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Michael J. Zimmer
Seton Hall University School of Law, mzimme4@luc.edu

Individual Disparate Impact Law: On The Plain Meaning of the 1991 Civil Rights Act

*By Michael J. Zimmer**

The plain meaning of section 703(k)(1)(A)(ii), added to Title VII[1] by the Civil Rights Act of 1991 ("1991 Act"),[2] creates an entirely new individual disparate impact action. An individual protected by Title VII can establish a disparate impact claim under section 703(k)(1)(A)(ii) simply by proving: (1) that the employer took adverse action against the plaintiff based on an "employment practice;" (2) that an alternative practice exists that serves the employer's interests yet would not adversely affect the plaintiff; and (3) that the employer refuses to adopt the better alternative.[3] Contrary to preexisting Title VII actions, this new cause of action does not include an intent to discriminate[4] or pretext element,[5] and does not require any showing of group impact.[6] In short, I call this new action the "individual disparate impact" cause of action.

In enacting the new section 703(k), Congress intended to fix the damage to disparate impact law caused by the Supreme Court in *Wards Cove Packing Co. v. Atonio*.[7] This section, however, did not overturn *Wards Cove*.[8] Instead, Congress created an entirely new method of establishing disparate impact discrimination. While the parts are familiar, the structure is new. As the end product of a long and partisan political battle,[9] this new structure is a compromise. This

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*Professor of Law, Seton Hall University School of Law. I want to thank Eddie Hartnett, Margaret Moses, and Charlie Sullivan.

1. 42 U.S.C.A. §§ 2000e to 2000e-17 (West 1994).

2. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2 U.S.C.A., 16 U.S.C.A, 29 U.S.C.A., and 42 U.S.C.A.).

3. *See infra* Part I.

4. *See infra* Part II.B.2.a.

5. *See infra* Part II.B.2.a.

6. *See infra* Part II.B.2.b.

7. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (holding that disparate impact is not alone established by a showing of racial imbalance, but that a specific employment practice must create the disparate impact and must be capable of statistical demonstration).

8. *See id.*

9. *See* Kingsley R. Browne, *The Civil Rights Act of 1991: A "Quota Bill," A*

compromise, however, raises as many questions as it answers.[10] Specifically, the new section 703(k)'s complex and intricate nature makes it less amenable to "open textured" judicial interpretation than the original Title VII.[11] Accordingly, it is important to carefully examine the terms of section 703(k).[12] The United States Supreme

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Codification of Griggs, A Partial Return to Wards Cove, or All of the Above?, 43 CASE W. RES. L. REV. 287, 371-73 (1993) (discussing the torturous political process leading to the enactment of the 1991 Act between President Bush and the Republicans in Congress on one side and the Democratic majority in Congress on the other side).

10. This reminds me of my days as a law student when Article 2 of the original U.C.C. was replacing the preexisting law of sales. The course I took and the casebooks I read discussed the impact of the U.C.C. upon the preexisting sales law. In fact, so much changed with this new codified approach that the more useful approach would have been to study the U.C.C. and use the preexisting law of sales to better understand the U.C.C. For an example of such a first generation approach to interpreting the 1991 Act, *see* Browne, *supra* note 9.

11. The original statutory source of all three major substantive theories—individual disparate treatment, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), systemic disparate treatment, *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977), and systemic disparate impact, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)—is the word "discriminate" in section 703(a). Section 703(a) provides:

> (a) It shall be unlawful employment practice for an employer-
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> (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C.A. § 2000e-2(k).

12. Section 703(k) in its entirety provides:

> (1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if -
>
> (i) a complaining party demonstrates that respondent uses a particular employment practice that causes a disparate impact on the basis of 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
>
> (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.
>
> (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 decision making process are not capable of separation for analysis, the decision making process may be analyzed as one employment practice.

Court undertakes careful analysis to interpret statutes. Specifically, the Rehnquist majority[13] is known for its use of a "plain meaning" approach because they interpret statutes based on the plain meaning of

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(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.

(C)(1) 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."

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. § 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C.A. § 801 et. seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

42 U.S.C.A. § 2000e-2(k).

13. The "Rehnquist majority" at the present time consists of Chief Justice William Rehnquist, Justice Antonin Scalia, Justice Sandra Day O'Connor, Justice Anthony Kennedy, and Justice Clarence Thomas. *See* Donald O. Johnson, *The Civil Rights Act of 1991 and Disparate Impact: The Response to Factionalism*, 47 U. MIAMI L. REV 469, 470 n.8 (1992) (describing the majority at the passage of the 1991 Civil Rights Act, with Justice Thomas now replacing Justice White).

their terms.[14] Specifically, those who follow the plain meaning rule "follow the plain meaning of the statutory text, except when text suggests an absurd result or a scrivener's error."[15] While doubts exist that the Rehnquist majority is always true to this approach,[16] plain meaning arguments can be forceful because they focus on the language in the statute.[17]

The plain meaning of section 703(k) is the theme throughout this essay. First, this essay demonstrates that section 703(k)(1)(A) creates separate causes of action in its subsections (i) and (ii).[18] Subsection (i) is the source of "group disparate impact" and subsection (ii) of "individual disparate impact" discrimination. Next, this essay examines the structure of this new subsection (ii) individual disparate impact action.[19] Part A explains that the burden of proof in a subsection (ii) action is always on the plaintiff.[20] Part B discusses the meaning of the phrase "alternative employment practice" for purposes of the subsection (ii) cause of action.[21] Part C shows that the second part of subsection (ii) requires the plaintiff to prove that the employer

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14. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION app. 3 at 323 (1994) (footnotes omitted); *see also* Johnson, *supra* note 13, at 485 (tracing the new plain meaning approach of the Rehnquist majority in the context of disparate impact law). *But cf.*, Patrick M. McFadden, *Fundamental Principles of American Law*, 85 CAL. L. REV. 1749, 1754 (1997) ("The surest way to misread a law is to read it literally."). Johnson focuses on the Supreme Court's reasoning in *Watson v. Fortworth Bank & Trust*, 487 U.S. 977 (1988), as an example of the Rehnquist majority approach. It noted that:

> The plurality [in *Watson v. Fort Worth Bank & Trust*] whole-heartedly embraced textualism or legal formalism as the correct method of interpreting Title VII. Textualism's central premise dictates that the court should apply the plain meaning of a statute. One finds this plain meaning by presuming that the legislature employed the statute's words in their ordinary sense, thus enabling the jurist to understand the statute through careful reading. This frees the textualist from the burden of inquiring into legislative purpose and intent, as understood by the legal process theorists, or studying legislative history. Those tools are dismissed as susceptible to manipulation and as judicial means of undermining the reasoned decision of the legislature. (citation omitted.)

Id.

15. ESKRIDGE, *supra* note 14, app. 3 at 323.

16. *See* ESKRIDGE, *supra* note 14, at 273 ("The Court's civil rights decisions from 1989 to 1991 do not represent its adherence to plain meaning.").

17. There is, however, a certain bizarre aspect of having a statute that is ambiguous and unclear because the legislature could not agree to a statute that was clear, and then have a court insist that it would only give the terms that were used their plain meaning.

18. *See infra* Part I.

19. *See infra* Part II.

20. *See infra* Part II.A.

21. *See infra* Part II.B.

refuses to adopt an alternative employment practice even though the employer knows of its existence.[22] Finally, this essay presents a case interpreting subsection (ii) and compares the new individual disparate impact cause of action under section 703(k)(1)(A)(ii) with the individual disparate treatment theory.[23]

I. SUBSECTIONS (i) AND (ii) OF SECTION 703(K)(1)(A) ESTABLISH SEPARATE CAUSES OF ACTION

Section 703(k)(1)(A)(ii) creates a new cause of action separate from the group disparate impact action created in subsection (i). This separate cause of action is based on the way subsection (ii) and subsection (i) are joined.[24] Disparate impact law decided under the original Title VII, before the 1991 Act amendments, clouds the clarity of this separation. *Albemarle Paper Co. v. Moody* is one decision that creates such confusion.[25] In *Albemarle*, the United States Supreme Court created a three-step process to litigate disparate impact cases: (1) in his or her prima facie case, the plaintiff was required to prove that an employer's practice had a disparate impact on members of groups protected by Title VII; (2) the defendant could rebut the plaintiff's prima facie case by proving the challenged employment practice was job related and consistent with business necessity; (3) and further, even if the defendant succeeded in its rebuttal, the plaintiff could

22. *See infra* Part II.C.

23. *See infra* Part III.

24. Section 703(k)(1)(A)(i) and (ii) are separated by the word "or." This section provides:

> (k)(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if-
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> (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*
>
> (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.

42 U.S.C.A. § 2000e-2(k)(1)(A) (West 1994) (emphasis added).

25. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (upholding disparate impact liability and awarding back pay after a finding of unlawful discrimination despite the employer's absence of bad faith). An early interpretation of Title VII created the concept of disparate impact discrimination. *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (holding the employer's requirements that employees have high school diplomas and pass tests for promotions were not job related and were illegal due to their disparate impact on minorities). The *Griggs* decision, however, did not articulate the litigation structure for a disparate impact action. *See id.*

prevail on surrebuttal by proving pretext, meaning the defendant could have used other practices with less discriminatory impact that also served its legitimate interest.[26]

Most attempts to construe the new section 703(k)(1)(A) deal with the impact of its language on this preexisting *Albemarle Paper* three-step process.[27] Plain meaning demands that this construction begins with the new statute's language rather than the prior *Albemarle Paper* three-step process.[28] If that is done, it is clear that section 703(k)(1)(A) creates two new disparate impact causes of action out of the three steps that were formally one cause of action under *Albemarle Paper*. The first cause of action, a group disparate impact action, arises under subsection (i) using the first two steps of the *Albemarle Paper* process. Under this action, the plaintiff has the burden of showing that an employer's practice had an adverse impact and that the defendant failed to meet its burden to rebut this claim with proof that the practice served a business necessity.[29] Subsection (ii) creates a second cause of action, the individual disparate impact action, based on the third pretext step of the *Albemarle Paper* approach.[30]

Section 703(k)(1)(A) subsection (i) sets forth the first cause of action, which includes two steps marked below by the imposed brackets:

> An unlawful employment practice based on disparate impact is established under this subchapter only if — (i) [1] 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 [2] the respondent fails to demonstrate that the challenged practice

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

27. *See, e.g.*, Rosemary Alito, *Disparate Impact Discrimination Under the 1991 Civil Rights Act*, 45 RUTGERS L. REV. 1011, 1037-38 (1993) (discussing the case law that Congress relied upon to create this new section of the 1991 Act relied upon); Browne, *supra* note 9, at 371-73 (suggesting that the pretext rule of *Albemarle* remains unchanged).

28. *See supra* text accompanying notes 13-17 (discussing the "plain meaning" approach to statutory interpretation).

29. *See supra* note 24. It is beyond the scope of this article to address the many issues raised concerning the cause of action created by subsection (i).

30. A plaintiff must prove the following elements for an individual disparate impact cause of action under subsection (ii): (1) the employer took adverse action against the plaintiff based on an employment practice, (2) an alternative employment practice exists that would serve the employer's interests but would not affect a plaintiff adversely, and (3) the employer refuses to adopt that alternative. *See* 42 U.S.C.A. § 2000e-2(k)(1)(A)(ii) (West 1994).

> is job related for the position in question and consistent with business necessity . . . .[31]

The word "demonstrates," used twice in section 703(k)(1)(A)(i), is defined in new section 701(m) as "meets the burdens of production and persuasion."[32] Taken together, these two steps clearly state that subsection (i) creates a cause of action for group disparate action much like the first two steps of the *Albemarle Paper* process—the plaintiff wins if he proves that the employer's practice had a disparate impact and the employer fails to justify the practice. Subsection (i), however, does not include the third pretext element of the *Albemarle Paper* process.[33]

Joined to the opening phrase of section 703(k)(1)(A),[34] subsection (ii) establishes individual disparate impact liability independent of the subsection (i) group disparate impact action:

> An unlawful employment practice based on disparate impact is established under this subchapter only if — (i) . . . ; *or* (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.[35]

Because Congress joined the two subsections with the word "or," it clearly intended to make subsections (i) and (ii) complete and independent causes of action. The common meaning of "or" supports this argument. Webster's Third New International Dictionary defines "or" as "a function word to indicate (1) an alternative between different or unlike things, states, or actions . . .; (2) choice between alternative things, states, or courses[.]"[36] Thus, "or" under its plain meaning in section 703(k)(1)(A) means that subsection (ii) is an alternative to

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31. 42 U.S.C.A. § 2000e-2(k)(1)(A).

32. *See* § 2000e-2(k)(1)(A); 42 U.S.C.A. § 2000e-(m).

33. Once the defendant carries its rebuttal burden proving the practice was job related and consistent with business necessity, the plaintiff would lose unless she could show the practice was pretext for discrimination. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); *see also supra* note 24 (providing the language of section 703(k)(1)(A)(i) and (ii)).

34. The opening phrase of the statute section is: "An unlawful employment practice based on disparate impact is established under this subchapter only if . . . ." 42 U.S.C.A. § 2000e-2(k)(1)(A).

35. *See id.* (emphasis added).

36. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY: UNABRIDGED 1585 (1986) [hereinafter WEBSTER'S]. A canon of plain meaning statutory construction is: "Follow dictionary definitions of terms unless Congress has provided a specific definition." *See* ESKRIDGE, *supra* note 14, app. 3 at 323 (footnotes omitted).

subsection (i) and is both distinct and separate from it.[37] Thus, plaintiffs who allege disparate impact liability have the option to proceed under subsection (i), or subsection (ii), or both.[38]

Maintaining the *Albemarle Paper* process,[39] however, would require reading subsections (i) and (ii) as if they were conjoined with "and"[40] instead of "or."[41] That would violate the plain meaning of the new statutory scheme. Subsection (i) simply states that disparate impact liability is established if [1] the plaintiff proves that an employment practice used by the defendant causes disparate impact "and" [2] the employer fails to prove it is job related and consistent with business necessity.[42] To attach subsection (ii)'s requirements to subsection (i) would require the plaintiff to prove that the defendant failed to adopt an available alternative, even if the defendant failed to carry its burden of proof under part [2] of subsection (i) — that the practice the plaintiff

37. *See* Alito, *supra* note 27, at 1037 ("By providing in [new section 703(k)] that a disparate impact plaintiff may make a case either by demonstrating that a particular practice causes a disparate impact, or by proving that an alternative procedure which does not have as great a disparate impact exists, the statute seems to make the alternative procedure approach an entirely separate mode of proof.").

38. The individual aspect of this new cause of action may well make the most likely joinder of causes of action be a subsection (ii) action with an individual disparate treatment cause of action rather than with a group disparate impact action under subsection (i). *See infra* Part III.

39. *See supra* text accompanying notes 26-28.

40. Webster's defines "and" as "along with, altogether with" and "added to or linked to." *See* WEBSTER'S, *supra* note 36, at 80.

41. Another modification of the statute to maintain the three-step *Albemarle Paper* structure would be to move little roman numeral (i) from its present position after the dash in section 703(k)(1)(A) to immediately after the word "and." As amended, the statute would then read as follows:

> (k)(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if 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
> (i) the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
> (ii) the complaining party makes the demonstration described in sub-paragraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

With this amendment, plaintiff must always prove disparate impact based on membership in a protected class and either (i) the defendant fails to prove job relatedness and business necessity or (ii) plaintiff proves an available alternative that the employer refuses to adopt.

Moving the placement of (i) is a substantial structural change. It is better and more appropriate for Congress to make this change rather than relying on a court interpretion.

42. *See* 42 U.S.C.A. § 2000e(k)(1)(A) (1994).

challenges was job related and consistent with business necessity. Therefore, the plaintiff could only win a disparate impact case under section 703(k)(1)(A) by proving both the first part of subsection (i) – that the challenged employment practice of the defendant caused disparate impact – and all of subsection (ii) – that an alternative existed that the employer refused to use. Essentially, this approach would make job relatedness and business necessity irrelevant in disparate impact cases and would relieve the defendant of its burden of persuasion because the justification of the challenged practice would not impact liability. Instead, the plaintiff would establish liability only after she satisfies her burden in the first part of subsection (i) and subsection (ii).

Removing the defendant's burden from the second part of subsection (i) radically reconstructs the statute beyond replacing the word "or" with "and." This reconstruction does not maintain the three-step *Albemarle Paper* litigation structure.[43] Instead, it remakes disparate impact law into a strange, new two-step process with the plaintiff first proving the employer's practice adversely affected a group protected by Title VII and second proving that an alternative existed that the employer refused to use.

To illustrate this radical change, it is necessary to examine the *Wards Cove Packing Co. v. Atonio*[44] decision. While the decision made several significant changes to disparate impact law, it is notorious for its impact upon business necessity and job relatedness. First, the Supreme Court diluted "business necessity" to "business justification."[45] "[A]t the justification stage of such a disparate-impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer . . . . The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice."[46] Second, the Court reduced the employer's "business justification" burden from a

43. *See supra* text accompanying note 26.

44. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

45. *Id.* at 659. Concerning the employer's justification, the court states as follows:

> A mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices. At the same time, though, there is no requirement that the challenged practice be "essential" or "indispensable" to the employer's business for it to pass muster . . . .

Id.

46. *Id.*

burden of persuasion to a burden of production.[47] To now conclude that the 1991 Act drops from disparate impact law any need for the employer to justify its practices would be remarkable and clearly against plain meaning.[48]

To avoid this outcome and to maintain the *Albemarle Paper* three-step approach,[49] including the defendant's rebuttal burden on job relatedness and business necessity, it would be necessary to amend subsection (ii) beyond changing "or" to "and." This change would include the addition of language like the following as an introductory clause within subsection (ii): "or (ii), *if respondent demonstrates that the challenged practice is job related for the position in question and consistent with business necessity,* 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."[50] Thus, the use of "or"—combined with the lack of the necessary qualifying phrase that links

47. *Id.* ("The employer carries the burden of producing evidence of a business justification for his employment practice. The burden of persuasion, however, remains with the disparate-impact plaintiff.").

48. Another very radical reconstruction of the statute could follow from construing the "or" as "and." That would be to construe section 703(k)(1)(A) as providing for liability for disparate impact only if the plaintiff proved disparate impact, the defendant failed to justify its practice, and the plaintiff proved there was an alternative that the defendant refused to adopt. Under this construction, the defendant would always win if it proved its practice was justified as job related and necessary for its business, even if the plaintiff also proved that an alternative existed that the defendant refused to adopt. This construction should be rejected by an interpreting court because it violates plain meaning and also fails to maintain the three-step *Albemarle Paper* structure.

49. *See supra* text accompanying note 26.

50. If Congress decided to amend the law to maintain the *Albemarle Paper* structure, the complete section 703(k)(1)(A) would tentatively read:

> An unlawful employment practice based on disparate impact is established under this subchapter 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 (ii), <u>if respondent demonstrates that the challenged practice is job related for the position in question and consistent with business necessity</u>, 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.

Nevertheless, even if some evidence illustrated that Congress meant to maintain *Albemarle Paper* and include the defendant's burden in the new section 703(k)(1)(A)(ii), this radical reconstruction should be left to affirmative Congressional action. *Cf.* 42 U.S.C.A. § 2000e-2(k)(1)(A) (West 1994) (which does not include the underlined phrase).

the job relatedness and business necessity requirement to both subsections (i) and (ii)—makes the meaning of section 703(k)(1)(A) plain: subsection (i) and (ii) set forth two separate paths for establishing disparate impact liability. To judicially "amend" subsection (ii) with additional language absent from the enacted statute is difficult to justify from any perspective and is directly against the plain meaning approach.[51]

II. THE STRUCTURE OF THE SUBSECTION (ii) INDIVIDUAL DISPARATE IMPACT ACTION

Section 703(k)(1)(A)(ii)'s language requires close analysis of the terms "demonstration," "alternative employment practice" and "refuses to adopt."

A. The Burden of Persuasion in Subsection (ii) Actions

To see the overall structure of a subsection (ii) individual disparate impact action, it is best to first address the burden of persuasion issue. Unlike the use of the word "demonstrate" in the subsection (i) group disparate impact action, subsection (ii) uses the word "demonstration" to describe the plaintiff's obligation in an individual disparate impact action.[52] "Demonstration" in subsection (ii) is the noun form of the verb "demonstrates" as defined in section 701(m). Webster's defines "demonstrate" as "to manifest clearly, certainly, or unmistakably: show clearly the existence of . . . to make evident or reveal as true by reasoning processes, concrete facts and evidence . . . ."[53] Further, it defines "demonstration" as "the act, process, or means of demonstrating . . . ."[54] As demonstration is the act of demonstrating, the plain meaning of "demonstration" in subsection (ii) is the same as the term "demonstrate" in subsection (i).[55] Thus, through plain language reasoning, the plaintiff bears the burdens of both production

51. The need to add a clause to subsection (ii) along the lines suggested to maintain the *Albemarle Paper* structure undermines any argument that the use of "or" was a slip of the pen. *See generally* ESKRIDGE, *supra* note 14, app. 3 at 323 (footnotes omitted) (citing to "scrivener's error" exception to plain meaning rule).

52. *See* 42 U.S.C.A. § 2000e-(m) (defining the term "demonstrates" as "meets the burdens of production and persuasion."). Note that "demonstrate" as used in the subsection (i) group disparate impact action is defined in section 701(m). Section 701(m) was also added to Title VII by the 1991 Act. *See id.*

53. *See* WEBSTER'S, *supra* note 36, at 600.

54. *Id.*

55. *See* ESKRIDGE, *supra* note 14, app. 3 at 323 (footnotes omitted) ("Interpret the same or similar terms in a statute the same way.").

and persuasion to show the "alternative employment practice."

With respect to the employer's conduct, neither "demonstrate," "demonstration" nor any similar word is included in the second part of subsection (ii).[56] Without some indication that the respondent is required to prove anything on this issue, it appears that the plaintiff's burdens of production and persuasion continue throughout subsection (ii). In other words, the plaintiff must prove both the first part of subsection (ii), the existence of the alternative employment practice, as well as the second part, that the employer refuses to adopt it.

B. The Meaning of "Alternative Employment Practice"

The meaning of "alternative employment practice" is at the heart of the subsection (ii) cause of action. Its meaning, however, is not easily discerned. Developing the plain meaning of "alternative employment practice" is a particularly difficult, multi-step process. Subsection (ii) does not itself define "alternative employment practice." Instead it refers to subsection (C) for a description. Subsection (C), however, also neither defines nor describes "alternative employment practice." Instead, to provide meaning to the term subsection (C) refers to the term's legal meaning under the law as it "existed on June 4, 1989."[57] Thus, the reader must refer to the prior state of the law.

1. The Significance of the June 4, 1989 Cutoff

June 4, 1989 is significant because the following day the Supreme Court issued its decision in *Wards Cove Packing Co. v. Atonio*.[58] Clearly, subsection (C) precludes any use of *Wards Cove* to define "alternative employment practice" in a subsection (ii) individual disparate impact action.[59] Ironically, the precise phrase "alternative employment practice" does not appear in the majority opinion in *Wards Cove*. Rather, Justice White's opinion in *Wards Cove* uses various phrases that relate to the concept of "alternative employment practice." These include "other tests or selection devices, without a similarly undesirable racial effect, [that] would also serve the employer's

56. *See* 42 U.S.C.A. § 2000e-2(k)(1)(A)(ii). Rather, subsection (ii) only provides that "the respondent refuses to adopt such alternative employment practice." *Id.*

57. *See id.* § 2000e-2(k)(1)(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.'").

58. Wards Cove Packing Co. v. Atonio, 490 U.S. at 642 .

59. *See id.* at 661.

legitimate [hiring] interest[s],"[60] "availability of alternative practices to achieve the same business ends with less racial impact,"[61] "alternative practices,"[62] and "proposed alternative selection devices."[63] Each is related to the concept of "alternative employment practice" because each suggests alternative practices for the employer other than those the plaintiff challenges. Nevertheless, the cutoff date established in subsection (C) precludes reliance upon *Wards Cove* for the definition of an "alternative employment practice" in a subsection (ii) action.

Puzzling as it seems, the phrase "alternative employment practice" is absent from every Supreme Court disparate impact decision preceding *Wards Cove*.[64] The most similar language can be found in Justice O'Connor's 1988 plurality opinion in *Watson v. Fort Worth Bank & Trust*.[65] In her opinion she used language that the majority of the Court would adopt the next year in *Wards Cove*.[66]

> [W]hen a plaintiff has made out a prima facie case of disparate impact, and when the defendant has met its burden of producing evidence that its employment practices are based on legitimate business reasons, the plaintiff must "show 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." Factors such as the cost or other burdens of *proposed alternative selection devices* are

60. *Id.* at 660 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)).

61. *Id.* at 658.

62. *Id.* at 661.

63. *Id.* (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 998 (1988)).

64. The decisions of lower federal courts also offer little assistance in defining the "law" of "alternative employment practices" in cases decided before the cutoff date in subsection (C). In a search of federal employment discrimination cases decided before June 4, 1989, only three opinions by one district court judge used the term "alternative employment practice." The concept, however, was not at issue. Judge Nixon of the Middle District of Tennessee rendered the following decisions regarding alternative employment practices. *See* Mineo v. Transportation Mgmt. of Tenn., Inc., 694 F. Supp. 417, 427 (M.D. Tenn. 1988) (mentioning alternative employment practice but finding that plaintiff bus driver failed to establish that employer's practice of prohibiting former heart attack victims from driving public buses adversely impacted plaintiff's protected age group); Kincade v. Firestone Tire & Rubber Co., 694 F. Supp. 368, 376 (M.D. Tenn. 1987) (holding that job applicants failed to demonstrate that Firestone's hiring and assignment procedures adversely affected blacks); Mosley v. Clarksville Mem'l Hosp., 574 F. Supp. 224, 232 (M.D. Tenn. 1983) (deciding that plaintiffs presented insufficient evidence that the hospital engaged in hiring and promotion practices that had a discriminatory effect on blacks).

65. Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) (holding that disparate impact analysis applied to employment decisions based on subjective criteria).

66. *See Wards Cove*, 490 U.S. at 660-61.

> relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals.[67]

Although *Watson* satisfies the June 4, 1989 cutoff date, its discussion of alternative selection devices is neither precedent nor binding because Justice O'Connor's statement on this issue is a plurality opinion and not an opinion of a majority.[68] Thus, like *Wards Cove,* it appears that *Watson* cannot be used to explain "alternative employment practice" under the new statute.

If *Watson* could be used to determine what the term "alternative employment practice" means in a subsection (ii) individual disparate impact action, its impact would be significant. Justice O'Connor's interpretation of the phrase in *Watson* conflicts with the earlier meaning she quotes from *Albemarle Paper.*[69] The *Albemarle Paper decision* only required that the alternative practice "serve the employer's legitimate interest in efficient and trustworthy workmanship."[70] In *Watson,* Justice O'Connor's interpretation makes it more difficult for the plaintiff. Instead of merely requiring that the employer's interests be served, Justice O'Connor would require "alternative selection devices" to "be equally as effective as the challenged practice in serving the employer's legitimate business

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67. *Watson,* 487 U.S. at 998 (emphasis added) (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)).

68. *See id.* at 982. A majority of the Court determined that disparate impact analysis should apply to subjective employment criteria, but only three members of the Court agreed with Justice O'Connor's opinion of alternative employment practices. *See id.* A plurality opinion of four members of the Court is not "law." *See* Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions,* 80 COLUM. L. REV. 756 (1980). Novak explains that:

> Plurality decisions . . . are those in which a majority of the Court agrees upon the judgment but not upon a single rationale to support the result. Thus, there is no "opinion of the Court" in the ordinary sense . . . . "[P]lurality opinion" . . . refer[s] to the opinion designated as the lead opinion of the Court, which is not always the opinion subscribed to by the largest number of Justices.

Id. at 756 n.1.

The thrust of Novak's article is that a plurality decision of the Supreme Court requires a lower court to interpret the precedential value to be given to the case. *See id.* A plurality opinion is clearly authority with regard to the specific result of the case, but it is not binding on dissimilar cases. *See id* at 758. The opinion may be influential, however, on the subsequent development of the law in question. *See id.* Therefore, *Watson's* authority is limited to its result, which established that subjective employment practices are subject to disparate impact attack. *See Watson,* 487 U.S. at 991.

69. *See Watson,* 487 U.S. at 998; *supra* text accompanying note 37.

70. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973)).

goals."[71] Even without Justice O'Connor's heightened interpretation, it is difficult enough for a plaintiff to prove that an "alternative employment practice" served the interests of the employer because those interests are generally within the control and knowledge of the employer. A heightened "equally effective" burden would make it a comparative test, where the knowledge and control remain in the hands of the employer. Employer's officials could easily testify that the alternative does not equal the existing practice, while the plaintiff could rarely find evidence to overcome such testimony. Thus, the exclusion of *Watson* is very significant in determining the meaning of "alternative employment practice."[72]

71. *Watson*, 487 U.S. at 998.

72. Subsection (C) limits the prevailing authority for determining the meaning of the phrase "alternative employment practice" to cases decided before *Wards Cove* in order to make clear that *Wards Cove* is not authoritative. *See* 42 U.S.C.A. § 2000e-2(k)(1)(C) (West 1994); *supra* note 57 and accompanying text. The use of a time cutoff to achieve that end is strange in itself. Its use, however, raises another thorny problem. Requiring that demonstration of an "alternative employment practice" must "be in accordance with the law as it existed on June 4, 1989" appears to deprive every decision following that date of precedential effect on the issue of what constitutes an alternative employment practice. *See id.*

Since the passage of the 1991 Civil Rights Act, there has been little action among the lower federal courts concerning the meaning of subsection (ii) and the phrase "alternative employment practice." In *Fitzpatrick v. City of Atlanta*, the court assumed that the three-step *Albemarle Paper* structure still applied. *See Fitzpatrick*, 2 F.3d 1112, 1117-18 (11th Cir. 1993). Within that structure, the court described an alternative employment practice as "alternative policies with lesser discriminatory effects that would be comparably as effective at serving the employer's identified business needs." *Id.* at 1118.

In *Fitzpatrick*, African-American firefighters challenged a fire department rule that required all firefighters be clean-shaven. *See id.* at 1113. That rule had a disparate impact on African-Americans because they were more likely than other groups to suffer pseudofolliculitis barbae, a condition in which skin infections develop after shaving. *See id.* at 1114. The court found that the no-beard rule was justified because respirators must be tightly sealed to firefighters' faces to ensure their safety. *See id.* at 1119-20. The plaintiffs did show that there had been no problems with the use of the respirators when firefighters had earlier been allowed to "shadow shave." *See id.* at 1120-21. The court, however, found that showing insufficient because no systematic study existed to show the effect of "shadow shaving" had worked, especially considering that exposure to even small amounts of toxic elements could, over time, be dangerous. *See id.* The court also held that the plaintiffs failed to prove that an alternative employment practice existed, stating that "any proposed less discriminatory alternatives to the no-beard rule that would not require firefighters to be clean-shaven would not be adequately safe." *Id.* at 1122.

2. The Essence of the Albemarle Paper Test Applied in Subsection (ii) Actions

If *Wards Cove* and *Watson* cannot be used to define "alternative employment practice," *Albemarle Paper* must be the main source of authority for the term. Even though the precise phrase "alternative employment practice" does not appear in the case, *Albemarle Paper* does address the concept of "alternative employment practice."[73] Additionally, *Albemarle Paper* is binding because it was decided before June 4, 1989. Notably, *Albemarle Paper* describes the concept by using the phrase "other tests or selection devices, without a similarly undesirable racial effect, [that] would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'"[74] This showing would constitute "evidence that the employer was using its tests [or selection devices] merely as a 'pretext' for discrimination."[75] Under *Albemarle Paper's* three-step litigation structure, the issue of pretext or the existence of alternatives with less drastic impact was relevant only after the plaintiff had proven that the employer's practice had a discriminatory group impact and the defendant had met its burden by justifying the practice as job related and necessary for business. Therefore, this last chance for the plaintiff implicated the employer's discriminatory state of mind through the use of the term "pretext."

After the creation of two separate disparate impact causes of action in the 1991 Act, the issue of "alternative employment practice" in a subsection (ii) individual disparate impact action is no longer linked to the issues of group disparate impact and employer justification of job relatedness and business necessity. Congress also eliminated any issue concerning the employer's discriminatory state of mind by removing the idea of "pretext" from the concept of "alternative employment practice." That being said, the essence of the concept in subsection (ii) can still be traced to *Albemarle Paper's* focus on an employment practice that serves the employer's interest in efficient and trustworthy workmanship.[76]

73. Albemarle Paper Co., 422 U.S. at 425.
74. *Id.* (citation omitted).
75. *Id.* (citation omitted).
76. *Id.*

a. Employer's State of Mind is Not an Element of a Subsection (ii) Individual Disparate Impact Action

Albemarle Paper addresses the concept of alternative employment practice in the final step of its three-step process.[77] By using the word "pretext," the Court introduces the employer's state of mind into a disparate impact analysis.[78] "Pretext" links the alternative practice with less impact than the one the employer uses to its discriminatory state of mind. The continued use of a practice that has a disparate impact when a better alternative is available suggests that the employer is using its practice because of, and not in spite of, its adverse impact on a group protected by Title VII.[79] In other words, the employer's continued use of the challenged practice was a mere facade to hide a true goal of discrimination.[80]

Contrary to the *Albemarle Paper* decision, the new section 703(k) includes neither the idea nor the language of "pretext" or "intent to discriminate" to suggest that the employer's state of mind is relevant to either subsection (i) or (ii) disparate impact actions.[81] Thus, there is

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77. *Id.*

78. As the law of individual disparate treatment discrimination makes clear, the term pretext connotes intentional discrimination. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981) (explaining that the plaintiff in an individual disparate treatment action has the opportunity to demonstrate that she was the victim of intentional discrimination by proving that the employer's proffered reason for the employment action was a pretext for the discrimination).

79. *See* Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979) ("'Discriminatory purpose, however, implies more than intent as volition or intent as awareness of consequences . . . . It implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.").

80. *See* Browne, *supra* note 9, at 364-65.

81. *But see* Browne, *supra* note 9, at 371-73. Professor Browne argues that the second part of subsection (ii) — that the employer refuses to adopt the alternative — incorporates employer state of mind and pretext into the subsection. *See id.* Based on that, he then reads pretext back into the concept of "alternative employment practice" in the first part of subsection (ii). *See id.*

Such a convoluted approach hardly seems consistent with a plain meaning approach. *See supra* notes 13-17 and accompanying text. The more natural reading of subsection (ii) is that the issue of the employer's refusal to adopt an available alternative is a factual question that does not necessarily connote state of mind beyond the mere conscious awareness of the existence of the alternative and the decision not to use it. Nothing in subsection (ii) connotes that a discriminatory reason, motive, intent, or purpose for the refusal is relevant. Even if it would, that only means that the state of mind issue had been moved from the broader level of the "alternative employment practice" concept to the more deeply imbedded refusal issue. It would not mean that pretext is an implicit part of the phrase "alternative employment practice" in the first part of subsection (ii). *See supra* note 24 (providing the text of the statute).

no textual support for the incorporation of the state of mind element into either subsection of the 1991 Act.[82]

In addition to the absence of any specific language that refers to pretext or intentional discrimination in subsection (ii), two additional examples illustrate that disparate impact analysis does not include the employer's state of mind. This point is best articulated by a discussion of two other sections of the 1991 Act.[83] First, section 703(k)(3) prohibits employers from implementing rules regarding drug use in order to intentionally discriminate, but this section does not apply to disparate impact cases. This section provides:

> *notwithstanding any other provision of this subchapter*, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance . . . other than the use or possession of a drug taken under the supervision of a licensed health care professional, . . . shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.[84]

In enacting section 703(k)(3), Congress differentiated between disparate impact analysis and analysis of intentional discrimination. Without this section, employer rules regarding drug use would be subject to attack under a disparate impact theory through the other provision of new section 703(k). To prevent that from happening, section 703(k)(3) limits the Title VII attack on these rules to disparate treatment claims involving an intent to discriminate. If disparate impact still included the intent to discriminate as an element or aspect, section 703(k)(3) would need not exclude disparate impact theory from being applied to employer drug rules. Section 703(k)(3) would be rendered practically superfluous.[85] Thus, section 703(k)(3) illustrates

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82. In addition to the absence of textual support, Supreme Court case law also supports the absence of intent from disparate impact actions. *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (stating that the employer's good intentions or "absence of discriminatory intent [did] not redeem employment procedures or testing mechanisms that operate[d] as 'built-in headwinds' for minority groups and [were] unrelated to measuring job capability.").

83. *See* 42 U.S.C.A. § 2000e-2(k)(3) (West 1994) (enacted as part of the Civil Rights Act of 1991); *Id.* § 1981a (enacted as part of the Civil Rights Act of 1991); ESKRIDGE, *supra* note 14, app. 3 at 324 ("Each statutory provision should be read by reference to the whole act.").

84. 42 U.S.C.A. § 2000e-2(k)(3) (emphasis added).

85. With section 703(k)(1)(A) creating two separate causes of action in subsections (i) and (ii), employer drug rules could not be analyzed under the group disparate impact approach of subsection (i) because that action does not include the concept of alternative employment practice, much less pretext or any other notion implicating discriminatory

that the disparate impact concept added to Title VII in the 1991 Act does not include a state of mind or intent to discriminate element.

Second, new section 42 U.S.C. § 1981a, which provides compensatory and punitive damages and a right to trial by jury in intentional discrimination Title VII cases, makes clear that disparate impact discrimination does not include the concept of intent to discriminate.

> In an action brought by a complaining party under Section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) [42 U.S.C.A. §§ 2000e-5 or 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2, or 2000e-3) [42 U.S.C.A. §§ 2000e-2, 2000e-3 or 2000e-16], . . . the complaining party may recover compensatory and punitive damages . . . .[86]

In sections 703(k)(3) and 42 U.S.C. § 1981a, Congress specifically excluded disparate impact discrimination from what it considered intentional discrimination.[87] In light of that fact, reading employer state of mind into any part of subsection (ii) violates plain meaning.[88] Thus, "alternative employment practice" under section 703(k)(1)(a) neither includes pretext nor any other concept of a discriminatory state of mind.[89]

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intent. If intent to discriminate were found to play a role in individual disparate impact claims under subsection (ii), then employer rules would presumably be subject to attack under that approach because section 703(k)(3)'s intent requirement would be satisfied.

86. 42 U.S.C.A. § 1981a. This section also establishes a right to trial by jury. *See id.*

87. It might be suggested that, before the 1991 Act, the disparate impact concept of discrimination had frequently been described as not involving intentional discrimination, despite its presence in the third, pretext step of *Albemarle Paper*. *See, e.g.*, International Bhd of Teamsters v. United States, 431 U.S. 324, 336 n.15 (1977) (stating that disparate impact "involve[s] employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity . . . . Proof of discriminatory motive . . . is not required under a disparate-impact theory."). Nevertheless, the plain meaning of sections 703(k) and 1981a is that intent to discriminate is not a part of a section 703(k)(1)(A)(ii) cause of action.

88. *See* ESKRIDGE, *supra* note 14, app. 3 at 324 (footnotes omitted) ("Avoid interpreting a provision in a way that is inconsistent with a necessary assumption of another provision.").

89. If, however, a plaintiff found evidence that the employer did in fact use an employment practice, even one neutral on its face, *because* of its discriminatory impact, the practice could be attacked as intentional disparate treatment discrimination. Merely adopting a policy that is neutral on its face but has a disparate impact would not be

b. Group Disparate Impact Is Not an Element of a Subsection (ii) Action

Until the enactment of section 703(k) in the 1991 Act, disparate impact law mainly focused on the impact of employer practices upon groups protected by Title VII. Supreme Court case law preceding the 1991 Act reflects the early disparate impact focus on Title VII groups. For example, the standardized tests and educational prerequisites in *Griggs v. Duke Power Co.* excluded more African-Americans than Whites from transferring to better jobs at the Duke Power Company.[90] Additionally, height and weight prerequisites in *Dothard v. Rawlinson*[91] excluded more women than men from prison guard jobs in Alabama. With the enactment of section 703(k)(1)(A), Congress limited the need to show group impact to subsection (i) actions - "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."[92] Subsection (ii) does not include this element, therefore, its plain meaning dictates that the plaintiff need not prove disparate impact on a group protected by Title VII. Rather, subsection (ii) only focuses on the existence of an alternative employment practice and the employer's refusal to adopt it.[93]

This point raises a second difference, in addition to the earlier discussed exclusion of pretext, between subsection (ii) and the *Albemarle Paper* structure.[94] In *Albemarle Paper,* alternative practices only arose after the plaintiff proved that the challenged practice had a disparate impact on a protected group and the defendant proved that business necessity justified the practice.[95] As discussed earlier, the structure of section 703(k)(1)(A) is fundamentally different from the *Albemarle Paper* structure because the separation of subsection (i)

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sufficient evidence from which to draw an inference that the practice was adopted by the employer in order to discriminate.

90. Griggs v. Duke Power Co., 401 U.S. 424, 427-8 (1971) (holding that promotion requirements had a disparate impact on black employees).

91. Dothard v. Rawlinson, 433 U.S. 321 (1977).

92. 42 U.S.C.A. 2000e-(k)(1)(A)(i) (West 1994).

93. *See supra* notes 52-57 and accompanying text (discussing subsection (ii) requirements).

94. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). Note again, that continual reference to *Albemarle Paper* arises because it represents the state of disparate impact law prior to the 1991 Act.

95. *See id.*

from (ii) creates two separate causes of action.[96] Consequently, liability under subsection (ii) arises without regard to any subsection (i) issue, including the group impact issue.

Despite this analysis, several arguments have been made that group disparate impact remains an element of subsection (ii) actions. Critics base this argument on the fact that although the language "disparate impact" is not expressly included in subsection (ii), the words "disparate impact" do appear in the opening phrase of section 703(k)(1)(A): "An unlawful employment practice based on *disparate impact* is established under this subchapter only if . . . ."[97] From this, it is argued that the phrase "disparate impact" should be incorporated as an element into subsection (ii) actions. This approach is flawed because the term "disparate impact" is also included within the substance of the subsection (i) group disparate impact action.[98] It is not, however, included within the substance of the subsection (ii) individual disparate impact action.[99] Giving substantive meaning to the term "disparate impact" twice in subsection (i) actions, based on the term in the opening phrase and again within subsection (i), would seem to make one of those uses superfluous. This redundancy violates plain meaning guidelines.[100] Specifically, if Congress intended to incorporate group "disparate impact" from the opening phrase of 703(k)(1)(A) into the substance of both subsections (i) and (ii), it would have been unnecessary to separately include this phrase within the substance of subsection (i).

Rejecting the argument that incorporation of the phrase into both subsections makes the phrase in the opening unnecessary is also flawed. It is flawed because the language "disparate impact" in the opening phrase of section 703(k)(1)(A) for the first time legitimates the concept of disparate impact discrimination with statutory terms. This ended a long-standing debate concerning the legitimacy of disparate impact discrimination as an unlawful employment practice under Title

96. *See supra* text accompanying notes 24-43.

97. 42 U.S.C.A. § 2000e-2(k)(1)(A) (emphasis added).

98. *See id.* § 2000e-2(k)(1)(A)(i) (providing "disparate impact on the basis of race, color, religion, sex, or national origin.").

99. *See id.* § 2000e-2(k)(1)(A)(ii) (stating "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.").

100. *See* ESKRIDGE, *supra* note 14, app. 3 at 324 (footnotes omitted) ("Avoid interpreting a provision in a way that would render other provisions of the act superfluous or unnecessary.").

VII.[101] "Disparate impact" was included in the opening phrase of section 703(k)(1)(A) to differentiate liability in both of the new section 703(k) actions from the preexisting actions available under sections 703(a) through (d),[102] and 701(j).[103]

A second argument for reading a group disparate impact element into a subsection (ii) individual disparate impact action arises from language in *Albemarle Paper* that states that the "other tests or selection devices" that plaintiff proposes must be "without a similarly undesirable racial effect."[104] Here it is argued that the word "similarly"[105] is a comparative term that requires the plaintiff's proposed alternative employment practice to have less of an undesirable effect than the challenged practice. The effect necessary for this comparison is the effect on a group protected by Title VII. Thus, group disparate impact is read back into subsection (ii) individual disparate impact actions by reading an embedded group disparate impact element into the term "alternative employment practice."

This argument is also flawed because it depends on the survival of the *Albemarle Paper* three-step process after the enactment of section 703(k) in the 1991 Act.[106] Congress, however, fundamentally

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101. The disparate impact theory of discrimination had been criticized before passage of the 1991 Act because Title VII did not specifically include the term "disparate impact." *See* Michael E. Gold, *Griggs' Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429, 432-39 (1985); RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 184-200 (1992).

102. Section 703(a) sets out liability for employers, (b) for employment agencies, (c) for unions and (d) for training programs. *See* 42 U.S.C.A. § 2000e-2(a)-(d).

103. Section 701(j) sets out liability for the failure to reasonably accommodate the religious observances, practices and beliefs of employees. *See id.* § 2000e(j).

104. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

105. "Similar" is defined as "having characteristics in common . . . comparable . . . one that resembles another . . . counterpart." *See* WEBSTER'S, *supra* note 36, at 2120.

106. *See* Alito, *supra* note 27, at 1037-38. Despite concluding that subsection (ii) creates a cause of action separate from a subsection (i) action, Rosemary Alito argues that "logic" requires the plaintiff prove the disparate impact as part of establishing liability under subsection (ii). *See id.* at 1038-39. "To make any showing similar to the established alternative practice rebuttal, some proof as to the impact of the challenged practice must be made; otherwise it would be impossible to demonstrate that the proposed alternative had less of an impact." *Id.* This is another example of where the commentator's primary focus is on preexisting law with the new statute being interpreted to fit into that law. The plain meaning approach reverses that sequence, the primary focus is on the terms of the statute while prior law is only sometimes helpful to determine the statutory terms mean.

changed that structure by enacting section 703(k)(1)(A). The first two steps of the *Albemarle Paper* structure have been broken off from the third and made into the subsection (i) group disparate impact action. The third step then stands free of subsection (i) as the independent subsection (ii) action for individual disparate impact.[107] Because plain meaning mandates the conclusion that subsections (i) and (ii) create separate causes of action, the real issue arises over the meaning of "alternative" for purposes of a subsection (ii) individual disparate impact action.[108]

A plain meaning analysis of the term "alternative" makes clear that the group effect is not included under subsection (ii) actions. As Webster's makes clear, "alternative" connotes "a proposition or situation offering a choice between two things wherein if one thing is chosen the other is rejected."[109] Thus, when subsection (ii) uses the term "alternative," plain meaning requires that it be an alternative to some other employment practice.[110] The other employment practice is the defendant's challenged practice. Merely identifying the employment practice, however, does not include the notion that the employer's use of it has been shown to have a disparate impact a group protected by Title VII.

This interpretation satisfies plain meaning because it is not absurd to conclude that "alternative" in subsection (ii) refers to the employment practice that the employer relied upon in adversely affecting the plaintiff. In other words, it is an impact on the individual. Showing that the defendant's employment practice had an adverse impact on the plaintiff does not necessarily include a showing that the practice the plaintiff challenges had a disparate impact on a group protected by Title VII. Thus, the term "alternative" has a reasonable function in subsection (ii) without any need to incorporate a showing of group disparate impact. Finally, this meaning is consistent with the separation of subsections (i) and (ii) into separate causes of action with the showing of group disparate impact limited by the terms of the statute to subsection (i) actions.

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107. *See supra* text accompanying notes 24-43 (explaining the new disparate impact action under subsection (ii)).

108. *See* ESKRIDGE, *supra* note 14, app. 3 at 323 (footnotes omitted) (suggesting that a provision be interpreted so as not to "render [an]other provision of the act superfluous or unnecessary.").

109. WEBSTER'S, *supra* note 36, at 63.

110. Plain meaning governs if a term can be given meaning that is not absurd. *See* ESKRIDGE, *supra* note 14, app. 3 at 323 (footnotes omitted) ("Follow the plain meaning of the statutory text, except when text suggests an absurd result . . . .").

In other words, Congress drafted section 703(k)(1)(A) to break apart the three-step *Albemarle Paper* structure into two separate causes of action. It removed the group impact from the concept of "alternative employment practice" in the subsection (ii) action. The plain meaning of the term is that the plaintiff must show the existence of an employment practice that is an alternative to the one the employer used to adversely affect her.[111] If she shows an adverse effect caused by an employment practice, that she would not be adversely affected by the proposed alternative practice and that the alternative serves the legitimate interests of the employer, she has established the first part of a section 703(k)(1)(A)(ii) cause of action.[112]

3. Subsection (ii) Individual Disparate Impact Actions Involve Two Employment Practices

Every subsection (ii) action involves two employment practices. The first is the employment practice of the employer that adversely affected the plaintiff. The second is the alternative employment practice the plaintiff proposes. Presumably, the definition of an employment practice is the same whether the focus is on the defendant's challenged practice or on the plaintiff's proposed alternative.[113] It is important to define the substantive meaning of this term "employment practice." The definitions of "practice" in Webster's that best fit the context of the word used in subsection (ii) are: "the usual mode or method of doing something" or "to do or perform often, customarily or habitually."[114] Presumably, the plaintiff

111. Section 706(f)(1) defines who may bring a Title VII action as a "person claiming to be aggrieved." *See* 42 U.S.C.A. § 2000e-5(f)(1) (West 1994). A person adversely affected by the employer's use of an employment practice is a "person claiming to be aggrieved." *Id.* § 2000e-5(b). She, therefore, has standing to bring a subsection (ii) individual disparate impact action. *See* 1 MERRICK T. ROSSEIN, EMPLOYMENT DISCRIMINATION: LAW AND LITIGATION § 13.3 (1997).

112. If the plaintiff also shows that the employer refuses to adopt her alternative, she proves a violation of section 703(k)(1)(A)(ii). *See infra* text accompanying notes 148-64 (describing the requirement that the plaintiff show the employer refused to adopt the alternative).

113. Section 703(k)(1)(C) sets a cutoff date, June 4, 1989, for authority for the "concept of 'alternative employment practice.'" *See supra* text accompanying notes 58-72 (explaining the effect of the cut-off date). If "employment practice" means the same for the practice the plaintiff challenges as for the alternative she proposes, it may be argued that the cutoff date operates to limit the authority for "employment practice" as it limits authority for the meaning of "alternative employment practice."

114. WEBSTER'S, *supra* note 36, at 1781. Webster's defines "employment" as "work (as customary trade, craft, service, or vocation) in which one's labor or services are paid for by an employer." WEBSTER'S, *supra* note 36, at 743.

can make out a case that the defendant's act that affected her adversely is an employment practice if there is evidence that the action is consistent with the way the defendant usually operates and is not ad hoc or idiosyncratic.[115] To prove an alternative employment policy exists, the plaintiff must also show that other employers either did or could act regularly on the basis of this proposed practice. It is not enough to show that an employer could act on it in some exceptional situations.

Until the *Wards Cove* decision in 1989,[116] in every disparate impact case the Supreme Court found that the challenged practice was an employment practice. Thus, standardized written tests,[117] educational prerequisites,[118] height and weight prerequisites,[119] and employer rules that prohibited the employment of anyone on methadone maintenance[120] were all deemed "employment practices" under

115. From the plaintiff's point of view, this is a situation where the adage, "Never do anything the first time," pays off. If the employer follows its normal practice, it is using an employment practice. Employers would have an incentive to argue that the action the plaintiff challenges was not based on a policy or practice but instead was ad hoc. Ad hoc refers to a first time action: an action based on a specific reason or only used for a specific circumstance.

116. In *Wards Cove*, the Court rejected the attempt to attack the "bottom line" of the employer's workforce statistics using the disparate impact theory, instead requiring the plaintiff to identify a particular employment practice that caused the disparate impact. *See* Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 656-57 (1989) ("Just as an employer cannot escape liability under Title VII by demonstrating that, at the bottom line, his work force is racially balanced, . . . a Title VII plaintiff does not make out a case of disparate impact simply by showing that, at the bottom line, there is racial imbalance in the work force.").

117. *See* Connecticut v. Teal, 457 U.S. 440, 448-49 (1982) (explaining that aptitude tests required for promotion violated Title VII as they adversely impacted black employees); Washington v. Davis, 426 U.S. 229, 234-35 (1976) (finding that pre-hire testing did not adversely affect black applicants); Albemarle Paper Co. v. Moody, 422 U.S. 405, 410-11 (1975) (ruling that standardized tests required for hiring constituted discrimination on the basis of disparate impact); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (holding that promotion requirements in the form of test score prerequisites had a disparate impact on black employees).

118. *See Griggs*, 401 U.S. at 431.

119. *See* Dothard v. Rawlinson, 433 U.S. 321, 328-30 (1977) (finding female applicants for corrections officer positions stated prima a facie case when national statistics showed Alabama's height and weight requirements for such positions excluded over 40% of female applicants but less than 1% of male applicants).

120. *See* New York City Transit Auth. v. Beazer, 440 U.S. 568, 583-87 (1979) (holding that transit authority's policy of excluding methadone users did not violate Title VII, even if statistics showed disparate impact on minorities, because transit authority established policy was job related). The 1991 Act added a new section, 703(k)(3), which exempts employer rules concerning use of illegal drugs from disparate impact attack. *See* 42 U.S.C.A. § 2000e-2(k)(3) (West 1994). Since the methadone

disparate impact discrimination law. In 1988, the United States Supreme Court even went so far as to conclude that an employer's reliance upon the subjective judgment of its supervisors to determine promotions was an employment practice for purposes of disparate impact law.[121] In so holding, it stated that "disparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests."[122]

Prior to the 1991 Act, however, the lower courts limited the scope of the term "employment practice" under disparate impact law. First, the Seventh Circuit found that a change in fringe benefits was not an "employment practice" subject to disparate impact attack under the Age Discrimination in Employment Act.[123] In *Finnegan v. Trans World Airlines, Inc.*[124] an employer in economic difficulty capped all employee paid vacation at four weeks per year.[125] Prior to this cap, vacation benefits increased with seniority; therefore the cap adversely affected older workers.[126] Specifically, this had a disparate impact on older workers who, as a group, generally had more seniority with the company than the group of younger workers.[127] In stating that "*this* case makes no sense in disparate impact terms," Judge Posner held disparate impact inapplicable without exactly basing the decision on whether or not the fringe benefit change was an employment practice.[128] Consequently, the court did not allow a Title VII

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maintenance rule at issue in *Beazer* involved the legal use of drugs, that rule would fall within the disparate impact analysis of section 703(k)(3).

121. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 991 (1988).

122. *Id.* at 990; *see also* Miriam A. Cherry, Note, *Not-So Arbitrary Arbitration: Using Title VII's Disparate Impact Analysis to Invalidate Employment Contracts That Discriminate*, 21 HARV. WOMEN'S L.J. 267, 298-304 (1998) (discussing the applicability of disparate impact analysis to the securities industry's employment practice of requiring mandatory arbitration of employment disputes).

123. *See* Finnegan v. Trans World Airlines, Inc., 967 F.2d 1161, 1164-65 (7th Cir. 1992) (construing the Age Discrimination in Employment Act, 29 U.S.C.A. §§ 621-634 (West 1985 & West Supp. 1998)).

124. *Finnegan*, 967 F.2d at 1161.

125. *See id.* at 1162 (noting that prior to the reduction, employees who had at least 16 years of service were entitled to between four and seven weeks of paid vacation).

126. *See id.*

127. *See id.* (noting that most of the workers having 16 years or more of service were at least 40 years old).

128. *Id.* at 1163. Judge Posner never actually said that a change in fringe benefits was not an "employment practice" but that seems to be the import of his following remarks:

> A company that for legitimate business reasons decides to cut wages across the board, or to cut out dental insurance, or to curtail the use of company cars is not required to conduct a study to determine the impact of the measure on

analysis.[129]

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employees grouped by age and if it is non random to prove that the same amount of money could not have been saved in some different fashion.

Id.

Subsequently, the same court decided that the Age Discrimination in Employment Act requires proof of motive, and thus mere disparate impact cannot be a premise for Age Discrimination in Employment Act liability. *See* EEOC v. Francis Parker Sch., 41 F.3d 1073, 1076-77 (7th Cir. 1994) (declining to employ disparate impact analysis to school's policy of hiring inexperienced—and thus younger—teachers in an effort to decrease salary expenses); *see also* Mack A. Player, *Wards Cove Packing or Not Wards Cove Packing? That is Not the Question: Some Thoughts on Impact Analysis Under the Age Discrimination Employment Act*, 31 U. RICH. L. REV. 819, 842-44 (1997) (stating that the court in *Francis W. Parker School* should have reached the same result under a disparate impact analysis since the employer's economic efficiency may have constituted a "reasonable" factor other than age, and, thus, would not be unlawful under the Age Discrimination in Employment Act). It may be that *Finnegan* is merely a poorly articulated foreshadowing of *Francis W. Parker School.* If so, *Finnegan* may not be saying anything about "employment practices."

129. Had *Finnegan* been a Title VII case, a way to rationalize the result is to analyze it as a section 703(a)(1) case, the language of which differs from section 703(a)(2) and which might be the basis for finding disparate impact inappropriate. Section 703(a)(1) makes it unlawful for the employer to "fail or refuse to hire or discharge any individual, or otherwise *to discriminate* against any individual with respect to his compensation, terms, conditions, or privileges of employment." 42 U.S.C.A. § 2000e-2(a)(1) (West 1994) (emphasis added). If fringe benefits are considered a "condition of employment," the use of the word "discriminate" could be limited to intentional discrimination. In contrast section 703(a)(2) makes it unlawful for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive *or tend to* deprive any individual of employment opportunities or otherwise *adversely affect* his status as an employee." *Id.* § 2002-2(a)(2) (emphasis added). The "tend to" and "adversely effect" language supports the connotation of disparate impact and is not limited to intentional discrimination. *But see* Garcia v. Spun Steak Co., 998 F.2d 1480, 1489,1489-90 (9th Cir. 1993) (analyzing employer practice of requiring bilingual employees to speak English on the job as a section 703(a)(1) issue that is nevertheless subject to disparate impact analysis).

Second, the scope of employment practice is limited by the meaning extended to "practice." "Practice" connotes an active decision by an employer to do something in some way. A mere passive response by the employer to outside stimuli is not an employment practice. Thus, at issue in the second limitation is the employer's active practice and its mere passive response. In *EEOC v. Chicago Miniature Lamp Works,*[130] the employer hired walk-in applicants who heard about job openings from incumbent workers.[131] According to Judge Posner, the disparate impact theory again did not apply because there was no "employer practice."[132] Rather, this was the employer's mere passive acceptance of a practice that included its non-supervisory employees telling their families, friends and acquaintances that the employer was looking to hire new employees.[133] "The [district] court erred in considering passive reliance on employee word-of-mouth recruiting as a particular employment practice for the purposes of disparate impact."[134] Yet, this opinion is arguable because while it may be true that the employer did not establish a "policy"[135] of word-of-mouth recruitment, it is much harder to conclude that the employer did not have a "practice" of hiring by word-of-mouth because that is how, as a matter of course, employees were hired.

In sum, "employment practice" is a very broadly defined term. The breadth of its definition allows a plaintiff to prove rather easily that the employer's adverse action[136] was based on an "employment

130. EEOC v. Chicago Miniature Lamp Works, 47 F.2d 292 (7th Cir. 1991).

131. *See id.* at 295 (noting that employees by "word-of-mouth" would tell their friends and relatives to come to the office to fill out an application).

132. *See id.* at 305.

133. *See id.*

134. *Id.* (explaining the practices instead were undertaken "solely by employees").

135. Webster's defines "policy" as "a definite course or method of action selected . . . from among alternatives and in the light of given conditions to guide and usually determine present and future decisions." WEBSTER'S, *supra* note 36, at 1754.

136. "Adverseness" is occasionally at issue. Generally, plaintiffs only challenge employer practices in claims of national origin discrimination dealing with language issues. In *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993), the plaintiff challenged an employment requirement that bilingual workers speak only English while working. *See id.* at 1486-87. The Ninth Circuit held that, although the challenged policy had an impact, that impact was not adverse because the plaintiffs could easily speak both English and Spanish. *See id.* at 1487. Requiring bilingual employees to speak English was not adverse treatment because it was not a burden to the employees. *See id.* at 1487-88. Specifically, the court said:

> When the privilege [of self-expression] is defined at its narrowest (as merely the ability to speak on the job), we cannot conclude that those employees fluent in both English and Spanish are adversely impacted by the policy. Because they are able to speak English, bilingual employees can engage in

practice."[137] Further, it allows a plaintiff to look broadly for an alternative employment practice that would not affect her adversely but would serve the employer's legitimate interests.[138]

5. All Persons Are Protected Against Individual Disparate Impact Discrimination

Title VII protects all persons against employment discrimination because of race, color, sex, religion, and national origin.[139] That protection extends to disparate treatment discrimination. Yet, section 703(k) does not address whether all persons, including males and whites, are protected against disparate impact discrimination.[140] Therefore, the plain meaning of subsection (ii) supports the conclusion that, like Title VII's prohibition against disparate treatment, the protection against individual disparate impact discrimination extends to all workers, whether or not they belong to a group specially protected by Title VII. Countervailing authority under earlier disparate impact law, however, provides that disparate impact protects against discrimination based on gender, religion, national origin, or minority membership that is specially protected under Title VII. Arguably, this protection does not extend to males and whites. Two arguments best illustrate this point. First, every disparate impact case decided by Supreme Court has involved claims by women or minority men.[141] In

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conversation on the job.

Id.

137. *See supra* notes 113-135 and accompanying text (discussing meaning of the term "employment practice").

138. *See id.* The sources of employment practices that the plaintiff may want to propose as alternatives include what other employers actually do in similar situations, what courts have found to be employment practices, academic and other literature on human resources management, as well as the testimony of academics, consultants and others who are qualified to testify on what is an employment practice.

139. *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278-80 (1976) (stating Title VII prohibits racial discrimination against all races, whether whites or non-whites).

140. *See supra* note 31, 35 and accompanying text (providing the text of section 703(k)(1)(A).

141. *See, e.g.*, Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 647 (1989); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 983 (1988). The closest the Supreme Court has come to addressing other groups under disparate impact was in *Espinoza v. Farah Mfg. Co., Inc.*, where the Court addressed whether alienage was national origin discrimination. 414 U.S. 86 (1973). The Court held that discrimination based on alienage does not violate the Civil Rights Act. Specifically, in *Espinoza*, the Court found that discrimination was not based on origin because the individual was not yet a citizen. This holding, however, noted in dicta that if discrimination occurs based on national origin a disparate impact cause of action does arise. *See id.* at 90.

Griggs v. Duke Power Co., the Court emphasized that Title VII sought "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."[142] Second, in *City of Los Angeles v. Manhart,* the Court suggested that the disparate impact theory was not available to men.[143] In deciding whether equalizing pension benefits and contributions for men and women would have a disparate impact on men who, as a group, do not live as long as women, the Court, in a footnote, addressed the defendant's claim that a gender neutral plan would have a "disproportionately heavy impact on male employees."[144] The Court said that "male employees would not prevail. Even a completely neutral practice will inevitably have *some* disproportionate impact on one group or another. *Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences."[145]

The most powerful reason advanced to limit individual disparate impact protection to members of groups historically victimized by employment discrimination, is that otherwise, every employment practice that adversely affects any worker is vulnerable to a subsection (ii) individual disparate impact action. To prevail under subsection (ii), plaintiffs would only need to show that an alternative employment practice existed that would not adversely affect the plaintiff and that the employer refused to adopt it. This creates an intrusive outcome that damages the operation of business. To extend individual disparate impact protection to all workers would establish a general standard of job security almost as protective as the just cause standard found in collective bargaining agreements and in some other employment situations.[146] Plain meaning, however, would require Congress, not

142. Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

143. City of Los Angeles v. Manhart, 435 U.S. 702, 709 (1978).

144. *Id.* at 710-11 n.20.

145. *See id.*

146. *See* MICHAEL J. ZIMMER, ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 22 (4th ed. 1997). Zimmer provided an overview of the "just cause" standard):

> [J]ust cause protection has two different forms. The first is cause related to the individual in question and focuses on such factors as inadequate job performance, disloyalty, and misconduct or violence. Further, adequate job performance most probably includes regular attendance, a reasonable quantity and quality of work, and obedience to rules, at least reasonable ones, for work performance. But the question is not necessarily "fault." An employee who is repeatedly sick might be subject to discharge no matter how authentic her illness. The second form of just cause focuses on systemic causes related to

the interpreting court, to change section 703(k)(1)(A)(ii) to reflect that policy.[147]

In sum, the first part of subsection (ii) requires that the plaintiff prove that she was adversely affected by an "employment practice," that an alternative practice exists, and that this alternative both would not adversely affect the plaintiff and would serve the employer's legitimate interests. The second part of subsection (ii) individual disparate impact action requires the plaintiff to prove that the employer refused to adopt her proposed alternative employment practice

C. *The Employer "Refuses" to Adopt the Alternative Employment Practice Plaintiff Proposes*

The plaintiff bears the burden of production and persuasion on both parts of a subsection (ii) individual disparate impact action.[148] Therefore, in addition to proving the existence of an alternative employment practice, the plaintiff must also show that the employer "refuses" to adopt the proposed alternative employment practice. Webster's defines the word "refuse" as "to show or express a positive

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> the business, typically involving a large-scale termination of employees in the context of a reorganization or a reduction in force during an economic downturn, including, at the extreme, shutting down entire departments or even plants.

Id. (citation omitted).

While most of the issues associated with just cause could be cast as the employer's use of an employment practice, the individual disparate impact approach requires a plaintiff to also prove the existence of another, alternative employment practice that would not affect her adversely and that would also serve the employer's interests. Because it may be difficult for a plaintiff to prove that an alternative exists, the individual disparate impact would not be as broadly protective as the just cause standard.

147. *See supra* notes 13-17 and accompanying text (discussing the plain meaning approach).

148. *See supra* Part II.A. (discussing the burden of persuasion in actions brought under section 703(k)(1)(A)(ii)).

unwillingness to do or comply with . . . ."[149] According to this meaning, the word "refuse" includes more than the mere failure to use the proposed alternative practice. At a minimum, it connotes the employer's awareness of an alternative practice and a conscious decision to reject it.[150] Further, while "refuse" marks a single moment in time, subsection (ii) actually uses the word "refuses." "Refuses" signifies a continuing refusal to adopt the proposed alternative. As later discussed,[151] this continuing refusal may include at least a future possibility that the employer could change its mind and adopt the policy. If the employer does adopt the proposed alternative practice, it could then no longer be said that the employer "refuses" to adopt the policy.

This refusal element raises several issues. The first concerns the relationship between the refusal element and the first part of subsection (ii).[152] Professor Browne, a critic of Title VII, argues that these two parts are related because both are necessary to establish pretext.[153] Specifically, evidence that an employer knows of a less adverse alternative but refuses to adopt it, supports the inference that the employer used the challenged practice that was neutral on its face as to race or gender to nevertheless hide its intentional discrimination. Thus, under his argument pretext and intentional discrimination remain relevant in section 703(k) disparate impact actions. That approach, however, runs counter to the plain meaning of subsection (ii) individual disparate impact actions because neither pretext nor intent to discriminate exist within the subsection.[154]

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149. WEBSTER'S, *supra* note 36, at 1910.

150. Such awareness may involve intent in some sense but it does not necessarily include discriminatory intent. That would only be implicated if there was evidence to support a reasonable inference that the employer refused to adopt the alternative because it used the challenged practice for its discriminatory effect. *See* Personnel Adm'r v. Feeney, 442 U.S. 256, 278-80 (1979) (finding Massachusetts' preference for hiring veterans in civil service positions not unlawful, even though practice had adverse impact on women, as to have "discriminatory purpose" employer must act "because of" not "in spite of" adverse effects).

151. *See infra* text accompanying notes 159-161 (discussing effect of word "refuses" in statute).

152. The first part of subsection (ii) provides: "the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice . . . ." 42 U.S.C.A. § 2000e-2(k)(1)(A)(ii) (West 1994).

153. *See* Browne, *supra* note 9, at 373.

154. *See supra* text accompanying notes 77-89 (discussing pretext under section 703(k)(1)(A)(ii)).

Plain meaning further rejects a second argument. Rosemary Alito seems to assume that, when an employer refuses to adopt the alternative, the employer not only knows the existence of the proposed alternative, but also knows that the challenged current practice or policy causes a disparate impact.[155] This argument depends upon the duty to show the employer's knowledge of disparate impact in a subsection (ii) cause of action. The plain meaning, however, of subsection (ii) does not include this element.[156] Rather, the employer's knowledge about the existence of an alternative employment practice and its refusal to use it are relevant.

Further, Alito seems to assume that subsection (ii) is violated only if the plaintiff has specifically proposed the alternative to the employer who then refuses to adopt it.[157] While typically this refusal is only manifested after the plaintiff has suggested her proposed alternative, section 703(k)(1)(A)(ii) language does not require the plaintiff to show that she proposed the alternative to the employer who then refuses to adopt it. Under plain meaning, subsection (ii) is violated when the employer knows of the alternative, from whatever source (including but not limited to plaintiff's proposal of it), and refuses to adopt it. The source who reveals this alternative is not relevant in a subsection (ii) individual disparate impact action.

To elaborate, the first part of subsection (ii), that the plaintiff prove the existence of an alternative practice, and the second part, the employer's refusal to adopt it ; are joined by the word "and." The use of "and" makes clear that the plaintiff must prove both parts to

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155. *See* Alito, *supra* note 27, at 1040. In the context of alternative employment practices, Alito described the burden of proof:

> [An] open question with respect to the alternative practice mode of proof is precisely when a plaintiff must reveal the availability of the purported alternative, and when a defendant will be deemed to have refused to adopt it. In some respects it would seem preferable for the plaintiff to make his showing at the time of filing the charge or even before filing where possible. This course would have the clear advantage of affording the employer a real opportunity to consider and adopt the alternative, outside the combative atmosphere of litigation and without the expense litigation entails for all concerned. The difficulty with this course, on the other hand, is the likely inability of a plaintiff to make a showing of disparate impact sufficient to convince an employer that an alteration of his practices is necessary without the aid of an EEOC investigation or pretrial discovery. Moreover, in the absence of a satisfactory showing of disparate impact, the employer should not be penalized for a refusal to adopt the alternative.

Id.

156. *See supra* text accompanying notes 77-89.

157. *See supra* note 155.

establish liability.[158] The two parts of subsection (ii) are only linked by the fact that both parts must be proved by the plaintiff. Each is a simple factual question. Neither pretext nor disparate impact plays any role in the proof of a subsection (ii) action. Rather, the refusal element seems straightforward: knowing the existence of the alternative, the employer refuses to use it.

Congress' choice of the word "refuses" rather than "refused" in subsection (ii) is problematic. It seems clear that once the employer is aware of the alternative employment practice but decides not to use it, it can be said the employer "refuses" to use the alternative. At that point, the refusal issue of a subsection (ii) individual disparate action is satisfied. Yet, it is problematic because it may be only conditionally satisfied. The employer can change its mind, adopt the alternative and undermine the subsection (ii) violation. It is undermined because it is no longer true that the employer "refuses" to adopt the plaintiff's proposed practice.[159] Under subsection (ii)'s literal meaning, an employer could steadfastly refuse to adopt the plaintiff's proposed alternative until the verge of trial, during trial, or even after trial.[160] This late adoption by the employer may then undermine the plaintiff's case because once the employer uses the practice it is no longer true that the defendant "refuses" to adopt the alternative. Therefore, the plaintiff cannot make a prima facie case.

This problem is best illustrated through the difference between undermining a plaintiff's case and rendering a plaintiff's case moot. In general litigation law, a defendant can, at any point before final judgment, end the litigation by providing a full remedy to the plaintiff. This full remedy renders the action moot. If subsection (ii) used the word "refused," the employer could moot the action if it put the plaintiff in the situation she would have been in if the defendant never

158. Webster's defines "and" as "along with, or together with" and "added to or linked to." WEBSTER'S, *supra* note 36, at 80.

159. One effect of this odd choice of words by Congress is that the use of "refuses" reinforces the plain meaning conclusion that the two parts of subsection (ii) are separate factual questions that are not closely linked to each other. While the employer must have known of the existence of the alternative for one to be able to conclude the employer refused to adopt such alternative, the exact factual issue is that the employer "refuses" to adopt it. *See supra* notes 148-51 and accompanying text. A refusal at one point in time is a necessary but not sufficient condition for a subsection (ii) action because of the possibility that the employer could later change course and adopt the practice it had previously decided not to use. At that point, it can no longer be said that the employer still "refuses" to adopt it and so subsection (ii) is no longer violated.

160. Presumably, after final judgment against a defendant, a change of mind of the defendant would be too late to effect the validity of the judgment.

used its employment practice to her disadvantage. Nonetheless, because Congress used the word "refuses," the employer can undermine the plaintiff's case at any time until judgment in her case becomes final.

Plain meaning supports the regular use of language if its use is not absurd or clearly a slip of the scrivener's pen.[161] To define a cause of action so that the defendant can undermine a plaintiff's case at any point until final judgment is unusual, maybe even unprecedented, but it is not necessarily absurd. While one goal of anti-discrimination law is to make victims whole,[162] another goal is to break down barriers to equal employment opportunity.[163] The plain meaning interpretation of subsection (ii)'s "refuses" language would serve this latter goal, even if the goal of making victims whole is not fully satisfied. It would be difficult to find the situation absurd where the odd use of the word "refuses" nevertheless satisfies one goal of a law, even if it does not meet all of a law's purported goals. A stronger case, however, may be made that the use of "refuses" rather than "refused" is a scrivener's error since the use of "refuses" or "refusal" involves the change of only one letter in one word.[164] Regardless of this argument, subsection (ii) makes sense despite the use of "refuses" in its ordinary sense.

III. RELATING A SUBSECTION (ii) INDIVIDUAL DISPARATE IMPACT CASE WITH OTHER TITLE VII CLAIMS

Suppose Alex Wesley is discharged by Cytron Incorporated allegedly because of excessive tardiness. How would Alex's discharge be analyzed under various theories of discrimination, including the new subsection (ii) individual disparate impact action?

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161. *See* ESKRIDGE, *supra* note 14, app. 3 at 323 (footnotes omitted) (stating that the plain meaning canon mandates "[f]ollowing the plain meaning of the statutory text, except when text suggests an absurd result or a scrivener's error."); *see also supra* notes 13-17 and accompanying text.

162. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (noting that one purpose of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination.").

163. *See* Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) (explaining that the objective of Congress in enacting Title VII was "to achieve equality of employment opportunities and remove barriers that have operated to favor an identifiable group of white employees.").

164. *See, e.g.*, Green v. Bock Laundry Mach. Co., 490 U.S. 504, 529 (1989) (Scalia, J. concurring) (interpreting a Federal Rule of Evidence as if Congress had inadvertently left out the qualification "criminal" as modifying "defendant").

A. A Subsection (i) Group Disparate Impact Action

Under a subsection (i) group disparate impact action, to qualify for a group disparate impact action Wesley would likely need to be a woman or a minority male.[165] Cytron's excessive tardiness discharge policy or practice is an employment practice for disparate impact purposes.[166] Wesley, however, would have to show that she is a member of a Title VII protected group and that this practice had a disparate impact on his group.[167] If Wesley is within one of these groups, more specifically if she is a minority and from a lower income household, her action is more likely to succeed because data is available to support the fact that people with lower incomes have more trouble with child care and transportation given their economic status. If a prima facie case were established, then the group disparate impact case would depend upon Cytron's ability to prove that its excessive tardiness discharge practice was job related and consistent with business necessity.[168] The regular and timely attendance of workers is a business necessity. Therefore, at issue is whether the tardiness discharge policy is "job related for the position in question." While perfect attendance is not necessary for some jobs, the employer's practice of discharging for excessive tardiness would still likely qualify as "job related." Accordingly, Wesley would probably lose a subsection (i) group disparate impact action.

B. An Individual Disparate Treatment Action

Title VII protects all workers from employment discrimination.[169] Theoretically, Wesley has an individual disparate treatment action regardless of his or her class status under Title VII. As intent to discriminate is the key element of a disparate treatment action,[170] Wesley would have to introduce evidence sufficient for a fact finder to

165. *See supra* text accompanying notes 139-147 (noting the historic limitation of disparate impact protection to women and minorities).

166. *See supra* text accompanying notes 116-138 (providing a discussion of the meaning of the term "employment practice").

167. *See supra* text accompanying notes 90-93 (discussing early disparate impact focus on Title VII groups).

168. *See supra* text accompanying notes 26, 29 (noting employer's burden to establish employment practice was job related and consistent with business necessity).

169. *See supra* text accompanying note 139 (stating Title VII's coverage).

170. *See* St. Mary's Honor Ctr v. Hicks, 509 U.S. 502, 514 (1993) (stating that, in a Title VII disparate treatment case, the plaintiff bears the ultimate burden of persuasion on the issue of the employer's intent to discriminate, and that it is not enough to show that the employer's reason for the adverse employment action is not credible).

infer that Wesley was discharged because of race, color, religion, sex, or national origin. Absent "smoking gun" evidence that Cytron fired Wesley because of race, gender or other basis proscribed by Title VII,[171] success will be difficult. Some evidence to overcome these obstacles may exist if Wesley is a member of a group historically victimized by discrimination.[172] Additionally, evidence, such as proof that some white male workers were excessively tardy but were not discharged, is also helpful. This uphill battle might be successful if a trier could conclude that the excessive tardiness discharge was in fact a pretext for discrimination.

While proof of an individual disparate treatment claim may prove daunting, the 1991 Act added incentives for plaintiffs to cast their claims as intentional discrimination. This is true because new section 42 U.S.C. § 1981(a) provides compensatory and punitive damages, subject to caps, as well as the right to a trial by jury, in Title VII claims against a defendant "who engaged in unlawful intentional discrimination . . . ."[173] This right does not accrue where disparate impact renders an employment practice unlawful.

C. A Subsection (ii) Individual Disparate Impact Action

Although compensatory and punitive damages are not available in a subsection (ii) individual disparate impact action, this action is not without incentives. Specifically, Wesley has an incentive to raise this claim because a plaintiff is not required to prove the employer's intent to discriminate.[174]

With the burden of production and persuasion on the plaintiff throughout,[175] subsection (ii) first demands that Wesley prove Cytron

171. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 256 (1989) (finding, in a sex discrimination case, the employer's statements concerning gender stereotypes were "direct" evidence of intent to discriminate).

172. Since women, minority men, and members of certain other groups have historically been victims of discrimination, it is reasonable to draw an inference of discrimination where plaintiff demonstrates her adverse treatment was not based on the "most common legitimate reasons on which an employer might rely" without discrimination. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977) (stating that the elimination of the most common legitimate reasons upon which an employer may reject a job applicant "is sufficient, absent other explanation, to create an inference that the decision was a discriminatory one.").

173. 42 U.S.C. § 1981a(a)(1) (West 1994) (providing right of recovery of damages against an employer for intentional discrimination).

174. *See supra* text accompanying notes 77-89 (stating employer's state of mind is not an element of the new section 703(k)(1)(A) action).

175. *See supra* text accompanying notes 52-56 (noting plaintiff's burden).

based its adverse action on an employment practice.[176] Cytron's stated reason for the discharge, excessive tardiness, easily satisfies this burden. Discharging employees for excessive tardiness is clearly an employment practice. Having stated its reason for discharging Wesley, Cytron's ability to prove an alternative reason for the discharge would be difficult. Additionally, it would be equally challenging to assert the decision was ad hoc. This is also strategically difficult because ad hoc decisions are more likely intentional discrimination and made pursuant to the employer's general employment practice.

Under the first part of subsection (ii) Wesley must also prove that an "alternative employment practice" exists that serves the employer's interests and does not adversely affect the plaintiff.[177] Finding this alternative practice may prove daunting. For example, if Wesley worked alone on the night shift as a clerk in a convenience store, Cytron may not be able to find an alternative that serves its interests. If, however, Wesley's job does not involve such restrictive elements, an alternative to the employer's excessive tardiness rule might be available with flexible scheduling regimes that allow employers to cover all job assignments while also solving problems for employees like Wesley. For example, if Cytron's work hours conflict with child care or school starting times, an employment practice incorporating flexible starting times might serve Cytron's interests and eliminate the adverse affect of the excessive tardiness rule.

Undoubtedly, Cytron would argue that a flexible scheduling practice would not serve its interests. Employers can satisfy their own interests without adversely affecting an individual employee by granting an exception from a general practice. Yet, granting an individual exception to a general rule may not qualify as an "alternative employment practice" because the employer may successfully argue that accommodating more than a few employees would not serve its interests.

If, however, Cytron agrees with the practice, it likely has one simple defense. The unusual usage in subsection (ii) of the term "refuses" signifies that the employer can apparently terminate the plaintiff's subsection (ii) case at any time by adopting the proposed alternative practice. In doing so, the employer no longer "refuses" to

176. *See supra* text accompanying notes 113-138 (discussing broad meaning of "employment practice").

177. *See supra* text accompanying notes 111-12, 138 (commenting on the alternative employment practices).

adopt the policy and this defeats any basis for disparate impact liability pursuant to section 703(k)(1)(A)(ii).

IV. CONCLUSION

Section 703(k)(1)(A)(ii), which was added to Title VII by the Civil Rights Act of 1991, is the source of an important new cause of action for individual disparate impact discrimination. Given its plain meaning, subsection (ii) creates a simple and straightforward cause of action if the plaintiff can prove that she was adversely affected by the defendant's employment practice, that an alternative practice exists that would serve the defendant's legitimate interests, and that the defendant refuses to use it. Valuable in its own right, subsection (ii) actions are also useful adjuncts to disparate treatment actions in an era where disparate treatment cases are difficult to prove.

Nevertheless, the defendant-employer may be able to defeat the plaintiff's case in a number of ways. For instance, the defendant may show the challenged employment practice is not actually a practice but an ad hoc decision. Further, the defendant may be able to show the plaintiff's proposed alternative employment practice does not serve its interests. Finally, at any point during the litigation, prior to final judgment, the defendant may adopt the alternative, thus no longer refusing to adopt such alternative.