Tuesday, October 26
4:30pm-6:00pm

806 - Is There a Target on Your Back? How to Prevent and Respond to an Agency Pursuit of Pattern and Practice, or Systemic Discrimination Claims

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Session 806

Faculty Biographies

Charles Baldwin

Charles Baldwin is the managing shareholder of the Indianapolis office of Ogletree Deakins and has years of experience as an advocate for management in all aspects of labor and employment matters.

As a trial lawyer, Mr. Baldwin has served as lead counsel in defending employers at trial and on appeal in class actions, multi-plaintiff and individual lawsuits arising out of every conceivable type of workplace dispute. He was selected by AIAM and AAMA to be Counsel for Amici Curiae in the Seventh Circuit in a case of first impression under the Americans with Disabilities Act.

For many years, Mr. Baldwin served as the Seventh Circuit Editor for the "Employment & Labor Relations Litigation Newsletter" of the ABA. He is a contributing author for the first and second edition of "Model Jury Instructions: Employment Litigation," published by the Litigation Section of the ABA. Mr. Baldwin was chosen Volunteer of the Year for 2001 by the Indiana Chamber of Commerce and in 2000 was appointed to the Indiana Chamber's Board of Directors. He has been featured in the 11th-13th editions of Who's Who in American Law and selected by Chambers USA Leading Business Lawyers in the USA (2004 to present) as one of the top labor and employment lawyers in Indiana, the Best Lawyers in America since (2007 to present). In 2009, Mr. Baldwin was inducted into the College of Labor and Employment Lawyers, a non-profit professional association honoring the leading lawyers nationwide in the practice of labor and employment law.

Jeffrey Frost

Jeffrey Frost is assistant general counsel for Sutter Health. Mr. Frost assists Sutter Health Affiliate's medical staff coordinators, human resource directors and managers with a variety of medical staff and employment issues including, but not limited to, conducting workplace investigations, credentialing and peer review issues, medical staff bylaw review, responding to administrative charges and attorney's letters, management training on federal and state employment laws and managing litigation matters.

Mr. Frost is a graduate of the University of Texas (Austin), and the St. Mary's University (JD, magna cum laude).

Carol Gibbons

Carol Rick Gibbons is an associate general counsel for Capital One Financial Corporation in Richmond, Virginia. She manages the employment law group, where she is responsible for overseeing legal support for all employment and benefits matters in the United States.

Ms. Gibbons is the chair of ACC's Employment and Labor Law Committee and she serves on the board for ACC's Washington Metropolitan Area Corporate Counsel Association (WMACCA) Chapter.

She earned her bachelor's degree from the University of Florida and her juris doctorate from Duke University.

M. Yusuf M. Mohamed

M. Yusuf Mohamed is associate counsel with Wayne Farms LLC in Oakwood, GA. He provides advice on a wide-variety of legal matters, including labor and employment issues.

Prior to joining Wayne Farms, Mr. Mohamed spent seven and a half years with the U.S. Department of Labor's Office of the Solicitor in Arlington, Virginia and Washington, DC. There, he litigated and advised on enforcement actions by the DOL and later worked exclusively on defensive employment litigation.

For the last two years, he has been serving as lead pro-bono trial counsel in a Title VII case against a federal agency.

Mr. Mohamed received his BS from Georgia Tech and received his JD from the University of Georgia School of Law. At UGA, he was the executive editor of the Journal of Intellectual Property Law.

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Overview
- Systemic discrimination
- Pattern-or-practice of discrimination
- Disparate impact

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Overview (cont'd)
- "Bet the Company" Cases
  - Damages
  - Litigation and discovery costs
  - Attorney's fees

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EEOC Developments
- Systemic Initiative/Task Force
  - Mission
  - District office plans (specific targets)
- EEOC "bang for buck"

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- ↑ EEOC Budget +
- ↑ EEOC Activity =
- ↑ WORK FOR YOU!

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Origin of Systemic Investigations
- Individual Charge
  - Includes "class-like" allegations
  - EEOC expands investigation
- Commissioner's Charges
  - EEO-1 data
  - Request from district office
  - Community pressure

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Example
- Origin of investigation
  - Single charge filed alleging national origin discrimination
  - Vague language: "Other employees of color have been held to higher standards"
  - EEOC forces employer to respond to "class allegations"

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Examples
- Origin of investigation
  - Single charge filed alleging sex discrimination in hiring
  - Company submits all applications with position statement
  - 6 months later, Commissioner's Charge alleging that policy of asking about criminal convictions has disparate impact

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What to Expect
- No mediation
- EEOC refuses to drop investigation even after employer settles with Charging Party

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What to Expect
- Broad info requests and subpoenas
  - Courts usually uphold subpoenas
  - EEOC publicizes enforcement actions
- Onerous litigation hold orders

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Example
- Information Requests & Subpoenas
  - *EEOC v. Kronos*
    - Single disability charge expands to nationwide investigation of disability and race discrimination
    - EEOC subpoenas company responsible for assessment test
    - 3rd Circuit enforces subpoena and vacates "confidentiality order" issued by district court

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Example
- Information Requests & Subpoenas
  - *EEOC v. FedEx*
    - Charge filed by one African-American on behalf of self and "similarly situated" employees
    - Charge alleges disparate impact from skills test required for promotion

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Example
- Information Requests & Subpoenas
  - *EEOC v. FedEx (cont'd)*
    - EEOC subpoena requests identification of basic information about computer files, including files about applicants, hiring, promotions, testing, discipline, etc.
    - 9th Circuit enforces subpoena even though broader than charge allegations because relevant to investigation

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Example
- Information Requests & Subpoenas
  - *EEOC v. UPS*
    - 2 single charges alleging religious discrimination
    - Subpoena seeking nationwide information about Appearance Guidelines and accommodation practices
    - 2nd Circuit enforces subpoena

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What to Expect
- On-sites and employee interviews
- EEOC finds cause=conciliation
  - EEOC's settlement demands
  - Confidential settlement still viable

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The Stakes—Litigation with EEOC
- Section 706 and Section 707 Actions
  - Section 706 starts with individual charge
  - Section 707 uses *Teamsters* method
  - Damages limited in Section 707 cases

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The Stakes—Litigation with EEOC
- EEOC does not play by same rules as private litigants
  - No Rule 23/class certification requirements
  - Recovery for acts occurring > 300 days before charge

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Examples
- Litigation
  - *Sterling Jewelers, Freeman, Bloomberg*
    - Damages for acts occurring > 300 days before charge filed
    - 300-day rule does not apply to EEOC
    - Courts split

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The Stakes—Litigation with EEOC
- Disparate Impact Litigation
  - No intent required
  - "Hybrid" disparate impact/disparate treatment cases

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The Stakes—Litigation with EEOC
- Disparate impact litigation (cont'd)
  - Impact of *Ricci v. DeStefano*
    - Reverse discrimination
    - Possible affirmative defense?

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The Stakes—Litigation with EEOC
- Settlement
  - No confidentiality
  - EEOC publicity
  - Consent Decree

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"Hot Button" Issues: EEOC Targets
- Criminal/credit checks
  - Disparate impact claims
- Compensation/promotion systems
  - Sex discrimination claims

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"Hot Button" Issues: EEOC Targets

- Policies affecting disabled employees
  - Strict worker's compensation leave exhaustion policy
  - "100% healed" policy
  - Strict attendance policy
- Policies affecting employees with certain religious practices
  - Grooming policies

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"Hot Button" Issues: EEOC Targets

- Tests
- Equal pay lawsuits on the horizon?

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Red Flags

- "Class"-like allegations in charge
- Multiple charges with similar allegations in short period of time
- Charge filed by former HR employee
- EEOC refuses to mediate
- Employee surveys

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What to Do When the EEOC Comes Knocking:

Strategies for Handling EEOC Systemic Investigations

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Involve IT Early

- EEOC requests electronic documents
- Involve IT to ensure preservation
- Understand company IT systems
- Litigation hold duties

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Protect Confidential Information

- Anything you give to EEOC may be turned over to other side pursuant to FOIA request
- Hold back sensitive info if possible
- Risks of confidentiality agreements with EEOC and court orders
- Consider declaratory judgment action

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Protect Confidential Information
- FOIA provisions protecting personal and commercial/trade secret information
- Exec. Order 12600 (commercial confidential information)
  - Must pre-mark
  - Chance to object before EEOC releases info pursuant to FOIA request
- Allow only inspection of documents on-site (no copies)

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Fighting Overbroad Information Requests
- Refuse to respond=Risks (public & expensive) enforcement action
- Ask for clarification
- Informal negotiation
- Consider declaratory judgment action

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Hire Statistician/Other Experts
- Statistics are everything in pattern-or-practice and disparate impact cases
- EEOC's statisticians will mine your data
- Fight fire with fire

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On-Sites & Interviews

- Management: Lawyer may be present
- Non-management: EEOC need not allow company lawyer
  - Unless employee requests company's counsel

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EEOC Finds Probable Cause

- Consider settlement through conciliation
- Last chance for confidential settlement
- EEOC's obligation to offer meaningful conciliation

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The Best Offense is a Good Defense:

Prevention and Best Practices

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Policies and Training

- Ensure discrimination and harassment policies are in place and up-to-date
- Credible complaint system critical
- Training
  - Discrimination and harassment policies
  - Supervisors must understand responsibilities

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What You Don't Know CAN Hurt You

- EEOC may analyze your company's personnel data Do you know what it would find?
- If not, consider an audit of HR practices

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What You Don't Know CAN Hurt You

- Audits
  - Hiring, pay practices, promotions, terminations, evaluations, "glass wall" issues
  - Must be committed to remedying problems
  - Be sure to maintain privilege
  - Consider statistical analysis performed by expert

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Examine "Hot Button" Practices

- Legally defensible?
- Focus on job-relatedness

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Reduce Subjectivity

- Objective factors when possible
- Establish standards for bonuses, raises, promotions…AND FOLLOW THEM
- Guardrails for any discretion allowed

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Validate Tests

- Company-specific validation
- Be wary of experts and "off the shelf" tests and validations
- Exercise common sense

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Document Management

- Erosion of statute of limitations
- Maintenance of documents a must
- Involve IT

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Don't Shoot Yourself in the Foot

- Exercise restraint in responding to individual charges
- Narrowly tailor response
- Keep sight of big picture of company-wide charges

Is There a Target on Your Back? How to Prevent and Respond to Agency Pursuit of Pattern-or-Practice and Systemic Discrimination Claims

by Carol Gibbons, Capital One; Jeffrey Frost, Sutter Health; Yusuf Mohamed, Wayne Farms LLC; Charles Baldwin, Ogletree Deakins Nash Smoak & Stewart P.C.*

"It is imperative that the [Equal Employment Opportunity Commission] make the identification, investigation, and litigation of systemic discrimination a top priority." Thus read the recommendation of the Equal Employment Opportunity Commission's ("EEOC") Systemic Task Force.[1] While the EEOC has always pursued claims of systemic discrimination on some level, the establishment of the Systemic Task Force marked a turning point for the agency, and the EEOC appears to be focusing on systemic discrimination in a more concerted way. The result has been a rising number of investigations in which the EEOC seeks to uncover an alleged "pattern or practice" of discrimination or to combat broad-based discrimination within a company. Increased budget appropriations for the EEOC portend an even further increase in such efforts. This trend is likely to continue. Just recently, EEOC General Counsel P. David Lopez remarked that the EEOC's goal is to identify and litigate "big cases where we can have the broadest possible impact."

The EEOC is not alone, as other federal agencies—most notably the Office of Federal Contract Compliance Programs ("OFFCP")—also turn their attentions to issues of systemic discrimination. Agency investigations of systemic discrimination differ from investigations of individual claims of discrimination in important ways, and employers should be prepared to respond to such investigations. Equally important, employers should take affirmative steps to avoid becoming the target of a systemic discrimination investigation. These materials provide information about the investigation and litigation of systemic discrimination claims, as well as advice on how to respond to and prevent such an investigation.

I. General Overview of Systemic Discrimination

These materials focus on agency pursuits of claims of pattern-or-practice and systemic discrimination. The EEOC Systemic Discrimination Task Force has defined "systemic discrimination" cases as "pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location." *See* EEOC Systemic Task Force report. That is, systemic discrimination cases encompass a variety of cases that go beyond Charges of Discrimination filed by single Charging Parties. They may be "class" cases, in which the EEOC simply seeks relief on behalf of a number of individuals. They may also take the form of a so-called "pattern-or-practice" case. A "pattern-or-practice" case is one in which the EEOC attempts to prove that the discrimination in question was more than a mere occurrence of isolated or sporadic discriminatory acts, but rather that discrimination has been a "regular policy or procedure" followed by an employer—that is, that discrimination was the company's "standard operating procedure." *Int'l Broth. of Teamsters v. United States*, 431 U.S. 324 (1977); 42 U.S.C. § 2000e-6.

* The authors would like to thank Susannah Mroz of Ogletree Deakins Nash Smoak & Stewart, PC for assistance in preparing these seminar materials.

While pattern-or-practice cases necessarily involve intentional discrimination, systemic discrimination is also broad enough to encompass cases of disparate impact, which is sometimes referred to as "unintentional discrimination." Disparate impact cases involve a claim that a facially neutral employment practice—such as a test, height requirement, or criminal background check policy—has an adverse impact on a protected class and cannot be justified by business necessity. 42 U.S.C. § 2000e-2(k); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The classic example of a disparate impact case involves the use of a test to screen applicants and a claim that African-Americans, Hispanics, or another protected group fail the test at a disproportionately high rate, as compared to Caucasians. *See, e.g.*, *Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010). The U.S. Court of Appeals for the Third Circuit has recently offered an in-depth discussion of the disparate impact theory and methods of proof in *Stagi v. National Railroad Passenger Corp.*, No. 09-3512, which is included in the attachments to this paper.

The common thread in systemic discrimination cases is that they can quickly become "bet the company" cases. When the EEOC seeks to recover on behalf of many employees, the stakes can be very high, including the damages for which a company may be liable, the reputational harm caused, and the costs associated with defending against a far-reaching EEOC investigation.

II. Systemic Discrimination Cases on the Rise

A. EEOC Developments

Over the last few years, the EEOC has increased its efforts to combat systemic discrimination. In 2005, the EEOC established a Systemic Task Force, which was charged with examining the Commission's systemic program and recommending new strategies to address systemic discrimination. In March 2006, the Task Force presented its findings and recommendations in an exhaustive report, which was adopted unanimously by the Commission. The report of the Task Force made it clear that, going forward, "combating systemic discrimination should be a top priority at EEOC and an intrinsic, ongoing part of the agency's daily work." It also set in motion several processes aimed at achieving that goal, including requiring district EEOC offices to develop Systemic Plans specifying the steps that each district will take to identify and investigate systemic discrimination; instituting incentives for EEOC field staff to identify, investigate, and litigate systemic cases; and creating new staff positions that focus on systemic discrimination. *See* EEOC Systemic Task Force Report.

Since the Systemic Task Force issued its report, the EEOC has received significant increases to its budget. From 2006 through 2008, the agency's budget remained flat, at approximately $329 million. The budget for 2009 increased by 4.5 percent to $344 million. For 2010, the EEOC added an additional 6.7 percent to bring the total budget to $367 million. President Obama has requested an $18 million budget increase for the EEOC in 2011, which would bring the total to $385 million, an increase of nearly $60 million in just three years.

Flush with new funds, the EEOC has taken steps to fortify its systemic discrimination initiative. It has increased its staff by hiring additional investigators and attorneys. It has also appointed a Systemic Program Manager, who is tasked with promoting the development of

systemic investigations. The EEOC has also created a Lead Systemic Investigator position and has begun hiring internal experts, such as statisticians and experts in litigation management.

The result of these developments has been an increase in the EEOC's involvement in systemic cases. One place in which this increase has been most evident has been the EEOC's use of Commissioner's Charges. Title VII of the Civil Rights Act of 1964 ("Title VII") and the Americans with Disabilities Act ("ADA") give an EEOC Commissioner the authority to file a charge on his or her own initiative when he or she has reason to believe that an employer has engaged in a "pattern or practice" of discrimination. 42 U.S.C. § 2000e-5(b) and 6(e). In 2008, the EEOC pursued only 15 Commissioner's Charges. However, in 2009, the EEOC more than doubled that amount, pursuing 39 Commissioner's Charges, thereby signaling how seriously the EEOC takes its Systemic Initiative.

B. OFCCP Developments

The EEOC is not the only federal agency that has increased its focus on systemic discrimination. The Office of Federal Contract Compliance Program ("OFCCP") requires non-exempt federal contractors and subcontractors to take affirmative action to ensure equal opportunity in employment without regard to race, color, religion, sex, national origin, disability, or status as a protected veteran. OFCCP has increased its enforcement efforts significantly since Director Patricia Shiu took office in September 2009. In addition, OFCCP's budget for 2010 increased *25 percent*—or $21 million—from its 2009 budget allotment of $82.1 million. With this increased budget, OFCCP plans to hire hundreds of new compliance officers and increase compliance evaluations by 20%. OFCCP has always focused on systemic discrimination, with a particular focus on hiring issues, but this increased budget is likely to translate into increased enforcement efforts with respect to systemic discrimination cases.

III. EEOC Investigations

A. Where do Pattern-or-Practice or Systemic Discrimination Investigations Come From?

Pattern-or-practice or systemic discrimination investigations may originate in one of several ways. First, an individual may file a charge that purports to be filed on behalf of a class of "similarly situated" individuals or that includes allegations that implicate employees other than him- or herself. Second, an individual may file a charge and, in the course of the investigation, the EEOC may become aware of information that causes it to broaden its investigation.

Finally, a pattern-or-practice investigation may stem from a Commissioner's Charge. As mentioned above, Title VII and the ADA give an EEOC Commissioner the authority to file a charge on his or her own initiative when he or she has reason to believe that an employer has engaged in a "pattern or practice" of discrimination.[2] That is, even though no Charging Party has stepped forward to complain of discrimination, an EEOC Commissioner may initiate an investigation on his or her own. The EEOC compiles data it receives from employer submission of EEO-1 forms, and statistical analysis of that data may lead a Commissioner to file a Commissioner Charge. Sometimes, a Commissioner's Charge may spring from outside pressures, as, for example, when community action groups request that a Commissioner initiate an

investigation of a certain employer.[3] Finally, district office staff may request that a Commissioner issue a Commissioner's Charge, based on their observation that a number of individual charges filed have been filed against one employer or that other evidence uncovered in an investigation suggests the possibility of a pattern-or-practice of discrimination.

Title VII requires that Commissioner's Charges be in writing, under oath, and "contain such information and be in such form as the Commission requires." 42 U.S.C. § 2000e-5(b). The regulations implementing Title VII further elaborate that a Commissioner's Charge should contain a "clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices." 29 C.F.R. § 1601.12(a)(3). The U.S. Supreme Court has provided a further gloss to this broad standard by holding that, in the context of a pattern-or-practice charge, this regulation requires only that:

> Insofar as he is able, the Commissioner should identify the groups of persons he has reason to believe have been discriminated against, the categories of employment positions from which they have been excluded, the methods by which the discrimination may have been effected, and the periods of time in which he suspects the discrimination to have been produced.

EEOC v. Shell Oil Co., 466 U.S. 54, 73 (1984). Beyond this broad outline of the basis for the Commissioner's Charge, the EEOC is not required to disclose more specific factual data, potentially making it difficult for an employer to know exactly why it is being investigated and, thus, for it to prepare a defense.

B. What to Expect from an EEOC Pattern-or-Practice or Systemic Discrimination Investigations

Whatever the source, pattern-or-practice and systemic discrimination investigations have several common features, all of which make response more difficult than a garden-variety claim filed by a single charging party.

1. No Mediation

First, the EEOC routinely refuses to mediate in cases of systemic discrimination. This represents a significant difference from single-charging party claims, in which the EEOC routinely encourages the parties to engage in mediation prior to investigation. Such is not the case when the EEOC suspects systemic discrimination. Indeed, the norm in such cases is for the EEOC to refuse mediation, and the EEOC's refusal to mediate may be an early clue that the employer is the subject of a systemic investigation. When the systemic discrimination investigation springs from an individual charge, the EEOC may refuse to mediate even when the charging party expresses a desire to resolve the charge. This leads to a potential trap for the unwary employer: If the EEOC refuses to mediate, entering into a settlement agreement with the charging party may not end the EEOC's investigation—even if the charging party attempts to withdraw his or her charge as a part of the settlement agreement. *See, e.g.*, *EEOC v. Watkins Motor Lines*, 553 F.3d 593 (7th Cir. 2009) (enforcing EEOC subpoena even after original charging party attempted to withdraw charge pursuant to settlement agreement with employer).

The EEOC's refusal to engage in mediation makes it very difficult to resolve systemic discrimination cases early.

2. Broad Requests for Information and Subpoena Enforcement Actions for Failure to Comply

Second, the EEOC routinely issues broad requests for information, for example requesting nationwide information when the charge in question appears to address local issues or requesting information about protected bases not covered by the charge. A sample request for information is included in the materials attached to this paper. The EEOC is also armed with subpoena power, 42 U.S.C. § 2000e-9, and an employer's failure to respond to an informal request for information from the EEOC may lead to an equally-broad subpoena. Raising the stakes even higher, the EEOC routinely files enforcement actions in the federal district courts when employers fail to respond to its subpoenas. Adding insult to injury, the EEOC usually publicizes these enforcement actions, bringing a previously private investigation into the public light.

Employers face an uphill battle when attempting to challenge an EEOC subpoena—even if the subpoena is extremely broad and potentially burdensome. Title VII states that the EEOC is entitled to "any evidence of any person being investigated . . . that relates to unlawful employment practices covered by [Title VII] and is relevant to the charge under investigation." 42 U.S.C. § 2000e-8(a). Thus, the standard for enforcing an EEOC subpoena is simply that the information sought is *relevant* to the charge under investigation. This standard is very broad, and courts are loathe to refuse enforcement of a subpoena from the EEOC.

For example, in *EEOC v. United Parcel Service*, 587 F.3d 136 (2d Cir. 2009), the original charging party filed a charge with the EEOC's Buffalo, New York office, alleging that the employer discriminated against him on the basis of his religion. Specifically, he charged that he had not been hired as a driver because he refused to shave his beard. The employer countered that he had not been hired because he had provided a false Social Security number with his application. A little over a year later, another individual filed a charge with the EEOC in Texas. He alleged that he had been prevented from transferring from his package handler position to a driver position because he wore a beard. He also claimed that he believed the employer had a pattern or practice of refusing to accommodate the religious beliefs of its employees. As it happened, the employer later granted his request for an accommodation and he was allowed to work as a driver even though he had not shaved his beard.

In the course of investigating these charges, the EEOC learned that the employer maintained a set of nationwide Appearance Guidelines, which prohibited employees in public-contact positions at all employer facilities from wearing any facial hair below the lower lip. The EEOC then served the with a subpoena requesting: (1) all documents related to its Appearance Guidelines and a list of all jobs which were subject to the Guidelines; (2) identifying information for all job applicants denied employment because of their refusal to adhere to the Appearance Guidelines since January 1, 2004 (some two years before the first charge was filed); (3) identifying information for all employees who requested a religious accommodation to the Appearance Guidelines and the outcomes of those requests since January 1, 2004; and (4)

identifying information for all employees who were terminated for reasons relating to the Appearance Guidelines since January 1, 2004. *Id.* at 138.

When the employer refused to comply, the EEOC filed a petition to enforce the subpoena. The U.S. Court of Appeals for the Second Circuit upheld the authority of the EEOC to issue such a broad subpoena. The court noted that, to obtain enforcement of an administrative subpoena, the EEOC need only show that "the inquiry may be relevant to the purpose [of the investigation]." *Id.* at 139. Such a subpoena will be enforced unless the opposing party demonstrates that the subpoena is unreasonable or that compliance would be unnecessarily burdensome. In this case, the court found that the EEOC's subpoena was clearly relevant to its investigation. *Id.* at 139-40. It also rejected the employer's argument that the subpoena should not be enforced because the first charging party had not been hired because he gave an incorrect Social Security number and the second charging party ultimately had his accommodation request granted, reasoning, "[The employer's] arguments as to the merits do not prevent the EEOC from investigating these charges. Indeed, at the investigatory stage, the EEOC is not required to show that there is probable cause to believe that discrimination occurred or to produce evidence to establish a *prima facie* case of discrimination." *Id.* at 140.

In another recent case, the U.S. Court of Appeals for the Third Circuit applied a similarly broad standard to an EEOC subpoena that requested information about an assessment test used by a nationwide retailer, stating that, "even if the information sought in the Commission's subpoena exceeded the literal scope of the [original charging party's] charge, the Commission was still entitled to its production as part of a properly expanded investigation of the charge." *EEOC v. Kronos Inc.*, No. 09-3219, 2009 WL 4086819 at *7 (3d Cir. Nov. 3, 2009). In so doing, it approved the EEOC's decision to expand its investigation from disability discrimination (as alleged by the original Charging Party) to also include discrimination against African Americans on a nationwide basis. It reasoned:

> The Commission also reasonably expanded its investigation to determine whether [the employer's] use of the . . . assessment test had a disparate impact on African Americans. An article the Commission found in the public domain clearly suggests that the . . . assessment test has an adverse impact on African Americans. The Commission has both the authority and the responsibility to investigate the full scope of any discriminatory impact the . . . assessment test is having on employment actions taken by [the employer].

Id.

It is also important to note that the EEOC may retain its subpoena power even after a case appears to be finished. As mentioned above, the EEOC has the power to issue subpoenas even after a charging party has attempted to withdraw his charge pursuant to a settlement agreement. *Watkins Motor Lines*, 553 F.3d at 593. The EEOC also may continue its investigation after a charging party has been granted a right-to-sue notice. In *EEOC v. Federal Express Corp.*, 558 F.3d 842 (9th Cir. 2009), the original charging party filed a charge on behalf of himself and similarly situated African-American and Latino employees. He alleged that the employer was using a test that had a significant adverse impact on African American and Latino employees. Approximately a year after he filed his charge, the charging party, through counsel, requested a

right-to-sue notice, which the EEOC issued. However, the EEOC stated in its notice that it would continue to process the charging party's charge. The EEOC then issued an administrative subpoena to the employer, requesting basic information about the computer files it maintains. According to the EEOC, this request was designed to help it fashion a more detailed request if the need for more information should arise in the course of the investigation. The U.S. Court of Appeals for the Ninth Circuit enforced the subpoena, holding that the fact that the original charging party had been granted a right-to-sue notice did not divest the EEOC of the authority to investigate the underlying charge of systemic discrimination.

The lesson for employers is clear: The EEOC possesses extremely broad subpoena power, and arguments that an EEOC subpoena is overbroad may fall on deaf ears in the federal district courts. Employers may also find it difficult to argue that an EEOC subpoena is unduly burdensome. Multiple courts have held that, to be unduly burdensome, an employer must demonstrate that compliance with the subpoena would seriously disrupt the normal operation of its business. *See, e.g.*, *EEOC v. Quad/Graphics, Inc.*, 63 F.3d 642 (7th Cir. 1995); *EEOC v. New Prime, Inc.*, 2002 WL 1377789 at *3 (W.D. Mo. 2002); *EEOC v. St. Louis Developmental Disabilities Treatment Center*, 118 F.R.D. 484, 486 (E.D. Mo. 1987). Because of the difficulty of invalidating an EEOC subpoena, employers should consider engaging in discussions with the EEOC to convince it to reduce the scope of the requested information. Such discussions may avoid an expensive—and ultimately futile—court battle.

3. On-Site Investigations and Witness Interviews

In addition to requesting extensive documentary evidence, the EEOC may also conduct an on-site visit in the course of a systemic investigation. Unlike an on-site visit performed in the course of investigating a single Charge, the EEOC may seek to interview large numbers of employees during an on-site visit performed while investigating a charge of systemic discrimination. Generally speaking, company lawyers may be present while the EEOC interviews members of management. However, they do not have a right to be present in interviews of rank-in-file employees. That said, any employee may inform the EEOC investigator that he wishes to have the company's lawyer present during the interview—and there is no prohibition on company lawyers informing employees of this right. Although employees may not elect to have counsel present, informing them of this option preserves the possibility that the company's lawyers will have an opportunity to observe what is happening during the EEOC's interviews of rank-in-file employees and, possibly, to limit overreaching by the EEOC.

4. Broad and Onerous Preservation Hold Orders

The EEOC routinely issues broad preservation orders, particularly when investigating charges of systemic discrimination. These orders tend to be so broad that they would, if literally followed, shut down business operations. For example, the notices typically demand that the employer not "alter" *any* electronic data, including backup tapes, "that relate to the claims and defenses in the accompanying charge of discrimination." Since electronic data is dynamic and each contact with electronic data "changes it" in some fashion, strict compliance with this requirement would preclude the employer from continued use of its computers and HRIS systems at the very least. The same problem derives from another common EEOC demand—

that "file fragments" be preserved. Such fragments can only be preserved if slack space is maintained unchanged, an objective that can be obtained only if the computer is not used. Given that retiring multiple computers is likely not operationally feasible, the best an employer could realistically do would be to forensically image every computer that might conceivably relate to the subject matter of the charge on some periodic basis. This process, in addition to being very expensive, also would still not guarantee that every file fragment was retained.

5. Conciliation

If the EEOC determines that there is "reasonable cause" to believe that discrimination has occurred, it is required to engage in a conciliation process. Conciliation is a confidential settlement process, through which the parties may negotiate to resolve the charge. It differs from traditional mediation in that the EEOC may insert itself into any negotiations between the employer and the charging party based on its view of the appropriate remedy for the discrimination it now believes has occurred. For example, it may seek to convince the employer to agree to a course of training for its employees or to agree to end a particular employment practice, such as an allegedly discriminatory test or policy.

The main advantage of conciliation is the fact that it guarantees confidentiality. That is, nothing that occurs during conciliation may be revealed by the parties or the EEOC—including the fact or amount of any settlement reached. If conciliation fails and the EEOC pursues litigation, the possibility of confidential settlement disappears. Although confidential settlement is not barred by statute, the EEOC, as matter of national policy, refuses to enter into settlement agreements that are subject to confidentiality provisions and requires public disclosure of all settlement terms. Thus, confidential settlement is a practical impossibility once a lawsuit has been filed. This is one reason that employers should consider resolution of the matter at the conciliation phase.

C. What are the Stakes? Litigation with the EEOC

To appreciate what is at stake in an EEOC systemic discrimination investigation and respond accordingly, it is crucial to understand the process of litigation with the EEOC. Litigation with the EEOC differs from litigation with private plaintiffs in some important ways. This section offers a broad overview of the common issues that arise in litigation with the EEOC.

1. Section 706 v. Section 707 Actions

a. Section 706 Actions

The majority of pattern-or-practice actions are brought by the EEOC pursuant to Section 706 of Title VII (42 U.S.C. 2000e-5). An EEOC suit under Section 706 must be based upon an individual charge of discrimination that was timely filed by an individual. Under Section 706, the EEOC must exhaust all of its administrative remedies prior to bringing suit. This means not only that an individual charge must first have been filed, but that the EEOC must have investigated and conciliated the charge. Moreover, any claim brought by the EEOC in a pattern-or-practice suit must be within the scope of, and reasonably related to, the underlying charge and the EEOC's subsequent investigation of the charge. For example, if the underlying charge of discrimination alleged discrimination at one location of a nationwide employer, the EEOC

investigated only at that one location, and the EEOC attempted to conciliate with regard to that location only, then the EEOC will be barred from later filing a pattern-or-practice lawsuit bringing nationwide claims.

Under Section 706, the EEOC may seek economic, emotional distress, and punitive damages on behalf of the individuals it represents, in addition to equitable relief.

b. Section 707 Actions

The EEOC may also bring a pattern-or-practice action under Section 707 of Title VII (42 U.S.C. § 2000e-6. Section 707 actions are more rare, and typically arise in the context of a Commissioner's Charge. As opposed to a Section 706 action, a Section 707 action gives the EEOC an advantage in that it can bring a claim on its own without first having to receive a claim of discrimination from an individual. A Section 707 action is subject to certain limitations. Although there is no statutory requirement that the EEOC exhaust administrative remedies (investigation and conciliation) under Section 707, courts nonetheless uniformly apply the requirement to conciliate to Section 707 suits. In addition, the main disadvantage to the EEOC in a Section 707 action is that the EEOC may not seek emotional distress or punitive damages. It is for this reason that the EEOC files most of its pattern-or-practice cases under Section 706 or combines a Section 707 claim with a Section 706 claim.

Section 707 actions also differ from Section 706 actions in that they use a different evidentiary framework. Individual discrimination cases are analyzed under the familiar *McDonnell Douglas* burden-shifting framework or the mixed-motive burden-shifting test. Section 707 pattern-or-practice cases are, however, analyzed under the bifurcated, two-phased burden-shifting paradigm developed by the U.S. Supreme Court in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

Under *Teamsters*, a pattern-or-practice case is evaluated in two phases. In Phase I, the plaintiff bears the burden of proving that discrimination has been a "regular procedure or policy" followed by an employer. The plaintiff must prove more than the mere occurrence of isolated or sporadic discriminatory acts. Instead, it must establish that discrimination was the company's "standard operating procedure." This is typically proved by offering a combination of anecdotal and statistical evidence. For example, in *Teamsters*, the plaintiff presented statistical evidence comparing the rates of minorities hired by the employer into certain positions with the total minority population in the area. Statistical evidence can then be bolstered by anecdotal evidence that brings "the cold numbers convincingly to life" to demonstrate the existence of a pattern or practice of discrimination. Once the plaintiff meets this burden, the burden then shifts to the employer to defeat the plaintiff's *prima facie* showing by demonstrating that the plaintiff's proof is either inaccurate or insignificant. In essence, the employer must show that the EEOC's statistical analysis was flawed or provide a nondiscriminatory explanation.

If the plaintiff successfully meets its burden in Phase I, it creates a rebuttable presumption that all individual employment decisions made during the period of the pattern or practice were discriminatory. This presumption carries into Phase II, which addresses the award of individual damages to individual claimants. Because of the inference in Phase I that any particular employment decision was made in pursuit of a discriminatory policy, the burden rests

on the employer in Phase II to demonstrate that the employment decision for each individual employee was not the product of discrimination, but was made for lawful reasons. Phase II can become a series of mini-trials, which often can take several weeks or months and several juries to complete, depending on the number of individuals represented by the EEOC.

The important point about the *Teamsters* framework is that it gives the EEOC an advantage. That is, it never has to show that any particular employment decision was discriminatory. Instead, it can paint an inference of discrimination with broad strokes—often statistical in nature. The burden then falls on the employer to refute that it discriminated as to any particular employee—a distinct reversal from the normal *McDonnell Douglas* paradigm. Although the *Teamsters* framework may give the EEOC an advantage, employers can take some heart from the fact that it applies in the context of a Section 707 case and that, in such a case, the EEOC may not pursue emotional distress or punitive damages.

2. The EEOC Does Not Have to Play by the Same Rules as Private Litigants

a. The EEOC Does Not Have to Comply with Rule 23

One of the most important ways that litigation with the EEOC differs from litigation with private plaintiffs is that the U.S. Supreme Court has held that the EEOC does not have to comply with the class certification requirements of Federal Rule of Civil Procedure 23. That is, the EEOC may pursue a class action without having to show that there are questions of fact or law common to the class, that representative parties will adequately protect the interests of the class, that common questions of fact or law predominate, or any of the other requirements private plaintiffs must overcome when pursuing a class action. The rationale behind allowing the EEOC to file class actions without having to comply with Rule 23 is that the EEOC is guided by "the overriding public interest in equal employment opportunity" and acts not only for the benefit of specific individuals, but "to vindicate the public interest in preventing employment discrimination." *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 326 (1980). That is, in some sense, when the EEOC seeks relief on behalf of a class of individuals, it is not "representing" them at all, but rather is "representing" the public interest. Thus, Rule 23 does not apply.

The result is that EEOC lawsuits can quickly become very large and onerous, with classes comprising thousands of employees. The lack of Rule 23 not only means large cases, but a change in litigation strategy. In a Rule 23 class action, the initial focus is on defeating class certification. Victory at the class certification stage may split the lawsuit into smaller, more manageable actions and may also significantly reduce the bargaining power of the claimants. Because the EEOC does not have to comply with Rule 23, the class certification process plays no role in EEOC pattern-or-practice litigation. In addition, EEOC pattern-or-practice cases do not have a class representative (as there is no need for one in the absence of Rule 23). Thus, individual plaintiffs often intervene in the litigation once the EEOC files suit. These plaintiff-intervenors usually are the employees who filed the initial EEOC charge(s), are represented by their own counsel, and make their own settlement demands separate from the relief requested by the EEOC.

b. No 300-Day Limit?

Adding to its arsenal, the EEOC also takes the position that it does not have to abide by the 300-day filing limit applicable to private litigants. That is, while private plaintiffs cannot seek recovery for discrimination that occurred more than 300 days prior to a charge being filed (absent a continuing violation, as in a harassment case), the EEOC routinely seeks to seek recovery for such acts. Courts are split on the EEOC's ability to do so.

In *EEOC v. Sterling Jewelers, Inc.*, No. 08-CV-706, 2010 WL 86376 (W.D.N.Y. Jan. 6, 2010), the U.S. District Court for the Western District of New York recently held that the EEOC could pursue recovery for acts of discrimination that occurred more than 300 days before a charge was filed. In that case, the EEOC filed a gender discrimination action pursuant to both Sections 706 and 707 of Title VII. Its complaint alleged that the employer had engaged in unlawful employment practices nationwide, by maintaining a system for making promotion and compensation decisions that was excessively subjective and through which the company permitted or encouraged managers to deny female employees equal access to promotion opportunities and the same compensation paid to similarly situated male employees. It also alleged that the employer maintained a system for making promotion and compensation decisions that had a disparate impact on female employees. Although no employee file a charge until May 18, 2005, the EEOC sought recovery for acts going back as far as January 1, 2003—much more than 300 days prior to the filing of the first charge.

The employer moved to dismiss the complaint to the extent that it sought recovery for acts occurring more than 300 days prior to the filing of the first charge. The EEOC replied by arguing that no statute of limitations applied to its claims. It acknowledged that, under Section 706, an individual must file a charge within 300 days (or 180 days, in a non-deferral state) of the alleged unlawful employment practice. *See* 42 U.S.C. 2000e-5(e)(1). It also acknowledged that, if the employee does not do so, the employee may not challenge that practice in court. *See Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 623024 (2007). It argued, however, that this limitation does not apply to the EEOC. According to the EEOC, this provision simply establishes a condition precedent to its ability to initiate an investigation and does not limit the scope of remedies it can pursue as a litigant. That is, assuming that one timely charge has been filed, there is no limit to the class of individuals for whom the EEOC can seek relief. The court agreed with the EEOC, as have several other federal district courts. *See EEOC v. LA Weight Loss*, 509 F.Supp.2d 527 (D. Md. 2007); *EEOC v. Scolari Warehouse Markets, Inc.*, 488 F.Supp. 2d 1117 (D. Nev. 2007); *EEOC v. Mitsubishi Motor Mfg. of Am., Inc.*, 990 F. Supp. 1059 (C.D. Ill. 1998).

Not all courts agree. In another recent case, *EEOC v. Freeman*, No. 8:09-cv-02573-RWT, 2010 WL 1728847, (D. Md. Apr. 27, 2010), the U.S. District Court for the District of Maryland rejected the same argument from the EEOC. In that case, an individual filed a charge of discrimination on January 17, 2008, alleging that the employer rejected her for employment based on her credit history. The EEOC ultimately filed a lawsuit under both Sections 706 and 707 of Title VII. It sought to recover for alleged discrimination that occurred beginning in February 2001—approximately *seven years* before a charge was filed. The EEOC made the same arguments that it had made in the *Sterling Jewelers* case, but the court rejected those arguments. The court reasoned that Section 707 of Title VII authorizes the EEOC to bring

pattern-or-practice lawsuits, but also plainly states that, in so doing, the EEOC must investigate and act on a charge according to the procedures set forth in Section 706. As explained above, the procedures set forth in Section 706 require that a charge be filed within 300 days of the alleged unlawful employment practice. Thus, according to the court, the plain language of Title VII limits the class of individuals for whom the EEOC can seek relief to those who could have filed an EEOC charge within 300 days of the alleged unlawful employment practice. Other courts have agreed with the reasoning of the *Freeman* court. *See EEOC v. Burlington Med. Supplies, Inc.*, 536 F.Supp.2d 647 (E.D. Va. 2008); *EEOC v. Custom Cos., Inc.*, 2004 WL 765891 (N.D. Ill. 2004); *EEOC v. Dial Corp.*, 2002 WL 1974072 (N.D. Ill. 2002); *EEOC v. Optical Cable Corp.*, 169 F.Supp.2d 539 (W.D. Va. 2001).

Given the split of authority, Courts of Appeal will doubtless begin to weigh in on this issue. In the meantime, the EEOC will doubtless continue to seek recovery for acts that occurred more than 300 days before a charge was filed.

c. Applying Teamsters in Section 706 Cases

In recent cases, the EEOC has also attempted to apply the *Teamsters* framework in Section 706 cases. That is, in cases filed under Section 706, it seeks to use the simplified method commonly used in Section 707 cases, whereby it establishes a "pattern or practice" of discrimination and then shifts the burden to the employer to prove that any given employment decision was not discriminatory. This is noteworthy because, in Section 706 cases the EEOC may pursue compensatory and punitive damages on behalf of a class of aggrieved individuals—thereby considerably raising the stakes.

Courts have split on whether the *Teamsters* framework can apply in a case filed under Section 706. *Compare Serrano v. Cintas Corp.*, No. 04-40132, 2010 WL 522846 (E.D. Mich. Feb. 9, 2010) (*Teamsters* does not apply to Section 706 lawsuit) with *EEOC v. Internat'l Profit Assocs., Inc.*, No. 01 C 4427, 2010 WL 1416153 (N.D. Ill. Mar. 31, 2010) (*Teamsters* applies in Section 706 lawsuit). This point is moot in many cases, as the EEOC proceeds under both Sections 706 and 707. However, to the extent that the EEOC seeks to apply the procedurally less onerous *Teamsters* framework in a pure Section 706 action, employers may argue that it does not apply and hold the EEOC to its proof as to each individual on whose behalf the EEOC is pursuing recovery.

d. Disparate Impact Litigation

As mentioned above, the EEOC may pursue disparate impact claims against employers. In a disparate impact case, the EEOC need not show intentional discrimination. However, the remedies are also more limited than in an intentional discrimination case. That is, the EEOC may not recover compensatory and punitive damages in a disparate impact case. Perhaps because of this limitation, the EEOC has recently been pursuing "hybrid" disparate impact/disparate treatment cases. In such cases, the EEOC argues that an employer has *intentionally* used an employment practice (for example, a test, a policy, or qualification standard) that it *knows* to have a disparate impact in an attempt to discriminate against a protected group.

An example of this can be seen in *EEOC v. Freeman*, No. 8:09-cv-02573-RWT (D. Md.). In that case, the complaint alleges that the employer has engaged in an on-going, nationwide pattern or practice of race, national origin, and sex discrimination against African-American, Hispanic, and male job applicants in violation of Title VII. Its complaint is divided into two parts. First, and perhaps not surprisingly, the EEOC alleges that the employer's practice of using credit history and criminal justice history information in making hiring decisions has a disparate impact on African-American, Hispanic, and male job applicants. Second, and perhaps more surprisingly, the EEOC argues that these unlawful employment practices are *intentional*, thereby opening the door to relief beyond that typically permitted in a disparate impact lawsuit.

The EEOC is pursuing a similar strategy in *EEOC v. Sterling Jewelers Inc.*, No. 1:08-cv-00706-RJA-JJM. In that case, it alleges that the employer's promotion and compensation policies have a disparate impact on women, and also alleges that the employer intentionally adopted the policies with the purpose of denying promotional opportunities and equal compensation to women because of their sex. In accordance with this "hybrid" theory, the EEOC seeks compensatory and punitive damages in addition to back pay and injunctive relief.

The area of disparate impact litigation has been the subject of increased attention since the U.S. Supreme Court's 2009 ruling in *Ricci v. DeStefano*, 129 S.Ct. 2658 (2009). In that case, the City of New Haven, Connecticut, discarded a set of test results because it feared that the test had a disparate impact on certain minorities and would expose the City to litigation. White and Hispanic applicants then filed suit, alleging that they had been the victims of intentional discrimination. A majority of the Supreme Court sided with the white and Hispanic applicants, holding that the City intentionally discriminated against them because it lacked a strong basis in evidence for believing that the City would be subject to disparate impact liability if it used the test results.

Lower courts have not had a significant chance to begin interpreting *Ricci* as of yet, but it is possible that it will represent a sea-change in disparate impact litigation. At the very least, *Ricci* suggests that, currently, a majority of the Court believes that *any* race-conscious decision—however "well-intentioned"—violates Title VII, absent some exception or justification.[4] This concept may have far-reaching impact and herald a tide of reverse discrimination lawsuits.[5]

In addition, two scholars have suggested that *Ricci* established a new affirmative defense to disparate impact claims. In discussing a hypothetical disparate impact lawsuit from the African-American firefighters, the *Ricci* majority said that "the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability." In "The New Disparate Impact,"[6] Joseph Seiner and Benjamin Gutman interpret this language as creating a new affirmative defense. That is, they argue that, under *Ricci*, if an employer had no reason to believe that its actions were discriminatory at the time it took them, then it cannot be liable under the disparate impact theory. According to Seiner and Gutman, if an employer has had a test validated, then it should be able to establish an affirmative defense to a claim of disparate impact because it would have had no reason to believe that its actions were discriminatory at the time it took them. Time will tell whether courts will accept this argument, but employers currently faced with a disparate impact lawsuit may be avail themselves of this argument in attempting to avoid liability.

e. Public Settlement

Employers accustomed to litigating with private plaintiffs are used to being able to settle lawsuits with complete confidentiality. Unfortunately, this option is not available in litigation with the EEOC. As a matter of policy, the EEOC refuses to enter into settlement agreements requiring confidentiality. It also takes matters a step further, automatically making settlements public and routinely announcing settlements on its website. A recent view of the "Newsroom" page on the EEOC's website touts a $650,000 settlement of a class action lawsuit alleging discriminatory hiring; a $1 million settlement of a lawsuit alleging widespread sexual harassment; and a $350,000 settlement of a class action lawsuit alleging national origin harassment. The desire to avoid such adverse publicity often plays into the decision of a company to resolve such charges before they proceed to litigation.

The EEOC also typically insists that a settling employer enter into a Consent Decree. In addition to providing some monetary relief, the EEOC typically insists that the employer agree to certain equitable terms, including:

- Requiring that management and hourly employees receive some form of training on the discriminatory conduct at issue.
- Creation of "hotlines" that permit employees to make discrimination complaints directly to the EEOC, bypassing internal complaint mechanisms.
- Requiring that the Decree will continue in effect for a certain period of time (typically two years), effectively giving the EEOC a cause of action for breach in the event future allegations of discrimination arise.

- Requiring the employer to report to the EEOC on a regular basis on carrying out the terms of the decree, sometimes including hiring an outside monitor to determine compliance with the terms of the decree.

D. EEOC Targets: Recent Litigation

Commissioner's Charges are highly confidential, as are the contents of the Systemic Plans developed by district offices, thus making it difficult for companies to know what practices are being targeted by the EEOC for systemic investigations. That said, a review of recent lawsuits and subpoena enforcement actions filed by the EEOC gives some hints as to the types of employment practices that seem to draw particular attention from the EEOC:

- Criminal background and credit checks: *EEOC v. Watkins Motor Lines* (N.D. Ill.) and *EEOC v. Freeman* (D. MD.)

- Policies that adversely affect treatment of employees with disabilities or run afoul of the duty to reasonably accommodate disabilities—such as "100% healed" policies or strict leave exhaustion policies: *EEOC v. Sears, Roebuck & Co.* (N.D. Ill.); *EEOC v. Federal Express* (9th Circuit); *EEOC v. United Parcel Service, Inc*. (N.D. Ill.); and *EEOC v. SuperValue, INC. and Jewel-Osco* (N.D. Ill.)

- Widespread sexual or racial harassment: *EEOC v. International Profit Associates, Inc.* (N.D. Ill.)

- Tests with disparate impact: *EEOC v. Kronos, Inc.* (W.D. Pa.)

- Policies affecting employees with certain religious practices—such as grooming policies: *EEOC v. Gold 'n Plump Poultry* (D. Minn.) and *EEOC v. UPS* (2d Cir.)

In addition, passage of the Lilly Ledbetter Fair Pay Act of 2009 may raise the possibility that the EEOC will pursue increasing numbers of equal pay investigations.

IV. OFCCP Investigations

Federal contractors face another source of systemic discrimination investigations—OFCCP. With the advent of the Obama administration, OFCCP has become reenergized and refocused. Director Patricia Shiu has been quoted as saying, "We are going to be extremely proactive and aggressive. The message is it's a new day at the Department of Labor and it's a new day at the OFCCP."

OFCCP is better funded and more motivated than in any previous administration in recent history. Accordingly, federal contractors and subcontractors can expect additional compliance requirements, new regulatory requirements, and aggressive enforcement. Hiring will always be a focus area of OFCCP, but contractors should also expect increasing attention to testing issues. OFCCP has stated that the *Ricci v. DeStefano* opinion does not affect how it examines the use and impact of tests and other selection procedures and that OFCCP will continue to assess these cases for compliance with the Uniform Guidelines on Employee Selection Procedures ("UGESP"). Nevertheless, OFCCP's position is that an employer's failure to validate a test prior to implementation is likely indefensible if the test is shown to have an adverse impact. OFCCP will also investigate any *Ricci*-style class complaint from applicants or employees who believe they were discriminated against when a federal contractor refused to use the results of a selection procedure and will assess whether there is a "strong basis in evidence" for any contractor defense that use of the selection procedure would result in liability because of adverse impact upon a protected group.

In addition, many desk audits are being converted to on-site reviews, even in the absence of discrimination allegations. At least one OFCCP Regional Office (Midwest) has an informal practice of conducting a "flash" on-site review in every compliance evaluation. OFCCP has also signaled increased attention on "glass ceiling" issues.

The message is clear: OFCCP is reenergized and backed by an increased budget. Accordingly, federal contractors should take stock of affirmative action programs and conduct internal compliance reviews. Noncompliance can result in disastrous consequences: burdensome agreements requiring periodic compliance reports to OFCCP; "make-whole" formula relief, including back pay, benefits, and interest, for victims for discrimination; the risk of reverse discrimination claims under *Ricci v. DeStefano*; and adverse publicity. An internal audit of compliance practices, conducted under the direction of an attorney to preserve privilege, can anticipate likely OFCCP concerns and improve overall compliance for federal contractors and subcontractors.

V. Response to a Systemic Investigation

As the above discussion makes clear, an employer that finds itself at the center of a systemic discrimination investigation will face many challenges. However, certain strategies may increase the likelihood of a positive outcome for the employer.

A. Discovery Strategies

First, an employer should gear up for massive discovery efforts. Because these cases are statistics driven, the EEOC commonly will ask for electronic records of all employees, going back a number of years. Even when the EEOC's requests are overbroad and seem to be a fishing expedition, courts will likely allow these requests. Extra IT support may be needed to compile or recover the information requested. By marshaling resources for the discovery process early in the investigation, the employer may ease the process once the EEOC begins serving it with broad requests for information.

Second, in appropriate cases, an employer should consider pushing back when the EEOC makes overbroad information requests and litigation hold orders. Although broad EEOC requests will likely be upheld in court, informal negotiation with the EEOC may allow an employer to whittle down the scope of documents requested.

In addition, employers may consider questioning the broad litigation hold orders routinely served by the EEOC. Any such effort should be reasonable, as an over-aggressive approach may antagonize the EEOC while it is still in the process of investigating. That said, it is possible to tell the EEOC, in clear and respectful terms, that the employer does not intend to comply, and its rationale, including why it is not obliged to comply. The following might be considered a useful starting point for crafting such a communication:

> [CLIENT] acknowledges receipt of the Commission's EEOC Form 131 (5/01), which recites the provisions of 29 CFR § 1602.14. This regulatory provision directs a respondent to preserve "all personnel records relevant to the charge." *Id.* [CLIENT] has undertaken reasonable and good faith measures to secure the paper and electronic "personnel records" that, based on the description of the charge provided by the Commission and complainant, it in good faith has determined are relevant to the allegations that have been raised.
>
> The Commission also served [CLIENT] with a typewritten "Document Retention Notice Pursuant to Charge of Discrimination" (the "Notice"). The Notice demands that [CLIENT] retain certain broad categories of information and that it undertake specified steps to retain information. [CLIENT] notes that several categories of information listed in the Notice clearly fall outside of the scope of 29 CFR § 1602.14. See, e.g., *Nichols-Villalpando v. Life Care Centers of America*, No. 05-2285-CM, 2007 WL 1560307, at *3 (D. Kan. May 30, 2007) (noting categories of employee related documents and information that are not required to be retained pursuant to 29 CFR § 1602.14). Furthermore, the requirements of this Notice are overbroad and unduly burdensome and do not accurately reflect [CLIENT]'s preservation duties, if any, under other sources of law. Any preservation duty that [CLIENT] may have requires it to undertake good faith and reasonable efforts to preserve relevant data and information. See

> The Sedona Principles Addressing Electronic Document Production (the "Sedona Principles"), Principle 5. Many of the procedures and demands set forth in the Notice, such as preserving "file fragments" or suspending the overwriting of back-up tapes, are generally recognized as not reasonable and should only be undertaken in extraordinary circumstances. See Sedona Principles, Principle 8, Comment 8c (forensic data collection should not be required "unless exceptional circumstances warrant the extraordinary cost and burden"); cf. *Scotts Co. LLC v. Liberty Mut. Ins. Co*., 2007 WL 1723509, at **2-3 (S.D. Ohio June 12, 2007) (denying forensic copy of information sought by plaintiff). Moreover, given the nature of backup media rotation and the date of the alleged conduct, [CLIENT] is not aware of any unique information that is contained on its disaster recovery back-up media that would relate to the subject matter of the charge. If the Charging Party deleted any electronic information from any [CLIENT]-owned asset or network within the 30 days preceding the Notice of Charge that may be relevant to the charge, then please notify us as soon as possible.
>
> If the Commission or the complainant is aware of specific managers or employees who are not named in the charge but who they would allege possess information relevant to the subject matter of the charge, or of facts that would place this in the narrow class of cases where the extraordinary burden of forensic copying should be considered, [CLIENT] formally requests that the Commission expeditiously identify those individuals or facts to ensure that the Company can make appropriately informed decisions as to document preservation. To the extent that the Commission insists on the extraordinary burden of taking mirror images of hard drives without the disclosure of such facts, [CLIENT] is willing to discuss such a procedure if the Commission is willing to bear the cost of such preservation. See, e.g., *Balboa Threadworks, Inc. v. Stucky*, 2006 WL 763668, at *5 (D. Kan. Mar. 24, 2006) (directing plaintiffs to pay for forensic copying of defendants' hard drives).

By exposing the preservation demand's problems, and putting the agency on notice of the employer's intended non-compliance, the employer averts any possible claim of surprise or prejudice. It may also force the EEOC to seek judicial intervention. If, in reality, the preservation demand is excessive, the EEOC may be reluctant to do so.

B. In Appropriate Cases, Hire an Expert or Statistician

In pattern-or-practice and disparate impact cases, the EEOC will usually seek to prove its case by means of statistical analysis. Its task in this regard has been made easier by increased budget allocations and the hiring of internal experts, including statisticians. Given that the employer will almost certainly face statistical analysis from the EEOC and that the EEOC's analysis will almost certainly be favorable to it, the employer should consider hiring a statistician or other expert to help it combat the EEOC's statistical analysis. Statistics can be everything in these cases, but the opinion of the EEOC's statistician need not be the last word. Methods of statistical analysis vary, and a good statistician may be able to undermine the EEOC's analysis and provide a more favorable analysis for the employer.

C. Consider Early Resolution

The realities of the process of investigating and litigating systemic discrimination cases may drive employers to consider resolution. The key strategy in settling an EEOC systemic or pattern-or-practice case is to explore settlement early. As mentioned above, there are a number of advantages to settling during the administrative or conciliation phase of an action, before a complaint has been filed. Settlement can be explored during the mandatory conciliation phase, but in addition to conciliation, an employer who is worried about a possible pattern-or-practice action should request mediation with the individual charging party(ies) through the EEOC Mediation Program, at any time during the administrative phase. Should mediation through the program be successful, the EEOC will be unable to later bring a pattern or practice claim based on the underlying charge(s). The EEOC also likely will be willing to settle for less at an early juncture, and in some circumstances, for no money at all. The key reason for settling early, of course, is to avoid the storm of negative publicity that occurs when the EEOC publicizes its decision to file a lawsuit and, later, when it publicizes any settlement or Consent Decree.

D. Protect Confidential Information

Employers should be aware that any documents they submit to the EEOC may later be produced to the Charging Party in response to a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b). Accordingly, employers should avoid providing confidential information to the EEOC as much as possible. If the EEOC requires that such information be produced, an employer's options for protecting the information are limited.

FOIA lists nine exceptions and three exclusions to information which must be released. The two that are most relevant to employers are § 552(b)(4), which exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential" and § 552(b)(6) relating to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Thus, ideally, EEOC would not disclose such information when responding to a FOIA request. That said, employers are understandably less than comfortable with assurances from the EEOC that confidential information will be protected and may seek more formal ways to protect their confidential information.

Employers may consider entering into a confidentiality agreement with the EEOC or seeking a protective order from a court. However, such strategies may not be successful because of the strong policy of disclosure embodied in FOIA. In *EEOC v. Kronos*, No. 09-3219, 2009 WL 4086819 at *7 (3d Cir. Nov. 3, 2009), the district court entered a protective order designating certain information as "confidential" and placing limits on the EEOC's ability to disclose that information in the event of a FOIA request. The Third Circuit held that the district court lacked the authority to enter such an order, in part because FOIA prohibits the EEOC from withholding any information not explicitly covered by one of the exemptions. Thus, while confidentiality agreements and protective orders may offer some reassurance, they may not stand up in the long run. Accordingly, employers seeking to protect truly sensitive information may need to take additional steps.

One of the only "official" ways to ensure some level of protection is to pre-designate information that falls under Exemption 4, which covers confidential commercial information. Executive Order 12600 lays out a mechanism for notifying submitters of such pre-designated information prior to fulfilling a FOIA request and allowing submitters to challenge potential disclosure. However, employers should note that this executive order applies only to documents designated as confidential and proprietary business information and may not cover other types of "confidential" information.

In the end, the only fail-safe way to protect confidential information is to avoid producing it to the EEOC in the first place. When faced with a demand for truly sensitive information, employers should consult with the EEOC and explore the possibility of having the EEOC examine the documents on-site—that is, without retaining photocopies of the documents. If the matter proceeds to litigation, the employer will then be able to produce copies of the documents subject to a protective order that will be enforceable.

E. Push Back When Appropriate

1. Broad Requests for Information

As explained above, the EEOC may demand massive amounts of information from the target of a systemic investigation. Unfortunately, official attempts to resist production—such as fighting a subpoena in court—tend to be unsuccessful. In addition, if the EEOC goes to court to enforce a subpoena, it will publicize that effort, thereby exposing the employer to the possibility of negative publicity.

The best option for fighting overbroad information requests is to proceed informally. The EEOC may serve "form" requests for information that seek more information than the EEOC investigator really desires. Accordingly, there may be some room for negotiation with the individual investigator in terms of responding. By entering into informal conversations with the EEOC, an employer may be able to narrow down the scope of the information request to a more manageable level.

2. Attorneys' Fees

Employers should be aware that if they are faced with an overly aggressive EEOC district office that pursues frivolous litigation or does not engage in a meaningful investigation or conciliation process, courts have been willing to award attorneys' fees to the employer. The two cases below serve as a model for how employers can position themselves to defend against unreasonable EEOC actions.

In *EEOC v. CRST Van Expedited, Inc*., 2010 WL520564 (N.D.Iowa Feb. 9, 2010), the court awarded the employer $4.56 million in attorneys' fees. The EEOC brought this case pursuant to Section 706 of Title VII on behalf of approximately 270 women that it contended CRST subjected to a sexually hostile work environment. Through a series of motions, the claims of all but 67 women were dismissed. On August 13, 2009, the court dismissed the EEOC's Complaint because "the EEOC wholly abandoned its statutory duties as to the remaining 67

allegedly aggrieved persons in this case." The court found that the EEOC did not conduct any investigation of the allegations, did not find reasonable cause, and deprived CRST of a meaningful opportunity to engage in conciliation. The employer then sought over $7 million in attorneys' fees. In granting an award of $4.56 million in fees, the court held that the EEOC's failure to investigate and attempt to conciliate the individual claims constituted an unreasonable failure to satisfy Title VII's prerequisites to suit. The court determined that an award of attorneys' fees was appropriate because the EEOC's actions in pursuing this lawsuit were unreasonable, contrary to Title VII procedures and imposed an unnecessary burden upon CRST and the court.

Similarly, in *EEOC v. Agro Distribution, LLC*, 555 F.3d 462 (5th Cir. 2009), the Fifth Circuit upheld an award of $225,000 in attorneys' fees after the employer obtained summary judgment. In this case, an employee filed an ADA discrimination case with the EEOC. Before investigating, the EEOC classified the charge as an "A2," which means that the EEOC was leaning towards a Cause determination. The investigator performed an onsite investigation, after which Agro's attorney mailed a letter to the EEOC expressing concern about the investigator's conduct during the investigation. The EEOC never responded to this letter. Subsequently, the investigator sent Agro a letter summarizing the evidence obtained, which included numerous factual inaccuracies. Agro responded by noting the errors to the EEOC. The EEOC then issued a For Cause determination and attached a "conciliation agreement" demanding that Agro reinstate the charging party, post a notice, submit to EEOC oversight, and pay the charging party $25,629 in back pay, $10,907 in out-of-pocket medical expenses, and $120,000 in compensatory damages. The record did not reveal any basis for compensatory damages and, in fact, the charging party later testified that his termination was a "blessing in disguise." Agro's counsel requested a meeting with the EEOC, but the EEOC sent a letter the next day indicating that conciliation had failed. On Agro's request, the EEOC reopened conciliation but required any settlement must follow its "Remedies Policy." Agro requested clarification, but the EEOC did not respond. Agro then offered $3,500 in settlement. Nearly ten months later, the EEOC replied to Agro, rejecting the offer and insisting upon reinstatement or front pay, back pay, medical expenses, and compensatory damages.

The EEOC filed suit seeking $250,000 in damages, which included approximately $80,000 in punitive damages. The district granted summary judgment to Agro and awarded attorneys' fees dated from the plaintiff's deposition. The appellate court upheld the award of summary judgment and attorneys' fees, finding that the EEOC did not attempt conciliation in good faith. In its ruling, the court noted:

> By repeatedly failing to communicate with Agro, the EEOC failed to respond in a reasonable and flexible manner to the reasonable attitudes of the employer. The EEOC abandoned its role as a neutral investigator and compounded its arbitrary assessment that Agro violated the ADA with an insupportable demand for compensatory damages as a weapon to force settlement.

Id.

VI. Prevention and Best Practices

The best strategy for dealing with pattern-or-practice or systemic discrimination investigations is to avoid becoming a target in the first place. This section details a number of preventative measures and best practices that may ward off systemic discrimination investigations.

A. Audits

Employers should be proactive about identifying and correcting practices that may expose it to the risk of a systemic discrimination investigation. The only way to do this is to conduct a self-audit. In conducting a self-audit, employers should monitor and examine the results of personnel decisions that are being made in the workplace so that vulnerabilities can be remedied. Specifically, employers should analyze data about hiring, promotion, transfer, compensation, and termination decisions. For example, are members of one racial group hired at a rate that is significantly lower than that of another? Are individuals with disabilities passed over for promotions at a disproportionately high rate? How does the pay of women compare to that of similarly situated men? Are there any patterns with respect to terminations? Analysis of data about personnel decisions may reveal a problem with the decision-making process and point the employer toward a solution. A self-audit should include analysis of data about the following employment practices, at a bare minimum:

- Hiring and Testing
- Pay practices and pay equity
- Promotion patterns
- Performance evaluation systems
- Placement of employees in particular departments or job classifications
- Termination patterns

Such an audit may require the involvement of a statistician or other expert who can analyze the data in a meaningful way. In addition, using a reputable statistician may set the employer up to make quick work of an agency's pattern-or-practice or systemic discrimination investigation. For example, the EEOC may become suspicious that the test an employer uses to make promotion decisions has a disparate impact on a certain minority group. If the employer has already engaged a statistician to analyze promotion data, it may be able to quickly convince the EEOC that the test does not, in fact, have an adverse impact.

Because such an audit may reveal problems with an employer's decision-making process, employers should take proper steps to protect the confidentiality of the self audit under the attorney-client communication privilege. At the very least, an employer should initiate the self-audit with a privileged and confidential memo from an in-house attorney to the relevant Human Resources executive directing that certain information and data be gathered on a privileged and confidential basis so as to enable the in-house attorney to advise the company on steps needed to assure compliance with federal, state, and local anti-discrimination laws. Alternatively, the employer's senior Human Resources official could initiate the audit process by requesting legal

advice from an in-house attorney, who in turn could direct that certain data be gathered to facilitate his advice. Use of outside counsel may further insulate the audit from future discovery.

Under these circumstances, the attorney-client privilege has a reasonably good chance of prevailing as long as the employer maintains the confidentiality of the audit, marks all documents as privileged and confidential, and limits dissemination of the audit materials and legal advice on a strictly need-to-know basis. That said, there will always be some risk that the results of a self-audit may be subject to discovery in later litigation. Because of this reality, the employer must, however, be committed to remedying any discrepancies that cannot be adequately explained or justified. Failure to do so may leave the employer in the position of *knowing* about its own arguably discriminatory practices but failing to remedy them. Placing itself in such a position may actually expose the employer to *more* legal risk—at least insofar as it could create an intentional discrimination claim where one had not previously existed.

B. Examine and Re-Consider Use of Hot Button Policies and Practices

As discussed above, certain policies and practices are perennial targets of EEOC systemic investigations and litigation, including tests, criminal background checks, credit checks, inflexible attendance policies, and grooming policies. Other policies that have proved vulnerable to systemic discrimination claims in the past have included high school diploma requirements and "100% healed" policies (under which employees cannot return to work if they have any medical restrictions). While such policies and practices are not *per se* illegal, they may be problematic if they are not job-related and consistent with business necessity. Employers should inventory their employment practices to determine if they are using any "hot button" policies and practices. If they are, then they should seriously consider whether the practices are legally defensible.

It is important to note that the EEOC's definition of "business necessity" or "legally defensible" may not coincide with a common sense definition of "business necessity." For example, in *EEOC v. Watkins Motor Lines*, 553 F.3d 593 (7th Cir. 2009), the employer experienced *three* episodes of employee-on-employee murder or attempted murder. Not surprisingly, it decided to implement a policy of refusing to hire anyone who had been convicted of a violent crime. Although this decision might seem to be a common sense application of the "business necessity" standard, the EEOC disagreed and initiated an investigation into whether the policy had a disparate impact on African-Americans. Likewise, an employer's desire to increase the quality of its work force by requiring applicants to have high school diplomas is understandable, but—in the eyes of the EEOC—potentially discriminatory, if the employer cannot prove that a high school diploma is needed to perform the job in question. The message here is not that employers must immediately discontinue use of "hot button" practices, but rather that they should give them serious consideration, in conjunction with a review of the current state of the law and an understanding that the mere presence of such a practice may make the EEOC more likely to pursue a systemic investigation.

C. Take Care in Responding to Individual Charges

Systemic discrimination investigations often have their genesis in a charge filed by an individual charging party. Too often, an employer will respond to the individual charge with a broad stroke—submitting anything and everything that might be helpful to it. Such a failure to narrowly tailor its response may expose the employer to a systemic investigation based on its own evidence. For example, a single charging party may allege that she was not hired because of her sex. In an attempt to nip the allegation in the bud, the employer may decide to submit all of the applications received for a given position and show that many men were also passed over for the position. Unbeknownst to the employer, however, an enterprising EEOC investigator may decide to read all of those applications and, in the course of reading them, discover an applicant who disclosed that he had been convicted of a felony and was not hired. Such a situation is now ripe for the investigator to initiate a Commissioner's Charge based on the theory that the employer might be adversely impacting certain minority groups by inquiring as to criminal background. Imagine the dismay of this employer when it discovers that its own submission has been used against it to initiate another charge.

The solution to this problem is to tailor responses to individual charges as narrowly as possible and to minimize the number of documents submitted to the EEOC. Responding to an EEOC charge may occasionally require painting with a broad brush and submitting significant documentary evidence. However, the guiding question in such responses should be: Do I really need to submit this piece of evidence? For example, in the above example, an adequate response to the charging party's allegations might have consisted of a list of the names and sexes of the applicants for the position. By holding back the actual applications, the employer would have deprived the EEOC of the chance to go on a fishing expedition for new allegations. Of course, if the EEOC requests additional information, the employer may be forced to comply. However, keeping the initial response narrow increases the possibility that the initial charge will be resolved without the EEOC expanding its investigation.

D. Arbitration Agreements and Class Action Waivers?

Recent court decisions have brought the use of arbitration agreements and class action waivers into close scrutiny. *See, e.g.*, *Stolt-Nielsen S.A. v. AnimalFeeds Internat'l Corp.*, 130 S. Ct. 758 (2010) (parties cannot be forced to submit to class arbitration unless there was a contractual basis for concluding that they agreed to do so); *Rent-A-Center West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010) (employee may be compelled to arbitrate issue of whether agreement to arbitrate was unconscionable). Indeed, the U.S. Supreme Court has agreed to hear AT&T Mobility LLC's appeal of a decision striking down the class action waiver in its consumer arbitration agreement.

For the time being, the viability of arbitration agreements and class action waivers in the employment context is unclear. However helpful such agreements might be, though, they provide no protection against an EEOC investigation or lawsuit. That is, even if a company's employees have signed enforceable agreements to arbitrate and enforceable class action waivers, the EEOC may still investigate claims of systemic discrimination and may still proceed with a lawsuit seeking relief on behalf of those employees. Thus, while such agreements may be helpful in fending off private lawsuits, they will not protect a company from an onerous EEOC investigation or lawsuit.

E. Best Practices

Implementing several best practices with respect to personnel decisions may also immunize an employer against a systemic investigation because these practices may prevent problems from occurring.

1. Recruiting and Testing

With respect to hiring and recruiting, companies should monitor hiring data. In addition, companies should train managers on interviewing techniques. For example, a manager who routinely asks female applicants if they have children in an attempt to make friendly conversation may be sowing the seeds of a claim that the company routinely discriminates against women. Likewise, implementing standardized interview questions and scoring systems may help eliminate any claim that a hiring process is tainted by excessive subjectivity.

It is also important for employers to recruit through a variety of sources. In this respect, one type of hiring practice is especially vulnerable to attack—word-of-mouth hiring. Although word-of-mouth hiring is not *per se* illegal, it may adversely affect certain minority groups. For example, if a company hires most of its employees based on recommendations from current employees or gives preference to family members of employees—who happen all to be white—its workforce may continue to be largely white, which may make the company vulnerable to a charge of systemic discrimination. By seeking employees through a variety of sources, employers can increase the possibility that all groups are given the opportunity to apply for employment.

If an employer uses tests as part of its selection process, it should monitor the results of its testing to ensure that no adverse impact is created. If the selection devices used create adverse impact, it is critical for the employer to engage appropriate professionals to validate the continued use of such tests. Industrial and organizational psychologists, statisticians, and external counsel are all important resources to involve in this process. Employers should not rely solely upon "off-the-shelf" validation work conducted by the testing vendor, but instead should follow the UGESP guidance to ensure that the tests are locally validated for how the employer is specifically using the selection device.

2. Promotions, Transfers, and Raises

Promotion and transfer decisions can also be fertile ground for systemic investigations, as can decisions related to salary increases and bonuses. With respect to such decisions, the importance of detailed and accurate job descriptions cannot be overstated. If the duties of a job are clearly spelled out, a company will have an objective basis against which to consider promotion and transfer decisions. Likewise, employers should develop *objective* criteria for hiring, promotion, transfer, salary increase, and bonus decisions—and then follow those criteria. By reducing subjectivity, employers also reduce the risk that the decision-making process will be challenged as discriminatory.

3. Policies and Procedures on Discrimination and Harassment

Employers should ensure that they have policies on discrimination and harassment, and that those policies are up-to-date. The law is always changing, and policies must be updated from time to time. For example, a locality in which a company does business may have passed an ordinance forbidding discrimination on the basis of sexual orientation and gender identity. Failure to update the discrimination and harassment policies accordingly may leave the company vulnerable to complaints of discrimination.

Such policies should be distributed to employees in writing, and receipt should also be acknowledged in writing (either electronically or in paper form) because such records may prove crucial in responding to claims of harassment. Discrimination and harassment policies should also include an internal complaint mechanism that allows the complaining party to bypass the alleged discriminator or harasser. In harassment investigations and lawsuits, it is often the case that the complaining party never reports the alleged conduct to the company. If the company has in place a reporting mechanism, such a failure to report may allow the company to avoid liability under the so-called "Faragher/Ellerth" affirmative defense. *See Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998). However, this affirmative defense may not be available if the company's policy fails to allow the complaining party to bypass the alleged harasser. Often, it is sufficient to draft a policy to provide that employees should result discrimination or harassment to their immediate supervisors, the Director of Human Resources, or any member of management. By creating multiple reporting mechanisms, an employer increases the chance that its policy will serve as the basis for an affirmative defense.

Finally, some employers find it helpful to engage a third-party company to operate a complaint "hotline." Offering such a tool to employees shows the EEOC that the company is committed to combating discrimination and harassment. It also undermines any claims an employee might make about lacking an adequate way to report discrimination or harassment. However, employing such a tool may lead to multiple anonymous complaints, which can be difficult or impossible to investigate and may tax already-busy Human Resources departments. If the employer is not committed to investigating all complaints, it may find itself in the unenviable position of being in possession of knowledge of a complaint of harassment but not having taken steps to address the complaint. Accordingly, a company should seriously consider whether it can devote the necessary resources to investigating all complaints that come through the third-party complaint service.

4. Diversity Programs

Some employers may wish to institute diversity programs. Such programs may be helpful for encouraging workplace harmony, but may backfire if not handled appropriately. For example, improper implementation may perpetuate stereotypes or encourage division—the exact opposite of the intended effect. Accordingly, a company considering adoption of a diversity program should proceed with caution and in consultation with counsel.

Also, it is important not to confuse a "diversity program" with a "voluntary affirmative action plan." The *Ricci* opinion has made it clear that the current majority of the U.S. Supreme Court considers *any* race-based (and, presumably, gender-, religion, etc.-based) decision to be presumptively illegal, unless there is an exception. Thus, even "well-intentioned" race-based actions may be found to be reverse discrimination. For example, an employer may utilize a multi-step testing and interview process to generate a list of qualified applicants. Finding that the list does not adequately reflect the company's "diversity goals" (i.e. its ideal racial or gender makeup), it is understandable that the company might seek to go back and add some additional, "more diverse" individuals to the list by changing the criteria it uses to determined who is "qualified." Although well-intentioned, such an action may expose the employer to liability for reverse discrimination under the rationale set forth in *Ricci*.

Even federal contractors who are required to maintain Affirmative Action Plans can be vulnerable to this trap. Although a full discussion of OFCCP requirements exceeds the scope of these materials, suffice it to say that even OFCCP-mandated Affirmative Action Plans should focus on improving the *pool* from which employment decisions are made, not intentionally selecting minority candidates. Such a practice may be problematic in light of *Ricci*.

5. Information Management

In an environment in which the EEOC can serve employers with broad subpoenas and seek recovery for acts that occurred years in the past, a premium is placed on sound information management programs. Indeed, not only are they a necessity, but information management considerations should find a prominent role in most decisions affecting the technological infrastructure of a company and its methods of communication.

The starting point is, obviously, a comprehensive records retention program. A comprehensive program incorporates (a) a written schedule defining the types of information to be retained; (b) policies relating to the creation and use of recorded information; (c) procedures for implementing the policy and retention schedule; (d) training on how to interpret the policies and use the retention schedule; (e) an audit function to provide for accountability; and (f) adequate resources to permit the implementation of the policy and schedule, in other words, both the time to do so, as well as necessary technology and facilities.

Many companies are tempted to purchase off-the-shelf record retention policies rather than investing resources in developing custom programs. While "penny wise," to succumb to this temptation is "pound foolish." An information management program must fit the business enterprise to which it relates. An information management program must take into account that organization's practices and business needs if it is to have any traction.

An information management program must also take into account the regulatory requirements specific to the industry and geographic location, as well as those generally applicable to employers. In this regard, every federal statute that regulates the employment relationship or the workplace incorporates substantial record keeping requirements. State requirements are often superimposed. To name but a few of the myriad federal requirements: the employer's policy should provide for the retention of I-9s and any immigration related documentation for the specific periods mandated by regulations; the policy should provide for

the retention of summary plan descriptions, government reports, and other information concerning employee benefits; applicant data is critical, as is employee demographic, hours worked, and payroll information; while medical information, exposure monitoring, hazard assessment, training, and safety program documentation is mandated by OSHA, MSHA, and state equivalents in those jurisdictions with state plans.

However, the information management program should not stop at regulatory requirements. An employer should consider the claims history of the company and the information it will need to defend claims. The employer's policy should make appropriate provisions to ensure that the needed information will be appropriately retained, while unnecessary information is promptly and uniformly discarded. For example, if a company faces frequent challenges to the exempt status of its employees and counsel has determined that there is some risk associated with their classification, it might consider keeping records reflecting the actual time worked of even employees classified as exempt. Given the natural tendency of claimants to inflate hours worked, such data, even if not regulatorily required, would be of significant benefit in the defense of claims. Similarly, the company that is frequently faced with claims of "off-the-clock" work should consider mandating retention of documentation reflecting individual employee corrections to, and approvals of, timesheets and paychecks. In light of the Lilly Ledbetter Fair Pay Act, which presents the possibility of liability for pay decisions made years—or even decades—ago, companies should weigh the costs of long-term record retention against the risks associated with destruction of records documenting the rationale for particular decisions affecting pay. If a company has reason to believe that is vulnerable to a claim under the Ledbetter Fair Pay Act for a particular pay decision, then it should consider permanent retention of records relating to pay decision in question.

It would also be wise to consider information management issues in system design. For example, IT departments typically build applications and databases to meet immediate operational needs – a customer billing system retains information relevant to customer billing. However, IT often includes features that may be unnecessary to meeting that operational need, such as a variety of logging functions, which, in the context of litigation, may become the focus of extraordinarily burdensome preservation and discovery demands. Similarly, it is the rare IT department that considers the need for preservation of email in litigation when configuring Outlook servers or backup systems that commingle email backup with SAP backup. Yet recognizing such litigation needs in designing systems could significantly reduce the economic burden of preservation as well as enhance the ability to meet preservation obligations.

Finally, employers should consider the demands of litigation in advance of rolling out new technologies. While everyone wants to twitter – how many companies have in place a plan to preserve all those tweets in the event of a claim or investigation which suddenly makes them potentially relevant? Employers should be aware that virtually any electronic information – no matter how fleeting – can be held subject to preservation, if it is technologically feasible, and the particular data is important to a case. See, e.g., *Columbia Pictures, Inc. v. Bunnell*, 245 F.R.D. 443 (C.D. Cal. 2007) (court required preservation of information stored in Random Access Memory), and *Columbia Pictures, Inc. v. Bunnell,* 2:06-cv-01093 FMC-JCx (C.D. Cal. Dec. 13, 2007) (court subsequently defaults Bunnell when it failed to meet the terms of the court's preservation order.)

ENDNOTES

[1] EEOC Systemic Task Force Report, March 2006, available at http://www.eeoc.gov/eeoc/task_reports/systemic.cfm.

[2] The Age Discrimination in Employment Act ("ADEA") and Equal Pay Act ("EPA") do not allow for Commissioner's Charges, but do allow for a similar process called a "directed investigation," whereby the EEOC may initiate an investigation, even when no individual has come forward to file a charge.

[3] A recent example of this is the request sent on behalf of a coalition of organizations (including the National Employment Law Project, the AFL-CIO, the Legal Action Center, and the National Partnership for Women and Families) asking that the EEOC issue a Commissioner's Charge against Bank of America, Manpower, and the Alameda, California One-Stop Career Center in connection with their alleged policies of barring individuals with criminal records from employment. A copy of this letter is available at www.nelp.org/page/-/SCLP/EEOCLetter062009.pdf.

[4] Richard Primus, "The Future of Disparate Impact," 108 *Mich. L. Rev.* 1341 (2010).

[5] As a possible foreshadowing of such a trend, on August 6, 2010, the EEOC filed a lawsuit against Dots LLC, alleging that it had deprived a class of white applicants equal employment opportunities because of their race. *EEOC v. Dots LLC*, Case No. 2:10-cv-00319-JVB-APR (N.D. Ind.). Although the Complaint is very vague and does not identify the precise way in which the employer allegedly discriminated, it does state that the EEOC is proceeding under both Section 706 and Section 707, suggesting that it will be making a pattern-or-practice claim.

[6] Joseph Seiner and Benjamin Gutman, "The New Disparate Impact," 90 *B.U. L. Rev.* ___ (2010) (forthcoming). Please note that this article is currently in draft form. The final version will be published in Volume 90, Issue 6 of the Boston University Law Review in December 2010.

RESOURCES

1. *The Lilly Ledbetter Fair Pay Act: The Impact on Employers*
2. Ledbetter Fair Pay Act Audit Questions
3. Compensation Analysis Data
4. Richard Primus, "The Future of Disparate Impact," 108 *Mich. L. Rev.* 1341 (2010).
5. Joseph Seiber and Benjamin Gutman, "The New Disparate Impact," 90 *B.U. L. Rev.* ___ (2010) (forthcoming). Please note that this article is currently in draft form. The final version will be published in Volume 90, Issue 6 of the Boston University Law Review in December 2010.
6. Charles B. Baldwin, "Audits: The Key to Avoiding Class Action Lawsuits."
7. Sample Information Request from EEOC
8. Sample Response to EEOC Document Retention Notice
9. *Stagi v. National Railroad Passenger Corp.*, No. 09-3512 (3d Cir., Aug. 16, 2010)

The Lilly Ledbetter Fair Pay Act: The Impact on Employers

Charles B. Baldwin

Executive Summary

On January 29, 2009, President Obama signed the Lilly Ledbetter Fair Pay Act, which may be the most important change in anti-discrimination laws in decades. As a result of the new Act, employers should:

- Gain a basic understanding of the new Act and its potentially sweeping impact well beyond pay decisions;
- Carefully distinguish between an employee's current *pay check* and current *pay*;
- Review compensation structure, pay-related records and polices, and record retention policies in light of the new Act;
- Consider switching from a pay-for-performance pay plan based on annual merit increases in base pay to one-time lump sum bonuses;
- Consider conducting a statistical analysis of starting pay, merit raise, and promotional pay increase decisions made during the past year;
- Review all pending claims with Ledbetter Fair Pay Act implications;
- Consider the adoption of alternative dispute resolution procedures;
- Protect the confidentiality of any self-audit activities by properly using the attorney-client communication privilege; and
- Keep an eye on Congress, which is considering legislation to significantly strengthen the Equal Pay Act.

The Ledbetter Fair Pay Act

The Basics. The new law explicitly overturns the Supreme Court's decision in *Ledbetter v. Goodyear Tire and Rubber Co., Inc.,*[1] where the Court held by a 5-4 vote that Lilly Ledbetter's Title VII EEOC charge of pay discrimination was untimely because she did not file the charge within 180/300days after an allegedly discriminatory decision.

The Ledbetter Fair Pay Act amends Title VII, the ADEA, and the ADA and applies to alleged discrimination on the basis of gender, race, religion, color, national origin, age and disability. The Act's operative portion provides the following:

> [A]n unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

In reversing the Supreme Court's decision, the new law allows individuals to file charges alleging pay discrimination without regard to the normal 180/300-day statutory charge filing period. The statute adopts the so-called "pay-check accrual" rule, "under which each paycheck, even if not accompanied by discriminatory intent, triggers a new EEOC charging period during which the complainant may properly challenge any prior discriminatory conduct that impacted the amount of that paycheck, no matter how long ago the discrimination occurred."[2]

For example, an employee hired ten years ago at an allegedly discriminatory starting salary will now be able to timely challenge her starting pay on the ground that

each subsequent pay check, including the current pay check, is diminished by that ten-year-old allegedly discriminatory starting pay decision.

Beyond the Basics. Because the Act covers "compensation decision[s] *or other practice[s*]," plaintiffs' lawyers will argue that each current pay check triggers the 180/300-day charge filing period such that an employee may now timely challenge any past employment decision that affects the employee's current pay check. For example, plaintiffs' lawyers will argue that employees may challenge an allegedly discriminatory denial of promotion occurring years ago, on the theory that the employee's current pay check would be larger but for the past discriminatory failure to promote.

On February 5, 2009, the EEOC issued its first interpretive guidance on the Act and adopted that broad interpretation. The agency's guidance indicates that the Ledbetter Fair Pay Act applies to "a discriminatory compensation decision" or "other discriminatory practice affecting compensation."

Moreover, the first reported decision under the Ledbetter Fair Pay Act has held that plaintiffs could timely challenge *demotions* that occurred 16 years before plaintiffs filed their EEOC charges because those demotions resulted in perpetual reductions in pay. The employees' current pay checks are less than they would have been had the employees not been demoted 16 years earlier. Thus, their claims are timely under the new law.[3] Another early decision has held that the Ledbetter Fair Pay Act applies to an allegedly discriminatory *promotion* decision, when the promotion, if granted, would have been to a higher paying job. According to the court, the plaintiff would be receiving a higher pay check today if she had not been denied a promotion in the past.[4]

Employers will surely argue that the EEOC guidance and the early court decisions are wrong and that the Ledbetter Fair Pay Act reaches only *compensation* decisions and other *compensation* practices.

Predictable Legal Wars Over the Statute's Interpretation. Unfortunately, employers can look ahead to many years of legal wrangling over the interpretation of the seven key words of the Act: "a discriminatory compensation decision or other practice." The outcome of this legal squabbling may turn on how the courts view the Act's sparse legislative history—a single committee report and limited debate in both the House and the Senate—and how the courts use so-called canons of statutory construction. As lawyers know only too well, however, important decisions that depend on the interpretation of a statute's ambiguous language generally produce much heat and little light before the Supreme Court pronounces the final word. Even then, Congress stands in the wings.

Ledbetter Act's Other Details. Because critics of the Supreme Court's decision felt that the decision threw into question the back pay period for compensation claims, the Ledbetter Fair Pay Act expressly states that aggrieved employees are entitled to two-years of back pay, dating from the EEOC charge. The final section of the Act applies its provisions to all pending claims.

Distinction Between Current Pay Check and Current Pay

For purposes of Title VII, employers must take care to distinguish between an employee's current *pay check* and the employee's current *pay*. The Supreme Court's decision in *Ledbetter* contained two closely related but critically separate rulings that

make the distinction between *pay check* and *pay* crucial to understanding employer's Title VII obligations.

First, the Supreme Court ruled that under Title VII "a pay-setting decision is a 'discrete act.'"[5] Thus, according to the Supreme Court, Title VII plaintiffs must prove that a particular pay *decision* was discriminatory. It was not enough for Ledbetter simply to allege that her current pay was less than the pay received by similarly situated male employees; she had to identify one or more specific *decisions* and prove that such decisions were discriminatory.[6] The Ledbetter Fair Pay Act did not alter this aspect of the Supreme Court's decision.

Second, the Supreme Court ruled that Title VII's charge filing period was triggered by the original pay decision and not by receipt of subsequent pay checks that were affected by the allegedly discriminatory pay decision. *Id*. This is the aspect—the only aspect—of the Supreme Court's decision that the Ledbetter Fair Pay Act reverses. Thus, as noted earlier, the key section of the Act provides as follows:

> For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

In other words, even under the Ledbetter Fair Pay Act, a Title VII plaintiff must still prove that a particular decision (or practice) was discriminatory.[7] All that has changed is the trigger for the charge filing period. Under the new Act, each pay check

affected by the earlier discriminatory decision triggers the charge filing period. Even so, a Title VII plaintiff filing a timely charge based on a current pay check must still prove that the original pay decision was biased.

Thus, in the context of conducting a Ledbetter Fair Pay Act compensation audit, employers should audit pay *decisions*, not current pay. Although some companies have, in the past conducted so-called "pay equity" audits in which they examine disparities in *current pay*, such audits will have much less relevance in view the first portion of the Supreme Court's decision in *Ledbetter*—which emphasized that Title VII reaches only pay *decisions*—and the Ledbetter Act's adoption of that portion of the ruling.

A compensation self-audit of *current* pay would say nothing about particular pay decisions and would not be an effective way to monitor the very decisions that the Fair Pay Act requires Title VII plaintiffs to challenge. Nor would a self-audit of current pay be particularly relevant under the Equal Pay Act (even if it were amended) because the Equal Pay Act applies only to employees doing the same work.

With this background in mind, employers should look to the steps that they can now take to assure that their pay decisions, at a minimum, are non-discriminatory. As discussed below, employers should examine their record retention policies and should review their pay practices. Employers should also consider conducting a statistical self-audit of recent pay decisions. While undertaking all these activities, employers should take steps to maximize the likelihood that they can protect their efforts with an attorney-client privilege and possibly with the attorney work product doctrine.

Record Creation and Retention

Because employees can now challenge pay decisions made in the distant past and because the decision-makers may no longer be available, employers should review the types of records that they currently create. Additionally, even if employers can demonstrate the absence of systemic discrimination, the Ledbetter Fair Pay Act reinforces the importance of being able to defend even isolated, individual decisions. An employer should coordinate its identification of the types of records currently in use with a review of written pay policies, as addressed below.

Whatever records are used, employers should consider modifying their record retention policies and should at least consider retaining records surrounding pay decisions indefinitely.

Any analysis of record retention policies should begin with a review of current legal requirements. With respect to payroll and other related pay records, IRS regulations already require employers to keep those records for at least four years after the tax return period to which the records relate. This four-year payroll record retention period is longer than any record retention requirement in Federal employment discrimination laws.

Of course, the IRS rule does not cover many types of employer records that relate to compensation decisions, such as documents justifying a particular starting salary or a specific merit pay increase. The panoply of Federal employment laws imposes a one-year record retention requirement on such records, however. In addition, OFCCP regulations require larger Federal contractors to preserve all employment

records for a minimum of two years and impose a one-year retention requirement on smaller contractors (those with fewer than 150 employees).

Many employers retain records far longer than one or two years required by Federal regulations. For example, some employers maintain paper employment records for employees as long as they are employed and maintain certain electronic records indefinitely. In light of Ledbetter Fair Pay Act's essentially open-ended limitations period, employers should now evaluate the need to extend their recordkeeping policies relating to pay decisions. For example, assume that a female employee with ten years of company service now challenges her starting pay. Assume further that many of the males hired at the same time have long since left the company. Will the employer still have their records available for use in defending ten-year-old starting pay decisions?

Employers should evaluate the risk of being without documents needed to defend decisions made in the distant past versus the potential advantage that prolonged record retention might provide to plaintiffs. Employers should obviously also consider the cost and logistics of extending record retention periods.

There is no single record retention rule that will fit all records or all employers. Unfortunately, employers will need to make highly individualized decisions about specific types of records.

Review of Pay Policies and Records

Employers should also give serious consideration to conducting an immediate self-audit of their written policies relating to the three most frequent types of pay decisions: (a) starting pay; (b) promotional pay increases; and (c) merit pay increases.

Employers should also seriously consider conducting a statistical self-audit, which is discussed in the next section below.

Pay Structure. Any analysis of written pay policies should begin with an understanding of the company's pay structure. Professionally-developed compensation structures derive from the need felt by most companies to maintain some form of internal pay alignment. Such structures are necessarily hierarchical. These hierarchies take various forms, such as pay grades or pay bands, but invariably slot every job into the hierarchy.

Pay grades typically have established minimums, maximums and mid-points. Pay grades typically overlap, with the established maximum pay rate of a particular grade overlapping with the minimum pay rate of the next higher grade. These minimum, mid-point, and maximum pay rates help assure consistency across decision-makers and provide convenient bench marks for evaluating the fairness of pay decisions. These bench marks act as embedded controls on managers' discretion. The mid-point of a pay grade is generally set to be competitive with the external market, thus establishing an external benchmark.

Many employers have collapsed traditional pay grades into broad pay bands, each with a very considerable pay range. Although even broad bands have established minimums, maximums, and mid-points, the wide breadth of the pay range for a particular broad band affords managers much more flexibility than afforded by a traditional pay grade structure. On the other side of the coin, the greater managerial discretion inherent in a broad band structure can result in less consistency across

managers and offers less assurance of fairness. Still, the minimum, mid-point and maximum pay for each broad band act as embedded controls on managerial discretion.

Employers that do not have a formal hierarchy of pay grades or bands should especially note the implications of the absence of a formal pay structure. Without an established formal structure, managers normally have very wide discretion in setting pay, discretion which may turn out to be a liability in the post-Ledbetter Act era. Moreover, any statistical self-audit of pay practices in an unstructured environment poses special challenges. The discussion below assumes the existence of some form of hierarchical pay structure.

Starting Pay. Regarding starting pay, most companies have written policies that ostensibly limit managers' discretion in setting a new hire's initial pay. A Ledbetter Fair Pay self-audit should examine the written policies to assure that proper controls exist on managers' discretion when they set starting pay. The self-audit should also determine if written policies provide safeguards to insure that managers follow the established limits. For example, many companies require written approval of the next higher level of management for starting salaries that exceed the midpoint of a job's pay range.

Many written policies on starting pay also provide appropriate guidance to managers on how to set starting pay. The guidance provided by many companies includes the role of the candidate's prior pay, special qualifications, the urgency in filling the job, and the pay of incumbent employees in the same or similar jobs. A self-audit should examine the written starting pay guidance with an eye to its future use in explaining starting pay decisions that may be challenged.

Starting pay decisions can be particularly problematic because of so-called salary or pay compression. Salary compression occurs when a pay grade's mid-point pay rate may no longer be competitive when compared to the external market. Thus, employees making above a pay grade's mid-point may find it profitable to move to another employer. Conversely, an employer facing salary compression may have to pay new hires well above a pay grade's mid-point, or even above the pay grade's maximum rate, in order to attract quality new hires. If that occurs, new hires often make more, some times considerably more, than veteran employees in the same pay grade. Under the Ledbetter Fair Pay Act, such decisions offer a fertile breeding ground for future discrimination claims.

Despite the potential for creating at least the appearance of discrimination, starting salary decisions are often accompanied by little or no formal recordkeeping. However, some companies undertake a formal, written "entry rate analysis" in which the compensation department documents external competitive issues and internal equity issues. Such an analysis typically includes a rationale for the eventual starting salary decision. Employers that do not currently formally document the reasons for starting salary decisions should reevaluate that issue in light of the new Act.

Merit Pay Increases. Employers should similarly review their policies regarding merit pay increases and promotional pay increases to insure that the policies establish decisional guidelines and limits on managers' decision-making. Most employers embrace some form of pay-for-performance philosophy. Pay-for-performance plans generally link annual increases in base pay to a manager's evaluation of an employee's

performance. Some pay-for-performance plans reward excellent performance with a one-time bonus that does not affect base pay. Other plans incorporate both merit pay increases in base pay and one-time bonuses.

The most common form of merit pay increase plan is one which establishes a multi-cell matrix in which an employee's actual merit pay increase is determined by the interaction of the employee's performance rating and the relationship of the employee's current pay to the mid-point of the employee's pay grade. That relationship is commonly called a *compa-ratio*, which is calculated by dividing the employee's pre-increase pay by the mid-point of the pay range. Employees whose pay is above the mid-point, *i.e.*, their compa-ratio is greater than one, get a lower percentage merit pay increase than an equally well performing employee whose compa-ratio is less than one. However they are configured, most merit pay plans allow managers some degree of discretion in granting merit pay increases.

Many companies have detailed controls on annual merit pay increases to assure that managers follow the established pay-for-performance scheme. A Ledbetter Fair Pay self-audit should evaluate the merit pay scheme to make certain that safeguards exist to ensure that managers adhere to established limits.

Employers with pay-for-performance plans that use annual increases in base pay to reward performance may want to rethink that strategy in light of the new pay-check accrual rule. Employers should reasonably assume that, at a minimum, courts will allow employees to challenge indefinitely into the future not only pay decisions themselves but also allegedly discriminatory performance ratings that affect merit raises because

each new pay check triggers a new charge filing period. Employers could break that cycle for all future performance ratings by adopting an annual one-time bonus reward for good performance. A one-time, lump sum award would not carry over into the future the effects of any allegedly discriminatory performance ratings. Under a bonus system, an employee who sought to challenge a future performance appraisal would have to do so within 180/300 days of the rating. While adopting a bonus system will not solve the issue with respect to previous annual performance appraisals, at least going forward employers can evaluate employees without fear that they will have to defend one of those future evaluations long after it was given.

Employers should note that switching from an annual raise to a lump sum bonus system presents significant employee relations issues and has significant implications for the structure of an employer's compensation system. Thus, employers should not make such a change without careful consideration. Nevertheless, employers who currently tie annual merit increases in base pay to performance ratings should seriously evaluate the implications of that practice in light of the Ledbetter Fair Pay Act.

Promotional Pay Increases. Finally, employers typically reward excellent employees by promoting them and granting them an increase in base pay attendant to the promotion. Many employers have formal rules for determining the amount of the promotional pay increase. For example, a typical policy might provide for a 10% base pay increase, except that the employee's new pay cannot be below the minimum of the pay grade into which the employee is promoted. A compensation self-audit should

examine the written rules for promotional pay increases and the safeguards that ensure that managers follow established policy.

Promotions may offer some employers a unique opportunity to limit their exposure for past decisions relating to the employees being promoted. Some employers have considered requiring employees to sign a full release of all possible claims—much like the releases in severance agreements—as a condition of obtaining the promotion. A release of that nature would at least eliminate potential exposure for past—but not future—decisions relating to the promoted employee. Of course, such a practice would constitute a substantial departure from established procedures and should not be adopted lightly. But, if future court decisions tend to interpret the Ledbetter Act extremely broadly, employers may need to take steps that they once would never have considered.

Statistical Self-Audit of Recent Pay Decisions

Even the best-designed, most tightly-controlled compensation systems allow managers some discretion in making pay decisions. Hence a compensation self-audit should include a statistical analysis of recent pay decisions—starting pay, promotional pay increases, and merit pay increases—to see if managers exercised their discretion in a statistically non-discriminatory manner. If practical, a statistical analysis should also measure the extent to which actual pay decisions reflect adherence to written policies.

As noted above, a statistical analysis can focus on systemic issues and will not identify one-off pay decisions that may be the result of discrimination. Nevertheless,

because employers need to ensure that no across-the-board discrimination is occurring, they should conduct some form of statistical analysis of recent pay decisions.

Before embarking on a statistical analysis, however, employers should commit to taking appropriate remedial action to correct any identified problems. Nothing would be worse than an employer's failure to correct potential problems that a self-audit uncovers.

Protecting the Confidentiality of the Self-Audit

Employers that undertake a self-audit will want to maximize the free flow of information and candid legal advice. Achieving that result will require strict confidentiality, so that persons conducting the self-audit and providing legal advice can rest assured that their analysis and advice will not be used against the employer in any future litigation or government investigation.

Although employers should recognize that their best efforts to protect the self-audit's confidentiality may ultimately fail, if they take proper care they can certainly maximize the likelihood that they can maintain its confidentiality.

First, employers should take proper steps to protect the confidentiality of the self audit under the attorney-client communication privilege. An employer should initiate the self-audit with a privileged and confidential memo from the employer's chief legal officer to the head of HR directing that certain information and data be gathered on a privileged and confidential basis so as to enable the chief legal officer to advise the company on steps needed to assure compliance with the Ledbetter Fair Pay Act. Alternatively, the employer's senior HR official could initiate the audit process by requesting legal advice

from the company's chief legal officer, who in turn could direct that certain data be gathered to facilitate his advice.

Under these circumstances, the attorney-client privilege has a reasonably good chance of prevailing as long as the employer maintains the confidentiality of the audit, marks all documents as privileged and confidential, and limits dissemination of the audit materials and legal advice on a strictly need-to-know basis.

Employers should also consider the application of the attorney work product protection on the basis of evaluating the potential for claims being filed under the recently passed Ledbetter Act. The work product doctrine is less likely to succeed than the attorney-client communication privilege unless the employer has reason to believe that some specific litigation is imminent. Nevertheless, the initial memorandum from the employer's chief legal officer to HR, or vice versa, should highlight the need for the chief legal officer to evaluate the likelihood of litigation arising from the new Act.

Employers should not rely on the so-called "critical self-analysis" privilege to protect the confidentiality of the self-audit. Almost all courts that have considered the "critical self-analysis" privilege have rejected it in the employment context.

No Magic Bullet

The self-audit recommendations discussed above can effectively assist employers in ferreting out and eliminating systemic pay discrimination problems. However, no matter how rigorously an employer adheres to non-discriminatory practices, isolated acts of discrimination can occur. The fact that employers must be prepared to defend against claims of even individual acts of discrimination heightens the

need for employers to be certain that they maintain appropriate records and retain those records for a sufficient period of time.

Reviewing Pending Claims

Because the new Act applies to all pending claims, employers should immediately examine all such claims, regardless of their procedural stage, to evaluate the Act's potential impact. Employers should expect that EEOC and plaintiffs' lawyers will aggressively assert the most expansive interpretations of the Act. Employers may find that formerly rock-solid timeliness defenses have evaporated overnight. Employers may suddenly be confronted with a situation similar to the Orange County Corrections Department, as noted above. "Thus, while [defendant's] untimeliness argument was valid prior to last week, with the passage of the Act Plaintiffs' Title VII claims are no longer administratively barred."[8]

Mandatory Alternate Dispute Resolution Programs

The potential for an avalanche of future claims inspired by the Ledbetter Act will motivate some employers to consider anew the virtues of a mandatory alternative dispute resolution program designed to manage the risk involved in such claims. After years of legal challenges, the contours of a permissible program have become reasonably clear in most states. Although the details of an alternate dispute resolution program are beyond the scope of this memorandum, employers should at least consider the possibility of adopting such a program.

Other Pending Legislation: The Paycheck Fairness Act

On January 9, 2009, the House of Representatives passed the Paycheck Fairness Act along strictly partisan lines. A similar bill awaits action by the Senate, where Republicans are expected to mount a fierce opposition if and when the Senate considers the matter.

The Paycheck Fairness Act would greatly strengthen the Equal Pay Act. As currently written, the Equal Pay Act prohibits employers from paying women less than men for performing the same work within the same location. The current Equal Pay Act allows employers to defend equal pay claims by demonstrating that the alleged pay disparity results from a factor other than gender. The current Equal Pay Act does not provide for punitive damages and effectively precludes class actions.

The Paycheck Fairness Act would change all of those key provisions by amending the Equal Pay Act: (a) to cover all locations within a county or similar political subdivision; (b) to impose rigorous new standards for employers seeking to defend the bona fides of any pay disparity; (c) to increase damage remedies; and (d) to permit class actions. In an odd twist, the Paycheck Fairness Act would also require the OFCCP to reinstitute the much maligned Equal Opportunity Survey, which the Bush administration discontinued. OFCCP had determined that the Survey was not useful, and employers regularly railed against the burden that it imposed.

Although the Senate has an extremely crowded agenda and has not scheduled any action on the Paycheck Fairness Act, proponents of the Act emphasize its strong

support among traditional Democrat constituencies and the fact that it would not increase federal spending. All of the burden would fall on employers.

For now, employers should direct their attention to the Ledbetter Act but should remain alert for Congressional activity on the Paycheck Fairness Act.

Conclusion

No matter how broadly the courts interpret the scope of the Ledbetter Fair Pay Act, the Act fundamentally changes the legal landscape. Because terminated employees are the most likely group to file claims, employers can expect that the increasingly large number of workers being laid off will only swell the ranks of those seeking solace by accusing their former employers of discrimination, at least to the extent that they have not waived their rights by signing releases as part of a severance agreement. Employers can also expect the EEOC to modify the agency's charge-intake procedures and to maximize the potential for claimants to assert claims that were previously time barred.

Employers, however, need not sit idle, waiting to be tossed about as mere flotsam and jetsam. Employers can proactively evaluate their policies, modify them where appropriate, and examine their past decisions to identify the need for corrective action.

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[1] 550 U.S. 618 (2007).
[2] *Ledbetter v. Goodyear Tire and Rubber Co., Inc.*, 550 U.S. 618, 127 S. Ct. 2162, 2172 (2007). The quoted passage from the Supreme Court's *Ledbetter* decision describes the "pay check accrual" rule which the Court rejected but which Congress validated in the Ledbetter Fair Pay Act.
[3] *Bush v. Orange County Corrections Dept.*, No. 6:07-cv-588-Orl, 2009 WL 248230 (M.D. Fla. Feb. 02, 2009) at *2.
[4] *Gilmore v. Macy's Retail Holdings*, No. 06-3020, 2009 WL 305045 (D.N.J. Feb. 4, 2009).

[5] 127 S. Ct. 2165.
[6] In this regard, Title VII is very different from the Equal Pay Act, which does apply to current pay but does not apply to specific past pay decisions. Although Ledbetter originally brought suit under both the Equal Pay Act and Title VII, she inexplicably abandoned her Equal Pay Act claim. Had she pursued her Equal Pay Act claim, she likely would have won her case because, when she filed her claim, she was then being paid less than men for the same work at the same location.
[7] As to the term "practice," the Supreme Court has already defined that term in the context of Title VII as being a "discrete" act, just as a "decision" is a discrete act: "We have repeatedly interpreted the term 'practice' to apply to a discrete act or single 'occurrence,' even when it has a connection to other acts." *National RR Passenger Corp. v. Morgan*, 536 U.S. 101, 111 (2002).
[8] *Bush v. Orange County Corrections Dept.*, 2009 WL 248230 at *2.

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Ledbetter Fair Pay Act Audit Questions

Pay Structure

- Does the company have a formal hierarchy of pay levels?
- Does each pay level have an assigned pay range?
- How does the company assign specific jobs to specific pay levels?
- How does the company determine the dollar values for a specific pay level?
- What, if any, are the important components of compensation in addition to base pay?

Starting Pay Policies

- Does the company have a written policy governing starting pay decisions?
- Does any company policy establish the specific factors that govern starting pay decisions?
- Does company policy explicitly address the role that a new hire's prior pay plays in determining starting pay?
- Who participates in making starting pay decisions and what is the role of each person?
- Who has ultimate authority to determine starting pay?
- What procedural steps are involved in making starting pay decisions?
- Does company policy require written documentation of the rationale for starting pay decisions?
- Does company policy require written documentation of the identity of the decision maker for each starting pay decision?
- Where and for how long are written records, if any, of starting pay decisions maintained
- What, if any, constraints does company policy place on starting pay decisions?
- What steps, if any, does the company routinely undertake to monitor compliance with its starting pay policies?

Merit Pay Increase Policies

- Does the company have a written policy governing merit pay increases?
- What technique does the company use to link performance and pay increases?
- Does the company typically reward performance by means other than a merit increase in base pay?

- How much discretion do managers have in determining an individual employee's merit pay increase?
- What checks and balances, if any, constrain managers' discretion in determining an individual employee's merit pay increase?
- Does company policy require written documentation of the rationale for individual merit pay increase decisions?
- Where and for how long are written records, if any, of merit pay increase decisions maintained?
- What steps, if any, does the company routinely undertake to monitor compliance with its merit pay increase policies?

Promotional Pay Increases

- Does the company have a written policy governing promotional pay increase decisions?
- Does any company policy establish the specific factors that govern promotional pay increase decisions?
- How much discretion do managers have in determining an individual employee's promotional pay increase?
- What checks and balances, if any, constrain managers' discretion in determining an individual employee's promotional pay increase?
- Does company policy require written documentation of the rationale for individual promotional pay increase decisions?
- Where and for how long are written records, if any, of promotional pay increase decisions maintained
- What steps, if any, does the company routinely undertake to monitor compliance with its promotional pay increase policies?

Personnel Files

- Does the company have a written policy establishing a retention period for personnel files of former employees, and, if so, how long are such records maintained?

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Compensation Analysis Data

1) Fields for Current Pay

Business Unit

Current Pay Rate

Date of Birth

Date of Performance Evaluation

Department

District

Education Level (HS, Assoc, Bach, Mast, Ph.D., etc.)

Employee ID

Exempt/Non-Exempt

FT/PT (Full-Time Part-Time flag)

Gender

Job Code

Job Group, EEO Category, SSEG, etc.

Job title

Location

Most Recent Performance Evaluation

Most Recent Rehire Date

Original Date of Hire

Pay Basis (per hour, year, etc.)

Pay Grade

Race/ Ethnicity

Region

Start Date in Current Job Code

2) Fields for Starting Pay

Date of Birth

Education Level at Hire (HS, Assoc, Bach, Mast, Ph.D., etc.)

Employee ID

Gender

Original Date of Hire

Pay Basis (per hour, year, etc.)

Race/ Ethnicity

Starting Business Unit

Starting Department

Starting District

Starting Exempt/Non-Exempt Status

Starting FT/PT

Starting Job Code

Starting Job Group, EEO Category, SSEG, etc.

Starting Job Title

Starting Location

Starting Pay Grade

Starting Pay Rate

Starting Region

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3) Fields for Merit Increases

Date in Pre-Increase Job

Date of Birth

Date of Performance Evaluation

Education Level (HS, Assoc, Bach, Mast, Ph.D., etc.)

Effective Date of Merit Increase

Employee ID

Gender

Merit Increase Amount ($)

Merit Increase Percentage

Original Date of Hire

Pay Basis (per hour, year, etc.)

Post-Increase Business Unit

Post-Increase Department

Post-Increase District

Post-Increase Exempt/Non-Exempt

Post-Increase FT/PT

Post-Increase Job Code

Post-Increase Job Group, EEO Category, SSEG, etc.

Post-Increase Job title

Post-Increase Location

Post-Increase Pay Grade

Post-Increase Region

Pre-Increase Business Unit

Pre-Increase Department

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Pre-Increase District

Pre-Increase Exempt/Non-Exempt

Pre-Increase FT/PT

Pre-Increase Job Code

Pre-Increase Job Group, EEO Category, SSEG, etc.

Pre-Increase Job title

Pre-Increase Location

Pre-Increase Pay Grade

Pre-Increase Performance Evaluation

Pre-Increase Region

Race/ Ethnicity

4) Fields for Promotion Increases

Date of Birth

Date in Pre-Promotion Job

Date of Performance Evaluation

Education Level (HS, Assoc, Bach, Mast, Ph.D., etc.)

Effective Date of Promotion

Employee ID

Gender

Original Date of Hire

Pay Basis (per hour, year, etc.)

Post-Promotion Business Unit

Post-Promotion Department

Post-Promotion District

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Post-Promotion Exempt/Non-Exempt

Post-Promotion FT/PT

Post-Promotion Job Code

Post-Promotion Job Group, EEO Category, SSEG, etc.

Post-Promotion Job title

Post-Promotion Location

Post-Promotion Pay Grade

Post-Promotion Region

Pre-Promotion Business Unit

Pre-Promotion Department

Pre-Promotion District

Pre-Promotion Exempt/Non-Exempt

Pre-Promotion FT/PT

Pre-Promotion Job Code

Pre-Promotion Job Group, EEO Category, SSEG, etc.

Pre-Promotion Job title

Pre-Promotion Location

Pre-Promotion Pay Grade

Pre-Promotion Performance Evaluation

Pre-Promotion Region

Promotion Amount ($)

Promotion Percentage

Race/ Ethnicity

THE FUTURE OF DISPARATE IMPACT

Richard Primus[*]

The Supreme Court's decision in Ricci v. DeStefano *foregrounded the question of whether Title VII's disparate impact standard conflicts with equal protection. This Article shows that there are three ways to read* Ricci*, one of which is likely fatal to disparate impact doctrine but the other two of which are not.*

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* Professor of Law, University of Michigan Law School; John Simon Guggenheim Memorial Foundation Fellow. For comments on drafts of this paper I thank Andrew Coan, Margia Corner, Ariela Dubler, David Franklin, Don Herzog, Ellen Katz, Kerry Monroe, Trevor Morrison, Angela Onwuachi-Willig, Nathaniel Persily, and Michael Selmi. Thanks also to Jennifer Bennett, Avern Cohn, Scott Hershovitz, Deborah Malamud, John Pottow, Richard Schragger, Gil Seinfeld, Reva Siegel, Nelson Tebbe, and the participants in workshops at Columbia Law School, Southwestern Law School, and the University of Michigan Law School. The work required to write this Article was funded in part by a fellowship from the John Simon Guggenheim Memorial Foundation and in part by the Cook Endowment at the University of Michigan Law School.

> "[T]he war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them."
>
> —Justice Antonin Scalia, concurring in *Ricci v. DeStefano*[1]

Introduction

Thanks to the confirmation hearings of Justice Sonia Sotomayor, *Ricci v. DeStefano* was the most publicly visible Supreme Court decision of 2009.[2] The basic facts are now famous. In brief, officials in New Haven, Connecticut suspended the city's process for promoting firefighters to officer positions after discovering that a written test that was part of that process had a severely adverse statistical impact on African American firefighters.[3] A group of white firefighters[4] sued, arguing that the city's decision constituted racial discrimination.[5] New Haven contended that its decision was appropriate in light of Title VII of the Civil Rights Act of 1964, which prohibits the use of some written tests with such disparate impacts.[6] The Supreme Court disagreed. In a 5–4 decision, the Court rejected New Haven's claim that its actions were required by Title VII's disparate impact doctrine and held instead that New Haven had violated Title VII's prohibition on disparate treatment—that is, its ban on formal or intentional discrimination.[7]

The Court did not rule on the plaintiffs' further claim that New Haven had also violated the Equal Protection Clause of the Fourteenth Amendment.[8] But that gesture of constitutional avoidance does not conceal the deeper issue that the *Ricci* litigation raised. That issue, in short, is whether Title VII's disparate impact doctrine, which requires employers and public officials to classify the workforce into racial categories and then allocate social goods on the basis of that classification, can be consistent with equal

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1. 129 S. Ct. 2658, 2683 (2009).

2. *Ricci*, 129 S. Ct. 2658; Adam Liptak, *Sotomayor Case Draws Scrutiny*, N.Y. Times, June 6, 2009, at A1.

3. *Ricci*, 129 S. Ct. at 2666–71 (describing the series of meetings held by the New Haven Civil Service Board to discuss the "significant disparate impact" of the written exams).

4. One of the *Ricci* plaintiffs, Benjamin Vargas, was Latino. Many accounts of the case have therefore spoken of the plaintiffs as a group of nineteen white firefighters and one Latino firefighter. *See, e.g.*, *Sotomayor Embracing Affirmative Action, Then and Now*, Los Angeles Times, June 15, 2009; *Firefighters' Case Called Civil Rights "Threat,"* New Haven Register, March 26, 2009. That said, "Latino" and "white" are not mutually exclusive categories, and according to published reports Lt. Vargas falls into both categories. *E.g.*, Adam Liptak, *Supreme Court Finds Bias Against White Firefighters*, N.Y. Times, June 30, 2009, at A1 (describing all the plaintiffs as white firefighters and one plaintiff as also being Hispanic).

5. *Ricci*, 129 S. Ct. at 2664.

6. *Id.* at 2664, 2673; *see* 42 U.S.C. § 2000e-2(k) (2006).

7. *Ricci*, 129 S. Ct. at 2681. My use of the phrase "formal or intentional" is intentionally ambiguous: disparate treatment doctrine often conflates these two conceptions of discrimination, but there is value for present purposes in noticing that they are not the same. *See infra* Part I.

8. *Ricci*, 129 S. Ct. at 2676, 2681.

protection after decisions like *Adarand Constructors, Inc. v. Pena*[9] and *Parents Involved in Community Schools v. Seattle School District No. 1*.[10] The problem is both legally complex and symbolically sensitive, and the *Ricci* majority practiced sound judicial craft in declining to resolve it when a statutory ground of decision was available. Now that the issue has come to the foreground, however, it is unlikely to disappear. In Justice Scalia's words, the Court's statutory ruling "merely postpones the evil day on which the Court will have to confront the question."[11]

That the question is being asked at all represents a complete turnabout in antidiscrimination law. Once upon a time, the burning issue about equal protection and disparate impact was whether the Fourteenth Amendment itself embodied a disparate impact standard.[12] The Court rejected that idea in *Washington v. Davis*, but in doing so it also opined that Congress could create disparate impact standards at the statutory level.[13] Until recently, therefore, the idea that a statutory disparate impact standard could violate equal protection was all but unthinkable.

Times change. Seven years ago, I noted that the Supreme Court's decreasing tolerance for race-conscious decisionmaking was creating tension between the Fourteenth Amendment and disparate impact doctrine under Title VII, and I analyzed the several ways that the two doctrinal frameworks might be either reconciled or found to conflict.[14] That analysis was partly an exercise in canvassing possibilities. There is more than one way to understand equal protection, and there is more than one way to understand disparate impact, and whether the two are compatible depends on which interpretation of each is on the table.[15] *Ricci* makes matters more determinate, because it says a fair amount about how the Supreme Court understands disparate impact under Title VII. It also signals that what was once academic speculation is now judicially actionable. In this Article, therefore, I explain what *Ricci* means for the future of disparate impact doctrine.

At the heart of the New Haven decision lies an idea that we can call the *Ricci* premise: that the city's suspension of the written test would constitute disparate treatment under Title VII unless suspending the test were justified

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9. 515 U.S. 200 (1995).

10. 551 U.S. 701 (2007).

11. *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring).

12. *See, e.g.*, Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 4–5, 22–26 (1976); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 141–46 (1976).

13. *See* Washington v. Davis, 426 U.S. 229, 248 (1976).

14. Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493 (2003).

15. *See generally id.*

by Title VII's provisions regarding disparate impact.[16] In other words, *Ricci* portrayed disparate impact doctrine as creating an exception to Title VII's prohibition on formal or intentional discrimination. The view that disparate impact doctrine constitutes an exception to disparate treatment doctrine entails the view that the two doctrines are conceptually in conflict—or, more precisely, that they would be in conflict if one were unable to carve itself out of the other. The Court articulated this vision as a matter of statutory construction,[17] but it clearly implies a constitutional proposition as well. For these purposes, Title VII's prohibition of disparate treatment and the Fourteenth Amendment's guarantee of equal protection are substantively interchangeable.[18] A conflict between disparate impact and disparate treatment is also a conflict between disparate impact and equal protection. And that makes things look bleak for the disparate impact standard. A Title VII doctrine can stand its ground against another Title VII doctrine, but not against the Constitution.

Yet we should not rush too quickly to the conclusion that *Ricci* heralds the end of disparate impact law. Considered carefully, the *Ricci* premise can be read in three different ways. Call them the general reading, the institutional reading, and the visible-victims reading. Whether Title VII's disparate impact standard can survive future constitutional attack depends on which of these three readings prevails in cases to come.

On the general reading, the *Ricci* premise means that the actions necessary to remedy a disparate impact violation are per se in conceptual conflict with the demands of disparate treatment doctrine (and, implicitly, the demands of equal protection). Disparate impact doctrine is race conscious; equal protection requires racial neutrality; the two are not compatible. This seems to be Justice Scalia's reading of *Ricci*.[19] It is also Ronald Dworkin's, albeit with a different normative spin.[20] The general reading is plausible, straightforward, and likely fatal for disparate impact doctrine. But it is not the only reading available, and it may not be the best one.

The institutional reading of the *Ricci* premise focuses on a difference between courts and public employers. On this view, a municipal employer's attempt to implement a disparate impact remedy is in conceptual conflict with the prohibition on disparate treatment (and implicitly with the requirements of equal protection) not because *any* disparate impact remedy is discriminatory but because public employers, unlike courts, are not authorized to engage in the race-conscious decisionmaking that disparate impact remedies entail. Judges are responsible for remedying racial discrimination,

16. *Ricci*, 129 S. Ct. at 2674 ("We consider, therefore, whether the purpose to avoid disparate-impact liability excuses what otherwise would be prohibited disparate-treatment discrimination.").

17. *Id.* at 2676.

18. *See infra* Part I.

19. *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring).

20. *See* Ronald Dworkin, *Justice Sotomayor: The Unjust Hearings*, N.Y. REV. BOOKS, Sept. 24, 2009, at 37, 39.

and that task requires more leeway to take note of race than other public officials have. (A requirement of complete judicial colorblindness would undermine all of antidiscrimination law, because courts cannot assess garden-variety discrimination claims without knowing the race of the parties involved.) Conversely, public employers face pressures that make it unwise to leave them with too much discretion to invoke disparate impact doctrine to justify racially conscious hiring decisions.[21] If the *Ricci* premise is read through this institutional lens, courts can continue to enforce Title VII's disparate impact doctrine, even if public employers will have to tread more carefully.

Third and last, there is a visible-victims reading. It holds that the problem in New Haven's case was not the race-consciousness of the city's decision per se but the fact that the decision disadvantaged determinate and visible innocent third parties—that is, the white firefighters. Most disparate impact remedies avoid creating such victims. And within the category of formally race-neutral actions intended to improve the position of disadvantaged racial groups, equal protection doctrine may well distinguish between those that have visible victims and those whose costs are more diffuse.[22]

Many people to both the left and the right of the Supreme Court may consider this distinction unprincipled. If race-conscious decisionmaking is objectionable, one might contend, then it is objectionable whether its allocative effects are visible or not.[23] Conversely, if some race-conscious decisionmaking is permissible, its permissibility should not depend on its being kept secret.[24] These objections have force. That said, the distinction between more and less visible race-conscious interventions is already present in equal protection caselaw,[25] and it may well be defensible, or even wise. If the Court ultimately reads *Ricci* through a visible-victims prism, Title VII's disparate impact doctrine can survive, because the standard judicial remedies all avoid creating visible victims: the *Ricci* plaintiffs suffered in the New Haven case only because the city acted more aggressively than a court enforcing a disparate impact order would have.[26]

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21. *See infra* Section II.B.

22. *See infra* Section II.C; *see also* Lawrence Lessig, Erie-*Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785 (1997) (describing the ways in which an issue's moving from the background to the foreground of public consciousness can change constitutional doctrine's approach to that issue).

23. *See, e.g.*, Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289 (2001).

24. *See, e.g.*, Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After* Grutter *and* Gratz, 85 TEX. L. REV. 517, 518 (2007).

25. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 787–89 (2007) (Kennedy, J., concurring in part and concurring in the judgment); Shaw v. Reno, 509 U.S. 630, 647 (1993) (stating that in some equal protection cases, "appearances do matter"); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989).

26. *See In re* Employment Discrimination Litig., 198 F.3d 1305, 1315 (11th Cir. 1999) (explaining that the principal disparate impact remedy is enjoining the employer against future use of the challenged practice). As the above analysis suggests, a court could adopt the institutional and visible-victim readings simultaneously. *See infra* note 27.

In Part I of this Article, I briefly describe the New Haven case and the Supreme Court's decision, with emphasis on the *Ricci* premise. I then explain why the *Ricci* premise is of constitutional import, despite the Court's insistence that *Ricci* is a statutory decision only: for relevant purposes, Title VII's prohibition on disparate treatment and the Fourteenth Amendment's guarantee of equal protection have the same content, so a rule that conflicts with one also conflicts with the other. In Part II, I distinguish the general, institutional, and visible-victims readings of the *Ricci* premise. All three readings are compatible with the facts of *Ricci*, but the future constitutionality of Title VII's disparate impact doctrine depends on which reading emerges in future cases. As I explain, disparate impact doctrine could survive the institutional reading or the visible-victims reading, or a combination of the two.[27] The general reading could be fatal. Then, in Part III, I examine whether disparate impact doctrine could be defended on the grounds that it is narrowly tailored to a compelling government interest. I conclude that a successful compelling interest defense is possible but unlikely.

Finally, in Part IV, I explain that the Supreme Court's choice among the three readings may be substantially driven by the way the next case to reach the Court frames the question. The full analysis is complex, but it hinges on a question of visibility. The Court is more likely to sustain disparate impact doctrine if it can do so without appearing indifferent to the situation of innocent third parties who are clearly bearing the cost of race-conscious decisionmaking. Accordingly, the Court is most likely to adopt the general reading and hold disparate impact unconstitutional in a case like *Ricci* itself, a case featuring visible innocent victims. Given that employer-initiated disparate impact remedies can create such third-party victims but judicially imposed disparate impact remedies do not, disparate impact doctrine is in greatest danger of being held unconstitutional in cases where employers voluntarily seek to comply with Title VII, just as New Haven claimed to be doing.

Here we confront a substantial irony. Title VII policy has traditionally sought to encourage voluntary employer compliance rather than litigation.[28] According to the standard wisdom, it is better to avoid fighting about discrimination in front of judges if the problem can be worked out privately. New Haven argued this point in *Ricci*,[29] and the Court's majority agreed in

27. The institutional and visible-victims readings are easily combinable in practice because the remedies that courts standardly provide for disparate impact violations all avoid creating visible innocent victims. Those remedies include injunctive relief against using the challenged practice in the future and equitable relief like backpay. These remedies run against the employer only and do not visibly burden determinate third parties, even if they necessarily have downstream distributional consequences. Assuming that future judicially ordered disparate impact remedies conform to this pattern, the law could therefore adopt the institutional and visible-victims readings of *Ricci* simultaneously. Alternatively, it could officially adopt only the institutional reading but also satisfy the concerns of the visible-victims reading as a consequence.

28. *See, e.g.*, Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 515 (1986).

29. *See* Brief for Respondents at 17–18, Ricci v. DeStefano, 129 S. Ct. 2658 (2009) (Nos. 07-1428 & 08-328).

principle that employers should have some room to maneuver, thus making it possible for them to avoid disparate impacts without involving the courts.[30] After *Ricci*, however, voluntary compliance is the greatest threat to disparate impact doctrine. If employers try to fix disparate impact problems themselves, they may create scenarios—like the one in New Haven—that make disparate impact law appear objectionable. With the constitutional question close, that framing could make all the difference.

It might seem intolerable for a constitutional question to turn on a difference in framing, just as it might seem odd for the validity of a governmental action to depend on which of its effects are visible to the public. That is, even if the constitutionality of disparate impact doctrine is a contestable question, perhaps the contest should not be resolved on the basis of what some audience notices. "Out of sight, out of mind" might be a feature of human decisionmaking, but something feels wrong about it as a principle of constitutional law. One could reply that actual judicial adjudication often falls short of the ideal. In this Article, however, I want to offer something more than the thought that legal theory should recognize the periodic reality of lousy judging. So consider the following point: Symbolism and social meaning have always shaped the law of equal protection, and necessarily so.[31] To be sure, any attempt to make constitutional norms track public opinion or public values is rife with problems, some of them normative and some of them practical.[32] But it is in the end hard to discern what equal protection should prohibit without recourse to some sense of the meaning of the government's actions. The canonical failure of equal protection analysis, after all, was *Plessy v. Ferguson*'s refusal to understand that a formally neutral action might carry a clear meaning about racial hierarchy.[33]

Whether Title VII's disparate impact provisions or any other piece of law is consistent with equal protection depends in part, and perhaps deeply, on whether it is understood to reinforce society's historical problems of racial division. The social meaning of disparate impact doctrine accordingly figures in the assessment of its constitutionality, and social meaning is in part a function of what is visible to a public audience. An accident of history made the New Haven controversy as visible as any constitutional contest is likely to be, and public officials and the legal commentariat then devoted their energies to arguing about what it meant. Those judgments are not separate from the constitutional question that now awaits decision in court.

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30. Ricci v. DeStefano, 129 S. Ct. 2658, 2674 (2009).

31. *See* Primus, *supra* note 14, at 566–67.

32. *See* Richard Primus, *Double-Consciousness in Constitutional Adjudication*, 13 REV. CONST. STUD. 1 (2007).

33. *See* Plessy v. Ferguson, 163 U.S. 537, 551 (1896) (upholding Louisiana's segregated-car law) ("We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.").

I. *RICCI V. DESTEFANO*

A. *The Case*

In 2003, the city of New Haven administered written and oral tests to firefighters seeking promotions to the ranks of lieutenant and captain.[34] The written tests had cutoff scores that applicants had to achieve in order to be considered qualified for promotion. If an applicant reached the required cutoff score on his[35] written test, his scores on the two tests would be combined into a single index, with the written test worth 60 percent of the total and the oral test worth 40 percent. All of the promotable applicants would then be arranged on the basis of that index, from the highest score to the lowest. Under the city charter, promotions would then be awarded based on a procedure called the "Rule of Three." The first vacancy for the position of captain or lieutenant would be filled from one of the top three scorers on the applicable combined index, after which the second vacancy would be filled from the top three scorers remaining after the first vacancy had been filled, and so on until all of the vacancies were filled.

After the tests were scored, it became clear that no African Americans would be promoted under this system.[36] Rather than proceed with the promotions process as originally planned, city officials decided to throw out the test and develop an alternative selection process.[37] The motives behind that decision were disputed. According to the city, the test results were disregarded because proceeding on the basis of those results would have exposed the city to Title VII liability if African American applicants were to bring a disparate impact claim.[38] According to a group of white firefighters who became the plaintiffs in *Ricci*, the city wanted to promote black firefighters for reasons quite apart from any need to comply with Title VII. Among other things, they charged, the city wanted to please a powerful black community activist who was an important part of the mayor's political coalition and who wanted to see more African Americans in positions of municipal authority.[39]

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34. This description of New Haven's promotion process is adapted from the district court's opinion in *Ricci*. *See* Ricci v. DeStefano, 554 F. Supp. 2d 142, 142–47 (D. Conn. 2006).

35. All the applicants for promotion were male.

36. Forty-one applicants took the captain exam. Twenty-two passed, thus becoming eligible for promotion to one of the seven vacant captain positions. Three of those who passed were African American. Given the Rule of Three, however, the seven vacant positions all had to be filled from the nine highest scoring applicants on the combined index, and none of the three African Americans with passing scores was in the top nine. Accordingly, the system as designed would have promoted no African Americans to the rank of captain. The situation with the lieutenant exam was similar: seventy-seven applicants took the tests, and thirty-four did well enough to be deemed qualified for promotion, six of them black. But under the Rule of Three, the eight vacant positions all had to be filled from the top ten scorers, and none of the qualified black applicants was within the top ten. *Ricci*, 554 F. Supp. 2d at 145.

37. *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2671 (2009).

38. *See id.*

39. *See Ricci*, 554 F. Supp. 2d at 150.

The objecting firefighters brought suit in federal district court, alleging that the city's decision to throw out the written test constituted intentional racial discrimination in violation of both the disparate treatment prong of Title VII and the Fourteenth Amendment's Equal Protection Clause. The district court awarded summary judgment to the city,[40] and the Second Circuit affirmed.[41] The Supreme Court reversed. In an opinion by Justice Kennedy for a five-Justice majority, the Court awarded summary judgment to the plaintiffs on their disparate treatment claim and declined to reach the issue of equal protection.[42]

Justice Kennedy's majority opinion can be understood as a four-step argument. First, the city's action was a race-based decision that would violate Title VII's prohibition on disparate treatment, absent some defense.[43] Second, the need to comply with disparate impact doctrine is a valid defense, because one branch of Title VII cannot be read to prohibit what another branch affirmatively requires.[44] Third, an employer cannot invoke that defense without a strong basis in evidence that its action was needed to prevent a disparate impact violation.[45] And fourth, the city lacked such a strong basis in evidence in the present case.[46] To be sure, the test had a statistically disparate impact large enough to create a prima facie case of disparate impact liability.[47] But under Title VII, the use of a test with a statistically disparate impact can be justified if the test is a valid measurement of relevant skills and necessary for the purpose for which it was used—in the words of the statute, if it is "job related for the position . . . and consistent with business necessity."[48] In the majority's view, the record below indicated that the city could have defended its test as sufficiently job related to withstand a disparate impact attack.[49]

B. *The* Ricci *Premise*

The first step of the Supreme Court's analysis is a crucial move. New Haven's attempt at a voluntary disparate impact remedy, the Court says,

40. *Id.* at 163.

41. Ricci v. DeStefano, 530 F.3d 87 (2d Cir. 2008), *reh'g en banc denied*, 530 F.3d 88 (2d Cir. 2008).

42. *Ricci*, 129 S. Ct. at 2681.

43. *See id.* at 2673.

44. *See id.* at 2674.

45. *See id.* at 2675.

46. *See id.* at 2677.

47. *See id.* at 2678 (recognizing the "four-fifths rule" of 29 C.F.R. § 1607.4(D) (2008), under which federal enforcement agencies generally find evidence of disparate impact for the purposes of Title VII if a selection mechanism results in a pass rate for one racial group that is less than 80 percent of the pass rate for another racial group).

48. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006) (stating that no unlawful employment practice based on disparate impact is established in cases where the respondent can "demonstrate that the challenged practice is job related for the position . . . and consistent with business necessity").

49. *Ricci*, 129 S. Ct. at 2678–79.

would constitute disparate treatment if it were not affirmatively saved by the statute.[50] That is, *Ricci* begins by envisioning disparate impact doctrine as ordaining an exception to disparate treatment doctrine, requiring something that Title VII would otherwise prohibit. This proposition—which I am calling the *Ricci* premise—may seem intuitive or even obvious. Disparate treatment doctrine prohibits race-conscious decisionmaking, and disparate impact remedies are always race-conscious. There is accordingly a tension between the two frameworks. That said, no prior decision ever conceived of disparate impact doctrine as an exception to the prohibition on disparate treatment. That is why the *Ricci* Court had to state the premise in its own voice and without citation. From the traditional perspective of antidiscrimination law, the idea that disparate impact remedies are as a conceptual matter disparate treatment problems is a radical departure.

The best way to understand why the *Ricci* premise is both radical and straightforward is to break down the category of disparate treatment into its two component parts and examine disparate impact doctrine's relationship to each one. One of those component parts is about the overt conduct of employers, and the other is about their states of mind. These concerns are usually related. Indeed, they are sufficiently intertwined in disparate treatment doctrine that many people, including law professors and appellate judges, often neglect to distinguish between them. But they are distinguishable, at least in principle, and often in practice as well. For present purposes, it will help to consider them separately.

One large strain in disparate treatment doctrine is about employers applying different rules to employees of different races (or sexes, etc.).[51] Such behavior involves "disparate treatment" in an ordinary-language sense. In cases raising this concern, people are treated disparately, and therein lies the illegality.[52] As a term of art, however, "disparate treatment" in Title VII also covers cases of illicit employer *motive*, whether or not those motives lead to disparities in the treatment of individuals of different races.[53] As is well known, discriminatory motives can lead to formally identical treatment for

50. *Id.* at 2673 ("Our analysis begins with this premise: The City's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense."); *see id.* at 2674 (recognizing that the need to comply with Title VII's disparate impact doctrine would constitute such a defense).

51. Title VII prohibits discrimination on grounds of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). In this Article, however, I am concerned with an issue of race, and I will generally use language that is limited to issues of race.

52. *See, e.g.*, Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) (finding a disparate treatment violation when an employer assigned black and Hispanic truck drivers to less-desirable positions than white truck drivers).

53. *See, e.g.*, McMullen v. Warner, 416 F. Supp. 1163 (D.D.C. 1976) (finding disparate treatment when, in order to prevent a black applicant from filling a position, the position was eliminated, thus denying it to all applicants). Conversely, a showing of illicit motive is not required to make out a disparate treatment claim: a showing of formally disparate treatment in the ordinary-language sense will suffice. *See, e.g.*, UAW v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991).

everyone as well as to different treatment for different people.[54] Consider a case in which a business located in a heavily white suburb of a heavily black city has a policy of hiring only people who live in the suburb. Formally, such a policy does not treat individual applicants disparately on the basis of their race. But if the policy is motivated by the desire to exclude black applicants from the city next door, it is actionable under the heading "disparate treatment," despite the absence of disparate treatment by race in the ordinary-language sense.[55] The discrimination is intentional, and intentional discrimination is *called* "disparate treatment."[56]

Until recently, disparate impact remedies were not thought to involve either of the two phenomena that come under the heading of disparate treatment. That is, they were not seen to entail overt acts allocating benefits to employees of one race that were denied to employees of another race, nor were they understood to involve any illicit motives on the part of employers. Consider first the question of disparate treatment in the ordinary-language sense. If a written test has a racially disparate impact and the employer throws out the results—as happened in *Ricci*—the test results are thrown out for all applicants, regardless of race. Any black applicants who did very well on the test are disadvantaged by the disparate impact remedy along with white applicants who did very well. White applicants who did poorly may stand to gain along with black applicants who did poorly. Obviously, the decision to throw out the test is race-conscious. But throwing out the test results does not involve "disparate treatment" in the ordinary-language sense of sorting employees into groups and conferring a benefit on members of one group that was withheld from members of the other group. No two employees are given different tests, nor are separate criteria used to evaluate

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54. *See, e.g.*, Palmer v. Thompson, 403 U.S. 217 (1971) (addressing the decision of city officials in Jackson, Mississippi, to close municipal swimming pools entirely rather than permit African Americans to swim there).

55. Given its aggregate effects, it is also likely to be actionable under the doctrine of disparate impact.

56. *See, e.g.*, Ky. Ret. Sys. v. EEOC, 128 S. Ct. 2361, 2366 (2008) (describing what must be proved by a plaintiff who claims "'disparate treatment' (*i.e.*, *intentional* discrimination[)]"). This terminological oddity is a product of the way that the Supreme Court organized antidiscrimination law in the 1970s. For a long time, official doctrine in American law had long wobbled among three accounts of the locus of actionable discrimination: motive, form, and impact. On the motive-based account, an action is discriminatory because of the actor's state of mind. On the form-based account, an action is discriminatory on the basis of the overt or visible aspect of the action. On the impact-based account, an action is discriminatory on the basis of the consequences that the action produces. *See* Kathleen M. Sullivan, *After Affirmative Action*, 59 OHIO ST. L.J. 1039, 1046 (1998) (distinguishing the three accounts). To be sure, these three concerns can flow into one another, such that many phenomena in antidiscrimination law cannot be fully understood as falling into one category but not the other two. But the law often tries to distinguish among them. When the disparate impact doctrine became the repository of the impact-based account of discrimination within Title VII, the other two accounts were grouped together as "not-disparate-impact": courts began classifying all cases of intentional discrimination and all cases of overt or formal differentiation as falling into a single category, and they extended the term "disparate treatment" to cover both kinds of cases despite its semantic awkwardness for the purpose. The term has stuck well enough that today we rarely notice the awkwardness at all. We simply understand that "disparate treatment" in Title VII is a term that covers both formal differences in the treatment of people of different groups and unlawful employer motives.

different employees, and no job is given to a Mr. Black but denied to a similarly situated Mr. White.[57]

Depending partly on one's normative perspective, the preceding analysis might seem like shallow formalism aimed at obscuring the race-conscious nature of the employer's intervention. But that intuition, if valid, is a concern about *motive*, rather than one about treatment in its strict sense. The remaining question, then, is whether throwing out the test results proceeds from a motive that is prohibited under Title VII. During the early decades of disparate impact doctrine, the easy answer to that question was no. Disparate impact doctrine was widely understood as a means of redressing unjust but persistent racial disadvantage in the workplace,[58] and antidiscrimination law was broadly tolerant of deliberate measures intended to improve the position of disadvantaged minority groups.[59] Even facially classificatory affirmative action was considered to have a permissible *motive*: challenges to affirmative action programs generally focused on their chosen means, which characteristically involved disparate treatment in the strict sense, rather than on the fact of a race-conscious intention.[60] Disparate impact doctrine is weaker medicine than affirmative action, so it raised no trouble as a matter of motive.[61] It was understood to be race-conscious, but the law did not regard race-consciousness in the pursuit of improving the position of disadvantaged groups to be problematic in the way that it does today.

I do not mean to give the impression that competent employment lawyers thirty years ago could all recite the foregoing explanation for why disparate impact and disparate treatment were not in tension with one another. What I have set forth here is a reconstruction of the assumptions of an

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57. Cases fitting the pattern here described and on which courts have declined to find disparate treatment under Title VII include, for example, Oakley v. City of Memphis, 315 F. App'x 500 (6th Cir. 2008); Hayden v. County of Nassau, 180 F.3d 42 (2d Cir 1999); Byers v. City of Albuquerque, 150 F.3d 1271 (10th Cir. 1998).

58. *See* U.S. Comm'n on Civil Rights, Affirmative Action in the 1980s: Dismantling the Process of Discrimination 17 n.20 (1981).

59. *See, e.g.*, United Steelworkers of Am. v. Weber, 443 U.S. 193, 194 (1979) (stating that Title VII was intended to be compatible with race-conscious affirmative action to help improve the position of African Americans).

60. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (plurality opinion) (agreeing that a medical school could aim at admitting a racially diverse student body but disapproving of the method used to achieve that aim).

61. *See* Deborah C. Malamud, *Values, Symbols, and Facts in the Affirmative Action Debate*, 95 Mich. L. Rev. 1668, 1676 (1997) (noting that affirmative action was controversial but disparate impact doctrine was not). The contrast between disparate impact and affirmative action parallels the distinction between overt disparities in treatment, strictly construed, and disfavored motives. Like disparate impact doctrine, affirmative action proceeds from motives that were broadly considered acceptable thirty years ago. But unlike disparate impact doctrine, most affirmative action programs engage in the disparate treatment (strictly construed) of particular persons. Accordingly, the Supreme Court long ago classified those forms of affirmative action that were acceptable under Title VII as *exceptions* to the general prohibition on disparate treatment. *See, e.g.*, *United Steelworkers of Am.*, 443 U.S. at 201–08 (acknowledging that a facially classificatory affirmative action plan was within the language of Title VII's prohibition on disparate treatment but that a legitimate affirmative action plan constituted a valid defense to liability). The *Ricci* premise extends this way of thinking to disparate impact doctrine for the first time.

earlier time, not a recovery of authoritative statements laid out in caselaw or hornbooks. Reconstruction is necessary here precisely because recovery is unavailable: cases and hornbooks did not directly address the question of why disparate treatment and disparate impact were not in conflict with each other. But the fact that such sources did not address the question only signals how far the idea of such a conflict was from the way that lawyers at that time understood the overall structure of antidiscrimination law.[62] The issue did not arise because it would not have made sense to imagine a conflict given then-prevailing assumptions about acceptable race-conscious motives. And given the general degree of comfort with the motives behind disparate impact doctrine, the formal absence of disparate treatment in the strict sense was enough to insulate the doctrine from any plausible complaint.

In the intervening decades, assumptions have changed. Antidiscrimination law is still not wholly colorblind, but it is considerably less tolerant of race-conscious measures of any sort.[63] In particular, the idea that the intent to improve the position of a disadvantaged racial group is unlike the intent to harm members of such a group has lost popularity.[64] Dominant judicial opinion now runs in the other direction, albeit with qualifications.[65] As a result, the race-consciousness involved in disparate impact doctrine is now problematic as a matter of motive. Discriminatory motives are, of course, coded as "disparate treatment" under Title VII. As a result, the idea that disparate impact remedies are as a conceptual matter tantamount to disparate treatment problems has become not just plausible but natural.

The *Ricci* premise is a radical departure from prior law, but its radicalism lies in forcing something old to align with newer ideas, not in striking out into unfamiliar territory. It is different from what went before, but it is supported by easily accessible intuitions, or at least intuitions that are easily accessible to people who take colorblindness to be the touchstone of antidiscrimination law. If Title VII's prohibition on disparate treatment is understood as a general requirement of colorblindness in employment, then it is easy to see any race-conscious decisionmaking as disparate treatment. Disparate impact doctrine does require race-conscious decisionmaking, so it follows that there is a conflict between the two frameworks. It's as simple as that. No court ever took this view before, but many people now and in the future will regard the proposition as obvious.

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62. *See* Malamud, *supra* note 61, at 1693 (noting the near-universal acceptance of disparate impact theory as a valid part of antidiscrimination law).

63. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

64. *Compare id.* (disallowing consideration of race as a tiebreaker in a small number of school assignments as part of a school district's attempt to maintain racial diversity in its schools), *with* Swann v. Charlotte–Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (upholding a wholesale busing remedy designed to integrate a school system).

65. *See*, *e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding a limited affirmative action plan in university admissions when that plan gave sufficiently individualized consideration to all applicants).

C. *The* Ricci *Premise as a Constitutional Proposition*

The prohibitions on disparate treatment and disparate impact both rest on the authority of Title VII, so the Court in *Ricci* treated one as an exception to the other.[66] Given the view that the two prohibitions conflict, that was reasonable. To say that the race-consciousness that disparate impact doctrine requires violates the prohibition on disparate treatment would be to say that Title VII requires something that it also prohibits. Quite sensibly, the Court declined to make hash of the statute in this way. Instead, *Ricci* said that the two prohibitions must be read as compatible with one another and accordingly limited the scope of the prohibition on disparate treatment to something smaller than its full conceptual extension. The *Ricci* premise is that disparate impact doctrine *would* collide with the prohibition on disparate treatment, were it not ordained by Title VII's own authority.[67] But it is so ordained. If understood strictly as a statutory matter, therefore, the *Ricci* premise does not threaten the continued operation of disparate impact doctrine within its proper domain. And Justice Kennedy's majority opinion did present itself as a statutory analysis only.[68]

It would be a mistake, however, to think of the *Ricci* premise as merely statutory. Despite the Court's professed intention to avoid equal protection issues, the *Ricci* premise is properly understood as a constitutional proposition as well as a statutory one. The reason is that constitutional antidiscrimination doctrine—that is, the law of equal protection—has, in the hands of the Supreme Court, the same substantive content as Title VII's prohibition on disparate treatment. Obviously, the two doctrinal frameworks diverge in some respects. They cover different though overlapping sets of parties,[69] and they have different procedural requirements for plaintiffs filing causes of action.[70] But the conceptual content of the two frameworks is the same.[71] The conduct prohibited under one is virtually coextensive with the

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66. *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2674 (2009).

67. *See id.* at 2674.

68. *Id.* at 2675 ("This suit does not call on us to consider whether the statutory constraints under Title VII must be parallel in all respects to those under the Constitution."); *id.* at 2681 (declining to address the plaintiffs' constitutional claim).

69. Equal protection doctrine covers all government actors, whether or not they are employers, but it reaches no private parties. *See* Civil Rights Cases, 109 U.S. 3, 11 (1883). Title VII reaches only employers, but it covers all employers, private or public, over a certain size. 42 U.S.C. § 2000e(a) (2006) (specifying that "person[s]" include "governments, governmental agencies, [and] political subdivisions"); 42 U.S.C. § 2000e(b) (2006) (defining as covered employers all persons "engaged in an industry affecting commerce who have fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year"); 42 U.S.C. § 2000e-16 (2006) (extending coverage to federal government employees).

70. *Compare* 42 U.S.C. § 2000e-5 (2006) (setting forth administrative filing requirements and enforcement procedures under Title VII), *with* 42 U.S.C. § 1983 (2006) (listing the necessary components of a cause of action alleging the deprivation of constitutional rights), *and* Bivens v. Six Unknown Named Agents of Fed. Bureau Narcotics, 403 U.S. 388 (1971) (governing requirements for lawsuits raising causes of action under the Equal Protection Clause).

71. Note that equal protection doctrine, like disparate treatment doctrine, houses both the form-based and the motive-based accounts of discrimination—that is, everything but the concern

conduct prohibited under the other. To be sure, it is possible to find differences in coverage at the margins.[72] But until a particular difference is identified, it is a good working hypothesis that equal protection and disparate treatment prohibit the same substantive conduct.

If the prohibition on disparate treatment would conflict with disparate impact doctrine but for a statutory carve-out, and if the prohibition on disparate treatment has the same content as equal protection, then equal protection must also conflict with disparate impact doctrine, absent some saving carve-out. The carve-out that saved disparate impact doctrine from actual conflict with disparate treatment doctrine in *Ricci* will not do the trick. The authority for that carve-out is Title VII, and Title VII, as a statute, must give way to the Constitution. Perhaps some other defense is available, such that the *Ricci* premise need not conclusively establish the unconstitutionality of disparate impact doctrine. But the problem is squarely put. If administering the disparate impact doctrine would be a disparate treatment problem but for the statutory carve-out, it is also an equal protection problem.[73]

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with impact, which is carved off and placed elsewhere. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976) (regarding equal protection); *supra* Part I (regarding disparate treatment). The ambiguity between form and motive has animated a parallel set of conflicts at the statutory and constitutional levels. Just as the Court has divided deeply over whether formal racial classifications are offensive to equal protection even when not motivated by racial animus, *see, e.g.*, Johnson v. California, 543 U.S. 499 (2005); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), the Court has divided deeply over whether a statutory disparate treatment claim should lie when an employer deploys a disfavored classification in the course of advancing an administrative scheme not motivated by animus against any category of workers. *Compare* Ky. Ret. Sys. v. EEOC, 128 S. Ct. 2361 (2008) (majority opinion) (privileging motive), *with id.* at 2371 (Kennedy, J., dissenting, joined by Scalia, Ginsburg, & Alito, JJ.) (privileging form). As the examples of *Johnson v. California* and *Kentucky Retirement Systems* indicate, it is not always the same Justices who rest on form and the same Justices who rest on motive. A focus on constitutional affirmative action cases might encourage the generalization that the more conservative Justices are more focused on form than their liberal counterparts, but on fuller consideration the reality is more complex. Particular decisionmakers can be on either side under different circumstances, and the Court's familiar liberal and conservative blocs do not always cohere on the question. Whichever way the Court leans in a particular case, however, the ambiguity it confronts is the same in disparate treatment as in equal protection.

72. Suppose that a police department wants to assign an undercover officer to infiltrate the Russian mafia and considers only white officers for the position on the grounds that the target organization is composed exclusively of white people (i.e., ethnic Russians), such that a nonwhite officer could never pass as a member. If a black officer brought an equal protection claim alleging racial discrimination, a court could (and surely would) find against him on the grounds that choosing a white officer for this job was narrowly tailored to a compelling governmental interest. But if a black officer brought a Title VII disparate treatment claim, the police department would have no defense. (Title VII recognizes a bona fide occupational qualification ("BFOQ") defense in cases where a person's religion, sex, or national origin is actually necessary to performance of a job, but the statute recognizes no BFOQ defense to claims of disparate treatment of the basis of race. *See* 42 U.S.C. § 2000e-2(e)(1) (2006).) In two respects, however, this example of a divergence in the coverage between Title VII and equal protection only serves to emphasize how thoroughly the two rubrics reproduce each other as a general matter. First, finding this difference requires resort to the fanciful: in real life, police officers do not sue to be permitted to undertake quixotic suicide missions like the one imagined here. Second, even this divergence between statutory and constitutional coverage arises from a difference in the *defenses* that apply in each sphere, not a difference between what Title VII and equal protection reach as an initial matter.

73. As noted earlier, I have explored the potential tensions between equal protection and disparate impact doctrine at length elsewhere. *See* Primus, *supra* note 14. Readers interested in the full analysis should see that discussion. But that article demonstrated that the relationship between

Read carefully, the Court's opinion in *Ricci* confirms that equal protection and disparate treatment are virtually interchangeable in their conceptual relationship to disparate impact. Indeed, *Ricci* repeatedly erases the line between disparate treatment and equal protection, though perhaps unintentionally so. In discussing the plaintiffs' injury, the defendant's motive, and the defendant's action in canceling the test, the Court's language, analysis, or both are more at home in the rubric of equal protection than that of disparate treatment. Obviously, the fact that one can classify a particular piece of language or analysis as sounding in equal protection rather than disparate treatment means that there are, as a technical matter, identifiable differences between the two frameworks. But the Court's repeated use of the apparatus of equal protection while adjudicating a disparate treatment claim suggests that whatever distinctions there may be between disparate treatment and equal protection have little importance to either doctrine's relationship to disparate impact law. So despite the Court's official statement of constitutional avoidance, all indications are that the *Ricci* premise is a constitutional proposition, not just a statutory one.

1. *Injury*

Consider first the Court's approach to the question of whether the *Ricci* plaintiffs had a legally cognizable injury. Under orthodox Title VII doctrine, a plaintiff must suffer an "adverse employment action" in order to merit relief.[74] The easiest examples of adverse employment actions include dismissals,[75] demotions,[76] failures to hire,[77] failures to promote,[78] and reductions in pay.[79] But not every undesirable thing that happens in the workplace counts as an adverse employment action. To take an extreme case, a Title VII action will not lie for a supervisor's glowering at an employee, assuming the glowering is not part of a pervasive pattern of mistreatment.[80] Between dismissal and glowering lie contestable cases. For example, lower courts have disagreed about whether employer actions that might make it

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equal protection and disparate impact was substantially indeterminate, such that the question of their compatibility would depend on which of several possible views of equal protection, and of disparate impact, an adjudicating official would ultimately adopt. The project of this Article is to show how *Ricci* narrows the range of views that the Supreme Court is likely to adopt.

74. *See, e.g.*, Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006).

75. *E.g.*, Vincent v. Brewer Co., 514 F.3d 489, 493 (6th Cir. 2007).

76. *E.g.*, Dorsey v. Morgan Stanley, 507 F.3d 624, 627–28 (7th Cir. 2007).

77. *E.g.*, Nilsson v. City of Mesa, 503 F.3d 947, 952 (9th Cir. 2007).

78. *E.g.*, Springer v. Convergys Customer Mgmt. Group, Inc., 509 F.3d 1344, 1346–47 (11th Cir. 2007).

79. *E.g.*, Nichols v. S. Ill. Univ.-Edwardsville, 510 F.3d 772, 780 (7th Cir. 2007).

80. *Cf.* Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996) (explaining that Title VII does not protect against every action "that an irritable, chip-on-the-shoulder employee did not like").

harder for employees to get jobs or promotions in the future count as adverse employment actions.[81]

Whether the plaintiffs in *Ricci* suffered adverse employment actions is a legitimate question within the contestable range. As of the time of litigation, the *Ricci* plaintiffs had not been denied promotions. The officer positions remained open. At least some of the plaintiffs would probably have been chosen to fill those positions under whatever alternative process New Haven might have instituted.[82] Moreover, because the Rule of Three had not yet been applied, no applicant was yet entitled to a promotion when litigation began. To be sure, setting aside the test results almost surely reduced the plaintiffs' average probability of promotion.[83] But whether that sort of probabilistic concern rises to the level of an adverse employment action for Title VII purposes is a question over which courts have divided in the past. After all, a large part of the rationale for the adverse employment action requirement is to prevent courts from having to adjudicate cases where the feared injury may never come to fruition. It is not absurd to argue that being set back in the promotions process should count as an adverse employment action under Title VII. But neither is it absurd to argue that no adverse employment action exists under Title VII when an employee seeking a promotion encounters a procedural setback that might or might not ultimately lead to the denial of a promotion.

What is striking in *Ricci*, therefore, is not that the Court believed the plaintiffs could state a claim. It is that the Court offered no analysis to explain why what happened to the plaintiffs counts as an adverse employment action under Title VII at this intermediate stage of the process. *Ricci* never acknowledges that as a matter of disparate treatment doctrine, the plaintiffs' claim of statutorily cognizable injury might be premature. The Court's apparent indifference on this score is the first suggestion that its analysis did not hew to the distinctive concerns of disparate treatment law.

No parallel curiosity arises if *Ricci* is read as an equal protection case. As a matter of constitutional doctrine, the *Ricci* plaintiffs needed some injury cognizable under Article III to maintain an equal protection suit.[84] But

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81. *Compare, e.g.*, Reed v. Unified Sch. Dist. No. 223, 299 F. Supp. 2d 1215, 1226 (D. Kan. 2004) (stating that refusal to give a letter of recommendation is adverse employment action because it risks harming the employee's future ability to get a job), *with* Enowmbitang v. Seagate Tech., Inc., 148 F.3d 970, 973–74 (8th Cir. 1998) (holding that giving a poor evaluation is not an adverse employment action if no further consequence immediately flows from it).

82. I assume that the canceled process and the hypothetical future process would have sorted roughly the same applicant pool. Obviously, the two processes would have sorted that pool somewhat differently. But many highly qualified applicants probably would have succeeded under both processes, assuming that both were valid measurements of qualification.

83. If New Haven had replaced the original test with a system that wound up yielding exactly the same set of promotable candidates, then the plaintiffs' average probability of promotion would be unaffected. But it seems highly unlikely that New Haven's chosen replacement system would have yielded that result. After all, we can assume that New Haven would have replaced the original test with a system designed, among other things, to change the pool of promotable candidates.

84. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (setting forth the general criteria for constitutional injury cognizable in Article III courts).

neither Article III nor anything particular to the rubric of equal protection mirrors the requirement of adverse employment actions under Title VII. On the contrary, an equal protection plaintiff can establish cognizable injury simply by demonstrating that he was subjected to and in some way harmed by a decisionmaking process infected by a state actor's illicit consideration of race.[85] That is a showing that the *Ricci* plaintiffs could make. Identifying the plaintiffs' legal injury is accordingly more straightforward if *Ricci* is read as sounding in equal protection than if it is read as sounding in disparate treatment.

2. *Motive*

Consider next the issue of the defendant's motive. One of disparate treatment doctrine's distinguishing characteristics is a burden-shifting regime derived from the Supreme Court's decision in *McDonnell Douglas Corp. v. Green*.[86] Within the *McDonnell Douglas* framework, a court adjudicating a disparate treatment claim is supposed to ask whether the plaintiff made a prima facie showing about the defendant's motive according to certain stylized rules, and if so whether the defendant's evidence includes a rebuttal called a "legitimate nondiscriminatory reason," and if so, whether the plaintiff's evidence shows that rebuttal to be pretextual.[87] Walking through *McDonnell Douglas* and asking whether the various burdens it assigns have been satisfied is a staple of disparate treatment cases.[88] Not surprisingly, the district court in *Ricci* used the *McDonnell Douglas* framework to structure its entire analysis of the statutory question.[89] But the Supreme Court's opinion in *Ricci* says not a word about *McDonnell Douglas*.

Given an unusual feature of the case, the Court may have been justified in skipping *McDonnell Douglas*. The primary virtue of the *McDonnell Douglas* process is that it shifts the burden of production to the defendant earlier than happens in most other civil litigation, and it does so because discriminatory intent is normally hard to prove.[90] *McDonnell Douglas* makes employers proffer reasons for their actions, thus allowing plaintiffs to win their cases if they can raise inferences of discriminatory purpose by discrediting the employers' explanations. If an employer seems to be lying about its reasons, a court might infer that the proffered explanation is a pretext for an

85. *See, e.g.*, Shaw v. Reno, 509 U.S. 630 (1993).

86. 411 U.S. 792 (1973).

87. *Id.* at 802–03.

88. *See* Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229 (1995).

89. Ricci v. DeStefano, 554 F. Supp. 2d 142, 151 (D. Conn. 2006) ("Because plaintiffs allege intentional discrimination, the familiar *McDonnell Douglas* three-prong burden-shifting test applies."); *id.* at 151–60 (conducting the *McDonnell Douglas* analysis).

90. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring) (stating that the rationale for the *McDonnell Douglas* proof framework is that "direct evidence of intentional discrimination is hard to come by").

illicit and perhaps discriminatory purpose.[91] But on this understanding, the special framework of *McDonnell Douglas* might be unnecessary in cases where facts suggesting discriminatory purpose are already in plain view. Accordingly, some lower courts have held that *McDonnell Douglas* states the applicable process only in cases lacking "direct evidence" of discriminatory intent.[92] It is not always clear what constitutes "direct evidence,"[93] but as a matter of common sense New Haven's stated explanation for setting aside the test results in *Ricci* might qualify. That New Haven acted because of the expected racial distribution of promotions was already known at the start of litigation. Whether New Haven's motives and actions added up to a violation of Title VII was a contestable question, but it was a question of legal interpretation rather than of facts and evidence.[94] So in the end, bypassing *McDonnell Douglas* may have made good doctrinal sense.

But it is once again noteworthy that the Court omitted any discussion of the issue. As with the matter of adverse employment actions, there is a reasonable doctrinal case on the other side of the question. Other than in mixed-motive cases where the special proof regime of *Price Waterhouse v. Hopkins* has been applied,[95] no Supreme Court majority prior to *Ricci* ever skipped *McDonnell Douglas* in a case adjudicating a Title VII disparate treatment claim.[96] And whatever the common sense of regarding an overtly

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91. *See generally* Fisher v. Vassar Coll., 114 F.3d 1332, 1354–61 (2d Cir. 1997) (en banc) (Calabresi, J., concurring in part and dissenting in part).

92. *See, e.g.*, Rogers v. City of Chicago, 320 F.3d 748, 754 (7th Cir. 2003).

93. *See* Fernandes v. Costa Bros. Masonry, 199 F.3d 572, 582 (1st Cir. 1999) (canvassing varying understandings of direct evidence).

94. Ricci v. DeStefano, 554 F. Supp. 2d 142, 145 (D. Conn. 2006) (noting that the parties strenuously disputed the legal issues in the cases but largely agreed on the facts).

95. *Price Waterhouse*, 490 U.S. at 228; *see, e.g.*, Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) (applying *Price Waterhouse*). The facts of *Ricci* made the case a natural candidate for mixed-motive analysis: the parties disputed whether New Haven had acted for the mere purpose of complying with Title VII or for the purpose of gratifying an important racially defined political constituency, and one possible answer was "a little of both." Justice Alito's concurrence suggests that at least three Justices found the racial politics explanation plausible, at least in part. *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2683–88 (2009) (Alito, J., concurring). Moreover, New Haven's decision was the joint product of more than one decisionmaker, as many municipal decisions are, and decisions with multiple decisionmakers are regularly proper subjects for mixed-motive analysis because different decisionmakers may have acted for different reasons, or different combinations of reasons. The majority opinion suggested that New Haven acted for a combination of motives, rather than for any single purpose to the exclusion of all others. *See id*. at 2681 (majority opinion) (stating that "the raw racial results became the *predominant* rationale" for the city's decision to set aside the tests) (emphasis added)). But the parties did not raise a mixed-motive argument in the district court, Ricci v. DeStefano, 530 F.3d 88, 89 (2d Cir. 2008) (Calabresi, J., concurring in the denial of rehearing en banc), so there is a straightforward explanation for the absence of mixed-motive analysis in the Supreme Court's opinion.

96. The closest the Court has come has been to hold that direct-evidence cases are different from *McDonnell Douglas* cases in the context of the Age Discrimination in Employment Act. *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985); *see also* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 667 (1989) (stating, in the context of a disparate impact case, that *McDonnell Douglas* provides "[t]he means for determining intent absent direct evidence"); *Price Waterhouse*, 490 U.S. at 270 (O'Connor, J., concurring) (distinguishing *McDonnell Douglas* cases from cases involving "direct evidence" of employer decisionmaking on the basis of a forbidden factor). These statements are a sufficient foundation for applying the idea in a disparate treatment

race-conscious decision like New Haven's as not requiring *McDonnell Douglas*, the Court has in the past applied *McDonnell Douglas* even when adjudicating a disparate treatment challenge to a facially classificatory affirmative action plan.[97] Obviously, there is no doubt that an employment decision made pursuant to an affirmative action plan is racially motivated, nor is there any difficulty in producing evidence of that motivation when the plan is publicly known. If affirmative action cases have been handled within the *McDonnell Douglas* framework, some explanation is required as to why a case like *Ricci* should proceed outside of it—even if that explanation is, as it might reasonably be, that henceforth affirmative action cases should not use *McDonnell Douglas* either. All in all, the Court could have justified proceeding without *McDonnell Douglas*. But one might expect that the Court would explain why it was doing so, given both the reasonable possibility of going the other way and the fact that the statutory discussion in the court below relied on *McDonnell Douglas* from start to finish. That the Court did not even mention this set of questions suggests once again that its analysis in *Ricci* did not fully engage with the distinctive doctrinal apparatus of Title VII.

The Court's discussion of New Haven's motive did, however, draw upon the language of equal protection. Rather than having a single, overarching framework for the consideration of motive issues, equal protection has slightly different frameworks for assessing defendants' motives in different sorts of cases.[98] One of those frameworks is applicable to cases in which state actors use facially neutral means to improve the position of disadvantaged groups.[99] As explained in Part I, and as I have shown at greater length elsewhere, disparate impact remedies like the one used in *Ricci* can usefully be located within that category.[100] Throwing out test results can be understood as facially neutral when the test results are thrown out for everyone; the discrimination, if any, lies in the motivation for that action. Within the doctrinal framework applicable to such cases, the critical question is whether the racial consideration was the state actor's "*predominant* motive."[101] And in *Ricci*, the Court used the idea of predominant motive to explain the invalidity of New Haven's decision. The absence of *McDonnell Douglas* is curious in a disparate treatment case, as described above, and

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case, but giving them force for the first time merits some discussion in light of prior practice to the contrary.

97. *See* Johnson v. Transp. Agency, 480 U.S. 616, 626 (1987).

98. *See* Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989) (distinguishing several modes of intent analysis in equal protection).

99. *See* Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2333 (2000).

100. *See* Primus, *supra* note 14, at 539–44.

101. *See, e.g.*, League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 474 (2006) (Stevens, J., concurring in part and dissenting in part); Vieth v. Jubelirer, 541 U.S. 267, 284–86 (2004); Miller v. Johnson, 515 U.S. 900, 911–13 (1995); Primus, *supra* note 14, at 545. Predominant motive is an imprecisely defined term, if it is defined at all. Its use in these cases seems intended to signal that racial consideration should not assume undue importance relative to other, less problematic factors in the decisionmaking process.

nothing in Title VII doctrine speaks of predominant motives. But if *Ricci* had been an equal protection case, a judgment about predominant motive would have been entirely at home.

3. *Standard for Voluntary Corrective Action*

In assessing the city's argument that it acted in order to comply with the disparate impact prong of Title VII, the Court had to confront the question of an employer's latitude to remedy actual or potential Title VII violations. The plaintiffs argued that if the purpose of remedying a disparate impact problem can ever justify what would otherwise be disparate treatment, it can do so only when an employer is actually in violation of Title VII's prohibition on disparate impact.[102] In other words, employers may not act to forestall possible, rather than actual, violations. The city argued in contrast that a good-faith belief that disparate impact liability is the alternative to corrective action should be good enough.[103] The Court rejected both positions. In its view, employers must have more latitude than the plaintiffs maintained: as prior cases had noted, it is the policy of Title VII to encourage "voluntary compliance" rather than force employers to litigate and lose before taking corrective action. At the same time, the Court considered a requirement of no more than employer good faith to be overly permissive.[104] So it had to find some middle ground.

The Court took that middle ground from equal protection doctrine, and this time it was forthright about the borrowing.[105] *Ricci* announced that a defendant in New Haven's position must have a "strong basis in evidence" that its conduct would open it to disparate impact liability absent corrective action.[106] As the Court acknowledged, the strong-basis-in-evidence standard was taken from constitutional cases—that is, equal protection cases—in which defendants had taken voluntary actions intended to cure past discrimination.[107] The Court signaled its awareness in principle of the dangers of borrowing constitutional doctrine to resolve statutory questions, saying that its use of the strong-basis-in-evidence standard should not be understood to mean that everything about the restrictions on employers is identical in the Title VII context to what it is in the equal protection

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102. Ricci v. DeStefano, 129 S. Ct. 2658, 2674 (2009) ("Petitioners next suggest that an employer in fact must be in violation of the disparate-impact provision before it can use compliance as a defense in a disparate-treatment suit.").

103. *Id.* at 2674–75.

104. *Id.*

105. *Cf.* Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459 (2010) (describing the practice and hazards of using doctrinal tools and tropes from one context in another context).

106. *Ricci*, 129 S. Ct at 2675 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986) (plurality opinion)).

107. *Id.* (considering *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986) (plurality opinion)).

context.[108] But it identified no differences. And once again, it used the apparatus of equal protection in what is ostensibly just a disparate treatment decision.

On its own, *Ricci*'s borrowing of the strong-basis-in-evidence standard might not signal a wholesale convergence between equal protection and disparate treatment doctrines. And it is tempting to understand *Ricci*'s other uses of the apparatus of equal protection rather than that of Title VII as little more than inattentive drafting. But more is going on. Equal protection language appears repeatedly in *Ricci*, and at key junctures, rather than in just a stray comment or two. Perhaps more importantly, the deep structure of the two conflated doctrines really is analogous, such that a Court thinking in terms of substantive fundamentals could easily let one colonize the other. Even if the *Ricci* Court had kept scrupulously to the terminology of disparate treatment doctrine, the substance of its analysis would have been largely transferable to the equal protection context. That the Court did not even bother to keep the terminologies separate only testifies to the artificiality of the distinction between them in practice. So despite the Court's presentation of the *Ricci* premise as a matter of statutory law only, one can probably substitute "equal protection" for "disparate treatment" and have an equally valid proposition.

II. Three Readings of the *Ricci* Premise

If the *Ricci* premise is of constitutional dimension, it threatens the continued validity of disparate impact law under Title VII. But the extent of the threat depends on which of three possible meanings the premise is given. One meaning, which I will call the general reading, is that any operation of the disparate impact standard is an equal protection problem. This general reading is plausible. Justice Scalia seems to read *Ricci* that way,[109] and so does Ronald Dworkin.[110] But *Ricci*'s statement of the premise is indeterminate as between that reading and two others. One of those other readings is institutional, and the other is about visible victims.

On the institutional reading, the disparate treatment (read: equal protection) problem in *Ricci* arose because the actor that implemented a disparate impact remedy was a public employer rather than a court. On the visible-victims reading, the city's conduct in *Ricci* was a disparate treatment (or equal protection) problem because it adversely affected specific and visible innocent parties. Either of these readings calls for a bit more subtlety than the general reading, but they may make for sounder positions in the end. And if the *Ricci* premise is given either the institutional reading or the visible-victims reading, disparate impact doctrine can survive constitutional challenge.

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108. *See Ricci*, 129 S. Ct at 2675.

109. *See id.* at 2682 (Scalia, J., concurring).

110. *See* Dworkin, *supra* note 20, at 38–39.

A. *The General Reading*

As described in Part I, the general reading would represent a fundamental change in American antidiscrimination law.[111] But like many successful fundamental changes, its logic is simple once one adjusts to the new perspective. The relevant perspective here takes colorblindness, understood as the rejection of race-conscious governmental action, as the guiding value of equal protection.[112] It is possible to understand Title VII's disparate impact doctrine in several different ways, but on any construction it is race-conscious. Courts must classify members of the workforce by race in order to adjudicate disparate impact claims, and the threat of liability encourages employers to classify their employees or applicants by race so as to monitor their own compliance with the law.[113] Moreover, disparate impact doctrine is concerned with racial groups, and the colorblind version of equal protection insists that the law's attention be on individuals.[114] If equal protection requires the law to be thoroughly colorblind, then a statutory doctrine that requires racial classification and makes liability turn on the status of groups considered collectively is an equal protection problem. As noted before, this view of the relationship between equal protection and disparate impact is sharply different from the view that prevailed in the first decades of Title VII's operation. But it is not hard to imagine the Supreme Court's adopting this orientation.

The general reading of *Ricci*'s premise does not quite entail the conclusion that disparate impact doctrine is unconstitutional. Even if disparate impact doctrine is in tension with equal protection, it could survive constitutional attack if it were found to be narrowly tailored to a compelling governmental interest. I explore this possibility further in Part III. But compelling interest defenses are always longshots. So if the general reading of the *Ricci* premise does not necessarily entail the unconstitutionality of disparate impact doctrine, it at least augurs poorly.

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111. *See supra* Section I.B.

112. *See generally* ANDREW KULL, THE COLOR-BLIND CONSTITUTION (1992).

113. Technically, it would be possible for an employer to avoid disparate impact liability without any race-conscious action. An employer who ensured that all of his employment practices met the business necessity test would be able to defend against any claim that might arise if some of those practices had racially disparate impacts. But one should not invest too heavily in this possible resolution. Litigation is expensive, so most employers most of the time would rather avoid being in the position where a plaintiff could make a prima facie case of disparate impact which would then need to be answered by a business necessity defense. The way to avoid going down that road is, of course, not to cause statistically disparate impacts in the first place.

114. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (("[T]he Fourteenth Amendment 'protect[s] *persons*, not *groups*[.]'") (second alteration in original) (emphasis added) (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)); Miller v. Johnson, 515 U.S. 900, 911 (1995) ("At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals.") (internal quotation marks omitted).

B. *The Institutional Reading*

The *Ricci* premise is also susceptible of more limited readings, readings that go not to an equal protection problem inherent in any operation of the disparate impact standard but only to an equal protection problem that arose on the specific facts of the New Haven case. One of those readings is institutional. It holds that *courts* may order race-conscious remedies for disparate impact problems, but *public employers* may not.[115]

As a general matter, the requirements of a constitutional norm often vary with the role or the capacities of the particular institutions to which (or by which) the norm is applied.[116] The judicially enforceable content of the Equal Protection Clause, for example, differs slightly from what Congress can do to enforce that Clause, and the difference is intended to track differences in the roles and capacities of the two institutions.[117] Both institutions are bound by equal protection, but the operationalized content of equal protection has some play in the joints. Depending on the specific example and the underlying constitutional theory of the commentator, the resulting differences between what a constitutional norm demands when applied to different institutional actors can be described in terms of underenforcement,[118] prophylaxis,[119] judicially manageable standards,[120] or simply as the way constitutional adjudication always works.[121] However described, it is clear that constitutional norms often impose slightly different demands on different institutional actors.

At least since *Shelley v. Kraemer*,[122] it has been established law that the Equal Protection Clause applies to courts as well as other governmental institutions. Given the role and characteristics of courts, however, not even the strongest advocates of a colorblind approach to equal protection have maintained that courts may never take note of race. Taking note of race is regularly part of core judicial functions, including those made necessary by the Equal Protection Clause itself. If I walk into federal district court and

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115. I specify *public* employers rather than employers generally because, given the state action requirement, only public employers can violate the Equal Protection Clause. A private employer trying to cure a disparate impact problem could violate Title VII, but its actions could not be unconstitutional.

116. *See generally* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 48–50 (2004).

117. *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641 (1966).

118. *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

119. *See* David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988).

120. *See* Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006).

121. *See* Evan H. Caminker, Miranda *and some Puzzles of "Prophylactic" Rules*, 70 U. CIN. L. REV. 1, 25 (2001); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

122. 334 U.S. 1 (1948) (holding that judicial enforcement of a racially restrictive covenant in a title deed constituted a denial of equal protection under the Fourteenth Amendment).

sue the government for discriminating against me as a black man, the court will, and should, notice that I am in fact a white man. That evaluation will and should figure heavily in the court's evaluation of my claim. As a matter of widely shared intuition, nothing about this governmental race-consciousness is an equal protection problem.[123] Additionally, our official conception of courts sees them as neutral adjudicators, rather than as agencies whose officers have incentives or self-conceptions that might lead them to favor some social groups over others.[124] It is accordingly not as necessary to prevent courts from taking note of race as it might be to prevent other governmental actors from doing so, because the danger that favoritism will result in unfair exercises of governmental power is less. To be sure, none of these considerations would justify allowing a court to violate the demands of equal protection. But in figuring out just what equal protection demands of a court, the fact that we are talking about a court is a relevant consideration. Partly because a certain degree of race-consciousness is necessary for executing core judicial functions, and partly for other reasons related to the judicial role, a legal system skeptical of race-conscious decisionmaking permits courts more leeway than it permits other institutions.

Public employers occupy a dramatically different position. Indeed, in the history of disparate impact law, public employers have been among the institutions least trusted to deal with race appropriately.[125] For as long as courts have recognized disparate impact claims under Title VII, disparate impact suits have been notoriously difficult for plaintiffs to win, with two categories of exceptions. First, in the years immediately after Title VII became effective, courts often granted disparate impact relief against Southern employers with histories of overt racial discrimination.[126] Second, courts have periodically granted disparate impact relief against large municipal employers, especially in settings like police and fire departments.[127] Such suits account

123. Equal protection has a similar tolerance for nonjudicial governmental actors executing something like the judicial function of remediation. For example, an administrative office evaluating an internal grievance alleging racial discrimination in a government agency would be permitted to consider the race of the complainant in much the same way that a court could take note of the race of a Title VII plaintiff. Interestingly, neither the caselaw nor the literature contains a full account of why colorblindness is subject to this limit. One possibility is that the individualist ideals that motivate colorblindness require at least this much color-consciousness for their enforcement. But this is not a complete explanation, because one could easily ask why what is required is this much, rather than a little more or a little less. Whether this conundrum is a problem for prevailing practices or for the theory of colorblindness is a question for another day.

124. This is not to deny that judges, like everybody else, can suffer from biases, nor is it to deny that a judiciary whose members are recruited disproportionately from certain segments of the population might show biases in predictable directions. But the design of the office is based on an aspiration to neutrality.

125. *See* Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 756–57 (2006).

126. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971); Parham v. Sw. Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970); Young v. Edgcomb Steel Co., 363 F. Supp. 961 (M.D.N.C. 1973).

127. *See, e.g.*, Boston Chapter, NAACP v. Beecher, 504 F.2d 1017 (1st Cir. 1974) (Boston); Vulcan Soc'y of N.Y. City Fire Dep't v. Civil Serv. Comm'n, 490 F.2d 387 (2d Cir. 1973) (New York); United States v. City of Chicago, 385 F. Supp. 543 (N.D. Ill. 1974) (Chicago); Officers for Justice v. Civil Serv. Comm'n, 371 F. Supp. 1328 (N.D. Cal. 1973) (San Francisco); Harper v.

for a large share of all successful disparate impact claims.[128] In many large cities, police and fire departments have been dominated by members of white ethnic communities—Polish or Irish or Italian—that have comprised important constituencies within reigning local political coalitions. Partly because of the logic of patronage, and partly because of the natural dynamics of self-perpetuation, new jobs in the departments have often gone disproportionately to members of the incumbent ethnic community. As a result, members of racial minority groups have often found it difficult to break in, even in the absence of formal discrimination or official discriminatory purposes.[129] In the 1970s, this pattern furnished the backdrop for several successful disparate impact suits against municipal employers, even as courts were showing themselves strongly disinclined to hold private employers liable in disparate impact cases.[130]

Then came an important shift. In the 1980s and 1990s, black and Latino voters became increasingly important political constituencies in many of the same big cities where the logic of local politics had previously been consistent with maintaining police and fire departments as domains of white ethnic patronage.[131] Alongside their other incentives, therefore, urban political leaders developed powerful interests in bringing more members of racial minority groups into municipal offices, including in police and fire departments.[132] In the pursuit of that new agenda, judicial compulsion was a valuable ally. Many cities were only too happy to be held liable for disparate impact violations, or to enter into consent decrees in suits brought on disparate impact grounds, and then to implement remedial decrees requiring increased minority hiring.[133] Integrating the departments served the interests of local decisionmakers, and disparate impact doctrine gave them the cover they needed to make it happen.

Mayor of Baltimore, 359 F. Supp. 1187 (D. Md. 1973) (Baltimore). There are recent examples as well. *See, e.g.*, United States v. City of New York, 637 F. Supp. 2d 77 (E.D.N.Y. 2009) (granting summary judgment against the New York City Fire Department in a Title VII suit alleging that a written examination for selecting entry-level firefighters had an unlawfully disparate impact on black and Hispanic applicants).

128. Selmi, *supra* note 125, at 756–57.

129. *See, e.g.*, Diane Cardwell, *Racial Bias in Fire Exams Can Lurk in the Details*, N.Y. TIMES, July 24, 2009, at A22 (describing a recent suit where fire department entrance exams tested knowledge of technical jargon, thus favoring those from traditional firefighter families or English-speaking families).

130. *See* Selmi, *supra* note 125, at 756.

131. *See, e.g.*, AFRICAN AMERICAN MAYORS: RACE, POLITICS, AND THE AMERICAN CITY 4–6 (David R. Colburn & Jeffrey S. Adler eds., 2001); JON TEAFORD, THE TWENTIETH-CENTURY AMERICAN CITY: PROBLEM, PROMISE, AND REALITY 147 (1993); CLARENCE STONE, REGIME POLITICS: GOVERNING ATLANTA, 1946–1988 247 (1989).

132. As should be obvious, the shift in political demographics did not mean that urban officeholders no longer had incentives to protect the interests of white ethnic groups in the allocation of public employment. Often those incentives remained. But similar incentives also obtained with respect to the employment of nonwhites. The precise balance of incentives in any particular case, or for any particular official, is a function of specific circumstances within the relevant polity.

133. *See* Selmi, *supra* note 125, at 764.

To the extent that this shift in urban political incentives reflected a larger share of the urban population's being represented at the municipal table, it should be regarded as a welcome change. But it means that courts in the twenty-first century are again likely to be suspicious of the racial agendas of local officeholders in police and fire department hiring, albeit sometimes from a different angle. Once the concern was that local politics would keep blacks out of the jobs. Now, just as often, the concern is that local leaders are playing politics by putting more blacks or Latinos into those jobs. Justice Alito's concurrence in *Ricci* vividly channels this anxiety, offering an ugly tale of racial politics as the context in which to see the issue presented.[134]

To be sure, one need not see the local officials who are inclined to go too far in the pursuit of minority hiring as evil. They might merely be officeholders acting in good faith to pursue the welfare of their cities as they best understand it, rather than being racially biased or intent on delivering political spoils along racial lines.[135] One important insight of constitutional theory, however, is that officeholders charged with particular responsibilities might pay insufficient attention to public values that argue against achieving those responsibilities in the most direct way.[136] A standard solution is to check those officeholders by subjecting them to the review of another institution that does not share the same incentives and responsibilities. Consider the Fourth Amendment warrant requirement: Police officers need judicial authorization to conduct certain kinds of searches because the responsibility for investigating crime tempts officers to minimize privacy concerns where the interest in privacy gets in the way of important investigations.[137] If investigating officers could decide on their own whether a search was valid, they would predictably undervalue the privacy that the Constitution protects, not for reasons of bad faith but simply because of what their role as police officers asks them to accomplish. Similarly, many public employers in racially

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134. *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2683–88 (2009) (Alito, J., concurring).

135. *Ricci*'s willingness to let employers escape disparate treatment liability with a strong basis in evidence for believing that the alternative is a disparate impact violation—rather than requiring a completely clear showing that the alternative is such a violation—indicates some measure of willingness to give public employers margin for error. Clearly, the Court does not see every public employer as bent on subverting the law, and the institutional reading of *Ricci* does not require such a dim view. It requires only that courts see a greater need for checking public employers than there is for checking courts.

136. For one excellent modern distillation of this idea in the Supreme Court's jurisprudence, relying partly on James Madison, see *Hamdi v. Rumsfeld*, 542 U.S. 507, 545 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) ("For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises. A reasonable balance is more likely to be reached on the judgment of a different branch, just as Madison said in remarking that 'the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights.' ") (quoting THE FEDERALIST NO. 51 (James Madison) (J. Cooke ed. 1961)).

137. I thank Trevor Morrison for suggesting this example.

diverse municipalities face a systematic temptation to use the threat of disparate impact liability to practice race-conscious hiring beyond what the law condones. This fact about public employer incentives might make it sensible to prohibit those employers from implementing disparate impact remedies without the review and direction of a court.

One of the *Ricci* Court's most overt departures from Title VII's rules for disparate impact cases can best be understood in terms of this understanding of the incentives of public employers. According to Title VII, the defendant in a disparate impact case can escape liability by showing that the employment practice with a racially disparate impact is "job related . . . and consistent with business necessity."[138] The statute places the burden of proof on the employer to show business necessity, not on the plaintiff to show that the practice is arbitrary.[139] That allocation of the burden makes sense on the generally sound assumption that employers prefer not to be held liable for Title VII violations. After all, the employer has the best access to information about why it deploys the challenged practice. If the employer also has a strong incentive to defend that practice—for example, to escape liability—then all considerations argue for giving the employer the burden of proof. But if a public employer's interest in increased minority hiring means that it prefers to be held liable, this allocation of the burden enables that employer to let a weak claim succeed simply by declining to argue the business necessity defense.

In *Ricci*, the employer *denied* that the written tests were required by business necessity.[140] Had the Court mechanically applied Title VII's burdens of proof, it would have been forced to conclude that the potential disparate impact claim against the city would have succeeded: there was a statistically disparate impact, and the city would clearly not satisfy its burden to show business necessity if its position was that the tests were not necessary. But perhaps because the Court was aware that the city's incentives were the reverse of what the statute supposed, the majority opinion treated the absence of business necessity as an element of a disparate impact claim, rather than regarding business necessity as an affirmative defense that the employer might or might not invoke.[141] The language of Title VII makes business necessity an affirmative defense,[142] so the Court's analysis required some unacknowledged surgery on the United States Code. But the Court's

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138. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

139. *Id.*

140. 129 S. Ct. at 2678 (noting and rejecting New Haven's assertion that the promotion test was not job related and consistent with business necessity).

141. Or, more broadly, perhaps the Court reallocated the burden not because of any particular sense it had about this case but because courts have been informally reallocating that burden as a matter of course for years, partly in response to the shift in incentives here described. *See* Selmi, *supra* note 125, at 749.

142. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (stating that a violation of Title VII is established when a statistically disparate impact is shown and "*the respondent fails to demonstrate* that the challenged practice is job related for the position in question and consistent with business necessity") (emphasis added).

impulse to relocate the burden arises sensibly from its recognition that under current conditions, a municipal employer like New Haven might have incentives to engage in race-conscious decisionmaking beyond that which a court would order to remedy authentic disparate impact violations.

At the constitutional level, the Court's analysis would make even more sense. There is no textual assignment of burdens to rewrite. Within equal protection doctrine, courts routinely adopt standards that are sensitive to the question of how far a certain kind of party should be trusted with a particular decision. The whole system of tiers of scrutiny is an example.[143] So if it is sensible for courts to worry that large municipal employers will have political incentives to allocate public employment along racial and ethnic lines, it is sensible for them to give those employers close scrutiny in cases involving such employment, including cases where the employers might be using Title VII as cover. Within that framework, it makes sense for equal protection to be less tolerant of a public employer's race-conscious actions taken to comply with Title VII than of a court's race-conscious actions taken to enforce the same statute. On that institutional reading, Title VII's disparate impact doctrine is still constitutional, so long as it is implemented by courts. *Ricci* would mean only that employers cannot implement race-conscious remedies by themselves.

C. *The Visible-Victims Reading*

Even as colorblindness has become increasingly dominant as the metaphor guiding equal protection, center-right constitutional actors have often drawn a distinction between race-conscious measures that visibly burden specific innocent parties and race-conscious measures intended to improve the position of disadvantaged groups but whose costs are more diffuse.[144] Justice Kennedy is an important example. In *Parents Involved*, he wrote that school districts seeking racially integrated student bodies could pursue that end with formally race-neutral means, like choosing where to locate schools or how to draw district lines, even though school districts were not permitted to achieve the same end by overtly using the race of particular students as decisional criteria.[145] Another important example is former President George W. Bush. As governor of Texas, Bush approved a plan under which the University of Texas admitted all in-state undergraduate applicants who graduated in the top 10 percent of their high school classes.[146] The Ten Percent Plan was designed to secure substantial minority admission after a facially classificatory affirmative action program was struck down as a

143. *See, e.g.*, Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 146–47 (2001).

144. *See* Primus, *supra* note 14, at 539–44.

145. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 787–89 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

146. *See* BARRY FRIEDMAN, THE WILL OF THE PEOPLE 361 (2009).

violation of the Equal Protection Clause.[147] In a world where high schools are assigned on the basis of residence and people's places of residence are highly correlated with their racial backgrounds, taking students from every high school will predictably ensure racial diversity. When the Bush Administration's Justice Department urged the Supreme Court to disallow the University of Michigan's affirmative action plans, it pointed to the Ten Percent Plan as a model for better alternatives.[148]

If all race-conscious government action were equally objectionable, Justice Kennedy's and President Bush's recommendations would be senseless. The Ten Percent Plan was adopted with the purpose of altering the racial allocation of social goods, and the school-siting or district-drawing measures that Justice Kennedy envisioned would be as well. But unlike the affirmative action plans of which Justice Kennedy and President Bush disapproved, these alternatives do not create visible victims. Obviously, if the Ten Percent Plan increases the proportion of African Americans who are admitted to the University of Texas, it also decreases the proportion of admittees from other racial groups. There are, in the end, losers. But it is harder to identify them, and their losses may therefore be less publicly salient and less likely to seem offensive to the ideals of individualism. To be sure, the degree to which these potential differences in salience and social meaning are realized depends on several fluid factors. Successful norm-entrepreneurs could, in principle, persuade the public that there is no moral difference between the two kinds of programs. But as a general matter, it has not worked out that way. At least at this point in history, many people who oppose classificatory affirmative action are comfortable with alternative measures that do not exclude identifiable innocent third parties, even though as a logical matter those alternatives must be excluding someone.

It is easy to think that this distinction should make no difference. If one believes that all race-conscious interventions are unacceptable, the distinction between policies creating identifiable victims and policies whose effects are more diffuse might seem unprincipled, perhaps maddeningly so.[149] From a different normative perspective, one might argue that broad public tolerance of measures like the Ten Percent Plan demonstrates the acceptability of race-conscious decisionmaking, such that more visible race-conscious interventions should be permitted as well.[150] Either of these views has analytic integrity. But whatever their appeal in terms of logical consistency or normative principle, equal protection doctrine has not to date endorsed either perspective. It may instead mediate between the two poles in roughly the way that Justice Kennedy and President Bush have articulated. The Supreme Court has not squarely upheld measures like the Ten Percent

147. *See* Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

148. Brief for the United States as Amicus Curiae Supporting Petitioner at 14–18, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241).

149. *See* FRIEDMAN, *supra* note 146, at 340–41 (quoting activists who hold this view).

150. *See, e.g.*, Ayres & Foster, *supra* note 24, at 518.

Plan, but important opinions from swing Justices have commended them more than once.[151]

The idea that equal protection should be concerned with visible victims is not merely a compromise. It has a logic. For in the end, the official doctrinal concerns of equal protection—that is, motive and form—sometimes fail to capture what is important in the realm of constitutional equality. From time to time, the Court comes up against those limits, acknowledges them, and considers also what a governmental practice *means*. Examples range from *Strauder v. West Virginia*[152] and *Brown v. Board of Education*,[153] where the Court took note of the white-supremacist meanings of the laws at issue, to modern affirmative action cases where the Court worried that well-intentioned programs would feed racial stigma or teach people to think of themselves in racial terms.[154] To be sure, social meanings are multiple and contested, such that it is hard to operationalize a reliable doctrine that focuses on them directly.[155] But that just means that the issue is slippery, not that the concern is misplaced.

The concern that a practice marks a group as inferior is a concern about social meaning, as is the concern that the government sees people as members of racial groups rather than as individuals. These have been core matters of equal protection, and appropriately so. Equal protection aims to reduce the public salience of race.[156] When considering the constitutionality of a race-conscious intervention, it is therefore useful to ask whether the measure will reduce or exacerbate the racial divides within the American

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151. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 787–89 (2007) (Kennedy, J., concurring in part and concurring in the judgment); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989) (plurality opinion).

152. 100 U.S. 303, 308 (1880) (describing the practice of excluding blacks from juries as "practically a brand upon them . . . an assertion of their inferiority").

153. 347 U.S. 483, 494 (1954) (explaining that legal segregation was "usually interpreted as denoting the inferiority of the negro group").

154. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 228–29 (1995) (arguing that racial classifications, even when made with "good intentions," raise equal protection problems because they will be perceived to rest on stigmatizing assumptions about the benefited groups); *id.* at 241 (Thomas, J., concurring in part and concurring in the judgment) ("So-called 'benign' discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority . . . ."); Shaw v. Reno, 509 U.S. 630, 643 (1993) (explaining that legal classifications by race "threaten to stigmatize individuals by reason of their membership in a racial group"); *Croson*, 488 U.S. at 493–94 (plurality opinion) (focusing on the danger of stigmatic harm resulting from racial classifications).

155. *See, e.g.*, DONALD R. KINDER & LYNN M. SANDERS, DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS 295–303 (1996) (using public opinion data to demonstrate the divide between the ways that whites and blacks perceive the meanings of legal policies).

156. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (expressing the hope that race-conscious policies necessary in 2003 would not be necessary in the future); *Croson*, 488 U.S. at 495 (plurality opinion) (stating that equal protection should be construed so as to diminish the relevance of race in American life over time).

public.[157] Salience is a function of perceptions, and perceptions are affected by the meanings attached to visible practices. Reducing racial divides therefore calls for sensitivity not just to what is done or what is intended but what is publicly understood.

To be sure, there would be something odd about a doctrine on which a practice can be permitted as long as the damage it does is hidden. But treating differentially visible practices differently need not be about hiding the damage. It might be about reducing the damage, inasmuch as a large part of the harm that race-conscious interventions cause operates at the level of public social meaning. A person who does not get a promotion that he would have gotten but for the operation of a disparate impact remedy suffers practical disadvantage whether or not the race-conscious factor is publicly known. But if the race-conscious aspect is visible and given a divisive social meaning, the disparate impact remedy causes a further harm at the societal level. The problem is then not just the particular individual's loss of a promotion but the exacerbation of race as a source of tension and ill-feeling in the polity at large.

One predictable way for the race-conscious aspect of a governmental practice to acquire a divisive social meaning is for the practice to create visible victims. Visible victims lend themselves to easily understood narratives of injustice, as every good plaintiffs' lawyer knows. To be sure, some instances of race-conscious decisionmaking become publicly salient and carry divisive social meanings even in the absence of visible victims.[158] But the existence of visible victims greatly increases the probability that a race-conscious practice will become publicly salient and divisively so. Indeed, what happened in New Haven illustrates the enormous difference in social meanings that can attend the difference between race-conscious interventions that do not create visible victims and race-conscious interventions that do. The decision to discard the results of the fire department's promotion tests was animated by race-conscious motives—as was the design and administration of those tests in the first place. But only the decision to discard the results created an identifiable set of victims, and only that decision became divisive.

As the Supreme Court understood, New Haven's fire department tests were designed in a race-conscious process.[159] The city strove to create tests that would both identify qualified officers *and* allow the promotion of significant numbers of nonwhite firefighters. In this respect, the promotion

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157. *See* Christopher L. Eisgruber, *Democracy, Majoritarianism, and Racial Equality: A Response to Professor Karlan*, 50 VAND. L. REV. 347, 355–56 (1997).

158. The race-conscious electoral districting at issue in cases like *Shaw v. Reno*, 509 U.S. 630 (1993), may be an example: it is notoriously difficult to identify the determinate individual victims of such practices. *See generally* Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276 (1998). I thank Nathaniel Persily for pressing this point.

159. *See, e.g.*, *Ricci*, 129 S. Ct. at 2678 (explaining that the municipal consultant entrusted with designing the test made sure that "minorities were overrepresented" among the people designing the test).

tests were racially conscious on the model of the Texas Ten Percent Plan. Unlike the Ten Percent Plan, New Haven's strategy failed: the tests did not produce the desired racial results. But the city's choice to use those particular tests likely affected *which* white firefighters scored well enough to be promoted. Had the test design process not been race-conscious, the tests would have asked a different set of questions, and the seventeen top scorers would probably not have been exactly the same people who earned the seventeen top scores under the tests that were actually administered. Quite straightforwardly, then, all the firefighters who might have been promoted under a test that had been designed with no race-consciousness at all but who did not score well enough to be promoted under the actual 2003 tests were disadvantaged by the race-conscious decision of a public actor. It is very hard, however, to know who those disadvantaged firefighters are. And in the absence of visible victims, the race-consciousness involved in designing the tests did not give rise to divisive social meanings about preferential treatment for members of minority groups, even though the tests were deliberately designed to foster a certain racial distribution of promotions.

Like most facts about the social meanings of particular events, this one is only contingently true. If norm-entrepreneurs had noticed and publicized the race-consciousness of New Haven's test design, they might have been able to persuade a public audience that the race-consciousness involved in the design of the tests constituted illegal discrimination. Whether they could in fact succeed in making the tests seem discriminatory would depend on complex and fluid aspects of the relevant public conversation. But the absence of visible victims—that is, of people whose disadvantage is already intuitively perceived by the public before the norm-entrepreneurs go to work—would make it more difficult to present the tests in a racially divisive light. And for now, even audiences suspicious of race-conscious decisionmaking tend to accept the kind of race-consciousness that informed the design of New Haven's tests. The *Ricci* plaintiffs and the Supreme Court both deemed respecting the results of those tests to be tantamount to judging applicants on their merits as individuals, not as implementing a system that was designed with racial considerations in mind.[160] As a matter of social meaning, the fact that the tests were designed to promote a certain racially calibrated outcome all but disappeared.

In contrast, the race-conscious aspect of New Haven's decision to discard the results of the test became enormously and divisively salient, and its creation of visible victims was an important part of the reason why. Scrapping the test after it was administered and graded highlighted a specific set of innocent third parties at risk of being adversely affected. There was no need for norm-entrepreneurs interested in pushing public sensibilities farther

160. *See Ricci*, 129 S. Ct. at 2677 (characterizing each test-taker's interest in having the test results applied as originally planned as a "legitimate expectation not to be judged on the basis of race"); Petitioners' Brief on the Merits at 2, *Ricci*, 129 S. Ct. 2658 (No. 07-1428) ("Our Constitution envisions a society in which race does not matter and individuals are judged on the strength of their character."); *id.* at 3 ("Petitioners qualified for promotion under a race-blind, merit-selection process.").

toward colorblindness to re-educate an audience to make it see the city's decision as disadvantaging people on the basis of race. That work was already done: within the common sense of the day, the victims were identifiable, and their victimization occurred in plain view. As the Court put it, "the firefighters *saw* their efforts invalidated by the City in sole reliance upon race-based statistics."[161] The language of sight may or may not have been intended to make this point, but the point is there: the publicly visible impact of New Haven's race-conscious decisionmaking was central to the ill feelings that surrounded the whole event. By the time the Supreme Court decided the case, the Sotomayor nomination had magnified that visibility even further, extending the audience nationwide. All in all, the storm around *Ricci* presented an object lesson in the divisive power of visible race-conscious interventions.

Perhaps not coincidentally, the standard judicial remedies for Title VII disparate impact violations all avoid creating visible third-party victims. Successful disparate impact plaintiffs can win forward-looking injunctive relief to end offending practices, but people who have already benefited from practices found to violate the disparate impact rule are never required to disgorge their benefits.[162] No hirings or promotions are retrospectively undone. Disparate impact plaintiffs can also win backpay or other equitable monetary relief, but those remedies run only against the employer and not against innocent third parties.[163] All of this suggests that disparate impact doctrine is sensitive to the visible-victims concern. It alters the racial allocation of social goods, but in a relatively quiet and nondivisive way.

On a visible-victims reading of the *Ricci* premise, then, equal protection limits disparate impact remedies to those that do not disadvantage determinate and innocent third parties. To date, the standard judicial remedies for disparate impact violations have stayed within that limit. The facts of *Ricci* presented disparate impact doctrine more divisively, and on those facts the Court found a problem. But on the visible-victims reading, *Ricci* poses no threat to the normal operation of disparate impact doctrine as codified in Title VII.

* * *

The choice among these three readings of the *Ricci* premise will be enormously consequential for disparate impact law. If the general reading prevails, Title VII's disparate impact provisions will be constitutional only in the unlikely event that the Court concludes that the prohibition on disparate impact is narrowly tailored to a compelling state interest. But if the

161. Ricci v. DeStefano, 129 S. Ct. 2658, 2676 (2009) (emphasis added). From a different perspective, it is misleading to say that the city acted in "sole" reliance on race-based statistics. If one credits the city's account, it acted on race-based statistics in combination with its understanding of its legal obligations under federal statute. But this point may not affect what the firefighters "saw" from their own perspective.

162. *See In re* Employment Discrimination Litig., 198 F.3d 1305, 1315–16 (11th Cir. 1999) (explaining remedies).

163. *See id.*

Court settles on the institutional reading or the visible-victims reading, disparate impact doctrine will survive. To be sure, it may survive in a partly truncated form. On either the institutional reading or the visible-victims reading, public employers might not be permitted to invoke Title VII to suspend employment practices in midstream, even if those practices do in fact violate the disparate impact prong of Title VII. But such a limitation on disparate impact doctrine would be less far-reaching, both practically and symbolically, than a flat declaration of unconstitutionality.

III. Compelling Interests

Within the domain of disparate impact doctrine's equal protection problem—whether that turns out be all of disparate impact doctrine, employer-initiated remedies, or remedies with visible victims—a constitutional attack can be parried by showing that that the doctrine is narrowly tailored to a compelling governmental interest. In this Part, therefore, I consider two interests that might rise to the level of the compelling. One, which we can call the "evidentiary interest," explains Title VII's disparate impact provisions as a dragnet intended to identify hidden intentional discrimination. The other, which we can call the "compliance interest," seeks to rescue state and local officials from situations where a tension between constitutional law and a federal statute threatens them with having to violate one or the other.

Given two potentially compelling interests and three readings of *Ricci*, there are in principle six possible states of the world to consider. One might ask, that is, whether the evidentiary interest or the compliance interest could underwrite a constitutional defense of disparate impact doctrine on each of the three understandings of the *Ricci* premise. For the sake of completeness, I sketch all six possibilities: the outcomes are schematically represented in the figure below. But only the sake of completeness justifies worrying about all six possibilities, much less worrying about all of them equally. In the end, the only scenario in which a compelling interest argument could affect the constitutionality of disparate impact doctrine is if *Ricci* is given its general reading and the constitutional defense on offer is based on the evidentiary interest.

		Reading of the *Ricci* Premise		
		General Reading	Institutional Reading	Visible-Victims Reading
Compelling Interest	Title VII as Evidentiary Dragnet	Yes	No (not narrowly tailored)	No (not narrowly tailored)
	Compliance with Federal Statute (limited time only)	Yes, for public employers	Yes, but hard to imagine	No (not narrowly tailored)

The other five scenarios fall away for varied reasons that I will gesture at here and then explain in greater depth in the coming pages. Briefly, the evidentiary interest cannot save disparate impact doctrine from a constitutional attack founded on either the institutional or the visible-victims reading of *Ricci*, and the basic reason why not is a matter of narrow tailoring. Even if the evidentiary interest is compelling, fulfilling that interest requires neither employer-initiated remedies nor remedies that burden determinate third parties. The compliance interest poses more intricate riddles when mapped onto the three readings of *Ricci*: sorting it all out could provoke squeals of glee from the doctrinally inclined.[164] But on the ground, none of that analysis will matter, or at least not for long, because the entire framework of the compliance interest comes with an expiration date. Even if it is accepted as compelling, the compliance interest can only shield state and local employers from constitutional liability while it remains unclear whether Title VII directs public employers to violate the Constitution. But that question will eventually be adjudicated. Once the Supreme Court announces that Title VII's disparate impact provisions either are or are not consistent with equal protection, the threat that complying with one of those sources of law would require the violation of the other will dissolve, and arguments based on the compliance interest will disappear with it.

In the long run, therefore, the only scenario in which compelling interest analysis might be important for the constitutionality of disparate impact doctrine involves the evidentiary interest and the general reading of *Ricci*. So that is where I now turn.

A. *The Evidentiary Interest*

As I have explained elsewhere, Title VII's disparate impact doctrine can be understood either as intended to redress self-perpetuating racial hierarchies inherited from the past or as an evidentiary dragnet intended to identify hidden intentional discrimination in the present.[165] On the evidentiary-dragnet view, an employment practice with a statistically disparate racial impact and that cannot be justified as a matter of business necessity supports an inference that the employer is discriminating intentionally. We presume that the employer has some reason for using its chosen employment practices, and if the reason is not a matter of the economic demands of the business, it is sensible to ask what ends are in fact being served—at

164. To sum up: On the general reading of *Ricci*, the compliance interest might underwrite a constitutional defense for public employers but not private ones. On the institutional reading of *Ricci*, the compliance interest might again offer a defense for public employers, but it is hard to imagine a court that is attracted to the institutional reading of *Ricci* also being willing to credit the idea that the compliance interest is compelling, because the two stances imply sharply different attitudes toward public employers. On the visible-victims reading, the compliance interest might fail narrow-tailoring analysis. *See infra* notes 179–181 and accompanying text.

165. Primus, *supra* note 14, at 520–21.

which point the disparate racial impact could be telling.[166] Viewing disparate impact doctrine as an evidentiary dragnet for intentional discrimination is less ambitious than viewing it as a device for redressing self-perpetuating racial hierarchies regardless of present ill intentions, and forgoing the more ambitious interpretation has costs.[167] But disparate impact doctrine is more likely to be justified by a compelling governmental interest if the more modest evidentiary interpretation prevails. Preventing intentional discrimination seems compelling as a consensus matter; the concern with inherited hierarchies lies within the domain of redressing "societal discrimination," and the Court has held that interest not to be compelling.[168]

The next question is whether Title VII's disparate impact provisions are narrowly tailored to advancing the interest in ferreting out hidden intentional discrimination. Perhaps the most critical part of that question goes to whether narrow tailoring requires that *only* intentional discriminators be caught in the evidentiary dragnet. If so, the doctrine might not be narrowly tailored, because intentional discrimination is not the only explanation for an employer's choice to use a non-business-justified practice with a disparate impact. Employer motivations are not wholly exhausted by the categories "economically necessary" and "racially invidious." An employer might just be mistaken, and perhaps stubbornly so, about what is good for business: he cannot demonstrate the instrumental rationality of his selection criteria, but he believes that they are good for the bottom line, and he sticks to his guns at his own economic peril. Or perhaps his conduct gratifies a noneconomic preference about the running of his enterprise. But employers who act for reasons like these and whose employment practices have statistically disparate impacts on people of different races could be—officially, would be—liable under Title VII even if their motives amount to nothing like racial animus. Once the statistical showing of disparate impact is made, business necessity is the only statutorily recognized defense. In *Ricci*, Justice Scalia intimated that the absence of a general good-faith defense might undermine the characterization of disparate impact doctrine as an evidentiary dragnet.[169] To be sure, the absence of a good-faith exception does not indicate that disparate impact doctrine could be *largely* understood in evidentiary terms: cases in which nonintentional discriminators will be swept up in the net might be few. But the relevant issue here is one of narrow tailoring, and a relatively small margin of overinclusivity could defeat the statute's claim to being narrowly tailored to the interest in identifying present intentional discrimination.

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166. The same is true if the challenged practice has a disparate racial impact and is justified as a matter of business necessity but the plaintiffs demonstrate the existence of an alternative employment practice that is equally good at meeting the business's economic needs and the employer refuses to adopt that alternative.

167. *See* Primus, *supra* note 14, at 520–21.

168. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498–99 (1989) (rejecting the idea that an attempt to redress societal discrimination can rise to the level of compelling interest).

169. *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2682 (2009) (Scalia, J., concurring) (implying this view).

It is worth noting, however, that rejecting the evidentiary-dragnet picture of disparate impact doctrine on these grounds would privilege a largely ignored set of formal rules over the operational realities of Title VII. Out in the world, courts almost never impose disparate impact liability if they do not suspect something untoward about the defendant's motivations.[170] (*Ricci* itself treated New Haven's good faith in designing the fire department's promotion test as strong support for the proposition that the city would not have been held liable in a disparate impact suit.[171]) Invalidating disparate impact doctrine on the grounds that it does not recognize a good-faith defense thus has a heads-I-win, tails-you-lose quality: Title VII plaintiffs cannot in practice win disparate impact suits without raising credible inferences of employer bad faith, but the formal absence of a good-faith defense would ultimately shut the door on those plaintiffs entirely. A Court sensitive to the practice as well as the form of Title VII litigation might therefore see beyond disparate impact doctrine's official omission of a good-faith defense. In that case, the idea of disparate impact doctrine as an evidentiary dragnet for identifying hidden intentional discrimination might support the claim that Title VII's disparate impact provisions are narrowly tailored to a compelling government interest.

The foregoing analysis applies if the constitutional problem to be solved is the one indicated by the general reading of the *Ricci* premise: that is, that Title VII's disparate impact provisions are per se in tension with the requirements of equal protection. If the Court adopts one of the more limited readings of *Ricci*, a compelling interest argument based on the need for an evidentiary dragnet for intentional discrimination may be less on point.[172] Consider first the status of the evidentiary-dragnet idea within a jurisprudence that follows the institutional reading of *Ricci*. The compelling interest in remedying hidden intentional discrimination may justify the existence of disparate impact doctrine, but there is no particular reason why it calls for employer-initiated remedies rather than judicial enforcement. Indeed, the premise of the institutional reading is that public employers might engage in intentional discrimination under the guise of compliance with disparate impact doctrine, so stressing the importance of preventing hidden intentional discrimination might make the Court *more* determined to prevent public employers from initiating disparate impact remedies on their own. Similarly, the evidentiary interest may be of little use if the Court reads *Ricci* in terms of visible victims. Once again, the need to prohibit hidden intentional discrimination may be sufficient to justify Title VII's inclusion of a disparate impact standard. But there is no specific reason why advancing that interest requires remedies than run against visible and innocent third parties.

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170. Selmi, *supra* note 125, at 716, 768–69.

171. 129 S. Ct. at 2678–79.

172. That said, the lack of a compelling interest defense would be much less damaging to disparate impact doctrine if the Court adopts the institutional or visible-victims reading of *Ricci* than if the general reading prevails.

B. *The Compliance Interest*

Consider next the possibility that state and local officials have a compelling interest in complying with Title VII's disparate impact provisions simply because federal law requires them to do so. At first blush, this idea might seem like a nonstarter: as a general matter, statutory law cannot create defenses to constitutional claims. But in an analogous context under the Voting Right Act, seven of the now-sitting Justices have endorsed the idea of compliance with federal law as a compelling interest. The reasons for this exceptional possibility are rooted partly in the difference between federal and local governments and partly in the special status of a few federal statutes.

In *Bush v. Vera*, five Justices opined in dicta that state governments have a compelling interest in complying with section 2 of the Voting Rights Act.[173] In *League of United Latin American Citizens v. Perry* (*LULAC*), the dicta of eight Justices endorsed the parallel proposition for the Voting Rights Act's section 5.[174] The reason in each instance was not that Congress has the authority to create compelling interests as a matter of legislative will. To say that would be to undermine the proposition, on which the Court insists, that Congress cannot unilaterally alter constitutional doctrine.[175] It is instead because the contrary holding might force state officials to choose between complying with the Voting Rights Act, which requires states to consider race when drawing electoral districts, and complying with the Fourteenth Amendment, which restricts the consideration of race. Saying that state governments have a compelling interest in complying with the Voting Rights Act rescues local officials from situations in which whatever they do might otherwise constitute illegal discrimination.[176]

If state officials have a compelling interest in complying with the Voting Rights Act, they might also have a compelling interest in complying with Title VII. The two scenarios are alike in several respects. In each setting, there is a tension between the Fourteenth Amendment and a statute that requires state actors to engage in race-conscious behavior and, accordingly, a

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173. Bush v. Vera, 517 U.S. 952, 990 (1996) (O'Connor, J., concurring); *id.* at 1033 (Stevens, J., dissenting, joined by Ginsburg & Breyer, JJ.); *id.* at 1046 (Souter, J., dissenting, joined by Ginsburg & Breyer, JJ.).

174. League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 475 n.12 (2006) (Stevens, J., concurring in part and dissenting in part, joined by Breyer, J.); *League of United Latin Am. Citizens*, 548 U.S. at 485 n.2 (Souter, J., concurring in part and dissenting in part, joined by Ginsburg, J.); *id.* at 518–19 (Scalia, J., concurring in the judgment in part and dissenting in part, joined by Roberts, C.J., Thomas & Alito, JJ.).

175. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act).

176. *See League of United Latin Am. Citizen*s, 548 U.S. at 518–19 (Scalia, J., concurring in the judgment in part and dissenting in part) (explaining this rationale). For further discussion and some trenchant criticism of Justice Scalia's reasoning, see Nathaniel Persily, *Strict in Theory, Loopy in Fact*, 105 MICH. L. REV. FIRST IMPRESSIONS 43, 44–46 (2006). To date, no Supreme Court case squarely holds that compliance with a federal antidiscrimination statute constitutes a compelling interest for a state or local official. But the dicta of eight Justices—seven of them still sitting—seems a pretty good indication of how the Court would approach the question.

serious threat that state officials will be forced to violate either the statute or the Constitution. The dilemma is especially ugly because the subject matter is race, such that either violation exposes state officials not just to legal liability but to the opprobrium that attaches to people who are adjudged to be racial discriminators. Given these similarities, a Court willing to recognize a compelling state interest in complying with the Voting Rights Act might also recognize a state employer's compelling interest in complying with the disparate impact prong of Title VII. To be sure, differences between the two contexts might persuade the Court to deem the compliance interest compelling only with respect to the Voting Rights Act.[177] But it is plausible that the similarities would outweigh the differences.[178]

If the compliance interest were deemed compelling, its capacity to underwrite a defense against equal protection claims would depend in part on which reading of *Ricci* is in play. As was true of the evidentiary interest, the compliance interest is most relevant if the Court adopts the general reading of *Ricci*. If the general reading prevails, the compliance interest would shield public employers[179] from constitutional liability for actions required

177. First, the tendency toward judicial abstention sometimes runs particularly strong in voting and election cases, and recognizing a compelling interest in compliance with the Voting Rights Act is a way of leaving more of that sphere to the ordering of other institutions. *See, e.g.*, Ellen Katz, *Withdrawal: The Roberts Court and the Retreat from Election Law*, 93 MINN. L. REV. 1615 (2009). There is no parallel rubric of extraordinary deference in employment law. Second, there is a long history of judicial skepticism toward Title VII's disparate impact doctrine that is not matched by anything in the history of the Voting Rights Act. Title VII as a whole may have a sacred status similar to that of the Voting Rights Act, but the disparate impact prong of Title VII has never much shared in that status. *See* Selmi, *supra* note 125. Recognizing a compelling interest in compliance with a statute that is widely regarded as sacred may be much easier than recognizing a compelling interest in compliance with a doctrine that many judges have at best tolerated for many years.

178. The Court in *Ricci* showed some sensitivity to the importance of giving employers some room to maneuver when facing a partly analogous compliance dilemma at the statutory level: *Ricci* holds that an employer must have a strong basis in evidence for believing that one of its practices violates Title VII's disparate impact doctrine before it can avail itself of an exception to disparate treatment doctrine, but it does not hold that the employer must actually have committed a disparate impact violation. *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2675 (2009). That margin of difference reflects reluctance to subject public employers to situations in which a good faith desire to comply with antidiscrimination law will predictably lead to other antidiscrimination violations. Of course, the dilemmas are not fully analogous. One involves two pieces of a single statute, and the other involves a statute and the Constitution; one involves the fine line between two doctrines, and the other involves two doctrines that might actually demand conflicting behaviors.

179. The limitation to *public* employers here is simple at first glance, but on second look it invites a trip down a particularly dark doctrinal rabbit hole. Given that the entire possibility of a successful compelling interest defense based on the compliance dilemma is limited, it may not be worth readers' time and effort to work this puzzle through to the end. But for those who are so inclined, here we go. At one level, it would seem that public employers are the only employers who could avail themselves of a compliance-based compelling interest defense—or, indeed, of any compelling interest defense. Private employers, not being state actors, are not subject to constitutional claims, and a party that cannot be sued on a constitutional claim is not a party that can raise a constitutional defense, or even a party that would want to. But matters are not so simple. Imagine a case in which a private employer takes some action necessary to comply with Title VII's disparate impact doctrine and in consequence is sued for disparate treatment, also under Title VII. (That is, imagine a case just like *Ricci*, but with two variations: the employer is private rather than municipal, and the employer's action was uncontroversially required by Title VII's provisions on disparate impact.) The employer, citing *Ricci*, defends on the ground that an action required by Title VII's disparate impact provisions cannot be a violation of Title VII's prohibition on disparate treatment. In response, the

to comply with Title VII's disparate impact provisions. In principle, the same analysis might apply given the institutional reading of *Ricci*, but it is hard to imagine the Supreme Court's both adopting the institutional reading and deeming the compliance interest a compelling one. The institutional reading is founded on mistrust of public employers, so a Court that found the institutional reading persuasive might be disinclined to take exceptional doctrinal measures to give those public employers ways out of difficult situations. Finally, a Court that chose the visible-victims reading of *Ricci* might conclude that the interest in letting local officials escape a liability dilemma could not survive narrow tailoring analysis. Even in the more favorable voting rights context, nothing in existing law indicates that the Supreme Court would credit a compliance-interest defense if that compliance victimized visible and innocent third parties. The race-conscious measures that state and local governments must take under the Voting Rights Act generally avoid that result: drawing minority-favorable electoral districts is much like drawing race-conscious but facially neutral school districts, which Justice Kennedy in *Parents Involved* held up as potentially consistent with equal protection.[180] If compliance with the Voting Rights Act created visible victims, the Court might be less willing to let such compliance escape constitutional censure. And there is every reason to expect the Court to be less generous with Title VII's disparate impact doctrine than it is with the Voting Rights Act.[181]

All of the preceding analysis, however, is subject to two sharp and interrelated limitations, one about the kind of claim against which the compliance interest can be a defense and one about the time frame in which such a defense could be valid. First, even if the compliance interest were compelling enough to protect state officials from constitutional liability, it could not

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plaintiff argues that the disparate impact provisions are unconstitutional. That move, if successful, would deny the private employer its proffered defense. So the private employer might choose to defend the constitutionality of the disparate impact provisions—or at least its own compliance with those provisions. At this point, one might be tempted to say that the private employer would be in the same position as a public employer making the compliance-interest argument and should be entitled to its protection on the same terms: the private employer, like a public one, faces a nasty dilemma, one in which a lack of clarity in the law forces him to choose between violating two different demands of antidiscrimination law. But the situation is not fully analogous. The idea that a public official's compliance interest rises to the level of the compelling is, after all, partly founded on special solicitude for public officials. In the end, the private employer's situation is no different from any situation in which uncertainty in the law makes it hard for some party to know how to escape liability. There are appropriate canons of construction to apply in such cases: concerns about lenity and notice and vagueness all come to mind. But to make all such cases involving constitutional law into sources of compelling interest arguments is to work an unnecessary universalization of an exceptional rule.

180. Parents Involved in Cmty. Schs. v. Seattle Sch. District No. 1, 551 U.S. 701, 788–89 (2007) (Kennedy, J., concurring).

181. The analysis above proceeds as if narrow tailoring is essentially a balancing test: the question is whether fulfilling the compelling interest is worth the required costs. To be sure, that is not the only way that narrow tailoring analysis operates: it also sometimes asks whether the measure taken is strictly required for achieving the end. The present narrow tailoring question would be harder, and more complex, on that model. But a court that read the *Ricci* premise in terms of visible victims would probably opt for the balancing model simply because of the strength of its concern that the cost of creating such victims was too great to justify a compelling interest argument.

protect Title VII's disparate impact provisions themselves from direct attack. The premise of recognizing a compelling interest in state compliance with Title VII is that the state should not be required to violate the Constitution as the price of abiding by a federal statute. That compelling interest is therefore only pertinent if the legal issue under consideration is whether a state has violated the Constitution by its statutory compliance. It does not bear on whether *Congress* violated the Constitution by passing the statute. Nor would it prevent a disparate impact *defendant*, public or private, from challenging the constitutionality of the provisions under which it was sued.

Perhaps the only scenario in which the compliance-dilemma argument could successfully protect a public employer, therefore, is during an interim period before the Court adjudicates the underlying question that it declined to reach in *Ricci*. That makes sense: the logic of the compliance argument is at its strongest precisely during such an interim period. Given uncertainty in the law, local officials fear both that following a federal law might be unconstitutional and that failure to do so might be garden-variety unlawful, such that they will be judged racial wrongdoers whatever they do. But once the underlying constitutional issue is clarified, the dilemma will dissolve. If disparate impact doctrine is upheld (e.g., because the evidentiary-dragnet argument passes the compelling interest test), local officials will know that they can comply with the statute. And if disparate impact doctrine is struck down, public employers will cease to worry about complying with it.

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The two compelling interest arguments described above operate in different domains. Characterizing Title VII's disparate impact provisions as an evidentiary dragnet could save those provisions from wholesale invalidation in a world where the courts adopted the general reading of *Ricci*. The compliance interest could protect public officials from constitutional liability until such time as the Court's reading of *Ricci* becomes clear. All that said, nothing here changes the fact that compelling interest arguments are usually outside shots. And if no compelling interest argument succeeds in addressing the tension between equal protection and disparate impact, the future viability of the doctrine rests that much more heavily on the choice among the three readings of the *Ricci* premise.

IV. Framing the Next Case

Now that the question of disparate impact doctrine's constitutionality has come to the foreground, it may well be adjudicated in the next disparate impact case to reach the Supreme Court. If the Justices have already chosen among the three ways of reading *Ricci*, that next case will merely be an occasion for clarification. But it is more likely that the *Ricci* premise is, as of now, indeterminate. If so, the choice among its possible readings may be significantly driven by the facts of the case that presents the constitutional question.

Suppose that the next case arises when a group of black plaintiffs brings a solid Title VII disparate impact claim against an employer who appears relatively unsympathetic. Imagine, for example, that the employer has a history of bringing few black employees into positions of responsibility, or that pretrial discovery reveals racially insensitive attitudes among middle management, or that the employer had long known that the challenged practice was not justified by business necessity and had a badly adverse racial impact but had done nothing to find alternatives. If the district court found for the plaintiffs, it would probably enjoin continued use of the challenged practice. It might also award the plaintiffs other equitable relief like backpay. In other words, it would order remedies that run against the employer, who seems like a bad apple in any event. But the district court would not order any remedy that required white employees who benefited from the now-invalid practice to surrender their benefits, because Title VII authorizes no such form of relief. Going forward, the fact that the old practice would now be prohibited by judicial decree would predictably change the racial distribution of jobs (or promotions, or raises, or whatever else was at issue) in the relevant workplace in a way that would be, on net, more favorable to blacks than to whites. But it would not be known, when the case was litigated, which particular people's futures had been adversely affected. Title VII's visibility as a racially allocative mechanism would be relatively low.

On appeal to the Supreme Court, the employer could challenge the constitutionality of the statutory disparate impact provision under which it had been held liable. Visible or not, the employer would argue, the race-consciousness is there. Some members of the Court would likely agree. But as a whole, the Court might prefer a more cautious course. As recent experience suggests, the Justices may experience some reluctance to invalidate portions of flagship antidiscrimination laws, even when those laws seem constitutionally questionable under presently prevailing doctrine.[182] So if the social meaning of disparate impact law in the litigated case permitted it, the Court might well decline to strike down a part of Title VII.

Doing so would require an explanation of how such a decision was consistent with *Ricci*. The answer, of course, would be that the *Ricci* premise should not be read for the most it might mean—that is, in accordance with the general reading. Instead, the *Ricci* premise would mean only that public employers cannot be the ones to institute race-conscious disparate impact remedies, or that disparate impact remedies may not disadvantage innocent third parties, or perhaps both. For a court to afford race-conscious relief that harms nobody but the wrongdoer is entirely in bounds. That is what happens when courts grant garden-variety disparate *treatment* relief, the Court might point out. And nobody believes disparate treatment doctrine to be constitutionally problematic.

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182. *See* Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 129 S. Ct. 2504 (2009) (upholding section 5 of the Voting Rights Act after showcasing powerful reasons for considering it unconstitutional).

Now suppose, however, that the next disparate impact case to reach the Supreme Court features visible victims. That would frame the social meaning of disparate impact law in a highly unfavorable light. If the facts of the case encouraged the Court to take a dim view of the doctrine generally, it might adopt the general reading of *Ricci*'s premise and hold Title VII's disparate impact provisions unconstitutional. (Whether it would do so because the Justices themselves were influenced by the social meaning of the facts, or because they tried to read and mirror a public perception, or whether some more complex dialectic would operate, is a subtle question that I do not propose to resolve here.[183]) To be sure, a Court could in principle say "This case puts disparate impact doctrine in a bad light, but considered carefully it isn't so bad." But there are foreseeable circumstances under which it seems both easier and more likely for the Court to dispense with such careful parsing.

Suppose that a case arises that is just like *Ricci* except in two respects: the employer is a private corporation rather than a municipality, and the promotion test at issue would clearly support a disparate impact claim by minority employees. In other words, suppose a private employer gives a written promotion test that has a racially disparate impact and cannot be justified on the grounds of business necessity. After discovering the test's disparate racial impact, the employer suspends the process without promoting anyone. Several white employees who did well on the test then file suit, just as the *Ricci* plaintiffs did. But unlike the *Ricci* plaintiffs, the plaintiffs in this case could not bring an equal protection claim. The state action doctrine would exclude their employer, a private corporation, from the coverage of the Fourteenth Amendment.[184] The plaintiffs would therefore bring only a disparate treatment claim under Title VII. As in *Ricci*, considerations of social meaning would weigh heavily for granting relief. Once again, a group of visible, determinate, innocent employees who worked hard and played by the rules would stand to incur a loss as a result of an employer's race-conscious decisionmaking. But if Title VII's disparate impact provisions are valid, the Court could not grant relief on statutory disparate treatment grounds. As *Ricci* confirms, a set of facts that actually constitutes a Title VII disparate impact violation cannot be a violation of Title VII's prohibition on disparate treatment. It is, according to the *Ricci* premise, an exception to that prohibition.[185]

The only way to grant relief for these plaintiffs, therefore, would be to bar the employer from defending on the grounds that his actions were required by Title VII disparate impact doctrine. And the most straightforward way to do that would be to hold the disparate impact doctrine unconstitutional. Given that the hypothesized defendant is a private corporation, only the general reading of *Ricci* would allow the Court to reach that conclusion.

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183. I have tried to sort out such complexities in another place. Primus, *supra* note 32.

184. *See* Civil Rights Cases, 109 U.S. 3 (1883).

185. Ricci v. DeStefano, 129 S. Ct. 2658, 2674 (2009).

The institutional reading and the visible-victims reading both locate the constitutional violation in the particular actions of a defendant-employer, and a private employer cannot violate equal protection. Stripping the employer of its statutory defense to the plaintiffs' disparate treatment claim would therefore require the Court to adopt the general reading of *Ricci* and declare Title VII's disparate impact doctrine invalid across the board. Given the unfavorable light that the facts of such a case would cast on disparate impact doctrine, and given the Court's relatively unsympathetic attitude toward that doctrine in the first place, the Court in such a case would probably embrace the general reading of *Ricci* rather than conclude that these plaintiffs are simply out of luck.

All this means that Title VII now faces an ironic bind. Historically, Title VII policy has been to encourage voluntary employer compliance, rather than to have employers let the chips fall where they may and sort things out in ex post litigation.[186] It now turns out, however, that voluntary employer compliance is the greatest threat to disparate impact doctrine.[187] So long as employers do nothing and wait to be sued, disparate impact doctrine can probably continue, because cases in which the question of its constitutionality can arise will be limited to cases in which courts intervene ex post and order remedies that create no visible victims. But if employers try to fix disparate impact problems themselves, they risk creating facts on which disparate impact doctrine might seem intolerable. After *Ricci*, the best chance for disparate impact doctrine to survive is for employers to ignore it until they find themselves in court.

CONCLUSION

"The war between disparate impact and equal protection will be waged sooner or later," Justice Scalia has advised, "and it behooves us to begin thinking about how—and on what terms—to make peace between them."[188] I have pointed to three possible settlements. *Ricci* is compatible with any of the three. Which one becomes actual depends substantially on matters of framing: to keep to Justice Scalia's metaphor, victory in warfare often goes to the party who succeeds in maneuvering the fight to its chosen ground. And this Article's analysis suggests ample opportunities for strategic

186. *See, e.g.*, Johnson v. Transp. Agency, Santa Clara County, 480 U.S. 616 (1987); Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 515 (1986).

187. One might wonder whether the conclusion that voluntary compliance is the greatest threat to the doctrine's continued constitutionality is in tension with the possibility, discussed above, that compliance could be regarded as a compelling interest. It is not. The underlying dynamic here is the conflict between the desire to give public officials room to maneuver and the aversion to visible victims, and my assumption throughout is that the latter force is more powerful. Thus, I earlier concluded that the compliance interest probably could not succeed in underwriting a constitutional defense of a public employer whose compliance created visible victims, even if it might shield a public employer whose compliance avoided that result. *See supra* Section III.B. Here, I am similarly contending that compliance that produces visible victims might provoke a generally negative view of disparate impact doctrine.

188. *Ricci*, 129 S. Ct. at 2683 (Scalia, J., concurring).

behavior. Cause-oriented lawyers who seek the demise of the disparate impact doctrine should be looking for cases with visible victims. Their opposite numbers should try to have the constitutional question resolved in a case involving only a forward-looking judicial remedy, and preferably one where the defendant seems unsympathetic, before a less favorable vehicle can reach the Supreme Court.[189] To be sure, the choice of case might not completely determine the outcome any more than the choice of physical ground need completely determine a battle. But concerned parties are nonetheless well advised to do what they can.[190]

It is worth noting that the Court could uphold disparate impact doctrine against constitutional challenge without having to choose between the institutional reading and the visible-victims reading of *Ricci*. So long as courts confine themselves to the traditional judicial remedies for Title VII disparate impact violations, they will not create third-party victims, because the traditional remedies run only against the offending employers. In effect, therefore, all of the considerations that argue for the visible-victims reading also argue for the institutional reading. Indeed, a court that was skittish about acknowledging the importance of visibility but was nonetheless persuaded that visible victims make a difference could have things both ways by adopting the institutional reading and saying nothing about the visibility concern. The benefits of the visible-victims reading would follow anyway. Such a strategy might be executed deliberately or subconsciously, which is to say that even a court adopting the institutional reading in good faith might be partly influenced by the fact that such a decision would eliminate the problem of visible victims from disparate impact cases.

The next disparate impact case to reach the Supreme Court is unlikely to be as squarely in the public eye as the last one was. Supreme Court nominations are rare, and the coincidence of a nominee's participation in a fraught and pending case is unlikely to be repeated. But to the smaller though still considerable audience that monitors constitutional law, either outcome on

189. One case still in litigation that might fit this bill is United States v. City of New York, 637 F. Supp. 2d 77, at 82–83 (E.D.N.Y. 2009) (granting summary judgment against the New York City Fire Department in a Title VII suit alleging that a written examination for selecting entry-level firefighters had an unlawfully disparate impact on black and Hispanic applicants). To be sure, the New York City Fire Department is in many ways a sympathetic litigant. But the facts of this case show the Department in a poor light. That the lawsuit was commenced by the Department of Justice under the Bush Administration suggests that the case lends itself to mainstream intuitions about improper discrimination.

190. The Justices themselves have substantial agency to choose the ground through the certiorari process. It follows that if the Court were a unified decisionmaker with a clear prior view of the constitutional question, other people's strategic behavior might be relatively unimportant. The Court would simply deny review of cases raising the issue in a posture unfavorable for reaching its desired result and wait for a better vehicle. But the process is not necessarily this simple, because the Court is composed of nine different decisionmakers who may see the issue differently. Some probably have already formed the view that Title VII's disparate impact doctrine should be held unconstitutional across the board, and some have probably already formed the view that the doctrine should be upheld, and others may be still working through the question. Given the Rule of Four for granting Supreme Court review, one could accordingly imagine four Justices with a clear view forcing their colleagues to confront the constitutional question in the setting most favorable for their own preferred perspective. Other permutations are also possible.

the question of disparate impact doctrine's constitutionality will be highly salient for years to come. From the perspective of the future looking back, what is at stake is whether disparate impact doctrine will represent a legislative commitment to redressing inequality or a perversion of fundamental values that was ultimately cured. How the future will understand this chapter of American law is very much an open question.

[90 B.U. L. Rev. __ (2010) (forthcoming)]

THE NEW DISPARATE IMPACT

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**Please note that this paper is a draft only, and that the final published version may include substantive changes.

ABSTRACT

Federal law has long prohibited not just intentional discrimination by employers, but also practices that have an unintentional disparate impact on minorities. A cryptic passage at the end of the Supreme Court's recent decision in Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), signals a sea change for this disparate-impact doctrine.* Ricci*, a lawsuit about a civil-service exam for firefighters, received widespread attention as a case about intentional discrimination. We show that the opinion has also created a new affirmative defense for employers facing claims of disparate impact. This Article marks the first time that this new defense has been identified and explained in the legal literature. Before* Ricci*, disparate impact was a purely no-fault doctrine. An employer was liable if its employment practice had an unlawful disparate impact, even if the employer did not know about the impact or intend to subject its employees to an unlawful practice. The focus of litigation was not on the employer's state of mind, but rather on the aspects of the employment practice. After* Ricci*, however, in a broad category of disparate-impact cases liability now turns on what the employer knew when it took the challenged action. If the employer had no reason to think that the practice would have an unlawful disparate impact, it is immune from liability for its past actions.*

This is a dramatic development, and it suggests that the Court sees disparate impact as not fundamentally different from intentional discrimination. Beyond its doctrinal importance for disparate-impact claims—which itself is considerable—the Ricci *affirmative defense reflects an entirely new direction for this area of law. In this Article, we parse the language of* Ricci *to derive the new affirmative defense. We explain its significance for disparate-impact theory and discuss the limited safe harbor it has created for employers. We also situate the new defense within the broader context of federal employment-discrimination law, including other affirmative defenses that the Court has created for policy reasons. We thus explain how* Ricci *heralds a new disparate impact.*

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> *What you're saying is that the department can engage in intentional discrimination to avoid concern that they will be sued under disparate impact. Why doesn't it work the other way around as well? Why don't they say, well, we've got to tolerate the disparate impact because otherwise, if we took steps to avoid it, we would be sued for intentional discrimination? This idea that there is this great dilemma—I mean, it cuts both ways.*
>
> —Chief Justice John Roberts[1]

I. INTRODUCTION

For nearly forty years, there have been two basic kinds of employment-discrimination claims: disparate treatment and disparate impact. *Ricci v. DeStefano*,[2] one of 2009's most-discussed Supreme Court decisions, was a disparate-treatment case,[3] and it may take years to sort out all of the decision's repercussions for claims of intentional employment discrimination. But a careful analysis of the case reveals that it will also have sweeping consequences for claims of *unintentional*—or disparate-impact—discrimination. We examine here the contours of this new approach to disparate impact.

In *Ricci*, a group of white and Hispanic firefighters sued the City of New Haven, Connecticut for failing to certify the test results of an examination given to determine who should be promoted within the ranks to several open lieutenant and captain positions.[4] The City had refused to certify the test results for fear of being sued by minority firefighters who had failed the exam in disproportionately high numbers.[5] The case attracted widespread attention because of the application of Title VII of the Civil Rights Act of 1964 to these so-called reverse-discrimination claims.[6] The decision, which

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[1] Supreme Court Oral Argument in Ricci v. DeStefano, 129 S. Ct. 2658 (2009), at 28–29, *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-1428.pdf.

[2] 129 S. Ct. 2658 (2009).

[3] *Id.* at 2673.

[4] *Id.* at 2664.

[5] *Id.*

[6] *See* Joan Biskupic, *Firefighter Case May Keep Sotomayor in Hot Seat: How She Viewed 'Reverse Bias' Has Critics' Attention*, USA TODAY, June 1, 2009, at 2A ("The most attention-grabbing case of Supreme Court nominee Sonia Sotomayor's began when a

was issued in the midst of now-Justice Sotomayor's confirmation hearings, became a catalyst for criticism of the nominee, as she had been a member of the Second Circuit panel that issued the decision vacated by the Supreme Court.[7]

In *Ricci*, a closely divided Supreme Court concluded that an employer's "fear of litigation" for unintentional (or disparate-impact) discrimination does not give it an absolute defense to a claim of intentional (or disparate-treatment) discrimination.[8] Rather, the employer has such a defense only where it has a strong basis in evidence to believe that it will be subject to disparate-impact liability.[9] Thus, the Supreme Court recognized a limited defense for employers administering performance examinations that face disparate-treatment suits.[10] Legal scholars have already written about this defense, as well as the potential conflict between disparate-impact claims and the Equal Protection Clause of the U.S. Constitution.[11]

The *Ricci* decision goes further, however, and implicitly creates an entirely new foundation for unintentional, disparate-impact claims brought under Title VII. In a cryptic passage at the end of the majority opinion, the Court established a sweeping new affirmative defense to these claims that was previously unavailable to employers.[12] The Court suggested that employers now have immunity from unintentional discrimination claims if they had no reason to believe their actions were discriminatory at the time they took them.[13] This new defense, the parameters of which have yet to be

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Connecticut city rejected the results of a firefighter-promotion test because whites outscored blacks and Hispanics.").

[7] *Id.*; *see* John Christoffersen, *Promotion Day Arrives for White Conn. Firefighters*, WASHINGTON POST, Dec. 11, 2009 ("The [Ricci] case became an issue in confirmation hearings for Supreme Court Justice Sonia Sotomayor, who ruled against the white firefighters when she served on a federal appeals court."); *Supreme Countdown*: *Sotomayor on Verge of Becoming First Hispanic Justice on High Court*, CHICAGO TRIBUNE, Aug. 6, 2009, at 6 ("Sotomayor also came under fire from conservative lawmakers by voting to reject the reverse discrimination claims of white firefighters from Connecticut who were denied promotions after taking a test that was later invalidated."), *available at* 2009 WLNR 15357692; Ricci v. DeStefano, 530 F.3d 87 (2d Cir. 2008) (per curiam), *rev'd*, 129 S. Ct. 2658 (2009).

[8] *See infra* Section III (discussing the holding of the *Ricci* case).

[9] *Id.*

[10] *Id.*

[11] *See, e.g.*, Richard Primus, *The Future of Disparate Impact*, __ MICH. L. REV. __ (2010) [hereinafter Primus, *The Future of Disparate Impact*] (forthcoming); Michael J. Zimmer, Ricci*'s Color-Blind Standard in a Race-Conscious Society*, *available at* http://ssrn.com/abstract=1529438; Cheryl I. Harris & Kimberley West-Faulcon, *Reading* Ricci, *available at* http://ssrn.com/abstract=1507344.

[12] 129 S. Ct. at 2681.

[13] *See infra* Section IV (setting forth the *Ricci* affirmative defense to disparate-impact discrimination).

explored, will undoubtedly generate contentious litigation for years to come. Whether deliberately or not, the Court has fundamentally altered this area of employment discrimination law without explaining the basis for doing so.

This portion of the Supreme Court's opinion has largely escaped the view of scholars to date, and we are aware of no published literature on the impact of the Court's concluding language. When the passage has been noted, it has largely been ignored as unintelligible; one of the leading employment-discrimination scholars calls it "obtuse" and "inscrutable."[14] This paper seeks to fill this void in the scholarship, explaining first how the Court's language can be translated into a new affirmative defense to claims of unintentional discrimination.[15] This paper further demonstrates the likely contours of this new theory, and explores the implications of the Court's newly created defense.[16]

In Section II, this Article begins by providing an overview of the history of disparate-impact law, examining the need for this theory as part of employment-discrimination jurisprudence and discussing its justifications and codification into Title VII.[17] Despite its long history, disparate impact's very existence remains controversial, as demonstrated by the starkly contrasting visions of disparate impact in the *Ricci* opinions.[18] In Section III, this Article examines the Supreme Court's *Ricci* case, exploring the Court's justification for—and the dissent's criticism of—the decision.[19] The paper further identifies the critical language at the end of the majority opinion that forms the basis for the new affirmative defense analyzed in this paper.[20]

In Section IV, this Article parses Justice Kennedy's concluding language in the *Ricci* opinion, and identifies for the first time this newly created affirmative defense to disparate-impact claims.[21] Although at first blush one might try to read the Court's language as merely commenting on the facts of the *Ricci* case (rather than as creating an affirmative defense of general applicability, as we argue here), a careful analysis of the Court's language rebuts this narrower interpretation.[22] As there are two primary theories under which employment discrimination cases can proceed—disparate treatment

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14 Zimmer, *supra* note 11, at 23–24.

15 *See infra* Section IV.

16 *Id.*

17 *See infra* Section II (addressing the history and contours of disparate-impact law).

18 *Id.*

19 *See infra* Section III (providing an overview of the *Ricci* decision).

20 *Id.*

21 *See infra* Section IV (discussing new affirmative defense for disparate impact).

22 *Id.*

and disparate impact—the Court's opinion has dramatic consequences for a significant category of workplace claims.

Under the new affirmative defense that we identify, an employer may now defend against a claim of disparate impact by showing that at the time it took the challenged employment action, it had *no reasonable basis* to believe that its workplace test had an unlawful disparate impact.[23] Employers that act reasonably and in good faith therefore have a qualified-immunity-like defense to liability for their past actions, even if they must change their practices prospectively. In particular, the newly enunciated affirmative defense rewards employers that perform the sort of validation studies that are often used to justify employment examinations.[24] When a proper validation study suggests that an examination is job-related and that there are no less discriminatory alternatives, the employer ordinarily has no reason to think that the examination has an unlawful disparate impact. Under the new affirmative defense articulated in *Ricci*, a properly performed validation study thus provides a limited safe harbor from disparate-impact liability and immunizes the employer from after-the-fact second-guessing by a fact-finder in court.

In Section V, this Article concludes by critiquing the newly created defense.[25] The *Ricci* affirmative defense that we identify marks a sharp theoretical departure from what had been an accepted framework for disparate-impact claims. While our primary aim here is to be descriptive rather than normative, we offer reasons to question whether this development in the law is a good one.[26] The defense will result in a windfall for employers, as it lowers the bar for defendants to prevail on an important category of employment-discrimination claims.[27] And given the time and expense associated with the complex statistical evidence that must be developed in most disparate-impact cases, the new defense will provide a strong disincentive to employees considering bringing such claims. This is an unfortunate result, as the academic scholarship had concluded even pre-*Ricci* that disparate impact is an often underused theory.[28] The *Ricci* affirmative defense may thus be the final blow to disparate impact as a viable litigation strategy for plaintiffs. The new affirmative defense will have other

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[23] *Id.*

[24] *See infra* Section IV.B (providing an overview of validation studies used in the disparate-impact context).

[25] *See infra* Section V (discussing the implications of the new affirmative defense to disparate impact).

[26] *Id.*

[27] *Id.*

[28] *Id.*

implications for workplace claims—both positive and negative—and this paper explores those consequences, comparing them to other nontextual affirmative defenses that the Supreme Court has read into Title VII for harassment claims and punitive damages.[29]

Finally, this Article concludes by examining how the affirmative defense identified by this paper fits within the other scholarship on the *Ricci* decision.[30] Although nothing has been written on this specific topic to date, some literature has already begun to emerge discussing the constitutional implications of *Ricci*, as well as how the decision will ultimately affect claims of intentional discrimination.[31] We thus situate our analysis of *Ricci*'s impact on *unintentional* discrimination claims within this academic discussion, showing how the decision has created a new framework for disparate impact.

II. THE ORIGINS OF DISPARATE IMPACT

For a full understanding of the *Ricci* decision and its significance for disparate-impact analysis, we must initially trace the history of disparate-impact liability under Title VII. The statute provides two primary methods of establishing employment discrimination and attaining relief: disparate treatment and disparate impact.[32]

A. The Two Theories of Employment Discrimination

Disparate treatment—or intentional discrimination—has long been a viable theory of discrimination under Title VII.[33] Disparate-treatment theory

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[29] *Id.*

[30] *Id.* (discussing existing disparate impact scholarship).

[31] *Id.*

[32] Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1368 (2009) ("Few propositions are less controversial or more embedded in the structure of Title VII than that the statute recognizes only disparate treatment and disparate impact theories of employment discrimination.") (quotation marks omitted). *See generally* Joseph A. Seiner, *Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach*, 25 YALE L. & POLICY REV. 95, 101 (2006) (providing an overview of disparate-impact and disparate-treatment law).

[33] *See* Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 874 (2007) ("With its focus on intent, disparate treatment theory has long been understood to present the paradigmatic picture of discrimination as the product of animus against or conscious reliance on irrational stereotypes concerning members of particular groups."); Harry F. Tepker, Jr., *Title VII, Equal Employment Opportunity, and Academic Autonomy: Toward a Principled Deference*, 16 U.C. DAVIS L.

is often thought to reflect most directly the text of Title VII, which prohibits an employer from taking an adverse action against an employee "because of such individual's race, color, sex, or national origin."[34] The key to asserting a claim of disparate-treatment discrimination is that the plaintiff must establish that the employer *intended* to discriminate.[35] Intent is often the most difficult element to satisfy when alleging a Title VII disparate-treatment violation.[36] In the seminal case of *McDonnell Douglas Corp. v. Green*,[37] the Supreme Court helped plaintiffs establish this element by setting up a burden-shifting evidentiary framework for proving intent circumstantially. Under this framework, a plaintiff can establish a prima facie case of discriminatory intent merely by negating the most obvious alternative explanations for the employer's action—for example, that the plaintiff was not qualified for the position.[38] The burden then shifts to the employer to give a nondiscriminatory explanation for its actions; a plaintiff who can show that this explanation is false may be able to convince the fact-finder that it is a mere pretext for unlawful discrimination.[39] While disparate-treatment cases need not proceed under the *McDonnell Douglas* framework—for example, when the plaintiff has direct evidence of the employer's discriminatory intent—in practice nearly all do so, and this framework has

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REV. 1047, 1050 (1983) ("Simply, disparate treatment is intentional discrimination. This theory is the oldest and most easily understood of the accepted theories of discrimination.").

[34] 42 U.S.C. § 2000e-2(a)(1); *see also* Teamsters v. United States, 431 U.S. 324, 335 n.17 (1977) (disparate treatment is "the most easily understood type of discrimination" and "[u]ndoubtedly . . . the most obvious evil Congress had in mind when it enacted Title VII"). *See generally* Tristin Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 112 (2003) ("Traditional disparate treatment theory conceptualizes discrimination as individual, measurable, and static, looking into the state of mind of a particular decisionmaker at a discreet point in time.").

[35] *See Teamsters*, 431 U.S. at 335 n.17; Linda Hamilton Krieger, *The Content of our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1168 (1995) ("Under existing law, the disparate treatment plaintiff . . . must prove not only that she was treated differently, but that such treatment was caused by purposeful or intentional discrimination.").

[36] Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 768 (2006) ("Intentional discrimination is difficult to prove not because the evidence of intent is lacking, but because the evidence that exists, chiefly circumstantial in nature, is inconsistent with our societal vision of discrimination. Absent the smoking gun, racial epithets, or other explicit exclusionary practices, it has been, and remains, hard to convince courts that intentional discrimination exists.").

[37] 411 U.S. 792 (1973).

[38] *Id.* at 802; *see also* Tepker, *supra* note 33, at 1051–52 (discussing elements of *McDonnell Douglas* prima facie case of intentional discrimination).

[39] 411 U.S. at 802–03.

become the dominant mode of analysis under Title VII and other antidiscrimination laws.[40]

Disparate impact, or unintentional discrimination, occurs when an employer's facially neutral policy or practice has an adverse impact on a group protected by Title VII.[41] The primary distinction, then, between disparate-impact and disparate-treatment claims is that disparate impact does not require an employee to establish discriminatory intent.[42] It is this lack of an intent requirement that makes disparate impact so controversial.[43] Courts and commentators have debated—and continue to debate—whether an employer can be said to act "because of" an employee's race or other protected trait when the employer does not subjectively rely on that trait.[44]

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[40] 411 U.S. at 802 n.13 ("The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations."); Martin J. Katz, *Reclaiming* McDonnell Douglas, 83 NOTRE DAME L. REV. 109, 114 (2007) ("most courts of law (even some that criticize it) continue to mandate [the *McDonnell Douglas* test's] use—paying little heed to its detractors. Virtually all courts continue to require unwilling plaintiffs to use *McDonnell Douglas*."); Stacy E. Seicshnaydre, *Is the Road to Disparate Impact Paved with Good Intentions?: Stuck on State of Mind in Antidiscrimination Law*, 42 WAKE FOREST L. REV. 1141, 1145 (2007) ("Plaintiffs may prove intent through direct evidence, or, in the absence of direct evidence, plaintiffs may offer circumstantial evidence of intent through a burden-shifting method of proof created by the Supreme Court in *McDonnell Douglas Corp. v. Green*.").

[41] *See* Martha Chamallas, *The Market Excuse*, 68 U. CHI. L. REV. 579, 599–600 (2001) ("The major conceptual distinction between the two theories is that disparate treatment requires proof of discriminatory intent or motivation, while disparate impact reaches unintentional discrimination that stems from neutral policies or practices that have a disproportionate effect."); Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505, 1513 (2004) [hereinafter Sullivan, *The World Turned Upside Down?*] ("[D]isparate impact discrimination is the use of employment practices that are facially neutral in their treatment of different groups that in fact fall more harshly on one group that another and cannot be justified by business necessity.") (citation and quotation marks omitted).

[42] *See* Sullivan, *The World Turned Upside Down?*, *supra* note 41, at 1513 ("Unlike disparate treatment discrimination, disparate impact liability does not depend upon finding intent to discriminate.").

[43] *See* Jennifer C. Braceras, *Killing the Messenger: The Misuse of Disparate Impact Theory to Challenge High-Stakes Educational Tests*, 55 VAND. L. REV. 1111, 1141 (2002) ("Although there is a broad consensus favoring the use of the disparate treatment model to eliminate purposeful discrimination in all arenas, the use of the disparate impact model to curtail practices that are not intentionally discriminatory remains controversial and is, therefore, limited in scope and reach.").

[44] *See, e.g.*, Washington v. Davis, 426 U.S. 229, 245 (1976) ("we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory"); Smith v. City of Jackson, 544 U.S. 228, 249 (2005) (O'Connor, J., concurring in the judgment); Selmi, *supra* note 36, at 702 ("Within

As originally enacted, Title VII's text did not expressly state whether it covered claims of unintentional discrimination or, if it did, what the parameters of those claims might be.[45] Unlike for disparate treatment, which follows straightforwardly from Title VII's "because of" language, the question for disparate impact has not been how to develop an evidentiary framework to establish theoretically uncontroversial, if practically difficult to prove, statutory elements. It has been how to establish and justify those elements themselves.[46]

B. Acceptance of Disparate Impact

Disparate impact was initially introduced into employment-discrimination jurisprudence in the context of seniority systems.[47] After Title VII was passed in 1964, there was concern that minorities would still face discrimination from the use of seniority ladders and employment tests that appeared neutral on their face but that locked in the results of past discrimination.[48] In the early cases addressing these issues, the lower courts struggled with how to deal with the evidence of statistical disparities that resulted from these seemingly neutral practices.[49] The U.S. Equal

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antidiscrimination law, no theory has attracted more attention or controversy than the disparate impact theory."); Charles Sullivan, *Disparate Impact: Looking Past the* Desert Palace *Mirage*, 47 WM. & MARY L. REV. 911, 954 (2005) [hereinafter Sullivan, *Looking Past the* Desert Palace *Mirage*] (noting the "enormous controversy" over the passage of the Civil Rights Act of 1991, which codified disparate impact); L. Camille Hebert, *Redefining the Burdens of Proof in Title VII Litigation: Will the Disparate Impact Theory Survive* Wards Cove *and the Civil Rights Act of 1990?*, 32 B.C. L. REV. 1 (1990) (acknowledging the "checkered history" of disparate-impact law); *infra* Section III (discussing the *Ricci* decision and the divisive split on the Supreme Court over the contours of disparate impact); *infra* Section II.B. (discussing the *Wards Cove* decision and the divisive split on the Supreme Court over the breadth of disparate impact).

[45] *See generally* Seiner, *supra* note 32, at 101 (noting that "disparate impact is a creature of case law rather than statute").

[46] *See generally infra* Section II.B.

[47] *See* Selmi, *supra* note 36, at 708–15. *See generally* Hebert, *supra* note 44, at 27 ("The legislative history of Title VII does not conclusively establish whether the disparate impact theory was intended to be a theory of discrimination under Title VII.").

[48] *See* Selmi, *supra* note 36, at 708–15. *Cf.* Hebert, *supra* note 44, at 88 ("As long as minority group members continue to suffer the disadvantages imposed on them by centuries of societal discrimination, the equal treatment notion of equality underlying the disparate treatment theory of employment discrimination will continue to fall short of the promise of true equality for minority group members.").

[49] *See* Selmi, *supra* note 36, at 708–15. *See generally* Tepker, *supra* note 33, at 1071–72 ("In the early years of [T]itle VII's existence, plaintiffs' attorneys were faced with an enormous challenge: to escape the strait jacket of disparate treatment theory under which the plaintiff was obligated to prove the employer's biased state of mind.").

Employment Opportunity Commission (EEOC) first proposed disparate impact as an alternative theory of discrimination that did not require proof of intent to discriminate.[50] The lack of blame associated with unintentional discrimination made it an attractive theory to the EEOC, and a liability finding would still allow the agency to correct the effects of the employer's discriminatory policies.[51]

A litigation strategy soon developed among disparate-impact advocates in an attempt to have this theory of discrimination recognized by the courts.[52] The strategy was largely patterned after the approach used in pursuing the case of *Brown v. Board of Education*,[53] and it consisted of filing a substantial number of disparate-impact claims under Title VII and 42 U.S.C. § 1981, developing a monitoring system to identify appropriate cases, and making strategic choices about the most promising cases to pursue.[54] This strategy culminated with the Supreme Court's weighing in on the issue in 1971.[55]

In *Griggs v. Duke Power Co.*,[56] the Supreme Court addressed the viability of the disparate-impact theory advocated by the EEOC in the context of a standardized-testing case.[57] *Griggs* was only the second case in which the Court interpreted Title VII's employment-discrimination provisions.[58] Before Title VII's enactment, the Duke Power Company had "openly discriminated" against black workers at a particular plant located in North Carolina.[59] Black workers were permitted to work only in the plant's labor department, which paid less than the other departments at the facility.[60]

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[50] *See* Selmi, *supra* note 36, at 715–16.

[51] *Id.* at 716.

[52] *See* ROBERT BELTON ET AL., EMPLOYMENT DISCRIMINATION LAW 196–97 (7th ed. 2004).

[53] 347 U.S. 483 (1954).

[54] *See* BELTON ET AL., *supra* note 52, at 196–97.

[55] *Id.*; Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[56] 401 U.S. 424 (1971). *See generally* ZIMMER ET. AL, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 212 (7th ed. 2008) ("The *Griggs* opinion was authored by Chief Justice Burger, and stands out in stark contrast to his more conservative approach to most other questions of statutory or constitutional interpretation."); BELTON ET AL., *supra* note 52, at 204 ("By any standard, *Griggs v. Duke Power Co.* ranks as the most important civil rights case since *Brown v. Board of Education*.").

[57] 401 U.S. 424 (1971). *See also* Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861, 869 (2006) (noting that *Griggs* "established that an employer may violate Title VII without intentionally discriminating against members of protected groups, even in the pursuit of laudatory policies.").

[58] *See* Selmi, *supra* note 36, at 708.

[59] 401 U.S. at 427.

[60] *Id.* at 427.

On July 2, 1965—the effective date of Title VII—the company instituted a requirement that to be placed in any department other than labor, an employee would have to pass an aptitude test.[61] It also decided to start requiring a high-school diploma for placement in a non-labor position.[62] But the company exempted the existing (white) employees from these new requirements, allowing those who lacked high-school diplomas to remain in their positions and those who had diplomas to transfer to the more desirable departments without taking the aptitude test.[63]

To today's readers, these facts may make it seem obvious that Duke Power's actions, although facially neutral, were merely a pretext for continuing a policy of deliberate discrimination against blacks.[64] But the case did not proceed on this theory in the Supreme Court. Instead, it became a test of the emerging theory of disparate impact.

Several black plaintiffs sued Duke Power, maintaining that the diploma and standardized-test requirements were not job-related, that the new policies had the effect of disproportionately disadvantaging black workers, and that the company had a practice of favoring white employees.[65] The district court acknowledged the company's prior practice of "overt racial discrimination," but found that this behavior had ceased following Title VII's implementation.[66] The lower court further found that "the impact of prior inequities was beyond the reach" of the statute.[67] The court of appeals agreed with the district court and concluded that without evidence of "a racial purpose or invidious intent" in establishing the new requirements at Duke Power, these policies were permissible under the statute.[68] The appellate court reached this conclusion while acknowledging that the requirements disproportionately affected black workers at the plant.[69]

The U.S. Supreme Court granted *certiorari* in the case, addressing for the first time whether Title VII ever prohibits a facially neutral policy or practice

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[61] *Id.* at 427–28.

[62] *Id.*

[63] *Id.* at 428.

[64] *See* GEORGE A. RUTHERGLEN & JOHN J. DONOHUE III, EMPLOYMENT DISCRIMINATION: LAW AND THEORY 145 (2005) ("On the evidence available in [*Griggs*], even without sophisticated statistical analysis, an inference of intentional discrimination could easily have been drawn.").

[65] 401 U.S. at 425–26.

[66] *Id.* at 428.

[67] *Id.*

[68] *Id.* at 429.

[69] *Id.* The appellate court did reverse some of the lower court opinion, "rejecting the holding that residual discrimination arising from prior employment practices was insulated from remedial action." *Id.*

that has an adverse impact on a protected group.[70] Justice Burger, writing for a unanimous Supreme Court, concluded that disparate impact is a viable theory under the statute.[71] The Court thus concluded that "practices, procedures, or tests" that are "neutral on their face, and even neutral in terms of intent," should not be allowed "if they operate to 'freeze' the status quo of prior discriminatory employment practices."[72] The Court was equally clear that Title VII was not meant to operate as a quota system for employment:

> [T]he Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. . . . What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.[73]

The Court further clarified that not all facially neutral policies are prohibited, even where those practices result in an adverse impact on a protected group. Rather, the "touchstone is business necessity," and a job-related criterion may be used by an employer if it is facially neutral and not used as a means of intentional discrimination.[74] Thus, the statute prohibits the use of tests, such as the one at issue in *Griggs*, "unless they are demonstrably a reasonable measure of job performance."[75] It is clear that what "Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract."[76] The Court put the burden of proof for showing that the policy is job-related and consistent with business necessity on the employer.[77] In thus reversing the lower courts' dismissal of the plaintiffs' claims, the Court established the availability of disparate impact for employment-discrimination plaintiffs.[78]

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[70] *Id.* at 424.

[71] *Id.*

[72] *Id.* at 429–30.

[73] *Id.* at 430–31.

[74] *Id.* at 431.

[75] *Id.* at 436.

[76] *Id.*

[77] *Id.* at 432 ("Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.").

[78] *Id.* at 436.

Notably absent from the Court's decision, however, was any substantive analysis of the statutory provisions that formed the basis for the decision.[79] The Court did indicate in a footnote that Title VII makes it unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's race, color, religion, sex, or national origin."[80] This provision of the statute may provide the basis for the Court's decision.[81] Nonetheless, without a clear statutory underpinning for the theory of disparate impact or the elements of job-relatedness and business necessity, the contours of the theory would remain fluid.[82] The ambiguity of the theory would make it particularly vulnerable as the makeup of the Court changed in later years.[83]

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[79] *See generally Griggs*, 401 U.S. 424 (1971); Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009 n. 41 (1995) ("Prior to the passage of the 1991 Act there was considerable debate among scholars as to whether the disparate impact theory of liability was authorized by the statute."); George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297 (1987) (discussing basis for disparate-impact theory); ZIMMER ET AL., *supra* note 56, at 228 ("*Griggs* itself had not focused on the statutory language (as opposed to the general policy), which raised questions about the textual basis for the decision."); BELTON ET AL., *supra* note 52, at 204 ("Scholars have criticized the Supreme Court on its failure in *Griggs* to explain the theoretical underpinnings of the disparate impact theory.").

[80] 401 U.S. at 426 n.1 (citing 42 U.S.C. § 2000e-2). *See* RUTHERGLEN & DONOHUE, *supra* note 64, at 145 ("*Griggs* was decided under the original version of Title VII, which contained no provisions specifically addressed to the theory of disparate impact. At most, isolated clauses in the main prohibitions and defenses in the statute obliquely address the issues.").

[81] *See* Connecticut v. Teal, 457 U.S. 440, 445–46 (1982) (stating that *Griggs* construed this provision). *See generally* ZIMMER ET AL., *supra* note 56, at 228 ("To the extent the *Griggs* principle can be found in the provisions of § 703 it is in the language of paragraph (a)(2).").

[82] *See* Sullivan, *Looking Past the* Desert Palace *Mirage*, *supra* note 44, at 964 (noting that "the rationale underpinning disparate impact theory has never been fully developed"); Seiner, *supra* note 32, at 97 ("The lack of a clear, uniform theoretical basis for disparate impact in the United States has left courts confused and often unwilling to accept such claims."); Robert Belton, *The Dismantling of the* Griggs *Disparate Impact Theory and the Future of Title VII: The Need for a Third Reconstruction*, 8 YALE L. & POL'Y REV. 223, 224 (1990) [hereinafter Belton, *The Dismantling of* Griggs] (noting that Title VII expressly prohibited intentional discrimination but "remain[ed] silent about whether it [was] also concerned with facially neutral employment practices, adopted without a discriminatory motive, that adversely affect the employment opportunities of racial minorities and women.").

[83] *See* Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1479–80 (1995) ("In 1971, when *Griggs* was decided, the Court was in a very real sense still the Warren Court . . . . By 1989, however, when *Wards Cove* was decided, Justices Black, Douglas, Harlan and Stewart had been replaced by Chief Justice Rehnquist, and Justices O'Connor, Scalia, and Kennedy. The 1989 Court was much more conservative on racial issues than the immediate post-Warren Court had been."); Amos N. Jones & D. Alexander

Although *Griggs* brought about a major expansion of civil rights law, the Supreme Court restricted the breadth of the theory in its later decisions.[84] Most notably, in *Wards Cove Packing Co., Inc. v. Atonio*,[85] a more conservative Supreme Court placed several rigorous limitations on the scope of disparate impact.[86] *Wards Cove* involved a disparate-impact claim brought by a class of nonwhite employees at an Alaskan cannery facility.[87] The workers alleged that the hiring and promotion practices of the employer resulted in a disproportionate number of white workers filling the more skilled (and higher paying) positions at the cannery.[88] The court of appeals held that the workers' evidence had established a prima facie case of disparate impact and that the burden then shifted to the employer to prove its business-necessity defense.[89] The Supreme Court found the court of appeal's analysis flawed for multiple reasons, and the Court remanded the case for further proceedings.[90]

Among other things, the Court diluted the job-related and consistent-with-business-necessity requirements to a standard requiring only "a reasoned review of the employer's justification for his use of the challenged practice."[91] And this watered-down "reasoned review" was only a burden of production on the part of the employer—the burden of persuasion "must remain with the plaintiff" throughout the case.[92]

Ewing, *The Ghost of* Wards Cove*: The Supreme Court, The Bush Administration, and the Ideology Undermining Title VII*, 21 HARV. BLACKLETTER L.J. 163, 164 (2005) (noting that in *Wards Cove* "a conservative majority overturned some of the most constructive elements of disparate impact doctrine.").

[84] *See* Selmi, *supra* note 36, at 733–34 ("By the end of the theory's first decade, the Court had rejected more challenges than it had accepted, and it had largely limited the [disparate impact] theory to its origins—namely testing claims and perhaps some other objective procedures capable of formal validation."); Seiner, *supra* note 32, at 101 ("Because disparate impact is a creature of case law rather than statute, the Supreme Court has been able to chip away at its protections more easily when so inclined.").

[85] 490 U.S. 642 (1989), *superseded in part by* Civil Rights Act of 1991, Pub. L. No 102-166 (codified in scattered sections of 42 U.S.C.).

[86] *Id. See* Belton, *The Dismantling of* Griggs, *supra* note 82, at 225 ("Underpinning *Griggs* and *Wards Cove* are two competing visions of workplace equality. One, endorsed by *Griggs*, is the equal achievement theory . . . . The other vision, endorsed by *Wards Cove*, is the 'equal treatment theory.'").

[87] *Id.* at 645–48.

[88] *Id.*

[89] *Id.* at 649.

[90] *Id.* at 651–52.

[91] *Id.* at 659.

[92] *Id.*

In *Wards Cove*, then, the Supreme Court transformed disparate-impact law.[93] The four-Justice dissent accused the majority of engaging in "judicial activism," arguing that it had "turn[ed] a blind eye to the meaning and purpose of Title VII," while "perfunctorily reject[ing] a longstanding rule of law and underestimat[ing] the probative value of evidence of a racially stratified work force."[94]

The changes made by the *Wards Cove* majority reflected parallel developments in disparate-treatment law. Earlier in the decade, for example, the Court had clarified that the *McDonnell Douglas* framework merely shifted—temporarily—the parties' burdens of production, but that the ultimate burden of persuasion remained with the plaintiff at all times.[95] And a few years later, the Court held that a plaintiff must prove not only that the employer's proffered explanation is false, but also that the true reason is discriminatory.[96] In addition to making it harder for plaintiffs to prevail in disparate-treatment cases, this development shifted the focus from the justification for the employer's action to the question of "discrimination *vel non*."[97]

The changes announced in *Wards Cove* therefore brought disparate-impact analysis closer to disparate-treatment analysis. The parallels suggest that the Court might have been trying to collapse the two theories: both would involve mere burden-of-production-shifting frameworks where the focus should remain on the question of discrimination rather than the justification for the employer's actions. Had Congress not stepped in, it is conceivable that the Court would have continued along this path. Eventually, the Court might have made disparate impact merely an evidentiary framework that could be used as an alternative to *McDonnell Douglas*, but not fundamentally different from it. Disparate impact, under this approach, would have been nothing more than a tool for smoking out hidden intentional discrimination.[98] As the facts of cases like *Griggs* suggested, employers who

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[93] *Id.* at 657–59. *See* Belton, *The Dismantling of* Griggs, *supra* note 82, at 240 (noting that "[t]he efforts to dismantle *Griggs* culminated in *Wards Cove*").

[94] 490 U.S. at 662–63 (Stevens, J., dissenting).

[95] Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981) ("The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.").

[96] St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515–20 (1993).

[97] *Id.* at 518 (quotation marks and citation omitted).

[98] *See, e.g.*, Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 520 (2003) [hereinafter Primus, *Round Three*] (discussing the view that "disparate impact doctrine is a prophylactic measure that is necessary because deliberate discrimination can be difficult to prove"); Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 652 (2001) (noting that "[a] leading gloss on the

imposed requirements that could not be justified as job-related but that tended to screen out minorities might well be doing so as part of a deliberate effort to keep minorities out of the workplace.[99]

But even if the Court was thinking along these lines in *Wards Cove*, it was not able to pursue its approach any further at the time. Congressional action in response to *Wards Cove* and related cases changed the basis for, and rules governing, disparate-impact cases.[100]

C. The Civil Rights Act of 1991

Congress responded to the Supreme Court's attempt to limit disparate-impact theory—as well as other decisions in the employment context—through the Civil Rights Act of 1991.[101] This amendment to Title VII at least partly overturned the *Wards Cove* decision, and in some measure it returned the law to how it had been interpreted before that opinion was issued.[102] And for the first time, Congress provided an unassailable textual basis for

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conception of disparate impact liability arising from [*Griggs*] is that disparate impact functions as a means of smoking out subtle or underlying forms of intentional discrimination on the basis of group membership," and discussing this view); *In re* Employment Discrimination Litig. Against Ala., 198 F.3d 1305, 1321–23 (11th Cir. 1999) (discussing the role of disparate impact in employment-discrimination law). *See generally infra* Section V (discussing the view that disparate-impact theory targets intentional discrimination hidden by employers).

[99] *Id.*

[100] *See infra* Section II.C. (addressing the impact of Civil Rights Act of 1991 on disparate-impact claims).

[101] Pub. L. No. 102-166 (codified in scattered sections of 42 U.S.C.). *See* Sullivan, *The World Turned Upside Down?*, *supra* note 41, at 1520 ("In reaction to *Wards Cove* and other decisions that the Supreme Court issued during the 1988 Term, Congress passed, and President Bush signed, the Civil Rights Act of 1991.").

[102] *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(2) (including among the Act's purposes "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.* and other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*") (citations omitted). Indeed, the fact that portions of *Wards Cove* are no longer good law was made explicit as to the showing of alternative employment practices, as the statute now requires that the law should be interpreted "as it existed on June 4, 1989 [the day before the *Wards Cove* decision], with respect to [this] concept." 42 U.S.C. § 2000e-2(k)(1)(C). *See* Julia Lamber, *And Promises to Keep: The Future in Employment Discrimination*, 68 IND. L.J. 857, 861 (1993) ("Overruling *Wards Cove* was so integral to the congressional action that the stated purpose of the Act mentions both *Wards Cove* and *Griggs* by name."); RUTHERGLEN & DONOHUE, *supra* note 64, at 217 (noting that in the Civil Rights Act of 1991, "Congress said that it was rejecting the decision in *Wards Cove*, but this is true only with respect to some of the Court's holdings but not others").

disparate-impact claims, incorporating the theory into Title VII.[103] The statute now codifies a three-step analysis for disparate-impact cases.[104]

First, the plaintiff must establish that an identified employment practice results in a disparate impact on a protected group.[105] Second, the employer must prove that the employment practice is "job related for the position in question and consistent with business necessity."[106] Finally, even if the employer satisfies its burden on the job-relatedness question, the plaintiff can still prevail by establishing that there is an alternative employment practice available with less discriminatory impact that still satisfies the employer's business needs.[107] Plaintiffs pursuing disparate-impact claims, however, have limited relief available to them. Most notably, prevailing plaintiffs in disparate-impact suits are not entitled to compensatory or punitive damages, as they would be in disparate-treatment cases under a new provision added by the 1991 law.[108]

With the passage of the Civil Rights Act of 1991, then, disparate impact finally has the clear analytic framework it had lacked since its inception in

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[103] *See* 42 U.S.C. § 2000e-2(k); Seiner, *supra* note 32, at 96–97, 102–04 (noting that Civil Rights Act of 1991 "established a statutory basis for disparate impact claims").

[104] *Id. See generally* ZIMMER ET AL., *supra* note 56, at 231–75 (setting forth how disparate impact is analyzed following the amendments to Title VII); Peter Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409, 422–24 (1998) (discussing how disparate-impact cases are analyzed in the employment-discrimination context).

[105] 42 U.S.C. § 2000e-2(k)(1)(A) (plaintiff must demonstrate "that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin"). A plaintiff must show 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 particular practice." 42 U.S.C. § 2000e-2(k)(1)(B).

[106] 42 U.S.C. § 2000e-2(k)(1)(A); 42 U.S.C. § 2000e(m). *See* RUTHERGLEN & DONOHUE, *supra* note 64, at 148 ("'Business necessity' appears to place a heavy burden upon the defendant, to show that the disputed employment practice is essential to the operation of his business: that he could not do business without it. 'Related to job performance' suggests a lighter burden, depending upon the degree of relationship that must be shown.").

[107] 42 U.S.C. § 2000e-2(k)(1)(A)(ii); 42 U.S.C. § 2000e-2(k)(1)(C). *See generally* Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH & LEE L. REV. 3, 37 (2005) (discussing how disparate-impact claims are analyzed in the employment-discrimination context).

[108] 42 U.S.C. § 1981a (setting forth the right to recover damages in Title VII cases). *See* Primus, *Round Three*, *supra* note 98, at 521 n.118 ("Plaintiffs who prove intentional discrimination can recover compensatory and, if appropriate, punitive damages, but plaintiffs who merely prove that an employment practice is unlawful because of its disparate impact are limited to equitable relief.").

Griggs.[109] But it remains controversial whether it is appropriate—or even constitutional—to hold employers liable when they have not engaged in intentional discrimination.[110]

III. *RICCI V. DESTEFANO*

In *Ricci*, the City of New Haven, Connecticut administered a test to 118 of its firefighters for possible promotions to lieutenant and captain positions within the department.[111] The City planned to use the test to determine who would be eligible for these upcoming promotions for the next two years, and many candidates studied extensively for the exam, "at considerable personal and financial cost."[112]

The City hired a consulting group to help prepare and administer the tests, at a cost of $100,000.[113] The consultants selected by the City specialized in promotional tests administered to public-safety officials, and the group performed an extensive analysis to make certain that the exam would measure the knowledge and skills necessary for the vacant positions.[114] As part of this process, the group observed the daily tasks of the officers and conducted interviews with those in the department.[115] Minority firefighters were "oversampled" as part of this analytical process to make certain that the test ultimately developed would not be biased against minority candidates.[116] Based on this information and other departmental sources such as training manuals and departmental procedures, the consulting group developed a multiple-choice exam and a separate oral test.[117]

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[109] *See* Sullivan, *The World Turned Upside Down?*, *supra* note 41, at 1534 (noting that the Civil Rights Act of 1991 codified disparate impact by adding the theory to Title VII); Seiner, *supra* note 32, at 103 (noting that with the passage of the Civil Rights Act of 1991 "disparate impact had clear statutory backing"); RUTHERGLEN & DONOHUE, *supra* note 64, at 145 ("The provisions that now codify the theory of disparate impact were added to the statute only much later, in the Civil Rights Act of 1991, and as we shall see, these provisions perpetuate much of the ambiguity found in the decisions that originally recognized this basis for liability.").

[110] *See generally* Ricci v. DeStefano, 129 S. Ct. 2658, 2682–83 (2009) (Scalia, J., concurring) (questioning the constitutional validity of the disparate-impact provisions of Title VII).

[111] Ricci v. DeStefano, 129 S. Ct. 2658, 2664–65 (2009).

[112] *Id.*

[113] *Id.* at 2665.

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.* at 2665–66.

To grade the oral examinations, the group selected thirty assessors, all of whom held a higher rank than the positions that were being filled.[118] Two-thirds of these assessors were minorities, and all of these individuals received several hours of training on how to evaluate candidate responses.[119] The candidates sat for the test at the end of 2003, and the results revealed that a disproportionate number of white exam-takers had passed the exam:

> Seventy-seven candidates completed the lieutenant examination—43 whites, 19 blacks, and 15 Hispanics. Of those, 34 candidates passed—25 whites, 6 blacks, and 3 Hispanics . . . . [T]he top 10 candidates were eligible for an immediate promotion to lieutenant. All 10 were white.
>
> Forty-one candidates completed the captain examination—25 whites, 8 blacks, and 8 Hispanics. Of those, 22 candidates passed—16 whites, 3 blacks, and 3 Hispanics . . . . [Nine] candidates were eligible for an immediate promotion to captain—7 whites and 2 Hispanics.[120]

Though City officials questioned whether these results suggested that the examination was discriminatory, the consulting group maintained that the test was valid and that the poor performance of minority candidates "was likely due to various external factors."[121] The consulting group also indicated that these results were consistent with other departmental tests.[122] At hearings on whether to certify the examination results, the New Haven Civil Service Board heard from firefighters who argued strenuously on both sides of the issue.[123] The validity of the test was vigorously debated, and the leader of the consulting-group team that had prepared the examination explained how the test was job-related and "facially neutral."[124] The Board also heard from an industrial psychologist who expressed concerns about the methodology of the examination but concluded that the test was "reasonably good."[125] A retired minority fire captain from another state further indicated

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118 *Id.* at 2666.
119 *Id.*
120 *Id.*
121 *Id.*
122 *Id.*
123 *Id.* at 2667.
124 *Id.* at 2667–68 (citation omitted).
125 *Id.* at 2669 (citation omitted).

that the test questions were job-related.[126] And a university professor told the Board that the results were consistent with testing in other areas.[127]

At the final Board meeting on the issue, New Haven's city counsel nonetheless argued that the results should *not* be certified because of the City's potential liability under Title VII of the Civil Rights Act of 1964.[128] The counsel expressed concern over the "severe adverse impacts" that resulted from the written test.[129] The chief administrative officer, who appeared on behalf of New Haven's mayor, also argued that the test should be discarded because the results "created a situation in which black and Hispanic candidates were disproportionately excluded from opportunity."[130] At the end of the meeting, the Board was deadlocked in a vote on whether to certify the test results, meaning that they would *not* be certified.[131]

A group of white firefighters and one Hispanic firefighter who passed the test sued the City, alleging violations of the Equal Protection Clause of the Fourteenth Amendment, Title VII, and other statutory provisions.[132] The district court entered summary judgment for the City, concluding that the City's "motivation to avoid making promotions based on a test with a racially disparate impact . . . does not, as a matter of law, constitute discriminatory intent under Title VII."[133] In a short *per curiam* opinion, the Second Circuit affirmed, adopting the lower court's analysis.[134] The Supreme Court granted *certiorari*.[135]

By a 5-4 vote breaking down along the predictable ideological lines, the Supreme Court reversed and entered judgment for the plaintiff firefighters. Justice Kennedy, writing for the majority, explained that the firefighters argued that by failing to certify the test results, the City "discriminated against them in violation of Title VII's *disparate-treatment* provision."[136] In contrast, the City maintained that its refusal to certify the examination results did not violate the statute because "the tests appear[ed] to violate Title VII's *disparate impact* provisions."[137] The Supreme Court therefore saw its task as

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126 *Id.*
127 *Id.*
128 *Id.* at 2669–70.
129 *Id.* at 2670.
130 *Id.*
131 *Id.* at 2671.
132 *Id.*
133 *Id.* (citations omitted).
134 *Id.* at 2672.
135 *Id.*
136 *Id.* at 2673 (emphasis added).
137 *Id.* (quotation marks omitted) (emphasis added).

resolving this apparent conflict between the disparate-treatment and disparate-impact provisions of the statute.[138]

The Court began its analysis by making it clear that the City's decision to discard the test "would violate the disparate-treatment prohibition of Title VII absent some valid defense."[139] Even though the City's actions may have been "well intentioned" and "benevolent," the decision was still made on the basis of race in violation of Title VII, as the examination was discarded "because the higher scoring candidates were white."[140] The City's "express, race-based decisionmaking violates Title VII's command that employers cannot take adverse employment actions because of an individual's race."[141] Thus, the Court determined that the City would be liable under Title VII unless an employer's attempt to avoid a disparate-impact suit creates a defense that would "excuse[] what otherwise would be prohibited" conduct.[142]

In considering the contours of such a defense, the Court adopted a "strong-basis-in-evidence standard" for Title VII claims "to resolve any conflict between the disparate-treatment and disparate impact provisions."[143] Thus, an employer may "engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact" only if the employer has a strong basis in evidence "to believe it will be subject to disparate impact liability if it fails to take the race-conscious, discriminatory action."[144] In considering the case under this standard, the Court concluded that the statistical disparity reflected in the test results failed to create a strong basis in evidence on its own for the City to believe that it would have been found liable for disparate impact if it had certified these results.[145] Even with this statistical disparity, the City would still have been able to avoid liability if it could have demonstrated that the tests were job-related and consistent with business necessity.[146] If the City had satisfied this job-related standard, minority firefighters challenging the test would not have been able to prevail unless they could have established that "there existed an equally

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138 *Id.*
139 *Id.* at 2673.
140 *Id.* at 2674.
141 *Id.* at 2673.
142 *Id.* at 2674.
143 *Id.* at 2675–76.
144 *Id.* at 2677.
145 *Id.* at 2678.
146 *Id.*

valid, less-discriminatory alternative that served the City's needs but that the City refused to adopt."[147]

Given the extensive measures taken by the consulting group in creating and administering the tests—and taking into account the statements of the witnesses that appeared before the Civil Service Board—the Court found no factual dispute on the issue of whether the tests were job-related and consistent with business necessity.[148] Indeed, the majority concluded that the City had "turned a blind eye to evidence that supported the exam's validity."[149] Thus, the City had not shown a strong basis in evidence to believe that the tests were *not* job-related and consistent with business necessity.[150] Similarly, the Court failed to find a strong basis in evidence for a less discriminatory alternative to the testing procedures used by the City.[151] In this regard, the City's failure to implement another selection procedure immediately may have proven fatal to this part of its case, because it suggested that an equally effective alternative was not readily at hand.[152] Looking at all of this, the Court held that the City's attempt to "create a genuine issue of fact based on a few stray (and contradictory) statements in the record" failed to rise to the strong-basis-in-evidence standard.[153]

In sum, the Court found "no evidence—let alone the required strong basis in evidence—that the tests were flawed because they were not job-related or because other equally valid and less discriminatory tests were available to the City."[154] The Court emphasized that "[f]ear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions."[155] The process used by the City in developing and administering the tests was "open and fair," and the City had been careful to craft a neutral exam and had encouraged "broad racial participation."[156] The Court thus concluded that the City's refusal to certify the examination results violated Title VII's disparate-treatment provisions, and determined that summary judgment should have been entered for the firefighters.[157]

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147 *Id.*
148 *Id.* at 2678–79.
149 *Id.* at 2679.
150 *Id.* at 2678–79.
151 *Id.* at 2679.
152 *See generally id.*
153 *Id.* at 2680.
154 *Id.* at 2681.
155 *Id.*
156 *Id.*
157 *Id.*

More importantly for purposes of this Article, in concluding the opinion, the Court also addressed the possibility that the City might face a disparate-impact claim brought by minority firefighters once the test results were certified in accordance with the Court's decision.[158] Though no such suit had been filed, and the issue was not presently before the Court, the majority opined that the minority firefighters could not prevail:

> If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability.[159]

Because the Court concluded that the white and Hispanic plaintiffs succeeded on their Title VII claim, it also determined that it was unnecessary to address the potential Equal Protection Clause issue.[160]

Justice Scalia, concurring in full in the Court's opinion, addressed the equal protection issue that the majority avoided.[161] Justice Scalia questioned the constitutional validity of the disparate-impact provisions of Title VII, noting that if the government cannot discriminate against an individual because of race, "then surely [the government] is also prohibited from enacting laws mandating that third parties—e.g., employers, whether private, State, or municipal—discriminate on the basis of race."[162] In Justice Scalia's view, disparate impact puts "a racial thumb on the scales," frequently forcing companies "to evaluate the racial outcomes of their policies."[163] Though acknowledging that the issue need not be resolved in this case, he opined that "it behooves us to begin thinking about how—and on what terms—to make peace between" disparate impact and equal protection.[164]

Writing for the dissent, Justice Ginsburg (joined by Justices Stevens, Souter, and Breyer) argued that the majority's holding "ignores substantial evidence of multiple flaws in the tests New Haven used," and noted that

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[158] *Id.* at 2681.

[159] *Id.*

[160] *Id.*

[161] *Id.* at 2682–83.

[162] *Id.* at 2682.

[163] *Id.*

[164] *Id.* at 2683. Justice Alito (joined by Justice Scalia and Thomas) wrote a separate concurrence as well, addressing the dissent's concerns that "the Court's recitation of the facts leaves out important parts of the story." *Id.* at 2683–90.

other cities have utilized better examinations that resulted in smaller racial disparities.[165] The dissent also noted that the majority had failed to paint a complete picture of the situation in New Haven, highlighting the racial disparity in the composition of the City's firefighters that had persisted for years (and that the majority's opinion had omitted).[166] The dissent accused the majority of breaking a longstanding promise of civil rights law "that groups long denied equal opportunity would not be held back by tests 'fair in form, but discriminatory in operation.'"[167]

As the dissent's vehemence reflects, *Ricci* represents a significant development in disparate-treatment that may profoundly influence that area of the law, especially so-called reverse-discrimination lawsuits alleging a bias in favor of minorities.[168] Other scholarship is focusing on this aspect of the decision, including potential limitations on the Court's analysis and its implications for traditional Title VII (as opposed to reverse-discrimination) cases.[169]

Ricci will also have a strong influence on the future of disparate-impact law. The Court's extended analysis of the evidence on job-relatedness and alternatives is likely to affect how lower courts approach those issues in other cases.[170] Justice Scalia's concurrence also raises questions about the constitutionality of Title VII's prohibition on disparate impact.[171] Other scholarship is examining these constitutional questions, and what they may signal about the future of the whole disparate-impact framework.[172]

All of these issues merit further exploration. Here, however, we will focus on a separate issue that thus far has been overlooked in the scholarship: Putting aside the constitutional concerns and potential consequences for disparate-treatment law, what are *Ricci*'s implications for *disparate-impact*'s doctrinal framework? We identify a new affirmative defense for employers that the Court has created—perhaps carelessly—for disparate-impact cases.[173] We thus aim to fill a void in the literature and to give guidance to

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[165] *Id.* at 2690-91.

[166] *Id.* at 2691.

[167] *Id.* at 2710 (citing Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

[168] *See generally id*. at 2689–710 (Ginsburg, J., dissenting).

[169] *See, e.g.*, Zimmer, *supra* note 11.

[170] *Cf.* Joseph L Gastwirth & Weiwen Miao, *Formal Statistical Analysis of the Data in Disparate Impact Cases Provides Sounder Inferences than the U.S. Government's 'Four-Fifths' Rule: An Examination of the Statistical Evidence in* Ricci v. DeStefano, 8 LAW, PROBABILITY & RISK 171 (2009).

[171] Ricci v. DeStefano, 129 S. Ct. 2658, 2682 (2009) (Scalia, J., concurring).

[172] *See, e.g.*, Primus, *The Future of Disparate Impact*, *supra* note 11.

[173] *See infra* Section IV (discussing the *Ricci* affirmative defense for disparate impact claims).

courts and litigants on how to proceed in cases that involve disparate-impact claims.

IV. THE NEW DISPARATE IMPACT

With *Ricci*, the Supreme Court once again revisited the breadth of the disparate-impact doctrine it announced in *Griggs*.[174] The Court's narrow division in *Ricci* demonstrates that disparate-impact theory remains controversial.[175] Though the "strong-basis-in-evidence standard"[176] announced by the Court has far-reaching consequences for disparate-treatment theory, Justice Kennedy's opinion goes even further and threatens the very foundation of disparate-impact law. In stating that the City—should it face a disparate-impact suit by minority firefighters who failed the exam—"would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability," the Court redefined the parameters of this doctrine.[177]

We explain here that the Court has created a new affirmative defense for employers in disparate-impact cases. An employer may now defend against a claim of disparate impact by showing that at the time it took the challenged employment action, it had no reason to believe that the test had an unlawful disparate impact. In other words, if after investigating the matter the employer reasonably concluded that its test was job-related and consistent with business necessity, and that there were no alternative tests available with less discriminatory impact that would similarly serve its business needs, it becomes irrelevant whether the employer's conclusions are *correct*. Even if an employee ultimately proves that the test is not job-related, or comes up with an equally effective alternative that has less disparity, the employer is insulated from liability because it had no reason to doubt the test's validity *at the time the employment decision was made*.

Our analysis proceeds in three sections. First, we show that *Ricci* sets forth a new affirmative defense for employers that took reasonable steps to investigate and mitigate the adverse impacts of a challenged employment practice before implementing it.[178] Second, we examine the scope of this affirmative defense, including the limited safe harbor it creates for employers

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[174] *See generally Ricci*, 129 S. Ct. at 2664–65.

[175] *See generally id.* at 2664–65; RUTHERGLEN & DONOHUE, *supra* note 64, at 147 ("Perhaps because of its uncertain foundations in Title VII as originally enacted, the theory of disparate impact has always suffered from ambiguity.").

[176] 129 S. Ct. at 2675–76.

[177] *Id.* at 2681.

[178] *See infra* Section IV.A.

who conduct validation studies.[179] Third, we respond to those who might read *Ricci*'s final passage as merely an observation limited to the particular facts of the case rather than a rule of general applicability.[180]

A final preliminary note: Throughout our analysis, we will assume that the employment practice at issue is a workplace examination. Doing so makes our discussion less abstract, and it makes the comparison to *Ricci* itself—which involved an employment examination—clearer.[181] To the extent that *Ricci*'s holding may apply to other employment practices such as requiring a high-school diploma for a job,[182] however, much of what we say would apply equally to those practices.

A. The New Affirmative Defense to Disparate Impact.

In describing how New Haven would defend against a hypothetical disparate-impact lawsuit, the Court stated that "the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate- treatment liability."[183] This corollary to *Ricci*'s primary holding confirms that Title VII is symmetric. The Court's principal holding is that potential disparate-impact liability does not automatically trump disparate-treatment liability; it does so only if the employer shows a strong basis in evidence to fear disparate-impact liability.[184] Conversely, the statement at the end of the majority opinion suggests that potential disparate-treatment liability does not automatically trump disparate-impact liability; it does so only if the employer shows a strong basis in evidence for the fear.[185] To generalize, an employer's fear of one form of liability under Title VII is a defense to another form of liability if and only if the employer has a strong basis in evidence for the fear.

Thus, in addition to the express defense announced by the Court for intentional discrimination claims, an employer that bases an employment decision on workplace test results has a defense to a claim of *disparate impact* if it can show:

(1) a strong basis in evidence that

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179 *See infra* Section IV.B.
180 *See infra* Section IV.C.
181 *See generally Ricci*, 129 S. Ct. 2658.
182 *Cf.* Griggs v. Duke Power Co., 401 U.S. 424 (1971).
183 *Ricci*, 129 S. Ct. at 2681.
184 *See generally id.* 2664–65.
185 *Id.* at 2681

(2) it would have been liable for disparate treatment if it had discarded the test results.[186]

Together with *Ricci*'s primary holding on disparate-treatment liability, these two elements establish an affirmative defense to *disparate-impact* liability for an employer who had no reason to believe its actions were unlawful at the time it took them.

Element (1) of the defense—the "strong basis in evidence" requirement—requires the employer to make an evidentiary showing, and thus the employer may not merely rely on the *absence* of evidence.[187] This signals that the legal principle at issue is an affirmative defense—a matter as to which the defendant, rather than the plaintiff, bears the burden of proof.[188] It also suggests something about the content of that defense: it is not enough for an employer to rely on mere ignorance as the basis for the defense, but rather an employer must have undertaken some sort of inquiry as to the test's validity. If mere good-faith ignorance were enough, the Court would be discarding some of the most important language in *Griggs*, which emphasized that "good intent or absence of discriminatory intent" is not enough to defend against a claim of disparate impact,[189] and it would essentially be jettisoning the entire concept of disparate impact, which addresses unintentional discrimination.[190] But the majority reaffirmed the basic approach of *Griggs*,[191] and Justice Scalia's concurrence noted the lack of a general good-faith defense to clams of disparate impact.[192] Requiring that the employer affirmatively establish the sound basis of its workplace decision preserves the possibility of liability for unintentional discrimination while still giving content to the defense.

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[186] *See generally id.* at 2681.

[187] *Id.* at 2681

[188] *See* Ronald J. Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321, 327 (1980) ("An affirmative defense is defined as an issue upon which the defendant bears the burden of persuasion, usually by the standard of a preponderance of the evidence."); Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV 1205, 1214-15 (1981) (discussing affirmative defenses and stating that, "[a]s a general rule, the procedural effect of pleading an affirmative defense is to place upon the defendant the burdens of pleading, production of evidence, and persuasion.").

[189] Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

[190] *See supra* Section II (discussing the background and theoretical basis for disparate-impact claims).

[191] 129 S. Ct. at 2672–73.

[192] *Id.* at 2683 (Scalia, J., concurring) ("the disparate-impact provisions . . . fail to provide an affirmative defense for good-faith (i.e., nonracially motivated) conduct, or perhaps even for good faith plus hiring standards that are entirely reasonable").

Element (2) of the defense—that the employer would have been liable for disparate treatment had it discarded the test results—is the heart of the affirmative defense. *Ricci*'s primary holding explains what this element requires. An employer that gives an employment test is subject to disparate-treatment liability for throwing out the results based on racially disparate passing rates unless, at the time it acted, it had a strong basis in evidence to believe that the test had an unlawful disparate impact.[193] By *unlawful* disparate impact, we mean not only that the test disproportionately disadvantages minorities, but also that either it is not job-related or there is a less discriminatory alternative. Thus, integrating *Ricci*'s principal holding into the affirmative defense, an employer may defend against a claim of disparate impact by showing that at the time it acted, it lacked a strong basis in evidence to believe that the test had an unlawful disparate impact.[194]

Although at first blush this formulation may appear circular—that the employer must disprove disparate impact to defend against a disparate-impact claim—the requirements are compatible, as the two showings must be made *at different times*. For a plaintiff to prevail on a claim of disparate impact against an administered test, it is not enough that the test *in fact* has an unlawful disparate impact. It also must be that the employer knew, or at least reasonably could have known, about the unlawful disparate impact *at the time it accepted the test's results*. Conversely, if the employer could not have known about the test's unlawful impact, then it would not have had a strong basis in evidence to think that the test had an unlawful impact.[195]

Putting the two elements together, an employer, relying on *Ricci*, may now defend against a claim of disparate impact by showing that at the time it took the challenged employment action, it had no reason to believe that the test had an unlawful disparate impact. To avail itself of the defense, an employer must undertake some sort of fact-finding to justify its belief that the test is job-related and that there are no less discriminatory alternatives.

As this formulation suggests, an employer might be able to establish the affirmative defense for past actions but—because of new information it has become aware of—not be able to invoke it prospectively. For example, if in the course of a disparate-impact suit the plaintiff were to submit a new validation study calling an employment test into question, the protection conferred by the *Ricci* affirmative defense would be only retrospective. The employer might avoid any liability for the actions challenged in that lawsuit, but it also would have received evidence calling the test's validity into question during the course of the litigation. That evidence—the plaintiffs'

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193 *See generally id*. at 2677.
194 *See generally id.*
195 *See generally id*. at 2681.

new study—would give the employer a factual basis to discard the test prospectively based on its disparate impact. If the employer refused to do so and was sued again for workplace decisions taken after the first lawsuit, the affirmative defense would no longer protect its use of the employment test.

In this respect, the *Ricci* affirmative defense resembles the doctrine of qualified immunity, which protects government officials sued under 42 U.S.C. § 1983 for violating a defendant's federal rights.[196] Qualified immunity shields these officials from personal liability for damages unless their conduct violates the defendant's "clearly established statutory or constitutional rights of which a reasonable person would have known."[197] "The protection of qualified immunity applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact."[198] But even if the officials are ultimately immune from damages, the court adjudicating the dispute can clarify the law, thereby ensuring that in future cases officials will not be able to continue to rely on qualified immunity.[199] And qualified immunity does not bar claims for prospective injunctive relief, which again allows the court to prevent further violations without imposing retrospective liability for past conduct.[200]

The *Ricci* affirmative defense likewise may prevent a court from awarding retrospective relief, but it should not prevent the court from determining prospectively that a test has an unlawful disparate impact. While compensatory or punitive damages are not available in disparate-impact cases,[201] plaintiffs typically can obtain instatement to the jobs they should have received and backpay to cover the period during which they were denied their rightful positions.[202] When plaintiffs show that a test has

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[196] *See* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).

[197] *Id.* at 818. *See* John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 264 (2000) ("Doctrinally, therefore, qualified immunity applies comprehensively to all damages actions brought against state and local officers under § 1983, as well as to analogous actions against federal officers under *Bivens* . . . . In all such cases, the defendant is immune from award of money damages 'if a reasonable officer could have believed' in the legality of the act that caused the plaintiff's injury.") (citation omitted).

[198] Pearson v. Callahan, 129 S. Ct. 808, 815 (2009) (quotation marks omitted).

[199] *See id.* at 818 (noting that this procedure "promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable").

[200] *See* County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998).

[201] *See* 42 U.S.C. § 1981a(a)(1). *See generally supra* Section II (discussing damages in disparate-impact cases).

[202] *See* 42 U.S.C. § 2000e-5(g)(1). *See generally* Primus, *Round Three*, *supra* note 98, at 521 n.118 ("plaintiffs who merely prove that an employment practice is unlawful because of its disparate impact are limited to equitable relief"); Cheryl L. Anderson, *Damages for*

an unlawful disparate impact, the analogy to qualified immunity suggests that even if these traditional remedies are unavailable to plaintiffs because of the *Ricci* affirmative defense, the court may still enjoin the employer from continuing to use the test as a basis for future employment decisions.

The analogy between the *Ricci* affirmative defense and qualified immunity is far from perfect. Although neither doctrine has a clear textual basis in the statute, qualified immunity is driven by policy concerns about preventing "unwarranted timidity" by government officials who are supposed to be protecting the public interest.[203] As the Supreme Court has recognized, this concern—and therefore the protection of qualified immunity—generally does not carry over to the realm of private, profit-making activities.[204] Most employers, of course, operate within that realm. And qualified immunity generally protects only individuals; their employers—such as municipalities like New Haven—are not themselves entitled to qualified immunity.[205] Whatever the shortcomings of the analogy, however, qualified immunity offers a way to understand the temporal character of the *Ricci* defense, which requires courts to look at the facts as they were understood at the time of the relevant decision rather than during the course of the litigation.

B. Validation Studies as a Limited Safe Harbor

The *Ricci* affirmative defense described above now allows an employer to defend against a claim of disparate impact by showing that at the time it took the challenged employment action, it had no reason to believe that the test had an unlawful disparate impact.[206] There may be several ways to satisfy the affirmative defense at this high level of abstraction. One is a formal validation study. As we explain below, under the affirmative defense, an employer that relies on a properly conducted formal validation study will ordinarily not be liable for disparate impact. Although employers may sometimes be able to satisfy the affirmative defense even without formal validation studies, those studies offer employers a safe harbor from disparate-impact liability. But this safe harbor applies only when the employer does not also have independent evidence calling the test's validity into question.

Intentional Discrimination by Public Entities Under Title II of the Americans with Disabilities Act: A Rose by Any Other Name, But are the Remedies the Same?, 8 BYU J. PUB. L. 235, 240 n.19 (1995) ("remedies for disparate impact discrimination are fairly consistent among the various federal statutes, and are limited to equitable relief such as backpay, reinstatement (when appropriate), and injunctions").

[203] *See* Richardson v. McKnight, 521 U.S. 399, 408 (1997).

[204] *Id.*; Wyatt v. Cole, 504 U.S. 158, 168 (1992).

[205] *See Lewis*, 523 U.S. at 841 n.5.

[206] *See supra* Section IV.A. (discussing contours of *Ricci* affirmative defense).

Once the employer has reason to doubt the test's validity—for example, because a plaintiff in a suit proffers evidence that the test is in fact invalid—the employer cannot continue to rely on a validation study to avoid disparate-impact liability. For this reason, we refer to validation studies as a *limited* safe harbor.

Validation studies are a familiar concept under Title VII and in the field of test development more generally. *Griggs* itself criticized an employer for adopting a test "without meaningful study" of its job-relatedness.[207] While an employer may not always need to conduct a formal validation study to win a disparate-impact suit,[208] the federal government encourages employers to do so whenever it is technically feasible.[209] Federal enforcement agencies, including the Department of Justice and EEOC, have adopted the *Uniform Guidelines on Employee Selection Procedures*[210] to explain in detail how to validate tests and other selection procedures. These guidelines walk employers through the steps they need to take to conduct proper validation studies, including gathering information about job requirements, investigating potential unfairness for minority groups, and examining less-discriminatory alternatives.[211] Above all, the guidelines emphasize that the methods should be consistent with "generally accepted professional standards for evaluating standardized tests and other selection procedures."[212]

Under *Ricci*'s affirmative defense as we have explained it, an employer that examined a test's impact in advance of its employment decision and found no reason to conclude that the test had an unlawful disparate impact is not liable even if plaintiffs were to prove after the fact that the test did in fact have an unlawful disparate impact.[213] If a proper validation study showed that the test was job-related and consistent with business necessity, and that

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[207] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[208] *Cf.* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 998 (1988) (plurality op.) ("Our cases make it clear that employers are not required, even when defending standardized or objective tests, to introduce formal 'validation studies' showing that particular criteria predict actual on-the-job performance."); Sullivan, *Looking Past the* Desert Palace *Mirage*, *supra* note 44, at 994 ("formal validation, as it is employed in disparate impact cases challenging testing regimes, will not be required across the spectrum of disparate impact cases . . . . [M]any cases have always approached business necessity from a more qualitative, less empirical, perspective.") (citations omitted).

[209] *See* Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607.1(B), 1607.5-.6.

[210] 29 C.F.R. pt. 1607.

[211] *See generally* 29 C.F.R. §§ 1607.1 *et seq*.

[212] *Id.* § 1607.5(C).

[213] *See supra* Section IV.A. (identifying the affirmative defense to disparate-impact claims created by the Supreme Court in the *Ricci* decision and explaining the contours of that defense).

alternative tests that are equally effective would not be likely to have a lesser disparate impact, then—without more—the employer would not have had a strong basis in evidence to conclude that the test has an unlawful disparate impact. The employer therefore could not have discarded the test results based on the disparate impact without opening itself to liability for disparate treatment.[214] Under the *Ricci* affirmative defense, therefore, an employer that relies on a formal validation study ordinarily should not be liable for disparate impact.

In this respect, the defense goes well beyond what pre-*Ricci* law provided. Before *Ricci*, a validation study presumably would satisfy the employer's burden of producing evidence of job-relatedness, and often that would be enough to prevail on a motion for summary judgment.[215] But the plaintiffs could have produced competing studies of their own demonstrating that the test was not job related or that there were alternatives that would have less of a disparate impact.[216] That would have created a question of fact for the court to resolve at trial.[217] In this situation, the *Ricci* affirmative defense would insulate an employer from the risk of an adverse factual finding. It also would dispense with the need for a trial. Even if the plaintiffs produced a conflicting validation study during the litigation, the court could grant summary judgment to the employer on the ground that there is no dispute that *at the time of the employment action* the employer did not have a basis to question the validity of the test.[218]

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[214] *See generally Ricci*, 129 S. Ct. at 2677.

[215] *See* Belton, *The Dismantling of* Griggs, *supra* note 82, at 232 ("It was generally agreed that a validation study provided the most probative evidence of business necessity."); David Yellen, *The Bottom Line Defense in Title VII Actions: Supreme Court Rejection in* Connecticut v. Teal *and a Modified Approach*, 68 CORNELL L. REV. 735, 749 (1983) ("To determine if a test is job related, courts generally . . . require that a validation study be done according to professional standards.").

[216] *See generally* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988) (noting that disparate-impact claims often involve arguments from both sides over the meaning of statistical evidence); Peter Siegelman, *Contributory Disparate Impacts in Employment Discrimination Law*, 49 WM. & MARY L. REV. 515, 550–51 (2007) ("One might analogize disparate impact's test validation/job relatedness requirement to the standard of care under a negligence rule. But the analogy is attenuated because even careful validation does not immunize a test from liability for disparate impact if the use of the test is not justified by business necessity.").

[217] *Cf.* Julia Lamber, *Discretionary Decisionmaking: The Application of Title VII's Disparate Impact Theory*, 1985 U. ILL. L. REV. 869, 905 (1985) ("[A] court should consider the facts then before it in terms of the disparate impact theory. A contrary action would exalt the form of the cause of action over the substance of the complaint.").

[218] *See generally* Fed. R. Civ. P. 56(c)(2) (stating that a motion for summary judgment is to be granted when "there is no genuine issue as to any material fact" and "the movant is entitled to judgment as a matter of law").

This alone would be a significant change in disparate-impact law, but *Ricci* suggests an even broader rule. While formal validation studies provide a safe harbor with relatively clear contours, the *Ricci* affirmative defense may not invariably require a formal validation study of the sort prescribed by the *Uniform Guidelines*.[219] Any serious effort to gauge the fairness and job-relatedness of a test, including examining its alternatives, could give an employer a reasonable basis to believe that the test did not have an unlawful disparate impact. In *Ricci* itself, for example, the Supreme Court did not characterize New Haven's test-validation efforts as amounting to a formal validation study, and it is not clear that such a study had been done.[220] The Court nonetheless suggested that New Haven would be entitled to the benefit of the affirmative defense, emphasizing the extent to which the test designer tried to ensure that the test would reasonably measure the skills needed by firefighters in New Haven.[221] Thus, employers may no longer even need a validation study to overcome a showing of disparate impact. This development, which is inconsistent with at least the tenor of the *Uniform Guidelines*,[222] would be a profound change for disparate-impact litigation.[223] And this change would be particularly beneficial to employers, which often expend a great deal of time and money in procuring these formal studies.[224]

C. Ricci *States a General Rule, not a Case-Specific Observation*

Before moving on to critique the new *Ricci* affirmative defense, we must address what is likely to be the most serious objection to our analysis: that in the passage we rely on, the Court did not intend to create a new affirmative defense at all, but was merely commenting on the facts before it. This

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[219] *See* Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607.1 *et seq*.

[220] *See* Ricci v. DeStefano, 554 F. Supp. 2d 142, 154–56 (D. Conn. 2006) (assuming that no formal validation study had been done), *aff'd*, 530 F.3d 87 (2d Cir. 2008) (per curiam), *rev'd*, 129 S. Ct. 2658 (2009).

[221] *Ricci*, 129 S. Ct. at 2665–66.

[222] *See, e.g.*, 29 U.S.C. § 1607.1(B) (stating that employers need not "conduct validity studies of selection procedures *where no adverse impact results*," suggesting that they must do so where there is an adverse impact) (emphasis added).

[223] *See* Belton, *The Dismantling of* Griggs, *supra* note 82, at 42 (discussing the use of validation studies in disparate-impact cases); Yellen, *supra* note 215, at 749 (noting that in deciding questions of job-relatedness, courts usually look to validation studies).

[224] *See* Yellen, *supra* note 215, at 749–50 ("It may, however, be difficult for employers to validate tests because the Uniform Guidelines are difficult and expensive to follow. Furthermore, some experts believe that virtually no tests conform to the Uniform Guidelines' standards."); Belton, *The Dismantling of* Griggs, *supra* note 82, at 232 ("Validation, however, was commonly known to be difficult, costly, and time-consuming.").

objection is understandable, because the Court's statement that we read as an affirmative defense is—to put it charitably—cryptic.[225] Nonetheless, the language the Court used is not consistent with this narrower reading.

According to this proposed alternative, the Court was doing nothing more than stating that no successful disparate-impact claim could be successfully brought against New Haven, because the evidence showed that the test was job-related and there was no available alternative with less discriminatory impact that would equally suit the City's needs. Perhaps the Court even meant to suggest that as a matter of fact, no suit against New Haven could possibly succeed even if plaintiffs were to adduce more evidence. If so, the Court might have been signaling to plaintiffs that it would not be plausible even to allege that the test has a disparate impact, thereby inviting the lower courts to dismiss such a claim at the threshold stage.[226]

This alternative reading, however, cannot be squared with the language the Court in fact used in *Ricci*. The Court phrased its observation in probabilistic terms: New Haven "would avoid disparate-impact liability based on *the strong basis in evidence that*, had it not certified the results, it would have been subject to disparate-treatment liability."[227] The term "strong basis in evidence" implies a prediction about the likely outcome of a suit that has not happened.[228] But here New Haven did refuse to certify the results and was held liable, which makes the "strong basis in evidence" language puzzling if meant just as an observation about the particular facts of this case.[229] If the Court had meant to limit its statement to the facts of this specific case, it would have said that New Haven "would avoid disparate-impact liability because, when it refused to certify the results, it was subject to disparate-treatment liability." The Court's use of predictive language makes sense only if it were intending to set forth a general legal principle that would apply beyond the facts of this case.

Nor, language aside, can the case-specific reading be defended on the ground that treating the Court's statement as creating a new affirmative defense reads too much into a single, unexplained passage. The case-specific reading also would be a significant development in the law. Ordinarily,

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[225] *Cf.* Zimmer, *supra* note 11, at 23–24 (calling this passage "obscure" and "inscrutable").

[226] *Cf.* Posting of Howard Wasserman to PrawfsBlawg, *When* Ricci *Met* Iqbal, http://prawfsblawg.blogs.com/prawfsblawg/2009/10/when-ricci-met-iqbal.html (Oct. 16, 2009, 12:17 EDT) (raising this possibility).

[227] *Ricci*, 129 S. Ct. at 2681.

[228] *Id.*

[229] *Id.*

nonparties are not bound by the outcome of lawsuits in which they did not participate and over which they had no control.[230] That generally applies even when the nonparty's interests are aligned with those of a party to the case, so long as the two do not have a special legal relationship, as when the party is the nonparty's fiduciary or a class representative.[231] For the Court to suggest otherwise here would be a remarkable departure.

As some scholars have noted in trying to understand this part of *Ricci*, there is a controversial provision of the Civil Rights Act of 1991 that purports to abrogate the general principle of nonpreclusion in some Title VII cases.[232] Under that provision, an employment practice that implements a court order in an employment-discrimination suit may not be challenged by a person whose interests were adequately represented in the prior lawsuit, except in limited circumstances such as collusion.[233] But the Supreme Court has never addressed this provision, which raises constitutional questions about the due-process rights of nonparties to the first lawsuit.[234] If the Court in *Ricci* meant to say that the Civil Rights Act of 1991 would bar future disparate-impact claims against New Haven, and that it would do so constitutionally, it picked a rather obscure way to announce this principle. In any event, reading the Court's statement as announcing a new principle of preclusion would not be any less controversial than reading it as a new affirmative defense, and so the alternative reading cannot be defended on that basis.[235]

It remains possible that the Court's language was sloppy, and that in fact it meant only to predict that the City would win any disparate-impact suit it might face, not to lay down a new affirmative defense for all cases. But because the lower courts take seriously even dicta from the Supreme

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[230] *See* Taylor v. Sturgell, 128 S. Ct. 2161, 2171 (2008) (explaining the general rule and the limited exceptions).

[231] *See id.* at 2172–73.

[232] *See* Charles A. Sullivan, Ricci v. Destefano: *End of the Line or Just Another Turn on the Disparate Impact Road?*, 104 NW. U. L. REV. COLLOQUY 201, 214 (2009) [Sullivan, *End of the Line*] ("Congress provided that a prior decree in a civil rights suit can bind nonparties if they either (1) had notice and the opportunity to intervene or (2) were adequately represented in the earlier suit. Assuming that this statute comports with due process, it seems likely that at least one prong will be met, which would allow the white fire-fighters to retain the gains they made in Ricci."); Zimmer, *supra* note 11, at 24 & n.58.

[233] *See* 42 U.S.C. § 2000e-2(n).

[234] *See* Sullivan, *End of the Line*, *supra* note 232, at 214 (noting the possible due-process concerns raised by this provision).

[235] *See* Sullivan, *End of the Line*, *supra* note 232, at 214 ("from a civil procedure perspective, the normal rule is that the black firefighters may not be bound by a judgment in a case in which they are not parties").

Court,[236] we accept here the Court's statement at face value. And as we explain shortly, in several respects the *Ricci* affirmative defense is similar to other policy-driven defenses that the Court has created in other areas of employment-discrimination law.[237] Regardless, we may soon find out how the lower courts interpret *Ricci*'s dictum, because a disparate-impact suit has already been filed against the City by minority firefighters who did poorly on the test.[238]

V. IMPLICATIONS OF THE AFFIRMATIVE DEFENSE

The *Ricci* affirmative defense represents a profound change for disparate-impact theory. An employer may now defend against a claim of disparate impact by showing that at the time it took the challenged employment action, it had a no reason to believe that the test had an unlawful disparate impact.[239] Thus, for the first time in disparate-impact law, the employer's state of mind is relevant to the analysis.[240] Before *Ricci*, disparate-impact claims turned solely on real-world facts: whether there was a disparity in pass rates, whether the test in fact predicted job performance, and whether there was an equally effective alternative with less impact.[241] Now the claims also turn on what the employer knew and what conclusions it drew.[242]

This brings disparate-impact analysis closer to disparate-treatment analysis, which always has turned on the employer's subjective motivation.[243] In theory, an employer could fail to establish the affirmative

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[236] *See, e.g.*, United States v. Oakar, 111 F.3d 146, 153 (D.C. Cir. 1997) ("'[c]arefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.'") (quoting Doughty v. Underwriters at Lloyd's, London, 6 F.3d 856, 861 n.3 (1993)). *See generally* Lisa M. Durham Taylor, *Parsing Supreme Court Dicta to Adjudicate Non-Workplace Harms*, 57 DRAKE L. REV. 75 (2008) (discussing the use of Supreme Court dicta by the lower courts).

[237] *See infra* Section V (discussing the analogy between the *Ricci* affirmative defense and affirmative defensives in other areas of employment-discrimination law).

[238] *See* Briscoe v. New Haven, No. 3:09-cv-01642-CSH (D. Conn.) (complaint filed Oct. 15, 2009). The docket and pleadings in this matter are available at http://www.ctd.uscourts.gov/cmecf/.

[239] *See supra* Section IV (discussing the *Ricci* affirmative defense).

[240] *See generally supra* Section II (discussing role of disparate impact as a theory of *unintentional* discrimination).

[241] *See supra* Section II (discussing disparate-impact theory and how pre-*Ricci* cases were analyzed under this theory of discrimination).

[242] *See supra* Section IV.

[243] *See supra* Section II.A (discussing the disparate-treatment theory of discrimination); Braceras, *supra* note 43, at 1140 ("The disparate treatment model attempts to expose and

defense even if it harbored no discriminatory motive. In practice, however, absent a discriminatory motive, few employers are likely to choose to use a test that they know to have a disparate impact on minorities without also having some basis to believe that the test is job-related. And few employers large enough to be covered by Title VII[244] would be so naive as not to examine the validity of their tests. An employer that uses a test it knows not to be job-related but that has a disparate impact on a minority group may well be using the test as a pretext to mask intentional discrimination, because it is difficult to imagine another reason that the employer would stick with a discriminatory examination.

Some have long seen disparate impact's primary purpose as smoking out intentional discrimination where it would be hard to prove motive through other means.[245] As noted earlier, this approach conceives of disparate-impact analysis as primarily an evidentiary framework, akin to the *McDonnell Douglas* framework for ordinary disparate-treatment claims, rather than a

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punish intentional discrimination. Under this model, proof of discriminatory motive is critical."); Cheryl L. Anderson, *What is "Because of the Disability" Under the Americans With Disabilities Act? Reasonable Accommodation, Causation, and the Windfall Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 323, 333 (2006) ("Cases proceeding on a disparate treatment theory require proof of motive. Cases proceeding on a disparate impact theory do not."); George Rutherglen, *Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality*, 74 FORDHAM L. REV. 2313, 2328 (2006) ("The theory of disparate impact initially played an important role in 'smoking out' these hidden forms of discrimination, but its effectiveness was compromised, on this pessimistic view, by procedural and substantive restrictions imposed on plaintiffs who brought claims under this theory.").

[244] *See* 42 U.S.C § 12111(5)(A) ("The term 'employer' means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year . . . ."); Jeffrey A. Mandell, Comment, *The Procedural Posture of Minimum Employee Thresholds in Federal Antidiscrimination Statutes*, 72 U. CHI. L. REV. 1047 (2005) (discussing minimum-threshold provisions in employment-discrimination law).

[245] Braceras, *supra* note 43, at 1167 ("Claims that the disparate impact model should be applied to high-stakes educational assessments in order to smoke out covert intentional discrimination have their roots in Professor George Rutherglen's 'objective theory of discrimination.' According to this theory, the disparate impact model serves as a mechanism for identifying intentional discrimination in the absence of direct evidence of racial or ethnic animus."); Jennifer L. Peresie, *Toward a Coherent Test for Disparate Impact Discrimination*, 84 IND. L.J. 773, 779 (2009) ("Where there is no evidence of bad intent on the part of the employer, judges who characterize disparate impact as a means of smoking out employers with animus toward a protected class . . . might be more willing to choose whatever statistical test favors the defendant.") (citing Primus, *Round Three*, supra note 98, at 518); Jolls, *supra* note 98, at 652 (discussing the view that "disparate impact functions as a means of smoking out subtle or underlying forms of intentional discrimination"); *In re* Employment Discrimination Litig. Against Ala., 198 F.3d 1305, 1321–23 (11th Cir. 1999) (discussing the role of disparate impact in employment-discrimination law).

separate substantive theory of liability.[246] Justice Scalia's concurrence in *Ricci* alluded to this view, although he discounted it because employers cannot defend a disparate-impact claim simply by disproving a discriminatory motive.[247] And the Eleventh Circuit relied on this view to uphold the abrogation of States' sovereign immunity from disparate-impact claims.[248]

The *Ricci* affirmative defense, which protects nearly all but the improperly motivated or unreasonably ignorant employer, may signal that a substantial portion of the Supreme Court subscribes to the smoking-out view of disparate impact. If the employer has no reason to question a test's validity, then the employer likely has a nondiscriminatory motive for using the test even if it disproportionately harmed a protected minority. By contrast, the employer that sticks with a test that has an adverse impact on minorities—even in the face of evidence questioning the test's validity—is more likely to harbor a discriminatory motive. This latest development, then, brings us back to the path the Supreme Court seemed to be pursuing before the Civil Rights Act of 1991, when it appeared poised to collapse the distinction between disparate treatment and disparate impact.[249]

The *Ricci* affirmative defense also may be the final blow to disparate impact as a viable litigation strategy for plaintiffs. The academic scholarship has long lamented that disparate impact is an "underutilized" theory.[250] Even before *Ricci*, it was hard for plaintiffs to develop meritorious disparate-

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[246] *See generally id*.; *supra* Section II.B (setting forth the history of disparate-impact law and the Supreme Court's treatment of the doctrine); Seicshnaydre, *supra* note 40, at 1163–64 (noting that some "theorists consider the proposition that disparate impact exists primarily to help litigants uncover discriminatory motive that is lurking below the surface . . . . As generally noted, this basis is framed by Professor Primus as 'evidentiary dragnet.' . . . Disparate Impact is thus conceived as a method of proof through which intent can be proven indirectly.") (citation omitted).

[247] *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2682–83 (2009) (Scalia, J., concurring).

[248] *In re Employment Discrimination Litig.*, 198 F.3d at 1321 ("Though the plaintiff is never explicitly required to demonstrate discriminatory motive, a genuine finding of disparate impact can be highly probative of the employer's motive since a racial imbalance is often a telltale sign of purposeful discrimination.") (quotation marks omitted).

[249] *See supra* Section II.B (discussing the history of disparate-impact law and the Supreme Court's efforts to narrow the doctrine before the Civil Rights Act of 1991).

[250] Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What's* Griggs *Still Good For? What Not?*, 42 BRANDEIS L.J. 597, 597 (2004) ("The theme of this article is that *Griggs* and the disparate impact theory of litigation remain largely untapped resources of enormous potential for plaintiffs."); Sullivan, *Looking Past the* Desert Palace *Mirage*, *supra* note 44, at 912–13 ("This Article's thesis is straightforward: the obsession of the legal academy and the plaintiffs' bar with disparate treatment cases, to the wholesale exclusion of the disparate impact alternative, is largely responsible for the present crisis in the field.").

impact claims.[251] Plaintiffs needed to collect a great deal of data and subject that data to rigorous statistical analysis just to determine if they had a prima facie case.[252] They then needed to do their own analysis of job-relatedness and alternatives that would rebut whatever the employer might be expected to proffer.[253] Few plaintiffs were eager to take on these daunting tasks.

The affirmative defense adds a whole new layer of analysis to what was already a complicated back-and-forth burden-shifting framework.[254] And even though injunctive relief may remain available to plaintiffs who prove the rest of their case, defendants that successfully avail themselves of the affirmative defense will have taken away the retrospective remedies plaintiffs are likely to want most—instatement to the position and backpay.[255] By further increasing the complication of proving a disparate-impact claim and reducing the potential payoff for success, the *Ricci* affirmative defense makes it even less likely that most plaintiffs will consider bringing disparate-impact claims.

But the new affirmative defense does not necessarily mean that there will be more discrimination by employers. Even if fewer disparate-impact claims are brought in court, the affirmative defense may create positive incentives that encourage employers and employees to resolve disparate-impact claims before they reach litigation. In this respect, the *Ricci* defense resembles two other nontextual affirmative defenses for employers that the Court has created under Title VII—one for employers facing claims of unlawful harassment and the other for employers facing liability for punitive damages.

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[251] Linda Hamilton Krieger, *The Content of our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1162 n.3 (1995) ("Because most individual employment decisions do not implicate identifiable practices that can be shown to have a statistically significant disparate impact on members of a protected group, very few Title VII cases are actually amenable to disparate impact treatment."); Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 377 (2007) ("practical difficulties in satisfying the *Griggs* standard have meant that disparate impact's reach has been uneven"); Sullivan, *Looking Past the* Desert Palace *Mirage*, *supra* note 44, at 912–13 ("Disparate impact has its own problems, some severe . . . .").

[252] Sullivan, *Looking Past the* Desert Palace *Mirage*, *supra* note 44, at 993 ("[T]urning to disparate impact will impose higher costs on plaintiffs than current disparate treatment litigation, which some commentators view as a serious problem with expanding the theory. Litigating under the disparate impact model will necessarily require expert testimony, whether of the traditional statistical kind or of cognitive biases."); Seiner, *supra* note 32, at 116 (noting that the "expert statistical analysis" used in disparate impact cases is "time-consuming and very costly.") (citation omitted).

[253] *See generally supra* Section II (discussing the requirements for establishing and defending against a disparate-impact claim).

[254] *See generally id*.

[255] *See generally* Section II.C. (discussing the remedies available in disparate-impact cases).

In both instances the Court has tried to shape parties' incentives by developing rules based on the policies behind Title VII rather than the statutory language itself.

The Court addressed the harassment defense first. Title VII outlaws discrimination that creates a hostile work environment, such as severe or pervasive sexual harassment.[256] In *Burlington Industries v. Ellerth*[257] and *Faragher v. City of Boca Raton*,[258] the Supreme Court created a standard for determining when an employer is liable for harassment of an employee by a supervisor.[259] When the harassment culminates in a tangible employment action such as a firing or demotion, the Court held, the employer is vicariously liable for the acts of its supervisor.[260] But when the pattern of harassment does not involve any tangible employment actions, the Court created an *affirmative defense* to the employer's vicarious liability.[261] The employer must show that (1) it exercised reasonable care to prevent or correct supervisory harassment, such as by developing a workplace harassment policy, and (2) the employee unreasonably failed to take advantage of opportunities to avoid the harm by, for example, failing to report it to higher-up supervisors.[262] This defense was intended to encourage

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[256] *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986).

[257] 524 U.S. 742 (1998).

[258] 524 U.S. 775 (1998).

[259] *See, e.g.*, Scott A. Moss, *Fighting Discrimination While Fighting Litigation: A Tale of Two Supreme Courts*, 76 FORDHAM L. REV. 981, 987–88 (2007) ("What has since been dubbed 'the Faragher/Ellerth defense' is a two-part test determining when employers are liable for supervisors' harassment of subordinates."); Stephen F. Befort & Sarah J. Gorajski, *When Quitting is Fitting: The Need for a Reformulated Sexual Harassment/Constructive Discharge Standard in the Wake of* Pennsylvania State Police v. Suders, 67 OHIO ST. L.J. 593, 609 (2006) ("In its [*Faragher* and *Ellerth*] holdings, the Court differentiated between situations in which employers are strictly liable for a supervisor's sexual harassment and those in which the employer may invoke an affirmative defense to escape liability.").

[260] *See Burlington Indus.*, 524 U.S. at 753–54 ("When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII."); *Faragher*, 524 U.S. at 790 ("[T]here is nothing remarkable in the fact that claims against employers for discriminatory employment actions with tangible results, like hiring, firing, promotion, compensation, and work assignment, have resulted in employer liability once the discrimination was shown.").

[261] *See Burlington Indus.*, 524 U.S. at 765 ("When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence."); *Faragher*, 524 U.S. at 807 ("When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence.").

[262] *See Burlington Indus.*, 524 U.S. at 765 (noting that the affirmative defense requires the following showing: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably

both employers and employees to resolve workplace harassment promptly and as an internal matter, without requiring the courts to intervene.[263] And it provides employers that take reasonable measures to prevent harassment with some protection against liability even if the measures prove inadequate: An employee who unreasonably bypasses those measures will be unable to collect damages.[264]

The Court relied on similar policies to create an affirmative defense to employers' liability for punitive damages.[265] The Civil Rights Act of 1991

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failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."); *Faragher*, 524 U.S. at 807–08 (discussing the elements of the affirmative defense).

[263] *Burlington Indus.*, 524 U.S. at 765 ("While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense."); *Faragher*, 524 U.S. at 807, 808 (adopting an affirmative defense for sexual harassment claims "[i]n order to accommodate the principle of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees."); *cf*. Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 885 (2008) ("Far from solving the problems created by Title VII's prompt complaint requirements, the added layer of internal processes created additional risks for employees."); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 537–38 (2001) ("[U]ncritical acceptance of internal dispute resolution processes legitimates purely formalistic solutions, and it will often leave underlying patterns and conditions unchanged.").

[264] *See generally* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998) ("An employer may, for example, have provided a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense. If the plaintiff unreasonably failed to avail herself of the employer's preventive or remedial apparatus, she would not recover damages that could have been avoided if she had done so."); Anne Lawton, *The Emperor's New Clothes: How the Academy Deals with Sexual Harassment*, 11 YALE J.L. & FEMINISM 75, 108 (1999) ("The Court's most recent decisions in *Faragher* and *Ellerth* mention both prevention and remedial efforts as part of the employer's affirmative defense to liability in sexual harassment cases. Yet the Court seems to equate procedures with prevention."); Moss, *supra* note 259, at 987 ("An employee may be precluded from suing to challenge otherwise actionable harassment if she has not attempted to resolve the problem internally—by complaining to her employer before filing a discrimination charge.").

[265] *See, e.g.*, Scott A. Moss & Peter H. Huang, *How the New Economics Can Improve Employment Discrimination Law, and How Economics Can Survive the Demise of the 'Rational Actor,'* 51 WM. & MARY L. REV. 183, 247 (2009) ("Although technically distinct, in practice there is substantial overlap between what does and does not suffice for the *Faragher*/*Ellerth* defense to harassment liability (based on an effective antiharassment program) and the *Kolstad* defense to punitive damages (based on good faith Title VII compliance).") (citing Bettina B. Plevan, *Training and Other Techniques To Address Complaints of Harassment*, 682 PLI/LIT 675, 755 (2002)); Joanna L. Grossman, *The Culture*

added damages as a possible remedy for a Title VII violation.[266] The statute allows punitive damages when the plaintiff shows that the employer engaged in intentional discrimination "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[267] But in *Kolstad v. American Dental Ass'n*,[268] the Court held that even when the plaintiff has met this standard, the employer may avoid liability if it shows that it engaged in "good faith efforts at Title VII compliance," such as taking steps to implement an antidiscrimination policy.[269] Without this affirmative defense, according to the Court, the fear of punitive damages would discourage employers from educating themselves and their managers about Title VII's requirements so as to avoid the risk of deliberately disregarding those requirements.[270] To neutralize these "perverse incentives," the Court created an affirmative defense that would do the opposite by encouraging employers to educate themselves and their managers about Title VII's requirements.[271] This, in turn, should help head off some employment-discrimination problems before they reach litigation.[272]

The *Ricci* affirmative defense similarly encourages employers to take reasonable steps in advance of litigation to head off possible Title VII violations—carefully examining the validity of an employment test for unlawful disparate impact before using it.[273] If that examination reveals flaws in the test, the employer will be able to fix them before any employee is harmed, and thus the affirmative defense could prevent some instances of unlawful disparate impact. And if the examination does not reveal flaws, the

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of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law, 26 HARV. WOMEN'S L.J. 3, 4 n.2 (2003) ("In *Kolstad v. American Dental Ass'n*, the Court supplemented the rules in *Faragher* and *Ellerth* by deciding that punitive damages could not be imposed against employers who have made good-faith efforts to comply with Title VII.").

[266] *See* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 533–34 (1999).

[267] 42 U.S.C. § 1981a(b)(1).

[268] 527 U.S. 526 (1999).

[269] *Id.* at 544–45.

[270] *Id.*

[271] *Id.* at 545.

[272] *See generally* Susan Bisom-Rapp, *An Ounce of Prevention is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1, 15 (2001) (noting that "[e]mployee education has been promoted as a litigation prevention mechanism for at least two decades and has found its ultimate approval in the *Kolstad* decision," and discussing this view).

[273] *See supra* Section IV (discussing the contours and requirements of the *Ricci* affirmative defense).

employer will be protected from liability for decisions that rely on that test until contrary information is brought to the employer's attention.[274]

To a large extent, employers already had this incentive, because under pre-*Ricci* law they would have been strictly liable for flawed tests that ultimately were shown to have a disparate impact.[275] A prudent employer would have carefully examined its tests even without an additional affirmative defense for doing so.

Perhaps more importantly, therefore, the *Ricci* defense also shapes the incentives of employees. Employees who have concerns about a test's validity need to bring those concerns to the employer's attention before it is used as a selection device for an employment decision. If they fail to do so, their potential remedies will be severely curtailed—they may be able to obtain an injunction barring continued use of the test, but they may not be able to obtain backpay, instatement, or any other retrospective remedy.[276] Like sexual harassment law, then, in certain circumstances the *Ricci* affirmative defense places an obligation on the employee to make the employer aware of the problem.[277]

The analogy to the *Ellerth-Faragher* and *Kolstad* defenses highlights the conceptual weakness of the *Ricci* defense. The other defenses arise in the context of an employer's vicarious liability for the acts of its agents, and the Supreme Court expressly grounded its analysis in background principles of agency law.[278] The *Ricci* defense, by contrast, does not appear to stem from any general principle of common law or statutory interpretation. There is no general rule immunizing civil defendants from liability when they reasonably

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[274] *Id.*

[275] *See supra* Section II (setting forth the requirements of a disparate-impact claim and the potential liability for an employer). *See generally* Martha Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 UCLA L. REV. 305, 374 n.329 (1983) ("It is often difficult to predict the outcome of a challenge to the validity of a selection device because judicial assessments of the adequacy of validation studies may be very complex.").

[276] *See supra* Section IV (discussing the contours and requirements of the *Ricci* affirmative defense).

[277] *Id.*; *see also Burlington Indus.*, 524 U.S. 742; *Faragher*, 524 U.S. 775.

[278] *See Burlington Indus.*, 524 U.S. at 754 ("We turn to principles of agency law, for the term 'employer' is defined under Title VII to include 'agents.'"); *Faragher*, 524 U.S. at 802 ("We therefore agree with Faragher that in implementing Title VII it makes sense to hold an employer vicariously liable for some tortuous conduct of a supervisor made possible by abuse of his supervisory authority, and that the aided-by-agency-relation principle embodied in § 219(2)(d) of the Restatement provides an appropriate starting point for determining liability for the kind of harassment presented here."); *Kolstad*, 527 U.S. at 545 ("Holding employers liable for punitive damages when they engage in good faith efforts to comply with Title VII, however, is in some tension with the very principles underlying common law limitations on vicarious liability for punitive damages . . . .").

but mistakenly believed their actions were legal. To the contrary, although statutes occasionally provide an express defense for bona fide errors,[279] defendants generally are liable for statutory violations even when they had good reason to think their conduct was lawful.[280] The *Ricci* defense, however, immunizes employers merely because they thought their conduct was lawful, even though disparate impact is a doctrine primarily aimed at unintentional conduct.[281] For that reason, it is particularly questionable to create what amounts to a bona-fide-error defense to disparate-impact liability.

By focusing on *Ricci*'s doctrinal implications for disparate-impact analysis as a statutory matter, this Article fills a gap in the emerging academic literature on *Ricci*, which so far has focused on other noteworthy aspects of the case. For example, Richard Primus's forthcoming article *The Future of Disparate Impact*[282] examines *Ricci*'s constitutional implications. Professor Primus argues that the Court's ruling appears to treat disparate impact as an inherently race-conscious theory that therefore is vulnerable to constitutional challenge under the Equal Protection Clause.[283] He also offers narrower ways to read *Ricci* that would help disparate impact survive constitutional challenge at least in the run of cases.[284] But because his focus is on the constitutional questions, Professor Primus does not address *Ricci*'s statement that New Haven would have had a defense to a disparate-impact lawsuit, and he does not consider what effect this statement may have on disparate-impact analysis. We complement his approach by putting the constitutional questions to the side and focusing on the doctrinal implications.

We also complement Michael Zimmer's approach in his recent article Ricci*'s Color-Blind Standard in a Race Conscious Society: A Case of Unintended Consequences?*[285] Professor Zimmer primarily looks at *Ricci*'s implications for future disparate-treatment claims, focusing on the Court's

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[279] *See, e.g.*, Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(c).

[280] *See, e.g.*, Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 537 (1999) (recognizing that there may be instances where an employer discriminates "with the distinct belief that its discrimination is lawful").

[281] *See, e.g.*, 42 U.S.C. § 1981a (contrasting "unlawful intentional discrimination" with "an employment practice that is unlawful because of its disparate impact"); *id.* § 2000e-2(k)(2) (clarifying that the business-necessity defense for disparate-impact claims "may not be used as a defense against a claim of intentional discrimination"). *See generally supra* Section II (discussing the background and application of disparate-impact law).

[282] Primus, *The Future of Disparate Impact*, *supra* note 11.

[283] *Id.*

[284] *Id.*

[285] Zimmer, *supra* note 11.

analysis of intent.[286] He argues that the Court has lowered the bar considerably for plaintiffs by allowing them to rely merely on proof that the employer knew the racial consequences of its actions, except during the design phase of an employment practice.[287] While Professor Zimmer notes in passing the part of the Court's opinion that we analyze here, he does not seek to make sense of it in detail, stating only that it is "obscure" and "inscrutable."[288]

Charles Sullivan has also recently written on the impact of the *Ricci* decision on employment discrimination cases.[289] In his article, Professor Sullivan discusses the intersection between disparate-impact and disparate-treatment theory after *Ricci*.[290] While his focus is on several other interesting aspects of the case, he notes the language that we identify as constituting an affirmative defense in this article, and he correctly suggests that this language "confus[es] things" and "makes sense only when read in the context of the rest of the opinion."[291] But because his article primarily deals with other questions raised by *Ricci*, Professor Sullivan does not offer a full account of what this language might mean doctrinally for future disparate-impact litigation.[292] This Article takes that additional step, explaining that the confusing language, in the context of the entire opinion, should be read as a broad-based affirmative defense that is now available to all employers.[293] Professors Zimmer and Sullivan also correctly identify the difficulty of applying this language to the facts of the disparate impact case that was recently brought by the black firefighters against the City in district court.[294] As we argue above, these issues extend beyond the facts of that pending case, and will be implicated in most future disparate-impact claims.[295]

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[286] *Id.* at 3.

[287] *Id.* at 21–22.

[288] *Id.* at 23–24.

[289] *See* Sullivan, *End of the Line*, *supra* note 232.

[290] *Id.* at 212–13.

[291] *Id.*

[292] *See generally id*.

[293] *See generally supra* Section IV (discussing contours of *Ricci* affirmative defense).

[294] Zimmer, *supra* note 11, at 23–27; Sullivan, *End of the Line*, *supra* note 232, at 213–14. Professor Sullivan notes the implications of the disparate impact suit brought by the black firefighters, discusses the civil procedure concerns, and addresses the possible impact of the Civil Rights Act of 1991. *Id.* The recent disparate-impact claim filed by the black firefighters can be found in the complaint at *Briscoe v. New Haven*, No. 3:09-cv-01642-CSH (D. Conn.), which was filed on October 15, 2009. The docket and pleadings in that matter are available at http://www.ctd.uscourts.gov/cmecf/.

[295] *See supra* Section IV.C (arguing that the *Ricci* affirmative defense is broader than a case-specific rule).

VI. CONCLUSION

The *Ricci* case has been a source of significant controversy in the months following the Supreme Court's decision, as scholars have already examined the disparate-treatment implications of the case as well as the possible equal-protection concerns raised by the decision.[296] The case is sure to generate even greater debate as the lower courts struggle with how to apply it. This Article provides a timely look at one aspect of the case that has thus far not been examined by the scholarship—the new affirmative defense to disparate-impact liability created by the *Ricci* Court. This affirmative defense, which until now has gone largely unnoticed, provides a limited safe harbor for employers that find their employment tests challenged under disparate-impact law.[297] Providing a form of qualified immunity for employers, this defense may prove to be the end of disparate impact as a viable litigation strategy for plaintiffs. Although this affirmative defense will give employers an additional incentive to validate their employment tests before relying on the results of these workplace exams, this benefit may ultimately be overshadowed by the added layer of difficulty and complexity for plaintiffs who otherwise would have meritorious claims.[298] Disparate impact has long been lamented as an "underutilized" theory of employment-discrimination law.[299] At best, the *Ricci* decision will ensure that plaintiffs continue to use disparate-impact theory only rarely. At worst, the decision will effectively end disparate impact as a viable theory of discrimination. Whatever happens, the new disparate impact heralded by *Ricci* is a dramatic development for the field of employment discrimination.

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[296] *See supra* Section III (discussing the current scholarship that explores *Ricci* decision).

[297] *See supra* Section IV (discussing the contours of the affirmative defense to disparate impact created by the *Ricci* Court).

[298] *See supra* Section V (addressing the implications of the *Ricci* affirmative defense).

[299] *Id. See* Shoben, supra note 250, at 597 (describing the theory as a "largely untapped resource"); Sullivan, *Looking Past the* Desert Palace *Mirage*, *supra* note 44, at 912–13 (noting the academy's "wholesale exclusion of the disparate impact alternative").

AUDITS – THE KEY TO AVOIDING CLASS ACTION LAWSUITS

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I. RECENT TRENDS IN LABOR AND EMPLOYMENT CLASS ACTIONS

Class Action: It is the fear of every employer, and with good reason. The number of class actions continues to grow, while astronomical awards and settlements attract media attention, which only invites more class claims. There are several explanations for this trend, including:

- The 1991 amendments to Title VII of the Civil Rights Act of 1964, allowing for compensatory and punitive damages dramatically increased the potential exposure and burden of litigation for defendants in such cases;
- Greater awareness of the effectiveness of using the Fair Labor Standards Act ("FLSA") and state equivalents – especially in California – as vehicles for bringing wage and hour collective actions;
- The magnitude of the potential recovery and the burden of defense under the multiplier effect of a class action – plus the expensive complexity of class action procedure – operate as a powerful engine to encourage large settlements in which part of the price of peace is commensurate large attorneys' fees provisions;
- The availability of such recoveries and enormous attorneys' fees have stimulated a generation of plaintiff's lawyers who now find it practical and attractive to make the substantial investment necessary to get a class action off the ground; and
- The Equal Employment Opportunity Commission ("EEOC") continues its commitment to bringing pattern or practice claims.

Most class actions never go to trial. Instead, the economies of risk tend to impel both sides to want to settle at some point. For defendants, of course, the costs and risks of employment class actions are well known. Even leaving aside the potential for lottery-type damages, the expense of extensive documentary and deposition discovery, elaborate expert research and analysis, fees for teams of lawyers, and the diversion of vast amounts of

management time from regular business affairs – possibly for years – makes even the threat of class action litigation a source of concern.

Even for plaintiff's counsel, class actions are fraught with risk and require a substantial investment of time, effort and money. For example, many people are familiar with the race discrimination class action against the Coca Cola Company that settled for $192.5 million in 2000, and also may be aware that the plaintiffs' attorneys collectively received $20.7 million in fees. What is less well known, however, is that those attorneys had fronted more than $1.5 million in expenses, of which well over half had been paid to experts and consultants.

Obviously, plaintiffs' lawyers feel the potential rewards justify the investment. Consider some recent class actions that have received notoriety:

- *Dukes v. Wal-Mart Store, Inc.* – class certification of potentially 1.6 million current and former female employees alleging that Wal-Mart discriminated against women in pay and promotion.
- *Sodexho Marriot Services, Inc. v. McReynolds* – the Supreme Court refused to preclude about 2,600 African-American managers from pursuing class race discrimination claims.
- *Dial Corp*. – $10 million settlement resolving pattern and practice action brought on behalf of approximately 100 women employed in an Illinois soap production facility who claim that the facility's strength testing discriminated against women.
- *Boeing* – suit brought on behalf of some 29,000 salaried and hourly female employees alleging discrimination in pay, promotions, overtime, assignments, bonuses and other conditions of employment, resulting in a $72.5 Million dollar settlement.
- *United Airlines* – lawsuit in which flight attendants alleged the use of different weight policies for male and female flight attendants constituted unlawful sex discrimination under federal and state law – class numbering more than 16,000 – settled for $36.5 million.
- *Rent-A-Center* – Sex bias allegations of 4,800 class members in 50 states covering nearly 2,300 company-owned retail outlets, settled for $47 million.
- *Texaco* – class action plaintiffs alleging discrimination on the basis of compensation, promotions, training, and job assignments settled for $176.1 million, including $115 million in damages and $29 million in attorneys' fees.
- *Computer Sciences Corp.* – $24 million settlement to 30,000 technical support workers who had been misclassified as exempt.

The key, obviously, is to prevent class actions before they start. This involves three key things: (1) knowing the warning signs of a brewing class action; (2) ensuring that employment practices and policies comply with legal obligations; and (3) responding to issues and problems in an effective and timely manner. The employer's efforts will be greatly aided by regular, meaningful, and effective audits of its labor and employment practices. The employer that critically examines what it is doing and – just as importantly – makes the commitment to doing what is necessary to correct and improve, will go a long way toward avoiding class action lawsuits, or will be in a much stronger position to defend them.

II. RECENT LEGISLATION AFFECTING CLASS ACTIONS (CLASS ACTION FAIRNESS ACT)

In 2005, President Bush signed into law the Class Action Fairness Act of 2005. In passing the Class Action Fairness Act, Congress found that over the past decade there had been abuses of the class action devise that had harmed class members with legitimate claims and defendants that had acted responsibly, had adversely affected interstate commerce, and had undermined public respect for the judicial system. Traditionally, the majority of class action lawsuits were brought in state courts. Often, plaintiffs' attorneys would search for and select a particular state where they believed that had the greatest likelihood of success to file a class action. One goal of the Class Action Fairness Act is to cut down on this type of forum shopping by plaintiff's attorneys.

Congress recognized that allowing large class actions to be brought in state and local courts kept cases of national importance out of the federal courts, sometimes allowed local courts to act in ways that demonstrated bias against out-of-state defendants, and sometimes allowed local courts to make judgments and impose their views of the law on other states and bind the rights of the residents of those other states.

The stated purpose of the Class Action Fairness Act is to: (1) assure fair and prompt recoveries for class members with legitimate claims; (2) restore the intent of the framers of the United States Constitution by providing for federal court consideration of interstate cases of national importance under diversity jurisdiction; and (3) benefit society by encouraging innovation and lowering consumer prices.

Under the Class Action Fairness Act, federal courts now have proper jurisdiction for most class actions in which defendants are from multiple states. Only in certain cases, such as when two-thirds of the plaintiffs are from the same state and the defendant also has a headquarters there, would class action remain in state courts.

It has been recognized by the Federal Judicial Center that federal courts are less likely to certify classes than are their state court counterparts. Accordingly, while it is too early to tell the full impact that this legislation will have on employers facing class actions, it is cause for tentative optimism.

III. WARNING SIGNS OF AN IMPENDING CLASS ACTION

The typical targets for class actions are large, publicly-traded and/or consumer driven corporations sensitive to negative publicity. Especially now, following the rash of corporate scandals, plaintiffs' attorneys seek to take advantage of anti-corporate sentiment and public mistrust. Just because your company does not fit this profile does not mean you are off the hook, however. Any company with large numbers of employees is a potential target. Sometimes, class action plaintiffs' attorneys will target specific industries, *e.g.*, retail establishments, insurance companies, etc. If your competitor has been hit with a class action, your company may be next. It is really time to evaluate what you are doing with regard to your employment practices.

EEOC charges or litigation can be a breeding ground for class action litigation. During the EEOC process, plaintiff's attorneys, current or former employees, or governmental agencies may gain access to information that otherwise would be unavailable. There are several "early warning" signs arising out of EEOC or equivalent state agency proceedings:

- FOR CAUSE FINDINGS – Plaintiff's attorneys or even current employees will use the "for cause" determination as a marketing tool to recruit other class members. Consequently, employers must be wary of any charge involving outspoken and/or charismatic employees. Great care should be taken in handling EEOC charges, especially charges that can easily form the basis of future class action, such as claims involving hiring or promotion practices.

- NUMEROUS EEOC CHARGES WITH THE SAME OR SIMILAR ALLEGATIONS – a number of similar EEOC charges may indicate that a plaintiff's attorney or a firm is considering a class action. While numerous charges originating from the same facility are easy to discern, it is less easy to detect a pattern when charges are filed in different geographic areas, or against different divisions of a company, because different managers may be responsible for handling each. Consequently, it is important to track centrally the number and types charges being filed across the company.

- HIGH PROFILE ATTORNEYS OR CLASS ACTION FIRMS INVOLVEMENT AT THE EEOC STAGE – another warning sign for employers is when high profile attorneys or class action law firms are involved in what seems to be a routine Title VII claim. Sometimes these attorneys will develop a case to test the waters and get information and admissions that will be helpful in building a subsequent class action lawsuit.

- A PATTERN OF IRRELEVANT QUESTIONS DURING MANAGEMENT DEPOSITIONS – the plaintiff's bar is adept at getting damaging information on companies' employment practices. Sometimes a plaintiff's firm planning to bring a class

action will get other plaintiffs' attorneys handling current litigation against the target company to ask questions of a deponent that are designed to assist in future class action litigation. For example, a pattern of questions relating to pay classifications and overtime asked in a straightforward Title VII case may indicate that a plaintiff's attorney is attempting to gather information for a future FLSA lawsuit or collective action.

Even in the absence of EEOC activity, there are other signs that a class action is brewing or has gained momentum. Some warning signs include:

- LARGE NUMBERS OF EMPLOYEES ASKING FOR PERSONNEL FILES

- A SIGNIFICANT INCREASE IN THE NUMBER OF INTERNAL COMPLAINTS – employees who lead the charge in getting a class action filed often are disgruntled, very vocal and potentially excellent recruiters. Consequently, they will often complain to many different employees about issues they believe are unjust and get employees to complain to management. Likewise, numerous complaints or questions regarding the same policy (e.g., the promotion policy, or the exempt classification of certain positions) may be.

- A FAILED UNION ORGANIZING CAMPAIGN – The employees attempting to organize often develop a dislike for the company and believe they are being treated unfairly. When the union campaign fails, these same employees may turn their attention to class action litigation.

- COMPLAINTS AIRED ON WEBSITES – some current or former employees of corporations now form websites to discuss their concerns and air their complaints. Most of the issues discussed on these websites do not have class action ramifications, but occasionally there are discussions that can lead to class actions. Prudent workforce management executives will assign someone inside the company to routinely review discussions on blogs, message boards and other sites to see if there are employment practices or policies that are creating problems that should be addressed.

IV. LABOR AND EMPLOYMENT AUDITS

A. WHAT IS AN AUDIT?

The best way for companies to identify the warning signs of class actions, and to ensure that they are complying with their policies and the law, is to conduct audits on a regular basis. A labor and employment audit is a systematic and rigorous examination of a company's human resources policies, procedures, and practices. An audit asks, for example:

- Do company policies and procedures exist to address and comply with all requirements of applicable federal, state, and local labor and employment law?
- Are company policies, procedures, and practices applied consistently?
- Is there effective, consistent, regular, and documented communication of these policies?
- Who in the company is responsible to implement and enforce these policies and do they do so properly?
- Is there an ongoing training program with respect to these policies?
- Are there effective, credible complaint procedures or other "safety valves" to permit employees to express their concerns and resolve disputes, without reprisals?

B. DON'T UNDERTAKE AN AUDIT UNLESS COMMITTED TO CHANGE

The decision to conduct an audit should be made with care. Unless senior management is committed prior to conducting an audit to address and correct in a timely manner any serious legal and employee relations issues which may arise, the audit may very well be counter-productive because the employer simply is providing a roadmap to plaintiffs' counsel or a government agency to areas of vulnerability. The audit may also establish a paper trail proving that the employer knew certain policies and practices were illegal, which can result in significantly increased damages, including punitive damage awards. Indeed, if the audit encompasses an area that includes criminal liability, the responsible corporate officer doctrine may result in personal criminal liability for certain corporate officers who become aware of violations and fail to take prompt, effective remedial action.

In addition, conducting the audit often creates an expectation among employees who are aware problems exist, that they will be corrected. Management that fails to take appropriate corrective action delivers the unmistakable message to employees that they cannot trust management to correct problems; rather employees must rely upon third parties (whether plaintiffs' attorneys, government agencies, or labor unions) to have their concerns addressed. In short, if senior management is not committed to fix any serious problems, do not waste your time, effort and money on an audit.

C. DEFINING THE SCOPE AND OBTAINING MANAGEMENT SUPPORT

A comprehensive audit of all labor and employment policies and practices can often be impractical due to the cost and management time involved. Thus, management often chooses to focus an audit on specific areas of perceived vulnerability, or to conduct the audit in stages.

In either event, this means identifying priorities and selecting among them. How does one go about prioritizing risks and then obtaining top management approval? Here are some recommendations:

1. Identify the risks. Staff with human resources and legal responsibility should first look to internal sources to identify risks such as recent legal claims filed against the company, employee complaints, recurring questions and issues raised by supervisors and management responsible for administering the company's human resources policies, feedback from those responsible for conducting training on frequently asked questions of particular concern, exit interviews, etc.

2. What labor and employment law claims are "hot" generally, within the applicable geographical area, and within your industry?

3. What are the enforcement priorities of government agencies, again generally and specifically for your industry?

4. What can you learn from colleagues in industry associations and local employer associations about areas of particular vulnerability?

5. What recent changes in the law have occurred at the federal, state, and local levels?

6. To the extent possible, define and quantify the risks and then prioritize them in a memorandum to senior management from legal counsel, marking the document attorney-client privileged and confidential.

7. In the memorandum explain to senior management a recommended time table and agenda for performing the audit. Describe the result to be expected from the audit (specific legal advice to correct any problems uncovered), and when it will be delivered. A budget for approval should also be submitted.

8. The memorandum should conclude by requesting that senior management fully support the audit process, including issuance of a communication instructing all affected employees to cooperate with the audit.

While avoiding the time and expense of lawsuits is a significant selling point in trying to persuade senior management to undertake the time and expense of an audit, there are often competing priorities. Avoiding possible problems down the road may not be persuasive. The audit may be viewed as a luxury when its purpose is exclusively presented as avoiding possible future litigation.

A stronger case for performing the audit may be made by also addressing the benefits to the business anticipated from the audit. Let's use selection criteria as an example. If selection criteria used in hiring, training, or promotion decisions have an adverse impact on a protected class and they are not job related and consistent with business necessity, they are likely unlawful. In addition, such selection criteria are probably ineffective and result in substantial turnover, poor job performance, low productivity, and poor quality work. Emphasizing how an audit may reduce turnover, and improve productivity and quality may increase the odds that a proposed audit is approved.

D. THE AUDIT TEAM

1. *Choosing The Team*

To conduct an effective audit of a large organization, it is necessary to create a team. In selecting team members, people should be chosen who are trustworthy and meticulous with respect to handling confidential information, credible within the company, and effective in relating with people. The employer should also be sensitive to workplace diversity issues in selecting team members. As discussed below, the team should report, through counsel who directs the audit, to the company's chief executive officer or its board of directors. Deciding who should be on the team, however, depends on the precise focus of the audit and the thoroughness of the audit plan. Generally, however, an interdisciplinary team should be assigned to conduct the audit, and members should include:

- Representatives from human resources with thorough knowledge of the company's policies, procedures, and practices;
- Representatives from operating management;
- Representatives from financial and information technology functions;
- Representatives from payroll functions; and
- Others as needed to insure a solid cross-section of line and staff functions, including corporate headquarters and other geographical locations.

We hate to say it, but you really need to have an attorney heading up the audit team. As a general rule, companies should conduct audits with an eye toward future litigation. Litigation means discovery, including requests for things like audits. A meaningful audit likely will uncover and document some activities and practices that could create the basis for liability in a lawsuit. We therefore want to do everything we can to avoid having to divulge the results of the audit in future litigation. Although utilizing counsel in the audit will increase the cost of the audit, this provides the employer the best opportunity to protect the audit results under the attorney-client privilege. Otherwise, an employer will have to rely on the self-critical analysis privilege to

protect the audit results. The scope of this privilege has become narrower and narrower in recent years.

The self critical analysis privilege is a non-statutory privilege designed to maintain the confidentiality of internal audits and investigations performed by companies to improve safety, productivity or compliance with various state and federal laws. The rationale for the privilege is that companies would either abandon or curtail candor in such investigations or audits if the information therein were likely to become public. In other words, the privilege offers businesses incentives to correct their own internal flaws without fear of litigation. The self critical analysis privilege is, however, a state common law development that is often not recognized by the federal courts. The privilege has been disfavored largely because of the Supreme Court's position that the law favors broad discovery as opposed to a liberal assertion of privileges, particularly when Congress has not acted to grant such privileges. In the context of employment litigation, although implication of the privilege has not been foreclosed, courts have largely disfavored it.

Although it is unlikely that the raw data analyzed by the studies suggested below will be protected by the attorney-client privilege or the work product doctrine, careful routing and identification of the analysis and related results and documents, careful documentation of outside counsel participation in meetings and rigorous confidentiality protection may increase the likelihood that counsel's review of the data will be protected from discovery. Employers are again cautioned, however, that the raw data for the studies – even if directed by counsel – is unlikely to be protected from discovery and has the potential of becoming a "blueprint" for a class action litigation later.

2. *Training The Team*

Basic training of the audit team is necessary before beginning the process. Team members must have a basic understanding of the various labor and employment laws applicable to the employer. They also must be instructed as to the importance of maintaining the confidentiality of information and the appropriate steps to bring information within the attorney-client privilege. Proper procedures for handling such information should be developed (as discussed below), and the team should be trained to follow these procedures. Finally, team members should be trained in effective interview techniques and be reminded not to reveal confidential information during the interviews or to make admissions regarding troubling issues or areas of concern.

E. GENERAL AUDIT GUIDELINES

1. *The Audit Plan*

The first step in conducting the audit is to prepare an audit plan. The audit plan defines standards against which the audit will be conducted, defines the thoroughness of the audit tests to be conducted, and establishes the audit procedures to be used by the team. In preparing the plan, the initial step is to identify the applicable laws in the areas to be audited. This is not an insignificant chore given the numerous sources of labor and employment law and their

complexity. The audit should proceed systematically by asking several questions to determine sources of applicable law:

- How large is the organization? Some employment laws apply to all employers, while others apply only to employers over a certain size. If multiple subsidiaries are involved, evaluate whether they are separate employers or a single employer under applicable laws.

- Identify all of the geographical locations where the company operates and identify all of the potential federal, state and local (city and county), for example, sources of legislation and regulation.

- In what industries does the company operate? Some employment laws (such as federal drug testing rules) and many whistleblower laws (such as the Surface Transport Assistance Act 49 U.S.C. § 31105) apply only to particular portions of certain industries, such as the transportation industry.

- What particular human resource policies, procedures, practices, and systems relevant to the areas to be audited. For example, if the audit is designed to test compliance with federal, state, and local wage and hour law, all applicable statutes and regulations must be identified and collected. Policies, procedures, practices, and instructions related to wage and hour law and payroll administration must be gathered, as well as any materials and employee handbooks, policies and procedures, manuals, or form books that might be relevant (for example, job descriptions, performance appraisals, and accompanying instructions). Any memoranda, training materials or other explanatory materials relevant to the area to be audited should be collected and included in the audit materials.

From these materials a checklist of questions and issues should be developed to test compliance with applicable federal, state, and local law, as well as compliance with company policies, procedures, training materials, instructions, etc. that have been gathered. Although (canned) checklists exist and may be a helpful starting point, it is imperative to craft this checklist in light of the specific laws, policies, and audit objectives that apply.

2. *Identifying Whom Will Be Interviewed*

The next step is to identify the company employees to be interviewed in the audit. Plainly, a representative cross-section of employees and records should be included in the audit process. An audit is essentially a test of compliance with company policy and the law. No reasonable person would expect that every member of management responsible for wage and hour administration be interviewed, for example, or that every pertinent record be examined during the course of an audit. In essence, the number of interviews to be conducted is a

function of the resources available to the audit team and the perceived risk posed by the issues to be audited.

A significant decision to be made is whether to interview only those who administer the policies or to include those affected by the policies who in essence may be potential claimants if violations of the law are uncovered. A more thorough and credible audit includes employee interviews, or perhaps employee questionnaires or employee focus groups, involving those affected by the policy to uncover employee perception of bias, or misclassification of exempt status under wage and hour law, for example. An employer should find out whether employees believe it is compliant with its policies and applicable law through the audit, rather than subsequent litigation.

When auditors interview employees, it is important that the interviewees understand what is taking place. At the beginning of the interview, the auditor should explain: (1) the purpose of the audit and the role of the interviews; (2) how or why this person was chosen to be interviewed (for example, randomly, because of his or her role in the company, particular knowledge, etc.); (3) the importance of maintaining the audit interview in confidence; (4) anything the interviewee tells the auditor may be disclosed to the company; (5) if the interviews are conducted by counsel, explain that the employer is the client, not the employee who is being interviewed; (6) the company will not retaliate against the interviewee because he or she says anything unfavorable about the company (although this is not a guarantee of immunity if the interviewee has violated company policy or the law); and (7) to advise the auditors or another designated company official if anyone attempts to retaliate against the interviewee for anything said during an interview or to pressure him or her to disclose what is said. If the decision has been made to protect the audit within the attorney-client privilege, this should be explained to the interviewee, who should be advised that the questions are being asked for the purpose of providing legal advice to the company and that it is, therefore, imperative to maintain the confidentiality of what each party says during the interview. All of these points should be confirmed in writing and the employee should sign a statement confirming that he or she has read and understood them before beginning the audit interview. Finally, the employee should be asked if he or she has any questions concerning the audit process.

An effective interview program should be designed to elicit from a representative sample of employees the way the company's policies and practices are actually applied day in and day out. The employees interviewed should generally consist of a diverse cross-section of the employee population. In selecting employees to interview, factors such as department, job title, seniority, and geographical location should be considered. In addition, depending upon the focus of the audit, other factors should be considered including protected classification under applicable federal, state, and local law, exempt and non-exempt status under federal and state wage and hour law (including employees and positions covered by all applicable exemptions), and other similar factors to permit the audit team to evaluate how those affected by the policy and practices being audited perceive and apply them.

3. *Identifying The Documents To Be Reviewed*

Often it is suggested that the audit should begin by collecting records, rather than conducting personal interviews. Although to a degree, this is a matter of personal preference, sending out an extensive "demand" for documents, records, and files often result in resistance, if not hostility, toward the audit process. It is generally helpful to begin by discussing with those who maintain records and files what documents exist, where, and in what form, and how they can effectively be examined while minimizing disruption to the business.

The types of "transactional" documents involved in the area to be audited should be identified, such as completed performance evaluations, time records, schedules, payroll data, etc. The audit team then must decide, based on the desired thoroughness of the audit, how extensive and comprehensive the sample of such "transactional" documents they should select and examine. At a minimum, the "transactional" documents collected should include a solid cross section of geographical locations, operating divisions, and functional departments. The time period from which the sample is collected should cover the applicable statute of limitations and account for any seasonal variations that could affect compliance. In a wage and hour audit, for example, the team should collect records that include any peak season when overtime is prevalent, as well as slower periods.

In conducting the record portion of the audit, it is imperative to include document retention requirements. Many labor and employment laws require that certain documents be retained for a specified time period. Determine whether the record retention policy and the actual practice comply with the law. Next ask whether the company has those required documents, where they are located, and who is responsible for maintaining them. Finally, verify through spot checks that the required records have been maintained for the required time periods, and as appropriate, confirm that document destruction policies have been followed with respect to them once the appropriate time period to maintain the documents has elapsed. Copies of previous policy statements, employee handbooks, etc. should be maintained indefinitely, however, to permit the employer to establish in a lawsuit that it had a policy in place at a given time, and what it was. In addition, confirm that appropriate procedures exist and are followed to suspend document destruction policies when a legal claim or government investigation arises or is eminent.

F. CRITICAL ISSUES AND EMERGING TRENDS TO EXAMINE

What are some of the all too common and costly mistakes employers make that render them vulnerable to large scale or high cost labor and employment claims? What follows are some of the major issues arising in lawsuits filed in the past several years to consider examining in a labor and employment audit.

1. The employer has no comprehensive plan to govern employment related decisions and practices such as hiring, promotions, and compensation.

If an employer has no comprehensive, carefully crafted plan governing its management decisions, it is left to the vagarious other subjected judgments or "common law" shop practices. Plaintiffs' counsel routinely argue that a selection system driven by "subjective" decision making is a ready mechanism for illegal discrimination because it allows management and supervisors to indulge a preference to the detriment of protected classes.

2. The employer has a comprehensive employment plan for making critical decisions, but fails to implement it, in whole or in part.

Plaintiffs' attorneys scrutinize cases to find an inconsistency between the written selection process and how decisions are made and practiced. If there is variation between the written plan and practice which disadvantages a protected class of employees, a significant potential for a class action exists. If management generally complies with the comprehensive plan, but a particular supervisor ignores it to the detriment of individuals in a protected classification, there are excellent grounds for individual claims.

3. The employer fails to analyze how its selection practices are applied.

Discrimination is frequently revealed through statistical analysis. When an employer's selection practices adversely affect a protected group, the courts may infer discrimination. An employer should audit its selection policies and practices to detect any patterns of potential discrimination. In doing so, the employer should play devil's advocate, not trying to make the company look "good," but legitimately trying to identify potential problems. In addition to the statistical analysis, it is important to interview supervisors and employees at various levels in its hierarchy to understand how the employment practices operate in the real world. In essence, the employer is analyzing its employment policies and practices as a plaintiff's attorney would, to evaluate whether a viable class action claim exists based on its selection, compensation, and training policies and practices.

4. The employer fails to establish effective, credible complaint procedures or other safety valves for employees to express their concerns and resolve disputes, without reprisals.

An effective, credible complaint system is critical. It permits employees to raise complaints and have those complaints promptly addressed internally without the threat of reprisals. Employees are almost always willing to try to resolve complaints internally, before filing a lawsuit or charge of discrimination, if there is a credible, accessible, and effective complaint procedure in their workplace. In addition, a good complaint procedure may provide a defense to claims of sexual harassment and punitive damages.

In addition, an audit should focus on the requirements of the Sarbanes Oxley Act of 2002 that the audit committee (which must be established under Sarbanes Oxley) of companies establish procedures for "(A) the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal account controls, or auditing materials; and (B) the

confidential, autonomous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters." 15 U.S.C. § 301(N)(4). Although Sarbanes Oxley does not define what procedures must be established, the policies, training, and procedures will be similar to those many employers have established to address harassment in the workplace. This requirement provides covered employers with the opportunity to minimize the risk of having to defend against the whistleblower claim by developing effective, credible complaint procedures and training employees concerning their use.

In addition to Sarbanes Oxley, many other federal and state laws provide job protection to an employee who, in good faith, reports what he or she believes to be illegal employer conduct. The audit should assess employer's steps to assure a lawful response to any whistleblower's complaints and management and supervisor training with respect to the various whistleblower protections and employer obligations. The audit should also review existing employment, settlement, and confidentiality agreements to assure that they do not contain language that may be construed as prohibiting or punishing conduct or complaints that are otherwise protected by Sarbanes Oxley or other whistleblower legislation. In addition, all company policies and employee communications should be reviewed to ensure compliance with applicable whistleblower legislation and to minimize any potential claim against the employer that it attempted to discourage protected whistle blowing activity.

5. The employer fails to implement employment policies and procedures that actually result in hiring and promoting those who are likely to be better employees.

The focus here is whether the company's selection practices are job-related and designed to eliminate or minimize any discriminatory adverse impact. If the company has not done so or it has failed to maintain records required by the uniform guidelines on employee selection procedures, 29 CFR § 1607(1978), the potential for liability increases.

6. The employer fails to develop effective job posting or other self nomination procedures to take advantage of its employees' actual job interests and ambitions.

If members of a protected class are disproportionately working in jobs that pay lower wages and lead to fewer promotional opportunities, this provides fertile ground for class action discrimination claims. The company often tries to respond by claiming that the troubling staffing pattern is due to individual decisions made by managers or the workers themselves, based upon their individual interests. Unless the company has an effective posting process, which allows employees to identify and pursue their interests, however, such a defense becomes much less tenable.

7. The employer has no effective training program to assure that its employment practices are properly implemented.

A key lesson for employers emphasized repeatedly by the courts is essentially training, training, and more training. The U.S. Supreme Court has imposed two basic duties on employers:

- Take reasonable steps to prevent harassment; and
- Correct promptly any sexual harassing behavior.

In general, this means employers must develop, implement (including communication and training), monitor and refine employment policies and procedures which prevent and correct promptly any unlawful harassing behavior.

Distribution of policies is insufficient if managers do not understand the policy, or their own responsibilities for complying with and enforcing the policy, including how to train subordinate employees about their rights and responsibilities under company policy.

An employer is shielded from vicarious liability for punitive damages for discrimination if the actions are contrary to an employer's "good faith efforts to comply" with employment law. However, the mere issuance of a policy is not sufficient to prevent an award of punitive damages. Rather, the employer must prove that it has communicated the policy, trained employees, and enforced the policy by monitoring compliance. Employers must monitor and adjust their employment policies and practices on a regular basis. This should include regularly scheduled reviews of the effectiveness of employment practices and policies and periodic verification that they comply with current changes in the law.

Management and supervision should receive training in employment law and practices on at least an annual basis. An employer should track complaints to assess whether the policies and procedures are effective. Management should evaluate the quality of their investigation, focusing on whether a prompt response has occurred and whether adequate and consistent results have followed each investigation. Employee perception of an employer's policies and procedures are also critical and should be evaluated on a periodic basis to ensure that they are readily understood and effective.

Records are critical in this area as well. An employer that has implemented a thorough training program must be able to demonstrate who has received training, what training they received, and when they received it.

8. The employer fails to classify its employees as exempt or fails to pay non-exempt employees for all hours worked under federal and state wage and hour laws.

In 2001, the number of collective actions filed in federal court under the FLSA surpassed the number of class actions filed alleging discrimination, and that trend has continued. State wage and hour law claims are also increasing. Many employers run afoul of wage and hour laws due to their complexity, the inconsistency between state and federal law, and the

employer's failure to systematically evaluate whether changes in employees' job responsibilities over time affect their exempt status.

The primary issues leading to class based litigation under federal and state wage and hour law are: (1) overtime claims based on alleged misclassification of employees as exempt from overtime requirements; and (2) claims that non-exempt employees have not been properly compensated for all their hours worked.

Misclassification issues arise primarily out of an argument either that the supposedly exempt employee is not actually paid on a "salary basis" (a fundamental requisite for exempt status), or that her primary duties do not fall within the exemption. A detailed discussion of these issues is beyond the scope of this paper. However, critical part of a thorough audit is an evaluation of the job classifications and payroll practices to ensure the exempt employee truly is "exempt." This should include review of written job descriptions and evaluation of what the employees actually do in the course of their work. A prudent employer should systematically track wage and hour claims filed in its industry and geographical area attacking the application of exemptions to particular positions, and then scrutinize its own employees' job responsibilities and similarly situated positions.

Failure to properly pay non-exempt employees for all hours worked is another common claim in class actions. Sometimes these are known as "working off the clock" claims, where the employees contend that the employer discouraged them from reporting all hours worked on their time records. Other disputes arise regarding whether certain tasks are compensable working time, such as tasks performed before and after work involving so called "donning and doffing" of clothing or equipment. It is impossible to eliminate the risk that employees will contend that they were permitted or encouraged to work off the clock, however, there are certain steps to reduce this risk which should be explored in the course of an audit. These include clear company statements, in writing, that:

- Non-exempt employees will be paid for all hours worked.
- Non-exempt employees must record all hours worked.
- Non-exempt employees must receive pre-approval for overtime hours worked.
- Non-exempt employees should not perform any work during lunch breaks.
- Non-exempt employees are encouraged to report any pressure or encouragement to work off the clock with assurances against reprisal.[1]

The employer should provide annual reminders that working off the clock is prohibited by company policy and signed acknowledgments by employees that they have not worked off the clock. Include a signed acknowledgment during an exit interview or in termination paperwork

that the employee has been paid for all hours worked during the course of his or her employment.

G. STATISTICAL ANALYSIS OF AVAILABLE EMPLOYMENT DATA

Reliable and accessible employment data is an invaluable tool in defending against employment class actions and should be a significant part of the audit process. Too often, however, employers do not analyze the available employment data until they have been sued – when it is already too late. As described more fully below, a regular audit of available employment data can allow employers an opportunity to correct alarming statistical disparities which may render them susceptible to a class action.

1. *Understanding The Database*

Countering the risks of a class action begins with an assessment of the workforce data available to the employer. A savvy practitioner should start with the assumption that most of the workforce database is subject to production in discovery. The key, therefore, is for the employer to understand and be prepared for what the database shows before the database has to be produced in the discovery. At the outset, employers should have a facile understanding of how their employee database is constructed, what is contains and how it can (or cannot) parse and segregate employee data in a way that is helpful to the employer. To the extent an employer has multiple databases, a review of all of those related to employment will assist the employer in identifying, correcting or explaining any conflicting data between databases. The database review will assist the employer in obtaining a greater understanding of available fields of information in the database that might support legitimate business reasons for employment decisions later challenged in litigation. These files might include those that allow the employer to "carve out" its data geographically, by business unit or department, by union representation, or by craft. Based on the initial analysis, decisions may be made to capture additional information in the database and/or correct inaccurate or out of date information.

An example of the importance of precise data collection might be the employer seeking to defend a class action resulting from an alleged discriminatory reduction in force. If that employer simply codes all of the parting employees as "T" for "terminated," the employer will likely have a far more difficult time defending the class action than the employer who has previously identified the parting employees with precise reason codes (such as "V – voluntary departure," "R – retired," "D – quit for disability," or "F – fired"). Since one of the fundamental requirements of establishing a "class" for a class action lawsuit is commonality, the more the employer can differentiate between employees in the database, the greater the chance for avoiding class certification. This also may achieve a reduction in the number of members of the alleged class and a more useful analysis of relevant decisions.

2. *Analyzing Employment Data*

Careful and confidential analysis of hiring, promotion, transfer, compensation, and termination personnel data may identify areas of vulnerability where the company's employment

practices are creating statistically significant disparities between similarly situated male/female and non-minority/minority employees. Specific suggested analyses include:

a. Pay Equity Analysis

Employers should examine their compensation data to insure that similarly situated male and female employees, as well as similarly situated white and minority employees, are being paid the same for performing comparable positions. Admittedly, this analysis is extensive and likely will require the assistance of an expert. Nonetheless, it can help identify disparities that cannot be explained by legitimate, non-discriminatory factors (such as experience, seniority, performance, education, etc.).

b. Promotion Analysis

Employers should conduct a study of the percentage, frequency, and time of promotions among its women and minority populations and compare the resulting data to the percentage, frequency and time of promotions among similarly situated male and white employees. Assuming statistically significant variations are found, the employer should then examine promotion processes to determine if a particular set of practices (*i.e.* promoting from a pool of predominantly male candidates) may contribute to the adverse data or if there are legitimate and defensible factors which will explain the differences. Such an analysis will focus not only on the numbering frequencies of promotions, but also on whether there are *de facto* limits on the level women and minority employees attain ("glass ceiling" analysis). As the data base permits, the analysis should also consider the "velocity" of promotions. Given a defined cohort of entry class employees, how much time does it take for a white or male employee to advance as compared to a protected class employee?

c. Evaluations Analysis

In conjunction with the promotion analysis described above, an employer should analyze its evaluation system. This analysis should involve the following steps: First, determine if the results of the above promotion analysis are affected significantly by disparities and performance evaluation scores. Second, review the performance evaluation system to ensure there are non-discriminatory reasons for any disparities. To do so, determine whether information systems can generate a statistically valid database for the further study of performance evaluations. Alternatively, select a statistically reliable sample of performance evaluations for review. Finally, analyze the data obtained on performance evaluations to determine whether there is a correlation between evaluation results/scores and a protected characteristic, *i.e.*, race or gender.

d. Training Opportunities Analysis

To the extent the database contents permit, employers should compare the training opportunities offered to female and minority employees to similarly situated white male employees. The objective of the analysis is to determine whether there is a negative correlation

between training opportunities and a protected characteristic. If that correlation is found, the next step is to determine if the phenomenon can be explained by legitimate factors.

e. "Glass Wall": Analyze Placement of Employees

A careful analysis of the placement of employees throughout the company will help determine whether a disproportionate share of the protected class is found in a particular function or department. This analysis should include a determination of whether there was a justifiable explanation, such as a self selection or seniority, for the resulting disproportionate share. In the absence of a justifiable explanation, a disproportionate number of the protected class in a particular function or department may subject the employer to vulnerability for a charge of unlawful steering on the basis of one or more protected characteristics.

f. Termination Analysis

Employers should similarly study the termination rates among its female, minority and over 40 employee populations and compare them to the rates of similarly situated male, white and under 40 populations.

V. HOW TO REPORT AUDIT RESULTS

Normally, audit results are reported in both a written format and an oral presentation, although this may vary depending upon the severity of the problems uncovered. Guidelines for preparing the report and presentation follow:

A. Base the report on objective facts which have been verified in the audit. Avoid impressions, speculation, and needlessly incriminating statements. Do not exaggerate.

B. Include a description of the audit process including by whom, and how the audit was conducted, who was interviewed, and what categories of documents were evaluated.

C. Identify issues addressed and recommend solutions.

D. Prepare a complete, balanced report by including what the company has done correctly.

E. In drafting a written report, recognize that it could very well be used as an exhibit against the company in a subsequent lawsuit despite efforts to protect the confidentiality of audit results.

F. Assure that corrective action is taken and then documented. All issues identified in the report should be addressed and documents should be prepared confirming that all problems uncovered have been corrected.

G. Consider a follow-up, mini-audit six months to a year after presenting the audit report, focusing on any problem areas identified in the initial audit and the effectiveness of the solutions which have been implemented.

H. Each copy of the final audit report should be destroyed after they are read by the chief executive officer or members of the board of directors. Corporate counsel should keep one remaining original copy of the report in a private file under lock and key and ensure that others who have no legitimate reason to see it do not have access to it (this is to preserve whatever attorney-client privilege may apply to the report).

VI. CORRECTING PROBLEM AREAS IDENTIFIED IN THE AUDIT

As stated above, the most important part of the audit process is correcting the problems uncovered in the audit itself. Again, if the employer is not willing to correct the problems its finds, it should not undertake the audit in the first place.

Although there is no risk free way to correct problems an employer uncovers in the course of an audit, there are simple steps an employer can take to manage that risk, minimize the potential that further damages will occur, and make itself a less attractive target to plaintiffs' counsel.

The first rule is to make no admissions. To illustrate additional steps, let's use as an example a group of employees that the employer believes has been misclassified as exempt. As a first step, the employer may reclassify the employees as non-exempt, however, this obviously may result in litigation, so it must be handled with care. One strategy is to make this change as a part of larger reorganization, including a shifting in job responsibilities, within the employer's operation, so that the change from exempt to non-exempt status is not highlighted. Alternatively, the employer might, in the course of the same operational restructuring, enhance the job responsibilities of the group of employees that it believes to be misclassified so that their exempt status is solidified. In either event, making this change in the context of a corporate restructuring is desirable.

The employer might also consider, in cases where liability is clear, informing employees that it has conducted a review of the duties of the position at issue and determined that in the future employees holding that position should be paid on an hourly basis instead of a salary basis. The employer should then calculate how much back overtime the employee would be owed using a two-year statute of limitations with no liquidated damages, no interest, and applying the fluctuating work week method to calculate the back pay owed. The employer can enclose a check in that amount to the employee, advising the employee of the basis for its calculation of overtime hours worked, and that if the employee has any information to suggest that he or she worked a different number of hours, the employee should provide it to the employer. This approach should reduce the risk of litigation which could involve significantly more liability including attorney's fees, a third year of liability, and liquidated damages. In addition, it illustrates to employees that if the employer makes a mistake it takes corrective action and there is no need for them to involve third parties, such as a plaintiffs' attorneys, labor

unions, or government agencies. Although a release is not generally valid with respect to claims under the FLSA, unless the settlement is obtained through the U.S. Department of Labor Wage/Hour Division, this is not the case with respect to many other claims. Thus, depending upon the nature of the claim under federal or state law, the employer may consider requiring the employee to execute a release, or at least an acknowledgment that he or she has been fully compensated or is fully satisfied with the remedy, in exchange for the payment.

VII. CONCLUSION

In labor and employment law, an ounce of prevention is worth a pound of cure. Although a thorough and rigorous labor and employment is not a simple chore, if done correctly, it pays tremendous dividends not only by reducing the risk of a major labor or employment law claim, but through improved employee relations, and a better qualified workforce.

8984762.1 (OGLETREE)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
District Office

, 2009

Re:
Charge Number et. al.*

Dear Mr.

As you know, the above-referenced charges have been assigned to me for investigation. I have reviewed and analyzed Respondent's position statements, but additional information is necessary to complete the investigation of these charges. Please submit a response to the following request for information by **Tuesday, 2009**.

Please identify any computerized or machine-readable files that are or have been maintained by the employer (or any other entity under contractual or other arrangement) since 2006 which contain data on personnel activities. This type of file would include, but not be limited to, information such as date of application, date of hire, educational history, employment history, reason for non-selection, amounts of pay, work assignments, test results, training, promotions, transfers, terminations, job status and so forth. For each file identified, please provide the following information: (Sub-files containing identical data to larger files need not be identified.)

a. The name of the file.

b. The name, model number, operating system, configuration and location of the mainframe or personal computer used to process the file. The name and version of the mainframe or personal computer software that is used to create, to access, to analyze or to produce reports from the files.

c. The date on which the company started using the file and, if the file is no longer used, the date it was discontinued. Name the predecessor and successor file, if any.

d. The medium on which the file is kept, e.g., tape, hard disk, or floppy diskette.

e. The name, title, department, business address and telephone number of the person who is

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responsible for maintaining and updating the procedure for collecting records and verifying the accuracy of them as they are entered into the file.

f. If applicable, the number of record types and their designation.

g. The approximate number of records on the file.

h. The name and commonly understood description of each field or variable on the file.

i. The file documentation, including file layout and field formats. That is, specify the beginning field and length of each variable, whether the variable is alpha or numeric, and the format of each variable such as date formats or numeric formats indicating decimals or "packed" data.

j. The definition of all codes used in the file.

k. Whether the file contains information on all of Respondent's employees. If not, the categories of employees that have been excluded from the file.

l. If the computerized files are maintained under contractual or other arrangements, please provide the following:

(1) the name and address of each such company, agency, or individual and its relationship with respondent.

(2) the inclusive dates of such contract or arrangement; and

(3) the precise purpose and nature of services provided under each such contract or arrangement.

This request for information does not necessarily represent the entire body of evidence which we may need to obtain from your organization in order for a proper determination to be made. You will be contacted if additional information or an on-site investigation is needed. You may be assured that any information or explanation you provide will not be made public during the course of the investigation.

If the Commission does not receive the requested information by _____, a subpoena to take testimony may be served on Respondent. This subpoena will order Respondent to appear in the Commission's Office to testify as to its response to the allegations contained in this charge, to produce documents responsive to this request for information, to make Respondent's facility available for an on-site inspection by the Commission, and/or to make witnesses employed by Respondent available for interviews by the Commission. **Alternatively, if you fail to respond as instructed herein, the Commission can infer that your refusal to provide a substantive response is detrimental to your position. Therefore, the Commission may draw an adverse inference against Respondent as to the information sought.**

The Commission's procedural regulations provide that officers of the Commission may engage in

settlement discussions prior to the issuance of a determination of reasonable cause. If the employer wishes to engage in settlement discussions to resolve the issues of this charge to all parties' satisfaction, please contact me.

I may be reached by telephone at or in writing at the address and fax number shown above. My email address is

Sincerely,

SAMPLE RESPONSE TO EEOC DOCUMENT RETENTION NOTICE

[CLIENT] acknowledges receipt of the Commission's EEOC Form 131 (5/01), which recites the provisions of 29 CFR § 1602.14. This regulatory provision directs a respondent to preserve "all personnel records relevant to the charge." *Id.* [CLIENT] has undertaken reasonable and good faith measures to secure the paper and electronic "personnel records" that, based on the description of the charge provided by the Commission and complainant, it in good faith has determined are relevant to the allegations that have been raised.

The Commission also served [CLIENT] with a typewritten "Document Retention Notice Pursuant to Charge of Discrimination" (the "Notice"). The Notice demands that [CLIENT] retain certain broad categories of information and that it undertake specified steps to retain information. [CLIENT] notes that several categories of information listed in the Notice clearly fall outside of the scope of 29 CFR § 1602.14. See, e.g., *Nichols-Villalpando v. Life Care Centers of America*, No. 05-2285-CM, 2007 WL 1560307, at *3 (D. Kan. May 30, 2007) (noting categories of employee related documents and information that are not required to be retained pursuant to 29 CFR § 1602.14). Furthermore, the requirements of this Notice are overbroad and unduly burdensome and do not accurately reflect [CLIENT]'s preservation duties, if any, under other sources of law. Any preservation duty that [CLIENT] may have requires it to undertake good faith and reasonable efforts to preserve relevant data and information. See The Sedona Principles Addressing Electronic Document Production (the "Sedona Principles"), Principle 5. Many of the procedures and demands set forth in the Notice, such as preserving "file fragments" or suspending the overwriting of back-up tapes, are generally recognized as not reasonable and should only be undertaken in extraordinary circumstances. See Sedona Principles, Principle 8, Comment 8c (forensic data collection should not be required "unless exceptional circumstances warrant the extraordinary cost and burden"); cf. *Scotts Co. LLC v. Liberty Mut. Ins. Co*., 2007 WL 1723509, at **2-3 (S.D. Ohio June 12, 2007) (denying forensic copy of information sought by plaintiff). Moreover, given the nature of backup media rotation and the date of the alleged conduct, [CLIENT] is not aware of any unique information that is contained on its disaster recovery back-up media that would relate to the subject matter of the charge. If the Charging Party deleted any electronic information from any [CLIENT]-owned asset or network within the 30 days preceding the Notice of Charge that may be relevant to the charge, then please notify us as soon as possible.

If the Commission or the complainant is aware of specific managers or employees who are not named in the charge but who they would allege possess information relevant to the subject matter of the charge, or of facts that would place this in the narrow class of cases where the extraordinary burden of forensic copying should be considered, [CLIENT] formally requests that the Commission expeditiously identify those individuals or facts to ensure that the Company can make appropriately informed decisions as to document preservation. To the extent that the Commission insists on the extraordinary burden of taking mirror images of hard drives without the disclosure of such facts, [CLIENT] is willing to discuss such a procedure if the Commission is willing to bear the cost of such preservation. See, e.g., *Balboa Threadworks, Inc. v. Stucky*, 2006 WL 763668, at *5 (D. Kan. Mar. 24, 2006) (directing plaintiffs to pay for forensic copying of defendants' hard drives).

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-3512

SHARYN STAGI, individually and on
behalf of all others similarly situated;
WINIFRED LADD,
Appellants

v.

NATIONAL RAILROAD PASSENGER
CORPORATION, t/d/b/a AMTRAK

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 2-03-cv-05702)
District Judge: Honorable Anita B. Brody

Argued May 28, 2010

Before: McKEE, Chief Judge,
RENDELL and STAPLETON, Circuit Judges.

(Filed : August 16, 2010)

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OPINION OF THE COURT

RENDELL, Circuit Judge.

Plaintiffs Sharyn Stagi and Winifred Ladd brought a class action against the

National Railroad Passenger Corporation ("Amtrak"), asserting that a company policy requiring all union employees to have one year of service in their current position before they could be considered for promotion has a disparate impact on female union employees in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and the Equal Protection component of the Due Process Clause of the Fifth Amendment. The District Court, presented with motions for class certification and for summary judgment, granted summary judgment in favor of Amtrak, finding that "the plaintiffs' evidence of disparate impact lack[ed] both statistical and practical significance," thus concluding that "the plaintiffs have failed to make out a *prima facie* case of discrimination under Title VII." *Stagi v. Nat'l R.R. Passenger Corp.*, Civ. No. 03-5702, 2009 WL 2461892, at *1 (E.D. Pa. Aug. 12, 2009) (*Stagi II*).

Although it is a close call, we will reverse and remand for further proceedings consistent with this opinion.

I.

At issue in this case is Amtrak's policy referred to as the "one-year blocking rule." Under that rule, a union member must be in her current union position for at least one year in order to be eligible for promotion into a management position. The policy states, "[a]n agreement covered employee may not apply for a posted non-agreement covered

position unless he or she has been in his or her current union for one year." App. 299.[1] The rule has no exceptions. The rule was first promulgated on May 1, 1994 and was revised in September 2000, which revision was in force during the time period relevant for this case.

Plaintiffs Stagi and Ladd are long-time Amtrak employees who have been employed in both its union and management ranks during their careers. Stagi began her career at Amtrak in 1973 as a reservation and information clerk, and eventually worked her way up to various union positions until the early 1990s, when she was promoted to a management position. She was in a management position in April 2002 when she was laid off as a result of a corporate-wide management restructuring effort. Ladd was promoted to management in 1986 and continued to be promoted through management until April 2002, when her job was similarly eliminated. Because they had previously worked in Amtrak's union ranks, they were both entitled to "bump down" into a union position based on their retained union seniority. In the year following their layoffs, both applied for management vacancies, some of which they had previously held or

[1] Although the policy says "in his or her current union[,]" the parties agree that the policy has been interpreted and applied by Amtrak as blocking an employee who has not been in his or her current union *position* for at least one year. *See Stagi II*, 2009 WL 2461892, at *1 n.4 ("Although the way the rule is written appears to prevent consideration of agreement-covered employees based on time-in-current-*union*, since at least 1999 or 2000, the Policy has been applied consistently to consider time-in-*position*, not time-in-union . . . . The language of the policy [sic] was changed in 2004 (after the commencement of this litigation).").

supervised. They were both blocked by the one-year rule from being considered for those positions. Stagi remains in her union position. Ladd was not able to return to management before 2004, when she left on long-term disability and retired with benefits inferior to those she would have enjoyed had she been permitted to access a management position.

In October 2003, Stagi filed a class complaint, and later amended it to add Ladd. Plaintiffs' complaint alleges that Amtrak violated Title VII, 42 U.S.C. § 2000e *et seq.*, and the Equal Protection component of the Due Process Clause of the Fifth Amendment by adopting and applying the one-year rule to plaintiffs.

In May 2005, Amtrak moved for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure. The District Court denied Amtrak's motion holding that plaintiffs had "made out a prima facie case" of disparate impact by the blocking rule at issue here. *Stagi v. Amtrak*, 407 F. Supp. 2d 671, 676 (E.D. Pa. 2005) (*Stagi I*).

The District Court held a discovery conference on January 2, 2006, and plaintiffs moved to compel production of discovery material related to the qualifications of the various management positions as well as the work histories and other qualifications of union employees who might have been qualified for management positions (although they might be blocked by the one-year rule). The court held additional discovery conferences on April 4, 2007 and May 4, 2007. One of the issues discussed at each conference was the use and availability of qualifications data. Amtrak subsequently produced certain

employee data in July 2007. Based in part on this data, plaintiffs submitted an expert report by Mark R. Killingsworth on October 23, 2007. Amtrak submitted a responsive expert report by David W. Griffin on January 25, 2008.

Plaintiffs filed a motion for class certification under Rule 23 on February 29, 2008. Before that motion was fully briefed, Amtrak moved for summary judgment on April 21, 2008. Briefing was complete for the class certification motion on June 6, 2008 and for the summary judgment motion on November 17, 2008. A hearing was held on July 21, 2009, at which each party's expert testified. By memorandum and order dated August 12, 2009, the District Court granted Amtrak's summary judgment motion.[2] *Stagi II*, 2009 WL 2461892, at *13. Plaintiffs timely appealed.[3]

II.

A. Title VII and Disparate Impact

Under Title VII of the Civil Rights Act of 1965, it is unlawful for an employer 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,

[2] On appeal, plaintiffs argue that the District Court erred in ruling on the summary judgment motion when it did because the District Court had informed the parties that the July 21 hearing would be limited to questions relating to class certification. Because we will reverse the District Courts's order granting summary judgment on other grounds, we need not decide this issue.

[3] The District Court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(4). We have jurisdiction under 28 U.S.C. § 1291.

color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(2). This prohibition against disparate impact is distinct from disparate treatment by an employer, which requires a showing of discriminatory intent. Under Section 2000e-2(a)(2), an otherwise facially neutral business practice that disproportionately affects or impacts a protected group may be unlawful. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); *see also Lanning v. SEPTA*, 181 F.3d 478, 485 (3d Cir. 1999). "Title VII strives to achieve equality of opportunity by rooting out artificial, arbitrary, and unnecessary employer-created barriers to professional development that have a discriminatory impact upon individuals." *Connecticut v. Teal*, 457 U.S. 440, 451 (1982) (internal quotation marks omitted). Accordingly, the Supreme Court has noted that "[i]n considering claims of disparate impact . . . this Court has consistently focused on employment and promotion requirements that create a discriminatory bar to *opportunities*. This Court has never . . . requir[ed] the focus to be placed . . . on the overall number of minority or female applicants actually hired or promoted." *Id*. at 450.

A prima facie case of disparate impact discrimination has two components. First, a plaintiff must identify "the specific employment practice that is challenged." *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 994 (1988). Second, the plaintiff must show that the employment practice "causes a disparate impact on the basis of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(k)(1)(A)(i). To show causation, the plaintiff must present "statistical evidence of a kind and degree sufficient to show that the

practice in question has caused exclusion of applicants for jobs or promotions because of their membership in a protected group." *Watson*, 487 U.S. at 994; *see also EEOC v. Greyhound Lines*, 635 F.2d 188, 193 (3d Cir. 1980).

If a plaintiff makes out a prima facie case, the burden shifts to the employer to show that the employment practice at issue is job related for the position in question and is consistent with business necessity.[4] *Watson*, 487 U.S. at 994; 42 U.S.C. § 2000e-2(k)(1) (clarifying that to maintain a claim, plaintiff must make out a prima facie case and the employer must then "fail[] to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity").[5]

B. The Prima Facie Case

As the District Court noted, there is no "rigid mathematical formula" courts can mandate or apply to determine whether plaintiffs have established a prima facie case. *Stagi II*, 2009 WL 2461892, at *3. If statistical evidence is used, as it typically will be in disparate impact cases, it must be "sufficiently substantial" to raise "an inference of causation." *Id*. (quoting *Watson*, 487 U.S. at 994-95). The Supreme Court has not provided any definitive guidance about when statistical evidence is sufficiently

[4] The District Court did not reach the issue of business necessity because it held that plaintiff failed to establish a prima facie case and ended its inquiry.

[5] The statute also allows plaintiff to show that an alternative employment practice exists that has a less disparate impact and would also serve the business's legitimate interest and the employer refuses to adopt it. 42 U.S.C. § 2000e-2(k)(1)(A)(ii); *Lanning*, 181 F.3d at 489-90. This alternative is not relevant here.

substantial, but a leading treatise notes that "[t]he most widely used means of showing that an observed disparity in outcomes is sufficiently substantial to satisfy the plaintiff's burden of proving adverse impact is to show that the disparity is sufficiently large that it is highly unlikely to have occurred at random." 1 B. Lindemann & P. Grossman, *Employment Discrimination Law* 124 (4th ed. 2007) (hereinafter "Lindemann & Grossman"). This is typically done by the use of tests of statistical significance, which determine the probability of the observed disparity obtaining by chance.

There are two related concepts associated with statistical significance: measures of probability levels and standard deviation. Probability levels (also called "p-values") are simply the probability that the observed disparity is random—the result of chance fluctuation or distribution. For example, a 0.05 probability level means that one would expect to see the observed disparity occur by chance only one time in twenty cases—there is only a five percent chance that the disparity is random. A standard deviation is a unit of measurement that allows statisticians to measure all types of disparities in common terms.[6] In this context, the greater the number of standard deviations from the mean, the greater the likelihood that the observed result is not due to chance. To offer some sense

[6] Technically, a standard deviation is defined as "a measure of spread, dispersion, or variability of a group of numbers equal to the square root of the variance of that group of numbers." D. Baldus & J. Cole, *Statistical Proof of Discrimination* 359 (1980). The "variance" of the group of numbers is computed by subtracting the "mean," or average, of all the numbers, "squaring the resulting difference, and computing the mean of these squared differences." *Id.* at 361.

of the relationship between these two measures, two standard deviations corresponds roughly to a probability level of 0.05; three standard deviations correspond to a probability level of 0.0027. *See* Lindemann & Grossman 126 n.85 and accompanying text.

As a legal matter, the Supreme Court has stated that "[a]s a general rule for . . . large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the [result] was random would be suspect to a social scientist." *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977). Additionally, many courts accept a 0.05 probability level (or below) as sufficient to rule out the possibility that the disparity occurred at random. *See, e.g.*, *Waisome v. Port Auth.*, 948 F.2d 1370, 1376 (2d Cir. 1991) ("Social scientists consider a finding of two standard deviations significant, meaning there is about one chance in 20 that the explanation for a deviation could be random and the deviation must be accounted for by some factor other than chance." (citation omitted)); *Palmer v. Shultz*, 815 F.2d 84, 92-96 (D.C. Cir. 1987) (noting that "statistical evidence meeting the .05 level of significance . . . [is] certainly sufficient to support an inference of discrimination" (citation and internal quotation marks omitted, alterations in original)).

In addition to using formal measures of statistical significance, some courts have also relied upon the "80 percent rule" from the Equal Employment Opportunity Commission's (EEOC) Uniform Guidelines on Employee Selection Procedures to assess

whether a plaintiff has established a prima facie disparate impact case. *See, e.g.*, *Stout v. Potter*, 276 F.3d 1118, 1124 (9th Cir. 2002) (applying "four-fifths rule" and calling it "rule of thumb" courts use when considering adverse impact of selection procedures); *Boston Police Superior Officers Fed'n v. City of Boston*, 147 F.3d 13, 21 (1st Cir. 1998) (affirming district court's use of four-fifths rule in context of consent decree, holding that, although "violation of the four-fifths rule, standing alone, is not conclusive evidence of discrimination," it nonetheless serves as an "appropriate benchmark"); *Smith v. Xerox Corp.*, 196 F.3d 358, 365 (2d Cir. 1999) (finding EEOC Guidelines "persuasive"). These Guidelines are codified at 29 C.F.R. § 1607.4(D), entitled "Adverse impact and the 'four-fifths rule,'" and they state, in relevant part,

> A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.

29 C.F.R. § 1607.4(D).

EEOC Guidelines are entitled only to *Skidmore* deference, *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), under which EEOC Guidelines "get[] deference in accordance with the thoroughness of [their] research and the persuasiveness of [their] reasoning." *El v. SEPTA*, 479 F.3d 232, 244 (3d Cir. 2007) (citing *EEOC v. Arab*

American Oil Co., 499 U.S. 244, 257 (1991)).[7] The "80 percent rule" or the "four-fifths rule" has come under substantial criticism, and has not been particularly persuasive, at least as a prerequisite for making out a prima facie disparate impact case. The Supreme Court has noted that "[t]his enforcement standard has been criticized on technical grounds . . . and it has not provided more than a rule of thumb for the courts." *Watson*, 487 at 995 n.3. *See also* Lindemann & Grossman 130 (noting that the 80 percent rule "is inherently less probative than standard deviation analysis"); E. Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII*, 91 Harv. L. Rev. 793, 806 (1978) (arguing that the "four-fifths rule should be abandoned altogether" and that "flaws in the four-fifths rule can be eliminated by replacing it with a test of . . . statistical significance").

Another non-statistical standard that has been discussed in the context of assessing whether a plaintiff has made out a prima facie case is the requirement that the disparity have "practical significance."[8] For example, Lindemann and Grossman write that "[t]o

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[7] It is worth noting that although the Supreme Court initially said that EEOC Guidelines were entitled to "great deference," the Supreme Court itself has made it clear that this is not the case. As we noted in *El v. SEPTA*: "It does not appear that the EEOC's Guidelines are entitled to great deference. While some early cases so held in interpreting Title VII, *Griggs*, 401 U.S. at 434 . . . more recent cases have held that the EEOC is entitled only to *Skidmore* deference." 479 F.3d at 244 (citing *Arab American Oil*, 499 U.S. at 257).

[8] A related concern, that the statistical disparity be "substantial," has been held out as an additional requirement for a plaintiff's prima facie case. *See, e.g.*, *Thomas v. Metroflight, Inc.*, 814 F.2d 1506, 1511 n.4 (10th Cir.1987) (suggesting that courts may require, in addition to statistical significance, that the observed disparity be substantial).

guard against the possibility that a finding of adverse impact could result from the statistical significance of a trivial disparity or a meaningless difference in results, the Uniform Guidelines on Employee Selection Procedures and some courts have adopted an additional test for adverse impact: that a statistically significant disparity also has practical significance." Lindemann & Grossman 131 (citations omitted).

We can identify no Court of Appeals that has found "practical significance" to be a requirement for a plaintiff's prima facie case of disparate impact, including the Third

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This requirement, however, appears to be derived from the Supreme Court's early disparate impact cases that were decided prior to the use of formal notions of statistical significance as the means by which causation was to be demonstrated. In these early formulations of the causation requirement, rather than requiring a particular level of statistical significance, the Supreme Court required that the relevant rule had a "substantially" disproportionate effect. *See, e.g.*, *Griggs*, 401 U.S. at 426 (examining "requirements [that] operate[d] to disqualify Negroes at a substantially higher rate than white applicants"); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (plaintiffs are required to show "that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants"); *Washington v. Davis*, 426 U.S. 229, 246-47 (1976) ("hiring and promotion practices disqualifying substantially disproportionate number of blacks"); *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (employment standards that "select applicants for hire in a significantly discriminatory pattern"). The Supreme Court has made it clear that the "substantial" language was meant to address the plaintiff's burden to demonstrate causation. As the Supreme Court noted in *Watson*, the Supreme Court's "formulations . . . have consistently stressed that statistical disparities must be sufficiently substantial that they raise . . . an inference of causation," in other words, that the statistical disparities are adequate to "show that the practice in question has *caused* the exclusion of applicants for jobs or promotions because of their membership in a protected group." 487 U.S. at 994-95 (O'Connor, J., plurality opinion) (emphasis added). The requirement of "substantiality" was not meant to introduce an additional burden on the plaintiff above that of offering evidence of causation.

Circuit. The "practical significance" language stems from the EEOC Uniform Guidelines on Employee Selection Procedures, which note that "[s]maller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and *practical* terms." 29 C.F.R. § 1607.4(D) (emphasis added). However, even the non-binding EEOC Guidelines only suggest that "practical significance" might be a requirement when differences in the selection rate were greater than eighty percent. *Id*. The one case identified by Lindemann and Grossman, *Waisome*, noted that the EEOC Guidelines, including the aforementioned one, "provide no more than a rule of thumb to aid in determining whether an employment practice has a disparate impact." 948 F.2d at 1376 (internal quotation marks and citation omitted), *cited in* Lindemann & Grossman 131 n.98. The Second Circuit Court of Appeals in *Waisome* did disregard a finding of statistical significance (2.68 standard deviations), but on the grounds that the African-American pass rate for a written examination was 87% of the white pass rate, and that the statistical significance of the disparity would disappear if just two additional African-American candidates, out of a total of 64 African-American candidates, had passed the written examination. 948 F.2d at 1376-77. Other courts have also found that, in cases where the "statistical significance" of the results would disappear if the numbers were altered very slightly, the plaintiff failed to make out a prima facie case. *See, e.g.*, *Apsley v. Boeing Co.*, --- F. Supp.2d ---, No. 05-1368, 2010 WL 2670880, at *18 (D. Kan. June 30, 2010) (noting that "[s]tatistical significance does not tell us whether the disparity we

are observing is meaningful in a practical sense nor what may have caused the disparity," and finding that because of the fact that if "forty-eight more people over the age of 40 would have been hired, Plaintiffs' hiring statistics would not have been statistically significant," plaintiffs failed to establish a prima facie case). As "practical" significance has not been adopted by our Court, and no other Court of Appeals requires a showing of practical significance, we decline to require such a showing as part of a plaintiff's prima facie case.

In sum, to establish a prima facie case of disparate impact in a Title VII case, a plaintiff must (1) identify a specific employment policy or practice of the employer and (2) proffer evidence, typically statistical evidence, (3) of a kind and degree sufficient to show that the practice in question has caused exclusion of applicants for jobs or promotions (4) because of their membership in a protected group. *See Watson*, 487 U.S. at 994. With respect to meeting her burden with respect to (3), a plaintiff will typically have to demonstrate that the disparity in impact is sufficiently large that it is highly unlikely to have occurred at random, and to do so by using one of several tests of statistical significance. There is no precise threshold that must be met in every case, but a finding of statistical significance with a probability level at or below 0.05, or at 2 to 3 standard deviations or greater, will typically be sufficient. *See Castaneda*, 430 U.S. at 496 n.17.

III. The District Court Decision

As noted above, the District Court granted Amtrak's summary judgment motion on the grounds that Plaintiffs failed to carry their burden of presenting a prima facie case of disparate impact. This decision was based on two main considerations: (1) that "the applicant pool plaintiffs analyzed to demonstrate the disparate impact of Amtrak's policy erroneously compares employees who may not have the minimal qualifications for the particular jobs at issue," and (2) that "when viewed in context, plaintiffs' evidence of discrimination lacks practical significance." *Stagi II*, 2009 WL 2461892, at *13. The District Court's reasoning behind these conclusions is nuanced and worth considering in some detail.

The District Court, in laying out the standard for a prima facie disparate impact case, correctly noted that the plaintiff does not need to offer proof of the employer's subjective intent to discriminate, but that, instead, she must "first identify the specific employment practice that is challenged" and then she must "show causation" by offering "statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Stagi II*, 2009 WL 2461892, at *3 (internal quotation marks and citations omitted). The District Court also noted that the "statistical disparities must be sufficiently substantial such that they raise an inference of causation." *Id*. (internal quotation marks and citation omitted).

The District Court then stated that there is no "rigid mathematical formula that

satisfies the sufficiently substantial standard in the disparate impact analysis." *Id*. (internal quotation marks and citation omitted). But rather than discuss the importance of various measures of statistical significance, particularly with respect to demonstrating that the disparity is unlikely to have been the product of chance, the District Court instead referenced the EEOC Guidelines "eighty percent" rule. The District Court stated that "the Supreme Court has indicated that the guidance of this administrative body should be considered with 'great deference,' and no consensus has developed around any alternative standard." *Id*. (quoting *Griggs*, 401 U.S. at 433-34). The District Court did note that this rule "is not intended to be an absolute requirement." *Id*.

Applying its statement of the law to the facts of the case before it, the District Court noted that Plaintiffs satisfied the first part of their prima facie case by identifying the one-year rule as the specific employment practice being challenged. *Id*. at *4. The District Court then conducted an extended discussion of the statistical evidence of disparate impact offered by Plaintiffs in the form of the expert report of Dr. Killingsworth, and the criticism of that report by Amtrak's expert, Dr. Griffin.

The District Court found that the one-year rule makes this situation equivalent to an "entrance requirement" case, which means that the pool of *actual* applicants for the position will under-represent those who would otherwise qualify, because the requirement itself would discourage the people who are claiming that the requirement has a disparate impact from applying. *Id*. at *5. The District Court noted that "[i]n such cases, it is

proper to establish disparate impact through reference to a reasonable proxy for the pool of individuals actually affected by the alleged discrimination." *Id*. (internal quotation marks and citation omitted).

The District Court then discussed Dr. Killingsworth's method for creating proxy pools. The key part of Dr. Killingsworth's method of creating the proxy pools is this multi-step process:

> (1) Identify each management vacancy occurring during the time at issue (between March 8, 2002 and June 30, 2007).
>
> (2) Of that full set of vacancies, isolate the vacancies that were filled by a union employee (which we will refer to as a "job fill").
>
> (3) For each successful union employee, identify the job title that the union employee had *prior* to getting the management job (which we will refer to as a "feeder job").
>
> (4) Define a "Feeder Pool" for a particular management vacancy as the set of people who had the same job title as the successful candidate for that vacancy on the date just before the vacancy was filled.

Dr. Killingsworth's model, using the above approach, identified 716 separate "Feeder Pools," each tied to a specific management vacancy, at a specific point in time. Each entry in a pool is called a "candidacy," rather than a candidate or person because the same potential applicants (or people) could be in more than one Feeder Pool. After discussing Dr. Killingsworth's method of creating the Feeder Pools, the District Court found that "[b]ased on the information provided to Dr. Killingsworth by Amtrak, plaintiffs' method is a reasonable one." *Id*. at *6.

The District Court objected, however, to Dr. Killingsworth's decision to "aggregate" all of the individual Feeder Pools into "one giant pool" (the "Aggregated Pool") in order to analyze "the degree to which the Policy disqualified women in the Aggregated Pool relative to men." *Id*. Specifically, Dr. Killingsworth combined all 716 individual Feeder Pools into one large pool in order to conduct his statistical analysis. The District Court noted that when Dr. Killingsworth analyzed the data using a "corrected probit analysis" (which corrects for the fact that the same individual might appear in more than one pool), the results yielded a standard deviation of 3.855, with a p-value of less than 0.001—results which the District Court acknowledged were "unlikely to have occurred as a result of chance alone."[9] *Id*.

Despite the statistical significance of this result, however, the District Court found that Plaintiffs had not done enough to carry their prima facie burden. First, the District Court was convinced by Amtrak's argument that Dr. Killingsworth's analysis was flawed, and that the statistical significance of his result was thus irrelevant. Amtrak's expert, Dr. Griffin, offered a report demonstrating that if one does not combine the 716 Feeder Pools into one large Aggregated Pool, and if, instead, one just examines whether women in each individual Feeder Pool were ineligible at a greater than expected level (given the

[9] The District Court also noted that using an "uncorrected" conventional chi-square test to analyze the data, Dr. Killingsworth's results were even more statistically significant (in terms of being unlikely to have occurred at random), with a standard deviation measure of 8.42.

ineligibility rate of that particular pool), one does not find that women were disadvantaged relative to men at a statistically significant level.

Dr. Griffin determined this by first determining the percentage of ineligible men and women in a particular Feeder Pool (i.e., if 50 out of 500 people are blocked, the total ineligibility rate would be 10%). Next, Dr. Griffin multiplied that percentage by the total number of women in the pool to determine the number of "expected" ineligibles (i.e., if there were 300 women in the pool, multiplied by 10%, one would expect 30 women in the pool to be ineligible). Finally, Dr. Griffin compared the "expected" number of ineligible women with the actual number of ineligible women in the pool, to assess whether there was a shortfall or a surplus of ineligible women in that particular pool, relative to what was expected (i.e., if 20 women were actually ineligible, then there would be a shortfall of 10 women—10 fewer women were ineligible than would be expected given the Feeder Pool's particular ineligibility rate as a whole).

Having conducted this analysis for approximately 600 "job fills," Dr. Griffin then summed the surpluses and shortfalls of ineligible women across those approximately 600 "job fills." This resulted in a net surplus of 6.2 ineligible women, meaning that 6.2 fewer women were promotion eligible than would have been if there were perfect gender parity across all 600 job fills. As the District Court noted, "[s]ix fewer promotion eligible females across 600 plus 'job fills' is *not* statistically significant by any measure, and does not support an inference of discrimination." *Id*. at *8 (emphasis in original).

At this point, the District Court noted that "the parties have merely presented two different statistical models that produce opposite results," and that "[s]imply demonstrating that an alternative analysis leads to alternative results is not sufficient to defeat a plaintiff's prima facie case—the defendant must also show that there is no genuine issue of material fact that plaintiffs' model is fundamentally flawed for the purpose of demonstrating disparate impact in the case at issue." *Id*. (citation omitted). The District Court continued:

> The key difference between the experts can be boiled down to this: Dr. Griffin looks at whether women applying to job X are disadvantaged relative to men applying to job X, whereas Dr. Killingsworth analyzes whether women applying to jobs X and Y are disadvantaged relative to men applying for jobs X and Y, combined. When seen in those terms, the difference between the expert analysis presented in this case is simply a question of whether the plaintiffs have analyzed the appropriate relevant labor pool for purposes of comparison. This question can be decided as a matter of law.

Id. at *9. Essentially, the District Court saw itself as forced to decide whether Dr. Killingsworth's decision to aggregate the 716 Feeder Pools into one Aggregate Pool was appropriate, and considered this to be a question of law.

The District Court noted that "[a]ggregated statistical data may be properly used to prove disparate impact where it is more probative than subdivided data," *id*. (citing *Paige v. California*, 291 F.3d 1141, 1148 (9th Cir. 2002)), but that "'[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications)

may have little probative value.'" *Id*. (quoting *Hazelwood Sch. Dist. v. U.S.*, 433 U.S. 299, 308 n. 13 (1977)). The District Court then stated that Dr. Killingsworth acknowledged that every union employee was not fungible for purposes of promotion, since he created the 716 Feeder Pools, "otherwise he would have simply compared all union employees across the board." *Id*. The District Court contended that because Dr. Killingsworth takes the "distinctions between job categories [to be] important . . . then the defendant's argument that these distinctions should be maintained throughout the analysis rings true." *Id*. Accordingly, the District Court found that "because plaintiffs' analysis is focused on an overbroad and incomparable pool of employees, it lacks the statistical significance necessary to make out a prima facie case of discrimination." *Id*. at *11.

In the alternative, the District Court found that "[e]ven if Dr. Killingsworth's methodology was sound and his results recognized as having 'statistical significance,' the results of his analysis are undermined by a lack of practical significance." *Id*. at *12. To reach this conclusion, the District Court credited Dr. Griffin's calculation that if female candidates in the Aggregated Pool had the same eligibility rate as male candidates, this would have translated to a "gender gap" of only 726 additional female promotion-eligible candidacies (not necessarily equal to the number of affected individual people or candidates) overall. The District Court also noted that, under the EEOC Guidelines' "80 percent rule," the adverse impact ratio's "practical significance is of limited magnitude," since the ratio here was 96.8 percent—well over the 80 percent baseline. *Id*.

In conclusion, the District Court found that "the applicant pool plaintiffs analyzed to demonstrate the disparate impact of Amtrak's policy erroneously compares employees who may not have the minimal qualifications for the particular jobs at issue," and that "plaintiffs' evidence of discrimination lacks practical significance." *Id*. at *13. The Court therefore granted Amtrak's motion for summary judgment.

IV.

We review a district court's grant of summary judgment *de novo*. *See, e.g.*, *Slagle v. County of Clarion*, 435 F.3d 262, 263 (3d Cir. 2006). Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate when "there is no genuine issue as to any material fact." The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *El*, 479 F.3d at 237 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The court must draw all reasonable inferences against the moving party. *Id*. at 238. "If the moving party successfully points to evidence of all of the facts needed to decide the case on the law short of trial, the non-moving party can defeat summary judgment if it nonetheless produces or points to evidence in the record that creates a genuine issue of material fact." *Id*. "Thus, if there is a chance that a reasonable factfinder would not accept a moving party's necessary propositions of fact, pre-trial

judgment cannot be granted." *Id*.

We find that there is a genuine issue of material fact as to whether the one-year rule caused a disparate impact on female employees. Accordingly, although it is a close case, we find that the District Court should not have granted Amtrak's motion for summary judgment based on this record.

As noted above, to establish a prima facie case of disparate impact in a Title VII case, a plaintiff must (1) identify a specific employment policy or practice of the employer and (2) proffer evidence, typically statistical evidence, (3) of a kind and degree sufficient to show that the practice in question has caused exclusion of applicants for jobs or promotions (4) because of their membership in a protected group. To establish (3), a plaintiff will typically have to demonstrate that the disparity in impact is sufficiently large that it is highly unlikely to have occurred at random, and to do so by using one of several tests of statistical significance. A plaintiff need not demonstrate that the disparate impact ratio satisfies the EEOC's 80 percent rule (the figure at which or below the EEOC will presume the existence of disparate impact). As noted above, the EEOC Guidelines are not entitled to great deference, but to *Skidmore* deference, under which EEOC Guidelines "get[] deference in accordance with the thoroughness of [their] research and the persuasiveness of [their] reasoning." *El*, 479 F.3d at 244 (citing *EEOC v. Arab American Oil Co.*, 499 U.S. at 257). The 80 percent rule has come under significant criticism and we do not find the reasoning that might support its application here persuasive in light of

the statistical significance of Dr. Killingsworth's results.

Similarly, this Court has never established "practical significance" as an independent requirement for a plaintiff's prima facie disparate impact case, and we decline to do so here. The EEOC Guidelines themselves do not set out "practical" significance as an independent requirement, and we find that in a case in which the statistical significance of some set of results is clear, there is no need to probe for additional "practical" significance. Statistical significance is relevant because it allows a fact-finder to be confident that the relationship between some rule or policy and some set of disparate impact results was not the product of chance. This goes to the plaintiff's burden of introducing statistical evidence that is "sufficiently substantial" to raise "an inference of causation." *Watson*, 487 U.S. at 994-95. There is no additional requirement that the disparate impact caused be above some threshold level of practical significance. Accordingly, the District Court erred in ruling "in the alternative" that the absence of practical significance was fatal to Plaintiffs' case.

There is no question that Dr. Killingsworth's results, if the product of a relevant and otherwise compelling statistical analysis, are statistically significant above the threshold that courts have required.[10] As noted above, when Dr. Killingsworth analyzed the data using a corrected probit analysis, the results yielded a standard deviation of

[10] Even Amtrak concedes that the results, if they stand, meet the threshold requirement for statistical significance. Oral Arg. Tr., 47-48.

3.855, with a p-value of less than 0.001—meaning the results are incredibly unlikely to have occurred as a result of chance alone. The Supreme Court has suggested that a standard deviation between 2 and 3 would be sufficient, and Dr. Killingsworth's results are considerably above that. *See, e.g.*, *Castaneda*, 430 U.S. at 496 n.17.

Thus, the only issue is whether the District Court was correct in finding that Dr. Killingsworth's statistical analysis was, in effect, legally irrelevant to satisfying Plaintiffs' burden with respect to their prima facie case because his analysis used aggregation, and in particular the Aggregated Pool, in conducting his statistical analysis. We find that Dr. Killingsworth's decision to aggregate the data, although not obviously correct, is also not obviously incorrect, and so there remains a genuine issue of material fact—whether the one-year rule caused a disparate impact on Amtrak's female employees.

The one-year rule applies to all union employees. However, including all union employees in the statistical sample would have been inappropriate, since many of them may not have been even remote candidates for *any* management position. To identify all those union employees who might reasonably be thought to be candidates for a management position, Dr. Killingsworth identified those candidates who obtained a management position during the relevant five-year span, and then identified the previous union positions held by those candidates. At that point, Dr. Killingsworth assumed, and the District Court found this assumption reasonable, that all those individuals who were in the same union position as the position that the successful candidate had previously

occupied might reasonably be thought to have been a possible candidate for the management position that the successful candidate actually obtained. Thus, if Smith was hired into Management Position One, and Smith had previously been in Union Position One, Dr. Killingsworth assumed that all other individuals—Jones, Williams, Johnson, etc.—who had been in Union Position One were possible candidates for Management Position One. This is not a perfect proxy, as all parties concede. For example, Smith might have had much more experience than Jones and Williams, or he might have educational degrees that they lack. But, given that the one-year rule operates as an initial bar from even becoming a candidate for a job, the only way to measure its effect is to devise some way of identifying those who might reasonably be thought to have been possible candidates were it not for the existence of the one-year rule. We agree with the District Court that Dr. Killingsworth's method here was reasonable.

It is true that while "the population selected for statistical analysis need not perfectly match the pool of qualified persons," without "a close fit between the population used to measure disparate impact and the population of those qualified for a benefit, the statistical results cannot be persuasive." *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1196 (10th Cir. 2006). One must have the proper pool of people in view before performing statistical analysis, or that analysis will be irrelevant. This, however, goes to the issue of whether Dr. Killingsworth's use of the individual Feeder Pools was reasonable or not. In discussing this issue, the District Court stated:

> In the absence of explicit measures of qualifications and job interest, Dr. Killingsworth assumed that information about the position held prior to promotion could reasonably serve as an indicator of qualifications and job interest. Based on the information provided to Dr. Killingsworth by Amtrak, plaintiffs' method is a reasonable one.

Stagi II, 2009 WL 2461892, at *6. We agree.

Where the District Court identified a problem was with the combining of the individual Feeder Pools into one Aggregated Pool. The District Court stated that because Dr. Killingsworth takes the "distinctions between job categories [to be] important" in creating the individual Feeder Pools, "then the defendant's argument that these distinctions should be maintained throughout the analysis rings true." *Id*. at *9. Amtrak's counsel made this same point repeatedly at oral argument, stating that "if you're going to live in a stratified world, you have to follow that stratified world through to your analysis" and that "the problem is that we're aggregating after we stratify, that's the heart of the matter." Oral Arg. Tr., at 41, 45.

However, neither the District Court nor Amtrak's counsel has offered a convincing explanation of why the use of aggregated data in this case is improper. The District Court reintroduces the "qualifications" issue, asserting that "[t]he single aggregated statistic Dr. Killingsworth relies on compares individuals who may never actually be in competition for the same jobs, and does not accurately account for what job the employee in question is coming from, where they are looking to go, and what the relevant qualifications are." *Stagi II*, 2009 WL 2461892, at *9. But this criticism misses its target. Creating the

Aggregated Pool out of the individual Feeder Pools does not erroneously imply that a person from Feeder Pool A (created based on Management Position A) is a possible candidate, along with the members of Feeder Pool B, for Management Position B. Rather, it just puts together all of those people (or candidacies, more precisely) who are in union positions currently, and who are reasonably thought of as possible candidates for *some management position or other*. All of these people are susceptible to the one-year rule, and thus all of them are potentially "blocked" by its uniform application if they have served less than one year in their respective union positions. Aggregating the individual Feeder Pools in this way appears to be no more problematic, at least with respect to the issue of qualifications, than doing what Dr. Griffin did when he simply "added up" the difference between the expected ineligibility rate and the actual ineligibility rate for each of the 600 plus individual Feeder Pools.

At various points, Amtrak's counsel at oral argument appeared to be arguing that, as a matter of *consistency*, once one has subdivided the pool into categories, one ought not to recombine those categories into an aggregate pool. The District Court appeared to accept a similar line of thought when it noted that because Dr. Killingsworth took the "distinctions between job categories [to be] important" in creating the individual Feeder Pools, "then the defendant's argument that these distinctions should be maintained throughout the analysis rings true." *Id*. at *9. But there has been no argument made that somehow the statistical analysis is corrupted if one "changes horses" from a stratified to

an aggregated analysis midstream. Indeed, Amtrak's counsel explicitly stated that "the actual manner in which [Dr. Killingsworth] performs the numbers is not incorrect, it's the underlying numbers that are the problem." Oral Arg. Tr., at 44. Finally, Plaintiffs' counsel stresses that they never were doing a "stratification" analysis in the first place, but that they were simply attempting to "define what is the subset of total union employees who seemed to be in positions that made them eligible to seek promotion." *Id*. at 56.

A final possible reason to object to the use of aggregated data is presented by the District Court when it notes that Dr. Griffin's report suggests that there are some Feeder Pools in which fewer women than men were made ineligible by the one-year rule, and some in which the reverse was true, and that the overall result of women doing worse than men (at least under Dr. Killingsworth's model) obscures these facts. This would be a reason against aggregating insofar as aggregating produces a misleading picture of the overall situation for women. (As one court has noted, "[i]f Microsoft-founder Bill Gates and nine monks are together in a room, it is accurate to say that on average the people in the room are *extremely* well-to-do, but this kind of aggregate analysis obscures the fact that ninety percent of the people in the room have taken a vow of poverty." *Abram v. United Parcel Serv. Inc.*, 200 F.R.D. 424, 431 (E.D. Wis. 2001).) For example, it might be that in 400 of the 716 Feeder Pools, women are made ineligible at a rate significantly greater than that of men, and that in 316 of the Feeder Pools, the reverse is true. In such a situation, the one-year rule appears to have a disparate impact on women only in a subset

of the 716 Feeder Pools.

Plaintiffs' second expert, Ramona Paetzold, submitted an affidavit arguing that stratification is inappropriate in this case precisely because of this possibility. In particular, stratification is inappropriate because the numbers of women in each feeder job at any given point in time is determined, in part, by the existence of the one-year rule itself, "because the one-year rule at least partially affects how long men and women must remain in the feeder job before being eligible for promotion." Paetzold Aff. 3. The District Court contends that this is a problem for Plaintiffs, because "the gender composition of feeder jobs may very well be affected by additional factors such as wage levels, working conditions, movement prospects, layoffs, and the union's collectible bargaining agreement that allows unrestricted lateral job movements among union employees, none of which the plaintiffs have made any attempt to identify or control for in their analysis." *Stagi II*, 2009 WL 2461892, at *10. But this seems to be a problem only if the reasons against aggregation are compelling. There is no legal requirement to use the smallest possible unit of analysis. If there are additional factors (such as seniority rules)—apart from just the one-year rule—that are determining the composition of the individual Feeder Pools in a "gendered" way, these factors may aid Amtrak in mounting a business justification defense, but it is inappropriate to require Plaintiffs to control for every possible such factor in order to sustain their burden of proving a prima facie case. If the aggregated data yields a statistically significant finding, such as the one here, that

the one-year rule is having a disparate impact on women, and there is no compelling reason to avoid use of aggregated data, that is enough for Plaintiffs to establish their prima facie case.

Additionally, there may be good reasons to aggregate data in a case such as this—reasons that have nothing to do with simply picking and choosing the model which will generate the most favorable results for plaintiffs' case. Perhaps most significantly, as the Fourth Circuit has observed, "by increasing the absolute numbers in the data, chance will more readily be excluded as a cause of any disparities found." *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326, 336 n.17 (4th Cir. 1983). This makes intuitive sense. "For example, if a coin were tossed ten times . . . and came up heads four times, no one would think the coin was biased (0.632 standard deviations), but if this same ratio occurred for a total of 10,000 tosses, of which 4,000 were heads, the result could not be attributed to chance (20 standard deviations)." *Id*. Here, by combining all of those candidacies in the 716 Feeder Pools into one Aggregated Pool, Dr. Killingsworth was better able to test whether the difference in the ineligibility rate for men and women was merely the product of chance. Many courts have found such a reason for aggregating compelling. *See, e.g.*, *Eldredge v. Carpenters 46 N. California Counties Joint Apprenticeship and Training Comm.*, 833 F.2d 1334, 1339 (9th Cir. 1987) ("Aggregated data presents a more complete and reliable picture."); *Cook v. Boorstin*, 763 F.2d 1462, 1468-69 (D.C. Cir. 1985) (rejecting defendant's argument to restrict statistical analysis to particular job categories);

Capaci v. Katz & Besthoff, 711 F.2d 647, 654 (5th Cir. 1983) (allowing a plan to aggregate data over several years because aggregation was necessary in order to accomplish a meaningful statistical analysis).

At a minimum, we find that there is a genuine issue of material fact as to whether the one-year rule caused a disparate impact on female employees. It is possible that there are reasons to prefer Dr. Griffin's methodology to Dr. Killingsworth's methodology, given that they yield conflicting conclusions regarding whether the one-year rule has an all-things-considered disparate impact on women. But we cannot so conclude on this record, and the reasons presented by the District Court for finding that Plaintiffs have failed to make out a prima facie case do not withstand scrutiny. Accordingly, we find that the District Court should not have granted Amtrak's motion for summary judgment based on this record.

V.

We will reverse the judgment of the District Court granting Amtrak's motion for summary judgment and will remand for further proceedings consistent with this opinion.

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