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Despite our tough economic climate, many employers exclude currently unemployed workers from consideration for a wide variety of jobs. Examples of such jobs include mechanics, professors, chefs, drivers, teachers, lawyers, coaches, service technicians, sign installers, emergency services dispatchers, receptionists, freight handlers, restaurant managers, paralegals, sales representatives, and executive assistants.[1] Not only does this practice seem cruel and unwise, but under certain circumstances it may violate federal antidiscrimination law.

As the Supreme Court and Congress have long made clear, employment practices that impose an unlawful disparate impact—that is, measures that disproportionately exclude protected class members from job opportunities without adequate justification—frustrate anti-discrimination objectives in at least two ways. First, employment practices that disproportionately disadvantage protected class members without any meaningful relationship to successful job performance may sometimes conceal an employer's intent to discriminate.[2] Second, even

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1. *See* NAT'L EMP'T LAW PROJECT, HIRING DISCRIMINATION AGAINST THE UNEMPLOYED: FEDERAL BILL OUTLAWS EXCLUDING THE UNEMPLOYED FROM JOB OPPORTUNITIES, AS DISCRIMINATORY ADS PERSIST 8–11 (2011); *see also* Laura Bassett, *How Employers Weed Out Unemployed Job Applicants, Others, Behind the Scenes*, HUFFINGTON POST, Jan. 14, 2011, http://www.huffingtonpost.com/2011/01/14/unemployed-job-applicants-discrimination_n_809010.html.

2. *See* Griggs v. Duke Power Co., 401 U.S. 424, 426–30 (1971) (observing that an employer's

absent an employer's discriminatory intent, employment practices that impose a disparate impact often reflect unexamined assumptions and stereotypes about the skills and capabilities that predict successful job performance.[3] For these reasons, current-employment requirements demonstrate the continuing need for vigorous enforcement of disparate impact standards.

Plaintiffs seeking to prove the existence of illegal disparate impact discrimination must start by demonstrating that the challenged practice causes an adverse impact based on protected class status.[4] There are a number of ways in which plaintiffs can make such a showing. One method is labor-market (or "labor pool") analysis, which is especially appropriate when the challenged practice likely skews the actual applicant pool by deterring potential applicants who realize that they cannot satisfy the requirement in question.[5] This would be the case, for example, when a job announcement expressly lists "current employment" among the requirements for the job: faced with such an announcement, many prospective applicants who are not currently employed will simply decide not to apply.

Under this analysis, the qualified labor market consists of those in the relevant geographical area (that is, the area from which the employer draws workers for the position in question) who otherwise possess the relevant job qualifications.[6] Labor-market analysis compares the

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non-job-related tests disproportionately excluded African Americans from jobs that "formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites" and thus operated "to 'freeze' the status quo of prior discriminatory employment practices.").

3. *See id.* at 431–32. The Court reasoned that "what is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id.* at 431. Further, the Court reasoned that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Id.* at 432.

4. *See, e.g.*, 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

5. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 330 (1977) ("There is no requirement, however, that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants. The application process itself might not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory."); *see also* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 365 (1977) ("A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection.").

6. *See, e.g.*, Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 (1977). When the job in question is entry-level or does not require specialized skills or training as a condition of employment, the relevant labor market may be the percentage of adult protected class members in the relevant geographical area. *Id.* at 308 n.13 ("In *Teamsters*, the comparison between the percentage of Negroes on the employer's work force and the percentage in the general area-wide population was highly probative, because the job skill there involved—the ability to drive a truck—is one that many persons possess or can fairly readily acquire."). If the employer recruits workers from across the nation, as would likely be the case for certain jobs requiring specialized skills or responsibilities, the relevant

selection rate for protected class members in the qualified labor market with that of a comparator group in that market. Consider, for example, a school located in a certain metropolitan area that requires applicants for teaching positions to be currently employed. To determine whether this practice has an adverse impact on African Americans, we might compare the percentage of African American teachers (those with the requisite teaching credential) currently employed in the metropolitan area with the percentage of currently employed white teachers in the metropolitan area. The plaintiff has established the existence of the requisite adverse impact if the difference between those two percentages is statistically significant[7] or satisfies the eighty-percent rule, which finds adverse impact upon a showing that the selection rate for protected class members under this requirement is less than eighty percent of the selection rate for the most successful group.[8]

Applicant-flow analysis is another method by which plaintiffs may show an adverse impact. This method may be more appropriate if the employment practice in question is instead used as a screen later in the process, for example when an employer does not require current employment as a condition of application but instead screens applicants who are not currently employed later in the decisionmaking process. Applicant-flow analysis compares the selection rate under that requirement for protected class members who apply for the position with that of the comparator group. Again, if the difference between the two percentages is statistically significant or satisfies the eighty-percent rule, the plaintiff has established the requisite adverse impact.

Depending on the relevant demographic data, a current-employment requirement has the potential to create an adverse impact in a number of contexts. For example, as of July 2011, the nationwide unemployment rate for African Americans (15.9%) was almost twice that of whites (8.1%).[9] Of course, the outcome of any adverse-impact analysis will depend on the job in question, the geographical area from

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geographical area could be the entire nation.

7. Courts consider disparities to be statistically significant when the difference between the compared percentages (that is, the difference between the actual and expected outcomes) is greater than two or three standard deviations, thus greatly reducing the possibility that the disparity can be explained by chance. *See id.* at 308–09 n.14 ("The Court [has] noted that '[a]s a general rule for such large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations,' then the hypothesis that teachers were hired without regard to race would be suspect." (quoting Castaneda v. Partida, 430 U.S. 482, 496–97 (1977))).

8. This would be the case, for example, if only sixty percent of the African Americans in the applicant pool were currently employed, compared to eighty percent of the whites in the applicant pool. *See, e.g.*, 29 C.F.R. § 1607.4(D) (2011) (stating that federal enforcement agencies will generally consider as evidence of adverse impact a selection rate for protected class members that is less than four-fifths of the rate for the group with the highest selection rate).

9. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, THE EMPLOYMENT SITUATION—AUGUST 2011, at 4 summary tbl.A (2011).

which the employer draws candidates for the job, and the characteristics of the relevant labor market and applicant pool.[10]

A plaintiff who proves that a practice imposes an adverse impact has established an actionable violation if the employer (or employment agency[11]) then "fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."[12] Even if the employer so demonstrates, the plaintiff will still prevail if he or she can prove the availability of a less discriminatory employment practice that achieves the employer's interest in selecting individuals who can successfully perform the job in question.[13]

By requiring careful examination of employment practices that impose a disparate impact on protected class members, along with possible alternatives to such practices, federal antidiscrimination law thus enhances not only equal access to job opportunities but also a commitment to true merit selection. As the Supreme Court has observed, "Nothing in the [Civil Rights Act of 1964] precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance."[14]

This attention to unjustified disparities has substantially enhanced social welfare by improving the practices used to fill key positions in public safety and elsewhere.[15] Too often employers relied on examinations

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10. Indeed, unemployment rates vary across region and job type. *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, GEOGRAPHIC PROFILE OF EMPLOYMENT AND UNEMPLOYMENT, 2009 at 258 tbl.29 (2010) (finding an unemployment rate of 34.1% for construction workers in the Las Vegas metropolitan area, compared to 21.2% for those in the Los Angeles area, and finding a 22.9% unemployment rate for construction workers in the Boston metropolitan area, compared to 6.6% for those working in the management, business, and financial fields in the Boston area).

11. Federal prohibitions on disparate-treatment and disparate-impact discrimination apply to employment agencies as well as employers. This means that employment agencies using discriminatory practices requested by their client employers remain liable themselves for such discrimination. *See, e.g.*, 42 U.S.C. § 2000e-2(b) (2006) ("It shall be unlawful . . . for an employment agency . . . to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin"); 29 C.F.R. § 1607.10 (2011) ("The use of an employment agency does not relieve an employer or labor organization or other user of its responsibilities under Federal law to provide equal employment opportunity or its obligations as a user under these guidelines.").

12. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

13. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(ii); 29 C.F.R. § 1607.3(B) ("Where two or more selection procedures are available which serve the user's legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser adverse impact."); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (holding that even if the employer proves that the challenged requirement is sufficiently job related for the position in question, the plaintiff may still prevail by then showing that another practice with a less discriminatory impact would also "serve the employer's legitimate interest in 'efficient and trustworthy workmanship'").

14. Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971).

15. Psychologists, for example, have found that decisionmakers frequently define merit for

and other devices without ensuring that performance on those tests actually predicted success on the job.[16] Reconsidering practices that imposed racially disparate impacts led to the creation of selection instruments that more accurately identified top performers. As just one example, Title VII's disparate impact provision spurred the development of risk assessment centers that more accurately replicate real-world emergency and management scenarios and thus better predict public-safety job performance than other forms of promotional testing like multiple-choice tests.[17]

With this in mind, consider the possible explanations that an employer might offer to justify a current-employment requirement and some of the questions that arise when considering those justifications. Some employers may use current employment as a signal of quality job performance, under the theory that those currently employed (especially in a tough economy) must be strong performers.[18] But such a correlation is decidedly weak, as there are many reasons why one might be unemployed at any time (and especially during a time of economic downturn) that have nothing to do with job performance. These reasons include, but are not limited to, having been in school or in a training program; having to leave a job because of spousal relocation; having lost

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specific jobs in ways "congenial to the idiosyncratic strengths of applicants who belong to desired groups." Eric Luis Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit to Justify Discrimination*, 16 PSYCHOL. SCI. 474, 474 (2005). *See generally* David Dunning et al., *A New Look at Motivated Inference: Are Self-Serving Theories of Success a Product of Motivational Forces?* 69 J. PERSONALITY & SOC. PSYCHOL. 58 (1995) (describing how individuals often define merit in a self-serving manner by emphasizing criteria consistent with their own credentials); Michael I. Norton et al., *Casuistry and Social Category Bias,* 87 J. PERSONALITY & SOC. PSYCHOL. 817 (2004) (finding that evaluators strategically emphasized certain performance criteria to justify discriminatory decisions in hiring and admissions). For example, one study found that evaluators strategically defined merit in a manner that favored male over female applicants when hiring for the job of police chief. Uhlmann & Cohen, *supra*, at 476. Study participants emphasized the importance of education and experience when evaluating a male candidate who had strong credentials in those areas, but devalued those same qualities when evaluating a male candidate who lacked them. *Id.*

16. *See, e.g.*, United States v. City of N.Y., 637 F. Supp. 2d 77, 84 (E.D.N.Y. 2009) ("[I]t is natural to assume that the best performers on an employment test must be the best people for the job. But, the significance of these principles is undermined when an examination is not fair. As Congress recognized in enacting Title VII, when an employment test is not adequately related to the job for which it tests—and when the test adversely affects minority groups—we may not fall back on the notion that better test takers make better employees. The City asks the court to do just that. Regrettably, though, the City did not take sufficient measures to ensure that better performers on its examinations would actually be better firefighters.").

17. *See* Winfred Arthur Jr. et al., *A Meta-Analysis of the Criterion-Related Validity of Assessment Center Dimensions*, 56 PERSONNEL PSYCHOL. 125, 145–46 (2003); Barbara B. Gaugler et al., *Meta-Analysis of Assessment Center Validity*, 72 J. APPLIED PSYCHOL. 493, 503 (1987); James R. Huck & Douglas W. Bray, *Management Assessment Center Evaluations and Subsequent Job Performance of White and Black Females*, 29 PERSONNEL PSYCHOL. 13, 13–14 (1976).

18. *See, e.g.*, Laura Bassett, *Employers Continue to Discriminate Against Jobless, Think "The Best People are Already Working,"* HUFFINGTON POST, Oct. 8, 2010, http://www.huffingtonpost.com/2010/10/08/employers-continue-to-dis_n_756136.html.

a job because of a lack of seniority during employer downsizing; having lost a job because the employer eliminated an entire division or shut down altogether; and having left employment temporarily due to illness, injury, disability, pregnancy, or family caregiving responsibilities.[19] A blanket reliance on current employment thus serves as a poor proxy for successful job performance.

As another possibility, some employers may use current employment as a proxy for relevant experience. But this also raises questions and concerns. First, such a justification is not job related or consistent with business necessity with respect to entry-level jobs that require no experience or for jobs in which candidates receive relevant on-the-job training. Second, even for those jobs that require state-of-the-art knowledge of rapidly changing technologies or practices, current employment may still be an impermissibly blunt instrument for evaluating relevant experience and knowledge. More accurate—and less discriminatory—alternatives include more individualized assessments, such as posing problems or questions in interviews or tests that measure relevant contemporary knowledge, as well as asking questions that reveal recent experience or recent education and training. For example, the candidate may be currently unemployed because he or she has been in school, the candidate may have been employed until very recently, or the candidate may have used a period of unemployment to receive additional education or training.

Offering still another possibility, some employers might use a current-employment requirement simply to discourage applications, or to provide a quick and easy mechanism for filtering applications received.[20] Such a justification—that the practice facilitates the employer's speed and ease in processing applications—has no relationship to candidates' successful job performance, and thus is not job related for the position in question.[21]

In short, current-employment requirements threaten to exclude protected class members from employment disproportionately and absent any meaningful connection to merit. In so doing, they undermine federal antidiscrimination law and its commitment to ensuring that access to job opportunities is free from discrimination in tough economic times as well as good.

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19. Even in the unlikely event that an employer or employment agency could establish the requisite connection between current employment and job performance, less discriminatory alternatives remain available. These include inquiries of the applicant as to whether he or she was ever disciplined or terminated for poor performance, as well as reference checks.

20. *See* NAT'L EMP'T LAW PROJECT, *supra* note 1, at 5.

21. Of course, employers who seek simply to reduce the number of applications to be processed are free to do so in a way that does not impose an adverse impact on protected class members, and thus does not trigger a requirement that they justify the practice as job related for the position in question and consistent with business necessity.