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Have a Job to Get a Job: Disparate Treatment and Disparate Impact of the 'Currently Employed' Requirement

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COUNTLESS people struggle to find a job in a competitive job market despite possessing solid qualifications. Although the news media reports that job numbers are improving, the problems of unemployment particularly loom for people of color, older workers, and people with disabilities. These groups are often unemployed longer than other job seekers. These groups also suffer the disparate impact of job advertisements that require “current employment” as a prerequisite for hiring. The harsh reality is that the longer a job seeker is unemployed, the closer a job seeker becomes to becoming permanently unemployed. Job advertisements that require “current employment” exacerbate the problem. However, traditional disparate impact analysis under the civil rights laws can help to address some of the issues faced by these long-term unemployed job seekers.

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INTRODUCTION

Americans recently faced the longest and worst recession since the Great Depression. Many Americans lost jobs and remain unemployed through no fault of their own. Many Americans believe that excluding

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unemployed workers from employment opportunities in the aftermath of one of the worst and longest recessions in American history is inherently unfair and bad for the economy. Americans view the denial of jobs to unemployed workers and job seekers as detrimental to the nation’s future.\textsuperscript{1} They strongly support a ban on discriminatory practices against unemployed workers and job seekers.\textsuperscript{2}

Hiring practices and job postings that require unemployed workers and job seekers to be “currently employed” create a new kind of discrimination against American workers. They leave unemployed Americans behind and exclude them from job opportunities in a very competitive job market. The practice also causes a rippling effect throughout the economy.\textsuperscript{3} The exclusion of unemployed workers and job seekers from job opportunities prolongs the American unemployment crisis and limits the pool of talented and skilled job applicants looking for work.\textsuperscript{4} In the long run, that is bad for business and bad for the economy.\textsuperscript{5}

Moreover, hiring practices and job postings that require job seekers to be “currently employed” discriminate against a large segment of unemployed Americans. The exclusion of unemployed job seekers for job opportunities disparately impacts older job seekers, job seekers of color, and job seekers with disabilities. It also likely violates many Americans’ basic civil rights.\textsuperscript{6}

Part I of this Article describes America’s jobs and unemployment crisis. A persistent shortage of paychecks seeps into Americans’ aspirations and erodes their basic “understanding about the supposed rewards of try-


\textsuperscript{2} Sixty-three percent of respondents favored a congressional proposal making it “illegal for companies to refuse to hire or consider a qualified job applicant solely because the person is currently unemployed.” See id.

\textsuperscript{3} Hiring Discrimination, supra note 1, at 1. “For the millions of jobless Americans struggling to climb out of the deepest jobs hole in many decades, nothing can be more demoralizing than the double-whammy of losing a job and then learning they will not be considered for new positions because they are not currently working.” Written Statement of Christine Owens, Executive Director, Nat’l Emp’t Law Project, to EEOC (Feb. 16, 2011) [hereinafter Owens Testimony], available at http://www.eeoc.gov/eeoc/meetings/2-16-11/owens.cfm.

\textsuperscript{4} Hiring Discrimination, supra note 1, at 5–6.

\textsuperscript{5} Press Release, Nat’l Emp’t Law Ctr., Discrimination Persists for Unemployed Job Seekers, New Report Finds (July 12, 2011), available at http://nelp.3cdn.net/5adfe65f9cc8a900_w6m6iaxaxz.pdf. “As a business practice, [excluding unemployed workers from consideration] . . . makes no sense. It is debilitating to workers—particularly the long-term unemployed—and it hampers economic recovery.” Id.

\textsuperscript{6} Id.
ing hard, getting educated and looking for work. Part II discusses hiring practices that exclude the long-term unemployed. It predicts that although the unemployment rate has improved over recent months, the crisis will continue to grow larger, particularly for the long-term unemployed, as long as employers and employment agencies exclude unemployed workers and job seekers from consideration for available jobs. Finally, Part III explains how traditional employment discrimination theories can be applied to address discrimination against long-term unemployed workers and job seekers, many of whom are protected under the civil rights laws.  

I. THE AMERICAN UNEMPLOYMENT AND JOBS CRISIS

America faces an unprecedented jobs and unemployment crisis. Although the unemployment rate has decreased, since the Great Recession of 2007 through 2009, roughly fourteen million Americans remain unemployed. For the past few years, the average unemployment rate has consistently hovered around 9 to 10 percent. The rate recently dropped to under 9 percent for the first time in three years.

For many American workers, unemployment has become a permanent, or at least a long-term, status. The rise in long-term unemployment has been unprecedented since the recession began in December 2007 and officially ended in June 2009. The Bureau of Labor Statistics (BLS) defines long-term unemployment as unemployment lasting twenty-seven weeks or longer. By the end of 2009, among the unemployed, four in ten had been jobless for twenty-seven weeks or more, "by far the highest proportion of


8. At the time of this writing, proposed federal legislation would also extend protection to unemployed workers who are unprotected by current civil rights laws but are discriminated against because of their status as unemployed workers. See Fair Employment Opportunity Act, H.R., 2501, 112 Cong. (2011); American Jobs Act, S. 1549, 112 Cong. (2011). However, this issue is beyond the scope of this Article. This Article only addresses disparate impact and disparate treatment of unemployed workers protected under current civil rights laws.


long-term unemployed on record.\textsuperscript{12} By April 2010, the BLS reported a 4.6 percent unemployment rate for workers unemployed for more than twenty-six weeks. This is the highest long-term unemployment rate since 1948 when the BLS started collecting unemployment data.\textsuperscript{13} Also, by April 2010, more than four million people remained jobless for longer than one year, which was "roughly equivalent to the total population of Kentucky" and the highest number since World War II.\textsuperscript{14} As of June 2011, the average "spell of unemployment" rose to more than nine months.\textsuperscript{15} Although the recession officially ended in 2009, by September 2011, the average length of unemployment rose to nearly ten months, or forty-one weeks.\textsuperscript{16}

12. Id. The Congressional Research Service (CRS) also published a report that breaks unemployment data down according to individuals looking for work for more than twenty-six weeks, more than fifty-two weeks, more than seventy-eight weeks, and more than ninety-nine weeks. Gerald Mayer, Cong. Research Serv., The Trend in Long-Term Unemployment and Characteristics of Workers Unemployed for More Than 99 Weeks 7 (2010). The designation of "ninety-nine weeks" is also used "because in some states with high unemployment, unemployed workers may receive 26 weeks of regular Unemployment Compensation, 53 weeks of Emergency Unemployment Compensation, and 20 weeks of Extended Benefits, for a total of up to 99 weeks of unemployment compensation benefits." Id. at 1. Persons who have been unemployed for over ninety-nine weeks are considered "very long-term unemployed" and are referred to as "99ers." Id. at 1 n.5. This designation will not be significant at the end of 2012. Sam Hananel, Deal on Payroll Tax Cut Also Reduces Maximum Jobless Pay to 73 Weeks, Times Leader (Scranton), Feb. 18, 2012, at 12A. The legislation that extended the payroll tax cut also reduces the current maximum ninety-nine weeks of unemployment benefits to seventy-three weeks by the end of September 2012. Furthermore, "[f]or those in all but about a dozen states, benefits will be cut off after 63 weeks." Id. In the future, there will be fewer people counted in the number eligible to collect unemployment benefits, although there are still so many unemployed for the long term. Politically, the deal is attractive to both Democrats and Republicans who can boast that the former kept unemployment benefits alive, while the latter can boast to keeping people off the public dole.


Although the unemployment numbers are dire, the actual unemployment rate is much higher than what is reported. The unemployment rate does not account for the large number of discouraged workers who have given up the job search after months, or even years, of looking for work.\textsuperscript{17} Many of those workers are among the long-term unemployed. To be classified as unemployed for more than six months, job seekers must persevere in their job search for more than six months. The statistics, however, show that after a period of time, many job seekers give up their job search and are no longer counted in the unemployment rate.\textsuperscript{18} Thus, many of these long-term unemployed workers are overlooked in unemployment statistics.

The unemployment rate also does not account for those Americans who choose to delay entry into the job market because of the bleak employment outlook. For instance, many recent college graduates and young workers choose to delay entering the labor market “because they believe their prospects of finding jobs are too bleak.”\textsuperscript{19} The off-shoring of white collar service jobs and the bursting information technology services bubbles in the early 2000s were greatly responsible for causing the number of unemployed college graduates to surpass that of unemployed high school dropouts for the first time since 1992.\textsuperscript{20} Many sectors employing recent college graduates have still not recovered. The cycle of unemployment for many workers, even for the well educated, continues.\textsuperscript{21}

Additionally, many young adults are not included in the unemployment rate because they never joined the job market in the first place. As one popular news source observed, although many unemployed young adults today may look like “[t]he slackers of the 1990s” who some remember “as listless MTV watchers and basement dwellers who opted out of America’s striving, mercenary ethos,”\textsuperscript{22} they are not the same. Although many young adults “don’t have jobs or spouses, and many still live at home with mom and dad, … that’s not by choice.”\textsuperscript{23} Because of the

\textsuperscript{17} “Persons are classified as unemployed if they do not have a job, have actively looked for work in the past 4 weeks, and are currently available for work.” See Bureau of Labor Statistics, \textit{supra} note 9, at 5.
\textsuperscript{19} Hiring Discrimination, \textit{supra} note 1, at 4 n.3.
\textsuperscript{23} \textit{Id.}
economy and the tight job market, many young adults’ lives are stuck in neutral.\(^\text{24}\)

Even more Americans are missing from the statistics because they have decided to withdraw from the ranks of workers and job seekers after spending most of their lives in the labor force. For instance, many older workers who are unable to obtain employment after being laid off for a period are left little choice but to retire early or collect government benefits.\(^\text{25}\) They have been referred to as the “downwardly mobile.”\(^\text{26}\)

For many older workers, Social Security benefits fill the void when unemployment benefits run out. In recent years, the number of Social Security retirement applications has far exceeded the numbers that the Social Security Administration expected, even after accounting for the hit that older workers’ 401Ks have taken over the last decade. More Americans are taking advantage of their Social Security accounts at age sixty-two and with that a significant reduction in benefits than they could have received at full retirement.\(^\text{27}\) These “downwardly mobile” older workers, with years of experience, job skills, and talent, have removed themselves from the job market, and as a result, are also excluded from the unemployment rate.

The prospects for unemployed workers and job seekers, and particularly the long-term unemployed, are not promising. Research shows that even though demand for workers increases following a recession, this demand is not the same for all workers; the short-term unemployed are hired before the long-term unemployed, so “the number of long-term unemployed could remain high for some time to come.”\(^\text{28}\)

Adding to the problem of unemployment is the fact that job growth has stagnated in this country. Millions of willing workers are shut out of the labor market simply because not enough jobs exist. For example, more than one million American jobs disappeared between 2001 and

\(^{24}\) Young adults have been referred to as “Generation Limbo” or “the Lost Generation” and compared to American youth who grew up during World War I or Japanese youth who grew up during the Japan’s recession of the 1990s. Adam Clarke Estes, More Signs That American Youth Are a Lost Generation, ATLANTIC WIRE (Sept. 22, 2011), http://www.theatlanticwire.com/national/2011/09/american-youth-lost-generation/42814/.


\(^{27}\) See Keith, supra note 25; see also Morley, supra note 26.

2011.\textsuperscript{29} Employers added only three hundred thousand new jobs between November 2011 and December 2011.\textsuperscript{30} This addition of three hundred thousand new jobs falls far short of the number of jobs available before the recession. For example, compare December 2011’s 3.4 million job openings with December 2007’s 4.4 million job openings.\textsuperscript{31}

The loss of jobs took place primarily after 2007. From January 2002 to January 2007, 944,000 job openings existed compared to the loss of 1,029,000 jobs between January 2007 and January 2012.\textsuperscript{32} While the number of actual job openings decreased between 2001 and 2011, the number of persons in the civilian labor force increased by more than ten million.\textsuperscript{33} Currently, there is only one job opportunity for nearly every four Americans looking for work.\textsuperscript{34} The real losers of America’s jobs crisis and the exclusion of unemployed job seekers from the employment ranks is America itself. “Workers and their families lose wages, and the country loses the goods or services that could have been produced. . . . [T]he purchasing power of those workers is lost.”\textsuperscript{35} It leads to “increasing personal indebtedness, bankruptcies, and foreclosures; destroying credit; and diluting America’s
storehouse of human capital." The American unemployment and jobs crisis will continue to have a devastating effect upon America's economy and Americans' psyches as long as large numbers of unemployed workers are shut out of the job market.

II. COMPOUNDING THE JOBS CRISIS: THE "CURRENTLY EMPLOYED" REQUIREMENT

The American jobs crisis and high unemployment rates, particularly for the long-term unemployed, are unlikely to improve any time soon unless employers and recruiting or staffing agencies are more willing to hire unemployed workers and job seekers. Requiring a person to be employed in order to be hired creates a vicious cycle for unemployed workers and job seekers. With more frequency, however, employers now require job seekers to be "currently employed" in consideration for available job openings. Requiring a job seeker to be "currently employed" as a prerequisite for an available job opening compounds the American jobs crisis and discriminates against unemployed workers and job seekers. It eliminates employment opportunities for many Americans in spite of their talents, qualifications, or motivations to work.

News of the practice of excluding unemployed job seekers as job candidates first broke in May 2010 when Sony Ericsson posted a job announcement through a recruiting firm to fill 180 new jobs at its relocated headquarters. The job announcement stated "No Unemployed Candidates Considered At All." The media then reported that many more potential employers refused to consider unemployed workers and job seekers for positions, regardless of the skills needed. For example, USA Today reported in an editorial that "similar ads are cropping up in job postings for everything from restaurant managers to forklift operators to medical device salespersons." In another reported instance, potential employers even blackballed an unemployed pet-sitter, "as if no dog could be subjected to a sitter whose skills were not utterly up to date."

A recent survey suggests that the exclusion of unemployed job applicants is widespread. Over a four-week period between March and April

36. Owens Testimony, supra note 3.
37. Hiring Discrimination, supra note 1.
38. Owens Testimony, supra note 3.
41. Id.
The National Employment Law Project (NELP) surveyed four top job search websites: Careerbuilder.com, Indeed.com, Monster.com, and Craigslist.com. NELP discovered more than 150 job advertisements, nationwide, that required applicants to be "currently employed." The survey revealed that a variety of employers and employment agencies that placed such job advertisements required "current employment" as a job qualification, including employers and agencies from across the United States, for "small and large employers, for white collar, blue collar, and service jobs at virtually every skill level.

Even though this practice is discriminatory, there are reasons why potential employers view the exclusion of unemployed job seekers from consideration for job opportunities as expedient and necessary. Employers rationalize that screening out unemployed workers and job seekers from the outset is cost effective and, generally, good business.

Facing an overabundance of job applications, employers benefit from cost effective and easy screening procedures in the hiring process. The buyers' market for job applicants has resulted in many more qualified job candidates from which an employer may choose to interview. In a potential employer's eyes, requiring current employment helps businesses efficiently sort out good workers from bad workers. Employers, as a result, rationalize that the best candidates for a job are likely to be those who are currently working. They presume that people who are already employed are "good performers and have a stronger work ethic than those who are unemployed." They therefore publicly advertise that only "currently employed" job candidates will be considered. Some employers and recruiting agencies see being employed as a "proxy for suitability of a position." The presumption, however, that an employed worker is more qualified or suitable for a job than an unemployed worker ignores the realities of the current job market where millions of Americans are unemployed regardless of their skills, talents, and efforts to find work.

42. Hiring Discrimination, supra note 1, at App. A (selected employer job advertisements include advertisements placed by Allstate Insurance, Beacon Hill Staffing Group, Cypress Hospitality Group, Kelly Services, Martin and Associates, and University of Phoenix requiring that applicants be currently or very recently employed).
43. Hiring Discrimination, supra note 1, at 2.
45. Hiring Discrimination, supra note 1, at 5.
47. Owens Testimony, supra note 3.
48. Hiring Discrimination, supra note 1, at 5.
[M]illions have become unemployed through no fault of their own, and unemployment spells are unusually long because of larger economic trends that have forced employers and entire industries to dramatically reduce their workforces. The unemployed workers barred from employment opportunities based on these biased assumptions have talents and experience and intense motivation to rejoin the workforce, to support their families and contribute to their communities. Erecting additional obstacles to their efforts to regain their economic footing on the basis of stereotypical assumptions is unfair and inconsistent with American values.49

Christine Owens, the Executive Director of NELP,50 surmises that employment, as a job requirement, creates a serious “catch-22” for job seekers. A worker must “have a job in order to get a job and it means highly-qualified, experienced workers who want and need work can’t get past the starting gate in the application process simply because they lost their jobs through no fault of their own.”51 She cautions that “as a business practice, this makes no sense, and as a way to rebuild the economy, it only debilitates workers, particularly the long-term unemployed.”52

Thus, the persistent practice of excluding the long-term unemployed from jobs may worsen the American jobs crisis. There is a real danger that job postings that exclude unemployed workers and job seekers will relegate a growing segment of the population to the ranks of the long-term unemployed. Even more problematic is that long-term unemployment may indeed erode “a worker’s skills and work discipline” over time. The conjectured horrors of taking a chance on the long-term unemployed may actually come to pass.53 A larger segment of the American population could indeed become actually unemployable.

49. Id.
50. “NELP is a national non-profit organization that engages in research, education, and advocacy on behalf of low wage and unemployed workers and individuals facing unfair and unlawful barriers to employment.” Owens Testimony, supra note 3.
51. Id.
III. DISPARATE TREATMENT AND DISPARATE IMPACT OF THE "CURRENTLY EMPLOYED" REQUIREMENT

Unless Americans are willing to find it acceptable that a larger and growing segment of the population is shut out of the workforce due to the "currently employed" requirement, a solution must be found to combat the long-term unemployment of those Americans who are willing and able to work. Current civil rights laws could be used to eliminate this discriminatory hiring practice and can make the job search fairer for unemployed Americans. For example, the civil rights laws could be used to enlarge the job applicant pool of qualified workers.

Although unemployed job seekers and workers as a class are not protected under the civil rights laws, many unemployed workers and job seekers fall within classes of people who are protected by the civil rights laws. For example, workers who are most likely among the long-term unemployed are older workers, people of color, and people with


55. See Jo Anne Schneider, Who Are the Long Term Unemployed in This Recession and What Can be Done to Help Them? (2011), available at http://www.thecyberhood.net/documents/papers/unemployment.pdf. "The percentages of those unemployed more than 27 weeks in 2009 to 2010 shows that nearly 40% of people 25–34 had been unemployed more than six months by November 2010 as compared with 60% of those 55–64." Id. at i. Although the rate of unemployment among older workers is lower than that for their younger counterparts, older persons who do become unemployed spend more time searching for work. "In February 2010, workers aged 55 years and older had an average duration of joblessness of 35.5 weeks (not seasonally adjusted), compared with 23.3 weeks for those aged 16 to 24 years and 30.3 weeks for those aged 25 to 54 years." Emy Sok, Bureau of Labor Statistics, U.S. Dep’t of Labor, Record Unemployment Among Older Workers Does Not Keep Them Out of the Job Market—Issues in Labor Statistics (2010), available at http://www.bls.gov/opub/ils/summary_10_04/older_workers.htm.

56. The Labor Force Statistics separate males and females. Below are the numbers for African-Americans and Latinos:

2011 Unemployment Numbers & Rates, Black or African-American, 25 Years and Over:
Men 1,082,000 unemployed; 15.2% unemployment rate
Women 951,000 unemployed; 11.9% unemployment rate

2011 Unemployment Numbers & Rates, Hispanic or Latino, Hispanic, 25 Years and Over:
Men 1,068,000 unemployed; 9.5% unemployment rate
Women 788,000 unemployed; 10.2% unemployment rate

disabilities, who are protected under federal and state antidiscrimination laws. An employer, for instance, may violate the civil rights laws, including the Age Discrimination in Employment Act (ADEA), Title VII of the Civil Rights Act of 1964 (Title VII), or the Americans with Disabilities Act (ADA), if a hiring practice or job listing disparately treats protected class members or has a disparate impact upon protected class members.

A. Disparate Treatment and Coded Intent

In an employment discrimination case based upon disparate treatment, a potential employee or employee alleges that the employer intentionally treated him or her less favorably than his or her peers who are not within a protected class. If an employer treats some job applicants who are protected under the civil rights laws less favorably than others because of their protected status, the applicant may have a Title VII claim. A causal connection between the applicant's protected status and less favorable treatment may be proven under a disparate treatment theory.

Proof of discriminatory intent is required in a disparate treatment case. The employer's motivation and intent can be proven through circumstantial evidence that the job applicant was treated less favorably than similarly situated job applicants outside of the protected class.

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57. News Release, Bureau of Labor Statistics, Persons with a Disability: Labor Force Characteristics (June 8, 2012), available at http://www.bls.gov/news.release/archives/disabl_06082012.htm. "In 2011, 17.8 percent of persons with a disability were employed, the U.S. Bureau of Labor Statistics reported today. In contrast, the employment-population ratio for persons without a disability was 63.6 percent. The employment-population ratio for persons with a disability declined from 18.6 percent in 2010 to 17.8 percent in 2011. The ratio for persons without a disability was about unchanged. The unemployment rate of persons with a disability was 15.0 percent in 2011." Id.


59. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2006). The civil rights laws also prohibit discrimination by employment agencies. See, e.g., id. § 2000e-2(b) ("It shall be unlawful . . . for an employment agency . . . to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin."). Nor can an employer use an employment agency as a shield from liability for discriminatory hiring practices.


61. See Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971); see also Smith v. City of Jackson, 544 U.S. 228, 232 (2005) (holding that employment of hiring practices that are facially neutral violate the Title VII and the ADEA if they have a disparate impact upon members of a protected class).


The burden of proof for a Title VII disparate treatment case is based upon the burden-shifting test that the United States Supreme Court articulated in *McDonnell Douglas Corp. v. Green*. In this seminal case, the Court established the analytical framework to determine whether employment discrimination occurred due to disparate treatment. To prove a prima facie case in an employment discrimination case based on disparate treatment, a claimant must show that he is a member of a statutorily protected class who applied for and was qualified for a position but was rejected based on his protected status. The essence of a disparate treatment claim is that the claimant was treated less favorably than another who is not protected under the civil rights laws. If the claimant is successful in proving a prima facie case of disparate treatment, the burden shifts to the employer "to articulate some legitimate nondiscriminatory reason for the employee's rejection" of the job seeker. If the employer is successful, the burden shifts back to the job seeker to prove that the employer's legitimate, nondiscriminatory reason for the decision is merely a pretext for discrimination.

This standard can be incredibly difficult to meet. The difficulty in proving intentional discrimination necessary for a disparate treatment claim is that most employers today are quite savvy about discrimination. Rather than using blatant language directly showing a discriminatory intent, employers and employment agencies may use code words to exclude some job seekers from consideration. Studies reveal that "Talk to Maria" means "I prefer Hispanics," "See me" means "no people of color," and "No I" means "no Blacks." A job posting that requires a job applicant to have small hands may be code words to hire only attractive, small women, which may in turn discriminate against men or certain nationalities.

In the context the relevant question then becomes whether a job advertisement that says that an applicant must be "currently employed" is a code for excluding protected class members. In answering this question, it is important to consider that an economy that creates high unemployment hits many people the civil rights laws protect the hardest.

65. Id.
66. Id. See also *Soules v. U.S. Dep't of Hous. & Urban Dev.*, 967 F.2d 817, 822–26 (2d Cir. 1982) (applying the *McDonnell Douglas* burden-shifting test in the context of a housing discrimination claim).
68. Id.
71. In January 2012, the unemployment rate for African-Americans was 13.6 percent, and for those aged sixteen and over with disabilities, the unemployment rate was
Because of job postings being worded in a "code," it is difficult to prove that employers or employment agencies intentionally discriminate against unemployed workers or job seekers by posting job advertisements that caution, only the "currently employed" need apply. Discriminatory intent or motive must be proven to win a disparate treatment claim, which is a high burden for any unemployed worker or job seeker who has been excluded from consideration. However, if the length of time to find a new position increases with age, a policy or job advertisement that requires current employment more than likely excludes older workers. Moreover, because higher unemployment among minority group members is also well documented, a "currently employed" policy is likely to result in racial discrimination. Therefore, a disparate impact claim may be a more viable alternative for unemployed job seekers. Disparate impact, as a theory to prove discrimination job advertisements cause, is advantageous because the proof does not depend upon the employers' intent or motivation.

B. Disparate Impact

A disparate impact case is one in which the plaintiff alleges that either a facially-neutral test or employment practice disproportionately disqualifies a protected class member from employment or benefits of employment, and that such test or practice is not job related. Unlike a disparate treatment case, proof of discriminatory motive or intent is not required. In such cases of discrimination, Congress was more concerned with the consequences of discriminatory employment practices than the employer's motive. Hiring policies and practices that create "built-in headwinds" to the employment of protected groups are prohibited. This prohibition exists even if the hiring policies and practices were not intended to discriminate, and the employer did not intend to treat people protected by the civil


72. See, e.g., Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988); McDonnell Douglas, 411 U.S. at 792; Michael K. Grimaldi, Disparate Impact after Ricci and Lewis, 14 St. Mary's L. Rev. on Race & Soc. Just. 165, 173 (2011) (noting that disparate impact theory has been used almost exclusively to challenge the employment tests of public employees and that "[d]isparate impact lawsuits are extremely difficult to win").

73. See Fort Worth Bank & Trust, 487 U.S. 977; McDonnell Douglas, 411 U.S. 792.


75. See, e.g., id. at 430 (concluding that Title VII proscribes facially neutral employment tests that bear no relation to job performance and serve to disproportionately exclude a protected class from employment).

76. Id. at 432.
rights laws differently than other job applicants. Disparate impact theory allows conduct that adversely affects protected class members despite being applied equally to all. This theory also allows recovery when there is proof of a pattern or practice of discrimination. If the practice of screening out unemployed workers and job seekers from job opportunities disparately impacts protected groups then it may violate the antidiscrimination laws.

Disparate impact analysis protects members of many groups who suffer during times of high and prolonged unemployment, including people of color. The Court has extended disparate impact analysis outside of the scope of Title VII. Disparate impact claims may also be brought under the ADEA, albeit with a narrower scope. Moreover, disparate impact claims are cognizable under the ADA.

The Court in Griggs v. Duke Power Co. set forth the standard of proof in employment discrimination cases when hiring practices adversely affect job seekers within a protected class. First, the job seeker must present a prima facie case of disparate impact. To prove a prima facie case, the unemployed worker or job seeker must identify a hiring practice that has caused a statistical under-representation of members of an otherwise protected class. Second, the job seeker must show that the hiring practice “is not fairly linked to job performance” and has caused the “exclusion of

79. Id. § 2000e-6(e) (“[T]he [Equal Employment Opportunity] Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination.”).
80. See Smith v. Jackson, 544 U.S. 228 (2005). In Jackson, police and public safety officers brought suit under the ADEA, alleging that salary increases they received were less generous than increases received by younger officers. Although the salary increases were designed to retain qualified people, workers with less than five years of tenure received proportionally greater raises than those with seniority. The Court determined that the ADEA authorizes recovery in disparate-impact cases; however, it is significantly narrower than Title VII because “§ 4(f)(1) of the ADEA, 81 Stat. 603, contains language that significantly narrows its coverage by permitting any ‘otherwise prohibited’ action ‘where the differentiation is based on reasonable factors other than age.’” Id. at 232–33. This is significantly narrower than Title VII’s “business necessity” test. Under the standard articulated by the Court, the petitioner’s failed to set forth a valid claim and summary judgment for the city was affirmed. Id. at 233.
82. 401 U.S. 424, 432 (1971) (finding that standardized tests and certain graduation requirements violated Title VII because they had a discriminatory impact).
83. Id. at 432.
applicants for jobs or promotions because of their membership in a protected group. 84

Statistics are often used to show that a hiring practice adversely affects protected class members. Statistics may also prove useful in a case based upon a "currently employed" requirement. 85 For example, the ratio of applicants and hires of one group to another group can be compared. Even where the numbers are too small to be reliable, a disparate impact may be determined based upon a long-term impact. If an employer fails to maintain data, an inference of discrimination can be drawn. 86

If the unemployed worker or job seeker establishes a prima facie case of discrimination, the burden then shifts to the employer to show that the challenged employment practice serves a business necessity. Disparate impact targets only those employment practices that have no "business necessity." 87

Once the burden shifts, the employer must demonstrate that its conduct was the result of a nondiscriminatory reason. If an employment practice excludes members of a protected class and is not related to job performance, the practice is prohibited. 88 Even if the employer or employment agency proves that the challenged requirement is sufficiently related to job performance, a job seeker may still prevail by showing that another practice with a less discriminatory impact would "serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" 89

86. 29 C.F.R. § 1607.4(D) (2011).
88. Griggs, 401 U.S. at 431.
89. See 42 U.S.C. § 2000e–2(k)(1)(A)(ii); 29 C.F.R. pt. 1607.3(B) ("Where two or more selection procedures are available which serve the user's legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser adverse impact."); see also Albermarle Paper Co., 422 U.S. at 425.
1. Disparate Impact of Screening Practices in Hiring

The weak economy has caused employers to use discriminatory employment screening devices that, like the "currently employed" requirement, have also caused a catch-22 for some unemployed Americans protected by the civil rights laws. For example, with increasing frequency, employers use credit checks "as a litmus test to weed out applicants." This practice exacerbates the problem. For racial minorities, and perhaps other groups, which have traditionally experienced higher and longer unemployment, low credit is likely. A recent Brookings Institution study found a disparity of consumer credit scores around the country and concluded that "[c]ounties with relatively high proportions of racial and ethnic minorities are more likely to have lower average credit scores." Unemployed workers with poor credit scores, like those weeded out by job advertisements that require current employment, face a harsh reality: they must be employed to improve their credit status.

The very condition that they seek to improve, however, is what bars them from succeeding in the job market. Thus, this policy creates a disparate impact because racial minorities are hit hardest by pre-employment credit checks. Because of the potential to adversely affect racial minorities and other groups protected by the civil rights laws, the looming question is whether credit checks are of business necessity. Human resource managers advance a number of reasons for using credit checks. Some jobs reasonably require great financial responsibility, such as those that require handling of large sums of money, access to highly confidential information, or access to company or other people’s property. Other jobs require security responsibilities or are safety sensitive positions. In these limited circumstances, the employer may have a valid reason for conducting credit checks of potential employees. Yet the EEOC has made clear that absent a showing of such job-relatedness and business necessity, an employer's use of a job applicant's credit history as a pre-employment

92. See Statement of Adam Klein, supra note 91.
screening device discriminates against racial minorities because it disproportionately impacts them.94

2. The “Currently Employed” Requirement’s Disparate Impact on Unemployed Workers Currently Protected under Civil Rights Laws

Like a pre-employment credit check, an employer’s “currently employed” requirement either posted in a job listing or applied in a hiring process, could disparately impact people protected by the civil rights laws. To prove their prima facie case of disparate impact, unemployed workers and job seekers who are older, people of color, or people with disabilities can use statistics to show that they are disparately impacted in great proportions. They could likely show that the connection between what is actually required in many jobs and the “current employment” requirement is nonexistent or at best, tenuous.

First, an excluded job seeker could use labor-market (or “labor pool analysis”) to show a “currently employed” requirement adversely affects members of a protected group.95 For example, if a job announcement requires applicants to be “currently employed” and dissuades unemployed workers and job seekers from applying for a job because they know they cannot satisfy the job requirement, the applicant pool will likely be skewed in favor of groups that have not suffered the brunt of the unemployment crisis. Labor pool analysis could be used to show that the exclusion of protected groups from available job opportunities disparately impacted them.96

Second, unemployed job seekers could use applicant-flow analysis to show that a “currently employed” requirement, as a precondition to em-

94. See EEOC Decision No. 72-427, 4 Fair Empl. Prac. Cas. (BNA) 304 (1971) (finding that a bank’s failure to hire an African-American as a computer operator, partially because of his marginally poor credit record, violated Title VII under a disparate impact theory in the absence of a showing that the credit check was a business necessity); see also United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977) (holding that background checks, which include credit checks, for potential police officer patrolman disparately impacted minority applicants and was not job related); EEOC Decision No. 72-1176, 5 Fair Empl. Prac. Cas. (BNA) 960 (1972) (finding the presence of disparate impact of pre-employment credit check of Hispanic job applicants).

95. Disparate impact will usually not be found unless the members of a group protected by the civil rights laws are selected at a rate that is less than 80 percent or four-fifths of the rate at which the group with the highest rate is selected. See 41 C.F.R. § 1607.4(D) (2011).

Have a Job to Get a Job

Dean Helen Norton of the University of Colorado School of Law writes that applicant flow analysis is appropriate when the questionable employment practice is used to screen out unemployed workers or job seekers later in the hiring process. For example, applicant flow analysis could be used to support a disparate impact claim "if an employer does not require current employment as a condition of application, but instead screens applicants who are not currently employed later in the decision-making process."

Based upon recent unemployment statistics, job advertisements or hiring practices that impose a "currently employed" requirement and exclude unemployed job seekers have great potential to disparately impact groups protected by the civil rights laws. Based upon recent unemployment statistics, older workers, people of color, and people with disabilities particularly suffer the brunt of discriminatory job advertisements and hiring practices.

a. The "Currently Employed" Requirement's Impact on Older Workers

Older workers are a growing category of the long-term unemployed and the numbers will likely increase as long as job seekers are required to be "currently employed" in order to get a job. Older workers who face prolonged layoffs and displacements are likely to face long-term or permanent unemployment. Older workers, even with years of relevant experience, are regularly told that "they will not be referred or considered for employment, once recruiters or potential employers learn they are not currently working." Older workers represent the largest group of the long-term unemployed. On average, older workers' "spell" of unemployment is 29.5 weeks, which is the longest among the different groups of

97. EEOC v. H.S. Camp & Sons, Inc., 542 F. Supp. 411, 442-43 (M.D. Fla. 1982) (holding that applicant-flow analysis utilizes the actual applicants as the relevant labor pool rather than an estimate of those persons in the community who would be expected to apply. Applicant flow analysis is considered the most accurate statistical method of analyzing hiring practices); see also Written Testimony of Helen Norton, Associate Professor, University of Colorado School of Law, to EEOC (Feb. 16, 2011) [hereinafter Norton Testimony], available at http://www1.eeoc.gov//eeoc/meetings/2-16-11/norton.pdf ("Applicant-flow analysis compares the selection rate under that requirement for protected class members who apply for the position with that of the comparator group. Again, if the difference between the two percentages is statistically significant or satisfies the eighty-percent rule, the plaintiff has established the requisite adverse impact.").

98. Norton Testimony, supra note 97.


100. Owens Testimony, supra note 3.
unemployed workers. The news media has reported the plight of older, unemployed Americans in a weak economy. For age-based reasons, employers may treat older job applicants differently from younger workers. One older job seeker described his plight as an unemployed older worker:

It's nearly impossible to get a job unless you already have a job . . . Companies will view you, especially people over fifty like me, . . . as somebody that's gonna require more money, that's not gonna be productive, or that might have some personal problems, because if you were a good employee you would never have lost your job in the first place.

b. The "Currently Employed" Requirement's Impact on People of Color

People of color are also overrepresented among those counted as unemployed. For the period between October 2009 and September 2010, 19 percent of all unemployed workers were African-American and 18.9 percent were Hispanic. Therefore, it is likely that job advertisements and hiring practices that require one to have a job to get a job disparately impacts many people of color. Hiring policies and job advertisements that exclude unemployed workers and job seekers from consideration for available jobs adversely impact nearly twice as many African-American and Hispanic workers as White workers. In January 2012, the unemployment rate for African-American workers was 14.2 percent, compared to 8 percent for White workers.

Most significant, unemployed African-American workers are unemployed much longer than unemployed White workers. From October 2009 to September 2010, nearly 10 percent of African-American, unemployed workers were unemployed for more than ninety-nine weeks, compared to 7.3 percent of unemployed White workers. Moreover, although Hispanics are overrepresented in the unemployment rates, they are often not unemployed as long as African-American workers. For example,

101. Bureau of Labor Statistics, supra note 11, at 2. Older workers are more likely to remain unemployed, even though younger workers are overrepresented among the long-term jobless. For example, between 2007–09, younger workers represented 19.5 percent of all persons unemployed for twenty-seven weeks or more compared with 13.9 percent of the labor force. However, between 2007–09, the number of young unemployed workers actually declined. In comparison, during the same period, the share of long term unemployed made up of older workers rose. Id. at 1–2.

102. Bassett, supra note 70.


in 2010, the average duration of unemployment for Hispanics was 30.5 weeks but 36.6 weeks for African-Americans. 

Because of the disproportionate number of long term unemployed people of color, job advertisements and hiring practices that require one to have a job to get a job likely disparately impacts them. Additionally, the impact is especially felt by African-Americans, who experience unusually high rates of unemployment and long-term unemployment.organisms

c. The “Currently Employed” Requirement’s Impact on People with Disabilities

People with disabilities truly struggle to find jobs. As of November 2011, the unemployment rate for people with disabilities was 13 percent while only at 8 percent for people without disabilities. For 2011, the BLS reported that nearly 80 percent of Americans with disabilities were not in the labor force at all. Of the remaining 20 percent of people with disabilities in the labor force, 13.6 percent of those individuals were not counted as employed. The sheer numbers of people with disabilities who lack “current employment” place them in a growing disadvantage in the job search. Job advertisements and hiring practices that say only the “currently employed” need apply significantly impact people with disabilities who are unemployed in greater proportions than many other people.

3. Is the “Currently Employed” Requirement a Business Necessity or Fairly Related to Job Performance?

A “currently employed” requirement for getting a job disparately impacts groups protected by the civil rights laws. However, even if a current employment requirement in a job ad or hiring procedure disparately


107. Owens Testimony, supra note 3. Scrubs, Inc., allegedly discriminated against African-American applicants for janitor jobs at O’Hare Airport by hiring almost all Hispanic and Eastern European employees. Wilkins was told to produce her birth certificate, and when she returned with it, Scrubs, Inc., told her there were no more positions available at the company. EEOC v. Scrub, Inc., Civ. 09 C 4228, 2010 WL 3172855, at *1 (N.D. Ill. Aug. 10, 2010). Approximately five thousand unsuccessful African-Americans applied for the jobs at Scrubs, Inc., between October 2004 and December 2009. The EEOC sought relief for about 550 of them. Id. at *3. Scrub, Inc., ultimately agreed to pay three million dollars to black job applicants. Chicago Janitorial Contractor to Pay $3 Million in EEOC Bias Decree, 35 BNA’s EMP. DISCRIMINATION REP. 19 (2010).


109. Id.

110. Id.
impacts protected groups, an employer will still have an opportunity to show business necessity or job relatedness for the requirement.\textsuperscript{111}

Under Title VII, the employer can rebut the job seeker's prima facie disparate impact claim by showing a business necessity for the "currently employed" requirement.\textsuperscript{112} However, the business necessity exception under Title VII is construed very narrowly. It applies only to "those limited instances where one must tolerate [discrimination] where it is a necessity, in fact, a prerequisite for the performance of a job."\textsuperscript{113} The "business necessity" must relate to the "essence of the business."\textsuperscript{114} For example, under the ADEA, an employer can assert a facially broader defense to an age-based disparate impact claim than allowed under Title VII, including a reasonable factor other than age.\textsuperscript{115} Employers can exclude older workers, reasoning that they are too qualified for a job. They may fear that an over-qualified worker will shortly be dissatisfied with the offered position and move on, or that the older worker will demand too much pay. Yet rejecting unemployed workers and job seekers on the basis of over qualification can be unlawful and unreasonable. In such a case, the key inquiry is how closely the stated reasons are fairly related to job performance.\textsuperscript{116}

Many employers view weeding out unemployed workers and job seekers as simply good business sense. However, in very few circumstances is the "weeding out" a business necessity. Employers often perceive that the best candidates for a job are those who are currently working and employed workers are more qualified than unemployed workers. Understandably, employers want employees with fresh skills, and the fear is that the longer a person is out of work, the rustier those relevant skills become. Yet how long must a worker be unemployed before he or she becomes virtually useless to a potential employer?

It is even more questionable why entry-level jobs require a job seeker to be "currently employed." An entry-level position presumes that a new hire is coming in with limited skills and background for the job. The relationship between job performance and the requirement of current employment is even more attenuated where an employer provides on the job training, apprenticeship, or further education. Moreover, although

\begin{itemize}
  \item Int’l Union v. Johnson, 499 U.S. 187, 203 (1991). In Johnson, the exclusion of women from battery manufacturing process because of perceived health risks associated with lead exposure “to any fetus carried by a female employee” was not a sufficient BFOQ because a female’s “reproductive potential” was not a “business necessity” and did not relate to the “essence” of the employer’s business. \textit{Id.} at 190, 206.
  \item Smith v. Jackson, 544 U.S. 228 (2005) (holding that an employment practice which disparately impacts older workers is not discriminatory if it can be justified by a “reasonable factor other than age”).
  \item \textit{Id.} at 228.
\end{itemize}
employers have an interest in hiring workers who are up to date with the latest technology and skills, job skills are not lost overnight. Indeed, many unemployed workers use off time to enhance their skills.¹¹⁷

Although employers may justifiably question applicants about résumé gaps, in a weak economy, there are many acceptable reasons why a worker might be unemployed that are not related to job performance. Those reasons might include enrollment in school or in a training program; having to leave a job because of spousal relocation; having lost a job because of a lack of seniority during employer downsizing; having lost a job because the employer eliminated an entire division or shut down altogether; and having left employment temporarily due to illness, injury, disability, pregnancy, or family caregiving responsibilities.¹¹⁸

A much better alternative to blanket exclusion of unemployed workers and job seekers is for employers to ask job candidates why they are unemployed or lost their jobs.¹¹⁹

CONCLUSION

Requiring a person to be “currently employed” in order to be hired condemns a large number of unemployed workers to long-term unemployment. Establishing such a requirement in a weak economy is fundamentally unfair to older people, people of color, and people with disabilities. While some unemployed workers are protected under current civil rights laws, gap-filling legislation that extends protection from discriminatory job advertisements and hiring practices to all unemployed workers is needed in a difficult job market.

In addition, throwing a jobless worker’s application in the trash solely because of joblessness is counter to good business practices. The goal of


¹¹⁸. Norton Testimony, supra note 97.

¹¹⁹. Norton, supra note 96, at 6 (questioning candidates about their education and experience or administering tests that measure knowledge relevant to the job may reveal that they are unemployed because they have been attending school or obtaining training which would make them even more qualified for the job).
employers is to hire the most qualified workers, which can best be accomplished by enlarging, rather than shrinking the applicant pool. A larger pool of qualified job applicants for employers to consider makes better business sense.