it is equally probative of the underlying question – namely, did the employer utilize hiring requirements that disproportionately excluded on a protected basis? If so, then the burden should shift to the employer to show business necessity. If, indeed, the business would benefit from the closeness of the working relationship rather than the superior objective qualifications of the plaintiff, then the employer

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Making Under Title VII, 39 Ariz. L. Rev. 1003, 1024 n.132 (1997).

[100] Roberts v. Gadsden Mem'l Hosp., 835 F.2d 793, 797 (11th Cir. 1988).

[101] *Id.*

[102] *Id.* at 798.

[103] *Id.* ("[The decision-maker's] informal methods necessarily and intentionally favored those who moved within his social circles – *i.e.* white people.").

[104] Reeves v. Sanderson Plumbing Prods., 530 U.S. 133 (2000); Saint Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

ought to be on the spot to produce such evidence. Law that holds otherwise simply encourages informal and unaccountable hiring procedures.

Indeed, another case involving "cronyism" reflects exactly the kind of unsavory situation that results from law that does not penetrate such decision-making with disparate impact analysis. In *Foster v. Dalton,*[105] the decision-maker in a naval hospital failed to promote the most qualified candidate, who was a black woman, in favor of his "fishing buddy."[106] The case was tried as a pretext case and the court held that the superior candidate could not prevail in the absence of discriminatory animus.[107] Although the court found the "cronyism" distasteful, it found no need to probe the connection between favoritism for same-race friends and the purpose of Title VII in eliminating racial barriers to employment.[108] Although not citing *Roberts*, the *Foster* court was apparently unpersuaded by the *Roberts'* approach of addressing "cronyism" as a practice that is inherently covered by the Act without further proof of a racial connection.[109] Whereas the *Roberts* plaintiff won without reliance on disparate impact, that theory would appear to be critical to success under the reasoning of *Foster*.[110] A hidden requirement for the job was to be a "fishing-buddy" of the decision-maker, and the plaintiff failed that requirement. Therefore, the racial composition of the decision-maker's fishing buddies would be relevant to examining the disparate impact of this requirement. Under the strict Navy rules of qualification, the plaintiff was objectively more qualified than the fishing buddy who received the job, but the "true" qualification involved the hidden requirement of being a "fishing-buddy." Therefore, like the diploma requirement in *Griggs*, this practice should be subject to examination for its disparate impact.

Foster is remarkably similar to *Hernandez.* Like the decision-maker in *Hernandez* who did not even know about the plaintiff's disability, the decision-maker in *Foster* was equally unaware of the race of the plaintiff applicant. Therefore, the cases failed as pretext cases and could succeed only as disparate impact cases.

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[105] 71 F.3d 52 (1st Cir. 1995).
[106] *Id.* at 54.
[107] *Id.* at 54-55.
[108] *Id.* at 56.
[109] *Id.* at 57.
[110] *Id.*

B. Disparate Impact Pitfalls

Even Mighty Mouse must have bad days. There have been a number of cases where plaintiffs have litigated a disparate impact theory and lost because of a theoretical confusion about the nature of this claim.

1. The "Red Herring" Fallacy

Despite the apparent simplicity of the concept of disparate impact discrimination, some plaintiffs have been confused by the nature of what they need to prove - or perhaps, lacking the necessary evidence, they have tried to convince courts that the evidence they do have is probative. For whatever reason, there have been some cases exposing a similar fallacy in the logic of the plaintiff's proof. I call this the "red herring" fallacy because in each of these cases the plaintiff presents different proof that is not directly probative of the disparate impact question.

The plaintiff's proof in a disparate impact case must probe the basic question: Does the employer's practice have a significant adverse effect on the plaintiff's group? To use a completely hypothetical illustration, suppose that an employer has a rule that results in the discharge of employees who chronically have bad breath on the job.[111] Assume that a man is fired for this reason and that he sues under Title VII with a disparate impact claim. His theory is that this rule adversely affects men because a prime cause of bad breath is smoking and more men are smokers than women.

The plaintiff's proof that more men smoke than women is a red herring. It does not answer the fundamental question in the litigation, namely whether a rule against bad breath disparately excludes men. The data on smokers is approaching the question from the side rather than the top. The evidence about smoking would answer the disparate impact question only if one of the following conditions is present: (a) smoking is the only cause of bad breath, or (b) smoking is only one cause of bad breath, but all the other causes are equally distributed by gender, or all other causes are also disproportionately male in character. Thus, for example, condition (b) might apply when there are three primary causes of bad breath: smoking, disease X and disease Y.[112] If both

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[111] If the employer adopted this policy with the intention of disadvantaging male workers, then the plaintiff could establish a disparate treatment claim. If the employer adopted this policy for the purpose of disadvantaging smokers, then it might run afoul of state law in some jurisdictions that protect smokers in the workplace. *See* ROTHSTEIN ET AL., *supra* note 6, § 2.41.

[112] If the plaintiff's bad breath is caused by a disease, then the Americans with Disabilities

diseases X and Y are suffered equally by men and women, then the data on the predominance of men among smokers would be probative of the disparate impact question.[113] Or, if diseases X and Y were suffered disproportionately by males, then all three major causes – smoking and diseases X and Y – would be mostly male and thus the bad breath rule would have a disparate impact on men. In the absence of such evidence, however, the smoking data is not probative of the disparate impact question unless condition (a) is met, namely that smoking is the only cause of bad breath.

A second hypothetical illustration helps to clarify the red herring problem. Assume that an employer permits employees on an assembly line to listen to music with headsets and portable players, but that the rule excludes rap. Thus, employees may listen to any type of music on the job except rap. An African American plaintiff is discharged for listening to rap on the job and sues. The plaintiff might have an intentional discrimination theory if there is proof that the rule was targeted at Black workers or that it was disparately enforced against the plaintiff or the plaintiff's group because of race. Alternatively, the plaintiff might be able to prevail on theory that this rule was a condition of employment that unduly burdened the plaintiff's cultural heritage, regardless of the employer's intent.[114] Failing these theories, however, the plaintiff can only prevail with a disparate impact theory.

Assume further that the plaintiff presents evidence that rap is very popular in the African American community. This evidence is a red herring because it does not answer the disparate impact question. In this case, that question is: Does a rule against rap music disproportionately burden Black workers? The evidence about the popularity of rap in the African American community would be probative of that question only if (a) only African Americans listen to rap music, or (b) a larger proportion of people in the African American community listen to rap than in the non-Black community. Because rap music enjoys a large non-Black audience, the plaintiff will be unable to satisfy condition (a). Condition (b) would be difficult, but not impossible, to prove if the plaintiff cannot find directly probative evidence. Without it, the plaintiff cannot prove the fundamental disparate impact question – whether a rule against rap music disproportionately affects African American workers. The plaintiff would need

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Act may be implicated.

[113] In the absence of proportionate distribution of diseases X and Y, then it would be possible that any negative effect against men from the smoking cause would be counterbalanced by a possible negative effect on women from diseases X and Y. The underlying question is whether bad breath causes a gender disparity, and there would be no such disparity if the causes counterbalance the effect on men and women.

[114] *See* Rogers v. American Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1981).

proof that a larger proportion of the African American community listened to rap music compared with the non-Black community. The plaintiff's offered proof that a "large" proportion of the Black community listened to rap would not be the same as proving that a "larger" proportion listened – i.e. a larger proportion than the listeners in the non-Black community.

With both of these hypothetical examples, if the plaintiff does manage to establish a prima facie case of disparate impact, the burden would shift to the defendant employers to establish the business necessity of the rules. The first employer may need the rule to avoid alienating customers with the bad breath of its employees, and the second employer may be able to show that rap agitates the workers too much or that its strong beat is more audible outside the headsets. Because the case law has always been more lenient in accepting the reasonableness of rules that only affect employment opportunities rather than necessarily preclude them, both employers are likely to prevail.[115] Both bad breath and music choices can usually be controlled for the hours of the working day. As opposed to these artificial hypothetical examples used to illustrate the problem, the real cases posing the red herring problem involve more substantial issues of employment opportunity.

One such case illustrating the red herring fallacy concerned a challenge to the employer's rule against hiring anyone with a "bad back" for a job requiring manual labor.[116] The plaintiff was an African American applicant who was rejected for this reason.[117] His bad back was caused by sickle cell anemia, so in the disparate impact litigation that followed he produced evidence that sickle cell anemia is suffered primarily by the Black community.[118]

The evidence about sickle cell anemia in this case was a red herring because it fails to address the fundamental disparate impact question: Does a rule against bad backs disproportionately exclude on the basis of race? The

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[115] It is possible that both of these examples would be treated as only miscellaneous conditions of employment like the grooming cases, and thus subject to great employer deference with respect to their business necessity. The rule against bad breath may be taken as a grooming requirement, although it has a medical component to it. The rule against listening to rap music would seem to be more like a working condition such as the English only rules or other situations where the employer has imposed a preference that is difficult to establish as a business necessity with concrete and objective evidence. Courts have nonetheless been quite deferent in accepting explanations of necessity without rigorous proof. *See, e.g.*, Garcia v. Spun Steak Co., 998 F 2d 1480 (9th Cir. 1993).

[116] Smith v. Olin Chem. Corp., 555 F.2d 1283 (5th Cir. 1977).

[117] *Id.* at 1284.

[118] *Id.*

rule was not against bad backs caused by sickle cell anemia, but against bad backs. There are many causes of bad backs, of which sickle cell anemia is only one. The plaintiff's evidence would be probative of the essential question only if (a) sickle cell anemia was the only cause of bad backs, or (b) all other causes of bad backs are equally distributed by race or they are also disproportionately suffered by African Americans. In the absence of such evidence, the plaintiff's evidence is simply a red herring.

Another example of the red herring fallacy derives from a case involving security clearances. In *Molerio v. Federal Bureau of Investigation*,[119] the plaintiff was an applicant to the Federal Bureau of Investigation ("FBI") for a position that required a "top secret" security clearance. The plaintiff was rejected because he had relatives living in Cuba and would not qualify for a "top secret" security clearance for that reason.[120] The FBI denies such clearance to individuals with "relatives residing in any foreign country controlled by a government whose interests or policies are hostile to or inconsistent with those of the United States."[121] The plaintiff sued on the basis that the policy had a disparate impact on applicants of Cuban ancestry.[122]

The plaintiff's argument was a red herring because it did not address the fundamental disparate impact question: Does the rule against hiring individuals with relatives living in a country hostile to the United States disproportionately exclude plaintiff's group? The court held that the policy has no greater impact on Cubans than it does on persons from other hostile countries.[123] The problem with the plaintiff's proof is that although the policy is not an impediment to persons with relatives in western European countries, for example, it is not also true that the group adversely affected will be disproportionately Cuban when there are other non-Cuban hostile countries. The composition of people who are *not* affected by a rule is irrelevant. Consider, for example, that the composition of people who do *not* have bad breath, or who do *not* listen to rap music, or who do *not* have bad backs are not relevant to the disparate impact inquiry as long as these groups are not being *favored* in any way except by the absence of disfavor.

Even if the plaintiff in *Molerio* had succeeded in establishing a prima facie case of disparate impact, the FBI had a statutory defense. The court also held

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[119] 749 F.2d 815 (D.C. Cir. 1984).
[120] *Id.* at 812, 822.
[121] *Id.* at 823.
[122] *Id.*
[123] *Id.*

in that case that section 703(g) of the Act "specifically acknowledges the general validity of national security clearance requirements," and "the mere fact that such requirements impose special disabilities on the basis of connection with particular foreign countries is not alone evidence of discrimination."[124]

Perhaps the best example of the red herring fallacy in case law is found in cases where African Americans challenge an employer's "no beards" policy on the grounds of its disparate racial impact.[125] The evidence offered is that beards are medically necessary because the plaintiff suffered from a skin condition known as pseudofolliculitis barbae ("PFB"). The standard medical advice for PFB sufferers is to grow a beard. It need only be a short one and can be neat and trimmed, but the absolute policy against beards excluded people with PFB. The plaintiff then presented evidence that PFB is a condition suffered predominantly by African American males.

The plaintiff's evidence about the racial disproportion in PFB sufferers is a red herring. The fallacy is that it does not directly bear on the fundamental disparate impact question: Does a rule against beards adversely affect the plaintiff's group compared with other groups? The issue thus is not whether PFB is racially disproportionate, but whether the medical necessity for beards is racially disproportionate. The plaintiff's evidence about PFB will be probative of the fundamental question only if (a) PFB is the only medical reason that necessitates beards, or (b) all other medical reasons for having beards are equally distributed by race or are also disproportionately suffered by African Americans.

In *EEOC v. Greyhound*[126] the Court of Appeals reversed a trial court decision in favor of the EEOC and an applicant for a position as a ticket agent. Although the employer permitted beards for men who did not have positions involving public contact, the position of ticket agent required public contact and therefore the employer rejected the applicant. The Court of Appeals noted:

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[124] *Id.*

[125] *See* E.E.O.C. v. Greyhound, 635 F.2d 188 (3d Cir. 1980).

[126] *Id.*

> [A] policy does not have a disparate impact unless it is the cause of that impact. In this case the Commission has not demonstrated that Greyhound's no-beard policy has a greater impact on blacks than on whites. EEOC argues that "(b)ecause of PFB's overwhelmingly greater prevalence among blacks than among other racial groups," Greyhound's policy "perforce excludes disproportionately more blacks than whites from its public-contact positions." Appellee's brief at 13-14. EEOC's evidence, however, assuming that it was reliable, admissible, and probative, would support only a conclusion that PFB has a disproportionate impact on blacks. It has presented no evidence from which it logically may be inferred that Greyhound's policy has a disproportionate impact.[127]

The no-beard question is a particularly interesting one with respect to the red herring fallacy because the rule is a cross between the foundation of the two hypothetical examples that began this section. In one hypothetical, the employer's rule against bad breath was at issue and in the other there was a rule against listening to rap music on the job. The rap music example could most likely be defended as a reasonable employer preference that modifies employment opportunities rather than eliminate them, like grooming requirements. In the absence of a disparate impact on employment opportunity that would require proof of a business necessity, such a rule is likely to be upheld even if the plaintiff were able to establish evidence of disparate impact by showing that a rule against rap music disproportionately affects African Americans.

The bad breath example may be more analogous to a grooming requirement because even medical causes of bad breath are usually subject to amelioration by personal hygiene and treatment. The beard case overlaps with the bad breath example in that sense, because there are medical as well as non-medical reasons for growing a beard, but it is also like the rap music example because the non-medical reasons for growing a beard are a matter of personal preference rather than necessity. The case law has not yet resolved whether disparate impact analysis can be used for matters of personal preference rather than immutable characteristics like height. The next section examines some of the case law that explores those issues, and the solutions offered by at least one jurist, Judge Posner.

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[127] *Id.* at 193.

2. A Slippery Slope to Unworthy Litigation

Another pitfall in disparate impact analysis that is troubling courts is whether to keep analytic purity in rejecting unsympathetic cases. The dockets are full of employment discrimination claims, and many judges and political observers would probably be horrified at my suggestion that there are more cases suitable for analysis under the disparate impact model than are currently being litigated. As a result, some courts are finding ways to reduce the types of cases that can be brought under this theory, such as by limiting the types of employment practices that are subject to disparate impact analysis to facilitate summary judgment.[128] It is my contention that neither the Act itself nor the Supreme Court's interpretation of it to date justify such limitation. The unsympathetic cases are usually ones where, like Molerio,[129] the case is best resolved by focusing on the defense. Both the statute itself and case law would support finding a business necessity in limiting the potential for personal duress for individuals receiving the highest security clearance. Similarly, the bad back case[130] can be addressed by determining whether the employer can establish a (a) business necessity for the rule under Title VII[131] or (b) reasonable accommodation for the condition if the disability is covered by the Americans with Disabilities Act.

The legal reality, however, is that most opinions list several grounds for rejecting a plaintiff's claim, presumably in order to reduce the probability of reversal on appeal.[132] Moreover, appellate rulings that facilitate summary

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[128] *See infra* text accompanying notes 133-139.

[129] *See supra* text accompanying notes 119-124.

[130] *See supra* text accompanying notes 116-118.

[131] In the bad back case discussed, the court discussed at length the application of the business necessity defense even though there were ample procedural and evidentiary irregularities to resolve the case without the additional discussion. Smith v. Olin Chem. Corp., 555 F.2d 1283 (5th Cir. 1977).

[132] An example of this approach is in *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (8th Cir. 1987). The plaintiff in that case challenged the employer's rule against unwed pregnancy on several grounds, including its disparate impact on the basis of race. *Id.* at 699. The plaintiff relied on evidence of a greater fertility rate among black females to support the disparate impact claim. *Id.* at 701. This evidence is an example of the red herring fallacy because it fails to relate directly to birth rates among unwed women rather than among women in general and thus fails to address squarely the fundamental disparate impact issue, namely the racial effect of the unwed pregnancy rule. The court recognized that this evidence was insufficient to support the claim but went on to note that regardless of the defects in the prima facie case, the rule was justified by business necessity because an essential function of the job was to serve as a role model for the girls served by the employer club. *Id.* at 701-01.

judgment have the appeal of reducing the number of cases that are clogging the federal courts. As such, it is not surprising that there have been a number of holdings that have attempted to restrict the types of claims that may be brought under the disparate impact model. As revealed in the list below, a striking number of these opinions derive from the Seventh Circuit, and from Judge Posner in particular. In this series of opinions, two of which penned by Judge Posner, the Seventh Circuit held that disparate impact analysis (1) does not apply to practices "tenuously" related to discrimination; (2) requires an "employment practice" narrowly defined, and (3) is limited to challenges to eligibility requirements.

(1) "*Tenuously related to discrimination.*" *Finnegan v. TWA*[133] was a claim under the ADEA involving cuts in wages and benefits made by the employer airline in order to avoid bankruptcy. One of those cuts was to put a cap on vacations, allowing a maximum of four weeks vacation.[134] This change had an adverse impact on older, more senior workers, because it had previously been the rule that workers with more than sixteen years in the company were entitled to more than four weeks paid vacation.[135] Writing for the panel, Judge Posner reasoned that this practice was not a violation of ADEA despite its adverse impact, because "practices so tenuously related to discrimination, so remote from the objectives of civil rights law, do not reach the prima facie threshold."[136]

(2) "*No employment practice.*" In *EEOC v. Chicago Miniature Lamp Works*,[137] Judge Cummings held that the disparate impact theory did not apply because there was no "practice" appropriate for the analysis. In that case the EEOC challenged the employer's "practice" of hiring only walk-in applicants who heard about job openings from incumbent workers.[138]

(3) "*Limited to eligibility requirements.*" Judge Posner observed in *Dormeyer v. Comerica Bank-Illinois*[139] that disparate impact analysis is limited to eligibility requirements and cannot be applied to a practice such as firing employees for absenteeism.

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[133] 967 F.2d 1161 (7th Cir. 1992).

[134] *Id.* at 1162.

[135] *Id.*

[136] *Id.* at 1168. It is noteworthy that this holding occurred when the Seventh Circuit still believed that the ADEA permitted disparate impact analysis.

[137] 947 F.2d 292 (7th Cir. 1991).

[138] *Id.* at 305.

[139] 223 F.3d 579 (7th Cir. 2000).

If restrictions of this type become the law applied to disparate impact analysis, then this theory of employment discrimination will have little vitality in the future.

III. CONCLUSION

The disparate impact theory of discrimination apparently has attracted more notice among scholars than it has among practitioners. Even though the theory is rarely litigated, scholars continue to debate the desirability and basis for this approach – some applauding it[140] - and others have reviled it as contrary to the intent of Congress when enacting the statute in 1964.[141] The scholarly debate about disparate impact continues to rage even though Congress formally included the concept in its amendments to Title VII in the Civil Rights Act of 1991.[142] Ironically, while scholars have spent considerable energy on the topic, it has not been the subject of much reported litigation.

This article has attempted to demonstrate that the disparate impact tool is a powerful one that could be employed far more often than it currently is. In cases both past and present, this definition of discriminatory exclusion may have been mistakenly omitted by plaintiffs who have difficulties with their claims of intentional exclusion. All litigators and corporate counsel would be well advised to attend to the potential of this powerful little theory. It may yet have a legal heyday.

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[140] *See* Blumrosen, *supra* note 15. *See generally* Earl M. Maltz, *The Legacy of* Griggs v. Duke Power Co.*: A Case Study in the Impact of a Modernist Statutory Precedent*, 1994 UTAH L. REV. 1353.

[141] *See* Michael E. Gold, Griggs' *Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429, 587-88 (1985).

[142] *See* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992); Kingsley R. Browne, *Discrimination, Affirmative Action, and Freedom: Sorting Out the Issues*, 43 CASE W. RES. L. REV. 287 (1993); Roger Pilon, *The Civil Rights Act of 1991: A "Quota Bill," a Codification of* Griggs, *a Partial Return to Wards Cove, or All of the Above?*, 45 AM. U. L. REV. 775 (1996).