NOTES

WORD-OF-MOUTH RECRUITING: WHY SMALL BUSINESSES USING THIS EFFICIENT PRACTICE SHOULD SURVIVE DISPARATE IMPACT CHALLENGES UNDER TITLE VII

Tobin M. Nelson[*]

Joe's Widget Company, a sole proprietorship specializing in manufacturing and selling widgets to businesses and consumers, operates in a small community in the Midwest. Joe started the company eighteen years ago out of his own garage with a five thousand dollar loan from his father and a single employee in his brother. Within two decades, Joe's had sales exceeding four million dollars annually and sold its widgets to customers in three different countries and twelve states. With twenty-one employees, Joe's had become one of the community's fifteen largest employers.[1]

However, the historical success of this small business is being threatened by its present economic environment. Over the last few years, competition in the widget industry has become fierce. Several foreign widget manufacturers have used e-commerce to successfully penetrate the American widget market. Due to significantly cheaper labor overseas, these foreign manufacturers have a strong competitive advantage over domestic widget manufacturers. In response, many domestic manufacturers have moved their manufacturing operations overseas to take advantage of the lower wage rates, a capability Joe

---

* The author is a J.D. and M.B.A. candidate at the University of Pittsburgh's School of Law and Joseph M. Katz Graduate School of Business. He will receive his degrees in December 2007. The author wishes to thank Benjamin E. Bratman, Associate Professor of Legal Writing at the University of Pittsburgh School of Law, for his guidance and scholarly feedback during the preparation of this note.

1. An employer is not bound by the requirements of Title VII unless it employs fifteen or more employees. 42 U.S.C. § 2000e(b) (2005).

feels he does not possess as a small manufacturer. Furthermore, WidgMart, a discount widget producer known internationally for "choking" its suppliers for the lowest possible price in order to offer retail customers the absolute lowest price, recently opened a store near Joe's community. By offering these low prices, WidgMart is notorious for quickly putting small local competitors out of business. Moreover, due to skyrocketing healthcare costs, Joe is not sure if he can continue to offer his employees health insurance while keeping the company above water. If he stops offering health insurance, Joe knows that several of his most valuable and loyal employees will be forced to seek employment elsewhere in order to insure themselves and their families. Times are very difficult for Joe's Widget Company.

Despite these difficulties, due to a new production contract and a current employee who wants to switch to part-time, Joe needs to hire another employee. Historically, Joe has actively encouraged and exclusively used a word-of-mouth recruitment system in order to attract and hire new employees. Joe's only reasons for the policy are that it is a cost-free method of recruiting employees and has previously resulted in a very efficient and reliable workforce. Joe has never considered racial animus a motivation for the policy. Because Joe's current employees are all white, this system increases the chances that prospective employees will likewise be white since employees of a certain race are more likely to recommend friends and family of the same race than persons of a different race.[2] Joe's local attorney has cautioned him that continuing this recruitment policy could potentially result in liability under Title VII through a disparate impact legal theory.[3] Because the company's workforce is composed entirely of white workers and the surrounding community has a twenty-percent minority population, Joe's attorney advised him that he potentially could be forced to adopt other recruitment policies that require a greater investment of capital and time.

---

2. *See* Thomas v. Wash. County Sch. Bd., 915 F.2d 922, 925 (4th Cir. 1990) (holding that nepotistic and similar practices in a predominantly white work force may operate to exclude outsiders); Jean Powell Kirnan et al., *The Relationship Between Recruiting Source, Applicant Quality, and Hire Performance: An Analysis by Sex, Ethnicity, and Age*, 42 PERSONNEL PSYCHOLOGY 293, 295 (1989) (noting that "current employees would most often refer applicants like themselves").

3. *See* 42 U.S.C. § 2000e-2(k)(1)-(3) (2005). Numerous employment practice materials warn against the use of word-of-mouth recruiting as an exclusive means of filling job vacancies. *See, e.g.*, *Word-of-Mouth Recruiting*, 5 EMPLOYMENT COORDINATOR § 39:31 (2006), *available at* EMPC Employment 39:31 (Westlaw); Louis A. Jacobs & Andrew J. Ruzicho, *Communicating About Openings By Word-of-Mouth*, 1 EMPLOYMENT PRACTICES MANUAL § 4:1 (2006), *available at* 1 EMPPM 4:1 (Westlaw); STEVEN KAHN & BARBARA BERISH BROWN, LEGAL GUIDE TO HUMAN RESOURCES § 2:17 (2006), *available at* LGHR 2:17 (Westlaw).

However, the extreme competition that Joe's Widget Company currently faces, Joe fears that a costly policy change could force the company into bankruptcy.

An employer violates Title VII when he "fail[s] or refuse[s] to hire . . . 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."[4] Congress's primary goal in enacting Title VII was to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[5] Title VII causes of action arise under both "disparate treatment" and "disparate impact" theories. Disparate *treatment* theories proscribe overt discrimination by requiring proof of employer intent or facts from which the court can infer discriminatory intent.[6] On the other hand, disparate *impact* theories make it unlawful for employers to make use of practices that are neutral on their face and in terms of intent, but that discriminate in their operation.[7]

Generally, word-of-mouth recruitment is the cheapest form of employee recruitment since it is essentially costless.[8] Furthermore, under certain circumstances, this form of recruitment may also be the most efficient and effective practice for an employer.[9] For instance, new employees procured through existing employees' referrals are generally more likely to have an accurate picture of the current status of the business, its working conditions, and the organization's norms than employees acquired through methods unconnected to the business, such as through employment agencies or newspaper advertisements.[10] Additionally, existing employees are unlikely to refer persons who would not be a good fit within the organization because an

---

4. 42 U.S.C. § 2000e-2(a)(1) (2005).

5. Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975).

6. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 645-49 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* Raytheon Co. v. Hernandez, 540 U.S. 44 (2003).

7. *Griggs*, 401 U.S. at 430-33.

8. *See* EEOC v. Consol. Serv. Sys., 989 F.2d 233, 235 (7th Cir. 1993) ("If an employer can obtain all the competent workers he wants, at wages no higher than the minimum that he expects to have to pay, without beating the bushes for workers—without in fact spending a cent on recruitment—he can reduce his costs of doing business by adopting [word-of-mouth recruitment]."); Kerri Koss Morehart, *How to Create an Employee Referral Program That* Really *Works*, HRFOCUS, Jan. 2001, at 3 (stating that employee referral programs lead to the lowest cost per hire of all recruitment methods).

9. *See Consolidated*, 989 F.2d at 236; discussion *infra* Part III.

10. *Consolidated*, 989 F.2d at 236.

unworkable relationship between the employer and the referred employee only reflects poorly upon the existing employee.[11] Therefore, besides being much cheaper than alternative recruitment methods, the result of word-of-mouth recruitment may often be a better informed pool of new employees who are more likely to be a good match within the organization.[12] Yet a few circuit courts of appeals have either fashioned or instructed district courts to fashion remedies that require employers to pursue more expensive, and possibly less efficient, recruitment methods.[13]

Efficiency has been accepted by at least one court as a sufficient employer justification in rebutting a plaintiff's prima facie case in the disparate treatment context,[14] but not yet in the disparate impact context.[15] This article addresses why, under certain narrow circumstances,[16] a small business should be able to successfully rebut a plaintiff's disparate impact prima facie case based on efficiency and cost arguments, and thereby lawfully maintain a word-of-mouth recruiting practice as its primary or exclusive method of employee recruitment.

Part I of this Note examines the current status of the disparate impact framework and the confusion surrounding an employer's burden in demonstrating business necessity under Title VII. Part II scrutinizes the active versus passive word-of-mouth practice distinction and describes the circumstances under which employees have failed to successfully demonstrate that word-of-mouth recruiting is a "particular employment practice." The effect of the Seventh Circuit's decision in *EEOC v. Consolidated Service Systems*[17] on how the efficiency of word-of-mouth practices plays a role in Title VII analyses is the focus of Part III. Lastly, this Note concludes that, when a small business is under extreme competitive pressures and word-of-mouth recruitment is the most efficient and effective method of recruitment,

---

11. *Id.*

12. *Id.*

13. *See, e.g.*, Thomas v. Wash. County Sch. Bd., 915 F.2d 922, 926 (4th Cir. 1990) (instructing the district court to award an injunction requiring the school board to publicly advertise vacancies); United States v. Ga. Power Co., 474 F.2d 906, 926 (5th Cir. 1973) (holding that the employer's word-of-mouth recruiting practice must be supplemented or changed, and encouraging public advertising).

14. *See* EEOC v. Consol. Serv. Sys., 989 F.2d 233, 236 (7th Cir. 1993).

15. *See, e.g.*, EEOC v. Andrew Corp., No. 81 C 4359, 1989 WL 134001, at *6 (N.D. Ill. Sept. 12, 1989) (rejecting an employer's argument that it should not be forced to adopt more costly recruiting procedures since word-of-mouth recruitment attracted enough sufficiently qualified applicants).

16. *See* discussion *infra* Part IV.

17. 989 F.2d 233 (7th Cir. 1993).

the small business should not be vulnerable to employees' disparate impact claims under Title VII.

I. DISPARATE IMPACT FRAMEWORK

Disparate impact claims do not require any evidence of an employer's discriminatory intent or motivation.[18] Therefore, an employer's facially *neutral* employment practices that in operation have significant adverse effects on protected groups may still violate Title VII.[19] The motivation behind the Supreme Court's interpretation of disparate impact theories is that certain employment practices that appear to lack deliberately discriminatory motives "may in operation be functionally equivalent to intentional discrimination."[20]

The disparate impact framework entails a burden-shifting analysis that is common in Title VII causes of action.[21] The employee's prima facie case involves a three-prong analysis first formulated in part by the Supreme Court in *Griggs v. Duke Power Co.*[22] In order to make out a prima facie case, the employee must "demonstrate[] that a[n] [employer] uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin . . . ."[23] Therefore, the employee must identify a *specific* employment practice and demonstrate that the identified practice *causes*[24] a disparate impact on a protected group. The burden then shifts to the employer to demonstrate "that the challenged practice is job related for the position in question and consistent with business necessity."[25] If the employer satisfies this burden, the employee may still prevail by demonstrating that an

---

18. Coleman v. Sch. Bd. of Richland Parish, 418 F.3d 511, 520 (5th Cir. 2005).

19. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 645-49 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* Raytheon Co. v. Hernandez, 540 U.S. 44 (2003).

20. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988) (plurality opinion).

21. *See* Cengr v. Fusibond Piping Sys., 135 F.3d 445, 451 (7th Cir. 1998) (observing the common use of the burden-shifting approach for Title VII cases originally laid out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973)).

22. 401 U.S. 424, 431 (1971).

23. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2005). The three prongs can succinctly be labeled: (1) particular employment practice, (2) causation, and (3) disparate impact.

24. This causal relationship between the identified employment practice and the disparate impact is usually proven through statistics. However, the "statistical disparities must be sufficiently substantial that they raise such an inference of causation." *Watson*, 487 U.S. at 994-95.

25. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2005); *Griggs*, 401 U.S. at 431.

alternative employment practice has a lesser disparate impact and would also serve the employer's legitimate business interests.[26]

The interpretation of the business necessity defense, the second phase in the disparate impact analysis, has often been a matter of debate.[27] In a landmark disparate impact case, the Supreme Court in *Griggs* interpreted the business necessity prong as requiring the employer to show that the particular employment practice has a "manifest relationship to the employment in question."[28] Eighteen years later, the Court appeared to require a lesser burden in *Wards Cove Packing Co. v. Atonio*.[29] This burden merely required that the employer demonstrate that the business practice "serve[d], in a *significant* way, the legitimate employment goals of the employer."[30] In response, Congress passed the Civil Rights Act of 1991.[31] While the Supreme Court has not ruled on the business necessity doctrine since the Act was passed, most courts have interpreted this legislation as codifying the *Griggs* "business necessity" standard.[32] Therefore, an employer must now go beyond the *Wards Cove* interpretation by demonstrating that the employment practice has a "manifest relationship to the employment in question."[33]

Even though the *Griggs* standard appears to have prevailed after the Civil Rights Act of 1991, courts have since interpreted this standard in different ways. For instance, in *Lanning v. Southeastern Pennsylvania Transportation Authority*, the Third Circuit strictly interpreted the *Griggs* standard as requiring an employer to demonstrate that the employment practice "measures the minimum qualifications necessary for successful performance of the job in question."[34] However, in *Rosser v. Pipe Fitters Local 392*, the Sixth Circuit accepted the employer's proffered business necessity justification for a name-

---

26. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977).

27. *See* Lanning v. Southeastern Pa. Transp. Auth., 181 F.3d 478, 486-87 (3d Cir. 1999).

28. 401 U.S. at 432.

29. 490 U.S. 642, 645-49 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* Raytheon Co. v. Hernandez, 540 U.S. 44 (2003) (stating that "[a] mere insubstantial justification . . . will not suffice . . . [but] there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster . . . .").

30. *Wards Cove*, 490 U.S. at 659 (emphasis added).

31. *Lanning*, 181 F.3d at 487.

32. *See, e.g.*, *Lanning*, 181 F.3d at 488 (holding that "Congress intended to endorse the business necessity standard enunciated in *Griggs* and not the *Wards Cove* interpretation of that standard"); Davey v. Omaha, 107 F.3d 587, 591 (5th Cir. 1997) (holding that "Congress intended to codify the standard enunciated by the Supreme Court in *Griggs v. Duke Power Co.* . . . .").

33. *Griggs*, 401 U.S. at 432.

34. 181 F.3d 478, 489 (3d Cir. 1999).

request provision allowing contractors to request members of the union by name.[35] The court explicitly noted that "[e]fficiency may constitute a valid business justification."[36] Therefore, while both courts cited *Griggs* as the appropriate standard, *Lanning* appears to hold that the employment practice must be absolutely necessary to the ongoing nature of the business, but *Rosser* appears to apply a lesser burden based on the relative efficiency of the employment practice and the importance of the employment practice to the business. Although the *Griggs* standard has been applied somewhat differently by courts, it is settled law that the "business necessity" rebuttal to the disparate *impact* prima facie case requires a greater showing than the "legitimate, nondiscriminatory reason"[37] rebuttal to the disparate *treatment* prima facie case.[38]

II. WORD-OF-MOUTH POLICIES AS PARTICULAR EMPLOYMENT PRACTICES

Under the above framework, employees challenging an employer's word-of-mouth recruiting methods must first successfully argue that the method is a "particular employment practice."[39] In *EEOC v. Chicago Miniature Lamp Works*, the Seventh Circuit held that a word-of-mouth recruiting practice undertaken solely by employees and only passively relied upon by the employer is not a "particular employment practice" under a Title VII disparate impact theory.[40] The challenged employer relied almost exclusively on word-of-mouth in order to fill positions within the organization, but never told or encouraged existing employees to pursue this form of recruitment.[41] At least

35. No. 92-3016, 1993 WL 498220, at *6 (6th Cir. Dec. 3, 1993) (unpublished table decision).

36. *Id.* at *5 (citing Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1262 (6th Cir. 1981), a pre-*Wards Cove* decision that interpreted the *Griggs* standard as requiring only that "the practice must substantially promote the proficient operation of the business").

37. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981).

38. *See, e.g.*, Thomas v. Metroflight, Inc., 814 F.2d 1506, 1509 (10th Cir. 1987) (quoting Williams v. Colorado Springs, Colorado, School District No. 11, 641 F.2d 835, 842 (10th Cir. 1987) (holding that the employment practice must go beyond being a legitimate, nondiscriminatory reason and instead be essential with a compelling purpose)); Lewis v. Bloomsburg Mills, Inc., 773 F.2d 561, 571-72 (4th Cir. 1985) (holding that the legitimate, nondiscriminatory reason burden is a "much less burdensome defensive riposte").

39. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2005).

40. 947 F.2d 292, 305 (7th Cir. 1991). *See also* Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 867 n.46 (D. Minn. 1993) (holding that, pursuant to *EEOC v. Chicago Miniature Lamp Works*, passive reliance on word-of-mouth recruitment is not actionable under a disparate impact theory).

41. *Chi. Miniature Lamp Works*, 947 F.2d at 295.

in the Seventh Circuit, "a more affirmative act by the employer must be shown in order to establish causation."[42]

However, where the employer actively encourages a word-of-mouth recruiting practice or policy that is shown to cause a disparate impact on a protected class, the plaintiff will likely establish his or her prima facie case.[43] For instance, where an employer concedes that word-of-mouth communication is vital to the company's hiring outcomes and distributes different applications based on whether or not the applicant was referred by existing employees, the employer goes beyond being a passive participant in the practice and is potentially subject to liability under a disparate impact theory.[44] Likewise, where an employer has a word-of-mouth policy, actively encourages its primarily white workforce to announce vacancies, and only advertises in newspapers aimed predominantly at white suburban markets, the employer is an active participant in the practice.[45]

Therefore, assuming the employee can show through statistics that a word-of-mouth practice causes a disparate impact on a protected class, an employer that actively encourages its employees to refer their peers for job vacancies or establishes a written policy mandating or encouraging such a practice may be required to show a business necessity for the practice under the burden-shifting disparate impact framework.[46] If the employer is an active participant in the practice, the plaintiff may successfully prove his or her prima facie case. Employers that actively and solely rely upon word-of-mouth recruiting practices must be prepared to defend these employment practices by demonstrating sufficient evidence that the practices "have a manifest relationship to the employment in question"[47] and therefore are required by

---

42. *Id.* at 305.

43. *Id.*

44. Gaines v. Boston Herald, Inc., 998 F. Supp. 91, 98-99 (D. Mass. 1998).

45. EEOC v. Andrew Corp., No. 81 C 4359, 1989 WL 134001, at *4 (N.D. Ill. Sept. 12, 1989). *See also* Mont. Rail Link v. Byard, 860 P.2d 121, 134 (Mont. 1993) (holding that an employer's word-of-mouth policy that functioned to favor men satisfied the plaintiff's initial burden).

46. If an employer makes use of other recruitment methods besides word-of-mouth practices, such as advertisements or employee referral programs, the employer is far less likely to be susceptible to Title VII liability. Courts are more likely to be sympathetic to the employer's cause, and the employer has a better chance of having a workforce more representative of the population. *See Word-of-Mouth Recruiting*, *supra* note 3 (recommending that employers make use of walk-in applications, advertising, or state employment agencies along with word-of-mouth recruiting); KAHN & BROWN, *supra* note 3 ("Where employee referral is only one of many means of recruitment and not the principal source of applicants, there is far less risk of perpetuating prior [discriminatory] patterns.").

47. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

business necessity, an argument that no employer has yet successfully made on disparate impact claims in federal court.[48]

While Joe's Widget Company has not established a written word-of-mouth recruitment policy, by merely encouraging its employees to refer applicants for vacant positions, it would probably be forced to satisfy the rigorous *Griggs* business necessity standard. Joe's admits to actively encouraging its employees to undertake this form of recruitment. This fact alone goes well beyond the defendant's actions in *Chicago Miniature Lamp Works*. Therefore, in this instance, a challenging plaintiff would likely satisfy the "particular employment practice" component of the prima facie case, thereby deeming Joe's an *active* participant by encouraging the word-of-mouth recruitment. Furthermore, Joe's solely relies upon word-of-mouth recruitment. Given the current racial composition of Joe's workforce and the surrounding community, a plaintiff challenging Joe's recruitment practice would probably establish causation and disparate impact, forcing Joe's to undertake the costly endeavor of defending its recruitment practice as "consistent with business necessity."[49]

III. BUSINESS NECESSITY—EFFICIENCY ARGUMENT AFTER *EEOC V. CONSOLIDATED SERVICE SYSTEMS*

If an employer is an active participant in the word-of-mouth practice, and, as a result, the plaintiff is able to make a prima facie case of disparate impact, the burden then shifts to the employer to prove that the practices are consistent with business necessity.[50] Therefore, an employer that encourages word-of-mouth recruiting and is motivated solely by matters of cost savings and efficiency must be capable of arguing that this practice bears "a manifest relationship to the employment in question."[51]

In *EEOC v. Consolidated Service Systems*, an opinion authored by Judge Richard Posner, the Seventh Circuit recognized and accepted an employer's

---

48. *See* EEOC v. Andrew Corp., No. 81 C 4359, 1989 WL 134001, at *4 (N.D. Ill. Sept. 12, 1989) (rejecting the defendant's argument that business necessity required it to recruit through word-of-mouth practices). However, an employer has successfully rebutted a disparate treatment *prima facie* case based on efficiency arguments. *See* EEOC v. Consol. Serv. Sys., 989 F.2d 233 (7th Cir. 1993); discussion *infra* Part III. *See also Byard*, 860 P.2d at 134 (accepting an employer's proffered justification that the word-of-mouth recruiting practice was necessary where the employer had to hire a large number of employees in a relatively short period of time).

49. *Griggs*, 401 U.S. at 431.

50. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2005).

51. *Griggs*, 401 U.S. at 432.

assertion of the efficient results of its word-of-mouth recruiting practice in rebuttal of a plaintiff's prima facie showing in a disparate *treatment* case.[52] In *Consolidated*, a small laundry business with annual sales of $400,000 and owned by a Korean immigrant relied mainly on a word-of-mouth recruitment practice to obtain new employees.[53] The result of this practice was a 73% Korean applicant pool and an 81% Korean workforce in the Chicago area.[54] Despite this practice, the Seventh Circuit refused to infer that the employer *intentionally* discriminated on the basis of race in order to be liable under a disparate treatment theory.[55] Because the employer showed that this form of recruitment was the most *efficient* method of recruitment, the court accepted this legitimate, nondiscriminatory reason as successfully rebutting the plaintiff's prima facie case.[56] Regarding the efficiency of word-of-mouth recruiting, Judge Posner remarked:

> We said [word-of-mouth recruitment] is the cheapest method of recruitment. It may also be highly effective in producing a good work force. There are two reasons. The first is that an applicant referred by an existing employee is likely to get a franker, more accurate, more relevant picture of working conditions than if he learns about the job from an employment agency, a newspaper ad, or a hiring supervisor. The employee can give him the real low-down about the job. The result is a higher probability of a good match, and a lower probability that the new hire will be disappointed or disgruntled, perform badly, and quit. Second, an employee who refers someone for employment may get in trouble with his employer if the person he refers is a dud; so word of mouth recruitment in effect enlists existing employees to help screen new applicants conscientiously.[57]

The court noted that in this exceptional circumstance, the employer, through word-of-mouth hiring, was able to secure all of the competent employees it

---

52. EEOC v. Consol. Serv. Sys., 989 F.2d 233, 236 (7th Cir. 1993). Prior to *Consolidated*, a line of disparate treatment cases held that word-of-mouth recruiting practices provide evidence from which courts can reasonably infer that an employer has intentionally discriminated against a protected class in violation of Title VII. *See, e.g.*, Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 426 (8th Cir. 1970) (holding that a word-of-mouth recruiting policy resulting in an "extraordinarily small number of black employees" violated Title VII on disparate treatment grounds); Barnett v. W.T. Grant Co., 518 F.2d 543, 549 (4th Cir. 1975) ("Word-of-mouth hiring . . . is discriminatory because of its tendency to perpetuate the all-white composition of a work force.").

53. *Consolidated*, 989 F.2d at 235. However, the employer did buy newspaper advertisements on three separate occasions. *Id.*

54. *Id.*

55. *Id.* at 236.

56. *Id.* The court noted that the employer went beyond defending the practice based on an efficiency argument, but rather was motivated *because* the practice was the most efficient form of employee recruitment. *Id.*

57. *Id.*

needed at a wage rate no higher than the minimum the employer expected.[58] Therefore, where an employer can present evidence that efficiency was truly its motivation in pursuing word-of-mouth recruiting, and the practice was actually the most efficient form of employee recruitment, employers will prevail in disparate *treatment* cases, at least in the Seventh Circuit, even if the practice essentially bars certain protected classes from future employment within the organization.[59]

Because the *Consolidated* analysis was based on a disparate *treatment* theory, the conclusion on efficiency does not in itself extend to a disparate *impact* theory wherein employers face heavier rebuttal burdens.[60] However, at the district court level, the plaintiff in *Consolidated* asserted both disparate treatment and disparate impact claims.[61] For undisclosed reasons, the plaintiff abandoned its claim of disparate impact at the appellate level.[62] However, Judge Posner did comment, arguably in dicta, on what the appropriate analysis would entail in a disparate impact context. According to Posner, if the circumstances were similar to the employer's in *Consolidated*, "then the advantages of word of mouth recruitment would have to be balanced against its possibly discriminatory effect when the employer's current work force is already skewed along racial or other disfavored lines."[63] Therefore, the benefits of cost savings, time savings, and a potentially more effective work force would have to be weighed against the disparate impact the practice causes.

Beyond the disparate impact and disparate treatment distinction, one must be cautious of extending *Consolidated*'s holding on efficiency to future cases for a few reasons.[64] First, no court outside the Seventh Circuit has cited

---

58. *Id.* at 235.

59. No circuit court outside the Seventh Circuit has yet cited *Consolidated* for this proposition.

60. The "legitimate, nondiscriminatory reason" burden is a lesser burden than the "business necessity" burden in disparate impact cases. *See, e.g.*, Thomas v. Metroflight, Inc., 814 F.2d 1506, 1509 (10th Cir. 1987); Williams v. Colo. Springs, Colo., 641 F.2d 835, 842 (10th Cir. 1981) (stating that "in a disparate impact case, unlike a disparate treatment case, a rational or legitimate, nondiscriminatory reason is insufficient. The practice must be essential, the purpose compelling.").

61. *Consolidated*, 989 F.2d at 236.

62. *Id.* While merely speculation, the plaintiff may not have pursued the disparate impact claim due to the great expense statistical analyses often entail in order to succeed on the merits.

63. *Id.*

64. *See generally* Elizabeth A. Madden, Comment, *Minority-Owned Company's Word-of-mouth Recruiting not Disparate Treatment in Violation of Title VII:* EEOC v. Consolidated Service Systems, 35 B.C. L. REV. 515, *passim* (1993) (discussing *EEOC v. Consolidated Service Systems* and the limitations of the Seventh Circuit's holding).

Consolidated for its statements on efficiency.[65] This outcome is not surprising, however, as both disparate impact cases and word-of-mouth cases in particular are rare.[66] Second, the *Consolidated* decision involved a minority-*owned* business.[67] The court explicitly noted the irony of using anti-discrimination laws against the persons those laws were intended to protect.[68] Forcing small minority-owned businesses, often "the first rung on the ladder of American success," to institute more costly hiring practices does not appear to be in the spirit of Title VII intended by Congress.[69] Therefore, while not settled, *Consolidated*'s holding may only be relevant where the employer is owned by a member of a minority class.[70] Because the primary purpose behind Title VII is the protection of minorities, a member of a majority group is less likely to win the sympathy of a court of law when faced with implementing more costly employment procedures.[71] On the other hand, arguments based on the efficiency and effectiveness of the practice hold true regardless of the employer's race or national origin.

Several other courts have made statements that leave open the possibility of using cost and efficiency in Title VII analyses. For instance, the Supreme Court, in a plurality opinion, has stated that "the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals."[72] The Supreme Court addressed a

---

65. However, some employment handbooks and manuals have cited to *Consolidated* for this proposition. *See, e.g.*, Ruzicho & Jacobs, *supra* note 3 (2005); *Methods of Recruiting*, 1 FAIR EMPLOYMENT PRACTICES § 4:26 (2005), *available at* 1 HRS-FEP 4:26.

66. Only seven word-of-mouth disparate impact cases have been published at the appellate level in the last ten years. *See* McGinest v. GTE Serv. Corp., 360 F.3d 1103 (9th Cir. 2004); Settles v. Ill. Dep't of Human Servs., 42 F. App'x 872 (7th Cir. 2002); EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263 (11th Cir. 2000); Alexander v. Local 496, Laborers' Int'l Union of N. Am., 177 F.3d 394 (6th Cir. 1999); Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998); Ballor v. Alcona County Rd. Comm'n, 145 F.3d 1329 (6th Cir. 1998) (unpublished table decision); Balele v. Dep't of Indus., Labor & Human Relations, 124 F.3d 203 (7th Cir. 1997) (unpublished table decision).

67. *Consolidated*, 989 F.2d at 234.

68. *Id.* at 238.

69. *Id.*

70. *See* Madden, *supra* note 64, at 523-24.

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

72. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 998 (1988) (plurality opinion). While most courts agree that the Civil Rights Act of 1991 was at least partially motivated by the *Wards Cove* decision, the current status of the "alternative employment practice" prong is also in question. Title VII currently provides that this prong "shall be in accordance with the law as it existed on June 4, 1989 . . . ." 42 U.S.C. § 2000e-2(k)(1)(C) (2005). Since the *Watson* plurality opinion was decided nearly one year before this

subsequent Title VII case where the employer had a policy of excluding women from battery manufacturing positions in which the health of fetuses would potentially be at risk due to lead exposure.[73] The Court stated that it was not deciding "a case in which [tort liability] costs would be so prohibitive as to threaten the survival of the employer's business."[74] The economic consequences of a malformed child due to working conditions "could be financially devastating, seriously disrupting the 'safe and efficient operation of the business.'"[75] The Sixth Circuit, in holding that a union's name-request provision was a legitimate business justification, stated that "[e]fficiency may constitute a valid business necessity."[76]

Other courts have been more skeptical. For instance, in the arguably analogous Age Discrimination in Employment Act context,[77] several courts have held that economic factors cannot form the basis of a "bona fide occupational qualification" since economic factors were fully considered when drafting the ADEA.[78] However, unlike the ADEA, where Congress's purpose was to curb the mistreatment of older employees when their

---

date, its language at least arguably carries some persuasive weight. Regardless, because the employer's business necessity burden precedes the employee's requirement to demonstrate that alternative practices, without similarly undesirable racial effects, would equally serve the employer's interests, *Watson*'s holding on cost considerations is not controlling in the instant case. For more discussion of the effects of the Civil Rights Act of 1991 on Title VII, see the discussion *supra* Part I regarding the business necessity doctrine.

73. UAW v. Johnson Controls, Inc., 499 U.S. 187, 191 (1991).

74. *Id.* at 210-11 (The Court ultimately found in favor of the employee.). *See also id.* at 217 (White, J., concurring) (holding that "costs are relevant in determining whether a discriminatory policy is reasonably necessary for the normal operation of a business"); *id.* at 224 (Scalia, J., concurring) ("I think, for example, that a shipping company may refuse to hire pregnant women as crew members on long voyages because the on-board facilities for foreseeable emergencies, though quite feasible, would be inordinately expensive"). *But cf.* Hayes v. Shelby Mem'l Hosp., 726 F.2d 1543, 1552 n.15 (11th Cir. 1984) (observing that the potential for tort litigation is too contingent to amount to business necessity where, in today's litigious society, a hospital can purchase insurance to protect itself from potentially devastating litigation).

75. Zuniga v. Kleberg County Hosp., 692 F.2d 986, 992 n.10 (5th Cir. 1982) (quoting Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971)).

76. Rosser v. Pipe Fitters Local 392, 12 F.3d 214 (6th Cir. 1993) (unpublished table decision), *available at* 1993 WL 498220, at **5 (6th Cir. Dec. 2, 1993) (citing Head v. Timken Roller Bearing Co., 486 F.2d 870, 879 (6th Cir. 1973)).

77. 29 U.S.C. §§ 621-34 (2005). *See* Chambers v. Omaha Girls Club, Inc., 834 F.2d 697, 704 (8th Cir. 1988) (holding that the bona fide occupational qualification analysis in the ADEA context is similar to the business necessity test and stating that the Eighth Circuit "has on different occasions applied the same standard—'manifest relationship'—to both").

78. *See, e.g.*, Orzel v. City of Wauwatosa Fire Dep't, 697 F.2d 743, 755 (7th Cir. 1983) (holding that "economic factors cannot be the basis for a [bona fide occupational qualification], since precisely those considerations were among the targets of the ADEA"); Leftwich v. Harris-Stowe State Coll., 702 F.2d 686, 691 (8th Cir. 1983) ("If the existence of . . . higher salaries can be used to justify discharging older employees, then the purpose of the ADEA will be defeated.").

employment may become more costly to organizations, the primary objective of Title VII "was to achieve equality of employment opportunities . . . ."[79] Therefore, these ADEA cases are not very persuasive in the Title VII context, where equal treatment and opportunities, rather than purely economic factors, are the primary targets of the law. In considering the *Griggs* standard, one court observed, "[w]hile considerations of economy and efficiency will often be relevant to determining the existence of business necessity, dollar cost alone is not determinative."[80] However, given the effectiveness of the recruitment practice and the significant competitive pressures currently facing Joe's Widget Company, the circumstances arguably go well beyond imposing merely additional raw dollar costs to the company.[81]

IV. SMALL BUSINESSES AND WORD-OF-MOUTH PRACTICES

This Note proposes that, under certain specific circumstances,[82] small businesses should be able to actively encourage and solely rely upon word-of-mouth recruitment practices without being vulnerable to disparate impact liability. Revisit once again the hypothetical plight of Joe's Widget Company. Joe's is experiencing intense competition from foreign widget manufacturers, domestic widget companies that outsource manufacturing processes overseas to take advantage of cheap labor, and huge widget conglomerates like WidgMart. At the same time, the company is encountering rapidly increasing energy, labor, and healthcare costs, all of which threaten the company's survival. Joe's policy of only recruiting employees through referrals from existing employees is one area in which the company can successfully control costs. Not only is word-of-mouth recruiting virtually cost-free, but Joe's has also been highly successful throughout the eighteen-year history of the company in attracting and retaining strong, competent, and highly motivated employees through this practice. Joe's employee turnover rate is very low, but is threatened by the reality that Joe may be forced to cut or even eliminate employee healthcare benefits altogether if costs continue to rise as forecasted.

---

79. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971)).

80. Robinson v. Lorillard Corp., 444 F.2d 791, 799 n.8 (4th Cir. 1971).

81. *See infra* Part IV for an in-depth discussion of the numerous benefits of word-of-mouth recruiting other than the cost-free nature of the practice.

82. Some of these circumstances may be similar to the circumstances of the employer in *EEOC v. Consol. Serv. Sys.*, 989 F.2d 233, *passim* (7th Cir. 1993). *See infra* Part III.

Under these circumstances, every opportunity to cut costs or increase revenues is critical to the future success and stability of Joe's Widget Company.

Small businesses have historically been the driving force behind the American economy.[83] Small businesses represent 99.7% of all employer firms and annually provide for between 60% and 80% of new job growth within the economy.[84] Our country would not be where it is today without the entrepreneurship and innovation of our domestic small businesses. However, American small businesses today are experiencing more competitive pressure than ever before. First, due to lower labor costs, more mobile organizations, globalization trends, and virtually cost-free communication across borders, many American businesses, especially manufacturers, are struggling to compete with foreign businesses and domestic businesses with foreign operations.[85] Many small businesses are struggling to find the resources and capabilities to compete in this environment. Furthermore, the costs of maintaining healthcare and retirement benefits for employees are currently skyrocketing.[86] Small businesses that are no longer able to offer these benefits will be at a distinct competitive disadvantage in the economy.[87] Without offering these benefits, small businesses may no longer be able to retain valuable employees. Additionally, the recently enacted Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 has potentially devastating repercussions for small businesses.[88] Because entrepreneurs, independent

---

83. *See* Boise Cascade Corp. v. Fed. Trade Comm'n, 837 F.2d 1127, 1153 (D.C. Cir. 1988) (dissenting opinion) (observing that Congress was convinced that protection of small business equated to protection of a competitive economy); Stomp, Inc. v. Neato, LLC, 61 F. Supp. 2d 1074, 1080 (C.D. Cal. 1999) (stating that "small businesses make up the backbone of the American economy . . ."); Minn. Energy & Econ. Dev. Auth. v. Printy, 351 N.W.2d 319, 340 (Minn. 1984) (commenting on economic studies that "demonstrate[] the important role of small businesses in creating jobs and stimulating economic growth"); State v. Ludlow Supermarkets, Inc., 448 A.2d 791, 795 (Vt. 1982) (observing the state legislature's view that "small business enterprises are essential and fundamental to the economy of the state").

84. *See* Small Business Administration, *Frequently Asked Questions*, http://sba.gov/advo/stats/sbfaq.pdf (last visited Sept. 11, 2007).

85. *See* Geoffrey Colvin, *America Isn't Ready [Here's What to Do About It]*, FORTUNE, July 25, 2005, *available at* http://money.cnn.com/magazines/fortune/fortune_archive/2005/07/25/8266603/index.htm.

86. *See* Michael Kinsman, *Access to Benefits at Small Businesses May Be Declining*, UNION TRIBUNE, Aug. 21, 2005, *available at* http://www.signonsandiego.com/uniontrib/20050821/news_1b21kinsman.html; Anthony Mason, *The Issues: Small Businesses*, CBS NEWS (CBS television broadcast July 7, 2004), *available at* http://www.cbsnews.com/stories/2004/07/07/eveningnews/main627978.shtml.

87. *See* Mason, *supra* note 86 (stating that "nearly six million small business owners now rank rising health care costs as their number one concern").

88. *See New Bankruptcy Legislation Undercuts Important Safety Net for Entrepreneurs*, Ewing Marion Kauffman Foundation, http://www.kauffman.org/entrepreneurship.cfm?topic=capital_markets&itemID=623 (discussing the inaccuracy of recent government bankruptcy statistics and how the

contractors, and self-employed individuals have historically used the bankruptcy laws as a safety net in the event of dismal economic circumstances, the harsher new consumer bankruptcy standards, which apply to many small businesses, could affect the survival of many small businesses.[89] Furthermore, some experts expect the Sarbanes-Oxley Act[90] to have unintended negative effects on small businesses.[91] Therefore, it is clear that small businesses today are competing in an environment very different from the competitive environment of even a decade ago.

In *Watson v. Fort Worth Bank & Trust*,[92] the Supreme Court stated that "disparate impact theory need [not] have any chilling effect on legitimate business practices."[93] If a court were to force a small business like Joe's Widget Company to adopt more costly recruiting or hiring practices, a chilling effect could easily be realized. Although the virtually cost-free nature of word-of-mouth recruiting is a significant cost savings for an organization, the more vital economic benefits of such a policy are of a more indirect nature.[94] While some opponents may argue that the extra couple hundred dollars to advertise job vacancies in a local newspaper is not a prohibitive cost for a company, few persons would dispute the great importance and economic relevance of having a well-informed and hard working group of loyal employees who work well together and are more likely to stay with the company for a prolonged period of time.[95] For instance, one source estimates that it costs an employer one-third of a new hire's *annual* salary to replace that employee.[96] Furthermore, multiple researchers have noted the difficulty

---

new changes to the Bankruptcy Code will likely negatively affect entrepreneurs and small businesses).

89. Mason, *supra* note 86.

90. The Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514(c) (2005). The Sarbanes-Oxley Act of 2002 was passed largely in response to numerous instances of corporate and accounting fraud and regulates corporate governance, financial disclosure, and the practice of public accounting. Publicly-traded companies were the only companies intended to be impacted by the Sarbanes-Oxley Act of 2002.

91. *See* MARC MORGENSTERN & PETER NEALIS, THE IMPACT OF SARBANES-OXLEY ON MID-CAP ISSUERS, at 16-17 (2004), *available at* http://www.sec.gov/info/smallbus/mmorgensternmidcap.pdf (noting that, due to Sarbanes-Oxley, some lenders and insurers are requiring non-publicly traded companies to comply with the legislation, and some states are in the process of developing similar state legislation applicable to private institutions).

92. 487 U.S. 977 (1988) (plurality opinion), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* Phillips v. Cohen, 400 F.3d 388, 398 (6th Cir. 2005). See discussion *supra* note 72 regarding *Watson* and the Civil Rights Act of 1991.

93. *Watson*, 487 U.S. at 993.

94. *See* EEOC v. Consol. Serv. Sys., 989 F.2d 233, 235 (7th Cir. 1993) (discussing how word-of-mouth recruiting is virtually costless).

95. *See id.* at 236.

96. Gerald L. White, *Employee Turnover: The Hidden Drain on Profits*, HRFOCUS, Jan. 1995, at

confronting many small businesses in attracting and retaining high caliber employees in today's economy.[97] The direct and indirect costs, often in the form of lost efficiency, a disheartened or unmotivated workforce, employee turnover, and personal conflict within an organization can be enormous and much more damaging than advertising costs alone.[98]

Numerous empirical and theoretical studies and papers in the social sciences arena have addressed the positive outcomes related to recruitment by employee referral, a form of word-of-mouth recruitment. For instance, under what researchers in the area coined the "realistic information hypothesis," employees recruited through informal recruitment sources, such as through employee referrals, consistently received more accurate and candid job descriptions than employees recruited through more formal sources.[99] Armed with the more realistic information regarding the position, several studies found positive outcomes for organizations, including lower turnover, better employee performance, a more qualified applicant pool, and higher levels of job satisfaction and organizational commitment.[100] Theorists explain these outcomes as resulting from a number of factors. For example, with a more accurate description of the position and its demands on the prospective employee, an applicant can easily "self-select" herself out of consideration if she feels the position will not satisfy her needs.[101] With this more accurate knowledge, new employees may also be more capable of coping with job demands and more satisfied with the job due to potentially lowered

---

15 (citing U.S. Department of Labor statistics).

97. Marilyn Carroll et al., *Recruitment in Small Firms: Processes, Methods and Problems*, 21 EMP. REL. 236, 238 (1999); Mike Thatcher, *The Big Challenge Facing Small Firms*, PEOPLE MGMT. 20, *passim* (1996).

98. *See* Roger Herman, *Reducing Costly Employee Turnover*, HRFOCUS, June 1997 1, 2-3 (listing the direct and indirect costs related to employee turnover for an organization).

99. *See, e.g.*, James A. Breaugh & Mary Starke, *Research on Employee Recruitment: So Many Studies, So Many Remaining Questions*, 26 J. OF MGMT. 405, 412 (2000); Kirnan et al., *supra* note 2, at 295; Steven L. Premack & John P. Wanous, *A Meta-Analysis of Realistic Job Preview Experiments*, 70 J. APPLIED PSYCHOL. 706, 712 (1985); Philip L. Quaglieri, *A Note on Variations in Recruiting Information Obtained Through Different Sources*, 55 J. OCCUPATIONAL PSYCHOL. 53, 55 (1982).

100. *See* Breaugh & Starke, *supra* note 99, at 419 (discussing lower turnover and higher levels of employee satisfaction); Kirnan et al., *supra* note 2, at 304-06 (finding higher quality applicant pools, applicant self-screening, and lower employee turnover); Premack & Wanous, *supra* note 99, at 712 (discussing applicant self-screening, better employee performance, and higher organizational commitment and job satisfaction). *See also* Morehart, *supra* note 8, at 3 (outlining all of the organizational benefits of a well-designed employee referral program, including the above and lower overall costs per hire, better cultural fits, and stronger employee networks).

101. Breaugh & Starke, *supra* note 99, at 412; M. Susan Taylor & Donald W. Schmidt, *A Process-Oriented Investigation of Recruitment Source Effectiveness*, 36 PERSONNEL PSYCHOL. 343, 344 (1983).

expectations surrounding the position.[102] Furthermore, under the "pre-screening hypothesis":

> The assumption is that applicants referred by current employees . . . are prescreened by these employees. As "screeners," current employees have the benefit of knowing both the job and the individual. Armed with this information, they are able to refer those applicants who are well qualified for the job. Additionally, current employees often feel that their reputation is at stake with a referral. This threat encourages them to refer only the highest quality applicants.[103]

One recent study even focused on the positive effects and outcomes the employee referral process generally has on the employee *making* the recommendation. The study theorized that, when referring prospective employees, employee recommenders generally experience higher levels of job satisfaction and organizational commitment because: (1) they relive their satisfaction in joining or confirm their happiness in being part of the organization (self-involvement); (2) they "reinforce their conviction that they made the right choice in working for the employer" (self-confirmation); or (3) they fulfill their desire to share the benefits of joining the organization with prospective employees.[104] However, some of these same studies warn of some of the adverse effects that the practices can have on protected groups and on the reputation of the organization as a whole.[105]

Therefore, there is empirical and theoretical support for Judge Posner's statements in *Consolidated* that word-of-mouth recruitment results in (1) a higher probability of a good match due to a better informed applicant under the "realistic information hypothesis," and (2) a higher quality applicant pool under the "pre-screening hypothesis" whereby employees will likely only refer potential applicants that would fit with the organizational culture.[106] Coupled with the clear economic savings[107] of the effectively costless recruitment approach and the hypothesis that the employees making the referrals also

---

102. Kirnan et al., *supra* note 2, at 295; Taylor & Schmidt, *supra* note 101, at 344.

103. Kirnan et al., *supra* note 2, at 294. *See also* EEOC v. Consol. Serv. Sys., 989 F.2d 233, 236 (7th Cir. 1993). Current employees may be motivated to refer only quality applicants for fear of damaging their relationships with the employer.

104. Rachel S. Shinnar et al., *The Motivations for and Outcomes of Employee Referrals*, 19 J. BUS & PSYCHOL. 271, 273 (2004).

105. Don Gudmundson & Linda S. Hartenian, *Workforce Diversity in Small Business: An Empirical Investigation*, J. SMALL BUS. 27, 29 (July 2000) (discussing the negative image sometimes accompanying a homogeneous workforce); Carroll et al., *supra* note 97, at 237; Kirnan et al., *supra* note 2, at 293.

106. *Consolidated*, 989 F.2d at 236. *See supra* Part III.

107. An organization employing this recruitment method will save resources both in advertising savings and time savings due to a smaller but arguably more qualified applicant pool.

benefit from the practice, there is substantial legal, empirical, and theoretical support for the proposition that word-of-mouth recruitment can be a very efficient and effective recruitment practice for small businesses. For all of the foregoing reasons, there is a strong argument that, under appropriate circumstances, word-of-mouth recruiting is not only very cost-efficient, but also very effective in producing the optimal workforce within an organization. To force a small business to pursue a less than optimal procedure in recruiting employees could be devastating to the future of the business.

This article does not propose an exclusive pass for *every* small business to use word-of-mouth recruiting exclusively. Rather, only in the narrow circumstances[108] where the small business is in a highly competitive environment and the ongoing nature of the business is at serious risk, such as the circumstances of Joe's Widget Company, should the small business be able to exclusively rely upon word-of-mouth recruiting practices. As Judge Posner stated, "the advantages of word of mouth recruitment . . . have to be balanced against its possibly discriminatory effect when the employer's current work force is already skewed along racial or other disfavored lines."[109] Therefore, under Judge Posner's balancing test, a small business in similar circumstances as Joe's would likely prevail over a disparate impact claim if courts considered as factors demonstrating the advantages of word-of-mouth recruitment the business's highly competitive environment, rising costs across the board, and most importantly, the often high efficiency and effectiveness of word-of-mouth recruiting itself.[110] A court's role would be, after considering the racial effects, the small business's current circumstances, and the employer's proof of the efficiency and effectiveness of the employment practice, to make a reasoned judgment on whether the balance weighs in favor of the small business keeping its recruiting practices intact.

This proposed outcome does not necessarily conflict with the purposes of Title VII. To require a company under Joe's circumstances to implement such costly changes would not be in line with the asserted purpose of Title VII, that being "to achieve equality of employment opportunities."[111] While

---

108. However, due to the increasing number of struggling small businesses and the changing economic environment, the trend in our American economy is expanding this narrow circumstance.

109. *Consolidated*, 989 F.2d at 236 (7th Cir. 1993).

110. Under Posner's balancing test, larger businesses would likely have a difficult argument when trying to persuade a court that the balance favors the word-of-mouth practice over any potential discriminatory effects. Because large businesses normally have a greater ability to absorb higher recruitment costs, the purposes of Title VII would likely prevail.

111. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975) (citing Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971)).

one cannot dispute the racial inequalities still present in the American economy, a blanket limitation on word-of-mouth recruiting would not benefit any party involved. The employer would be rendered competitively crippled, the company's future would be in jeopardy, and the jobs currently provided by the small business employer would be at risk. Remember that the Supreme Court stated that "disparate impact theory need [not] have any chilling effect on legitimate business practices."[112] Because no party benefits from the alternative, there should be no more legitimate a business practice than the survival of a small business in these circumstances.

V. CONCLUSION

Today, Joe is reluctantly contemplating following his attorney's advice and invoking more costly recruiting procedures to fill the company's vacancy. However, he truly fears that the additional costs associated with both implementing new procedures and a potentially more ineffective workforce could put Joe's Widget Company out of business. Under the current business necessity precedent first set forth in *Griggs v. Duke Power Co.* and recently interpreted by the Third Circuit in *Lanning v. Southeastern Pennsylvania Transportation Authority*, the maintenance of Joe's current recruiting policy could easily put the future of the Company at risk. Such an outcome in which no affected party would benefit cannot be what Congress intended when enacting Title VII, nor what the Supreme Court intended when interpreting its standards. If courts hearing such disparate impact cases would simply consider the demonstrated efficiency and effectiveness of word-of-mouth recruitment and the economic circumstances of the small employers when embarking upon Judge Posner's balancing test, small businesses in Joe's circumstances would not suffer this extreme outcome. As Joe debates what to do from here, he can only ponder the future of the company he built and whether his desperate circumstances would be considered by a court.

112. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 993 (1988) (plurality opinion).