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ONLINE TARGETED ADVERTISING FOR JOBS: DOES SHOWING JOB ADVERTISEMENTS TO MEN AND NOT WOMEN VIOLATE THE CIVIL RIGHTS ACT?

ALEXANDRIA SILVA*

INTRODUCTION:

As online advertising for employment is becoming increasingly popular, it begs the question: how do employers target employee prospects, and are those practices violative of Title VII of the Civil Rights Act of 1964?[1] Online job advertisements are shown to users and viewers based upon individual interests, just like online advertisements for clothing, housing, and other products.[2] This is done through an algorithm; employers can decide who to target based on interests and "categories" of people, such as race, gender, age, etc.[3] Such practices give effect to stereotyping, which is clearly not a plausible indication of people's qualifications and skills for employment purposes.[4] Employers want

*J.D. Candidate, Rutgers Law School- Newark, Class of 2020.
[1] Pat Didomenico, *Is Illegal Bias Lurking in your Online Job Ad?,* BUS. MGMT. DAILY (Oct. 8, 2018), https://www.businessmanagementdaily.com/52081/is-illegal-bias-lurking-in-your-online-job-ad.; *See* The Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*
[2] Gola Romain, *Digital Advertising and Algorithms,* THE CONVERSATION (Aug. 19, 2018), http://theconversation.com/digital-advertising-and-algorithms-101797.
[3] *Id.*
[4] *Id.*

their advertisements shown to those they believe are best qualified for the job.[5] This could have negative consequences for people who may be qualified for the job in question, but are not targeted by the employer.[6] This note will look specifically at the potential disparate impact on women, who, in particular circumstances, are not shown employment advertisements for jobs that they are qualified for because they were not targeted by the employer.[7] It will be pertinent to explore whether the women plaintiffs are able to sue internet platforms, such as Facebook or Google, for presenting advertisements of a third party, under the Communications Decency Act.[8] This note will conclude that gender targeting in online advertising for employment violates the Civil Rights Act of 1964 because it has a disparate impact on the gender that is not being targeted but who, nonetheless, is qualified for the job.[9]

First, this paper will begin by discussing women's history of inequality in the workplace. I will then explore how employment advertisements are put together using algorithms from users' online activity. Next, the significance and history of the Civil Rights Act of 1964 and how the Equal Employment Opportunities Commission is charged with enforcing the Act will be discussed. In addition, other legislation that was aimed at suppressing workplace discrimination but was not enacted due to political agendas will be discussed. Next, this paper will examine the two theories that a plaintiff can base their case on in suing an employer for discrimination Furthermore, this paper will discuss whether a plaintiff can sue large platforms, such as Google or Facebook, for advertisements of a third party. Lastly, this paper will walk through an analysis of a potential lawsuit for a woman plaintiff who wants to sue an advertiser/potential employer for not seeing advertisements that men can view.

INEQUALITY IN THE WORKPLACE:

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[5] *Id.*
[6] *Id.*
[7] Alexia Fernández Campbell, *Women accuse Facebook of illegally posting job ads that only men can see,* VOX (Sept. 18, 2018), https://www.vox.com/business-and-finance/2018/9/18/17874506/facebook-job-ads-discrimination.
[8] *See generally* Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008).
[9] Campbell, *supra* note 7.

Gender bias in the workplace is not a new phenomenon.[10] The wage gap is a real and ongoing issue that women face in the workplace today.[11] Women are earning only about 75% of what men are earning, a frightening statistic for women who are just as or more qualified than their male counterparts.[12] Social science research has concluded that often times, women who are qualified for the position, if hired at all, are placed in menial positions with minimal power.[13] The allegations that this note will explore show that many employers choose to seek men instead of women for job positions. It begs the question, is there a light at the end of the tunnel for women in regard to employment?

ALLEGED EVIDENCE OF DISCRIMINATION:

I. Google

A study done at Carnegie Mellon University reveals alleged discrimination that is a product of Google's targeted advertisement process.[14] The university started the study by designing a tool called AdFisher.[15] This tool examines the targeting activity of Google's advertisements.[16] The study was based on fake user profiles that are associated with stereotypical male and female users.[17] The simulated user profiles are built upon website visits; for example, websites that men are likely to visit as well as websites that women are likely to visit.[18] The study concluded that Google was more likely to advertise higher paying jobs to the male users then to female users.[19] Data demonstrated "[t]he male

[10] *See generally* Christine Tsang, *Uncovering Systemic Discrimination: Allowing Individual Challenges to a "Pattern or Practice"*, 32 YALE L. & POL'Y REV. 319 (2013).
[11] *See generally* William T. Bielby, *Minimizing Workplace Gender and Racial Bias*, 29 CONTEMP. SOC. 120 (2000).
[12] *Id.*
[13] *Id.* at 121.
[14] Tom Simonite, *Probing the Dark Side of Google's Ad-Targeting System*, MIT TECH. REV. (July 6, 2015), https://www.technologyreview.com/s/539021/probing-the-dark-side-of-googles-ad-targeting-system/.
[15] *Id.*
[16] *Id.*
[17] Amit Datta et al., *Automated Experiments on Ad Privacy Settings*, 2015 PROCEEDINGS ON PRIVACY ENHANCING TECH. 92, 96 (2015).
[18] *Id.*
[19] *Id.* at 102.

users were shown the high paying job ads about 1,800 times, compared to female users who saw those ads about 300 times."[20]

II. Facebook

Facebook is also under scrutiny for its online job advertising practices.[21] A group of women have filed a complaint with the Equal Employment Opportunity Commission ("EEOC") with regard to Facebook's online job postings.[22] The women alleged that third party advertisers who purchased advertisement spots have excluded women from viewing the job postings, and further, that Facebook allowed this discrimination to occur.[23] The jobs in question include truck driving and window installation positions.[24] These positions could be looked at as being predominantly male positions, but in 2019, any person should have an equal opportunity for any job based on skill, and not based protected classifications, such as gender. In this specific instance, the lawyers representing the women stated that they first learned of the discrimination through Facebook's advertisement disclosures.[25]

> [We] discovered the targeting by supervising a group of workers who performed job searches through their Facebook accounts and clicked on a variety of employment ads. For each ad, the job seekers opened a standard Facebook disclosure explaining why they received it. The disclosure for the problematic ads said the users received them because they were men, often between a certain age and in a certain location.[26]

For now, the women maintain that Facebook's practices violate the Civil Rights Act, while Facebook maintains that it is immune from liability due to the Communications Decency Act.[27]

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[20] *Byron Spice, Questioning the Fairness of Targeting Ads Online: CMU Probes Online Ad Ecosystem*, CARNEGIE MELLON U. (July 7, 2015), https://www.cmu.edu/news/stories/archives/2015/july/online-ads-research.html.
[21] *See* Campbell, *supra* note 7.
[22] *Id.*
[23] *Id.*
[24] Noam Scheiber, *Facebook Accused of Allowing Bias Against Women in Job Ad*s, N.Y. TIMES (Sept. 18, 2018), https://www.nytimes.com/2018/09/18/business/economy/facebook-job-ads.html.
[25] *Id.*
[26] *Id.*
[27] Campbell, *supra* note 7.

In a separate complaint against Facebook for discrimination based on age, workers filed a class action lawsuit against well-known companies for its targeted job advertisements through Facebook.[28] The workers allege that these companies' online targeted advertisement practices excluded older workers from seeing the job postings on Facebook.[29]

THE ADVERTISEMENT AND THE ALGORITHM:

Advertising was extremely different before the internet age.[30] Before the internet, businesses would often hire a marketing firm to further the business's advertisements for available job positions.[31] These marketing firms would aid the businesses in determining the content of the employment advertisements, and also the prospective audience that the business wants the advertisement to reach.[32] The firms would specialize in the art of advertisement placement, and modifying the content and placement of the advertisement to attract different types of candidates.[33] Advertisements were usually found in newspapers, magazines, and posted around local community areas.[34] In most cases, firms would give strategic advice to companies in order to target prospective candidates for its business, and these strategies usually did not have the effect of exclusion of specific, protected classes of people.[35] Businesses now prefer to advertise on the internet because it is much cheaper and more efficient in reaching a targeted public.[36] However, given the nature of the new technology, online advertisers have a larger margin of error to exclude classes of people.[37]

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[28] Press Release, Commc'n Workers of Am., Class Action Lawsuit Hits T-Mobile, Amazon, Cox and Hundreds of Large Employers for Allegedly Using Facebook to Exclude Millions of Older Americans from Job Ads in Violation of Age Discrimination Laws (Dec. 20, 2017).
[29] *Id.*
[30] David Jacobus Dalenburg, *Preventing discrimination in the automated targeting of job advertisements*, 34 COMPUTER L. & SECURITY REV. 615, 616 (2018).
[31] Brief for Plaintiff at 2, Onuoha v. Facebook, Inc., 2017 U.S. Dist. LEXIS 53963 (N.D. Cal. 2017) (No. 5:16-cv-06440-EJD).
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.* at 3.
[37] *Id.*

Today, the biggest online advertising platforms are Google and Facebook.[38] Google and Facebook both allow third party companies to buy advertisement space, allowing the ads to be shown on its websites directly.[39] Additionally, Google and Facebook provide advertisement space on separate websites and apps.[40] Both platforms have their own advertisement software; Google's software is called AdWords and Facebook's software is called Facebook Business Manager.[41] When third party advertisers create a new advertisement for available employment, it is done with an agenda.[42] The goal is to attract a large number of qualified applicants.[43] In order to do this, advertisers want to "[show] the advertisement to the right people...[and show] the right people what they want to see."[44]

Internet users see advertisements based on his or her individual web activity.[45] This process of ad selection is done through an algorithm.[46] Algorithm is defined as "a procedure for solving a mathematical problem in a finite number of steps that frequently involves repetition of an operation."[47] Algorithms are said to be based off of predictions and assumptions that are collected by online activity, but in reality,[48] algorithms are based off of stereotypes.[49] The advertiser engages in a type of online profiling in order to deliver its advertisements to candidates that it believes are the most interested.[50] This means that advertisers may have to categorize people in order to attract its prime candidate.[51] For instance, Facebook asks users to provide the gender he or she identifies with; even if it did not, Facebook would likely predict the gender of its users by monitoring their other online

[38] Dalenburg, *supra* note 30.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.* at 625.
[44] *Id.* at 616-17.
[45] Romain*, supra* note 2.
[46] *Id.*
[47] *Algorithm,* MERRIAM-WEBSTER ONLINE DICTIONARY (2020), https://www.merriam-webster.com/dictionary/algorithm (last visited Feb. 6, 2020).
[48] Romain*, supra* note 2.
[49] *Id.*
[50] *Id.*
[51] *Id.*

activity.[52] All stereotyping aside, data collectors can learn a lot about a user by knowing what he or she googles, clicks, shares, likes, or buys.[53]

Acxiom is home to a commercial database that is known to be the world's largest for consumer data.[54] Its database has information on around 500 million consumers, averaging to "about 1,500 data points per person."[55] With the amount of data that Acxiom holds about each of us based on our online activity, it is extremely concerning that the general public is most likely unaware of its existence.[56]

It is also difficult for online users to use sites without being tracked by data collectors, such as advertisers.[57] In fact, it is almost impossible for users to use sites without consenting to the terms and conditions of that site, which usually detail that by using the site, the consumer consents to personal information being collected and stored.[58] The terms and conditions of many sites are usually extremely long, boring, and hard for the lay person to understand.[59] However, most people often consent to the terms and conditions anyway, because they forfeit use of the site if they do not consent.[60] Because most people skip the heavy legal language and because they have no other option but to agree to the terms in order to use the service, it is fair to assume that most people are not giving informed consent about the data that is being collected from them.[61] Online services that help people find employment

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[52] Julia Glum, *I Found Out Everything Facebook Knows About Me – And You Can Too*, MONEY (Mar. 23, 2018), https://money.com/how-facebook-tracks-me/.
[53] *Id.*
[54] Natasha Singer, *Mapping, and Sharing, the Consumer Genome*, N.Y. TIMES: TECHNOLOGY (June 16, 2012), https://www.nytimes.com/2012/06/17/technology/acxiom-the-quiet-giant-of-consumer-database-marketing.html?pagewanted=all&_r=0
[55] *Id.*
[56] *Id.*
[57] Romain, *supra* note 2.
[58] Fred H. Cate & Viktor Mayer-Schonberger, *Tomorrow's Privacy: Notice and consent in a world of Big Data*, 3 INT'L DATA PRIVACY L. 66, 67 (2013).
[59] *Id.*
[60] *Id.*
[61] *Id.*

are arguably necessary, but make users consent to an ultimatum of either finding a job and giving away personal information or not using the site at all; this is a dangerous position to put consumers into.[62]

Facebook is one of the most popular ways that employers recruit applicants for employment.[63] Facebook is responsible for collecting data on individual users and allowing businesses to use that data to target specific classes of people.[64] More broadly, "Facebook in part or in whole creates, develops, collects, analyzes, categorizes, channels, and delivers the marketing, recruitment, sourcing, advertising, branding, information, and/or hiring services that employers... use to identify, communicate with, recruit, advertise for, seek, hire, and/or attract applicants for employment...."[65] Facebook's targeted advertising practices may not seem particularly suspect on its face.[66] However, advertisers can choose who its advertisements will reach by filtering within specific categories, such as age, gender, location, interests, sexual preference, education, relationship status, financial status, politic interests, or ethnicity.[67] Allowing advertisers to make its audience more specific has an efficiency aspect, however, the consequences may outweigh the benefits.[68] Efficiency means that some people are excluded from advertisements based on individual characteristics that are protected under the Civil Rights Act when it comes to employment practices.[69] Ultimately, this means that some people are excluded from economic opportunities altogether.[70]

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[62] Steve Kroft, *The Data Brokers: Selling Your Personal Information*, CBS NEWS (Mar. 9, 2014), https://www.cbsnews.com/news/the-data-brokers-selling-your-personal-information/.
[63] Brief for Plaintiff at 2, Onuoha v. Facebook, Inc., 2017 U.S. Dist. LEXIS 53963 (N.D. Cal. 2017) (No. 5:16-cv-06440-EJD).
[64] *Id.* at 3.
[65] First Amended Complaint at 4, Onuoha v. Facebook, Inc., 2017 U.S. Dist. LEXIS 53963 (N.D. Cal. 2017) (No. 5:16-cv-06440-EJD).
[66] Adriana Arriaga, *Ad Targeting A Facebook Overview Facebook For Business,* YOUTUBE (Jan. 8, 2015), https://www.youtube.com/watch?v=MS-QPe3S86o.
[67] *Id.*
[68] Brief for Plaintiff at 27, Onuoha v. Facebook, Inc., 2017 U.S. Dist. LEXIS 53963 (N.D. Cal. 2017) (No. 5:16-cv-06440-EJD).
[69] *Id.*
[70] First Amended Complaint at 5, Onuoha v. Facebook, Inc., 2017 U.S. Dist. LEXIS 53963 (N.D. Cal. 2017) (No. 5:16-cv-06440-EJD).

THE CIVIL RIGHTS ACT[71] & THE EEOC:

The Civil Rights Act of 1964 bans segregation on the grounds of race, gender, religion or national origin at all places of public accommodation, such as parks, restaurants, theaters, etc.[72] The Act also bans similar discrimination by employers and labor unions.[73] The Civil Rights Act of 1964 was first a measure in retaliation against the Jim Crow laws and literacy tests used to disenfranchise African American citizens in the South.[74] It later became a tool against discrimination with respect to voting, obtaining fair housing, and equal protection in employment.[75] Title VII of the Civil Rights Act makes discrimination illegal with regard to hiring practices and compensation based on race, gender, religion, or national origin.[76] Title VII of the Act also makes clear that any advertisement for employment cannot show a preference for any classification unless that classification is a bona fide qualification for the position.[77] The Equal Employment Opportunity Commission is charged with enforcing and regulating the Act.[78] Federal courts have long recognized a cause of action against

[71] A plaintiff could have brought this action under the Employment Non-Discrimination Act, however, due to political reasons, the ENDA "died" in congress. The Employment Non-Discrimination Act is a bill proposed by congress in an effort to prohibit the discrimination on the basis of gender and sexual orientation with respect to employment practices. CONG. DIGEST, EMPLOYMENT NON-DISCRIMINATION ACT TIMELINE: CONGRESSIONAL ACTION ON ENDA – 1994 TO THE PRESENT 2 (Dec. 2013). The bill's purposes were threefold: (1) It would address the longstanding history of discrimination that specifically women and members of the LGBTQ community have faced, (2) it would prohibit this type of discrimination, and (3) it would provide for the power to invoke the 14th Amendment in order to prohibit such discrimination. *Id.* Section 4 of the Act states: It shall be an unlawful employment practice for an employer-(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual's actual or perceived sexual orientation or gender identity; or (2) to limit, segregate, or classify the employees or applicants for employment of the employer in any way that would deprive or tend to deprive any individual of employment or otherwise adversely affect the status of the individual as an employee, because of such individual's actual or perceived sexual orientation or gender identity. *Id.*
The Employment Non-Discrimination Act was first introduced to Congress in 1994, however, it was not until 2007 that "gender identity" was added to the language. As of 2018, the bill has still not become law. *Id.*
[72] *Civil Rights Act of 1964,* HISTORY (last updated February 10, 2020), https://www.history.com/topics/black-history/civil-rights-act.
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Know Your Rights: Title VII of the Civil Rights Act of 1964*, AM. ASS'N U. WOMEN, https://www.aauw.org/what-we-do/legal-resources/know-your-rights-at-work/title-vii/ (last visited March 18, 2020).
[77] *Id.*
[78] *Id.*

employers when the content of its advertisements are discriminatory, and also, when certain classes of people are targeted and others are excluded, regardless of the content.[79]

To file an employment discrimination lawsuit, a plaintiff must first file a charge to the Equal Employment Opportunity Commission.[80] Plaintiffs can file a charge to the EEOC online, in person, by telephone, or by mail.[81] There are also time limitations for filing an EEOC complaint.[82] Generally, an employee would have to file a complaint 180 days after the discrimination took place.[83] However, some states extend the timeline to 300 days after the discrimination took place depending on whether the state or local governmental agency enforces a law that prohibits employment discrimination on the same basis.[84] The form asks employees to provide basic information about their employer, the basis for the charge, such as gender or race discrimination, and a summary of the events surrounding the alleged discrimination.[85] Once a charge is filed, the EEOC begins investigating the alleged discrimination.[86] The EEOC's investigation consists of the information that was provided by the complaint, the information the EEOC gathered itself, and the information that was collected through onsite visits to the employer, including interviewing other employees at the place of employment.[87] Once the investigation has reached the 180 day mark, the employee is then allowed to request permission from the EEOC to sue the employer for workplace discrimination.[88] If the EEOC, upon completion of its investigation, finds reasonable cause, the case moves into a mediation phase, where the EEOC tries to eliminate the unlawful employment practice through conferences, conciliation, and

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[79] First Amended Complaint at 2, Onuoha v. Facebook, Inc., 2017 U.S. Dist. LEXIS 53963 (N.D. Cal. 2017) (No. 5:16-cv-06440-EJD).
[80] *How To File A Charge Of Employment Discrimination,* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/employees/howtofile.cfm (last visited March 18, 2020).
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] Joni Hersch & Jennifer Bennett Shinall, *Fifty Years Later: The Legacy of The Civil Rights Act of 1964*, 34 J. POL'Y ANALYSIS & MGMT. 424, 442 (2015).
[86] *Id.*
[87] *Id.*
[88] *Id.*

persuasion.[89] The EEOC will attempt to settle the dispute between the parties, however, if an agreement cannot be reached, the employee is allowed to sue.[90]

Employment practices that are equally applied to everyone, that are not job related or necessary to the operation of the business, can still be illegal if it has a negative impact on employment of people belonging to a certain class.[91]

DISPARATE IMPACT:

Two different theories of liability exist under the Civil Rights Laws that combat employment discrimination.[92] The first theory, disparate treatment, deals with the subjective intent of the employer.[93] Here, the person bringing the lawsuit has the burden of showing that the employer deliberately harmed him or her.[94] This is a very high burden and would be extremely difficult for a plaintiff to delve into the subjective intent of an employer.[95] Most discrimination nowadays is less blatant and more subtle, so a plaintiff is less likely to win using the disparate treatment theory.[96]

Alternatively, plaintiffs are usually more successful under a disparate impact theory.[97] Section 2000e-2(k)(1)(A) states,

> 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.[98]

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[89] *Id.*
[90] *Id.*
[91] *See Sex-Based Discrimination,* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/types/sex.cfm (last visited Jan. 29, 2020).
[92] *See* Pippen v. State, 854 N.W.2d 1, 9 (Iowa 2014).
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Title VII of the Civil Rights Act of 1964*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/statutes/titlevii.cfm (last visited Jan. 29, 2020).

This theory deals not with the subjective intent of an employer, but with the effect of an employment practice on a person or class of persons.[99] "Experts familiar with the subject now generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs."[100] The plaintiff does not need to show proof of discriminatory motive under this theory, which, as has already been stated, is an extremely tough burden.[101] It is not the purpose of the courts with regard to the theory of disparate impact to hold an employer liable of employment discrimination when there is less evidence than necessary to prove disparate treatment or intentional discrimination.[102] The purpose of the alternative theory of disparate impact is to give a legal cause of action to those that are on the receiving end of employment practices that, although may be neutral on its face, are the functional equivalent of employment practices that are motivated by discrimination.[103]

In the landmark Supreme Court case on disparate impact, *Griggs v. Duke Power Co.,* the court invalidated an employer's mandate that job applicants pass aptitude tests or have a high school diploma, which had a negative effect on African Americans at the time.[104] The Court stated:

> The Act proscribes not only overt discrimination, but also practices that are fair in form but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude [blacks] cannot be shown to be related to job performance, the practice is prohibited . . . Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.[105]

Courts since have solidified the disparate impact analyses, starting with *Watson v. Fort Worth Bank & Trust.*[106] In *Watson,* the plaintiff argued that because of her race, she was denied promotions and other

[99] *See* Pippen, 854 N.W.2d at 9.
[100] *Id.* (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 (1977)).
[101] *Id.*
[102] Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 985-87 (1988).
[103] *Id.* at 987.
[104] Griggs v. Duke Power Co., 401 U.S. 424 (1971).
[105] *Shaping Employment Discrimination Law*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/history/35th/1965-71/shaping.html (last visited Jan. 30, 2020) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971)).
[106] *See Watson*, 487 U.S. at 985-87.

positions within the company.[107] The analysis coming out of *Watson* is as follows: A plaintiff, in bringing an employment discrimination claim under a disparate impact theory, must first identify the specific employment practice in question.[108] In identifying the practice that is being challenged, courts make a distinction between objective practices and subjective practices.[109] Objective practices are neutral practices that are applied to everyone across the board, such as the aptitude tests given in *Griggs,* for example.[110] Subjective practices are not generally applied practices, but are alternatively based on the exercise of personal judgement of employers.[111] Disparate impact analyses may be applied to both objective and subjective employment practices, although the court points out that identifying subjective practices generally proves to be more difficult.[112]

To establish a prima facie case, the plaintiff must point out the employment practice at issue, and show that there is a significant statistical disparity.[113] After the plaintiff has pointed out the practice being challenged, he or she must prove causation.[114] More specifically, a plaintiff must show that the practice being challenged has excluded prospective employees due to his or her protected class status, and not for any other reason, such as skill or qualification.[115] This cannot be conclusory, and plaintiff must show concrete evidence.[116] The evidence of statistical disparities must be substantial in order to raise an inference of causation.[117] Plaintiffs can do this by showing that the employer being challenged has engaged in practices that have a disparate impact repeatedly, and by showing significant patterns of this behavior over time.[118] Courts have looked to the Equal Employment Opportunity

[107] *Id.* at 992.
[108] *Id.* at 994.
[109] *Id.* at 989-92.
[110] *Id.* at 989; *see generally* Griggs v. Duke Power Co., 401 U.S. 424 (1971).
[111] *See Watson*, 487 U.S. at 988.
[112] *Id.* at 991.
[113] *Id.* at 994.
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.* at 995.
[118] *Id.*

Commission's guidelines as a rule of thumb to determine if an employment practice has had an adverse impact on a current or prospective employee.[119] The guidelines state that an adverse impact will not usually be inferred unless members of a minority or protected class are favored less than four-fifths of the rate that members of the majority class are favored.[120] Justice O'Connor noted that this is not a hard and fast rule, just a guideline for the courts to use.[121]

The employer may rebut plaintiff's allegations by pointing out discrepancies in plaintiff's evidence.[122] The employer, in addition to discrediting plaintiff's findings, has a powerful defense: the business necessity defense.[123] The burden is on the defendant employer to show that any requirement for hiring or giving promotions needs to be related to the position in question.[124] This does not mean that the burden has shifted to defendant to disprove that the employment practice in question causes discrimination.[125] It means that defendant must provide a business reason for the employment practice in question.[126] Once defendant has provided this evidence, the burden is on plaintiff once again to show that there are less discriminatory alternatives.[127] In other words, defendant has to satisfy the "manifest relationship" test, whereby defendant employer's legitimate goals are significantly served by its exclusionary principles.[128] If plaintiff can show that other business practices that would not lead to discrimination would serve the defendant's ends, the plaintiff will likely be successful on a disparate impact theory.[129] The plaintiff must take into account the cost of such practices while making the comparison.[130]

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[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.* at 996.
[123] *Id.* at 997.
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.* at 998.
[129] *Id.*
[130] *Id.*

In summary, disparate impact analysis comes down to a three-pronged analysis: "(1) the plaintiff's prima facie demonstration of a policy's disparate impact; (2) the defendant's job-related business necessity defense of the discriminatory policy; and (3) the plaintiff 's demonstration of an alternative policy without the same discriminatory impact."[131]

Additionally, it is important to note that disparate impact theory does not apply to claims of discrimination brought under the Fifth or Fourteenth amendments.[132] Discrimination claims brought under the Fifth or Fourteenth amendments require a showing of discriminatory intent in order to be successful, so a plaintiff would be limited to the disparate treatment theory.[133]

COMMUNICATIONS DECENCY ACT:

Women who are excluded from seeing job postings that men see may have a good cause of action against that employee for discrimination under a disparate impact theory, however, could those women even sue Facebook or Google in the first place?[134] In other words, should platforms such as Facebook or Google be held liable for the targeted advertising of a third party?[135] Under the Communications Decency Act, 47 USC § 230 (c)(1), interactive computer services cannot be treated as publishers or speakers.[136] Immunity under this Act only applies if the interactive computer service provider is not the information content provider.[137] The Act defines interactive computer service as, "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides

131 Kevin Tobia, *Disparate Statistics*, 126 YALE L. J. 2382 (2017).
132 *See generally* Washington v. Davis, 426 U.S. 229 (1976); *see also* George Rutherglen, *Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality*, 74 FORDHAM L. REV. 2313, 2314 (2006).
133 George Rutherglen, *Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality*, 74 FORDHAM L. REV. 2313, 2314 (2006).
134 *See* Brief for Defendants at 4, Onuoha v. Facebook, Inc., 2017 U.S. Dist. LEXIS 53963 (N.D. Cal. 2017) (No. 5:16-cv-06440-EJD).
135 *Id.*
136 47 U.S.C. § 230(c)(1) (2018). This section reads as follows, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." *Id.*
137 Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1162 (9th Cir. 2008).

access to the Internet and such systems operated or services offered by libraries or educational institutions."[138] An information content provider is defined as, "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."[139]

The Communications Decency Act plays a huge role in protecting free speech online, but it also has been used to defend some questionable behavior.[140] In the past, the Communications Decency Act has been used to protect forums with advertisements for sex trafficking of children.[141] The law questions how much responsibility forums should have when it comes to its online users.[142] Before §230 was adopted, the court held in *Stratton Oakmont v. Prodigy Servs. Co.,* that the platform did not have immunity under the Communications Decency Act because the platform moderated various posts to conform with its standards, like newspapers, which are generally held liable for the articles they publish.[143] Now §230 protects platforms from being held liable for the acts of a third party, even if the platform engages in moderating the content of its site.[144]

Some proponents of the Act believe that, had it not been adopted, many social media platforms would be held liable for acts of a third party, creating a chilling effect on speech.[145] In essence, the proponents' viewpoint is that without the Act, large social media platforms are likely to engage in heavy censorship, which suppresses the free flow of ideas.[146] Critics of the Act believe that websites that make billions of dollars should be held accountable for the unlawful acts of a third party

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138 47 U.S.C. §230(f)(2).
139 47 U.S.C. §230(f)(3).
140 Alina Selyuhk, *Section 230: A Key Legal Shield For Facebook, Google Is About To Change*, NPR (Mar. 21, 2018), https://www.npr.org/sections/alltechconsidered/2018/03/21/591622450/section-230-a-key-legal-shield-for-facebook-google-is-about-to-change.
141 *Id.*
142 *Id.*
143 *Id.*
144 *Id.*
145 *Id.*
146 *Id.*

on its platform.[147] Even though the Act shields platforms that serve in a moderator function, the Act does not shield platforms that are involved or connected with the content that is posted, like a publisher function.[148] The "publisher function" liability's purpose is to hold platforms responsible for advertisements posted.[149]

When interactive computer services become information content providers, the interactive computer service loses protection under the Communications Decency Act.[150] In *Fair Housing Council of San Fernando Valley v. Roommates.com,* plaintiffs argued that defendant's website, designed to match people who wish to rent a living space together, is discriminatory because it forces users to disclose details about themselves (such as age, gender, and sexual orientation) and forces users to make a profile detailing their preferences in a roommate.[151] The District Court held that the operator of the website was entitled to immunity under §230 of the Communications Decency Act, reasoning that Roommates.com was simply a platform for third parties to post content.[152] The Appellate Court reversed, holding that with regard to the mandatory questionnaire that the website posted, Roommates.com could not claim immunity because it acted as an information content provider.[153] The Ninth Circuit stated:

> A website operator can be both a service provider and a content provider: If it passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content. But as to content that it creates itself, or is 'responsible, in whole or in part' for creating or developing, the website is also a content provider. Thus, a website may be immune from liability for some of the content it displays to the public but be subject to liability for other content.[154]

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147 *Id.*
148 *Id.*
149 *Id.*
150 Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1162 (9th Cir. 2008).
151 *Id.* at 1161.
152 *Id.* at 1162.
153 *Id.* at 1176.
154 *Id.* at 1162-63.

The Ninth Circuit held that the interactive computer service provider, Roommates.com, became an information content provider when it published a questionnaire asking users to disclose gender and sexual orientation.[155] The key issue for the Ninth Circuit is that the site required users to provide answers to these questions, rather than making them optional inquiries.[156] The argument for categorizing platforms as information content providers is stronger when not only does the platform request personal information, such as age and gender, but it knows these answers already, based on users' online activity.[157]

ANALYSIS[158]:

Setting aside the notion that these employment advertisements are not necessarily discriminatory on their face, these advertising practices still show a preference.[159] In the past, it was not uncommon to see job advertisements specifying the employer's preferred gender for an open position.[160] For example, an employer might state that they are seeking female candidates for a receptionist position.[161] Today, advertising in this manner would absolutely violate the Civil Rights Act.[162] Specifically, it would violate Title VII, Section 704(b) stating:

> It shall be an unlawful employment practice for an employer, labor organization, or employment agency to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or

155 *Id.* at 1167.
156 *Id.*
157 Brief for Plaintiff at 2, Onuoha v. Facebook, Inc., 2017 U.S. Dist. LEXIS 53963 (N.D. Cal. 2017) (No. 5:16-cv-06440-EJD).
158 For the purposes of this analysis, I operate under the hypothetical situation where a woman is feeling wronged about being excluded from a job that is targeted only toward male applicants. This job may traditionally be a male dominated field, but, nonetheless, this woman is highly qualified for the position.
159 *See generally Know Your Rights: Title VII of the Civil Rights Act of 1964*, *supra* note 76.
160 Alison Doyle, *What Employers Should Not List In a Job Ad,* THE BALANCE CAREERS (Dec. 3, 2018), https://www.thebalancecareers.com/what-employers-should-not-list-in-a-job-ad-2061390.
161 *Id.*
162 *Id.*

> national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.[163]

It is specifically advertisements like these that the Civil Rights Act is meant to guard against.[164] However, why are targeted advertisements not also seen as an issue?

It becomes more challenging to analyze whether an advertisement or an advertising practice would pass constitutional muster when the advertiser does not explicitly state its preferences. Advertisers would likely argue that advertising online, neutrally and without preferences would not be violative of the Civil Rights Act, because technically, anyone could apply for the position. However, advertisers who knowingly choose a class they want their advertisement to reach by using an algorithm to exclude other classes from seeing the advertisement are pushing out potential candidates, making it difficult for those who are not targeted to realize that there is an open position.[165] This type of selective advertising is just as harmful as explicitly stating preferences for gender on the face of the advertisements.[166] Limiting the class of people who can view the advertisement is a more cunning mechanism than being upfront about who the employer wishes to hire.[167] Both advertisement practices seemingly violate the Civil Rights Act of 1964, but only one is currently recognized as running contrary to the United States Constitution.[168]

If a woman plaintiff felt that she was excluded from seeing a job advertisement that she was qualified for, she may want to file a complaint with the EEOC.[169] If that process turns into litigation, it is imperative to analyze whether she would have standing to sue. Article III of the Constitution

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163 The Civil Rights Act of 1964, 42 U.S.C. § 704(b).
164 *Id.*
165 *See generally* Scheiber, *supra* note 24.
166 *Id.*
167 *Id.*
168 *Id.*
169 *How To File A Charge Of Employment Discrimination*, *supra* note 80.

limits the federal courts to hear only valid "cases" or "controversies."[170] This requirement prevents the federal courts from intruding on other branches of government.[171] The case or controversy requirement, at a minimum, makes plaintiffs satisfy three elements in order to establish standing: (1) she was "injured in fact," (2) the injury can be detected from defendant's conduct, and (3) the injury will be "redressed by the requested relief."[172] The "injury in fact" requirement must be "(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical."[173] The purpose of these requirements are to make sure that the court has jurisdiction, but to also ensure that the party has a "personal stake" in the cases' outcome.[174]

In analyzing whether the woman in this hypothetical situation would have standing to sue, it first must be determined whether she has suffered an "injury in fact."[175] More specifically, the woman plaintiff must show that by being excluded from a job advertisement, she has suffered an "injury to a cognizable interest."[176] Plaintiff has a plausible argument here. She would likely argue that she suffered a cognizable interest by losing economic opportunities stemming from being excluded from viewing, and ultimately applying to the job that targets only male candidates. There may be some speculation whether the harm suffered to the plaintiff is actual or imminent. A defendant will argue, and a court may defend, that the harm suffered here is only hypothetical. However, the plaintiffs do not need to prove that the allegations are true in order to have standing; all they need to do is state a plausible allegation where, if proved, injunctive relief would remedy the harm.[177]

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[170] Lujan v. Defenders of Wildlife, 504 U.S. 555, 590 (1992) (Blackmun, J., dissenting).
[171] Daniel A. Zariski, Leonard J. Feldman, et al., *Mootness in the Class Action Context*: *Court-Created Exceptions to the "Case or Controversy" Requirement of Article III*, 26 REV. LITIG. 77, 78 (2007).
[172] Lujan, 504 U.S. at 590.
[173] Zariski, *supra* note 171, at 78-79.
[174] *Id.*
[175] Lujan, 504 U.S. at 563.
[176] *Id.*
[177] L.A. v. Lyons, 461 U.S. 95, 102 (1983); *see generally* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). Moving forward with this analysis, I assume that the plaintiffs have adequate standing to sue a potential employer/advertising platform.

Assuming that these targeting practices are extremely harmful to women, specifically in this scenario, a woman plaintiff can try to argue her case first under a disparate treatment analysis. In analyzing under a disparate treatment analysis, the first question that is pertinent to ask is "whether an employer has, with a discriminatory intent or motive, treated a particular person less favorably than others because of that person's race, color, religion, sex, or national origin."[178] The women plaintiffs would have the burden of proving that the employer deliberately harmed her.[179] Even though this is an extremely high burden,[180] it would be smart for the plaintiff to still make the argument.

Plaintiffs should first make the argument that employers and advertisers having the option to manually exclude certain classes of people from seeing specific job postings is an intentional form of discrimination. Furthermore, plaintiffs should argue that it is intentional discrimination because employers and advertisers have the option to advertise its job posting to all ranges of people, and by excluding women, for example, they did it with at least some discriminatory motive. It would be near impossible to prove the intentions of the employer, however. Plaintiffs would have to be able to dig up some direct evidence, such as an email or letter, detailing the employer's subjective motive to exclude women from the advertisement; an extremely unlikely finding.

Because proving disparate treatment is an exceptionally high burden, plaintiffs will most likely go for a disparate impact theory in bringing this suit. Instead of looking to the subjective intent of the employer, plaintiff would be able to prove discrimination based on the effects of the employer's act. In other words, the woman plaintiff would not focus on the intentional wrongdoings of the employer, but focus on how the employer's acts have negatively affected them, regardless of intent.

The first step in a disparate impact analysis is plaintiff's identification of the specific discriminatory practice in question. Here, the woman plaintiff would demonstrate that the practice at

[178] *See* Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 985-87 (1988).
[179] *Id.*
[180] *Id.* at 986.

issue, and the practice that is causing the disparate impact is the advertisement practice. This practice of specifically targeting males and not females would likely be considered an objective practice.[181] Because excluding a certain class from seeing job advertisements is an objective practice, it is generally easier for plaintiff to identify.

After identifying the discriminating practice at issue, the woman plaintiff must establish a prima facie case. In order to do this, plaintiff must show a significant statistical disparity. In *Texas Department of Housing & Community Affairs v. Inclusive Communities Project,* the plaintiffs alleged that the Department of Housing was aiding the perpetuation of segregated housing.[182] The plaintiffs here were able to build a prima facie case based upon alleging that the Department of Housing was engaged in a pattern or practice that allocated a significant amount of tax credits to housing in inner city areas predominantly consisting of African American families, and few tax credits to housing in surburan areas predominantly consisting of white families.[183] Similarly, the woman plaintiffs can also make out a prima facie case by highlighting that the employer often engages in a pattern of the discriminatory practice. The plaintiffs can use ad disclosures to their benefit.[184] For example, big platforms will disclose why the user is seeing the ad.[185] The female plaintiffs would have to show that a particular advertiser specifically targets men for a particular position, and be able to back this proposition up by the proof laid out in the ad disclosure.[186] Plaintiffs will then want to allege that the ad is generally shown to men, and play up the fact that the job may be a traditionally male-dominated field or position.[187] For example, in the Facebook incident, the jobs in question were for truck driving and

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[181] *See Watson*, 487 U.S. at 998. It would be an objective practice because it fits more into the paradigm of a neutral practice that is not based on the exercise of personal judgement of the employer.
[182] Tex. Dep't of Hous. & Cmty. Aff. v. Inclusive Cmtys. Project, Inc.,135 S. Ct. 2507 (2015).
[183] *Id.*
[184] *See generally* Scheiber, *supra* note 24. (proposing that Facebook, in its employment ads, will disclose why the user is seeing the ad, and that it raises a red flag when the user is shown the ad based on a protected classification).
[185] *Id.*
[186] *Id.*
[187] *Id.*

window installation positions.[188] This will get to the heart of the employer's reasons for excluding women, and weigh in favor of proof that women were not excluded based on a particular skill or qualification.[189]

The employer can always rebut plaintiff's allegations by using the business necessity defense.[190] For manual labor jobs, the employer might try to argue that men are generally stronger than women; for jobs requiring heavy lifting, a man might be a better fit. However, this argument will most likely not hold up as being a legitimate reason to exclude a protected class of people, due to the fact that this is an under inclusive and over inclusive characterization; there are very weak men and very strong women.

Next, it is pertinent to explore whether the women plaintiff would be able to go after large advertising platforms, such as Facebook or Google, due to immunity under the Communications Decency Act.[191] However, immunity under the Act only applies if the interactive computer service provider is not the information content provider.[192] In this scenario, Facebook or Google would be considered an interactive computer service provider, because it provides the platform for third parties to post content.[193] The third party advertisers would be considered the information content provider.[194] The plaintiffs here would argue that platforms such as Facebook and Google have lost the ability to claim immunity because the interactive computer service provider has become the information content provider.[195] Plaintiffs would further argue that Facebook and Google, with

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188 *Id.*
189 *Id.* Deciphering the employer's motive is helpful in a disparate treatment analysis as opposed to a disparate impact theory analysis. For a closer discussion on the muddled intermingling of the disparate treatment and disparate impact analyses. *See* Stacey E. Seicshnaydre, *Is The Road To Disparate Impact Paved With Good Intentions?: Stuck On State Of Mind In Antidiscrimination Law*, 42 WAKE FOREST L. REV. 1141 (2007).
190 Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 997 (1988).
191 *See generally* 47 U.S.C. § 230 (2018).
192 Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1162 (9th Cir. 2008).
193 *Id.*
194 *Id.*
195 *Id.*

respect to allowing these third parties to advertise on its platform, are information content providers because they allow third parties to make preferences that Facebook or Google sets.[196] Similarly in *Fair Housing Council v. Roommates,* the advertisers here create preferences that third party advertisers can use when deciding who to show its advertisements to.[197]

In summary, it would be more attractive for the women plaintiffs to sue platforms such as Facebook or Google for allowing discriminatory advertisements to be shown on their website, because bigger settlements would stem from these suits, rather than going after the employer specifically.

CONCLUSION:

Targeted advertising is a widely recognized, but equally troubling practice that may lead to the exclusion of a protected class of people from economic opportunities. It is especially troubling when these practices are used to keep women – a group who has faced many hurdles and hardships in the working sector – away from high paying positions that men have always had access to. If showing specific preferences for a protected class of people on its face is violative of title VII of the Civil Rights Act of 1964, why is targeting towards a specific class not? These are the questions that will only be addressed through the litigation process. Those who are able to make a case for disparate impact should be encouraged to bring suit against big advertising platforms for being excluded, and in effect, being kept away from economic resources and opportunities.

[196] *Id.*
[197] *Id.*