

Just Who Is An Applicant?: The Impact of Electronic Resumes and Job Search Engines On Employment Discrimination Law

I. INTRODUCTION

Out of a job? Looking for a career change? Well, you're in luck! Job searches have become relatively effortless with the continued growth of the Internet and the influx of employers willing to post job openings and career opportunities online. Consequently, it is safe to say that the process by which individuals seek employment in the Twenty-First Century bears little resemblance to the manner in which employees pursued jobs in the mid to late Twentieth Century. With the advent of numerous job search engines and career opportunities listed on company websites, electronic resumes and online applications have become commonplace in today's job market.¹ After all, why would an individual spend the time, money, and effort to compose mass mailings of resumes and cover letters when they can simply post the same materials on Internet job boards or employer websites at no cost, and with little time expenditure?² At least one career advisor has noted that e-mail is the quickest and most efficient way to get resumes and cover letters to employers and recruiters.³

While online search engines originally targeted their postings towards "techies,"⁴ the focus of online career opportunities has expanded to include various types, and levels, of employment.⁵ Search engines such as Monster.com, Hotjobs.com, Jobfind.com, and the like, all create a database of job listings that are made accessible to job seekers on the respective websites at

1. Report, *Online Job Hunting: A Pew Internet Data Memo*, at <http://www.pewinternet.org/reports/reports.asp?Report=65&Section=ReportLevel1&Field=Level1ID&ID=291>. (Nov. 2000). More than fifty-two million Americans have looked for work on the Internet according to the study and more than four million do so on a typical day. *Id.*

2. Osing, Gary L., *Managing a Career Transition*, 21 No. 1 ALA NEWS 18 ¶ 8 (Feb/Mar 2002).

3. *Id.*

4. HR Policies & Practices Update, 3 No. 6, HRPP UPDATE 2 ¶ 7 (1999) (defining "techies" as white males between the ages of 25 and 35 and employed in the technology field).

5. *Id.* at ¶ 8 (emphasizing the ease with which the Internet can be accessed even if individuals do not have Internet access in their homes as opposed to physically driving to an employer's place of business and inquiring as to various job openings).

no cost.⁶ All of the search engines offer job seekers the opportunity to search and view descriptions of various types of employment.⁷ In addition, job seekers can submit their resumes to a specific employer with just a few clicks of the keypad.⁸

In contrast to the large Internet job boards previously described, a new model of recruiting has also emerged during the past few years.⁹ The new model, DirectEmployers.com, comes in the form of a hybrid directory and search engine that allows job seekers to link directly to job listings on employer and recruiter web sites.¹⁰ The key difference between the hybrid version and the larger job boards is the job seeker's ability to link directly to the employer's web site.¹¹ The site's primary purposes are to provide for more effective use of the Internet and to allow for the listing of more career opportunities by reducing employers' publishing costs.¹² DirectEmployers.com launched the site in February 2000, with job listings from over 200 companies and recruiters, and twenty-six members of the E – Recruiting Association supported the site.¹³

DirectEmployers.com is aiming to produce "one directory" of job postings on a website that is completely and entirely free of advertising and all other distractions that may not be related to the recruitment process.¹⁴ DirectEmployers.com allows job seekers to interact directly with employers, and in lieu of compiling a database of job listings, places the application materials directly into the hands of the hiring employer or recruiter.¹⁵ By directly linking the job seeker to employers' web sites, DirectEmployers.com also allows the employer to avoid receiving applications for previously filled positions.¹⁶ Furthermore, the links provide the job seeker with a description of

6. At <http://www.monster.com>; <http://www.hotjobs.com>; and <http://www.jobfind.com>.

7. *Id.*

8. *Id.* Perhaps it is the ease of the process that makes large Internet job boards so popular. ComScore Media Metrix, which measures hits electronically, estimated that Monster.com, the largest of the Internet job boards amassed 16.4 million visitors in October 2002 alone. Mary Ann Milbourn, *The Hire Road*, PROVIDENCE J., Jan. 19, 2003, at H1. Milbourn cites individuals from various staffing companies who require all applicants to file resumes and applications via the website and no longer accept hardcopies of the applicants material. *Id.*

9. Ralph M. Silberman, *Employers Turn The Internet To Their Advantage*, HR-WIRE, Mar. 4, 2002.

10. *Id.* at ¶ 7. DirectEmployers.com bills itself as a "true Internet directory" much like Google.com, which maintains a site clean of all advertising and other materials that detract from the employment recruitment relationship. *Id.*

11. *Id.* at ¶ 9. Adhering to such a practice allows DirectEmployers.com to provide the job seeker with a link to the application information and job descriptions found on the employer's web site. *Id.*

12. Ralph M. Silberman, *Employers Turn The Internet To Their Advantage*, HR-WIRE, Mar. 4, 2002 (estimating that only ten percent of a company's openings are listed on other sites at any one time). *Id.* at ¶ 4.

13. *Id.* Supporters include Abbott Laboratories, Compaq, IBM, Lockheed Martin, SAP America, and Sprint. *Id.*

14. *Id.*

15. *Id.*

16. Ralph M. Silberman, *Employers Turn The Internet To Their Advantage*, HR-WIRE, Mar. 4, 2002. DirectEmployer.com is able to achieve this by not following the generally accepted practice of housing individual job listings on the site in the manner that other search engines do. *Id.* at ¶ 10.

the position and application process, so that the individuals can better gauge their interest in the position as well as determine whether they are qualified for the position.¹⁷

In addition to the web-based search engines, job seekers also have the ability to directly access employment listings on company websites. Employers ranging from investment firms and law firms to pharmacy chains, airline manufacturers, and hotels use this method of recruitment.¹⁸ Utilization of this system, in conjunction with the popularity of independent job search engines, has led to the filing of a staggering number of electronic resumes, especially in light of the floundering economy.¹⁹

Examination of the astounding number of online applications shows that it is impractical to expect employers to have the capacity to carefully review and consider all electronic resumes.²⁰ Mere deletion of the resumes without documentation, however, can lead to charges of discrimination, investigations

17. *Id.*

18. Tamara Loomis, *Inundations of Electronic Resumes Pose Problems for Employers*, (Sept. 2003) at <http://www.law.com/servlet/ContentServer?pagename=OpenMarket/Xcelerate/View&c=LawArticle&cid=1032128604839&live=true&cst=1&pc=0&pa=0> (recognizing that virtually every Fortune 500 Company has an employment web site). *Id.* at ¶ 13.

19. *Id.* at ¶ 15 (citing Boeing Co. as an example of mind-boggling numbers. Boeing projects that it will receive about 1.3 million resumes this year as compared to 790,000 during 2001. *Id.* In addition, Lockheed Martin estimated that it receives 4,000 resumes a day, or approximately 1.4 million annually). *Id.*

20. Although such an expectation is impractical, the employers are required by federal law to reserve their compiled records including personnel and employment records; application forms and records concerned with hiring, promotion, transfer, lay-off, termination, rates of pay, etc. See Preservation of records made or kept, 29 C.F.R. § 1602.14 (2002); MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW 357-358 (West 1988). All such records must be maintained for a period of one year from the date of the making of the report or date of the personnel action involved, and if any of the records are relevant to the disposition of a charge or lawsuit, the records must be maintained until the litigation concerning the records is concluded. *Id.*; PLAYER at 357 - 358. In addition, 29 C.F.R. § 1602 requires larger employers and labor unions generally having 100 or more employees or members to complete and file standard reporting forms with the applicable federal agency. 29 C.F.R. § 1602 (2002). The report, entitled the Employer Information EEO - 1 Survey must be filed on or before September 30 of each year and must be filed by every employer that is subject to Title VII of the Civil Rights Act of 1964, as amended, and that has 100 or more employees. Requirement of Filing of Report, 29 C.F.R. § 1602.7 (2002). All employers subject to Executive Order 11246 and its affirmative action plan also must file such reports. See BRUCE S. HARRISON & ERIC HEMMEDINGER, RESPONDING TO EMPLOYMENT DISCRIMINATION CLAIMS § 2.03(1) (Volume E3 1998). Those subject to Executive Order 11246 include all federal contractors (private employers), who: 1) are not exempt as provided for by 41 CFR 60-1.5, (2) have 50 or more employees, and (a) are prime contractors or first-tier subcontractors, and have a contract, subcontract, or purchase order amounting to \$50,000 or more; or (b) serve as a depository of Government funds in any amount, or (c) is a financial institution which is an issuing and paying agent for U.S. Savings Bonds and Notes. See Uniform Guidelines on Employee Selection Procedure, 41 C.F.R. pt. 60-3 *et seq* (2002). The report is to be filed with the Commission or its delegate in conformity with the directions set forth in the form and accompanying instructions. 29 C.F.R. § 1602.7 (2002). Notwithstanding the provisions of § 1602.14, every such employer shall retain at all times at each reporting unit, or at company or divisional headquarters, a copy of the most recent report filed for each such unit and shall make the same available if requested by an officer, agent, or employee of the Commission under the authority of section 710(a) of Title VII. Appropriate copies of Standard Form 100 in blank will be supplied to every employer known to the Commission to be subject to the reporting requirements, but it is the responsibility of all such employers to obtain necessary supplies of the form from the Commission or its delegate prior to the filing date. *Id.*

conducted by the Equal Opportunity Commission²¹ (EEOC) and expensive lawsuits for employers under current federal anti-discrimination laws.²² Consequently, employers are understandably concerned about the care and consideration they must provide to rejected applicants who have filed online applications with the company.²³ The critical question employers must address inquires whether all individuals who submit online applications or resumes are applicants for purposes of the federal anti- discrimination laws. Employers must re-examine their hiring practices involving online solicitations at least until the task force concludes its duties. The EEOC task force designated to alleviate this dilemma, however, does not appear to be close to doing so.²⁴

Part II of this note will examine the federal guidelines currently governing the employee selection process as well as the history, purpose, and scope of the guidelines. Part III will analyze the body of federal discrimination law to which the guidelines apply. Next, Part IV will consider the ramifications resulting from the guidelines' inability to define the term "applicant" in light of the recent surge of electronic resumes. Finally, Part V will examine and critique the current definitions of an "applicant" in light of the underlying policies of employment discrimination law and will examine their affect on employers, applicants, and fundamental tenets of employment discrimination.

II. THE FEDERAL GUIDELINES

On August 25, 1978, several federal agencies, including the Equal Opportunity Employment Commission,²⁵ the Office of Personnel Management,²⁶ U.S. Department of Justice,²⁷ U.S. Treasury Department,²⁸ the Civil Service Commission,²⁹ and the U.S. Department of Labor Office of Federal Contract Compliance Programs,³⁰ adopted the the Uniform Guidelines

21. The Equal Employment Opportunity Commission is the federal agency responsible for enforcing Title VII of the Civil Rights Act of 1964 and the Americans With Disabilities Act as well as the Age Discrimination in Employment Act and the Equal Pay Act. HARRISON, *supra* note 21, at § 2.03(1). Inherent within the E.E.O.C.'s power to file suit in its name on behalf of its named complainants or to sue on its own initiative to remedy "patterns or practices" of illegal discrimination. PLAYER, *supra* note 21, at 470. Even assuming that an employer is able to prevail in such a lawsuit, the protracted process of litigation and the extensive nature of the E.E.O.C. investigation, which includes an E.E.O.C. request for information, a fact finding conference, an E.E.O.C. investigation and possible conciliatory procedures prior to the commencement of litigation may cause an employer to expend of great deal of time, money, and resources. HARRISON, *supra* note 21, at § 3.02(1) – (9) (explaining and detailing the process by which employment discrimination investigations and lawsuits proceed).

22. Additional Reporting Requirements, 29 C.F.R. § 1602.19 (2002); Loomis, *supra* note 18, at ¶ 5.

23. Loomis, *supra* note 18, at ¶ 10, 20.

24. Loomis, *supra* note 18, at ¶ 31.

25. 29 C.F.R. § 1607 (2002).

26. Employment, 5 C.F.R. § 300 *et seq.* (2002).

27. 28 C.F.R. § 50, *et seq.* (2002).

28. Disclosure of Records, 31 C.F.R., pt. 1 (2002).

29. Disclosure of Records, 5 C.F.R. 300.103(c) (2002).

30. Uniform Guidelines on Employee Selection Procedure, 41 C.F.R. pt. 60–3 (2002).

on Employee Selection Procedure³¹ (the “Guidelines”). The purpose behind the adoption of the Guidelines was to fulfill the long-standing need of the federal government in having a uniform set of principles applicable to employee selection procedures.³² The federal government designed the Guidelines to rid society of employment discrimination by assisting employers, labor organizations, employment agencies, and licensing and certification boards in complying with federal law, which prohibits employment practices that discriminate on race, color, religion, sex, and national origin.³³ The Guidelines apply to private and public employers alike in the enforcement³⁴ of Title VII of the Civil Rights Act of 1964³⁵ and Executive Order 11246.³⁶

The Uniform Guidelines fulfilled its main goals and purposes until the mid 1990’s when the electronic application boom arose.³⁷ In 1995, the U.S. Department of Labor concluded that an employer should consider any individual who submits an online application or electronic resume to be an applicant.³⁸ The Department of Labor’s conclusion, in conjunction with the explosion of electronic resumes, online applications, and job postings, has led to a costly and confusing dilemma for employers.

Theories of Employment Discrimination

Plaintiffs wishing to challenge employment decisions pursuant to the federal anti-discrimination laws may proceed on either the theory of disparate treatment discrimination or disparate impact discrimination. The definition of an applicant is critical to the success of the plaintiff or defendant under each theory.

31. Uniform Guidelines on Employee Selection Procedure § 60-3 (2002); *see also* Citations 41 C.F.R. § 60-3.18 (2002). The citation listed is the official citation for the Uniform Guidelines on Employee Selection Procedure; however, footnotes 25 through 29 also indicate the correct, and more specific citations, to be used when the guidelines are cited in connection with the activities of one of the issuing agencies.

32. 41 C.F.R. § 60-3.1(A) (2002).

33. 41 C.F.R. § 60-3.1(B) (2002).

34. 41 C.F.R. § 60-3.2(A) (2002). The guidelines are applicable to the cited orders and statutes to the extent they involve tests and other selection procedures which are used as a basis in making employment decisions (i.e., hiring, firing, promotion, demotion, membership in labor organizations, referral, retention, and licensing and certification to the extent that licensing and certification may be covered by Federal equal employment opportunity law). *See* 41 C.F.R. § 60-3.2(B) (2002). Likewise, the guidelines only apply to selection procedures that are used as a basis for making employment decisions. *See* 41 C.F.R. § 60-3.2(C) (2002).

35. 42 U.S.C. § 2000e *et seq* (2000). Title VII was instituted as one segment of the 1964 Civil Rights Act intended to combine with the other statutory segments to provide equal access to such areas as voting (Title I) and public facilities and accommodations (Title II & III) as well as to combat discrimination in education (Title IV) and in federally assisted programs (Title VI). *See* PLAYER, *supra* note 21, at 199. Title VII proscribes employment discrimination and harassment on the basis of race, color, sex, national origin, or religion. *Id.*

36. 41 C.F.R. § 60.1 *et seq* (2002). The requirements of the Executive Order apply to the pertinent contractors even though the employer’s workforce may be already free of discrimination. HARRISON, *supra* note 21, at § 1.07.

37. Loomis, *supra* note 18, at 12.

38. *Id.*

Disparate treatment occurs when a member of a protected class is the recipient of adverse treatment as contrasted with the treatment afforded similarly situated individuals who are not members of the same protected class.³⁹ Broadly speaking, the court may hold an employer liable for disparate treatment discrimination if it cannot state a non-discriminatory reason for the differential treatment or if the plaintiff later proves the proffered reason is pretextual.⁴⁰ The disparate treatment model applies to Title VII of the Civil Rights Act of 1964,⁴¹ the Age Discrimination in Employment Act of 1967 (ADEA),⁴² and the Americans with Disabilities Act of 1990 (ADA).⁴³

Disparate Treatment Discrimination

a. Individual Disparate Treatment

In the absence of direct evidence⁴⁴ of discrimination, the plaintiff must satisfy four specific, and well-established, elements to validate an individual disparate treatment claim.⁴⁵ First, the plaintiff must show that he belongs to a racial minority.⁴⁶ Next, the plaintiff must show that he applied⁴⁷ and was qualified for a job for which the employer was seeking applicants.⁴⁸ Third, the plaintiff must prove that the prospective employer rejected him despite his qualifications.⁴⁹ Finally, the plaintiff must establish that the position remained

39. HARRISON, *supra* note 21, at § 2.01.

40. *Id.*

41. 42 U.S.C. 2000e *et seq* (2000); Wendy L. Kahn, *EEO Statutory Overview*, A.B.A. LAB. & EMP. LAW. P.46 (2000).

42. 29 U.S.C. §§ 621 *et seq* (2000).

43. 42 U.S.C. §§ 12101 *et seq* (2000).

44. Direct evidence of discrimination may be shown through a written or oral policy, which is discriminatory on its face. *See City of Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978).

45. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). The analysis set forth in *McDonnell Douglas* is applied when there is no direct evidence available to support the claim. Kahn, *supra* note 41, at 46.

46. The term "protected class" is more widely utilized today in place of "racial minority." PLAYER, *supra* note 21, at 331. The primary reason for the change in terminology is the fact that the *McDonnell Douglas* test applies to women, as well as racial minorities, so the term "racial minority" is too clearly narrow for the application of the statute. *Id.* It also appears that Title VII applies to white plaintiffs as well. *McDonald v. Santa Fe Transportation Corp.*, 427 U.S. 273 (1976).

47. In order to satisfy the "applied" element of the prima facie case, the plaintiff must show that the employer knew she was seeking employment. *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126 (11th Cir. 1984). General, unfocused inquiries will not satisfy this element. *E.E.O.C. v. F & D Distributing, Inc.*, 728 F.2d 1281 (10th Cir. 1984). In addition, applications remain viable for a reasonable length of time after the filing; yet do not have indefinite life spans. PLAYER, *supra* note 21, at 332.

48. A vacancy for which the employer is seeking applicants must be available at the time the application is filed or within a reasonable time thereafter. *Phillips v. Joint Legislative Committee*, 637 F.2d 1014 (5th Cir. 1981).

49. A "qualified" applicant is one who establishes that he satisfies the characteristics, qualities, and skills necessary to perform the job applied for. *Mitchell v. Baldrige*, 759 F.2d 80 (D.C. Cir. 1985). Consequently, it is important for employers to avoid posting vague and highly subjective requirements on job postings as it will be more difficult for the employer to defend their applicability when challenged.

open and the employer continued to seek applicants from persons of the complainant's qualifications after rejecting the plaintiff.⁵⁰ Satisfaction of the requisite elements of the disparate treatment claim serves to prove a prima facie case of discrimination.⁵¹

Establishing the prima facie case⁵² shifts the burden of production to the employer to rebut the presumption of discrimination by producing⁵³ a legitimate,⁵⁴ non-discriminatory reason for the decision.⁵⁵ If the employer is successful in producing a legitimate and non-discriminatory reason for its decision, the court shifts the burden back to the plaintiff and permits the plaintiff an opportunity to rebut the allegedly non-discriminatory reason by showing that the articulated reason is false, or pretextual.⁵⁶ At this stage of the litigation, it appears from the Supreme Court's ruling in *Reeves v. Sanderson Plumbing*⁵⁷ that, if successful in showing that the articulated reason was pretext, the plaintiff will be entitled to judgment as a matter of law.⁵⁸

50. *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973).

51. *Id.*; *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253–256 (1981) (explaining that a prima facie case of discrimination eliminates the most common nondiscriminatory reasons for the plaintiff's rejection and citing a plaintiff's lack of qualifications and a lack of a job vacancy as the primary reasons). Proof of the prima facie case also creates a presumption that the employer unlawfully discriminated against the employee. *Id.* This presumption of illegal motivation is created "because we presume these acts, if otherwise unexplained, are more likely than not based on the considerations of impermissible factors." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978) (citing *McDonnell Douglas*, 411 U.S. at 802).

52. Proof of the individual disparate treatment can also be accomplished through the production of direct evidence such as statements attributable to the employer or employment policies. See *PLAYER*, *supra* note 21, at 327–328.

53. The burden imposed on the employer is one of production, and not persuasion, as the burden of persuasion rests with the plaintiff at all times throughout the case. *Id.* Consequently, the employer's burden of persuasion involves no "credibility assessment." *Id.* (citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993)).

54. The term "legitimate" does not require that the reason be job related. See *McDonnell Douglas*, 411 U.S. at 804–805 (explaining that "past misconduct" may support an inference that misconduct as opposed to racial consideration motivated the employment decision).

55. *Id.*; *Burdine*, 450 U.S. at 253–256.

56. *HARRISON*, *supra* note 21, at § 2.01(4). Evidence of pretext can be shown through direct evidence of prejudice towards the plaintiff's class, statistical data showing an unbalanced workforce, statistics evincing a disproportionate percentage of rejected minority applicants, and proof of inconsistent application of the employer's articulate reason in the past. *PLAYER*, *supra* note 21, at 338.

57. *Reeves v. Sanderson Plumbing*, 530 U.S. 133 (2000).

58. *Reeves*, 530 U.S. at 148; Fed. Rule Civ. Proc. 50(a). The *Reeves* court stated: "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the fact finder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt." (citing *Wright v. West*, 505 U.S. 277, 296 (1992); see also *Wilson v. United States*, 162 U.S. 613, 620–621 (1986)). Factors included in the determination are: the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law. *Reeves*, 530 U.S. at 149. The Supreme Court's holding in *Reeves* effectively undermines the Court's prior holding in *St. Mary's Honor Center*, 509 U.S. at 524–525, which essentially required the plaintiff to produce additional evidence showing that the adverse employment action was racially motivated even in cases where the employer's reason was proven to be pretextual. *Id.* Justice Scalia articulated this finding by stating:

Depending upon which statute the plaintiff invokes in the disparate treatment claim, damages may vary accordingly,⁵⁹ and if the employer's defense is unsuccessful, will result in significant expenditures. Generally, the damages may include punitive damages, back pay, front pay, liquidated damages, compensatory damages, and injunctive relief.⁶⁰

Another method to pursue an individual disparate treatment claim is a "mixed motive" claim.⁶¹ When Congress passed the Civil Rights Act of 1991 ("Act"),⁶² Congress declared it unlawful for an employer to base an employment decision even partly on impermissible considerations outlawed by Title VII.⁶³ The goal of the "mixed motive" theory and the Act is to lessen the onerous burden the *McDonnell Douglas* framework places on the plaintiff as the mixed motive analysis requires that the plaintiff need only demonstrate that race, color, religion, sex or national origin was a "motivating factor" in the decision.⁶⁴ The Act essentially makes "mixed motive" an affirmative defense, and if the employer successfully asserts the defense, the court may award the plaintiff declaratory relief and injunctive relief as well as attorney's fees, but not damages or reinstatement.⁶⁵

While the plaintiff may choose to formulate its case pursuant to either the *McDonnell Douglas* theory or the "mixed motive" theory, the plaintiff need not choose one to the exclusion of the other at the outset of the litigation. The plaintiff, however, may alternatively request the appropriate jury instruction at the close of evidence.

b. Systemic Disparate Treatment

The second theory of disparate treatment discrimination involves discrimination imposed on a group level.⁶⁶ Discrimination occurring in this

"[w]hile rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination but rejection of the proffered reasons *did not compel* judgment for the plaintiff." *Id.* at 511-512.

59. See Kahn, *supra* note 41, at 18, 23, 27, 37, and 44.

60. *Id.*

61. HARRISON, *supra* note 21, at § 2.01(5).

62. 42 U.S.C. § 20003 (2000).

63. The passage of the 1991 Act was in direct response to the Court's holding in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which was partly affirmed, partly overruled and partly clarified by the Act. Kahn, *supra* note 41, at 46.

64. 42 U.S.C. 2000e-2(m) (2000). While the factor must be a motivating factor, it need not be the primary factor in the decision. Kahn, *supra* note 41, at 46.

65. 42 U.S.C. § 2000e-5(g)(2)(B) (2000).

66. See HARRISON, *supra* note 21, at § 2.01(3). While a systemic claim is normally brought as a class action it may also be pursued on an individual basis. Kahn, *supra* note 41, at 48. To secure individual remedies in a class action suit the plaintiff must demonstrate that each individual was affected by an employment decision by proving that the individual was within the class against whom the defendant had discriminated and had either applied for a position with the defendant or, if he did not apply, that he was deterred from applying because of the employer's discriminatory practices. PLAYER, *supra* note 21, at 340. To avoid individual liability the employer must persuade the trial court that the rejection of each individual was

manner is aptly entitled “systemic disparate treatment” or “pattern or practice” discrimination.⁶⁷ Systemic disparate treatment applies to Title VII actions as well as those set forth pursuant to the ADEA.⁶⁸

Systemic disparate treatment alleges that the defendant employer has intentionally engaged in systematic disparate treatment against a specific class of individuals and that the employer has essentially adopted discrimination as a standard operating procedure.⁶⁹ A key factor in the presentation of systemic cases is the presentation of statistical evidence that attempts to demonstrate that employers treat all employees and/or applicants of a particular protected class unequally and less favorably.⁷⁰ While the Supreme Court recognized in *Int’l Br’hd of Teamsters v. U.S.*⁷¹ that statistical patterns may establish a prima facie case of systemic discrimination,⁷² it is generally accepted that other evidence, in addition to the statistics, must be set forth to prove the pattern or practice claim.⁷³

When pursuing a systemic discrimination claim, plaintiffs may need to refine statistical data due to the nature of the position they applied for or because of the characteristics of the labor pool from which the employer recruits.⁷⁴ Key determinations in refining the statistical data include determining the appropriate geographical area to which the workforce comparison can be made as well as limiting the working population to those whom the employer’s workforce is compared to and to those who possess the special skills, certification, experience, education or training necessary for the position.⁷⁵

As was evident in the individual disparate treatment section, the determination of who is an applicant plays a critical role in the analysis of systemic disparate treatment lawsuits, as applicants play a major role in the statistical proof.

done for a lawful reason. See *Dillon v. Coles*, 746 F.2d 998 (3d Cir. 1984).

67. *Id.*; see also *PLAYER*, *supra* note 21, at 339.

68. 29 U.S.C. § 631(c) (2000).

69. See *Hazelwood School Dist. v. U.S.*, 433 U.S. 299, 303 (1977) (alleging racial discrimination in the hiring of teachers).

70. Kahn, *supra* note 41, at 48.

71. 431 U.S. 324 (1977).

72. *Id.*

73. In *Int’l Br’hd of Teamsters*, the Supreme Court relied on the statistical evidence, which was regarded as an inference of illegal motivation but also relied on a number of examples where individuals arguably had been subjected to illegal disparate treatment. *Id.* The statistical evidence showed that of the employer’s 6,500 employees only 5% were black and only 4% were Hispanic and also showed that the percentages employed in more desirable jobs at the defendant’s employ were reduced to 0.4% for blacks and 0.3% for Hispanics, respectively. *Id.* The additional evidence showed a number of individual examples of qualified minority person who applied for vacancies but were rejected in favor of white applicants. *Id.*

74. See *Hazelwood*, 433 U.S. at 311.

75. *Id.* If, however, the position is one, which requires such little skill that the entire working age population could perform the tasks of the position, general statistical data may suffice. *Id.*

The "Disparate Impact" theory of discrimination

The Supreme Court's 1971 ruling in *Griggs v. Duke Power Co.*⁷⁶ gave rise to the notion that Title VII forbids those "practices that are fair in form, but discriminatory in operation" in addition to prohibiting those actions exhibiting overt discrimination.⁷⁷ Although the theory existed as a matter of judicial interpretation from 1971 through 1991, the passage of the Civil Rights Act of 1991 confirmed the legitimacy of the disparate impact theory of discrimination.⁷⁸ With the passage of the 1991 Civil Rights Act, Congress added a number of subsections to Title VII in an effort to define the circumstances under which disparate impact charges are available.⁷⁹

By definition, disparate impact cases involve challenges to facially neutral policies that employers implement in a non-discriminatory fashion, yet have a significant adverse and disproportionate impact on a protected class.⁸⁰ If the challenge is successful, the practice is unlawful unless the employer can show there is a business necessity for administering the policy.⁸¹ While the majority of adverse impact cases proceed as government suits or class actions, individuals can also utilize the adverse impact theory to assert a suit against an employer and employ the same method of proof utilized in a class based suit.⁸² When a plaintiff files a suit or charge with a federal agency, the agency permits the plaintiff to simultaneously pursue a disparate treatment suit.⁸³ The disparate impact theory applies to cases, in which subjective employment practices are at issue, and while damages may still be costly, the statute does not allow for the recovery of compensatory and punitive damages normally permitted under Title VII.⁸⁴

a. Burdens of Proof

Pursuant to the *Griggs* model of adverse impact analysis under Title VII, the plaintiff has the burden of proving that a neutral employer practice or selection

76. 401 U.S. 424 (1971).

77. LEX K. LARSON, EMPLOYMENT DISCRIMINATION, § 20.01, 20 02 (2d. Ed. 2002). Examples of practices that are fair in form but discriminatory in operation include employment tests and educational requirements that have the effect of excluding a disproportionate number of blacks. *Id.*; *Griggs*, 401 U.S. at 431.

78. See LARSON, *supra* note 77, at § 20.01.

79. *Id.* (stating that Section 105 of the Civil Rights Act of 1991 added subsections (k)(1)(A), (B), and (C) to § 703 of the Civil Rights Act of 1964).

80. HARRISON, *supra* note 21, at § 2.02. It is important to remember that intent is not required to prove unlawful disparate impact. *Id.* at §2.02(1).

81. *Id.*

82. Caviale v. Wisconsin, 744 F.2d 1289 (7th Cir. 1984); PLAYER, *supra* note 21, at 357.

83. PLAYER, *supra* note 21, at 357.

84. Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988); Kahn, *supra* note 41, at 51-52 (noting that an issue still remains open as to whether disparate impact applies to ADEA cases). Kahn *supra* note 41, at 52.

device has a disproportionate impact on a protected group.⁸⁵ The parties satisfy this burden by following a precise method of proof.⁸⁶ First, the plaintiff must demonstrate⁸⁷ that the employer uses a particular employment practice that causes a disparate impact.⁸⁸ Although the statute infers that a plaintiff must directly point to a component of the hiring process, as causing a disparate impact, the statute also provides that the plaintiff can point to the entire decision-making process if he or she can demonstrate that the elements of a respondent's decision-making process are not capable of separation for analysis.⁸⁹

If the plaintiff carries this initial burden, the burden shifts to the defendant to establish that use of the device is a "business necessity."⁹⁰ The burden shifted to the defendant is one of persuasion.⁹¹ If the defendant, however, is successfully able to show that the challenged practice did not cause the alleged disparity or that the plaintiff was incorrect in asserting that a disparity existed, the need to prove business necessity does not factor into the equation.⁹² If the need to prove business necessity arises, it is critical that the court refrain from contemplating the defendant's motivation for using the device when making the determination.⁹³

b. Statistical Implications in Determining Adverse Impact

For a plaintiff to successfully maintain the initial burden of proving that a particular device or system adversely affects employment opportunities, he or she must document the impact.⁹⁴ Consequently, statistics have become a tool of great significance in the outcomes of disparate impact suits.⁹⁵ In *Alabama v. U.S.*,⁹⁶ the court emphatically articulated their significance by stating:

85. LARSON, *supra* note 77, at § 21.

86. *See id.*

87. 42 U.S.C. § 2000e(m) (2000) defines the term "demonstrate" to mean "meets the burdens of production and persuasion."

88. 42 U.S.C. § 2000e 2(k)(1)(A) (2000); *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

89. 42 U.S.C. § 2000e 2(k)(1)(B)(i) (2000).

90. *Id.* Proof of business necessity proceeds in the following manner. The defendant may prove that a "manifest relationship" exists between the device being challenged and bona fide and significant business purposes. The burden the defendant faces in doing so is one of persuasion and cannot be achieved by merely articulating a business purpose or a conceivable relationship between the practice and the purpose. If the defendant successfully proves the existence of the "manifest relationship" and the plaintiff presents nothing more to the court, the defendant is entitled to judgment. *See also* *E.E.O.C. v. Rath Packing Co.*, 787 F.2d 318 (9th Cir. 1986) (holding that an employer unable to identify the criteria and qualifications which were considered in the hiring decisions could not establish that these qualifications and criteria were necessary to the safety and efficiency of its operations); *Cf. Contreras v. Los Angeles*, 656 F.2d 1267 (9th Cir. 1981) (the employer's burden is met with less than proof of absolute business necessity).

91. *See* LARSON, *supra* note 77, at § 20.01.

92. 42 U.S.C. § 2000e 2(K)(1)(B)(ii) (2000).

93. PLAYER, *supra* note 21, at 356.

94. *Harper v. Trans World Airlines, Inc.*, 525 F.2d 409 (8th Cir. 1975).

95. LARSON, *supra* note 77, at § 22.01.

96. *Alabama v. U.S.*, 304 F.2d 583, 586 (5th Cir. 1962), *aff'd per curiam*, 371 U.S. 37 (1975).

“Statistics often tell much and the courts listen.”⁹⁷ This premise applies even in instances where it is rationale to assume that a hiring practice would fall more heavily upon a protected class.⁹⁸ Nonetheless, it is essential that the plaintiff attain the ability to document the impact through statistical proof.⁹⁹

i. What must the statistics show?

Determination of the unlawful affect of policies in a disparate impact case involves ascertaining how “significantly different” the selected applicants are from the entire applicant pool and gauging whether the employer disqualifies the adversely affected class at a “substantially higher” rate than the selected classes.¹⁰⁰ The Supreme Court’s articulated its reasoning in both the *Griggs*¹⁰¹ and *Moody*¹⁰² cases, respectively.¹⁰³

ii. Recommended Statistical Analysis

Pursuant to the Uniform Guidelines governing the EEOC, the Office of Federal Contract Compliance Programs, and other federal agencies, the most appropriate form of data analyzed in disparate impact cases is “applicant flow” data because of its presumed reliability.¹⁰⁴ Applicant flow data examines the employer’s own hiring or promotion experience.¹⁰⁵ In analyzing such data, the Guidelines require a comparison between the percentage of eligible, actual applicants who possess the challenged criteria to the percentage of actual applicants of other classes who possess the criteria.¹⁰⁶

In making the comparison between the two groups of applicants, the Uniform Guidelines suggest utilizing the “four-fifths rule” or “eighty percent rule.”¹⁰⁷ The rule states:

97. *Id.*

98. *Harper*, 525 F.2d at 412. It is rationale to assume that a rule prohibiting employment of spouses would fall more heavily upon female applicants, but that assumption will not be sufficient to prove impact. *Id.*

99. *Id.*

100. LARSON, *supra* note 77, at § 22.10[2].

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

102. *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

103. “[B]oth requirements operate to disqualify Negroes at a *substantially higher* rate than white applicants . . .” *Griggs*, 401 U.S. at 436. “This burden arises of course, only after the complaining party or class has made out a prima facie case of discrimination, has shown that the tests in question select applicants for hire or promotion in a racial pattern *significantly different* from the pool of applicants.” *Moody*, 422 U.S. at 425.

104. 29 C.F.R. § 1607.4 (2002); PLAYER, *supra* note 21, at 360.

105. PLAYER, *supra* note 21, at 357. In contrast “applicant pool” data, which is not favored by the Uniform Guidelines, examines the percentage of person by race, ethnicity, or gender in a potential applicant pool that possess the device being challenged. *Id.*

106. *Id.*

107. 29 C.F.R. § 1607.4 (2002); LARSON, *supra* note 77, at § 22.10[2]. It should be noted that the “eighty percent rule” is not legally binding upon the courts, but instead just provides them with an objective standards employed by the E.E.O.C. and other agencies in carrying out investigations intended to determine whether a practice produces a disparate impact. *Id.*

A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.¹⁰⁸

The following example illustrates this rule: Prior to qualifying for employment, an employer requires all applicants to take a written test. One hundred white males take the objective test and ten “pass” the test. The selection rate for the white male group is ten percent. Suppose fifty black applicants also take the test and four of the fifty “pass” the test. The selection rate for the black group equals eight percent. The black selection rate (eight percent) is equal to eighty percent of the white selection rate (ten percent). Consequently, the test will not result in a disparate impact on black applicants.¹⁰⁹

While there are several noted problems with the eighty percent analysis, the federal agencies and the courts continue to accept its utilization in disparate impact lawsuits.¹¹⁰ The Uniform Guidelines recognize the problem small statistical samples produce due to an inability to provide an accurate account of the device’s impact and also note that an employer’s reputation for engaging in discriminatory hiring practices may discourage people from submitting applications to the company, therefore reducing the statistical bases.¹¹¹ Despite these shortcomings the courts continue to rely on the eighty percent rule when making intuitive judgments as to whether a plaintiff successfully established a disparate impact among the classes.¹¹²

IV. RE EXAMINATION OF WHO QUALIFIES AS AN “APPLICANT”

Subsequent to the Department of Labor’s conclusion that the term “applicant,” as used in the Uniform Guidelines, covered all employment-seeking individuals, employers and other federal agencies began to express concern over this broad definition. Consequently, in 2000, the Office of Management and Budget ordered the EEOC and other federal agencies to update the definition of an applicant.¹¹³ Pursuant to the order issued by the Office of Management and Budget, a task force comprised of representatives from the EEOC, the Office of Personnel Management, the Department of Justice, and the Department of Labor, including the Office of Federal Contract Compliance, have been working towards a uniform definition. The task force,

108. 29 C.F.R. § 1607.4 (2002).

109. PLAYER, *supra* note 21, at 360.

110. See LARSON, *supra* note 77, at § 22.10[2]; PLAYER, *supra* note 21, at 361, 363.

111. 29 C.F.R. § 1607.4 (2002).

112. PLAYER, *supra* note 21, at 363; See, e.g., *Bushey v. New York State Civil Service Comm’n*, 733 F.3d 220, 225 (2d Cir. 1984); *Williams v. Vukovich*, 720 F.2d 909, 925-926 (6th Cir. 1983).

113. *Id.*

however, has not yet rendered a decision.¹¹⁴

One must question whether the Department of Labor realized the ramifications of its 1995 interpretation of who constitutes an “applicant.” The Department of Labor presumably contemplated online filings because its interpretation specifically included those who “applied online.”¹¹⁵ Whether the Department actually foresaw the popularity of electronic resumes, and the problems such an interpretation would cause in light of this popularity, is a matter of conjecture. By reaching such a conclusion, the Department of Labor greatly increased potential applicant pools.¹¹⁶ The finding also seems to contradict the criteria previously recognized in federal discrimination cases.¹¹⁷

Currently, one source offering guidance to employers seeking an answer to the question of who qualifies as an applicant is the Uniform Employee Selection Guidelines Questions and Answers.¹¹⁸ Question 15 of the Q & A asks the following: “what is meant by the terms “applicant” and “candidate” as they are used in the Uniform Guidelines?”¹¹⁹ The answer provided states:

The precise definition of the term “applicant” depends upon the user’s recruitment and selection procedures. The concept of an applicant is that of a person who has indicated an interest in being considered for hiring, promotion, or other employment opportunities. This interest might be expressed by completing an application form, or might be expressed orally, depending upon the employer’s practice. The term “candidate” has been included to cover those situations where the initial step by the user involves consideration of current employees for promotion, or training, or other employment opportunities, without inviting applications. The procedure by which persons are identified as candidates is itself a selection procedure under the Guidelines. A person who voluntarily withdraws formally or informally at any stage of the selection process is no longer an applicant or candidate for purposes of computing adverse impact. Employment standards imposed by the user, which discourage disproportionately applicants of a race, sex, or ethnic group, may, however, require justification. Records should be kept for persons who were

114. See White Papers, *EEOC Task Force Re Examining “Who is an applicant?”* at <http://www.eeosource.com/whitepapers/default.asp?WhitePaperID=36>; Ogeltree, Deakins, Nash, Smoak & Stewart, P.C., Agency Action, 11 No. 15 CAL. EMP. L. LETTER 5, (Oct. 2001). The original updated definition was due to the Office of Management and Budget by the end of 2001. *Id.* The task force, however, failed to meet the deadline, and also failed to satisfy two subsequent deadlines. Presently, no deadline is set for the task force to conclude their duties. *Id.*

115. Loomis, *supra* note 18, at ¶ 12.

116. PLAYER, *supra* note 21, at 357 – 358. Defining an “applicant pool” requires the plaintiff to identify the most appropriate pool of potential applicants by taking the geographic area from which the employer is most likely to receive applicants as well as the elements of the job to be performed. *Id.* Skill level plays a key role in determining the population data and geographic area to be utilized in such a determination. *Id.*

117. E.E.O.C. v. F & D Distributing, Inc., 728 F.2d 1281 (10th Cir. 1984) (“while a formal application for a specific vacancy is not required, a general, unfocused inquiry about potential vacancies. . . will not suffice”).

118. At <http://www.uniformguidelines.com/questionsandanswers.html>. The information on this site is advertised as “a free service for human resources professionals” and does not have any legal force and effect, but is merely a guide for employers. *Id.*

119. *Id.*

applicants or candidates at any stage of the process.¹²⁰

At least one commentator has interpreted this definition to include two elements, which an individual must satisfy prior to being afforded applicant status: First, the job seeker must express an interest in working for that particular employer; and second, the job seeker must follow the employer's application procedures.¹²¹ While the first element merely mirrors the 1995 Department of Labor conclusion, the second element serves to restrict the applicant pool only slightly. Essentially the interpretation states that the employer's recruiting practice will be conclusive as to which individuals are applicants. If an employer chooses to recruit solely through online databases, search engines, and directories, the applicant definition found in section 15 of Uniform Guidelines Question and Answers appears to conclude that all those job seekers submitting their resumes or applications online will be applicants. This conclusion makes no mention of whether the individuals must be qualified for the position that they are applying for. Without such a consideration present in the definition, an individual may be viewed as an applicant, yet be wholly unqualified for the position at issue. Therefore, the standard evinced in the Questions and Answers section does little to curb employers' concerns as it bestows unqualified individuals with applicant status. Advising employers to utilize such a standard places them in only a slightly better position than they held under the 1995 Department of Labor conclusion.

Burdensome ramifications resulting from an ambiguous "applicant" definition

1. Record maintenance and production

A broad and all inclusive definition of the term "applicant" not only carries dangers of large jury awards in employment discrimination lawsuits, but it also includes exorbitant costs in relation to the retention and recording of documents and records.¹²² Consequently, an issue of utmost concern to employers as a result of the Department of Labor's finding is the extent to which they must

120. See *id.*

121. Elizabeth Glennie, *Who is an applicant, at* <http://eosource.peopleclick.com/whitepapers/default.asp?WhitePaperID=13>. While Glennie interprets the Q & A definition to include two elements, she states that a third element must be implemented to accomplish the precision so needed in the definition of an applicant. *Id.* The third element imposed by Glennie is as follows:

For a job seeker to be an applicant for a particular employer, that employer must actually act upon the job seeker's qualifications. That is, based on a review of some aspect of the job seeker's qualification, the employer must decide whether or not this person continues with the application process. Based on the job seeker's qualifications, if the employer decides to hire the job seeker, allow the job seeker to advance to the next stage of the application, or to exclude the person from further consideration, that person is an applicant.

Id.

122. Loomis, *supra* note 18, at ¶ 18.

retain records of these online applicants.¹²³

According to the EEOC's Record keeping and Reporting Requirements¹²⁴ under Title VII,¹²⁵ employers who are, first, subject to Title VII of the Civil Rights Act of 1964 with more than one hundred employees excluding State and local governments, primary and secondary school systems, institutions of higher education, Indian tribes and tax-exempt private membership clubs other than labor organizations; or second, those employers subject to Title VII who have fewer than 100 employees if the company is owned or affiliated with another company, or there is centralized ownership, control or management (such as central control of personnel policies and labor relations) so that the group legally constitutes a single enterprise, and the entire enterprise employs a total of 100 or more employees must file Standard EEO-1¹²⁶ forms.¹²⁷ All federal contractors (private employers), who: (1) are not exempt as provided for by 41 CFR 60-1.5, (2) have fifty or more employees, and (a) are prime contractors or first-tier subcontractors, and have a contract, subcontract, or purchase order amounting to \$50,000 or more; or (b) serve as a depository of Government funds in any amount, or (c) is a financial institution which is an issuing and paying agent for U.S. Savings Bonds and Notes must file the EEO-1 forms as well.¹²⁸

The employer must file the EEO-1 Report on or before September 30 of each year.¹²⁹ The penalties for failure to file a report or for falsifying a report are extensive and severe.¹³⁰ An employer also must preserve all personnel or employment records in accordance with the federal regulations.¹³¹

123. 29 C.F.R. §1602 (2002); 41 C.F.R. § 60-3.15(A)(1)(2) (2002).

124. 29 C.F.R. §1602.7 - 14 (2002).

125. 42 USCA § 2000e-8(c) (2000); Title VII § 709(a)

126. The EEO-1 Employer Information Report was jointly developed by the E.E.O.C. and the Office of Federal Contract Compliance Programs for the U.S. Department of Labor to fit the needs of both agencies in the interests of consistency, uniformity, and economy. See Standard Form 100, Rev. 3 - 97, Employer Information Report EEO-1, 100 - 118 Instruction Booklet.

127. *Id.*

128. *Id.*

129. 29 C.F.R. § 1602.7 (2002).

130. See 29 C.F.R. § 1602.8 stating that an employer who willfully makes false statements on an EEO-1 form can be punished or fined in accordance with United States Code Title 18 § 1001. Additionally, federal contractors subject to § 209(a) of Executive Order 11246 and who fail to comply with the filing requirement may be penalized through termination of their Federal government contract and debarment of future federal contracts. 41 C.F.R. § 60.1 *et seq* (2002).

131. 29 C.F.R. § 1602.14 (2002). Any personnel or employment record made or kept by an employer (including but not necessarily limited to requests for reasonable accommodation, application forms submitted by applicants and other records having to do with hiring, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship) shall be preserved by the employer for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later. In the case of involuntary termination of an employee, the personnel records of the individual terminated shall be kept for a period of one year from the date of termination. Where a charge of discrimination has been filed, or an action brought by the Commission or the Attorney General, against an employer under Title VII or the ADA, the respondent employer shall preserve all personnel records relevant to the charge or the action until final disposition of the charge or the action. The term "personnel records relevant

While an employer may compile the EE0-1 information after applicants become employed, the regulations require the preservation of information relating to hiring and promotions.¹³² The broad, and currently utilized, applicant definition requires that employers store and maintain all electronic resumes.¹³³ Such a requirement only increases the volume of documents an employer must maintain, many of which are no longer needed due to an applicant's insufficient qualifications or lack of interest in the position.

Costs of maintaining the records

In light of Title 29's stringent recording and reporting requirements, employers have exhibited extreme caution in processing and maintaining the necessary records and documents mandated by federal law.¹³⁴ This care and concern, however, has evolved into an extremely burdensome expense for employers throughout the nation.¹³⁵ As noted earlier, more than 52 million Americans have searched for work on the Internet.¹³⁶ Consequently, companies such as Boeing and Lockheed Martin receive over one million resumes on an annual basis.¹³⁷

Due to the EEOC's record keeping requirements, employers must preserve these voluminous records, including applications and resumes, for a mandated period of time.¹³⁸ The question of whether or not an employer must maintain the records is not the employer's dilemma at the present time; rather it is how they can possibly manage the numerous files until allowed to discard them. Consequently, companies similar to Boeing and Lockheed Martin have taken costly measures to ensure compliance with the federal regulations.¹³⁹

One method of storing the electronic resumes is to rent warehouse space solely for that purpose.¹⁴⁰ Renting the warehouse space appears to be cost-effective and allows employers to maintain accurate records of the applications in the event that a plaintiff asserts a charge against the company. Another more

to the charge," for example, would include personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person and application forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that for which the aggrieved person applied and was rejected. The date of *final disposition of the charge or the action* means the date of expiration of the statutory period within which the aggrieved person may bring an action in a U. S. District Court or, where an action is brought against an employer either by the aggrieved person, the Commission, or by the Attorney General, the date on which such litigation is terminated. *Id.*

132. HARRISON, *supra* note 21, at §15.03[2].

133. *Id.*

134. Loomis, *supra* note 18, at ¶ 16.

135. Loomis, *supra* note 18, at ¶ 15.

136. Online Job Hunting, *supra* note 1.

137. Loomis, *supra* note 18, at ¶ 15.

138. 29 C.F.R. § 1602.14 (2002).

139. Loomis, *supra* note 18, at ¶ 15.

140. Loomis, *supra* note 18, at ¶ 15 (citing Cari Dominguez who stated that at least one major U.S. company has rented warehouse space entirely for the purpose of storing applications).

expensive means of managing the applicant pools is through the purchase and implementation of online staffing management systems.¹⁴¹ Such systems are effective in terms of managing applications while simultaneously satisfying the federal tracking requirements mandated by the federal regulations.¹⁴² Costs for the systems average approximately \$500,000.¹⁴³ Properly storing the resumes does not, without more, protect the employer from charges filed by disgruntled job seekers.¹⁴⁴ Employers must maintain the applicants' race, gender, and ethnicity to help the federal agencies discern whether their hiring practices adversely impact upon any particular groups.

Purchasing resume scanning software and tracking software provides another costly manner of maintaining and handling documents.¹⁴⁵ While plaintiffs challenged such software in *Rivers v. The Walt Disney Company*,¹⁴⁶ there have been no decisions invalidating utilization of the software. The software¹⁴⁷ allows an employer to enter resumes into a database through several methods including scanning, manual key dating, accessing other services' resume databases, and through the Internet.¹⁴⁸ When it conducts the search, the software can search for keywords according to the program's level of sophistication.¹⁴⁹ While there are benefits to the scanning software, such as programs that are gender and race blind, there is also a severe potential for "digital redlining."¹⁵⁰ Many, including the plaintiffs in *Rivers*, allege that the scanning software is essentially discriminatory because it recognizes key words that are likely to identify an individual's race.¹⁵¹ Although the Court considered these assertions, a majority of Fortune 1000 companies still use resume-scanning technologies.¹⁵²

V. CONCLUSION

As section III states, at least one interpretation of the Uniform Guidelines Questions and Answers provides that the current definition of an applicant

141. Loomis, *supra* note 18, at ¶18.

142. *Id.*

143. *Id.*

144. *Id.*; see Standard Form 100, Rev. 3 – 97, Employer Information Report EEO-1, 100 – 118 Instruction Booklet.

145. Nadya Aswad, *Resume Scanning, Tracking Software Raises New Discrimination Issues*, B.N.A. Inc. Daily Labor Report, March 17, 1998.

146. 980 F. Supp. 1358 (C.D. Cal. 1997).

147. Resumix Inc produced the software challenged in the *Rivers* case. Aswad, *supra* note 145 at ¶ 3.

148. Aswad, *supra* note 145, at ¶ 10.

149. *Id.* at ¶ 11. Once resumes are in an electronic database, it is possible to search 100,000 resumes for key words and other features in ten seconds. *Id.*

150. *Id.* at ¶ 13. The term digital redlining refers to an employer's ability to detect certain traits such as age and zip codes on resumes that may essentially allow the employer to discriminate against potential applicants. *Id.*

151. *Id.* at ¶ 4.

152. Aswad, *supra* note 145, at ¶ 9.

includes two elements.¹⁵³ In that analysis, author Elizabeth Glennie of Peopleclick Analytics concludes that the Questions and Answers definition is not specific enough and allows job seekers to qualify as applicants too easily.¹⁵⁴ Glennie is correct in stating that the definition is too broad, as it regards any individual who files an online resume as an applicant. The manner in which she attempts to add to the Guidelines definition, however, arguably fails to consider the purposes of employment discrimination law, and specifically Title VII.¹⁵⁵

In contrast to Glennie's assertion that merely posting a resume on a website should not sufficiently qualify an individual as an applicant, the Guideline's definition merely appears to mandate that an individual indicate "an interest in being considered for hiring, promotion, or other employment opportunities."¹⁵⁶ As a result, the Q and A definition would qualify all those who post resumes on Internet job boards as applicants, while Glennie, through implementation of a third definitional element, would require that the employer consider the potential applicant's materials before that person is regarded as an applicant.¹⁵⁷

Utilizing the Q and A definition in cases of disparate impact discrimination opens the floodgates and includes all individuals who submit online resumes and comply with the employer's hiring practices. Some may ask why this standard isn't strict enough. Complying with both elements still regards unqualified individuals as applicants

Glennie's approach, however, may still drag employers into the quagmire of litigation, as the approach will still force employers to defend their decisions on either a group or an individual basis. Additionally, the employer's individual decisions may potentially face numerous challenges based on alleged subjectivity and vagueness, which are two areas that are extremely difficult to defend.¹⁵⁸ First, subjective justifications are usually determined to lack legitimacy, especially when objective measurements are available.¹⁵⁹ Secondly, the courts view vague responses to discrimination charges as mere denials of discrimination, and are regarded as insufficient to satisfy the employer's burden of producing a legitimate, non-discriminatory reason for their decision.¹⁶⁰

It would appear that following Peopleclick Analytics' suggestion that a person only becomes an applicant after the employer makes a decision based on their resume and qualifications would lead to a multitude of challenges based on subjective and vague reasoning. Following Peopleclick's analysis, an

153. Glennie, *supra* note 124.

154. Glennie, *supra* note 124.

155. *PLAYER*, *supra* note 21, at 199. The original goal of Title VII was to rid the employment relationship of discrimination at all levels. *Id.*

156. Available at <http://www.uniformguidelines.com/questionsandanswers.html>

157. Glennie, *supra* note 124.

158. *PLAYER*, *supra* note 21, at 335–336.

159. *Rowe v. General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972).

160. *PLAYER*, *supra* note 21, at 335.

employer could essentially choose to review one hundred of a possible five hundred resumes filed with the company and could simply disregard the four hundred resumes not considered, as they were not applicants anyway. The Guidelines definition, however, would include all five hundred as applicants. While neither definition is perfect, it seems that the proposal set forth by Peopleclick Analytics places an employer in a more precarious position. Although the Guidelines approach may lead to exorbitant costs and administrative expenses, the potential for the courts looking upon the employer's practice of simply disregarding resumes may lead to even greater liability. How would an employer prove that they simply disregarded those four hundred resumes? The employer would have to prove something for which little to no evidence exists. Traditionally, employers prefer to avoid such situations, and defending such a position, even to the summary judgment stage, would be costly, time consuming, and possibly open the door to other lawsuits.

Instead of altering the applicant definition, it may be more practical to impose requirements on employers that post online job opportunities. Employers should expect to bear some of the burden for utilizing the Internet as a recruiting tool, especially when they reap the benefits of the process. Mandating that an employer list all job requirements in the employment description, requiring the inclusion of an explicit list of procedures for the potential applicant to follow, and implementing non discriminatory staffing systems to manage the electronic resumes may all serve to make the online application process less of a quandary for employers. Taking these steps will enable the current definition to undergo only minor changes while still providing for employer's with a heightened degree of protection.

Additionally, it may be wise for employers to momentarily refrain from posting all of their positions on the Internet even if they believe the process is highly beneficial. Perhaps an employer should only post those positions that they are certain will require a high degree of skill, expertise, and experience. This approach may prevent the filing of a voluminous amount of applications for lesser-skilled positions. Refraining from posting lower-level positions will assist the employer in avoiding subjective decisions, as the highly skilled positions will require a more objective analysis due to the inherent nature of the jobs.

While none of these suggestions could serve as a fool-proof method of avoiding the online application dilemma, they may serve to mitigate the costs and pitfalls all employers experience until the EEOC Task Force formulates a proper definition of an applicant.

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