Applying Disparate Impact Theory to Subjective Employee Selection Procedures

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APPLYING DISPARATE IMPACT THEORY TO
SUBJECTIVE EMPLOYEE SELECTION
PROCEDURES

I. INTRODUCTION

Congress rendered race, color, religion, sex and national origin invisible to employers in 1965, when Title VII of the Civil Rights Act of 1964 took effect. The central provisions of Title VII make it unlawful to base hiring or any subsequent employment decision on these protected characteristics. To enforce Title VII, Congress established the Equal Employment Opportunity Commission (EEOC), vesting it with authority to issue administrative regulations, investigate unlawful employment practice charges, mediate disputes and institute civil actions in district court when mediation fails. The Department of Justice may also bring suit in certain circumstances. If the EEOC and the Department of Jus-

2. Title VII establishes that:
   (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
   (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.
3. Id. § 2000e-4.
4. Id. § 2000e-12. See infra text accompanying notes 80-94.
5. 42 U.S.C. § 2000e-5. "If the Commission determines . . . that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." Id. § 2000e-5(b). "If . . . unable to secure . . . a conciliation agreement . . ., the Commission may bring a civil action." Id. § 2000e-5(f)(1).
6. Title VII states in pertinent part: "In the case of a respondent which is a government, governmental agency, or political subdivision, . . . the Attorney General . . . may bring a civil action against such respondent in the appropriate United States district court." Id. § 2000e-5(f)(1).

The Department of Justice's pre-1972 authority in system-wide pattern or practice cases reads as follows:
Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter [title VII], and that the pattern
tice decide not to pursue legal action, Title VII complainants may sue on their own behalf in district court.\(^7\)

Since 1965, federal courts have decided thousands of Title VII lawsuits.\(^8\) Courts analyze Title VII cases using two major theories formulated by the Supreme Court—disparate treatment and disparate impact.\(^9\) Disparate treatment is a motivation-based theory; it requires proof of discriminatory intent to support a finding of unlawful discrimination.\(^10\) Courts typically use disparate treatment to analyze cases involving overt discrimination, for example, where a company publicly refuses to hire Catholics;\(^11\) pretextual discrimination, where a complainant charges un-
fair treatment but the employer denies wrongful motivation; and systemic discrimination, where a "pattern or practice" of unfair treatment is so pervasive that discriminatory intent may be inferred.

Unlike the disparate treatment theory, the disparate impact theory does not require proof of improper intent to sustain a Title VII violation. Disparate impact analysis is result-oriented, focusing on facially neutral employment practices that fall more harshly on members of groups protected by Title VII.

The Supreme Court first articulated the disparate impact theory in *Griggs v. Duke Power Co.*, a 1971 race discrimination case. In *Griggs*, the Court found that use of standardized tests violated Title VII because the tests screened out a significantly larger proportion of blacks than whites (hence the later adopted term "disparate impact"). Although *Griggs* involved objective tests, the Court's conclusion that lawful intent "does not redeem employment procedures . . . or testing mechanisms" may be interpreted to mean that any employment procedure, objective or subjective, can violate Title VII if it has a disproportionate, adverse effect on women or minorities. In *Griggs*, the Supreme Court did not define the term "employment procedures," nor has it subsequently identified

12. *McDonnell Douglas*, 411 U.S. at 801 (complainant alleged he was denied rehire due to civil rights activities, but the employer denied any discrimination).

13. *Hazelwood School Dist. v. United States*, 433 U.S. 299, 303 (1977) (pattern or practice of discrimination found where school district had history of racial prejudice, hired first black teacher in 1969, was accused of 55 specific instances of discrimination, used standardless hiring policies, and exhibited "gross" statistical disparity in black hiring rates compared to pool of qualified black teachers in the area); *Teamsters*, 431 U.S. at 337 (system-wide pattern or practice of discrimination found where black and Hispanic employees were historically excluded and, by 1969, still grossly underrepresented in desirable "line driver" jobs).


15. *Griggs*, 401 U.S. at 432. "[P]ractices, procedures or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Id.* at 430.

Though an employer's intent is honorable, its procedures may nonetheless operate to exclude or hinder progress of protected group members, hence causing disparate impact. See *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 583 (1978) (Marshall, J., dissenting in part).


17. *Id.* at 429, 431.

18. *Id.* at 432.

19. In Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 2357 (1985), the court interpreted *Griggs* broadly, emphasizing that the purpose of Title VII is "not well served" by "permit[ting] challenges only to readily perceptible barriers. . . . It is abundantly clear that Title VII tolerates no discrimination, subtle or otherwise." *Id.* at 1271-72, 1288 n.34 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973)).
the limits of disparate impact analysis. While the Court has employed disparate impact analysis to examine objective selection criteria such as height/weight minimums and non-drug-use requirements, the applicability of disparate impact analysis to subjective selection procedures remains undecided.

Lacking explicit Supreme Court guidance, the circuit and district courts have arrived at contradictory answers to the questions of whether and how to apply disparate impact theory to subjective selection procedures such as interviews and performance appraisals. Courts opposing disparate impact analysis of subjective procedures argue that such analysis places an unreasonable burden of justification on the employer. Conversely, courts favoring disparate impact analysis of subjective procedures contend that refusal to use such analysis hampers the achievement of Title VII's purpose.

The purpose of Title VII is to eliminate unlawful discrimination in employment. Currently, the statute is understood to prohibit both intentional and unintentional discrimination. This view is based on the belief that discrimination is often so deeply ingrained in employment systems that its presence goes unrecognized. People who make subjective employment decisions may, without intending to do so, perpetuate discriminatory patterns.

This Comment explores the issues of whether and how the non-motivational disparate impact theory may apply to subjective procedures. Parts I and II review Title VII's legislative history and outline

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20. Id. at 1271 (application of disparate impact model to non-specific employment practices does not place unreasonable burden on employer, notwithstanding fears expressed by Pouncy court); Pouncy v. Prudential Ins. Co. of Am., 668 F.2d 795, 801 (5th Cir. 1982) (plaintiff's failure to isolate variables causing racial imbalance barred application of disparate impact model).

21. See infra text accompanying notes 181-83.

22. Segar, 738 F.2d at 1271; see also infra note 199 for the circuits following the Segar court's view.

23. H.R. REP. No. 914, 88th Cong., 2d Sess. 2, reprinted in 1964 U.S. CODE CONG. & ADMIN. NEWS 2355, 2401. There was no conference committee to report on the 1964 civil rights bill. Therefore, the only complete source of legislative history for the bill as enacted is the thousands of pages of debate recorded in the Congressional Record.


26. "An important question on which there has been considerable confusion is whether the
relevant portions of the EEOC administrative guidelines. Part III summarizes Supreme Court cases that have framed the standards for disparate impact analysis, then sets forth two court of appeals decisions adopting diametrically opposite positions concerning the scope of disparate impact. Part IV analyzes practical and policy issues raised by applying disparate impact theory to subjective selection procedures and then proposes guidelines for examining subjective procedures under disparate impact theory. Finally, part V concludes that extending disparate impact analysis to subjective procedures is advisable because the benefits gained in advancing the purpose of Title VII outweigh the difficulties associated with a complex analysis.

II. LEGISLATIVE HISTORY OF TITLE VII

A. Roots of Title VII

Although Congress enacted Title VII under the authority of the commerce clause,\textsuperscript{27} the philosophical roots of equal employment opportunity law lie in the fourteenth amendment's equal protection clause.\textsuperscript{28} The nation's first civil rights acts emerged during the post Civil War Re-

\textit{Griggs-Moody} validation requirements apply to selection procedures other than the kind of objective tests and educational requirements actually involved in those cases." 3 A. LARSON \& L. LARSON, EMPLOYMENT DISCRIMINATION § 76.30, at 15-81 (1986). Larson and Larson contend that the \textit{Griggs-Moody} model should be limited to objective selection criteria. \textit{Id.}

27. 110 CONG. REC. 7209 (1964). Then-Deputy Attorney General Nicholas Katzenbach issued a Department of Justice opinion stating that, "We believe that the commerce clause of the Constitution (art. I, sec. 8) provides authority for Congress to enact fair employment practices legislation." \textit{Id.}

28. In 1857, a slim Supreme Court majority held that slaves, who counted as 3/5 of a person for apportionment purposes, were not "citizens" of the United States, and therefore could not claim the privileges and immunities of citizens. Dred Scott v. Sanford, 60 U.S. 393 (19 How. 1857).

After the Civil War, Congress enacted the thirteenth, fourteenth and fifteenth amendments, abolishing slavery and establishing the entitlement of all citizens to due process of law, equal protection of the law and freedom from state interference with their federal citizenship privileges. U.S. CONST. amends. XIII, XIV, XV.

In 1964, Senator Joseph Clark (D-Pa.), one of two Senate floor leaders supporting Title VII, explained that the commerce clause provided enabling authority, while the equal protection clause provided the underlying purpose for Title VII:

[Title VII] would establish a legislative civil right for what has always been a sacred American constitutional right, the right to equal protection of the laws. . . . [T]he philosophy behind [the equal protection clause] . . . is the philosophy behind the fair employment practice title.

It merely says, "When you deal in interstate commerce, you must not discriminate on the basis of race, religion, color, national origin, or sex." 110 CONG. REC. 13,080 (1964).

In Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964), the Supreme Court asserted that the Civil Rights Act of 1964 was based on \textit{both} the fourteenth amendment and the commerce clause. \textit{Id.} at 249.
construction era; they were enacted under the enabling authority of the fourteenth amendment. Their key provisions guaranteed to everyone the same right to contract as white people enjoyed (this provision has survived as Section 1981), barred discrimination under color of state law (now Section 1983), and promised equal access to public accommodations. However, the Supreme Court severely curtailed congressional authority to enact civil rights legislation in the 1883 Civil Rights Cases. The Court determined that Congress had exceeded its fourteenth amendment authority by enacting laws defining the amendment's scope, and that the amendment only prohibited state action. Following that narrow interpretation of the fourteenth amendment's enacting authority, eighty-two years elapsed before Congress passed another civil rights law.

30. Part of the 1866 Act, now codified at 42 U.S.C. § 1981 (1982), provides basically that people of all races shall have the same rights to make contracts, to sue, and to enjoy protection of the laws for personal security, as white citizens.
33. 109 U.S. 3 (1883); see also Senate discussion of public accommodations provision in 1964 Civil Rights Act, 110 Cong. Rec. 10,380-82 (1964).
35. Id. at 11, 13. The Court again constricted the application of the fourteenth amendment equal protection clause in Plessy v. Ferguson, 163 U.S. 537 (1896). The Plessy majority held that a Louisiana statute requiring racial separation on intrastate railway cars was constitutional under a reasonableness standard. Id. at 548, 550-51. The Court determined that a state "is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort" to determine what is "reasonable." Id. at 550. The majority asserted that the absolute equality required by the fourteenth amendment meant political equality and "could not have been intended to abolish distinctions based on color, or to enforce . . . a commingling of the two races." Id. at 544. The Plessy dissent foreshadowed the view adopted 50 years hence: "Our Constitution is color-blind. . . . The thin disguise of "equal" accommodations for passengers in railroad coaches will not mislead any one, nor alone for the wrong this day done." Id. at 559, 562 (Harlan, J., dissenting).
37. Members of Congress introduced fair employment practices legislation at every session between 1944 and 1963. Vaas, Title VII: Legislative History, 7 B.C. INDUS. & COM. L. REV. 431, 431 (1966). However, all of the bills died in committee or in Senate filibusters. Id.
38. Before the Civil Rights Act of 1964, the only federal law unambiguously prohibiting private employment discrimination was an Executive Order covering government contractors. In FREEDOM'S VANGUARD: NAACP REPORT FOR 1963 71 (1964) [hereinafter NAACP RE-
Sections 1981 and 1983, the surviving portions of the Reconstruction civil rights acts,37 and the equal protection clause itself, formed the major bases for employment discrimination actions before 1965.38 Even after the advent of Title VII, some discrimination plaintiffs continue to plead their cases alternatively under these theories.39 However, Sections 1981 and 1983, and the equal protection clause, present two serious limitations for people alleging employment discrimination. First, federal courts generally require purposeful discrimination to support a finding of liability under these theories.40 Second, these theories typically only pro-
hibit discrimination involving state action. Therefore, parties injured by unintentional discrimination, or by private employer discrimination, find their sole federal remedies under Title VII.

B. History of Title VII and the 1972 Amendments

Congress passed the Civil Rights Act of 1964 after a year of subcommittee hearings, drafts, amendments and protracted debate in the Senate. Contemporary commentators—including opponents—agreed that the new law created a revolutionary mandate for equality in employment opportunities, public accommodation, education and other essential areas.

The racial unrest of the early 1960s had made the country ripe for major civil rights legislation, as blacks began demanding their full rights and privileges as citizens. In June 1963, following a march-turned-riot


45. That [Negro] revolution . . . has burst out of the South to engulf the North . . . . It has seared the white conscience—even while, in some of its excesses, it has created bitterness . . . . And right up to the President of the U.S., it has forced white politicians who have long cashed in on their lip service to “civil rights” to put up or shut up.


The economic situation of many American blacks gave them added impetus to seek new civil rights legislation. From 1953-63, the median income for black families decreased from 57% to 53% of white family income. Id. at 13.

The NAACP reported that: “What was dramatically altered in 1963 was the temper of the American Negro and the attitude of the white majority. The ferment in the Negro commu-
in Birmingham, Alabama, President John F. Kennedy sent a message to Congress requesting new civil rights legislation. The President stressed the need to include provisions improving minority employment opportunities:

Unemployment falls with special cruelty on minority groups. The unemployment rate of Negro workers is more than twice as high as that of the working force as a whole. . . . Delinquency, vandalism, . . . and the high cost of public welfare are all directly related to unemployment . . . .

. . .

[R]acial discrimination in employment must be eliminated: Denial of the right to work is unfair regardless of its victim. It is doubly unfair to throw its burden on an individual because of his race or color.  

Several committees in the House of Representatives were already considering civil rights bills before President Kennedy's message. The administration's comprehensive bill, introduced one day after the President's message, was combined with key provisions of related bills and replaced twice with substitute amendments before it passed the House.

The equal employment provisions of the Civil Rights Act comprise Title VII. As reported by its original authors in the House Judiciary Committee, Title VII was designed "to eliminate, through . . . formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin." The House added a prohibi-
tion against sex-based discrimination as an amendment.52

Another essential purpose of Title VII was the establishment of a uniform, nationwide fair employment law.53 The House Judiciary Committee explained that the uniformity goal applied to the entire Civil Rights Act: “H.R. 7152 . . . is designed as a step toward eradicating significant areas of discrimination on a nationwide basis. It is general in application and national in scope.”54 Senator Joseph Clark (D-Pa.), one of two floor managers supporting Title VII, asserted that federal fair employment legislation law was essential because state and local laws were sometimes ineffective—and nonexistent where most needed: “[E]ffective enforcement is hampered by inadequate legislation, inadequate procedures, or an inadequate budget. Big interstate industry cannot effectively be handled by the States.”55 During the sixty-six day Senate filibuster on the Civil Rights Bill,56 senators proposed more than 500 amendments to the House-approved version57 and rewrote the entire bill twice.58

A key issue during Senate debate was whether the law should expressly require discriminatory intent to support a Title VII violation.59 Title VII opponents demanded inclusion of specific language requiring

52. 110 Cong. Rec. 2577-84, 2718, 2720-21 (1964). Vaas, supra note 36, at 439. A noted opponent of civil rights legislation, Representative Howard Smith (D-Va.) offered the sex amendment as a joke, referring to a letter from a female seeking to find out what Congress planned to do about the fact that American women outnumber American men. Id. at 441-42.
53. In 1964, 28 states and 48 cities had fair employment practices laws, which varied widely in scope and effectiveness. 110 Cong. Rec. 13,080 (1964). No states of the Old South had fair employment laws in 1964, and 60% of the non-white population lived in the 22 states lacking employment discrimination laws. Id.
55. 110 Cong. Rec. 13,080 (1964). Relatively few cases were pursued under pre-Title VII state and local fair employment laws, “and the overall impact on personnel practice [was] almost nil except for the fact that certain questions on . . . employment applications were eliminated.” M. Miner & J. Miner, Employee Selection Within the Law 4 (1979).
56. 110 Cong. Rec. 14,480 (1964) (recapitulation of events leading to passage of the Civil Rights Act, contained in final edition of Bipartisan Civil Rights Newsletter).
57. Senator Robert Byrd (D-W. Va.) lamented the inability of opposition Senators to block the cloture vote, which ended the filibuster and brought the Act to a vote: “Senate rules which provide for unlimited debate—call it filibuster if you will—constitute the final weapon possessed by a minority of States for their protection against a temporary and tyrannical majority.” Id.
58. Vaas, supra note 36, at 445-46. The two substitute bills were the product of extensive behind-the-scenes coordination among Senate and House leaders, the Attorney General and administration representatives. Id.
59. For example, Senator Sam Ervin (D-N.C.) attacked Title VII as a “thought control bill,” asserting that an employer could be “judged guilty or innocent on the basis of the contents of his mind at the time he commits the act, because discrimination is a mental process.” 110 Cong. Rec. 13,078 (1964). Senator Ervin further predicted that the bill would rob em-
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discriminatory purpose, while proponents argued that such language was unnecessary and redundant. Some Senators feared that the new law would ban any employment test that had the unintended effect of discriminating against minorities. To allay detractors’ fears and clarify the law’s reach, the Senate added amendments specifying that only unlawful employment practices intentionally engaged in could be enjoined, and that use of “professionally developed ability tests” would be permitted as long as the tests were not designed or used to discriminate. Senator Clark explained that the amended bill meant employment tests would only be unlawful if they were “used for the purpose of discriminating against an individual because of his race, color, religion, sex or national origin. . . . [I]t is not enough that the effect of using a particular test is to favor one group above another, to produce a violation of the act . . . .” Senator Hubert Humphrey (D-Minn.), one of the chief pro-

employers of the right to run their own businesses “in any case where a federal bureaucrat or a federal court rules that they were actuated by any racial motive.” Id.

For similarly lively discussions of intent, see 110 Cong. Rec. 7036, 7253-55 (1964).

60. Senator John Tower (R-Tex.) proposed an amendment allowing employers to use professionally developed tests even if such tests had the unintended effect of discriminating against “culturally deprived or disadvantaged groups.” 110 Cong. Rec. 13,492 (1964). The Senate approved a rephrased version of Senator Tower’s amendment. 110 Cong. Rec. 13,724 (1964). However, Title VII proponents believed that the amendment was only a clarifying change, not a substantive one. See infra notes 64-65 and accompanying text.

Accepting proponents’ interpretation of the intent requirement, Senator John Williams (D-Del.) said he would vote for Title VII as amended because “no employer can be held responsible for any violation, unless it can be proved . . . intentional.” 110 Cong. Rec. 14,331 (1964).

61. Title VII opponents wanted to ensure that federal law did not have the same effect as the Illinois decision, Motorola, Inc. v. Illinois Fair Employment Practices Comm’n, 51 Lab. Cas. (CCH) § 51,323 (Ill. Cir. 1963), which invalidated tests with unintended discriminatory effects. 110 Cong. Rec. 13,492-505 (1964).

62. That amendment, codified at 42 U.S.C. § 2000e-5(g) (1982), provides in part: “If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent . . . .”

63. The test amendment, codified at 42 U.S.C. § 2000e-2(h) (1982), provides: [I]t shall not be an unlawful employment practice for an employer to . . . give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

64. 110 Cong. Rec. 14,468 (1964). In a letter to the editor of the Wall Street Journal, Senator Clark emphasized that Title VII should be interpreted to exclude tests given in good faith. However, Clark asserted that he and the other members of the Labor and Public Welfare Committee thought Title VII should cover tests with unintended discriminatory results: “I believe that the situation presented in the Motorola case should be covered by Federal law. But whatever my preferences, and those of my colleagues . . . , the issues [of ostensibly nondiscriminatory tests] . . . have nothing to do with Title VII . . . and are plainly beyond its scope.” Id.
ponents of the civil rights bill, observed that the amendment limiting injunctions to intentional violators only reinforced the implicit meaning of the bill.

Since the title bars only discrimination because of race, color, religion, sex or natural [sic] origin it would seem already to require intent, and, thus, the proposed change does not involve any substantive change. . . . The express requirement of intent is designed to make it wholly clear that inadvertent or accidental discriminations will not violate the title . . . . 65

Thus, when Congress enacted the Civil Rights Act of 1964, Title VII was generally understood to prohibit only intentional employment discrimination. 66

By 1971, when Congress began considering major amendments to Title VII in the form of an Equal Employment Opportunity Act, 67 many senators and representatives had changed their thinking about the nature of job discrimination, whom it affected, and how to eradicate it. 68 The Senate and House committee reports recommending the 1972 legislation rejected the prevalent 1964 view that employment discrimination is a “series of distinguishable events, due, for the most part, to ill-will on the part of some identifiable individual or organization.” 69 Instead, the committees determined that job discrimination is a complex and pervasive phenomenon, better described “in terms of ‘systems’ and ‘effects’ rather than simply intentional wrongs.” 70 The committees concluded that identifying discrimination is no easy task, 71 and eliminating it is even more

65. Id. at 12,723-24. Richard Berg, a Justice Department attorney in 1964, concluded that the effect of the word “intentionally” in the statute was questionable—if it had any effect at all:

Discrimination is by its nature intentional. It involves both an action and a reason for the action. To discriminate “unintentionally” on grounds of race, color, religion, sex or national origin appears a contradiction in terms.

. . . .

If the Amendment . . . exempts such [subconscious, therefore unintentional] discrimination, the loss is hardly significant since such discrimination would be well-nigh impossible to prove.


66. See supra notes 64-65 and accompanying text.


68. H.R. REP. No. 238, supra note 25, at 2143-44; S. REP. No. 415, supra note 25, at 5.

69. H.R. REP. No. 238, supra note 25, at 2144; S. REP. No. 415, supra note 25, at 5.

70. S. REP. No. 415, supra note 25, at 4.

71. H.R. REP. No. 238, supra note 25, at 2144. “It is increasingly obvious that the entire area of employment discrimination is one whose resolution requires not only expert assistance, but also the technical perception that a problem exists in the first place . . . .” Id.
difficult, because "practices and policies of employment discrimination are so deeply ingrained."\textsuperscript{72} One of the most critical Title VII issues confronting legislators in 1972 was how to enforce the law more effectively.\textsuperscript{73} Based on the then-new assumption that discrimination is difficult to identify because it is deeply rooted in many employment systems, both committees concluded that the EEOC needed greater enforcement powers.\textsuperscript{74} Since 1965, the EEOC had resolved less than half of the 81,000 charges it had received through the voluntary conciliation procedure established in 1964.\textsuperscript{75} The 1972 Equal Employment Opportunity Act empowered the EEOC to bring action in district court if conciliation efforts failed.\textsuperscript{76} Title VII's key prohibitions—against consideration of protected characteristics in hiring, firing, promotion and job classification decisions—remained unchanged by the 1972 amendments.\textsuperscript{77} Similarly unaltered were the subsections permitting use of ability tests and limiting injunctions to employers who intentionally engage in an unlawful employment practice.\textsuperscript{78} Meanwhile, Supreme Court decisions and the EEOC procedural regulations (Guidelines) were changing the intent requirement of Title VII.\textsuperscript{79}

\section*{C. Key Provisions of the EEOC Guidelines}

Title VII authorizes the Equal Employment Opportunity Commission "from time to time to issue, amend, or rescind suitable procedural regulations."\textsuperscript{80} While these regulations lack the force of law, numerous courts have deferred to them as representing legislative intent.\textsuperscript{81}

\begin{thebibliography}{9}
\bibitem{72} S. REP. NO. 415, supra note 25, at 4.
\bibitem{73} H.R. REP. NO. 238, supra note 25, at 2139; S. REP. NO. 415, supra note 25, at 1, 4.
\bibitem{74} H.R. REP. NO. 238, supra note 25, at 2139; S. REP. NO. 411, supra note 25, at 1, 4.
\bibitem{75} S. REP. NO. 415, supra note 25, at 5.
\bibitem{76} Pub. L. 92-261 § 4, 86 Stat. 104 (1972), (codified at 42 U.S.C. § 2000e-5 (1982)). Other major changes effected by the 1972 Act included extending Title VII coverage to smaller employers (minimum number of employees was reduced from 25 to 15), non-religious schools and government employers. \textit{Id.} §§ 2, 3, 86 Stat. 103 (1972), (codified at 42 U.S.C. § 2000e(b) and § 2000e-1 (1982)).
\bibitem{78} The language remained as originally written in 1964. \textit{See supra} notes 62-63.
\bibitem{79} \textit{See supra} notes 67-73.
\bibitem{80} 42 U.S.C. § 2000e-12(a) (1982).
\end{thebibliography}
The EEOC issued its first Guidelines on Employment Testing Procedures in 1966.82 Those rules were superseded in 1970 by new Guidelines on Employee Selection Procedures,83 and again in 1978 by the Uniform Guidelines on Employee Selection Procedures.84 The 1978 Guidelines were issued jointly by the EEOC, the departments of Justice and Labor, and the Civil Service Commission.85

The 1970 edition of the Guidelines focused mainly on tests, requiring "validation" of any test "which adversely affects hiring, promotion, transfer or any other employment or membership opportunity of classes protected by Title VII."86 To validate a test, an employer had to conduct a validity study, using procedures generally accepted by the American Psychological Association to demonstrate that the test predicted or was significantly correlated to desired work behavior.87 A short section entitled "Other Selection Techniques" noted that such procedures as interviews and application forms may be discriminatory in use, and gave employers the choice of validating or eliminating such procedures if they caused discrimination.88 The brevity of this section, and its separation from the central "adverse effects" definition of discrimination, suggest that techniques other than tests were not considered serious problems by the EEOC.

The 1978 Guidelines expanded the reach of regulations governing adverse impact, stating that any "procedure having adverse impact constitutes discrimination unless justified."89 In addition to tests, the new regulations applied to any selection procedure, defined to include "the full range of assessment techniques from traditional paper and pencil tests . . . through informal or casual interviews and unscored application forms."90 Thus, by 1978, the administrative regulations issued by the agencies chiefly responsible for enforcing Title VII extended the validation requirements for procedures causing "adverse impact" to the full range of employment practices.91

The 1978 Guidelines failed to close one important loophole regarding unscored, subjective procedures. That loophole is an undefined re-
requirement for employers who use informal or unscored selection procedures with adverse impact. The rule gives such employers three alternatives to avoid violating Title VII: 1) eliminate the adverse impact; 2) change the procedure to an objective one that can be formally validated; or 3) "otherwise justify continued use of the procedure." How to "otherwise justify" informal or unscored selection procedures remains an open question.

III. DEVELOPMENT OF CASE LAW

A. Supreme Court Decisions

The Supreme Court has designed two models of analysis in Title VII cases: disparate treatment and disparate impact. Under the disparate treatment model, the court must find intentional discrimination. Under the disparate impact model, the court focuses on the effects of an employment procedure rather than the employer's intention.

Title VII plaintiffs may argue their cases under disparate treatment, disparate impact, or both models. Similarly, courts may apply either or both models in deciding a case. A court's choice of model has a significant effect on case outcome, because the patterns of proof differ substantially. For example, the defendant's evidentiary burden is heavier in the disparate impact model, so applying that model increases the plaintiff's likelihood of success. Some courts apply disparate treatment analysis to fact situations where often other courts would apply disparate impact analysis; this malleability of facts makes a sound understanding

92. Id. § 1607.6.B.
93. Id.
94. A. LARSON & L. LARSON, supra note 26, § 76.32, at 15-83.
95. See supra note 9.
96. See supra notes 14-15.
99. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252 n.5 (1981). "[T]he factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact . . . ." Id.
100. The ultimate burden of persuasion in disparate treatment remains on the plaintiff at all times. Burdine, 450 U.S. at 253. See also Board of Trustees v. Sweeney, 439 U.S. 24, 25 n.2 (1978). On the other hand, in disparate impact, the burden of proof shifts to the defendant after plaintiff establishes a prima facie showing of discrimination. The employer must prove "that the challenged requirements are job related." Dothard v. Rawlinson, 433 U.S. 321, 329 (1977).
of disparate treatment necessary to evaluate the proper scope of disparate impact.

The Supreme Court explained the three-step procedure for disparate treatment analysis in *McDonnell Douglas Corp. v. Green*,101 and refined it in subsequent cases.102 First, the complainant must establish a prima facie case of discrimination.103 The complainant may meet this preliminary burden by showing that: 1) he belongs to a protected group;104 2) he applied for and was objectively qualified for an open job; 3) he was rejected; and 4) the employer continued to seek additional applicants with the same qualifications.105 Second, the defendant must rebut the resulting presumption by articulating a "legitimate, nondiscriminatory reason" for the rejection.106 The employer's burden, as clarified in *Texas Department of Community Affairs v. Burdine*,107 is one of production, not persuasion; the explanation need only raise "a genuine issue of fact" as to whether the employer discriminated.108 The third step in disparate treatment analysis arises only if defendant has met its intermediary burden by offering a nondiscriminatory explanation.109 At that point, the complainant may introduce evidence showing that the employer's "stated reason for [complainant's] rejection was in fact pretext [for discrimination],"110—in other words, that "a discriminatory reason more likely motivated the employer."111 At the "pretext" stage, having heard all the evidence, the court "must decide which party's explanation of the employer's motivation it believes."112 Throughout the process of disparate treatment analysis, the ultimate burden of proving the employer's unlawful motivation is on the plaintiff.113

102. Burdine, 450 U.S. at 254 (defendant's intermediary burden is one of production, not proof; defendant's evidence rebuts presumption of intentional discrimination if it "raises a genuine issue of fact" concerning defendant's motive); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 580 (1978) (defendant may introduce broad range of evidence relevant to its motive in order to rebut plaintiff's prima facie showing).
104. In *McDonnell Douglas*, the Court stated that the prima facie case required a showing that plaintiff "belongs to a racial minority." *Id.* at 802.
106. *Id.*
108. *Id.* at 257.
110. *Id.*
111. Burdine, 450 U.S. at 256.
112. Aikens, 460 U.S. at 716.
113. Burdine, 450 U.S. at 253.
On the other hand, disparate impact theory places a greater burden on the party accused of discrimination.\(^4\) In *Griggs v. Duke Power Co.*\(^5\) and its progeny,\(^6\) the Supreme Court established a three-step inquiry for disparate impact cases.\(^7\) First, plaintiff must make a prima facie showing that a "facially neutral" selection procedure has a disparate impact on his or her protected group.\(^8\) Second, defendant must demonstrate that the challenged procedure is job-related or a business necessity.\(^9\) Finally, if defendant succeeds in justifying its procedure, plaintiff has the opportunity to show that "other tests or selection devices, without a similarly undesirable . . . effect, would also serve the employer's legitimate interest."\(^10\)

In *Griggs*, a class of black employees successfully argued that the requirement of a median score on standardized tests, or a high school diploma, violated Title VII because the requirement screened out a "markedly disproportionate number of Negroes."\(^11\) The test/diploma requirement was a prerequisite for employees seeking to transfer from labor or coal-handling departments to higher paying "inside" depart-

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\(^{114}\) In *Grant v. Bethlehem Steel Corp.*, 635 F.2d 1007 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981), the court explained: "The employer's burden of proving job-relatedness . . . is greater than its burden of merely showing a legitimate, non-discriminatory reason in response to a claim of discriminatory treatment. The hard, cold statistical record of impact provides a stronger circumstantial case of discrimination than a subjective claim of improper motivation." *Id.* at 1015.

\(^{115}\) 401 U.S. 424 (1971).

\(^{116}\) Connecticut v. Teal, 457 U.S. 440 (1982) (non-discriminatory final outcome of selection procedure does not justify intermediate step with disparate impact); Dothard v. Rawlinson, 433 U.S. 321 (1977) (if employer proves job-relatedness, the Court considers evidence of a less discriminatory alternative selection procedure available to defendant); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (the Court considers showing of less discriminatory alternative as evidence that neutral selection device was mere "pretext" for discrimination).

\(^{117}\) *Id.*

\(^{118}\) *Griggs*, 401 U.S. at 430-31.

\(^{119}\) *Id.* at 431. The operative language in *Griggs* states: "[t]he touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.*

\(^{120}\) *Albermarle*, 422 U.S. at 425.

\(^{121}\) *Griggs*, 401 U.S. at 428-29. The 1960 Census showed that in North Carolina, the site of the *Griggs* dispute, only 12% of black males had completed high school, while 34% of white males had done so. Also, the EEOC found that given a battery of standardized tests, similar to the tests employed in *Griggs*, 58% of whites passed, versus only 6% of blacks. *Id.* at 430 n.6.
ments. Until 1966, all black employees at the plant had worked "only in the Labor department where the highest paying jobs paid less than the lowest paying jobs in the other four 'operating' departments in which only whites were employed." The company instituted the transfer requirements in 1965, the year Title VII took effect; management asserted that the purpose of the requirements was to improve the general work force quality. However, the Court found that "employees who have not completed high school or taken the tests have continued to perform satisfactorily and make progress in departments for which the high school and test criteria are now used." The Court rejected the employer's selection devices because they were not job-related: "[A]ny tests used must measure the person for the job and not the person in the abstract."

The Griggs Court carefully reviewed the statutory language and legislative history to clarify legislative intent regarding tests. The Court narrowly interpreted the statute's "professionally developed ability test" language, which permits discrimination based on tests. Writing for the 8-0 majority, Chief Justice Burger found that Congress intended to limit the test exception to tests that are job-related. To support that view, the opinion cited a Senate memo stating that Title VII "expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications." The Court found additional support for its interpretation of the statute's test language in the EEOC Guidelines. The Guidelines required that tests fairly measure "the knowledge or skills required by the particular job or class of jobs which the applicant seeks." Because the 1964 Act created the EEOC and authorized it to issue regulations, the Court interpreted the guidelines as expressing the will of Congress.

Underlying the Court's ruling in Griggs was the resolution of a "question of first impression . . . concerning the meaning of Title VII"—

122. Id. at 427-28.
123. Id. at 427.
124. Id. at 427, 431.
125. Id. at 431-32.
126. Id. at 436.
127. Id. at 433-36.
128. Id. at 434-36.
129. Id.
130. Id. at 434 (emphasis in original).
131. Id. at 433 n.9 (citations omitted).
132. See supra notes 3-4.
133. Griggs, 401 U.S. at 434.
whether discriminatory intent was necessary to violate the statute.\textsuperscript{134} The Court was less than painstaking in citing legislative authority to explain the statute's purpose. Instead, the opinion announced that the objective of Congress was "plain from the language of the statute."\textsuperscript{135} Congress' objective, the unanimous decision stated,

was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.\textsuperscript{136}

This language in \textit{Griggs} contained the seeds of later disagreement concerning which "practices, procedures or tests"\textsuperscript{137} are subject to the job-relatedness requirement of the disparate impact theory. While the \textit{Griggs} Court applied the job-related requirement to objective tests, the language of the decision may be read to approve a broader application of disparate impact theory.\textsuperscript{138} For example, the opinion asserted that Title VII prohibits any "employment practice which operates to exclude Negroes [and] cannot be shown to be related to job performance . . . .\textsuperscript{139}

Since 1971, the Supreme Court has applied the disparate impact approach straightforwardly in cases involving objective selection procedures. For instance, the Court has found Title VII violations where disparate impact resulted from use of height/weight requirements for prison guards,\textsuperscript{140} an intelligence test for paper mill applicants,\textsuperscript{141} and a written examination for potential supervisors.\textsuperscript{142} In addition, the Court has used disparate impact analysis to uphold one employer's policy of

\begin{itemize}
\item\textsuperscript{134} \textit{Id.} at 428.
\item\textsuperscript{135} \textit{Id.} at 429.
\item\textsuperscript{136} \textit{Id.} at 429-30 (emphasis added).
\item\textsuperscript{137} \textit{See}, e.g., \textit{Spaulding v. University of Wash.}, 740 F.2d 686, 707 (9th Cir.) (disparate impact model was designed to handle specific employment practices not obviously job-related), \textit{cert. denied}, 469 U.S. 1036 (1984); \textit{Pouncy v. Prudential Ins. Co. of Am.}, 668 F.2d 795, 800 (5th Cir. 1982) (disparate impact model applies only to specific, nondiscretionary selection criteria).
\item\textsuperscript{138} \textit{See}, e.g., \textit{Segar v. Smith}, 738 F.2d 1249, 1288 n.34 (D.C. Cir. 1984) (disparate impact analysis applicable to procedures involving subjective judgments of agents' performance), \textit{cert. denied}, 105 S. Ct. 2357 (1985); \textit{Bethlehem Steel}, 635 F.2d at 1010-11 (2d Cir. 1980) (disparate impact theory applied to haphazard, subjective selection process).
\item\textsuperscript{139} \textit{Griggs}, 401 U.S. at 431.
\item\textsuperscript{140} \textit{Dothard v. Rawlinson}, 433 U.S. 321 (1977).
\item\textsuperscript{141} \textit{Albemarle Paper Co. v. Moody}, 422 U.S. 405 (1975).
\item\textsuperscript{142} \textit{Connecticut v. Teal}, 457 U.S. 440 (1982).
\end{itemize}
rejecting all job applicants who use methadone or narcotics,\textsuperscript{143} and another employer's policy of excluding pregnancy from disability benefits.\textsuperscript{144} The Court reasoned in the narcotics use case that non-user status was a job-related criterion.\textsuperscript{145} The pregnancy benefits case ended, however, at the prima facie stage; the Court held that excluding pregnancy coverage was not sex-based discrimination.\textsuperscript{146}

The Supreme Court addressed the possibility of applying disparate impact analysis to subjective selection procedures, albeit obliquely, in \textit{Furnco Construction Corp. v. Waters}\textsuperscript{147} and \textit{Connecticut v. Teal.}\textsuperscript{148} The High Court ruled in \textit{Furnco} that a firm's policy of refusing to consider applications at the job site should be evaluated under the disparate treatment model, not disparate impact.\textsuperscript{149} In \textit{Furnco}, three black bricklayers who applied for work at a company job site were rejected summarily, while the superintendent continued to seek other bricklayers from referrals and previous employees.\textsuperscript{150} The Court held that the employer's justification for its referrals-only hiring policy—that it needed bricklayers of known expertise—was a "legitimate nondiscriminatory reason" under the disparate treatment model.\textsuperscript{151} In a footnote, the Court explained that the \textit{McDonnell Douglas} approach was appropriate in \textit{Furnco} because the latter case did not involve employment tests, particularized job requirements, or a pattern or practice of discrimination.\textsuperscript{152}

Justice Rehnquist's 7-2 majority opinion in \textit{Furnco} did not affirm the district court's finding that the racially neutral policy of not hiring at the gate had no disparate effect.\textsuperscript{153} Nor did the Seventh Circuit, which reviewed \textit{Furnco} below, directly address the disparate impact issue.\textsuperscript{154}

Justice Marshall, dissenting in part, argued that Furnco Construction Company's hiring practices should be evaluated for possible dispa-
rate impact. Justice Marshall reasoned that a practice of limiting jobs to those with prior experience working in an industry or for a particular person, or to those who hear about jobs by word of mouth would be invalid if the practice in actuality impacts more harshly on a group protected under Title VII, unless the practice can be justified by business necessity.

The dissenting opinion also noted that the Furnco superintendent’s use of a hiring list, composed exclusively of white former employees, should be examined on remand for disparate impact. Justice Brennan was the only other Justice to sign Justice Marshall’s partial dissent in Furnco.

In 1982, four years after deciding Furnco, the Supreme Court considered a different aspect of disparate impact analysis in Connecticut v. Teal. The plaintiffs in Teal were black female employees who were passed over for promotion to permanent supervisor because they failed a written test. The test was the first step in a multi-component selection process; the other components were past performance, supervisory recommendations and seniority.

The Court’s central holding in Teal was that a nondiscriminatory “bottom line” result—such as an overall selection process that promotes blacks at a higher rate than whites—does not justify inclusion in the process of one component with adverse impact. Justice Brennan, writing for a 5-4 majority, ruled that any component with adverse impact must be proved job-related under the disparate impact theory. To support its use of disparate impact theory in Teal, the Court asserted that Congress “recognized and endorsed the disparate-impact analysis employed ... in Griggs.” The majority buttressed its holding in Teal by asserting that Congress, in enacting Title VII, “required ‘the removal of artificial, arbitrary, and unnecessary barriers to employment’ and professional development that had historically been encountered by women and blacks as

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155. Id. at 583 (Marshall, J., concurring in part and dissenting in part).
156. Id. (Marshall, J., concurring in part and dissenting in part).
157. Id. at 584 (Marshall, J., concurring in part and dissenting in part).
158. Id. at 581 (Marshall, J., concurring in part and dissenting in part).
160. Id. at 443-44.
161. Id. at 444.
162. Id. at 442. Although the “bottom line” favored blacks, the preliminary exam adversely affected them. The passing rate for blacks was 54.17% while the passing rate for whites was 79.54%. Id. at 443 n.4.
163. Id. at 445.
164. Id. at 447 n.8.
well as other minorities." Translating the policy goals—achieving equal employment opportunity and removing barriers to equality—into more concrete terms, the Court found that any "'identifiable pass-fail barrier [that] denies an employment opportunity to a disproportionately large number of minorities' . . . must be shown to be job-related." Under that rationale, the other components of the supervisory selection process in Teal, including the subjective past performance and supervisory recommendation components, must also be proved job-related if they create an "identifiable pass-fail barrier."

Taken together, the Griggs, Furnco and Teal decisions have created somewhat confusing guidelines for the scope of disparate impact theory. The Griggs Court determined that Title VII bars both overt and facially neutral discrimination, then explained that job-relatedness may justify discriminatory objective tests. In Furnco, the Court held that the McDonnell Douglas disparate treatment model provided the proper framework to analyze defendant's refusal to consider job site applicants. The Furnco Court suggested (in a footnote) that the Griggs approach is limited to tests and particularized requirements. Finally, in Teal, the majority stated that it is not enough to measure results at the bottom line—adverse impact must also be measured at intermediate "pass-fail barriers." In Teal, the potential "pass-fail barriers" included subjective components in the selection procedure. Based on these precedents, it is not surprising that federal district courts and courts of appeals have been inconsistent in deciding when to apply disparate impact analysis.

B. Contradictory Circuit Court Interpretations

The circuit courts have arrived at widely varying conclusions as to whether disparate impact analysis should apply to subjective selection procedures. Segar v. Smith, a 1984 District of Columbia Circuit

165. Id. at 447 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).
166. Id. at 449 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971)).
167. Id. at 445 (quoting Teal v. Connecticut, 645 F.2d 133, 138 (2d Cir. 1981)).
168. Id.
170. Id. at 431.
171. Furnco, 438 U.S. at 575.
172. Id. at 575 n.7.
174. Id. at 444 (employer considered supervisors' recommendations and past work performance).
175. See infra notes 179, 193-94 for examples of cases adopting different positions on the issues of subjective procedures.
decision, and *Pouncy v. Prudential Insurance Co. of America*, a 1982 Fifth Circuit decision, exemplify the irreconcilable positions that some circuits have advanced.

In *Pouncy*, the Fifth Circuit held that disparate impact theory was not applicable to the overall promotion and classification system, nor to subjective employee evaluations made by supervision. Pouncy, a black man who was not selected for promotion, asserted a disparate impact claim based on evidence that Prudential hired blacks at an average weekly salary lower than whites and promoted them at a lower rate than their representation in the company work force. The court rejected Pouncy’s disparate impact claim because “[t]he discriminatory impact model . . . is not . . . the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company’s employment practices. . . . Although some courts have used the disparate impact model to challenge multiple employment practices simultaneously, . . . this is an incorrect use.” Four other circuits have embraced the *Pouncy* court limitation of disparate impact analysis to single, objective selection devices. However, these four circuits have also ruled the opposite way on other occasions.

Other decisions, such as *Segar*, reject *Pouncy*’s narrow application in favor of an expansive use of the disparate impact theory. In *Segar*, the District of Columbia Circuit found that the Drug Enforcement Agency (DEA) violated Title VII by discriminating against its black agents,

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177. 668 F.2d 795 (5th Cir. 1982).
178. *Id.* at 800.
179. *Id.* at 801. The Fifth Circuit reaffirmed the *Pouncy* rule concerning exclusion of subjective criteria from disparate impact analysis in *Carroll v. Sears, Roebuck & Co.* 708 F.2d 183 (5th Cir. 1983).
181. *Id.* at 800.
182. In accordance with the Fifth Circuit’s *Pouncy* decision, the Fourth, Eighth, Ninth and Tenth circuits have held that disparate impact does not apply to subjective selection procedures. *Pope v. City of Hickory*, 679 F.2d 20, 22 (4th Cir. 1981) (disparate impact model only applies to specific procedures, usually a criterion for hiring); *Harris v. Ford Motor Co.*, 651 F.2d 609, 611 (8th Cir. 1981) (subjective decision-making system, such as supervisory evaluation of work quality, not the type of practice that can form the foundation of disparate impact case); *Heagney v. University of Wash.*, 642 F.2d 1157, 1163 (9th Cir. 1981) (disparate treatment model appropriate where gist of plaintiff’s claim is use of subjective or ill-defined criteria); *Mortensen v. Callaway*, 672 F.2d 822, 823-24 (10th Cir. 1982) (subjective system where numerous factors were combined to evaluate chemists for supervisory positions does not constitute neutral employment practice amenable to disparate impact analysis).
183. See infra note 194.
184. 738 F.2d 1249.
under both disparate treatment and disparate impact analyses.\textsuperscript{185}

Having found unlawful discrimination under the disparate treatment model, the \textit{Segar} court did not need to decide plaintiffs' disparate impact claim. However, the court affirmed the district court finding that the "DEA's initial [government service] grade assignments, work assignments, supervisory evaluations, . . . and promotion process had disparate impacts on black agents."\textsuperscript{186} The \textit{Segar} court endorsed the use of disparate impact theory to analyze employment processes involving subjective components.\textsuperscript{187} In explaining its view, the \textit{Segar} court roundly criticized the \textit{Pouncy} court's assertion that complainants must pinpoint the specific cause of any disparate impact.\textsuperscript{188} "Such a requirement in effect permits challenges only to readily perceptible barriers; it allows subtle barriers to continue to work their discriminatory effects, and thereby thwarts the crucial national purpose that Congress sought to effectuate in title VII."\textsuperscript{189}

The \textit{Segar} court specifically endorsed extension of disparate impact analysis to the subjective selection procedure used to determine agents' grade assignments.\textsuperscript{190} While the DEA contended that the one year "specialized experience" requirement was objective, the court found that the requirement comprised mainly subjective elements, making it more subjective than objective.\textsuperscript{191} The employer's policy defined "specialized experience" as experience enabling an agent to demonstrate subjective assets such as tact, discretion, initiative, resourcefulness and the ability to gain the cooperation and confidence of others.\textsuperscript{192} Because "subjective criteria may well serve as a veil of seeming legitimacy behind which illegal discrimination is operating,"\textsuperscript{193} the \textit{Segar} court concluded that it is proper to measure the "relation of such a [subjective] factor to an observed disparity."\textsuperscript{194} Thus, the court concluded that the statistical analysis of disparate impact should include the "specialized experience" factor as a potential source of discrimination, rather than removing it as a lawful reason to distinguish among employees.\textsuperscript{195}

Although few courts have attempted as comprehensive a study of

\begin{footnotes}
\footnote{185. \textit{Id.} at 1288.}
\footnote{186. \textit{Id.} (citation omitted).}
\footnote{187. \textit{Id.} at 1288 n.34.}
\footnote{188. \textit{Id.} at 1271.}
\footnote{189. \textit{Id.} at 1271-72.}
\footnote{190. \textit{Id.} at 1288 n.34.}
\footnote{191. \textit{Id.} at 1275-76.}
\footnote{192. \textit{Id.} at 1275.}
\footnote{193. \textit{Id.} at 1276.}
\footnote{194. \textit{Id.}}
\footnote{195. \textit{Id.} "The law is clear that a plaintiff's [statistical] proof must account for objective
Title VII jurisprudence as the Segar court did, six other circuits have arrived at the same conclusion, that disparate impact analysis should be extended to subjective selection procedures. In addition, the four circuits that have adopted Pouncy's narrow view—that disparate impact is proper only for single, objective procedures—have adopted the Segar court view in other cases.

IV. ANALYZING SUBJECTIVE PROCEDURES FOR DISPARATE IMPACT

This discussion begins by explaining why subjective employment procedures are increasingly important. Second, it shows why disparate treatment analysis should not be the sole model available for challenging subjective procedures. Third, the analysis outlines the legislative, judicial and administrative authority supporting disparate impact analysis of subjective procedures. Finally, responding to the valid argument that sub-

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196. Circuits endorsing the District of Columbia Circuit Segar rule, in favor of examining subjective procedures under disparate impact analysis, are the First, Second, Third, Sixth, Seventh and Eleventh circuits. Robinson v. Polaroid Corp., 732 F.2d 1010 (1st Cir. 1984) (layoff selection guidelines, including subjective evaluations of employees' knowledge, past performance and future potential, evaluated for disparate impact); Zahorik v. Cornell Univ., 729 F.2d 85 (2d Cir. 1984) (tenure decision involving subjective peer evaluations upheld under disparate impact analysis); Coser v. Moore, 739 F.2d 746 (2d Cir. 1984) (prior experience requirements held to be job-related, justifying disparate impact on women professors and classified staff); Wilmore v. City of Wilmington, 699 F.2d 667 (3d Cir. 1983) (fire department promotion system, incorporating subjective evaluations, found to have disparate impact on racial minorities); Green v. United States Steel Corp., 570 F. Supp. 254 (E.D. Pa. 1983) (extended Wilmore, holding that unguided, subjective hiring process, depending on interviewer's "gut-level reaction" to individual applicants, requires a more specific explanation than defendant's stated reason—seeking the best qualified people—to rebut prima facie showing of disparate impact); Rowe v. Cleveland Pneumatic Co., Numerical Control, 690 F.2d 88 (6th Cir. 1982) (rehire system giving plant foremen unrestricted discretion not sufficiently job-related to justify adverse impact); United States v. City of Chicago, 549 F.2d 415 (7th Cir.) (subjective requirements including good character, moral conduct and lack of dissolute habits held to violate Title VII due to disparate impact on blacks), cert. denied, 434 U.S. 875 (1977); Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985) (promotion practice with subjective standards subject to disparate impact evaluation).

197. Hawkins v. Bounds, 752 F.2d 500 (10th Cir. 1985) (United States Post Office promotion system, based on subjective prior "detailing" to upgraded jobs, subject to disparate impact analysis); Gilbert v. City of Little Rock, 722 F.2d 1390 (8th Cir. 1983) (promotion system including oral interview and subjective performance appraisal invalidated due to disparate impact), cert. denied, 466 U.S. 972 (1984); Hung Ping Wang v. Hoffman, 694 F.2d 1146 (9th Cir. 1982) (predominantly subjective promotion selection system should be evaluated under disparate impact theory); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.) (seniority system limiting promotion to employees with experience in certain, typically all-white departments, violated Title VII under disparate impact model), cert. dismissed, 404 U.S. 1006 (1971).

Even the Fifth Circuit has approved the use of disparate impact for a subjective selection system. Page v. United States Indus., 726 F.2d 1038, 1046 (5th Cir. 1984).
jective procedures may not fit neatly into traditional disparate impact analysis, this Comment proposes guidelines for analyzing subjective procedures.

Most employment decisions contain some element of subjectivity. Employers justifiably consider subjective, intangible qualities in their hiring, firing, promotion, transfer and performance appraisal decisions because subjective qualities do affect job performance. However, use of subjective selection systems creates a strong potential for discriminatory results. The potential for unfair results exists even where the employer and its decision makers lack discriminatory intent.

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198. R. FEAR, THE EVALUATION INTERVIEW 40 (1958). This classic primer on interviewing lists “honesty, loyalty, willingness to work hard, and ability to get along with people” as “common-denominator traits that are important in practically all jobs.” Id.

199. The Supreme Court emphasized that Title VII was not designed to diminish traditional management prerogatives. United Steelworkers v. Weber, 443 U.S. 193, 207 (1979). Employers may use their discretion to “choose among equally qualified candidates, provided the decision is not based upon unlawful criteria.” Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981) (emphasis added). See also Nellis v. Brown County, 722 F.2d 853, 860-61 (7th Cir. 1983) (even subjective misjudgments not necessarily the basis for a Title VII claim).

200. See supra note 195.

201. Coates v. Johnson & Johnson, 756 F.2d 524, 543 (7th Cir. 1985) (merit ratings based on subjective evaluations by white supervisors insufficient to rebut inference of racial discrimination); Gilbert v. City of Little Rock, 722 F.2d 1390, 1398 (8th Cir. 1983) (decisions based on subjective criteria must be closely scrutinized due to potential for discriminatory abuse), cert. denied, 466 U.S. 972 (1984); Lilly v. Harris-Teeter Supermarkets, 720 F.2d 326, 338 (4th Cir. 1983) (management’s unbridled discretion tends to confirm inference of discrimination created by statistical disparities), cert. denied, 466 U.S. 951 (1984); Watson v. National Linen Serv., 686 F.2d 877, 881 (11th Cir. 1982) (standardless hiring procedure, based on policies that changed daily and were neither communicated to employees nor followed, found discriminatory); Burrus v. United Tel. Co., 683 F.2d 339, 342 (10th Cir.) (rejection of otherwise qualified person on subjective grounds entitles plaintiff to inference of discrimination under disparate treatment theory), cert. denied, 459 U.S. 1071 (1982); Nandy v. Barrows Co., 660 F.2d 1327, 1334 (9th Cir. 1981) (subjective requirements that delivery truck drivers be neat, articulate and personable “present potential for serious abuse and should be viewed with much skepticism”); Rowe v. General Motors Corp., 457 F.2d 348, 359 (5th Cir. 1972) (promotion and transfer procedures depending almost entirely on favorable recommendation of foreman are ready mechanism for racial discrimination).


202. When a candidate’s background and reactions “appear to have been similar to his, the interviewer is presupposed to be biased in favour of him. . . . Judgment can be warped in this way without the interviewer being conscious of it.” R. PLUMBLEY, RECRUITMENT AND SELECTION 145-46 (1981). Prejudices tend to be directed toward personal characteristics and immutable qualities such as race and color. Id.

Judgments developed in the course of an interview may be affected by factors of which the interviewer is unaware. All of us are undoubtedly influenced—often without recognizing the fact—by our conceptions of what a criminal, a dilettante, or an
nate the unintentional variety of unlawful employment discrimination, application of disparate impact analysis is essential.

Subjective criteria take on added importance when an employer relies primarily on them. Primary reliance on subjective evaluations occurs in selection of management or professional personnel, and in selection processes where objective tests are not used. People responsible for selection of high-level employees typically seek value-dependent qualities such as aggressiveness, self-confidence, good judgment, tact and ability to in-

honest man really looks like. We build up stereotypes of such people . . . . If we are not constantly on the alert, we may base an important interview decision on the resemblance of an applicant to some preconceived stereotype.

R. FEAR, supra note 198, at 35. Merit ratings, like interviews, may reflect the rater's prejudices. This is particularly true where only one person does a rating, without training or written instructions, and where abstract traits rather than concrete behavior are used in the rating. R. BELLOWS, PSYCHOLOGY OF PERSONNEL IN BUSINESS AND INDUSTRY 396-97 (3d ed. 1961).

See also Wilmore v. City of Wilmington, 699 F.2d 667, 673-74 (3d Cir. 1983) (exclusion of blacks from administrative jobs caused by both conscious and unconscious racial bias); Chance v. Board of Examiners, 330 F. Supp. 203, 223 (S.D.N.Y. 1971) (court found a strong possibility that white interviewers unconsciously discriminated against blacks and Puerto Ricans), aff'd, 458 F.2d 1167 (2d Cir. 1972).

A large scale example of the possible effects of unintentional discrimination may be found in the statistics for the United States work force. For example, median weekly earnings for full-time employees in 1983 were $397 for white men, $253 for white women, $299 for black men, $231 for black women, $274 for Hispanic men and $209 for Hispanic women. BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 419 (1985).

Although the percentage of the labor force constituted by women increased from 30% to 43% from 1950 to 1982, women’s earnings remained constant at approximately 60% of men’s. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, BULL. NO. 2168, WOMEN AT WORK: A CHARTBOOK iii, 29 (Apr. 1983). The Bureau of Labor Statistics also reported that “the very highly paid professional and managerial occupations are still predominately male.” Id. at 28. As of August 1985, 13.5% of white male workers held executive, administrative, and managerial jobs, in contrast to 6.2% of black male workers, 9.7% of white female workers, and 6% of black female workers at those levels.

The quality of managerial jobs held by non-traditional management personnel presents another issue for the future. A 1984 newspaper report stated: “Although [blacks] now constitute 3.9% of all managers, ‘you'd have a hard time counting a dozen who are heads of divisions . . . .’ Minority managers . . . are concentrated in staff jobs, such as personnel, public relations or government affairs—positions that, unlike line jobs, don’t usually lead to the inner sanctum.” Hymowitz, Taking a Chance: Many Blacks Jump Off the Corporate Ladder to Be Entrepreneurs, Wall St. J., Aug. 2, 1984, at 1, col. 1.

In middle management positions, organizational psychologists assert that "interpersonal skills" constitute the single most important prerequisite for success on the job. Whatever subjective qualities an employer seeks, the extent to which a candidate possesses them depends on the perceiver's viewpoint. Thus, subjective evaluations are crucial in determining who moves up the organizational ladder, and whether traditional outsiders may join the ranks of the upwardly mobile.

Similarly, subjective evaluations gain importance where objective tests are absent or downplayed. In response to Griggs and the EEOC Guidelines, a large proportion of American companies reduced or completely abandoned the use of objective tests "rather than undergo the risk and expense of compliance." While reducing the risk of discrimination due to culture bias, reliance on subjective evaluations creates new risks. Even conservative employment discrimination scholars concede that "the widespread jettisoning of tests may well cut both ways in its effect on fair employment, by sacrificing objectivity and magnifying the opportunity for subjective bias to express itself."

However, commentators differ as to whether test use is decreasing or increasing in the 1980's. Some industry observers indicate that test-

204. R. FEAR, supra note 195, at 41-42. See also INDUSTRIAL RESEARCH UNIT, WHARTON SCHOOL, UNIV. OF PA., MANPOWER AND HUMAN RESOURCES STUDIES No. 8, THE OBJECTIVE SELECTION OF SUPERVISORS 75-76 (1978). This empirical study of firms in eight different fields found that four criteria were consistently sought in supervisory hopefuls: ability to get along with people, job knowledge, leadership and initiative. Id.


206. Experts in organizational behavior observe that corporate leaders commonly select key subordinates based on the subordinates' perceived sharing of their own values and styles. P. HERSEY & K. BLANCHARD, MANAGEMENT OF ORGANIZATIONAL BEHAVIOR: UTILIZING HUMAN RESOURCES 142 (4th ed. 1982).

The usual process is to measure the values and styles of the top management and then select new people who are compatible with those patterns. The assumption is that if those people got to the top, their values and styles must be what are needed to be successful in the organization.

207. Id. § 75.22, at 15-7 (citing Wall St. J., Sept. 3, 1975, at 1, col. 6). In 1975, 36.5% of 2500 companies surveyed did no testing at all. Among the 63.5% of employers that did use tests, 75% had reduced their testing and 14% planned to eliminate tests completely. Id.

208. Id. § 75.23, at 15-8.

209. Some reports assert that testing, particularly psychological and personality testing, has virtually disappeared. R. PRESTON, EMPLOYER'S GUIDE TO HIRING AND FIRING 84 (1982); A. LARSON & L. LARSON, supra note 26, § 75.22, at 15-8. Others indicate a continuing decline in test use by American employers, from 90% in 1963 and 42% in 1976 to 33% in 1983. Lookatch, Alternatives to Formal Employment Testing, PERSONNEL ADM'R, Sept. 1984, at 112. "Title VII has made testing more costly and, thus, has led firms, even nondiscriminating firms, to use it less." Rothschild & Werden, Title VII
ing is on the upswing after a steep decline in the 1970's. But even these observers note that employers are using tests more cautiously than in the past, basing their final decisions on a combination of objective and subjective evaluations. Because test results no longer merit automatic deference, employers place heavy reliance on subjective criteria.

Federal courts have consistently applied motivation-based disparate treatment theory to disallow unlawful bias hidden behind subjective decisions. The treatment approach is appropriate where the circumstances suggest covert discriminatory interest, or abuse by prejudiced decisionmakers. However, the disparate treatment model will not ferret out discrimination if subjective procedures cause an unintended adverse impact.

A. Shortcomings of Disparate Treatment Theory

Federal courts often apply a careful scrutiny standard in analyzing subjective procedures under the disparate treatment model. Such
scrutiny is appropriate because subjective decisions "provide a ready mechanism for discrimination, permitting . . . prejudice to affect and often control promotion and hiring decisions." 214

Even with the use of a strict scrutiny standard, disparate treatment theory contains three notable shortcomings when used to analyze subjective selection procedures. First, the plaintiff's prima facie burden of showing that he applied for a job, met job qualifications, and was rejected, is made more difficult and complicated by the nonexistence of such data or its unavailability to the plaintiff. 215

Second, the defendant's intermediary burden of articulating a legitimate, nondiscriminatory reason for its decision is essentially standardless as applied to subjective reasons. 216 Because the defendant, to meet its intermediary burden, need not convince the court that its reason is true, 217 any subjective explanation that could be legitimate may, in theory, suffice. 218 Acceptance of the subjective explanation moves the anal-


215. Where informal, subjective procedures are the norm, employees seldom know of opportunities for promotion or transfer until after the fact. Someone who is considered for a new position may never find out that he or she was not chosen. Because of the importance of access to employer records for such evidence, the Supreme Court endorsed shifting the burden of proof to the employer in pattern or practice cases. International Bhd. of Teamsters v. United States, 431 U.S. 324, 359-60 n.45 (1977). The burden of proof, however, does not shift to the employer in individual disparate treatment cases, so the complainant must identify and obtain access to relevant records in order to succeed.

For a discussion of the data problems associated with challenging subjective procedures, see D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION 25-29 (Supp. 1985). Baldus and Cole suggest that the plaintiff's prima facie proof requirements should be lightened where "there are no data available to the plaintiff on applicants . . . . In such cases, justice calls for an adjustment of the plaintiff's usual burden since he or she is not responsible for the lack of data." Id. at 27.

216. See, e.g., Lee v. Conecuh County Bd. of Educ., 634 F.2d 959 (5th Cir. 1981) (employer using wholly subjective procedure to judge employee qualifications cannot successfully defend against charge of discrimination by claiming general lack of qualifications).

217. "The defendant need not persuade the court [at this stage] that it was actually motivated by the proffered reasons." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). See also Board of Trustees v. Sweeney, 439 U.S. 24, 25 (1978) (no need for defendant to prove nondiscriminatory reason, just to offer it); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978) (reason offered should bear reasonable relation to "some legitimate goal").

218. But several courts have rejected subjective explanations: Wilmore v. City of Wilmington, 699 F.2d 657, 675 (3d Cir. 1983) (explanation that whites promoted due to "superiority")
ysis to the final "pretext" stage, when the court must decide which party to believe. Unfortunately, the parties' explanations of what happened may be so far apart that they give the court little help in determining whether discrimination occurred. For example, a black man could claim that racial prejudice caused his non-selection, after he was interviewed for an advertising agency account executive position. This unsuccessful applicant might testify that several agency employees, including the interviewer, did "double takes" when he walked in, and that the whole interview process lasted less than fifteen minutes. On the other hand, the interviewer could offer a nondiscriminatory, subjective explanation, such as the applicant's lack of a sufficient vocabulary to handle clients effectively. In such a fact situation, the court would have to determine whether the interviewer's reason were true. Whether the reason made sense in light of the job applied for would be a factor in the court's determination, but whether the interviewer actually relied on that reason would be central.

Several circuit courts have evaded the difficulties of evaluating the "legitimacy" of employers' subjective explanations by holding that subjective explanations are per se insufficient to rebut a prima facie showing of discriminatory intent. Because this approach presumes—incorrectly—that subjective decisions are inherently unfair, it is unjustifiably harsh. If the employer's only explanation for distinguishing between employees/applicants is subjective and that explanation is summarily rejected, the court finds intentional discrimination without reaching the final "pretext" stage of the disparate treatment model. A better approach, one that numerous courts have taken, is to view subjective decisions suspiciously and to require specific, clear explanations of the

discredited); Payne v. Travenol Laboratories, 673 F.2d 798 (5th Cir.) (employer's explanation of hiring "best qualified" insufficient), cert. denied, 459 U.S. 1038 (1982).

On the other hand, several courts have accepted subjective explanations to rebut plaintiff's prima facie case: Coser v. Moore, 739 F.2d 746 (2d Cir. 1984) (state university successfully argued good faith to overcome statistics showing male-female pay disparity); Zahorik v. Cornell Univ., 729 F.2d 85 (2d Cir. 1984) (subjective tenure decision lawful absent procedural irregularities, anecdotal evidence of bias, or defendant's failure to present evidence); Burrus v. United Tel. Co., 683 F.2d 339 (10th Cir.) (subjective decision that accountant lacked interpersonal skills needed for supervision accepted), cert. denied, 459 U.S. 1071 (1982).

employer's purpose and methods.\textsuperscript{220}

The third shortcoming of disparate treatment theory stems from the motivation-based nature of the model. Courts only find disparate treatment violations when an employer fails to offer any legitimate justification at the intermediary stage\textsuperscript{221} or when a plaintiff convinces the court that an employer's true motive was discriminatory.\textsuperscript{222} Therefore, discrimination will go undetected under disparate treatment if the defendant innocently employs subjective procedures with disproportionate effects. The likelihood of perpetuating past discrimination through well-intentioned subjectivity is great because individual decisionmakers often fail to recognize their biases. For instance, interviewers may have a stereotyped mental picture of what a manager should look like—a well-groomed, slender white male—and no one else will match that image.\textsuperscript{223} Similarly, expectations about proper speech, eye contact and body language may block the advancement of newcomers to the American workplace.

These shortcomings outweigh the possible benefits of restricting Title VII challenges of subjective procedures to disparate treatment. The disparate treatment approach should not be the only method of testing a subjective procedure for discrimination.

\textbf{B. Authority for Extending Disparate Impact to Subjective Procedures}

Congressional inaction, Supreme Court rulings,\textsuperscript{224} the \textit{Uniform

\textsuperscript{220} "[D]efendant's explanation of its legitimate reasons must be clear and reasonably specific." \textit{Burdine}, 450 U.S. at 258. See also \textit{Grano}, 699 F.2d at 837 (subjective promotion decision not illegal per se, but subject to particularly close scrutiny); \textit{Mohammed v. Callaway}, 698 F.2d 395, 401 (10th Cir. 1983) (employer's reliance on subjective distinctions to justify choosing non-minority candidate over minority with greater objective qualifications supports inference of discrimination); \textit{Lamphere v. Brown Univ.}, 685 F.2d 743, 748 (1st Cir. 1982) (citation omitted) (clarity and specificity required to rebut prima facie showing); \textit{Loeb v. Textron, Inc.}, 600 F.2d 1003, 1012 n.5 (1st Cir. 1979) (employer's vague, general avowals of good faith insufficient—plaintiff cannot challenge employer's reasons unless reasons articulated with specificity).

\textsuperscript{221} \textit{Burdine}, 450 U.S. at 254. "If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff.” \textit{Id.}

\textsuperscript{222} \textit{Id.} at 258.

\textsuperscript{223} \textit{Id.} "[T]he WASP manager is, of course, a man . . . clean limbed and neatly buttoned collar . . . His preferred religion is Presbyterian, Baptist or Lutheran. . . . even Catholicism may be OK if it is not made too much of." J. KELLY, \textsc{Organizational Behavior} 143 (3d ed. 1980). Along with this tongue-in-cheek description of the stereotypical WASP manager, the author notes seriously that stereotypes often attach to people of different ethnic groups. \textit{Id.}

\textsuperscript{224} See infra text accompanying notes 228-42.
Guidelines on Employee Selection Procedures, and the statute itself support the use of disparate impact theory to evaluate subjective employment procedures. Since 1972, when Congress amended Title VII, that body has taken no action on the unintentional discrimination standard developed by the judiciary. Meanwhile, federal courts have decided many cases under the Griggs approach. Thus, it is highly unlikely that Congress is collectively unaware of judicial Title VII interpretation. Congressional inaction in response to fifteen years of disparate impact decisions provides a strong indication of congressional approval of the model.

Supreme Court rulings provide more specific support for applying the Griggs approach to subjective procedures. Authority for this conclusion begins with Griggs itself, where the Court asserted that any "practices, procedures or tests" with adverse impact must be proved job-related. Nowhere in Griggs did the Court limit the scope of its adverse impact rule to objective screening devices. Because no subsequent Supreme Court decision has clearly limited the reach of Griggs, it remains the cornerstone of disparate impact jurisprudence.

In Connecticut v. Teal, the Supreme Court noted that Congress had approved the Griggs decision's motivation-neutral disparate impact approach in enacting the 1972 amendments to Title VII. The Teal Court also focused on the analysis presented to Congress to explain the 1972 amendments. The analysis specified that "in any area where the new law does not address itself, or . . . where a specific contrary intention is not indicated, . . . the present case law as developed by the courts would continue to govern the applicability and construction of Title VII."
VII.233 Congress evidenced no disapproval of the Griggs approach in the 1972 Act; in fact, the Act expanded rather than contracted the scope of Title VII.234

The Teal decision indirectly strengthens the view that disparate impact analysis may be applied to subjective procedures. The Court ruled that any "identifiable pass-fail barrier" with adverse impact must be justified as job-related.235 While the adverse impact in Teal was caused by an objective part of a multi-component selection process, the majority never suggested that its "pass-fail barrier" rule should be limited to objective procedures.236

One leading commentator has erroneously interpreted Furnco Construction Corp. v. Waters237 to establish the general principle that subjective procedures never involve the "neutral factors" required for disparate impact analysis.238 This view is erroneous because it reaches far beyond the Court's actual holding. Furnco primarily clarified the proper method of conducting a disparate treatment inquiry.239 Employing the McDonnell Douglas disparate treatment approach, the Supreme Court ruled that the Seventh Circuit exceeded its authority by devising a new hiring procedure for the defendant.240 The Court held that an employer can rebut the inference of intentional discrimination by offering a "justification which is reasonably related to the achievement of some legitimate goal."241 Thus, the central holding of Furnco concerned only intentional discrimination. The Court explained its reason for using disparate treatment analysis in Furnco in a footnote: "This case did not involve em-

233. 118 CONG. REC. 7166 (1972).
236. To the contrary, the majority read the pertinent statutory language and the Griggs methodology broadly: "The statute speaks . . . in terms of limitations and classifications that would deprive any individual of employment opportunities." Id. at 448 (emphasis in original). "When an employer uses a non-job-related barrier . . . and that barrier has a significant adverse effect on minorities or women, then the applicant has been deprived . . ." Id.
238. A. LARSON & L. LARSON, supra note 26, § 76.33, at 15-85.
239. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 569 (1978). "We granted certiorari to consider . . . the exact scope of the prima facie case under McDonnell Douglas and the nature of the evidence necessary to rebut such a case." Id.
240. Id. at 576-77.
241. Id. at 578.
ployment tests, . . . or particularized requirements such as . . . height and weight specifications.”

Unfortunately, the Court offered no rationale for the difference it found between *Furnco* and the test and particularized requirements cases. One possible distinction is that tests and requirements screened applicants for *substantive* abilities and characteristics, while Furnco's no-hiring-at-the-gate policy was only a *procedural* requirement. However, such a distinction is not very useful to persons who are injured by procedural requirements. Another possible explanation for the distinction is that the hiring policy was subjective while tests and requirements are objective. However, that distinction fails because Furnco's policy left no subjective discretion to the superintendent; he could not hire *anyone* at the gate. The policy was as facially objective as the tests and requirements that the Court attempted to distinguish. Thus, *Furnco* does not support any principle regarding subjective selection procedures.

Unlike recent Supreme Court decisions, the *Uniform Guidelines on Employee Selection Procedures* unambiguously support the view that disparate impact theory extends to subjective procedures. The *Guidelines* prohibit “[t]he use of any selection procedure which has an adverse impact on . . . members of any race, sex, or ethnic group . . . unless the procedure has been validated in accordance with these guidelines . . . .”

“Selection procedures” are defined broadly to include casual interviews, probationary periods and work experience requirements. Many procedures explicitly included in the *Guidelines* involve subjective judgments.

The current (1978) *Guidelines* were based on court decisions—primarily *Griggs* and *Albemarle*—and were “intended to be consistent with existing law.” These *Guidelines* were issued two months after the Supreme

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242. *Id.* at 575 n.7.
244. See *supra* notes 83-94 and accompanying text.
245. *Guidelines*, § 1607.3.A.
247. “Selection procedures include the full range of assessment techniques,” including probationary periods, work experience requirements and unscored application forms. *Id.*
Court decided Furnco. Nonetheless, the Guidelines called for very broad application of the Griggs disparate impact approach. Clearly, the issuing agencies (EEOC, Department of Justice, Department of Labor and Civil Service Commission) did not read Furnco to provide authority for restricting disparate impact to tests and particularized requirements. Instead, the agencies characterized Furnco as a case “where there was no adverse impact,” thus only involving disparate treatment.

While the EEOC Guidelines have changed considerably since their first appearance in 1966, the statutory provisions defining unlawful employment practices have remained the same. Section 703(a)(2), the provision that Griggs and its progeny construed to establish the disparate impact model, still states, as it did in 1964, that an employer may not “limit, segregate or classify his employees or applicants” in any manner that would “tend to deprive” an individual of opportunities “because of such individual’s race, color, religion, sex, or national origin.” Unlike section 703(a)(1), which bars employers from discriminating directly because of someone’s protected characteristics, section 703(a)(2) focuses on the deprivation caused by the employer’s action. Title VII’s language supports the view that subjective selection procedures may be invalidated due to adverse impact. The statute’s proscription against limiting, segregating or classifying employees does not specify how an employer might do so. It is the effect—being deprived of opportunity or otherwise adversely affected—not the means, that creates a Title VII violation under section 703(a)(2).

On the whole, there is a wide range of legislative, judicial and administrative authority for extending disparate impact theory to subjective procedures. The potential benefits of furthering Title VII’s equal employment opportunity goal outweigh any practical difficulties the courts may encounter.

251. “Where there is no adverse impact, the Furnco principle rather than the Albemarle principle is applicable.” Questions and Answers, supra note 246, at 12,004.
254. Id. § 2000e-2(a)(2).
255. Id. The Teal Court distinguished between the two code sections, stating that if § 703(a)(1) (codified as 42 U.S.C. § 2000e-2(a)(1)), stood alone, it “might support exclusive focus on the overall result.” Teal, 457 U.S. at 448 n.9. However, the Court concluded that § 703(a)(2) (codified as 42 U.S.C. § 2000e-2(a)(2)) encompasses claims against intermediary procedures with adverse impact. Teal, 457 U.S. at 448-49.
C. Proposed Guidelines to Analyze Subjective Procedures Under Disparate Impact Theory

Impracticality is the most persuasive argument against extending disparate impact theory to subjective procedures. Although disparate impact theory may in theory encompass subjective procedures, no definitive guidelines demonstrate how courts should conduct such analysis, or how employers can differentiate between lawful and unlawful subjective selection procedures.\footnote{256} Unlike objective selection devices, subjective ones are often characterized by ambiguous starting dates, unknown numbers of candidates, and few written records. Therefore, opponents of expanded disparate impact analysis, such as the court in \textit{Pouncy v. Prudential Insurance Co. of America}, assert that disparate impact challenges to procedures other than objective screening devices are too ambiguous, forcing employers to justify entire employment systems.\footnote{257} Yet in \textit{Segar v. Smith}, the court dismissed this concern, based on the employer's superior knowledge of its procedures.\footnote{258} When an employee identifies a subjective selection proce-

\footnote{256} Schlei and Grossman have compiled a 13-item list of factors useful in evaluating the legality of subjective appraisal systems. The factors include presence of a job analysis, specific guidelines for raters, firsthand knowledge by raters of candidates, job announcements, level of discretion, and appeal mechanism. B. \textsc{Schlei} \& P. \textsc{Grossman}, \textsc{Employment Discrimination Law} 202-05 (2d ed. 1983).

"[A] problem with allowing disparate impact challenges to . . . discretionary systems is the difficulty of demonstrating the impact of the individual selection criteria involved . . . ." D. \textsc{Baldus} \& J. \textsc{Cole}, \textit{supra} note 212, at 26-27.

\textit{See also} Case Comment, \textit{Bazemore v. Friday: Salary Discrimination Under Title VII}, 99 Harv. L. Rev. 655, 666-67 (1986). While suggesting that the \textit{Bazemore} court should have applied the disparate impact model to a charge of discrimination in discretionary assignments of salary levels and granting of raises, the commentator observed that "[e]ven if the Bazemore court had applied adverse impact analysis, it is unclear how the court would have resolved the case." \textit{Id.} at 667 n.81.

\footnote{257} The statistics . . . show that, on the whole, blacks are overrepresented in the lower levels of Prudential's work force. But this might result from any number of causes. Absent proof that the disparate impact is caused by one or more of the challenged employment practices, we do not require the employer to justify the legitimacy of any (or all) employment practices.

\textit{Pouncy v. Prudential Ins. Co. of Am.}, 668 F.2d 795, 801-02 (5th Cir. 1982). The practices attacked by Mr. Pouncy were the job level system, unannounced transfer/promotion system and subjective performance appraisals. \textit{Id.} at 801.

\footnote{258} \textit{Segar v. Smith}, 738 F.2d 1249, 1271 (D.C. Cir. 1984), \textit{cert. denied}, 105 S. Ct. 2357 (1985). The \textit{Segar} court determined that employers' inherently greater knowledge of their practices, and of how those practices affect employees, justifies placing the burden of pinpointing the cause of a disparity on the employer. \textit{Id.} \textit{See also} D. \textsc{Baldus} \& J. \textsc{Cole}, \textit{supra} note 218:

When . . . lack of data limits the plaintiff's ability to prove [the disparate impact's source, the plaintiff's burden of proof should be satisfied with proof of overall disparate impact. . . . [T]he burden should then fall to the defendant . . . . This
dure, such as a classification or promotion system, that adversely affects his protected group, courts should require employers to explain the purpose of that procedure, not their entire employment system. Courts presume that employers have some rational basis for their actions; hence an employer's inability to articulate details concerning a procedure with disparate impact serves as evidence of discrimination.

This Comment proposes a revised model of disparate impact analysis for subjective procedures, aimed at achieving a fair allocation of burdens, and providing courts with sufficient, organized information. The proposed model presumes a class action. It begins with a five-step procedure for establishing a prima facie case of disparate impact. Under this proposed model, the plaintiffs would:

1. Allege membership in a group protected by Title VII;
2. Identify the job category affected by the alleged disparate impact;
3. State the time frame during which the discriminatory effect occurred (this should not be a "snapshot," but a reasonable period under the circumstances);
4. Identify the subjective (or partially subjective) procedure responsible for the disparate result. Examples include hiring,

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Id. at 27.

259. Furnco, 438 U.S. at 577. "[W]e know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting." Id.

260. See, e.g., Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir.) (absence of evidence on what criteria used in supervisory ratings was fatal flaw in validation study), cert. denied, 429 U.S. 861 (1976).

261. This factor will depend on whether the employer's personnel decisions are cyclical (as in a school district) or unscheduled. Where selection decisions are made on an as-needed basis, one at a time, it may take years to generate meaningful statistics. However, the statute of limitations for filing an EEOC complaint is 180 days from the alleged wrongdoing. 42 U.S.C. § 2000e-5(e) (1982). Complainants might have to undertake substantial research to generate meaningful statistics. One court held, though, that the relevant time frame was the one beginning 180-300 days before the first challenged action. EEOC v. Local 14, Int'l Union of Operating Eng'rs, 553 F.2d 251 (2d Cir. 1977).

On the other hand, where the employer makes a large number of decisions at one time, such as at the beginning of every school year, the results of a single iteration of the process may be statistically useful. See, e.g., Hazelwood School Dist. v. United States, 433 U.S. 299, 309-11 (1977).

Another factor to be considered in selecting the appropriate time period for statistical analysis is pre-Title VII discrimination. Statistics from before 1965 for private employers, and before 1972 for public employers, are not dispositive evidence of post-Act unlawful discrimination. Id. at 309 n.15.
job assignment, promotion, layoff and transfer procedures;\textsuperscript{262} and

5. Present statistics indicating the number of people evaluated under the challenged procedure, the percentage of applicants from their protected group who emerged successfully, and the percentage of successful applicants from the most-selected group.

To support a prima facie case, the disparity in selection rates should be statistically significant\textsuperscript{263} under the following principles. First, if the procedure involves internal selection only, and the employer openly announces the selection process and the minimum qualifications, only objectively qualified applicants should be included in the figures.\textsuperscript{264} However, if the internal procedure is not openly announced, then all objectively qualified and available employees must be included in the "relevant labor pool." Use of a hypothetical pool of potential applicants is

\textsuperscript{262} The purpose of this factor is to focus the case on a discrete selection process. The process should be one that plaintiff can identify without extensive research or discovery. It should also be identified clearly enough to notify defendant of what is being challenged.

Procedures that operate amorphously, or that employ unstated subjective criteria, should be challenged under this pattern of proof. A subjective system's "very vagueness makes the fairness of its application difficult to assess on a decision-by-decision basis," hence necessitating disparate impact analysis. Green v. United States Steel Corp., 570 F. Supp. 254, 274 (E.D. Pa. 1983).

For discussions of logical and equitable reasons to test multicomponent and discretionary (subjective) procedures under disparate impact, see D. BALDUS \& J. COLE, supra note 215, at 25-28; Willborn, The Disparate Impact Model of Discrimination: Theory and Limits, 34 Am. U.L. Rev. 829-32 (1985). Willborn contends that difficulties of proof do not justify immunizing nonspecific criteria from disparate impact challenge: "Excluding nonspecific employment criteria from disparate impact analysis because of manageability problems, however, is like eliminating mathematics from the curriculum because it is too difficult." Id. at 830.

263. Most courts find statistically significant disparity in one of two ways. One method is the statistical theory that finds evidence of non-accidental causes where there is a "standard deviation" greater than two or three (normal for accidental results) between expected and actual outcomes. See Hazelwood, 433 U.S. at 308-09 n.14, 311 n.17; D. BALDUS \& J. COLE, STATISTICAL PROOF OF DISCRIMINATION 47-48 (1980).

The second method finds statistical significance when there is a ratio of less than four-fifths between the protected group's selection rate and the selection rate of the most successful group (successful in terms of selection). The four-fifths rule is found in the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4.D (1985). A step-by-step demonstration of how to use the four-fifths rule appears in Questions and Answers, supra note 246, at 11,998.


For discussions of how to define the "relevant labor pool" for internal promotions, see Rivera v. City of Wichita Falls, 665 F.2d 531 (5th Cir. 1982); Fisher v. Procter & Gamble Mfg. Co., 613 F.2d 527 (5th Cir. 1980).
necessary to obtain a fair ratio of those selected versus those available, when protected group members lack the opportunity to apply.\textsuperscript{265} Similarly, for selection procedures open to both current employees and outsiders, the relevant labor pool for selection rate statistics would be comprised of actual applicants, unless the vacancy was unannounced. Also, where an employer's history of discrimination is likely to discourage applicants from the protected group, the statistics should include all qualified persons in the appropriate geographical area, to correct for a pro-employer statistical bias when few or no protected group members are considered.\textsuperscript{266}

If plaintiffs present sufficient evidence to complete the five-point procedure outlined above, courts should find a prima facie case of disparate impact. At that point, the defendant may rebut the inference in two ways.\textsuperscript{267} First, defendant may offer its own statistics and demonstrate that these are more credible than plaintiffs'. Second, defendant may justify the challenged process by explaining how it measures job-related abilities.

If defendant offers only statistical evidence and the court finds plaintiffs' statistics more credible, the plaintiffs prevail. On the other hand, if defendant's statistics refute plaintiffs' statistics, the analysis ends for lack of a prima facie case. Usually, though, defendants will augment their statistical defense with proof of job-relatedness.

To prove that a subjective selection procedure seeks job-related qualities, the defendant should thoroughly explain the nature and purpose of the challenged procedure. The defendant's evidence should address these major issues: specific qualities sought;\textsuperscript{268} connection of those qualities to job performance;\textsuperscript{269} ranking of qualities, if any;\textsuperscript{270} sex, race

\textsuperscript{265} One court required a greater statistical disparity where actual rather than potential applicants are counted, because the "qualified and interested" pool fails to account for those discouraged from applying by expected exclusion. Townsend v. Nassau County Medical Center, 558 F.2d 117 (2d Cir. 1977).

\textsuperscript{266} See, e.g., Grant v. Bethlehem Steel Corp., 635 F.2d 1007 (2d Cir. 1980) (steel construction foremen qualifications included productivity, leadership, and safety consciousness, but extent to which haphazard selection process identified these qualities was dubious), cert. denied, 452 U.S. 940 (1981).

\textsuperscript{267} Hazelwood, 433 U.S. at 310-12.

\textsuperscript{268} Segar, 738 F.2d at 1267-68; Pouncy, 668 F.2d at 800 n.8.

\textsuperscript{269} Judicial suspicion of vague subjective decision making is equally appropriate in disparate impact as in disparate treatment analysis. For cases demonstrating this point, see B. Schlei & P. Grossman, supra note 254, at 202 n.51.

\textsuperscript{270} See, e.g., Grant v. Bethlehem Steel Corp., 635 F.2d 1007 (2d Cir. 1980) (steel construction foremen qualifications included productivity, leadership, and safety consciousness, but extent to which haphazard selection process identified these qualities was dubious), cert. denied, 452 U.S. 940 (1981).

\textsuperscript{270} B. Schlei & P. Grossman, supra note 254, at 203. "In the absence of assigned weights, comparative judgments between candidates with different skills become subject to whim . . . ." Id.
and ethnicity of evaluators;\textsuperscript{271} training or guidance for evaluators;\textsuperscript{272} and review/appeal procedures available.\textsuperscript{273}

In considering the evidence, the court should give little credit to employers seeking completely subjective qualities, such as "good attitude" and "ability to fit in." On the other hand, the court should place more value on relatively measurable capabilities such as writing skill, oral communication ability, technical knowledge and related experience.

In its evaluation, the court should consider the means by which evaluators are informed of the qualities sought, and the relative importance of each quality. Lack of information and training for evaluators would indicate that the espoused "procedure" is really a vacuum bearing the loosely given label, "procedure."\textsuperscript{274} Similarly, evidence that the plaintiffs' protected group, and/or other protected groups, are unrepresented among the evaluators would weigh against the employer, and vice versa. Finally, the availability of a review/appeal procedure, initiated either by upper level management or by the aggrieved parties, would favor upholding the employer's procedure as lawful.

Additionally, defendants may offer other relevant evidence to illustrate how the subjective selection procedure is job-related. If the defendant can justify its procedure as job-related, the inquiry should conclude with a decision upholding the procedure as lawful. The "less discriminatory alternative" stage is unnecessary in the proposed analysis because such an inquiry is used to determine whether the defendant is using subjective procedures unfairly, arbitrarily, or without serious effort. In such a case, the proper mode of analysis would be disparate treatment, with the court deciding whether the subjective procedure was a pretext for intentional discrimination.

The practicality of the proposed subjective procedure guidelines may be tested by applying them to an actual case. For instance, in \textit{Grant}
v. Bethlehem Steel Corp.\textsuperscript{275} the proposed analytical approach would have supported a finding of disparate impact, which was the result actually reached in the case. In Bethlehem Steel, black and Puerto Rican iron-workers filed a class action claiming that the company's foreman selection procedure caused disparate impact.\textsuperscript{276} The defendant company permitted its superintendents, all white males, to select foremen at their absolute discretion.\textsuperscript{277} The superintendents generally offered foremen jobs to acquaintances or recommendees eight to twelve months before a construction job began, leaving no openings available when the projects actually began.\textsuperscript{278} The plaintiffs in Bethlehem Steel would have made the proposed five-step prima facie showing as follows:

1. Plaintiffs were members of protected groups;\textsuperscript{279}
2. They were excluded from foreman jobs;\textsuperscript{280}
3. The relevant time frame was 1970-75, a sufficient time period to minimize the statistical effects of accidents;\textsuperscript{281}
4. The superintendents' absolute discretion to select foremen caused disparate impact;\textsuperscript{282} and
5. Blacks and Puerto Ricans were promoted to foreman at 7.2\% of the non-minority selection rate. This rate was derived by constrasting the number of blacks and Puerto Ricans selected from the employer's work force—1/102 or 0.98\%—to the number of non-minorities in the work force selected—125/916 or 13.6\%. The entire work force was used for these statistics because the company did not announce foreman openings.\textsuperscript{283}

After the plaintiffs had established a prima facie case, the burden of proof would shift to the defendant to prove its procedure was job-related. Under the proposed considerations for proving job-relatedness, the qualities the employer sought were definitely useful characteristics for con-

\textsuperscript{275} 635 F.2d 1007 (2d Cir. 1980).
\textsuperscript{276} Id. at 1012.
\textsuperscript{277} Id. at 1010-11.
\textsuperscript{278} Id. at 1011.
\textsuperscript{279} Id.
\textsuperscript{280} Id.
\textsuperscript{281} Id. at 1010; see supra note 261.
\textsuperscript{282} Grant, 635 F.2d 1012. "One superintendent, Driggers, hired his two sons as foremen, notwithstanding that they had less ironwork experience than the three named plaintiffs and had not served as foremen before [two of the plaintiffs had]." Id. at 1012.

Superintendent Driggers had "never appointed a black or Puerto Rican [foreman] . . . . Although he conceded that some minority ironworkers . . . were capable of being foremen, he . . . excused his failure [to appoint them] . . . on the grounds that he 'didn't know any.' " Id. 283. Id. at 1010.
struction foremen: leadership, productivity and safety consciousness. However, because leadership and safety consciousness are wholly subjective qualities, their evidentiary value for the employer was limited. The fact that the hiring superintendents were all non-minority males also weighed against the subjective procedure. In addition, there was no showing that the company provided superintendents with training or instruction to ensure their understanding of the selection standards. Moreover, there were no review/appeal procedures available for aggrieved persons. Based on these facts, Bethlehem Steel’s evidence would have failed to rebut the ironworkers’ prima facie case, so the court would have found a Title VII violation.

The proposed evaluation procedure, applied to the facts of Gilbert v. City of Little Rock produces a less certain result. In Gilbert, eleven black police officers charged that the city police department’s promotional system operated to exclude blacks from higher-level positions. Once a year, the department created a ranked list of promotion candidates based on composite scores from a written test, an oral interview, a performance appraisal, the chief’s rating and seniority. Promotions were made in order from the list as vacancies arose.

The complainants in Gilbert would have succeeded in making a prima facie case of disparate impact under the proposed procedure. Between 1975 and 1979, only one of fourteen black officers was promoted, a 7.1% selection rate, while 25 out of 201 other, non-black officers became sergeants, a 12.4% rate. The rate for blacks was 57.2% of the rate for others, a dramatic difference.

284. Id.
285. Id. at 1011.
286. The company had prepared a “Guide to Equal Employment Opportunity” which it incorporated into certain contracts. However, the evidence was unclear as to whether the company complied with the provisions of the Guide in performance of those contracts. Id. at 1012.
288. Gilbert, 722 F.2d at 1393.
289. Id. at 1395-96.
290. Id. at 1396.
291. Id.
292. For explanations of statistical significance see Hazelwood, 433 U.S. at 311 n.17; Castaneda, 430 U.S. at 496 n.17. The Hazelwood Court observed that precise calculations, such as those measuring standard deviation, are not absolutely necessary to legal analysis. 433 U.S. at 311 n.17. However, the Court emphasized that choice of an appropriate labor pool for use in statistical analysis was essential. Id. at 312 n.17.

In Gilbert, the relevant labor pool was clearly identified, because the promotional system was internal; thus, a 57% disparity in success rate by race provided a strong indication of non-random results.
The defendant's job-relatedness evidence could have rebutted the prima facie case, exonerating the police department. The personality traits evaluated in the oral interviews were performance under stress, ability to reason, ability to work harmoniously with associates, presentation of a forceful public image and social skills. These qualities seem related to a police sergeant's job, yet their extremely subjective nature weighs against the employer. Similarly, the facts that all the interviewers were police captains, and that no black had been promoted to lieutenant (the rank immediately below captain), supports a finding for the complainants.

On the other hand, the fact that defendant provided interviewer training and an appeals procedure might tilt the scales in its favor. The personnel department trained the five interviewing captains to evaluate candidates using an objective rating system. Also, the police chief retained final responsibility for supervising the interview process. Finally, the availability of a formal appeals procedure through the city civil service commission would support the employer's case.

The court's judgment, based on these facts in Gilbert, would depend on whether the court viewed the safeguards as sufficient to overcome the possibility that discrimination tainted the subjective procedure. Thus, the proposed guidelines will not always provide certainty. They will, however, make the plaintiff's prima facie case sufficiently unambiguous to inform the employer as to which procedure is being challenged, and require the employer to explain its procedures thoroughly. The goal of the proposed procedure is not to outlaw subjective selection procedures, but rather to ensure that employers monitor their subjective selection practices to prevent abuse.

V. CONCLUSION

Employers need freedom to consider intangible qualities in making personnel decisions. However, subjective evaluation processes—such as interviews and appraisals that rate personal qualities—offer a strong potential for discriminatory abuse because they give decisionmakers broad

294. Gilbert, 722 F.2d at 1398.
296. Gilbert, 722 F.2d at 1396.
298. Id. at 1249.
299. Id. at 1234.
discretion. Decisionmakers who do not recognize their own prejudices may abuse that discretion unintentionally.

In order to curtail the unlawful use of subjective procedures, federal courts should apply both disparate treatment and disparate impact approaches. The disparate treatment approach should be employed where a complainant alleges that an employer intentionally used subjective procedures to mask discrimination, or passively allowed managerial employees to indulge their prejudices.

The disparate impact model should be employed where the complainant does not allege improper intent. Unintended discriminatory results may survive indefinitely due to lack of awareness of their cause. Such results should be scrutinized under the stricter "job-relatedness" standard of disparate impact analysis. If federal courts would uniformly adopt this approach, employers would gain new incentive to examine their subjective procedures, ensuring that those procedures focus on job-related skills. Unlawful employment discrimination would then take a significant step toward extinction.

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