A Duty to Make Reasonable Efforts and a Defense of the Disparate Impact Doctrine in Employment Discrimination Law

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INTRODUCTION

In 1997, five women brought a class action against the Southeastern Pennsylvania Transportation Authority ("SEPTA") claiming that SEPTA's physical fitness test, which applicants were required to pass in order to be eligible for employment, had a discriminatory effect on women.1 The plaintiffs satisfied all administrative requirements for positions as transit police officers, but failed the "physical entrance requirement of running 1.5 miles in 12 minutes or less."2 On average, only twelve percent of women passed the running test, while almost sixty percent of men passed the test.3 Using these statistics as evidence, the women argued that the running test had a disproportionately adverse effect on women.

As Judge Weis noted in his dissent, the record tended to show that the plaintiffs did not make good faith efforts to pass the running test.4 An expert witness testified that the average woman could pass the running test "with only moderate training."5 In addition, videotapes showed some of the female applicants walking "at the halfway point, either because they were indifferent or unable to run for even that short a period of time."6 Despite this evidence that the plaintiffs and other members of their class did not make good faith attempts to pass the running test, the Third Circuit permitted the plaintiffs' claim to

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2. Id. at 484.
3. Id. at 482-83.
4. Id. at 495 (Weis, J., dissenting).
5. Id.
6. Id.
stand and remanded the case to the district court for further consideration.\(^7\)

The plaintiffs in _Lanning v. Southeastern Pennsylvania Transportation Authority_ brought their employment discrimination claim under the disparate impact doctrine.\(^8\) Disparate impact is a theory of liability under Title VII of the Civil Rights Act of 1964,\(^9\) which allows plaintiffs to prove employment discrimination by showing that a "facially neutral" employment practice when applied "result[s] in a significantly discriminatory hiring pattern."\(^10\) Disparate impact can be applied to a wide variety of practices, such as ability and intelligence tests, education requirements, work history requirements, arrest records, credit history, and height, weight, and strength requirements.\(^11\) An employment practice that has a significant discriminatory impact constitutes illegal employment discrimination unless the defendant employer can prove that the employment practice is "job related for the position in question and consistent with business necessity."\(^12\)

The defining feature of disparate impact is that it requires only a showing of a significant discriminatory effect.\(^13\) Conversely, disparate treatment, also a theory of liability under Title VII, requires plaintiffs to show that the employer considered race, color, national origin and/or sex in its decision-making process.\(^14\) Plaintiffs can make a prima facie case of disparate treatment by showing that the employer

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\(^7\) Id. at 494.
\(^8\) Id. at 485.
   
   It shall be an unlawful employment practice for an employer—(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, . . . because of such individual's race, color, religion, sex, or national origin.

\(^10\) Id. § 2000e-2(a).


\(^13\) Griggs, 401 U.S. at 432 ("But Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.").

\(^14\) See EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1078 (7th Cir. 1994) (affirming summary judgment in favor of the school whose hiring practices the EEOC claimed had a disparate impact on older applicants under the Age Discrimination in Employment Act); see also Larson, supra note 10, § 20.03.
had a discriminatory intent or took action based on the consideration of the “impermissible factors” listed above. Therefore, “liability depends on whether the protected trait... actually motivated the employer’s decision.” Disparate treatment was the primary theory of liability under Title VII until the Supreme Court created the disparate impact theory in the “seminal case,” Griggs v. Duke Power Co.

The theory of disparate impact has been hotly debated since first recognized by the Supreme Court in Griggs in 1971. Legal scholars and practitioners initially argued over whether the theory was proper and/or intended under the Civil Rights Act of 1964. In 1991, Congress mooted this debate by codifying the disparate impact doctrine in the Civil Rights Act of 1991. However, codification did not quell the controversy.

Debate over the theory of disparate impact still thrives. Tension arises because employment discrimination laws paradoxically embody two competing conceptions of equality: the colorblind vision, which

15. See Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981) (holding that the employer only bears the burden of production, not persuasion, when giving its non-discriminatory reason for rejecting plaintiff); Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977) (holding that the lower court should have considered the plaintiff's argument regarding the proper geographic region to include in the relevant labor market analysis); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) (holding that Title VII permitted the maintenance of seniority systems even though the employer discriminated against African-Americans before the passage of Title VII).
16. Hazen Paper Co. v. Biggins, 507 U.S. 604, 609-10 (1993). “‘Disparate treatment... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion [or other protected characteristics.] Proof of discriminatory motiv[e] is critical ....” Id. (quoting Teamsters, 431 U.S. at 335-36 n.15).
18. 401 U.S. 424 (1971) (holding that Title VII prohibits employment practices that have a discriminatory effect on a protected group, even in the absence of discriminatory intent).
19. Id.
claims that employers should not look to race, color, national origin or sex, but rather individual merit and qualifications in employment and promotion practices, and the remedial vision, which claims that the law must acknowledge race, color, national origin and sex in order to remedy past injustices and achieve equality in employment.

Critics of disparate impact argue that the theory is at odds with a merit-based system, and leads to the establishment of quotas. According to this view, quotas force employers to focus on an individual's "race, color, religion, sex, or national origin" rather than individual qualifications. Both the Civil Rights Acts of 1964 and 1991 purport to stand against hiring and promotion practices that are based upon impermissible classifications. Opponents of the theory argue that while disparate impact may not have been intended to cause the implementation of quotas, quotas are the inevitable result of a theory that finds employment discrimination partially or wholly on the basis of the statistical makeup of an employer's workforce. Further, if an employer does not institute quotas, it may be held liable for many other factors not within its control, such as quality of education and lack of financial resources that may have led to the statistical disparity.

affirmative action, we simultaneously insist that subjective decisions on the person's race or gender or ethnicity shall prevail. In other words, we are in a hopelessly contradictory situation . . . ." Id.


24. E.g., Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978). "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently." Id; see Rutherglen, supra note 22, at 56-57.


26. See Mona Charen, The Supreme Court Discovers Common Sense, S. F. Chron., July 2, 1989, at Z6 (claiming that quotas lead to the hiring of unqualified people); see also Souzzi, supra note 22 ("[P]referential hiring and preferential treatment on the basis of gender and ethnic or racial background should not be tolerated.").


28. Rosemary Alito, Disparate Impact Discrimination Under the 1991 Civil Rights Act, 45 Rutgers L. Rev. 1011, 1011-13 (1993). "While quotas are consistently rejected in principle as a means to equal employment opportunity, they have become an accepted fact of litigation. Racial/ethnic/sexual composition of a workforce may be probative—and at times determinative—of a claim of illegal employment discrimination." Id. at 1012.

Proponents of disparate impact argue that the theory is essential to prevent discrimination in employment. Proponents argue that under a remedial vision of equality, individuals' status as members of historically disadvantaged groups is acknowledged in order to achieve equality. This view charges that critics of disparate impact incorrectly fail to consider historical, social and economic factors that stand as barriers to the achievement of "conventional badges of accomplishment," such as educational degrees. These barriers, which exist in the pre-labor market, prevent equalization of outcomes by race, color, national origin and sex.

Each side of the debate recognizes that intentional discrimination is wrong. However, discrimination may exist without an intent to discriminate and proving the intent to discriminate today, especially in the context of subjective employment practices, is often very difficult, if not impossible. Thus, one argument for disparate impact is that it shows intentional discrimination vis-à-vis its effects. Statistical inequalities may be used to prove employment discrimination without showing either intent to discriminate or that race, color, national origin and/or sex were used in the employer's decision-making process.

This Note defends the theory of disparate impact by narrowing its

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the cause of a disparity, even though it may be only one of a wide array of factors necessary to produce the disparity." Id. at 353-54.

30. See Alfred W. Blumrosen, The Legacy of Griggs: Social Progress and Subjective Judgments, 63 Chi.-Kent L. Rev. 1 (1987) (arguing that Title VII has become a powerful force in social progress because of the Supreme Court's creation of disparate impact in Griggs).

31. See supra note 24 and accompanying text.


33. See Lawton, supra note 32, at 599-612.


35. This argument acknowledges that disparate impact is also important in cases where the employer did not have any intent to discriminate and did not consider the applicant/employee's race, color, national origin or sex in his or her decision-making process.

36. See Connecticut v. Teal, 457 U.S. 440 (1982) (illustrating that even though an employer can prove it had no intent to discriminate, the employer may still be found liable under the disparate impact theory).
scope, and accounting for the argument that the theory does not adequately focus on merit, while acknowledging the historical, social, and economic factors that can prevent equal access to employment opportunities.37 The theory of disparate impact can thus be strengthened and made more defensible if it is improved to allow for recovery only when plaintiffs have put forth reasonable efforts (in light of the circumstances and surrounding conditions) to comply with an employer's hiring criteria. The scope of disparate impact should be narrowed, but only so far as is necessary to prevent plaintiffs who fail to demonstrate reasonable efforts to meet an employer's hiring criteria from recovering under the theory. As it stands, disparate impact law is vulnerable to attack because plaintiffs have the potential to hold employers liable without themselves putting forth reasonable efforts to comply with the hiring criteria at issue.38

Part I of this Note provides a brief history of disparate impact law and its development. Part II examines the argument that disparate impact is unable to deal justly with situations in which plaintiffs prevail without having made reasonable efforts to meet employment criteria. Part II also presents three different formulations of the duty to make efforts and discusses several possible methods of allocating the costs of such a duty. Using the facts of three important disparate impact cases, Part III tests the formulations of the duty to make efforts presented in Part II. Part III then lays out four possible implementations of the duty to make reasonable efforts. In light of the formulations as applied, Part III proposes that plaintiffs be required to make reasonable efforts (in light of the circumstances) to meet the hiring requirement at issue. This duty takes into account some concerns of disparate impact critics, while acknowledging the necessity of disparate impact to combat the historical, social, and economic barriers to equality in employment opportunity. Defendants should bear the costs of the duty to make reasonable efforts if they are found liable. The duty should be incorporated into the present disparate impact model by allowing defendants to contest the accuracy of plaintiffs' statistics based on plaintiffs' failure to make reasonable efforts. In support of this proposition, Part III shows that the duty to make reasonable efforts is consistent with similar mitigation duties in other areas of the law, as well as the original formulation of the disparate impact doctrine laid out in Griggs.
A. Griggs and the Development of the Disparate Impact Doctrine

In *Griggs v. Duke Power Co.*, the Supreme Court developed the theory of disparate impact, which allowed plaintiffs to prove employment discrimination based on statistical evidence of disparate effects without showing that the employer had a discriminatory intent. The Court held that "[t]he [Civil Rights] Act [of 1964] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." Under this theory, plaintiffs can prevail if they show that employment or promotion practices had adverse consequences or effects on a protected class, even if the employment practices are neutral on their face and there is no suggestion of any discriminatory motive by the defendant.

In *Griggs*, African-American employees at a Duke Power Company ("Duke") plant in North Carolina brought a class action under Title VII alleging that Duke's hiring and promotion practices had a discriminatory effect on African-Americans. According to the district court, before the Civil Rights Act of 1964 became effective, Duke had overtly "discriminated on the basis of race in the hiring and assigning of employees." The power generating plant consisted of five departments, of which the Labor Department was ranked lowest in pay. The other four departments consisted entirely of white employees. In 1965, Duke began to require a high school diploma in order to transfer from the Labor Department to a higher department. Also in 1965, Duke began to require that all new hires into any department other than the Labor Department pass "two professionally prepared aptitude tests" in addition to having a high school diploma.

The Supreme Court found for plaintiffs, holding that Title VII did not require a showing of discriminatory intent. In doing so, the
Court laid out the model of disparate impact liability. This framework consists of two stages. The first stage is plaintiffs’ prima facie case, in which plaintiff must show that an employer’s hiring and/or promotion requirements have a discriminatory effect on the basis of race or “other impermissible classification.” Upon plaintiffs’ successful showing of a prima facie case, the second stage shifts the burden to the defendant employer to prove “business necessity.” The Supreme Court explained that, “[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.” The Court found that the requirements in question resulted in African-Americans being disqualified from employment and promotion at a “substantially higher rate than white applicants.” In addition, defendants did not prove that these requirements were “significantly related to successful job performance”; therefore, the Court found for plaintiffs.

After Griggs, the disparate impact doctrine continued to develop and became an important tool for fighting employment discrimination. However, in 1989 the Supreme Court decided an important disparate impact case that significantly altered the doctrine.

50. Id. at 431.  
51. Id.  
52. Id.  
53. Id. at 432.  
54. Id. at 431. Further, “Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.” Id. at 432.  
55. Id. at 431.  
56. Id. at 426.  
57. Id.  
58. Additionally, the court considered these factors against the backdrop of a long history of intentional discrimination. Id.  
59. In Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), decided shortly after Griggs, the Supreme Court refined this new theory and added a final stage, which allowed the plaintiff, after the defendant had successfully shown business necessity, to prove that the employment practices were “merely [] a ‘pretext’ for discrimination.” Id. at 425 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973)). A plaintiff could provide evidence of pretext by “show[ing] that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer’s legitimate interest in ‘efficient and trustworthy workmanship.’” Id. (quoting McDonnell Douglas, 411 U.S. at 801). The Court clarified Griggs, stating first that the “complaining party or class [must make] out a prima facie case of discrimination” by showing that the employment practices “in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants.” Id. (internal citation omitted). Once the plaintiff makes his or her prima facie case, the employer bears the “burden of proving that its tests are ‘job related.’” Id. (quoting McDonnell Douglas, 411 U.S. at 802). The third stage is rarely an issue, as the litigation does not usually progress past the first two stages.  
60. See supra note 30 and accompanying text.
B. Wards Cove "Tip[s] the Scale in Favor of Employers"\textsuperscript{61}

In 1989, \textit{Wards Cove Packing Co. v. Atonio}\textsuperscript{62} critically changed the theory of disparate impact, leading to a doctrine more favorable to employers.\textsuperscript{63} Civil rights advocates condemned the decision, calling it a major setback.\textsuperscript{64} The dissent lamented that the majority had "\textit{[t]urn[ed] a blind eye to the meaning and purpose of Title VII, ... perfunctorily reject[ing] a longstanding rule of law.}"\textsuperscript{65} The majority did not claim to overrule any case, but only to "address[] ... disputed questions of the proper application of Title VII's disparate impact theory."\textsuperscript{66} However, some commentators claimed that \textit{Wards Cove} had effectively overturned \textit{Griggs}.\textsuperscript{67}

In \textit{Wards Cove}, a class of racial minority current and former employees of two seasonal salmon canneries brought a Title VII action against the canneries claiming that a number of the employers' practices created a racially stratified workforce and prevented minority employees from being employed in higher ranked positions.\textsuperscript{68} The two defendant companies, who operated their canneries in remote areas of Alaska, divided their workforce into two main groups: "cannery jobs," which were "unskilled" and held by minority employees, and "noncannery jobs," which were varied, generally skilled, paid more, and held by white employees.\textsuperscript{69} The employees lived and ate in separate quarters according to their position.\textsuperscript{70}

The Supreme Court held that plaintiffs did not prove their prima facie case because they misused statistics in attempting to show disparate impact.\textsuperscript{71} A showing that there is a racial imbalance in the workforce did not, on its own, make a prima facie case of employment

\textsuperscript{62} \textit{Id.} at 642.
\textsuperscript{65} \textit{Wards Cove}, 490 U.S. at 663 (Stevens, J., dissenting).
\textsuperscript{66} \textit{Id.} at 650.
\textsuperscript{67} See, e.g., \textit{A Civil Rights Setback}, supra note 64, at 16 ("The \textit{[Wards Cove]} decision is nearly a reversal of a 1971 decision in the case of \textit{Griggs v. Duke Power Co."}). Some critics agreed with the Supreme Court's contention that it did not overrule any prior disparate impact cases. See, e.g., Bork, supra note 25.
\textsuperscript{68} \textit{Wards Cove}, 490 U.S. at 647-48.
\textsuperscript{69} \textit{Id.} at 647.
\textsuperscript{70} \textit{Id.}
\textsuperscript{71} \textit{Id.} at 650.
The Court held that evidence of racial stratification along the lines of cannery and noncannery positions is insufficient because the "proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified... population in the relevant labor market," except when the statistics for the relevant labor market are "impossible to ascertain." The Court held that this method of statistical analysis was appropriate to prevent employers from being subject to litigation simply for having a workforce that was "racially imbalanced."

Wards Cove made at least two critical changes to the theory of disparate impact, both of which favored employers. First, the Court held that after the plaintiff has made a prima facie case, the defendant has only the burden of production in justifying its employment practice, while the plaintiff continues to bear the burden of persuasion. The Court also relaxed the business justification requirement. While earlier cases had focused on "business necessity" and "requirements... essential to good job performance," the Court declared that the "touchstone of this inquiry is a reasoned review of the employer's justification" and that the justification need not be "essential" or "indispensable." Some commentators argued that the Supreme Court made these changes, which favored employers, in order to prevent the establishment of quotas. However, Congress quickly stepped in to correct the Court's interpretation of Title VII.

C. The Civil Rights Act of 1991: Congress's Response to Wards Cove

In late 1991, Congress passed the Civil Rights Act of 1991, which added a new subsection to Title VII, amending section 703 of the Civil Rights Act of 1964. Congress responded to the recent Supreme Court's interpretation of Title VII.

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72. Id. at 653.
73. Id. at 650 (quoting Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 (1977)).
74. Id. at 651.
75. Id. at 652.
76. Id. at 660.
77. Id. at 671-72 (Stevens, J., dissenting).
80. Wards Cove, 490 U.S. at 659.
81. Id. at 652; see Kremer, supra note 63, at 979-80.
   (k)(1)(A) An unlawful employment practice based on disparate impact is established under this title only if—
   (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
Court decisions that weakened Title VII protections, especially \textit{Wards Cove}, and sought "to strengthen and improve Federal civil rights laws," in order to "expand[] [their] scope . . . [and] to provide adequate protection to victims of discrimination." 83 Proponents of the Act claimed that it was a step forward for civil rights and improved disparate impact in a much-needed way,\textsuperscript{84} by making the doctrine more friendly to plaintiffs.\textsuperscript{85} Some critics of the Act argued that the bill, despite its sponsors' claims, created incentives for and may even require employers to implement quotas (to avoid litigation).\textsuperscript{86} Other critics have argued that even if the Act were an improvement for plaintiffs, the Act and judicial interpretations of it did not do enough to secure equality in employment under a remedial vision of equality.\textsuperscript{87}

Under the Act, a plaintiff may prove unlawful discrimination if she can show a disparate impact based on an impermissible classification and if the defendant fails to show that a practice is "job related" as well as "consistent with business necessity."\textsuperscript{88} Importantly, the Act fails to explain what type of statistics are needed to show a disparate impact, and also fails to define "job related" and "business necessity,"

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\item[(ii)] the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.
\item[(B)(i)] With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.
\item[(ii)] If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.
\item[(C)] The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice."
\end{itemize}

\textit{Id.}


87. \textit{See generally} DeSario, \textit{supra} note 32.

creating a debate surrounding their meaning.\textsuperscript{89} The Act does clarify that the fact that the employer need not show business necessity if it can show that there is no disparate impact.\textsuperscript{90} However, the plaintiff may win even after the employer satisfies its burden under the business necessity defense by proving that there is another employment practice that is available to the defendant and that (1) this alternative does not have a discriminatory effect and (2) the employer failed to adopt it.\textsuperscript{91}

The Civil Rights Act of 1991 codified \textit{Wards Cove} in part and overruled it in part.\textsuperscript{92} The Act codified the causation requirement laid out in \textit{Watson v. Fort Worth Bank \\& Trust}\textsuperscript{93} and made law of the finding in \textit{Wards Cove} that the plaintiff, as part of her prima facie case, must establish that “each particular challenged employment practice causes a disparate impact.”\textsuperscript{94} However, the Act leaves open the possibility that “the decisionmaking process may be analyzed as one employment practice” in the case that the plaintiff “can demonstrate to the court that the elements of a respondent’s decisionmaking process are not capable of separation for analysis.”\textsuperscript{95} In addition, the Act overruled \textit{Wards Cove} by placing the burden of production and persuasion on employers to show business necessity.\textsuperscript{96} Plaintiffs would not have to bear the burden of persuasion with regard to the defendant’s justification for the disparate impact.

\textbf{D. Principles in Modern Enforcement: The EEOC’s Four-Fifths Rule}

Under the Civil Rights Act of 1991, plaintiffs must show a statistical disparate impact in order to establish a prima facie case of disparate

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\item \textsuperscript{89} The interpretive memorandum states that business necessity should be defined according to Supreme Court cases from \textit{Griggs} up to, but excluding, \textit{Wards Cove}, however these cases are not consistent as to what business necessity means. 137 Cong. Rec. S15,273 (daily ed. Oct. 25, 1991). Some cases presented a more relaxed requirement, while others presented a more stringent requirement. See Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (stating that the “touchstone is business necessity”). \textit{But see} Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (requiring only that the requirements be “job related”).
\item \textsuperscript{90} 42 U.S.C. § 2000e-2(k)(1)(B)(ii).
\item \textsuperscript{91} See id. § 2(k)(1)(A)(ii).
\item \textsuperscript{92} See Alito, \textit{supra} note 28, at 1017.
\item \textsuperscript{93} 487 U.S. 977, 994 (1988). This causation requirement was not part of the holding of the Court because this section was written by Justice O’Connor, and joined only by Chief Justice Rehnquist, Justice White, and Justice Scalia. \textit{Id}.
\item \textsuperscript{94} 42 U.S.C. § 2000e-2(k)(1)(B)(i).
\item \textsuperscript{95} \textit{Id.} This exception to the causation requirement may be important for a plaintiff attempting to prove that an employer’s subjective employment practices are unlawfully discriminatory. See Alito, \textit{supra} note 28, at 1017.
\item \textsuperscript{96} 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000). The Act also overruled \textit{Wards Cove} by allowing a plaintiff to show the employer refused to adopt an “alternative employment practice” that complies with the law that existed on June 4, 1989, the day before the \textit{Wards Cove} decision came down. \textit{Id.} § 2000e-2(k)(1)(A)(ii), 2(k)(1)(A), 2(k)(1)(C).
\end{itemize}
There are "no bright line rules... to guide courts in deciding whether plaintiffs' statistics raise an inference of discrimination, [however,] several overarching principles inform the issue." The most important principle is the four-fifths rule.

The Equal Employment Opportunity Commission ("EEOC"), which creates the Uniform Guidelines on Employee Selection Procedures, created the "four-fifths rule," which states that "[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 [disparate] impact, while a greater than four-fifths rate will generally not be regarded... as evidence of [disparate] impact." However, this rule does not foreclose the possibility that a disparity less than eighty percent can constitute evidence of disparate impact. Under the four-fifths rule, if the pass rate for a particular group is less than eighty percent of the pass rate for others, this difference in pass rates presents evidence of a disparate impact.

For example, the statistics in *Lanning* were based on a percentage of the women who passed the running test compared to the percentage of men who passed the running test:

\[
\text{Pass Rate for Women} = \frac{\text{Number of Women Test Passers}}{\text{Number of Women Test Takers}} \quad \frac{\text{Number of Men Test Passers}}{\text{Number of Men Test Takers}}
\]

These percentages are calculated by dividing the number of women who passed by the number of women who took the test.

The following illustrates the operation of the EEOC's four-fifths rule, using the equation above and a fact pattern similar to that in *Lanning*. If one hundred men took the running test and seventy-five of these men passed the test, the men would have a pass rate of

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97. *See id. § 2000e-2(k)(1)(A); see also Larson, supra* note 10, § 21.01.

98. Smith v. Xerox Corp., 196 F.3d 358, 365 (2d Cir. 1999) (holding that plaintiffs' statistics were flawed and therefore inadequate to prove employment discrimination under either the disparate treatment or disparate impact theories of liability).

99. *E.g., Mems v. City of St. Paul, 224 F.3d 735, 740-41 (8th Cir. 2000) (affirming summary judgment in favor of the St. Paul Fire Department on plaintiffs' disparate impact claim based on a written examination).*

100. 29 C.F.R. § 1607.4(D) (2003).

101. *Id.*

102. *Id.*


104. *Id.* at 481-83.
seventy-five percent. If 100 women took the running test and fifty of them passed the test, the pass rate for these women would be fifty percent. The pass rate of women (fifty percent) would therefore be sixty-six percent of the pass rate for men (seventy-five percent). The pass rate of women is less than four-fifths (or eighty percent) of the pass rate for men. Therefore, these statistics show evidence of a disparate impact under the EEOC's four-fifths rule.105

Table 1: Example of the Operation of the Four-Fifths Rule

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<th>Men</th>
<th>Women (Overall)</th>
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<tr>
<td># Taking</td>
<td>100</td>
<td>100</td>
</tr>
<tr>
<td># Passing</td>
<td>75</td>
<td>50</td>
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<tr>
<td>Pass Rate</td>
<td>75%</td>
<td>50%</td>
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<tr>
<td>Relative Pass vs. Men</td>
<td>50/75 = 66%</td>
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In light of the central role that statistics and the EEOC's four-fifths rule play in establishing a prima facie case of disparate impact, it is important that statistics accurately reflect plaintiffs' ability to meet a hiring requirement. As discussed below, Judge Weis’s dissent in *Lanning* implicitly calls into question the ability of the present disparate impact model to ensure the accuracy of plaintiffs’ statistics.

II. SHOULD A DUTY TO MAKE EFFORTS BE INCORPORATED INTO THE DISPARATE IMPACT DOCTRINE?

Part II begins by analyzing Judge Weis’s dissent in *Lanning*, which implies that plaintiffs should have a duty to take the steps within their power to meet a hiring requirement before they may sue based on that requirement. Part II then lays out three possible formulations of the duty to make efforts, a duty which is implicated in Judge Weis’s dissent. Finally, Part II looks at several possible ways of allocating the costs of a duty to make efforts.

A. Judge Weis’s Dissent in Lanning

Judge Weis’s dissent in *Lanning*106 suggests—without explicitly stating—that plaintiffs should be subject to a requirement that obligates plaintiffs to take the steps within their power to meet an employment requirement before they may win a disparate impact claim based on that employment requirement.107

105. 29 C.F.R. § 1607.4(D).
106. 181 F.3d at 494.
107. Id. at 501. There being no other literature calling for such a duty, Judge Weis’s dissent in *Lanning* is the sole source of the duty to make efforts proposed in this Note.
In *Lanning*, five women who satisfied administrative requirements but were denied employment brought a class claim of disparate impact under Title VII against SEPTA, the mass transit authority for the Philadelphia area.\(^{108}\) They claimed that SEPTA's physical fitness screening test, which required applicants to run one and one-half miles in twelve minutes, had a disparate impact on women.\(^{109}\) The statistics showed that on average only twelve percent of women passed the test, while almost sixty percent of men passed.\(^{110}\) SEPTA conceded that the screening test had a disparate impact on women; however, they argued that the test was justified by business necessity.\(^{111}\) The district court ruled in favor of SEPTA based on its belief that the relationship of aerobic capacity to the essential duties of a SEPTA officer justified the implementation of the physical fitness tests.\(^{112}\) On appeal, the Third Circuit reversed and remanded the case, holding that under the business necessity defense, “a discriminatory cutoff score on an entry level employment examination must be shown to measure the minimum qualifications necessary for successful performance of the job in question” to escape disparate impact liability under Title VII.\(^{113}\)

Judge Weis dissented, arguing that the “minimum qualifications” criteria of business justification do not apply in circumstances where public safety is at issue.\(^{114}\) However, critical to Judge Weis’s dissent is the fact that the record showed that “a smaller percentage of female applicants passed the running test than males, but that nearly all women who trained for it were able to pass.”\(^{115}\) Judge Weis pointed out that “[t]he named plaintiffs and some of the class members who failed demonstrated, for the most part, a ‘cavalier’ attitude towards the running test.”\(^{116}\) Judge Weis discussed videotapes, which demonstrated that some of the applicants were walking, rather than running, at the halfway point either out of fatigue due to a lack of training or indifference.\(^{117}\) SEPTA even sent the applicants correspondence that included recommended training techniques,
which were testified to be adequate.\textsuperscript{118} Judge Weis pointed out that the “cavalier” approach of some of the female applicants exaggerated the extent of the disparity between the pass rates of the genders.\textsuperscript{119} Thus, Judge Weis argued that “where applicants have it within their power to prepare for the running test, they may properly be expected to do so.”\textsuperscript{120} His argument is that the plaintiffs should have a duty to make efforts\textsuperscript{121} to meet the hiring requirement at issue by taking the steps within their power to pass the test. The broader application of this dissent is to suggest that all plaintiffs should have an obligation to take the steps within their power to prepare for an employment test or requirement in order to win a disparate impact claim based on that test or requirement.

The dissent in \textit{Lanning} could provide a strong platform upon which disparate impact critics may stand.\textsuperscript{122} Is it in the interest of justice to allow plaintiffs to recover under the theory if they have not even made reasonable efforts to meet a requirement? How can a court determine if the running test had a disparate impact on plaintiffs if it cannot determine whether it was the terms of the running test or simply plaintiffs’ lack of effort that resulted in their failure? Should Title VII be used to require employers to hire applicants who do not make good faith attempts to pass the screening tests? How much confidence could an employer have in such a workforce? In an effort to answers these questions, Part II.B. explores possible formulations of the duty to make efforts and ways to allocate its costs.

\section*{B. Defining the Duty to Make Efforts and Allocating Its Costs}

Drawing from Judge Weis’s dissent, the duty to make efforts could be defined in a number of ways. The way in which the duty is ultimately defined affects plaintiffs, for it dictates what measures are required in meeting particular hiring requirements and may be determinative of their claims. The definition may also affect plaintiffs’ incentive to take the steps within their power to meet hiring requirements. The definition of the duty will also be important to employers. If the duty is defined stringently, plaintiffs will be less likely to win disparate impact cases and employers will have more leeway to devise tests without considering their impact on applicants.

This section presents three possible formulations for the duty to make reasonable efforts and outlines distinctions that exist among them: (1) no duty at all; (2) an absolute duty to make efforts; and (3)

\begin{itemize}
  \item \textsuperscript{118}Id.
  \item \textsuperscript{119}Id.
  \item \textsuperscript{120}Id. at 501.
  \item \textsuperscript{121}This exact terminology is not found in Judge Weis’s dissent in \textit{Lanning}. Rather, the author developed it from the ideas implicit in Judge Weis’s dissent.
  \item \textsuperscript{122}See supra notes 25-29 and accompanying text (discussing criticisms of disparate impact).
\end{itemize}
a duty to make reasonable efforts in light of historical, social and economic circumstances. The section also examines possible allocations of the costs that a duty to make reasonable efforts would entail and touches upon the policy issues as they relate to the central paradox embedded in the disparate impact doctrine. This paradox involves focusing on individuals' race, color, religion, sex and/or national origin in an attempt to create a system of equal employment opportunity that does not consider individuals' status as members of these groups.

Importantly, each of the formulations of the duty will be tested for just results by applying it to the facts and hiring requirements in the following cases: the high school diploma requirement in Griggs, the height and weight requirements in Dothard v. Rawlinson, and the twelve minute, one and one-half mile running test in Lanning.

1. No Duty to Make Efforts

The first possibility is simply not to have a duty to make reasonable efforts. Plaintiffs would not be required to take any steps to comply with a hiring requirement regardless of how easy or difficult it would be to do so. However, this standard leaves disparate impact theory susceptible to an attack by opponents who would prefer that hiring reflected a system of pure meritocracy, in which each individual is rewarded based on their past "conduct" and personal "attributes." Without a duty to make reasonable efforts, plaintiffs who make little or no effort to meet a hiring requirement may still be successful and receive damages in a disparate impact claim challenging that requirement. In contrast, merit-based hiring would reward individuals for their past achievements and allow employers to make predictions about job success based on past performance. Critics argue that a departure from merit leads employers to institute quotas, and to hire

123. See supra notes 22-36 and accompanying text for a brief discussion of the debate.
124. See supra note 22 and accompanying text.
125. With these models in mind, Part III.A. uses "test suites" in an attempt to clarify and give examples of the application of each possible formulation of the duty to make reasonable efforts. See Eugene Volokh, Test Suites: A Tool for Improving Student Articles, 52 J. Legal Educ. 440 (2002) (proposing that students writing law review notes use test suites to ensure the soundness of their proposals).
129. See supra notes 25-29 and accompanying text.
130. See Banks, supra note 32, at 1036.
131. Id. (discussing merit in the college admissions context, which is analogous to the employment context).
applicants or promote workers who simply are not the best qualified (as evidenced by their lack of effort to meet the requirement).\textsuperscript{132}

Proponents of merit hiring would have a strong claim that there are other applicants who are able to fulfill the requirement and would be better qualified for the job (in terms of capability and/or motivation, as evidenced by their pre-test efforts to meet the requirement).\textsuperscript{133} Merit hiring rewards applicants for their achievements, effort and motivation.\textsuperscript{134} According to this view, one who tries harder to meet hiring requirements is more deserving and should be treated more favorably than one who does not.\textsuperscript{135} Such a rule encourages self-improvement and productivity.\textsuperscript{136}

Disparate impact absent a duty to make reasonable efforts may also be open for attack on the grounds that it results in misleading statistics. Absent a duty to make reasonable efforts, there is a potential for plaintiff's statistics, which are used to show a prima facie case of disparate impact,\textsuperscript{137} to be misleading. When plaintiffs' statistics show that a particular group did not meet a hiring requirement in disproportionate numbers to other groups, it may be difficult to determine whether this statistical disparity resulted from the employer's unfair hiring requirement, or from plaintiffs' failure to take steps to meet that requirement.\textsuperscript{138} In some cases, these statistics may be so misleading that they show a disparate impact where they would not have if the plaintiffs had made efforts to meet the hiring requirement at issue. This situation would arise if the plaintiff and other members of his or her group failed to make efforts to meet the requirement and thus failed in higher numbers than any other group. In this case, the statistics may show a disparate impact; however, this showing of disparate impact would be a result of plaintiff's lack of effort rather than the employment requirement.

2. An Absolute Duty to Make Efforts

The duty to make efforts could be defined as a duty to take all of the steps within one's power to meet the hiring criteria at issue. Thus, if it is within one's power to take such steps, regardless of how difficult those steps may be to take, one must take them in order to bring a

\textsuperscript{132} See supra notes 25-29 and accompanying text. Some proponents of the disparate impact theory claim "'quotas' have become merely the current political code word for those who always have opposed the protection of civil rights." Kent Spriggs, \textit{Title VII Arguments Rang False}, Nat'l L.J., Nov. 29, 1993, at 13.

\textsuperscript{133} See supra note 26 and accompanying text.

\textsuperscript{134} See Banks, \textit{supra} note 32, at 1043 ("This approach ties one's deservingness to the contribution to social productivity represented by one's performance.").

\textsuperscript{135} See infra notes 267-69 and accompanying text.

\textsuperscript{136} See Banks, \textit{supra} note 32, at 1043.

\textsuperscript{137} See supra notes 52, 89 and accompanying text.

successful disparate impact claim. This formulation of the duty is most consistent with notions of meritocracy. Meritocracy is a social system, which distributes “privileges, power, wealth, and status, as well as the opportunity to acquire them . . . according to merit.” Merit is determined by individuals’ “conduct” or “attributes.” In a meritocratic system, past achievements are seen as indicators of future performance. In this way, a meritocratic system rewards individuals’ past achievements. Thus, a meritocracy promotes “productivity[] to the extent that it distributes opportunities and resources based on predictions of future performance,” which benefits society as a whole.

The absolute duty to make reasonable efforts is consistent with meritocracy because those who best meet the hiring requirement would get the job, regardless of any unfavorable conditions (for which the applicant was not responsible). Those who make efforts to meet a hiring requirement would be most deserving of the job because those applicants are most likely to perform well in the future and they should be rewarded for their past efforts. Those who do not make efforts to meet the requirement, and subsequently fail, should not be given the job because they were not the most able or motivated (regardless of any historical, social, or economic barriers they faced in taking steps to meet the requirement). A system of meritocracy defined in this way would consider performance in terms of the hiring requirement, not the amount of effort one put into meeting it. (Of course, effort at meeting the hiring requirement may well correlate with success in doing so.)

In addition, this definition of the duty would begin to answer the concerns of critics of disparate impact who feel that the theory leads to quotas, which prevent hiring on the basis of merit. However, this formulation of the duty fails to account for the social, historical and economic forces that perpetuate discrimination, for which the

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139. Robin West, Constitutional Fictions and Meritocratic Success Stories, 53 Wash. & Lee L. Rev. 995, 1011 (1996) (defining meritocracy, but arguing that it does not function properly in our society).
140. See Banks, supra note 32, at 1036.
141. Id.; see also DeSario, supra note 32, at 485.
142. See Banks, supra note 32, at 1039-40.
143. Id. at 1036.
144. Meritocracy “ties one’s deservingness to the contribution to social productivity represented by one’s performance. Deservingness corresponds to, and arises from, one’s contribution.” Id. at 1043.
145. Under an absolute duty to make efforts, those applicants who make efforts and nevertheless fail to meet the hiring requirement would be permitted to bring a disparate impact claim based on that hiring requirement.
146. See Banks, supra note 32, at 1043 (explaining the performance-contribution account of deservingness).
147. See supra notes 25-29 and accompanying text.
disparate impact theory was designed to account. This definition may be both more economically efficient and easier for courts to administer than other possibilities because it only requires a determination of what steps were within a plaintiff's power to take. It does not require an in-depth look at historical, social and economic forces that may affect one's efforts in meeting a hiring requirement. Regardless of whether an applicant was ultimately able to meet a hiring requirement, an absolute duty to make efforts would require that the applicant take all possible steps to meet a hiring requirement in order to bring a successful disparate impact suit based on that hiring requirement.

3. A Duty to Make Reasonable Efforts in Light of Surrounding Circumstances

The absolute duty to make efforts could be tempered by requiring plaintiffs to make good faith efforts to take only the steps to meet a requirement that are reasonably within their power in light of historical, social and economic circumstances. Thus, the duty to make reasonable efforts would require that plaintiffs take reasonable steps to meet the hiring requirement at issue in order to win their disparate impact case. This obligation would strengthen the disparate impact theory from the perspective of critics who claim that the theory does not adequately account for notions of merit. However, this definition of the duty also considers the historical, social and cultural forces that can act to perpetuate past discrimination and prevent minorities and women from taking steps to meet a hiring requirement, although it is technically within their power to do so.

A duty to make reasonable efforts provides protection against the possible injustice of plaintiffs winning without having made reasonable efforts. However, it still accounts for situations in which it is technically, but not practically within one's power to make efforts to meet a hiring requirement. Under the duty to make reasonable efforts, the effort required of plaintiffs would be balanced against the difficulty of taking steps to meet that requirement. Accounting for the difficulty a particular group would have in meeting a hiring requirement would account for some of the historical, social and economic barriers that members of protected groups face. Hiring criteria could be analyzed on a spectrum with immutable characteristics at one end and criteria with which it is relatively easy to comply (due to the absence of historical, social and economic barriers)

148. See supra note 83 and accompanying text.
149. The duty to make reasonable efforts would look at what steps were reasonable not for the individual, but for the average member of the plaintiff's protected group.
150. See supra notes 139-48 and accompanying text.
151. See supra notes 32-36 and accompanying text.
152. See, e.g., Lawton, supra note 32, at 599-612.
on the other. The requirement would not be as stringent as the absolute duty to make reasonable efforts because its aim would be to protect against the unjust results of a plaintiff recovering when he or she has not made a good faith effort to meet that requirement in light of the situation. This formulation of the duty may not be as easy to administer as the absolute duty, which is more bright-line and requires less inquiry into surrounding circumstances. However, it would have the benefit of taking the prevailing historical, social and economic situations of a protected group into consideration.

As disparate impact doctrine now stands, it does not consider factors other than the particular employment practice at issue in accounting for disparate impact. For example, in *Griggs* the plaintiffs challenged the high school diploma requirement because it disqualified African-Americans at a "higher rate" than whites. In this example, the court would only look to the employer's diploma requirement to explain the disparate impact and not, for example, at the historical and socioeconomic factors that prevented the plaintiffs from having the same access to and quality of education that whites had. An important consideration in this formulation would be the extent to which courts would be willing and able to delve into the social, historical, and economic issues facing plaintiffs.

Another critical consideration in the application of a duty to make reasonable efforts would be determining what is "reasonable" within the meaning of the rule. Extraordinary efforts are not reasonable, but the line between extraordinary and reasonable efforts may be difficult to draw. Is taking a particular step reasonable based on evidence

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153. See Paetzold & Willborn, *supra* note 29, at 353-55 (maintaining that the causation element in disparate impact cases fails to consider external social factors). However, the justification or aim of the disparate impact theory *does* account for historical, social and economic barriers to equal employment opportunities.


155. See Paetzold & Willborn *supra* note 29, at 353-54.

156. Courts consider a similar issue in the context of the duty to mitigate damages in employment discrimination cases: whether one who has been discharged or denied employment has to take different or inferior work to mitigate his or her damages. *E.g.*, Ford Motor Co. v. EEOC, 458 U.S. 219, 231-32 (1982) ("Although the unemployed or underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position, he forfeits his right to backpay if he refuses a job substantially equivalent to the one he was denied."); *Meacham* v. *Knolls Atomic Power Lab.*, 185 F. Supp. 2d 193, 218-19 (N.D.N.Y. 2002). The district court stated:

An employee discharged as the result of discrimination has an obligation to attempt to mitigate her damages by using reasonable diligence in finding other suitable employment. An employee's duty to mitigate is not onerous and does not require that an employee actually find other employment. On this issue, a defendant bears the burden of proving (1) that suitable work existed, and (2) that the employee did not make reasonable efforts to obtain it. In considering other employment, a discharged employee need not go into another line of work, accept a demotion, or take a demeaning position... The ultimate question is whether a discharged employee acted reasonably in
that others are able to take it, and if so how many others: five percent, fifty percent, or ninety percent? The more strictly a court defines reasonable, the more the reasonable duty begins to look like the absolute duty. Reasonableness may best be defined on a case-by-case basis by examining the difficulties members of protected groups face in taking those steps. This analysis cannot be exact or scientific. The interests at stake are: (1) ensuring that employers do not maintain employment requirements that have an adverse impact on members of a particular group, and (2) ensuring that plaintiffs do not unjustly hold employers liable for failing to meet a hiring requirement that they were reasonably capable of meeting.

4. Allocation of Costs

Any imposition of a duty to make reasonable efforts would create additional costs resulting from the requirement that plaintiffs take steps to meet a hiring requirement.\(^{157}\) Therefore, a definition of the duty to make reasonable efforts should include an allocation of those costs. This section considers two possibilities for allocating the costs of the duty to make reasonable efforts: first, the employer should bear the cost of the duty to make reasonable efforts if the employer is found liable; and second, the applicant should bear the costs of the duty to make reasonable efforts regardless of the employer's liability.

Generally, applicants bear the costs of the steps that they must take to obtain employment. That general rule would continue to apply when an employer is *not* found liable for disparate impact.\(^{158}\) This rule applies even though it results in different costs for different people depending on how much effort the individual must make to meet an employment requirement.\(^{159}\)

However, the general rule that applicants bear their own costs might not be appropriate when an employer is found liable for disparate impact. If the plaintiff incurred costs in taking steps to meet an employment requirement, which disproportionately disadvantages him or her, then the employer arguably should bear those costs because those costs were either unnecessarily high or unnecessary in general. The central justification for imposing those costs would be

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\(^{157}\) Id. (internal quotations and citations omitted).

\(^{158}\) Any additional expenditure of time, money or effort that an individual makes, results in costs to that individual.

\(^{159}\) The duty to make reasonable efforts need not disturb the usual distribution of costs absent liability.

\(^{159}\) For example, an applicant who applies for a position at a company at which he or she has an employed relative might not have to incur the costs involved in interviewing numerous times, etc. However, an applicant with no contacts at the company may have to send a number of résumés and attend a number of interviews. That applicant, therefore, incurs greater cost in getting the same position. However, some inequity is generally accepted as an unavoidable reality.
the employer's liability. It may be that the employer should only bear
the applicant's additional costs above those of other applicants
proportionately based on the disadvantage the requirement entailed.
Or perhaps, the employer's liability justifies its bearing the entire cost
of plaintiff's seeking that employment.

The duty to make reasonable efforts may also be defined to require
that applicants bear the costs of obtaining employment regardless of
the employer's liability. This definition would be based on the general
rule that applicants bear their own costs in seeking employment. The
general rule entails disparities in the costs that applicants bear, which
are not necessarily fair or equal. If the general rule accepts these
disparities, then perhaps the rule should not be changed in the context
of employer liability. The plaintiff would have had to incur costs
regardless of the disparate impact and it may not be practical to
determine which of the costs the plaintiff bore disproportionately or
unnecessarily.

Given that there are a number of possible formulations of the duty
to make efforts and several ways to allocate its costs, Part III argues
that the theory of disparate impact should be strengthened and
improved by implementing a duty to make reasonable efforts, which is
best defined as a duty to make reasonable efforts and that the
employer should bear the costs of this duty only in the event that the
employer is found liable for employment discrimination. This
requirement would prevent plaintiffs from bringing successful
disparate impact claims without making reasonable efforts to meet the
hiring requirements at issue, thereby helping to ensure that
employment practices are merit-based, while still accounting for
important societal factors that prevent equal access to employment
opportunities.

III. A DUTY TO MAKE REASONABLE EFFORTS AND A STRONGER
AND MORE DEFENSIBLE DISPARATE IMPACT DOCTRINE

Part III begins by testing the formulations of the duty to make
efforts detailed in Part II. Part III then presents four possible
methods of implementing the duty to make efforts. Part III proposes
that a duty to make reasonable efforts should be implemented in
disparate impact law as a tool for defendants to use in contesting
plaintiffs' statistics. In defense of this proposal, Part III shows that the
duty to make reasonable efforts will strengthen the disparate impact
document by helping to ensure both that plaintiffs' statistics accurately
reflect plaintiffs' ability to meet hiring requirements and that hiring is
merit-based. Finally, Part III demonstrates that the duty to make
reasonable efforts is consistent with similar mitigation duties in other
areas of the law and with the original formulation of the disparate
impact doctrine laid out in Griggs.
A. Testing Different Formulations of the Duty to Make Efforts

This section tests the three definitions of the duty to make efforts described in Part II. Each formulation of the duty to make efforts will be applied to the hiring requirements in Griggs, Dothard, and Lanning. The purpose of running these tests is: (1) to determine which formulations of the duty to make efforts yield results which are most compatible with the goals of Title VII and the disparate impact doctrine; (2) to clarify these formulations of the duty to make efforts; and (3) to demonstrate their applications using specific examples.

1. Testing the Status Quo: No Duty to Make Efforts

Absent a duty to make efforts, the courts in each of the three cases discussed above would likely reach the same decision. In Griggs, the plaintiffs would not have needed to show that they made efforts to obtain a high school diploma. Thus, the court would have been able to find, as they did, that the high school diploma requirement had a negative and disproportionate effect on African-American employees and applicants, and that Duke did not have a legitimate business justification for the requirement.

In Dothard, Rawlinson would not have to show that she made efforts to meet the height and weight hiring requirements. Thus, absent a duty to make efforts, the court would probably conclude, as it did, that the height and weight requirement had an adverse impact on women and that the defendant did not meet her burden of showing a business necessity.

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160. See supra Parts II.B.1.-3.
162. 433 U.S. 321, 323-30 (1977). In Dothard, a woman (Rawlinson) brought a class action against the Alabama Board of Corrections after being denied employment as a prison guard for failure to meet the weight requirement. Id. at 324-25. Rawlinson claimed that the height and weight requirements for prison guards had a disparate impact on women because the requirements would exclude over forty percent of women, but only one percent of men. Id. at 329-30. The Alabama Board of Corrections required prison guards to be above five feet, two inches tall and to weigh in excess of 120 pounds. Id. at 327. The Supreme Court upheld the district court's holding that under Title VII, the height and weight requirements could not be applied to the plaintiff and her class. Id. at 331-32.
164. See Volokh, supra note 125, at 442.
165. See id.
166. See id.
167. See infra tbl. 2 (Summary of Test Suites Results).
169. Id. at 426.
Without a duty to make efforts, the women plaintiffs in *Lanning* would win their disparate impact claim. These women would not have to show that they made efforts to pass the running test. Despite evidence that these women did not make a good faith effort to train or to pass the test when taking it, and despite evidence that almost everyone who trained for the test was able to pass it, their disparate impact claim would be successful. Regardless of the plaintiff's failure to train, the court would likely find that the running test had a disparate impact on women and that SEPTA was unable to show a legitimate business necessity for the test.

2. Testing the Absolute Duty to Make Efforts

Application of the absolute duty to make reasonable efforts to the facts in *Griggs* would require that the plaintiffs in that case take all of the steps within their power to obtain a high school diploma. This formulation of the duty would not take into account the surrounding circumstances. If it were shown that it was possible for an African-American to obtain a high school diploma in North Carolina in the 1950s and 1960s, then plaintiffs would be expected to take the steps within their power to obtain a diploma, regardless of the degree of difficulty, or fail in their disparate impact claim.

Obviously, it was possible, at least in a technical and/or legal sense, for an African-American to graduate from high school in North Carolina during the period in which the plaintiffs lived. However, it is clear that there existed powerful historical, social and economic barriers to such an accomplishment. In *Griggs*, the record showed that at least one African-American working at the power plant had obtained a high school diploma. Thus, under the strictest version of a duty to make reasonable efforts, plaintiffs' claims in *Griggs* likely would have been barred, since they presumably could have attended high school and thereby negated the disparate impact of the plant's high school graduation requirement.

In *Dothard*, it was clearly not within plaintiff's power to meet the height requirement, as height is an immutable characteristic. However, under the absolute duty to make reasonable efforts, it seems that it was within the plaintiff's power to gain weight sufficient

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172. *Id.*
173. *Id.* at 483.
174. *Id.* at 481.
175. *See infra* tbl. 2 (Summary of Test Suites Results).
to meet the weight requirement.\textsuperscript{178} Thus, the plaintiff would not have been able to make out a successful claim without showing that she did all that which was within her power to meet the weight requirement, regardless of how difficult it would have been for her actually to achieve the standard.\textsuperscript{179}

Under an absolute duty to make efforts, the plaintiffs in \textit{Lanning} would have been barred from recovery due to the evidence that it was within their power to train to pass the running test and that they failed to do so.\textsuperscript{180} Plaintiffs were given information regarding training techniques and the record showed that nearly every woman who trained was able to pass.\textsuperscript{181} This absolute duty to make efforts would not have required that they passed the test, only that they took all of the steps within their power to pass it, which they failed to do.

3. Testing the Duty to Make Reasonable Efforts

A duty to make reasonable efforts may have more palatable results than the absolute duty when applied to the specific facts in \textit{Griggs}.\textsuperscript{182} It would be unjust to insist that the plaintiffs did not make reasonable efforts to comply with the high school graduation requirement, taking into consideration the practical infeasibility of African-Americans, living in the South in the 1950s and 1960s, obtaining high school diplomas.\textsuperscript{183} Thus, under the duty to make reasonable efforts, plaintiffs would not be required to take steps to obtain a diploma if not reasonably within their power. To determine reasonableness, courts might look to the difficulty that African-Americans in general, and the individual plaintiffs in particular, faced in obtaining a high school diploma.\textsuperscript{184} Courts might look at such factors as the quality of

\textsuperscript{178} Although people can generally gain weight, it may not have been the applicant's weight that mattered to the defendant. Rather, the defendant was concerned with strength and possibly the appearance of strength. Dothard v. Rawlinson, 433 U.S. 321, 331 (1977) (stating that the defendant argued that the height and weight requirements "have a relationship to strength, a sufficient but unspecified amount of which is essential to effective job performance as a correctional counselor"). If the weight requirement had been higher, the plaintiff had been required to gain a great deal of weight and did, and if that weight was not proportionate to her muscle mass, then although the letter of the requirement would be met, the purpose of the requirement—strength—would not.

\textsuperscript{179} See infra tbl. 2 (Summary of Test Suites Results).

\textsuperscript{180} See supra notes 5-7, 106-20 and accompanying text.

\textsuperscript{181} See supra notes 115-20 and accompanying text.

\textsuperscript{182} See infra tbl. 2 (Summary of Test Suites Results).

\textsuperscript{183} See generally Brown v. Bd. of Educ., 347 U.S. 483, 487-88 n.1 (1954) ("[African-American] schools were inferior with respect to teacher training, pupil-teacher ratio, extracurricular activities, physical plant, and time and distance involved in travel.").

\textsuperscript{184} The duty to make reasonable efforts is concerned with how reasonable it would be for a particular individual or class to take steps to meet a hiring requirement, not how difficult it would be for that individual or group in comparison to others.
early education that African-Americans had access to as well as the number of African-Americans who actually obtained high school diplomas during this time.

As applied, the duty to make reasonable efforts has built-in flexibility that accounts for the passage of time and changing social conditions. For instance, if *Griggs* were retried today, it is quite possible that a court would find a high school diploma requirement to be reasonable, even if it were true that African-Americans had lower high school graduation rates than other groups. A court might also find that plaintiffs were required to make reasonable efforts to meet this requirement.

An analysis of *Dothard* would require more facts to determine whether the plaintiff took reasonable steps to meet the weight requirement. If, for instance, the plaintiff weighed 117 pounds, it might not have been unreasonable to require her to make good faith efforts to gain three pounds to meet the weight requirement of 120 pounds. If however, the plaintiff weighed only 100 pounds and had a very high metabolism, it may have been unreasonable to require that she take the extreme measures needed to meet the requirement in that instance. In that situation, the plaintiff would only be required to take reasonable, not extreme steps to meet the 120-pound weight requirement. The plaintiff would be required to take the steps that would be reasonable for most women to take to meet the weight requirement. Again, the duty would not require her to gain the weight necessary to meet the requirement; it would only require her to make a reasonable effort to do so. If Rawlinson made reasonable efforts to meet the weight requirement and failed, then she would not be foreclosed from bringing a successful disparate impact claim. Her claim would proceed under the current disparate impact model. It would then be left to the court to determine whether the weight requirement had a disparate impact on women and if so, whether business necessity justified the weight requirement.

185. Courts would determine reasonableness on a case-by-case basis by considering how difficult it would be for a protected individual or group to take steps to meet the hiring requirement, not how difficult it would be when compared with other individuals and groups.

186. See infra tbl. 2 (Summary of Test Suites Results).

187. It is important to note that this inquiry does not reach whether it was proper to impose such a requirement, but only whether plaintiff made a good faith effort to meet the requirement before bringing a successful disparate impact claim.

188. See supra note 149 and accompanying text.

189. See supra note 52 and accompanying text for the requirements for showing a prima facie case of disparate impact.

190. See supra notes 53-55, 88 and accompanying text for a discussion of the business necessity defense available to employers after the plaintiff has shown his or her prima facie case.
On the other end of the spectrum from the height requirement in *Dothard* would be requirements such as the running test in *Lanning*, in which it was within the plaintiffs' ability to pass without extraordinary efforts. Thus, it would be reasonable in light of the circumstances to require that the plaintiffs make good faith efforts to pass the running test. Evidence showed that a minimum amount of training was required and plaintiffs were advised as to training techniques. If the plaintiffs passed the running test and met the other requirements, presumably SEPTA would award them the job. If the plaintiffs did not make reasonable efforts and failed, they would be foreclosed from bring a successful disparate impact claim. If the plaintiffs made reasonable efforts and still failed the test, they would be able to bring a claim under the present disparate impact model and the court would determine whether the test had a disparate impact on women and if so, whether business necessity justified the test. The duty might mean that women would be required to train harder or longer than men, who, studies showed, needed to do less training to pass the test. The possible inequity in such a situation would be tempered by the reasonableness requirement of the duty because it would only impose on female applicants an obligation to do a reasonable amount of training in light of their physiological disadvantage. Although they might, therefore, have to train harder than men, they would not be required to train unreasonably hard.

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191. *See infra* tbl. 2 (Summary of Test Suites Results).
192. *See supra* notes 115-20 and accompanying text.
193. *See supra* note 88 and accompanying text.
195. *Id.*
196. *See supra* note 149 and accompanying text.
### Table 2: Summary of Test Suites Results

<table>
<thead>
<tr>
<th>No Duty to Make Efforts</th>
<th>Absolute Duty to Make Efforts</th>
<th>Duty to Make Reasonable Efforts</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Griggs</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rationale: Plaintiffs need not show that they made efforts to obtain a high school diploma. The high school diploma requirement had an adverse impact on African-Americans and it was not justified by business necessity.</td>
<td>Rationale: Plaintiffs did not show that they made all possible efforts to obtain a high school diploma; therefore, plaintiffs' disparate impact case could not proceed.</td>
<td>Rationale: Plaintiffs show that they made reasonable efforts to obtain a high school diploma in light of the surrounding historical, social and economic circumstances in North Carolina in the 1950s and 1960s. The requirement had an adverse impact on African-Americans and was not justified by business necessity.</td>
</tr>
<tr>
<td><strong>Dothard</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rationale: Plaintiff was not required to show that she made reasonable efforts to meet the height and weight requirements, which were shown to have an adverse impact on women and which were not justified by business necessity.</td>
<td>Rationale: Plaintiff did not show that she took all possible steps to meet the weight requirement; therefore, she loses her disparate impact claim.</td>
<td>Rationale: More information would be needed to determine whether the plaintiff made reasonable efforts to meet the weight requirement. If it were found that she did make reasonable efforts, she would win as the weight requirement had an adverse impact on women and the defendant did not prove that it was required by business necessity.</td>
</tr>
<tr>
<td><strong>Lanning</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rationale: The plaintiffs were not required to show that they made reasonable efforts to pass the running test. The running test had an adverse impact on women and was not justified by business necessity.</td>
<td>Rationale: The evidence showed that plaintiffs did not do everything they could to train for the running test; therefore, plaintiffs lose their disparate impact claim.</td>
<td>Rationale: The evidence showed that plaintiff did not make reasonable efforts to pass the running test; therefore, they could not proceed with their disparate impact claim.</td>
</tr>
</tbody>
</table>

### B. Implementing the Duty to Make Efforts

Once the duty to make efforts has been defined, it must be implemented. This section will consider the consequences of four possible ways of integrating the duty to make efforts into the disparate impact model: (1) by contesting plaintiff's statistics; (2) by class
certification in class actions; (3) by creating a duty for plaintiff to plead and prove; and (4) by creating a defense for defendant to plead and prove.

1. Incorporating the Duty to Make Efforts into the Present Disparate Impact Model

This section will consider two ways of incorporating the duty into the present disparate impact model. This method has the advantage of not requiring legislation or court action to change the model. Furthermore, the duty would not need to be litigated in situations where it was not a material issue.\(^{197}\)

a. Contesting Plaintiff’s Statistics

The duty to make reasonable efforts could be implemented into the current model by allowing defendants to contest the plaintiff’s statistical evidence of disparate impact during the first stage of litigation.\(^{198}\) As discussed above, the duty to make reasonable efforts helps to ensure the accuracy of plaintiff’s statistics.\(^{199}\) The defendant would be able to argue that plaintiff’s statistics are inaccurate, as they present a pass rate that is artificially low, and therefore that the comparison between the pass rate of the plaintiff’s group and the pass rate of others is misleading.

Absent a duty to make reasonable efforts, it is possible that the fifty percent pass rate of women in the example above is the result of the women’s failure to make efforts to train to pass the running test.\(^{200}\) Thus, perhaps the baseline number in the equation above should not be the number of women who took the test, but the number of women who actually tried or made reasonable efforts to pass the test. For example, imagine that of the one-hundred women who took the test, only thirty of them made reasonable efforts to pass the running test.\(^{202}\) Then, the relevant pass rate for women would be seventy

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\(^{197}\) It would be inefficient and futile to require the parties to litigate this issue in a situation in which it was clear that the plaintiffs had fulfilled their duty to make reasonable efforts, either because the requirement at issue involved an immutable characteristic or because the record was clear as to the fact that plaintiffs had met their obligation.\(^{199}\) See Larson, supra note 10, § 23.02.\(^{199}\) See supra notes 137-38 and accompanying text; see also infra notes 200-06 and accompanying text.\(^{200}\) See supra tbl. 1 (Example of the Operation of the Four-Fifths Rule).\(^{201}\) See supra Equation 1.\(^{202}\) See infra tbl. 3 (Illustration of the Possible Effect of the Duty to Make Reasonable Efforts on Plaintiff’s Statistics).
percent because twenty-one women passed the test out of the thirty who made reasonable efforts to pass the test.\textsuperscript{203}

Table 3: Illustration of the Possible Effect of the Duty to Make Reasonable Efforts on Plaintiff’s Statistics

<table>
<thead>
<tr>
<th></th>
<th>Men</th>
<th>Women (Overall)</th>
<th>Women (Making Reasonable Effort)</th>
</tr>
</thead>
<tbody>
<tr>
<td># Taking</td>
<td>100</td>
<td>100</td>
<td>30</td>
</tr>
<tr>
<td># Passing</td>
<td>75</td>
<td>50</td>
<td>21</td>
</tr>
<tr>
<td>Pass Rate</td>
<td>75%</td>
<td>50%</td>
<td>70%</td>
</tr>
<tr>
<td>Relative Pass vs. Men</td>
<td>50/75 = 66%</td>
<td>68/75 = 93.3%</td>
<td></td>
</tr>
</tbody>
</table>

The percentage may prove to be higher (the percentage will never be lower) and therefore closer to the percentage of men who passed. This redefinition of the baseline may even eliminate a showing of disparate impact as it does in this example.\textsuperscript{204} The pass rate for women (sixty-eight percent) is 90.7\%, which is more than four-fifths (or eighty percent) of the pass rate for men (seventy-five percent). Thus, these statistics would not constitute evidence of a disparate impact under the EEOC’s four-fifths rule.\textsuperscript{205}

Absent a duty to make reasonable efforts, plaintiffs may use misleading statistics to show their prima facie case. Imposing this duty could lead to more accurate statistics by giving plaintiffs further incentive to take steps to meet hiring requirements. The statistics might prove more accurate in that they will reflect the applicants’ true ability to meet a hiring requirement. This statistical “accuracy” allows courts to find liability only where disparate impact is the result of the employer’s hiring requirements, not plaintiffs’ failure to comply. Mitigation duties in tort and contract law function similarly, in that they give the plaintiff incentives to take steps to assure that the defendant’s damages reflect the true result of the harm he or she caused, rather than injuries the plaintiffs caused or exacerbated.\textsuperscript{206}

This implementation of the duty is analogous to the market definition issue in disparate impact cases, which is frequently an important issue in this first stage of litigation.\textsuperscript{207} Therefore, the duty

\textsuperscript{203} See infra tbl. 3 (Illustration of the Possible Effect of the Duty to Make Reasonable Efforts on Plaintiff’s Statistics).
\textsuperscript{204} See supra tbl. 3 (Illustration of the Possible Effect of the Duty to Make Reasonable Efforts on Plaintiff’s Statistics).
\textsuperscript{206} See infra note 297 and accompanying text.
\textsuperscript{207} Although not a disparate impact case, \textit{Hazelwood School District v. United States}, 433 U.S. 299 (1977), dealt primarily with issues regarding the relevant labor pool. In that case, the United States brought suit against the Hazelwood, Missouri School District for employment discrimination against African-American applicants
to make reasonable efforts is not too great a departure from current disparate impact law. For example, in Dothard, plaintiffs alleged that Alabama's height and weight requirements for prison guards had a disparate impact using statistics regarding the heights and weights of men and women throughout the United States. Defendants argued that these statistics were incorrect and therefore not probative of disparate impact because the "generalized national statistics should not suffice to establish a prima facie case." Defendants claimed that plaintiffs should have used "comparative statistics concerning actual applicants for correctional counselor positions in Alabama." The court determined that plaintiff's statistics were admissible because plaintiff's "reliance on general population demographic data was not misplaced where there was no reason to suppose that physical height and weight characteristics of Alabama men and women differ markedly from those of the national population."

The relevant baseline number is the central issue in both relevant labor pool disputes and duty to make reasonable efforts disputes. With regard to the duty to make reasonable efforts, defendants could argue that the labor pool against which disparities should be measured was not all applicants, but only those applicants who took reasonable steps to meet the hiring requirement. This would presumably cause the percentage to increase and therefore be closer to the higher percentage against which it was being compared.

For example, consider the facts of Lanning. Imagine that sixty out of one hundred men passed the running test while only fifteen out of fifty women passed. The comparison would be the sixty percent pass rate for men compared with a thirty percent pass rate for women. These numbers would probably be sufficient to show that plaintiffs had met their initial burden of showing disparate impact. There would be a statistical showing of disparate impact under the EEOC's four-fifths rule, as the pass rate for women is fifty percent of the for teaching positions. Id. at 301. One of the arguments over the statistics was whether the relevant labor market included the city of St. Louis, in which the percentage of qualified African-Americans was substantially higher than the number of qualified African-Americans in the suburban area of Hazelwood. Id. at 310-12. See also Larson, supra note 10, § 22.07; supra notes 74-75 and accompanying text. 208. Dothard v. Rawlinson, 433 U.S. 321, 329-30 (1977). 209. Id. at 330. 210. Id. 211. Id. 212. See supra notes 200-06 and accompanying text for an explanation of the baseline number concept. 213. See generally Larson, supra note 10, § 22.07. 214. See supra notes 200-05 and accompanying text. 215. See supra notes 106-20 and accompanying text for a discussion of the case. 216. EEOC Uniform Guidelines on Employment Selection Procedures, 29 C.F.R. § 1607.4(D) (2003). 217. See supra notes 98-102 and accompanying text.
pass rate for men. The burden would then shift to the employer to show a business justification for the running test.\textsuperscript{218} However, rather than accepting these statistics, the employer could argue that the evidence showed that many of the women did not take the steps within their power to pass the running test. Thus, the plaintiffs’ statistics are misleading in that they do not reflect the applicants’ true ability to pass the test. In other words, the employer would argue that the statistics should account for the women who did not make efforts to pass the test.

Suppose the employer had evidence that only thirty of the fifty women who took the test made reasonable efforts to train for the test. In that case, the relevant percentages for comparison would be the sixty percent pass rate for men compared to a fifty percent pass rate for women, which would probably be insufficient to show disparate impact, because in this case the pass rate for women would be 83.3\% of that of men.\textsuperscript{219} Under the four-fifths rule, there would be no showing of a disparate impact.\textsuperscript{220} However, if those other twenty women did train reasonably hard and still failed to pass the test, they would have been included in the baseline number, which would result in no change in the overall pass rate, and thus would support a conclusion of disparate impact under the four-fifths rule. Although requiring these twenty women to make reasonable efforts to pass the test would have been futile—in the sense that their pass rates would not have increased—it would have had the effect of eliminating these twenty non-triers from the baseline of women applicants, thus ensuring that the female pass rate statistics better reflect applicants’ true ability to pass the test.\textsuperscript{221} Without statistics reflecting the applicants’ true ability to pass, the possibility exists that the employer would be held liable, not for implementing a hiring requirement with a discriminatory effect, but for plaintiffs’ failure to take reasonable steps to meet that requirement.

Implementing the duty at this stage of the litigation would be

\textsuperscript{218} Larson, \textit{supra} note 10, § 23.04 (“Once a disparate impact is demonstrated, the defendant may also prevail by persuading the court that the challenged practice is ‘job related for the position in question and consistent with business necessity.’” (citations omitted)).

\textsuperscript{219} 29 C.F.R. § 1607.4(D).

\textsuperscript{220} \textit{Id.}

\textsuperscript{221} If those twenty women trained reasonably hard, resulting in a pass rate of fifty percent for those women, the result would be the same as if those women had not been included in the baseline number at all. All of the women would have made reasonable efforts and therefore the baseline number would be fifty. Twenty-five women would have passed and therefore the fifty percent pass rate for women would be compared to the sixty percent pass rate for men and there would be no evidence of disparate impact under the four-fifths rule. \textit{Id.} Again, requiring the women to train reasonably hard would not have been futile insofar as this requirement is necessary to determine their true ability to pass the test so that the relevant percentages for comparison would reflect that ability.
consistent with the Civil Rights Act of 1991. The Civil Rights Act of 1991 does not specify what type of statistics the plaintiff must show as evidence of disparate impact. Thus, integrating the duty at this stage would not run contrary to the statute.

b. Federal Rule of Civil Procedure 23 in Class Actions

Disparate impact cases may be brought by individuals or as class actions. Many disparate impact cases have been brought as class actions. In the case of disparate impact claims brought as class actions, the duty to make reasonable efforts could also be integrated into the disparate impact model in the form of class certification. Under Federal Rule of Civil Procedure 23(a), which sets out the prerequisites for class certification, "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if . . . (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class . . . ." If the representative of the class did not take the steps within his or her power to mitigate disparate impact, then his or her claim may not be typical of the class's claim as a whole. Similarly, if the representative plaintiffs made efforts to meet the hiring requirement, while there is evidence that the remainder of the class, in whole or part, did not make reasonable efforts, then the representative of the class may not have a claim that is typical of the class. If it were found that the representatives of the class did not have claims typical of the class based on the duty to make reasonable efforts, then the class would not be certified and the litigation would not continue (at least as a class action).

For example, in Lanning, the class of plaintiffs may never have been certified if it had been determined that the representative plaintiffs' claims were not typical of those of the class as a whole (women applicants). Or perhaps the class would have been smaller because it comprised only the women who fulfilled the duty to make reasonable

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223. Id. § 2000e-2(k)(1)(A)(i); see supra note 88 and accompanying text.
225. See Rutherglen, supra note 22, at 55-57; see also supra note 224 and accompanying text.
efforts. In that situation, the defendant would not need to contest the statistics plaintiffs used to make out their prima facie case because the baseline number would necessarily include only those plaintiffs who complied with the duty. If it were found that none of the women in the class took the steps within their power to prepare for the test, then either the class would be certified or the plaintiffs would be barred from recovery.

If the duty were integrated into the disparate impact model in this way, it would prevent class members who did not take the steps within their power to meet the requirement from recovering by hiding their claims behind those of the class representatives who may have. It would assure that plaintiffs who did not comply with the duty would not be permitted to slip through the cracks.

However, this implementation of the duty does not operate in disparate impact cases brought by individuals. Although disparate impact claims have been frequently brought as class actions, implementing the duty to make reasonable efforts in this manner would not improve the disparate impact doctrine in individual cases. In addition, such implementation may be administratively inefficient in the sense that the issue may have to be litigated twice. If the representatives of the class made the same general efforts, then the class would be certified and the issue of whether reasonable efforts were made may have to be litigated later to determine whether the standard was met. However, this method may also be efficient. If all plaintiffs did not make reasonable efforts, then the case would not continue.

2. Creating a New Disparate Impact Model

The duty to make efforts might also be put into practice by changing the present structure of the disparate impact model. The duty could be implemented as a requirement that plaintiffs have the burden of proof and persuasion to demonstrate as part of their prima facie case. Or the duty could be put into practice by making it an affirmative defense that employers have the burdens of proof and persuasion to show after plaintiffs have made their prima facie case.

a. The Duty to Make Efforts as Part of Plaintiffs' Prima Facie Case

The duty to make efforts could be implemented by placing the burden on plaintiffs to show that they made reasonable efforts to comply with the hiring criteria. Under this model, proving reasonable efforts would be part of the plaintiffs' prima facie case and plaintiffs

227. See Rutherglen, supra note 22, at 55-57.
228. However, some of the evidence used at the class certification stage may be used later as well.
would have the burdens of production and persuasion to show that they made reasonable efforts in order to shift the burdens onto defendants to show business necessity.  

This implementation of the duty would answer the concerns of disparate impact critics who believe that hiring should be based on merit as defined by past conduct and applicants' success with regard to employers' hiring requirements. Thus, the burden would be on plaintiffs to show in every case that they made efforts to comply with the hiring requirement at issue.

This implementation of the duty to make efforts is appealing for several reasons. First, it would prevent unjust results where plaintiffs would recover despite not having taken the steps reasonably within their power to comply with the hiring requirement. Second, plaintiffs, for practical reasons, are in the best position to plead this portion of the case. Plaintiffs would have better access to evidence and information because they would know best what they did or did not do. Although discovery would also allow defendants to obtain this information, it would be more efficient for plaintiffs to plead this as part of their prima facie case.

However, this implementation of the duty may be also be inefficient in that it would require that the issue of reasonable efforts be litigated regardless of whether the record showed that it was material. It may be in the interest of both defendants and plaintiffs to make disparate impact litigation as efficient as possible because disparate impact suits are expensive, time consuming, and difficult to win.

b. The Duty to Make Efforts as a Defense for Employers

The duty may also be applied as a defense available to defendants during the second stage of the litigation (following the plaintiffs' prima facie case). After plaintiffs have made their prima facie case, defendants could have an optional defense of showing that plaintiffs did not make reasonable efforts to take the steps within their power to meet the hiring requirement and that the defendant should therefore not be liable for employment discrimination. Under this

229. See supra notes 53-55 and accompanying text.
231. Plaintiffs are bringing fewer and fewer class claims of disparate impact, as they require a great deal of resources and are thus increasingly difficult to win. See John J. Donohue III & Peter Siegelman, The Changing Nature of Employment Discrimination Litigation, 43 Stan. L. Rev. 983, 998 (1991) (discussing the causes and effects of the changes in the nature of employment discrimination litigation in federal courts from 1964 to 1991); see also Rutherglen, supra note 22, at 71-72.
232. See Larson, supra note 10, § 23.01.
233. Id. § 21.01.
model, defendants would have the burden of production and persuasion to plead this defense. This option places a relatively lighter burden on plaintiffs, in that the employer will have to prove that plaintiffs did not make efforts to comply with the hiring requirement. If the employer fails to carry this burden, then plaintiffs will prevail. Thus, plaintiffs may win even if they were not able to prove that they did make efforts to comply, so long as the employer does not have enough proof to show that plaintiffs did not make efforts to do so. Placing the burden of proof and production on defendants may be inefficient because the employer may not have the access to the information it needs to plead the defense successfully. However, the employer may gain access to this information through the discovery process. This fact may also work in favor of plaintiffs because defendants cannot make use of the defense unless they can come up with enough evidence to show plaintiffs did not meet their obligation under the duty. In the case that they cannot, plaintiffs will prevail on this issue. In addition, defendants will probably only be successful in this defense in cases where it is clear that plaintiffs did not make reasonable efforts. Thus, this formulation may protect against unjust results, while not placing too heavy a burden on plaintiffs. In addition, this issue would not need to be litigated unless it was a material issue, thereby decreasing litigation expenses, especially for plaintiffs who generally have fewer resources.

C. The Disparate Impact Doctrine Should Include a Duty to Make Reasonable Efforts

Part III.C. argues that disparate impact law should be strengthened and improved by implementing a duty to make reasonable efforts. This duty will prevent plaintiffs from bringing successful disparate impact claims without making reasonable efforts to meet the hiring requirement at issue, thereby helping to ensure that employment practices are merit-based, while still accounting for important societal factors that prevent equal access to employment opportunities. In support of this argument, Part III.C. shows that the duty to make reasonable efforts improves upon the disparate impact doctrine, that it does not implicate a similar duty in the disparate treatment context, and that it is consistent with mitigation principles in other areas of the law and with the original formulation of disparate impact laid out in Griggs.

1. The Duty to Make Efforts Should Be Defined as a Duty to Make Reasonable Efforts

The duty to make efforts should be defined to require that plaintiffs make reasonable efforts (in light of the circumstances) to meet the
hiring requirement at issue.\textsuperscript{234} Defining the duty in this way takes into account historical, social and economic factors that may make a hiring requirement technically, but not practically possible for plaintiffs to meet.\textsuperscript{235} This definition prevents the harsh and unpalatable results of the absolute duty to make efforts\textsuperscript{236} while protecting against the injustices of having no duty to make efforts (where plaintiffs may bring a successful disparate impact claim without having made efforts to meet the hiring requirement at issue). Thus, the duty to make reasonable efforts prevents abuse of the disparate impact doctrine, while acknowledging that historical, social and economic factors, which perpetuate past discrimination, are exactly the barriers that the theory of disparate impact was intended to remove.\textsuperscript{237}

One might argue that the duty to make reasonable efforts is too vague and fact-specific to lead to consistent and predictable results. Thus, plaintiffs will not know what steps they must take to preserve their right to bring a disparate impact claim. The duty to make reasonable efforts is fact-specific, however, it must be in order to ensure that courts adequately account for the unique historical, social and economic forces affecting plaintiffs and their ability to make efforts to meet hiring requirements.\textsuperscript{238} While analysis on a case-by-case basis may not be as predictable as a bright-line rule, courts and plaintiffs have been able to deal successfully with predictability issues in the context of the duty to mitigate damages in tort and contract cases.\textsuperscript{239} In these cases, courts must determine on a case-by-case basis what steps are reasonable for plaintiffs to take in order to mitigate their damages.\textsuperscript{240} Thus, there is strong evidence that courts can successfully administer a case-by-case analysis of reasonableness that will permit future plaintiffs to act accordingly. Once it is determined that the duty to make efforts is best defined as a duty to make reasonable efforts, the costs of this duty must be allocated.

\section*{2. Only Employers Found Liable for Employment Discrimination Should Bear the Costs of the Duty to Make Reasonable Efforts}

The employer should bear the costs of plaintiffs' reasonable efforts to comply in the event that the employer is found liable for

\begin{itemize}
\item \textsuperscript{234} See supra Part II.B.3.
\item \textsuperscript{235} See Banks, supra note 32, at 1046.
\item \textsuperscript{236} See supra Part III.A. and tbl. 2 (Summary of Test Suites Results) and accompanying text for an illustration of the absolute duty's harsh results when applied to the facts of Griggs and the no duty to make efforts rule's unjust results when applied to the facts of Lanning.
\item \textsuperscript{238} See supra notes 151-55 and accompanying text.
\item \textsuperscript{239} See infra notes 294-307 and accompanying text.
\item \textsuperscript{240} See infra note 299 and accompanying text.
\end{itemize}
employment discrimination. If the employer is not found liable, the general rule that the applicant bears the costs of obtaining employment should apply. This rule results in applicants incurring different levels of costs; however, applicants generally bear the costs of seeking employment, even though those costs might be higher for some applicants than others. The employer's liability is the sole justification for imposing the costs of reasonable compliance on the employer. If an employer is found liable, it is in the interest of fairness that it should bear the plaintiff's cost of reasonable compliance. The plaintiff should not have to absorb costs incurred to meet a requirement that disadvantaged him or her. This allocation of costs gives the plaintiff the incentive to incur the costs that accompany reasonable compliance even if he or she feels that the employment requirement disadvantages him or her and members of his or her protected group. In addition, it gives employers incentive to design employment requirements that will not result in a disparate impact and/or that will not cause members of a particular group to incur excessive costs in making reasonable efforts to meet hiring requirements.

3. The Duty to Make Reasonable Efforts Should Be Implemented as a Tool for Defendants to Use in Contesting Plaintiffs' Statistics

The duty to make reasonable efforts should be integrated into the present disparate impact model by giving defendant employers the opportunity to contest plaintiffs' statistics during the first stage of litigation. This implementation of the duty has a number of critical advantages.

First, it is consistent with the Civil Rights Act of 1991 and current case law. This implementation would not require a revision of disparate impact through legislation or the overruling of any case law, both of which could be arduous tasks. It is in line with the Civil Rights Act of 1991, which does not specify what type of statistics plaintiffs must present to make their prima facie case. It is also consistent with the no-quota provision of the Civil Rights Act of 1991 because it promotes merit-based hiring. Additionally, it is in line with current case law because the issue of defining the appropriate

242. See supra Part III.B.1.a.
243. This implementation of the duty would be more efficient if the political battles and compromises that took place during the passage of the Civil Rights Act of 1991 could be avoided. See generally Roger Clegg, A Brief Legislative History of the Civil Rights Act of 1991, 54 La. L. Rev. 1459 (1994) (giving a history of the enactment of the Civil Rights Act of 1991).
244. See supra note 89 and accompanying text.
baseline number is already a frequently litigated issue in the context of determining the relevant labor pool for each disparate impact case.\textsuperscript{246}

Second, this implementation of the duty is economically and administratively efficient. It would not put an extra or undue burden on either party or the courts because the issue would not need to be litigated unless it was material. Further, the parties already must litigate the issue of the relevant baseline number under current case law.\textsuperscript{247} Whether plaintiffs' statistics accurately reflect their true ability to meet the hiring requirement may be determined early in the litigation. If, taking into consideration plaintiffs' reasonable efforts to comply, the court determines that there is no disparate impact under the four-fifths rule,\textsuperscript{248} the litigation would not need to proceed to the business justification stage.\textsuperscript{249} Thus, the duty to make reasonable efforts should be considered when litigating the issue of whether plaintiff has presented statistics sufficient to make out a prima facie case of disparate impact.

4. The Duty to Make Reasonable Efforts as a Defense of Disparate Impact

The duty to make reasonable efforts should be incorporated into the disparate impact model because it would improve and strengthen the theory. Disparate impact is an important vehicle for achieving equality in employment.\textsuperscript{250} Discriminatory employment practices frequently exist in the absence of evidence of discriminatory intent.\textsuperscript{251} Often employers are unaware of their own biases and may act on them subconsciously.\textsuperscript{252} Therefore, even when an employer does not have a discriminatory motive, the employer's actions may still have a negative and disproportionate effect on a particular group.\textsuperscript{253} In

\begin{itemize}
  \item \textsuperscript{246} See supra notes 207, 213 and accompanying text.
  \item \textsuperscript{247} See supra notes 207-14 and accompanying text.
  \item \textsuperscript{248} EEOC Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(D) (2003).
  \item \textsuperscript{249} See supra notes 54-55, 88 and accompanying text.
  \item \textsuperscript{250} See supra note 30 and accompanying text.
  \item \textsuperscript{251} See Bennett-Alexander, supra note 34, at 196 (“[O]vert discrimination may have waned after the enactment [of] Title VII, [but] covert and ‘unintentional’ discrimination remain[] alive and well, and in need of redress.”).
  \item \textsuperscript{252} See Linda Hamilton Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 Stan. L. Rev. 1161, 1164 (1995) (“[T]he way in which Title VII jurisprudence constructs discrimination, while sufficient to address the deliberate discrimination prevalent in an earlier age, is inadequate to address the subtle, often unconscious forms of bias that Title VII was also intended to remedy.”); Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 318-21 (1987) (analyzing the discriminatory purpose doctrine created by the Supreme Court in Washington v. Davis, 426 U.S. 229 (1976)).
  \item \textsuperscript{253} Justin D. Cummins, Refashioning the Disparate Treatment and Disparate Impact Doctrines in Theory and in Practice, 41 How. L.J. 455, 468-69 (1998)
\end{itemize}
addition, even if an employer has a discriminatory motive, that motive may be difficult to prove. As openly discriminatory “behavior has become more unfashionable, evidence of intent has become harder to find. But this does not mean that racial discrimination has disappeared.” Given these difficulties and disparate impact’s role in overcoming them, the disparate impact doctrine should be refined, improved, and strengthened so that it may best serve its purpose of paving a way toward equality in employment. Thus, the duty to make reasonable efforts should be incorporated into the disparate impact doctrine to protect against the injustice that results when a plaintiff wins a disparate impact case without having made reasonable efforts to meet the employment criteria at issue. The duty to make reasonable efforts would help to ensure that employment practices are merit-based, while acknowledging the societal factors that prevent equal access to employment opportunities.

A duty to make reasonable efforts would serve important functions in disparate impact law. First, it would help courts to determine whether there is a disparate impact and, if so, its severity. The duty to make reasonable efforts helps to ensure that the statistics that plaintiffs use to show their prima facie case reflect plaintiffs’ true ability to meet a hiring requirement, and protects employers from being held liable for implementing hiring criteria that would not have had a disparate impact if plaintiffs had made reasonable efforts to meet it. Without a duty to make reasonable efforts, it can be difficult to determine whether plaintiffs failed to meet a facially neutral hiring requirement because the requirement had a negative impact on them, or because they simply did not make efforts to comply with the requirement. Thus, the duty also protects against unjust results, which occur when plaintiffs are able to recover based on hiring criteria that they did not make efforts to meet.

Second, the duty to make reasonable efforts will act as an incentive

(“[R]acism and discrimination infect the unconscious as well as the conscious.”); e.g., Connecticut v. Teal, 457 U.S. 440, 454 (1982) (holding that a nondiscriminatory “bottom line” is not a defense to a disparate impact claim under Title VII).

254. See supra note 34 and accompanying text.

255. Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1043 (2d Cir. 1979) (quoting Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290) (holding that the plaintiff’s prima facie case of disparate impact under the Fair Housing Act could not be rebutted by the landlord’s hypothetical reasons for rejecting the plaintiff).

256. See, e.g., supra notes 106-20 and accompanying text.

257. See supra Part III.B.1.a. for a discussion of how a duty to make efforts could improve the reliability of the statistics that plaintiffs use to make their prima facie case.

258. See supra notes 106-20 and accompanying text for a discussion of Lanning as an example of a case in which it is difficult to determine whether it was plaintiffs' lack of efforts or the running test itself that caused the statistical disparity.

259. See, e.g., supra notes 106-20 and accompanying text.
to plaintiffs to make efforts to comply with hiring criteria. Giving plaintiffs this incentive has the benefit of allowing courts to determine whether any disparate impact is the result of a hiring requirement with a discriminatory effect or the result of plaintiffs' failure to take steps to meet the hiring requirement. If a plaintiff feels that a requirement may be discriminatory, that plaintiff may not have the incentive to meet it if he or she can still win a disparate impact claim based on that requirement. A duty to make reasonable efforts would give plaintiffs an incentive to make reasonable efforts, which would, in turn, make statistical determinations of disparate impact more accurate.\textsuperscript{260}

Third, without a duty to make reasonable efforts, employers have an incentive to focus more on the pass rates of applicants than on the quality of their hiring requirements. If employers know that they could be found liable for disparate impact regardless of how sensitive their requirements were to minority groups, employers would be encouraged to focus only on the pass rates of applicants (which might lead to quotas), rather than on devising quality employment requirements designed to avoid disadvantaging particular groups.\textsuperscript{261} If an employer knows it may be held liable for a disparity that occurs even when the applicant could have passed with minimal effort, it will have only a few options to avoid liability. It could hire the applicant despite his or her refusal to meet the demands; or it could lower the test standards (so that everyone could pass without training) and thereby decrease the quality of its workforce.\textsuperscript{262} From an employer's perspective, neither of these options results in desirable outcomes.

Fourth, the duty to make reasonable efforts encourages merit-based employment practices and protects against quotas. Such a duty promotes hiring based on merit, in that an applicant's motivation and effort in complying with hiring criteria may be strongly indicative of the motivation and effort that they will exhibit in carrying out their job in the future.\textsuperscript{263} Thus, the duty protects against the institution of quotas\textsuperscript{264} because it ensures that the employer will not be made to hire applicants of a particular group if they have not made efforts to comply with their requirements over applicants who have made efforts.

Finally, a duty to make reasonable efforts comports with notions of fairness and deservingness, in that those who try harder should be rewarded and treated more favorably than those who do not because

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\textsuperscript{260} The statistics would be more accurate in the sense that they reflected plaintiffs' true ability to meet the hiring requirement.
\textsuperscript{261} See \textit{supra} notes 25-29 and accompanying text for a brief discussion of the argument against quotas in the hiring context.
\textsuperscript{262} See \textit{supra} note 26 and accompanying text.
\textsuperscript{263} See \textit{supra} notes 129-32 and accompanying text.
\textsuperscript{264} See \textit{supra} notes 25-29 and accompanying text.
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it promotes productivity.\textsuperscript{265} Generally, the legal system holds defendants liable only when they have acted culpably, meaning that their actions caused harm to plaintiffs.\textsuperscript{266} If plaintiffs have not made efforts to meet a hiring requirement, it is difficult to determine whether the defendant has caused the harm under this disparate impact theory.\textsuperscript{267} Therefore, holding that defendant liable may be unjust.

Obtaining employment almost always requires that one make efforts to meet job requirements. Generally, people feel that it is fair that those who try harder obtain employment over those who make less or no effort.\textsuperscript{268} It is simply not fair to bring a complaint about a hiring requirement that plaintiff did not make efforts to meet. Society also has an interest in treating those who try harder more favorably than those who do not because those who try are likely to be more valuable and productive members of society.\textsuperscript{269} One should not claim that a task is too difficult or disadvantages him or her without making a good faith effort to complete that task successfully. Therefore, fairness dictates that plaintiffs make an effort to do what is required of them when seeking employment before they bring suit claiming that the requirement had a discriminatory effect on them.

5. The Duty to Make Reasonable Efforts Does Not Implicate a Duty to Mitigate Disparate Treatment

One might argue that if a duty to make reasonable efforts is needed in disparate impact law, a similar duty should be implemented in disparate treatment law. However, the proposed ex ante duty to make reasonable efforts for disparate impact law does not carry over

\textsuperscript{265} See infra notes 266-69 and accompanying text.

\textsuperscript{266} There are many instances of strict liability; however, generally, whether courts will award relief to plaintiffs is contingent on finding the defendant liable.

\textsuperscript{267} See supra Part III.B.1.a.

\textsuperscript{268} Distributive justice supports this conception of fairness and deservingness. "In distributive justice, things are allocated to persons in accordance with a criterion of distribution." Peter Benson, The Basis of Corrective Justice and Its Relation to Distributive Justice, 77 Iowa L. Rev. 515, 526, 535 (1992) (attempting to "explain the nature and basis of corrective justice without referring in any way to distributive considerations"). In a merit system, the criterion of distribution is past conduct and efforts in meeting the hiring requirement. See Banks, supra note 32, at 1036. These criteria are chosen because they promote efficiency and productivity. Id. Individuals may be unequal; however, they are treated equally if employment is offered to them on the basis of their past conduct and efforts in meeting the hiring requirements. See Benson, supra, at 535-36. Thus, each person's share will then be according to the extent of his or her qualification under the criter[a] [of past conduct and efforts in meeting the hiring requirement]. If shares are different, this will reflect differences among persons that are relevant in light of the criter[a]. Equality consists here in there being a proportion ....

\textsuperscript{269} See Banks, supra note 32, at 1036-37.
to the disparate treatment context. A duty to make reasonable efforts would be inappropriate in the disparate treatment context because (1) such a duty would not further the goals of Title VII, and (2) because there is no evidence of intentional discrimination in disparate impact cases, while there is in treatment cases, which negates the need for a duty to make reasonable efforts.

A duty to make reasonable efforts in the disparate treatment context would require plaintiffs to show that they made reasonable efforts to mitigate the existence of intentional discrimination. For example, an African-American plaintiff might be required to refrain from applying for employment with a company that he or she knows intentionally discriminates against African-Americans. Instead he or she should seek employment with another company that does not discriminate if it is within his or her ability to do so. Similarly, a plaintiff may be required to quit a job at which he or she is being discriminated against and find employment elsewhere if it is within his or her power. This requirement is patently unjust. It does little to give employers incentive to implement equal employment practices. It also penalizes the plaintiff for the employer’s discrimination. Rather than working towards equality in employment, it encourages applicants to avoid employers that have discriminatory hiring practices. These are clearly not the goals of Title VII.

Further, the critical difference between disparate treatment and disparate impact is that there is evidence of intent to discriminate in disparate treatment cases. The duty to make reasonable efforts is aimed at finding liability only where it was the employer’s requirement, and not the plaintiff’s failure to make efforts, that resulted in his or her failure to meet the requirement. If the employer had the intent to discriminate, then there is no concern that the employer will be found liable for the lack of effort on plaintiff’s

270. See Connecticut v. Teal, 457 U.S. 440, 451 (1982) (“Title VII strives to achieve equality of opportunity by rooting out ‘artificial, arbitrary, and unnecessary’ employer-created barriers to professional development that have a discriminatory impact upon individuals.”).

271. See Larson, supra note 10, § 20.03; see also supra notes 9-42 and accompanying text.

272. See EEOC v. Chi. Club, 86 F.3d 1423, 1434 (7th Cir. 1996) (“[T]he overriding goal of the Civil Rights Act of 1964 was to eliminate discrimination and to create disincentives to discriminate . . . .”); see also supra note 9 and accompanying text. There is a duty to mitigate damages in both disparate impact and treatment cases. See infra note 311 and accompanying text. For instance, a plaintiff would be required to find another comparable job if he or she were fired, however, this duty does not run contrary to the goals of Title VII because it only prevents the defendant’s damages from piling up, and does not act as a bar to liability. See infra Part III.C.6.b. discussing the differences between the duty to mitigate damages and the duty to make reasonable efforts.

273. See supra notes 13-18 and accompanying text; see also Larson, supra note 10, § 20.03.

274. See supra Part II.B.3.
part because the plaintiff would have been rejected on account of her "race, color, religion, sex, or national origin"\textsuperscript{275} even if he or she had made reasonable efforts. The employer's intent to discriminate justifies its being held liable.\textsuperscript{276} Thus, there is no need for a duty to make reasonable efforts in disparate treatment cases because there is another means of finding employer liability: intent to discriminate.\textsuperscript{277} The duty to make reasonable efforts, therefore does not implicate an analogous duty in disparate treatment cases.

While the ex ante duty to make reasonable efforts does not implicate a corresponding ex post duty to mitigate disparate treatment, the duty to make reasonable efforts is consistent with established mitigation duties in other areas of the law.

6. The Duty to Make Reasonable Efforts Is Consistent with Mitigation Principles in Other Areas of the Law

The duty to make reasonable efforts is in line with mitigation duties in other areas of the law and therefore is not a great departure from existing law.\textsuperscript{278} The duty to make reasonable efforts has important similarities to and differences from other obligations in employment discrimination law as well as other legal disciplines. Comparing the duty to make reasonable efforts to similar obligations puts into focus the need for such a duty, its goals, and its possible functions and effects. The following sections compare the duty to make reasonable efforts to the ability to comply standard in employment discrimination cases based on employers' English-only rules, and the obligation to mitigate damages in tort and contract law.

a. Ability to Comply Standard

The duty to make reasonable efforts is analogous to the "ability to comply" standard applied in employment discrimination cases based on English-only rules in the workplace with respect to bilingual employees.\textsuperscript{279} Numerous federal circuits have held that "English-only

\textsuperscript{276} See supra note 266 and accompanying text.
\textsuperscript{277} See Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (noting that intent is not necessary to finding discrimination under Title VII); Larson, supra note 10, § 20.03. "[I]n disparate treatment cases the plaintiff is ultimately attempting to show that the employer acted with discriminatory intent. In disparate impact cases, the plaintiff may prevail by showing the impact of the employer's practices; a showing of discriminatory intent is not necessary." \textit{Id.}
\textsuperscript{278} See infra Part III.C.6.a.
\textsuperscript{279} E.g., Garcia v. Gloor, 618 F.2d 264, 266-67 (5th Cir. 1980) (holding that the employer's rule prohibiting sales employees from speaking any language other than English on the job did not constitute employment discrimination based on national origin); Kania v. Archdiocese, 14 F. Supp. 2d 730, 731-32 (E.D. Pa. 1998) (holding that the church's rule requiring employees to speak only English during business hours did not constitute national-origin discrimination when applied to bilingual employees);
policies are not discriminatory if the employees speak English and are thus not disadvantaged in the job market." Thus, employers do not violate Title VII by disallowing employees, who also speak English, to speak their native tongue on the job provided that the English-only policy has a legitimate business purpose. Plaintiffs who are able, but not willing to comply with English-only rules may not bring a successful claim under Title VII.

This standard is analogous to the duty to make reasonable efforts in that it requires employees to take steps within their power to meet an employer's requirement. The courts view an employee's "choice of language, like other behaviors, [as] a matter of [personal] preference." If there is clear evidence that plaintiffs failed to make efforts to meet the English-only requirement (with which they could comply because the record shows they speak English) then their failure to comply with the rule was a "matter of choice." This choice not to follow the English-only rule cannot be the basis for a disparate impact claim because the "Act does not support an interpretation that equates the language an employee prefers to use with his national origin." Thus, bilingual employees who fail to comply with English-only rules (and are subsequently discharged) are not discharged because of an immutable characteristic, specifically their national origin in violation of Title VII, but rather because of their personal decision not to comply with the rule. It may be that plaintiffs have limited English or inadvertently slip into speaking their native tongue and therefore the requirement may be difficult to comply with at times. However, their ability to comply bars a disparate impact claim based on an English-only rule.


280. Long, 894 F. Supp. at 940; see Garcia, 618 F.2d at 271.
282. Id.
283. Kania, 14 F. Supp. 2d at 733 (quoting Garcia, 618 F.2d at 270).
284. Garcia, 618 F.2d at 270.
285. Id. at 272 ("Mr. Garcia was neither discharged because of his national origin nor denied equal conditions of employment based on that factor; instead, he was discharged because, having the ability to comply with his employer's rule, he did not do so."). Thus Title VII does not "command[] employers to permit employees to speak the tongue they prefer." Kania, 14 F. Supp. 2d at 734.
286. Some critics of the ability to comply standard have argued that it is unjust for failing to take into account the "close connection between one's primary language and one's ethnicity." Paul K. Hentzen, EEOC v. Syncro-Start Products: The New Face of Disparate Impact Challenges to English-Only Workplace Rules, 69 UMKC L. Rev. 439, 453 (2000). However, courts have held that "Title VII does not protect the ability of workers to express their cultural heritage at the workplace." Kania, 14 F. Supp. 2d at 736.
The ability to comply standard in the English-only workplace context differs from the duty to make reasonable efforts in the case of hiring requirements in two important ways. First, the evidence of efforts to comply may not be as clear as in the case of English-only rules. It would be easier to determine whether one is bilingual than to determine whether, for instance, the plaintiff in Dothard made efforts to meet the weight requirement. Second and most importantly, the duty to make reasonable efforts is not as stringent as the ability to comply standard. The ability to comply standard dictates that because plaintiffs can comply (regardless of the difficulty), they cannot prove disparate impact. However, the duty to make reasonable efforts requires only that plaintiffs make reasonable efforts to meet the hiring requirement even if further steps are within their power, but are unduly difficult to take. In other words, the ability to comply standards bars a disparate impact claim regardless of how difficult it may be for an employee to speak English only at designated times in the workplace so long as that employee is bilingual. The duty to make reasonable efforts would not require that applicants take steps to meet a hiring requirement that are unreasonably difficult to take.

Third, the ability to comply standard addresses the concern that employers should be able to fashion rules that promote legitimate business objectives. Numerous courts have held that plaintiffs should not be able to claim that these rules discriminate on the basis of national origin if the rules are legitimate and plaintiffs make a personal choice not to comply with them. Conversely, English-only rules as applied to employees who do not speak English can be considered immutable characteristics and may be found to constitute a discriminatory employment practice because employees do not choose to violate them. Like the ability to comply standard, the duty to

287. See supra note 162 and accompanying text.
288. Garcia, 618 F.2d at 272 (finding that although it may have been difficult for the plaintiff to comply with the English-only rule, his ability to comply barred his disparate impact claim).
289. See supra note 284 and accompanying text.
290. See supra Part II.B.3.
291. E.g., Kania, 14 F. Supp. 2d at 736. According to the court:

[It is clear that the Church adopted its English-only rule to improve interpersonal relations at the Church, and to prevent Polish-speaking employees from alienating other employees, and perhaps church members themselves. The courts in Spun Steak, Gloor and Prado upheld the validity of workplace English-only rules adopted for similar reasons. Accordingly, the Court finds that in adopting the challenged rule, the Church had business justification as a matter of law.

Id.]
293. Garcia, 618 F.2d at 270 ("To a person who speaks only one tongue or to a person who has difficulty using another language than the one spoken in his home,
make reasonable efforts is concerned with employers being able to fashion legitimate employment requirements without facing liability if applicants make a determination, as a matter of personal preference, not to take steps to meet them.

b. Duty to Mitigate Damages in Tort and Contract Law

The duty to make reasonable efforts is also analogous to the obligation to mitigate damages in both tort and contract law; therefore, it does not diverge substantially from existing law. In the tort and contract contexts, after the defendant's liability has been established, plaintiff's failure to mitigate damages acts as a limitation on the damages he or she may recover. The Restatement (Second) of Contracts states, "damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation." Similarly, "one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure" after the tort has been committed.

The aim of the mitigation duty in both tort and contract law is to give the plaintiff an incentive to limit his or her injuries where it is within his or her power, rather than to let the amount of damages mount because he or she knows that the defendant will bear the cost. The goal is economic efficiency in that the total cost to society of a tort or contract breach should be limited as much as possible. Plaintiffs are only required to take reasonable measures to limit the extent of their damages—they are not obligated to take any burdensome or potentially harmful steps. The rule acknowledges the defendant's culpability by requiring that he or she bear the cost of any reasonable mitigation measures the plaintiff takes, whether or not

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294. E.g., State Pub. Sch. Bldg. Auth. v. W.M. Anderson Co., 410 A.2d 1329, 1331 (Pa. Commw. Ct. 1980) ("It is a familiar rule of law that a party who suffers a loss due to a breach of contract has a duty to make reasonable efforts to mitigate his losses.").
296. Restatement (Second) of Torts: Avoidable Consequences § 918(1) (1979).
297. Restatement (Second) of Contracts § 350 cmt. a.
298. Munn v. Algee, 924 F.2d 568, 577 n.16 (5th Cir. 1991) ("[T]he purposes of the doctrine ... are to encourage plaintiffs to reduce the societal costs of their injuries and to ensure fair treatment of defendants.").
299. Foust v. Valleybrook Realty Co., 446 N.E.2d 1122, 1127 (Ohio Ct. App. 1981) ("The rule requiring one injured by a wrongful act or omission of another to minimize the damages resulting does not require a party to make extraordinary efforts, or to do what is unreasonable or impracticable."); see Chandler v. Gen. Motors Acceptance Corp., 426 N.E.2d 521, 523 (Ohio Ct. App. 1980) (finding that there were issues of material fact as to whether plaintiff could have reduced his losses with "reasonable effort").
these measures actually succeed in lowering the plaintiff's damages. 300 Further, "[t]he injured party is not precluded from recovery by the rule... to the extent that he has made reasonable but unsuccessful efforts to avoid [the] loss." 301 Thus, reasonable attempts at mitigation, even if unsuccessful, do not limit the plaintiff's recovery. 302

The duty to make reasonable efforts may also be understood as a duty to mitigate the effects of disparate impact. This duty has important parallels to and differences from the obligation to mitigate damages. These duties are similar in that they require a plaintiff to take steps to lessen the harmful (or potentially harmful in the case of the duty to make reasonable efforts) effects of the defendant's actions. 303 Both duties require plaintiffs to make efforts to avoid suffering an actual or potential harm, which they are capable of preventing. 304 In the tort and contract context, this duty begins after a defendant has harmed the plaintiff and liability has been found. 305 It is concerned with mitigating the ex post effects of the harm. 306 Conversely, the duty to make reasonable efforts exists before there is a finding of liability and may even influence whether or not a court will find liability. It is concerned with mitigating the ex ante or potential existence of a disparate impact. In this respect, the duty to make reasonable efforts may be more justifiable because the plaintiff is not necessarily preventing further loss to one who has already harmed him or her, 307 but rather taking steps to ensure that any harm done is solely the fault of the employer and not attributable to the

300. CUNA Mut. Life Ins. Co. v. L.A. County Metro. Transp. Auth., No. B14 91200, 2003 Cal. App. LEXIS 636, at *20 (Ct. App. Apr. 30, 2003) ("[T]he costs of mitigation efforts are recoverable... if they are reasonable and undertaken in good faith; and... it is 'irrelevant' that the mitigation efforts may have failed."); Mr. Eddie, Inc. v. Ginsberg, 430 S.W.2d 5, 12 (Tex. Civ. App. 1968) ("If... expenses are the result of a prudent attempt to minimize damages they are recoverable even though the result is an aggravation of the damages rather than a mitigation."); Eugene Kontorovich, Note, The Mitigation of Emotional Distress Damages, 68 U. Chi. L. Rev. 491, 496-99 (2001) (analyzing courts' failure to apply a mitigation rule to emotional distress damages and proposing means by which courts can limit moral hazard in this area without a mitigation rule).

301. Restatement (Second) of Contracts § 350(2).

302. Id. § 350 cmt. h.

303. See supra note 297 and accompanying text.

304. See supra note 297 and accompanying text.


306. Restatement (Second) of Torts § 918 cmt. a (1979) (noting that "the rule stated in this Section applies only to the diminution of damages and not to the existence of a cause of action").

307. The duty to mitigate damages in the tort and contract contexts arises only after the commission of the tort or the breach of a contract because it acts as a limit to damages, which result from injury. Restatement (Second) of Contracts § 350 (1981); Restatement (Second) of Torts § 918.
plaintiff. The obligation to mitigate damages is also aimed at compensating the plaintiff for only the harm that the defendant caused, not any harm that the plaintiff caused him or herself (except when the defendant and the plaintiff are both "but for" causes of the harm). Similarly, the goal of the duty to make reasonable efforts is to limit the possibility that a defendant will be held liable when the plaintiff’s failure to meet a hiring requirement was not the result of an employer’s discriminatory requirement, but rather the plaintiff’s failure to take steps to meet that requirement. Like the obligation to mitigate damages, the duty to make reasonable efforts would only require that plaintiffs make reasonable efforts to comply, and would not bar recovery if those reasonable steps were unsuccessful. 308

The obligation to mitigate damages in the tort or contractual contexts differs from the duty to make reasonable efforts in that the obligation to mitigate damages acts only as a limit to damages and not to recovery, 309 while the duty to make reasonable efforts would be a bar to finding liability. If a court finds that the plaintiff failed to mitigate his or her damages, the court could limit the plaintiff’s recovery by the amount that he or she could have avoided by taking reasonable steps to mitigate the damages. 310 Plaintiffs in disparate impact cases already have a duty to mitigate damages, in that if plaintiffs do not get a job, plaintiffs must make reasonable efforts to obtain other employment and refrain from running up the defendant’s damages where plaintiffs have reasonable power to limit them. 311 Conversely, if a court were to find that a plaintiff failed to mitigate the effects of disparate impact, this failure to mitigate would act as a complete bar to recovery. This difference in results may be a reason to define the duty to make reasonable efforts less stringently than the obligation to mitigate damages.

308. See supra notes 301-02 and accompanying text.
309. The plaintiff “incurs no liability for his failure to [mitigate damages]. The amount of loss that he could reasonably have avoided by stopping performance, making substitute arrangements or otherwise is simply subtracted from the amount that would otherwise have been recoverable as damages.” Restatement (Second) of Contracts § 350 cmt. b.
310. E.g., Kallman v. Radioshack Corp., 315 F.3d 731, 740-42 (7th Cir. 2002) (affirming the lower court’s ruling that the plaintiff landlord failed to mitigate her damages and limiting her damages based on that failure); Baker v. John Morrell & Co., 263 F. Supp. 2d 1161, 1182 (N.D. Iowa 2003) (finding that plaintiff failed to mitigate her damages).
311. See Ford Motor Co. v. EEOC, 458 U.S. 219, 231-32 (1982) (“An unemployed or underemployed claimant, like all other Title VII claimants, is subject to the statutory duty to minimize damages set out in [42 U.S.C. § 2000e-5(g)].”); see also United States v. City of Warren, 138 F.3d 1083, 1098 (6th Cir. 1998) (“A Title VII claimant has a duty to mitigate damages by seeking substantially equivalent employment.”).
c. The Duty to Make Reasonable Efforts Is Consistent with the Original Formulation of the Disparate Impact Doctrine in Griggs

A duty to make reasonable efforts is also compatible with the original formulation of the disparate impact doctrine in Griggs, which was to remove barriers to employment that are the result of past discrimination (not barriers to employment that plaintiffs have created themselves).\(^{312}\) Courts and Congress could have read the original formulation of disparate impact laid out in Griggs narrowly as creating the theory of disparate impact as a temporary measure to be used only where there had been a showing of "purposeful discrimination in the past."\(^{313}\) The Court stated that, "[u]nder the [Civil Rights] Act [of 1964], 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."\(^{314}\) The Court explained that Congress's purpose in enacting Title VII "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."\(^{315}\) In these passages, the Court described the aim of disparate impact as eradicating the lingering present effects of past discrimination.\(^{316}\) Under a narrow reading, disparate impact was meant only to be a temporary means of stopping employment discrimination while disparate treatment was being eliminated. However, courts and Congress\(^{317}\) did not read Griggs narrowly. The theory of disparate impact grew and expanded into many areas of the law, such as housing discrimination.\(^{318}\)

As originally exposited, the theory of disparate impact was not intended to allow plaintiffs to bring successful claims without having made efforts to comply with a hiring requirement, which they were capable of meeting. Rather, disparate impact was intended to "achieve equality of employment opportunities and remove barriers

\(^{312}\) See infra notes 313-20 and accompanying text.

\(^{313}\) See Gold, supra note 20, at 478 n.169.


\(^{315}\) Id. at 429-30.

\(^{316}\) See supra notes 314-15 and accompanying text.

\(^{317}\) In 1991, through the passage of the Civil Rights Act of 1991, Congress codified the theory of disparate impact that the Supreme Court developed in Griggs. See supra notes 82-96 and accompanying text.

\(^{318}\) E.g., Hack v. President & Fellows of Yale Coll., 237 F.3d 81 (2d Cir. 2000) (challenging a requirement that students live in co-educational residence halls as discriminatory on the basis of religion under the Fair Housing Act); Pfaff v. U.S. Dep't of Hous. & Urban Dev., 88 F.3d 739 (9th Cir. 1996) (holding that the landlord's refusal to rent to a family of five did not constitute housing discrimination based on familial status). See generally Peter E. Mahoney, The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle, 47 Emory L.J. 409 (1998) (analyzing the disparate impact doctrine in the context of fair housing law).
that have operated in the past to favor an identifiable group . . . over other[s]." 319 The original goal was to eliminate the lingering effects of prior discrimination, 320 not of the failure to take steps to comply with a hiring requirement when it was within one's power to do so. This lack of effort is clearly not the type of barrier that disparate impact was intended to overcome. If applicants know that they may be able to sue without making any effort to meet the hiring requirement at issue, disparate impact liability may heighten current barriers to equal employment opportunity. If disparate impact gives already disadvantaged plaintiffs an incentive not to work hard because they may obtain employment anyway, it may actually be doing more harm than good.

CONCLUSION

Disparate impact is an essential and powerful tool with which to fight discrimination and achieve equality in employment. Ensuring that barriers to equal employment opportunities are lifted is a vital societal goal. Achieving this goal requires acknowledging individuals' status as members of disadvantaged groups and working to undo those disadvantages. Incorporating the duty to make reasonable efforts into the theory of disparate impact will both enhance and strengthen the doctrine, thus ensuring that the theory is not abused and remains in place for the benefit of victims of employment discrimination and for society as a whole.

320. See supra notes 313-18 and accompanying text.