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DISCRIMINATION IN ONLINE EMPLOYMENT RECRUITING

PAULINE T. KIM* AND SHARION SCOTT**

ABSTRACT

Employment recruitment is increasingly moving online as employers use Facebook and other social media platforms to advertise job opportunities. This shift to online advertising allows employers to more precisely target workers likely to apply, but also raises concerns about unfair exclusion. This essay explains the mechanisms through which online recruiting can produce discriminatory effects and examines the question of when employers will be liable under existing employment discrimination laws. Both Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act contain little-noticed provisions that specifically forbid discriminatory advertising, in addition to their general prohibitions on taking adverse employment actions because of a protected characteristic. We examine whether or how these provisions might apply to online targeted advertising and also whether employers' recruiting practices might support claims of disparate treatment or disparate impact discrimination. We conclude that ample room exists within existing doctrine to address the most egregious practices; however, it is less certain whether current law is adequate to reach all forms of targeted recruitment with significant discriminatory effects.

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I. INTRODUCTION

When Mark Edelstein scrolled through his Facebook newsfeed one day, he was unaware that there were job postings he was not seeing. He saw ads for software he could purchase or websites he could use to book travel, but positions at companies such as HubSpot were not visible to him because they had chosen to advertise only to certain groups, such as “people ages 27 to 40.”¹ Edelstein, who was fifty-eight at the time, was not in the audience targeted to receive those advertisements even though he was searching for employment.²

As Edelstein’s experience suggests, employer recruiting practices have undergone a seismic shift. Not too long ago, when employers sought to recruit new employees, they could advertise the job opening in a newspaper or other media outlet, distribute flyers, engage an employment agency, attend a job fair, or simply ask their current employees if they knew of anyone who might be interested.³ Some of these methods—particularly word-of-mouth recruitment—tended to limit the pool of workers who would learn of the opportunity.⁴ But the most commonly used formal methods of recruitment, like newspaper advertisements, were potentially accessible to all interested persons. Today, employment recruiting is increasingly moving onto social media platforms like Facebook. Recent surveys show a clear upward trend in online recruiting.⁵ In 2015, an overwhelming majority of employers surveyed—eighty-four percent—

1. Julia Angwin, Noam Scheiber & Ariana Tobin, *Dozens of Companies Are Using Facebook to Exclude Older Workers from Job Ads*, PROPUBLICA (Dec. 20, 2017, 5:45 PM), <https://www.propublica.org/article/facebook-ads-age-discrimination-targeting> [https://perma.cc/B356-KYRJ].

2. *Id.*

3. See F. Carson Mencken & Idee Winfield, *Employer Recruiting and the Gender Composition of Jobs*, 32 SOC. FOCUS 201, 202 (1999).

4. *Id.* at 203–04 (discussing how informal recruiting limits employment opportunities for certain groups but more formal advertising reaches a wider audience).

5. The Society for Human Resource Management conducts biennial surveys of job recruiters. The surveys demonstrated an increase in the use of online recruiting by employers, rising from fifty-six percent in 2011 to seventy-seven percent in 2013 to eighty-four percent in 2015. *SHRM Survey Findings: Social Networking Websites and Recruiting/Selection*, SOC. FOR HUM. RESOURCE MGMT. 2 (Apr. 11, 2013), <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Pages/shrm-social-networking-websites-recruiting-job-candidates.aspx> [https://perma.cc/6E3B-2D3L]; *SHRM Survey Findings: Using Social Media for Talent Acquisition—Recruitment and Screening*, SOC. FOR HUM. RESOURCE MGMT. 3 (Jan. 7, 2016), <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Documents/SHRM-Social-Media-Recruiting-Screening-2015.pdf> [https://perma.cc/A523-99VX]. See also *Jobvite’s New 2015 Recruiter Nation Survey Reveals Talent Crunch*, JOBVITE (Sept. 22, 2015), https://www.jobvite.com/news_item/jobvites-new-2015-recruiter-nation-survey-reveals-talent-crunch-95-recruiters-anticipate-similar-increased-competition-skilled-workers-coming-year-86-expect-exp [https://perma.cc/72TY-HW3J]; Kimberlee Morrison, *Survey: 92% of Recruiters Use Social Media to Find High-Quality Candidates*, ADWEEK, (Sept. 22, 2015), <https://www.adweek.com/digital/survey-96-of-recruiters-use-social-media-to-find-high-quality-candidates/> [https://perma.cc/8F7E-AH4D].

reported using social media to recruit,⁶ and the proportion has likely gone up since then.

Facebook is not alone in allowing recruiters to target a demographically restricted audience. The very premise of online advertising is that it can precisely target viewers based on their interests, preferences, and characteristics. Google, LinkedIn, and other platforms also encourage advertisers to use personal attributes to choose who can see their ads, as well as who will be excluded.⁷ Employers value these tools because they can deploy their recruiting dollars strategically, targeting ads to those who are most likely to have relevant skills and to actually apply.

The shift to online recruiting raises concerns about unfair exclusion. In a series of articles, ProPublica reported on the potential for advertisers to exclude certain racial groups from receiving their online ads.⁸ Several lawsuits were subsequently filed alleging that Facebook unlawfully permitted discriminatory advertising.⁹ The issue of whether online platforms should be liable for facilitating discriminatory conduct is a vexing one, involving questions about what constitutes discriminatory conduct as well as when the platforms are entitled to immunity under Section 230 of the Communications Decency Act.¹⁰ A number of cases and articles have explored these questions in some depth.¹¹

6. *SHRM Survey Findings: Using Social Media for Talent Acquisition—Recruitment and Screening*, *supra* note 5, at 3.

7. Jennifer Valentino-DeVries, *AARP and Key Senators Urge Companies to End Age Bias in Recruiting on Facebook*, PROPUBLICA (Jan. 8, 2018, 8:00 AM), <https://www.propublica.org/article/aarp-and-key-senators-urge-companies-to-end-age-bias-in-recruiting-on-facebook> [https://perma.cc/6ND8-GEGW].

8. Julia Angwin & Terry Parris, Jr., *Facebook Lets Advertisers Exclude Users by Race*, PROPUBLICA (Oct. 28, 2016, 1:00 PM), <https://www.propublica.org/article/facebook-lets-advertisers-exclude-users-by-race> [https://perma.cc/B8YC-LJYM]; Julia Angwin, *Facebook Says it Will Stop Allowing Some Advertisers to Exclude Users by Race*, PROPUBLICA (Nov. 11, 2016, 10:00 AM), <https://www.propublica.org/article/facebook-to-stop-allowing-some-advertisers-to-exclude-users-by-race> [https://perma.cc/E87K-LWJW]; Julia Angwin, Ariana Tobin & Madeleine Varner, *Facebook (Still) Letting Housing Advertisers Exclude Users by Race*, PROPUBLICA (Nov. 21, 2017, 1:23 PM), <https://www.propublica.org/article/facebook-advertising-discrimination-housing-race-sex-national-origin> [https://perma.cc/84QT-GUGV].

9. *Onuoha v. Facebook, Inc.*, No. 5:16-cv-06440-EJD, 2016 WL 6599689, para. 2 (N.D. Cal. Sept. 9, 2018) (class action lawsuit against Facebook for engaging in a pattern-or-practice of providing racially discriminatory advertising for employers, creditors, and housing providers, in violation of multiple civil rights laws); *Bradley v. T-Mobile*, No. 5:17-cv-07232, 2017 WL 6539268, para. 1–2, 10 (N.D. Cal. Nov. 1, 2018); *Nat'l Fair Housing Alliance v. Facebook, Inc.*, No. 1:18-cv-02689, 2018 WL 1505634, para. 2 (S.D.N.Y. Aug. 31, 2018) (fair housing lawsuit against Facebook for enabling housing advertisers to exclude certain groups on the basis of protected traits).

10. Communications Decency Act of 1934 § 230, 47 U.S.C. § 230 (2012).

11. *See Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1164 (9th Cir. 2008); Amit Datta, Anupam Datta, Jael Makagon, Deirdre K. Mulligan, Michael Carl Tschantz, *Discrimination in Online Advertising: A Multidisciplinary Inquiry*, 81 PROC. MACHINE LEARNING

This Article examines the distinct but related question of *employer* liability. Our focus is thus on the underexplored question of when employers should be liable for discrimination based on their online recruiting strategies. These questions were raised in *Bradley v. T-Mobile*,¹² a lawsuit filed in December 2017, which claims that employers such as T-Mobile, Amazon, Cox Communications, and Hubspot are using Facebook's advertising tools in ways that violate federal and state age discrimination laws.¹³ The complaint alleges that these employers exclude older workers from receiving information about job opportunities by using advertisements targeted on the basis of age.¹⁴ As explained below, Title VII of the Civil Rights Act of 1964¹⁵ and the Age Discrimination in Employment Act ("ADEA")¹⁶ both contain little-noticed provisions that specifically forbid discriminatory advertising¹⁷ in addition to their general prohibitions on taking adverse employment actions because of a protected characteristic. We consider various theories for holding employers liable for their advertising and recruitment practices, and conclude that ample room exists within existing doctrine to address the most egregious practices. Whether current law is adequate to reach all practices with significant discriminatory effects is less certain.

We begin in Part II by explaining how employers can recruit candidates online and why these strategies may sometimes discriminate based on race, sex, age, or other traits currently protected by law. In Part III, we analyze the sparse legal authority interpreting the prohibitions on discriminatory advertising in the context of newspaper advertisements. We also review cases that relied on discriminatory recruitment practices as evidence of disparate treatment or disparate impact liability. In Part IV, we apply that authority to online recruitment practices, considering the extent to which existing law can address concerns about discriminatory exclusion.

RES. 1, 2 (2018), <http://proceedings.mlr.press/v81/datta18a/datta18a.pdf> [<https://perma.cc/48YJ-7C5E>]

12. *Bradley*, 2017 WL 6539268, para. 1–22.

13. Press Release, Comm'n Workers of America, *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), <https://www.cwa-union.org/news/releases/class-action-lawsuit-hits-tmobile-amazon-cox-for-alleged-age-discrimination> [<https://perma.cc/GM36-AB8M>]. The lawsuit was filed with both a plaintiff class that includes older workers and a defendant class of hundreds of companies that utilize targeted advertising.

14. *Id.*

15. Civil Rights Act of 1964 §§ 703-716, 42 U.S.C. §§ 2000e to 2000e-15 (2012).

16. Age Discrimination in Employment Act of 1967 §§ 2-12, 14-15, 17, 29 U.S.C. §§ 621–634 (2012).

17. *See* 42 U.S.C. § 2000e-3(b) (2012); 29 U.S.C. § 623(e) (2012).

II. ONLINE EMPLOYMENT RECRUITING PRACTICES

The power of online recruiting lies in the ability it gives employers to precisely target specific audiences. By directing their employment ads at the most plausible and desirable candidates, they can save money and effort. While targeted advertising enables more efficient outreach, it may also open the door to the discriminatory delivery of ads. This part explains that risk, focusing primarily on Facebook to illustrate the mechanics of the ad targeting process.

Like other internet platforms, Facebook systematically collects large amounts of data about users' activities on the site, such as who their friends are, when they "like" something, and what links they click.¹⁸ Facebook also purchases information from data brokers to learn about users' offline behavior, including income and spending habits.¹⁹ All of this data is aggregated and analyzed to sort and categorize users. Studies estimate that Facebook uses tens or perhaps hundreds of thousands of unique attributes to classify its users²⁰—categories ranging from people who have expressed an interest in cats to expats who lived in Bangladesh. Facebook uses all this data to help advertisers identify the specific types of people they want to receive their ads.²¹ They can choose to target or exclude people from their audience using basic demographic variables like age, gender, or location.²² They can also select more granular categories—

18. See Hanna Kozłowska, "Why Am I Seeing This Ad" Explanations on Facebook are Incomplete and Misleading, a Study Says, QUARTZ (Apr. 6, 2018), <https://qz.com/1245941/why-am-i-seeing-this-ad-explanations-on-facebook-are-incomplete-and-misleading-a-study-says/> [<https://perma.cc/6TGR-EGTQ>]; Dylan Curran, *Are You Ready? Here Is All the Data Facebook and Google Have on You*, THE GUARDIAN (Mar. 30, 2018, 3:17 PM), <https://www.theguardian.com/commentisfree/2018/mar/28/all-the-data-facebook-google-has-on-you-privacy> [<https://perma.cc/FFT2-HJMT>].

19. See Julia Angwin, Surya Mattu & Terry Parris, Jr., *Facebook Doesn't Tell Users Everything It Really Knows About Them*, PROPUBLICA (Dec. 27, 2016, 9:00 AM), <https://www.propublica.org/article/facebook-doesnt-tell-users-everything-it-really-knows-about-them> [<https://perma.cc/6WE7-BR2M>].

20. Angwin et al., *supra* note 19 (collecting more than 52,000 unique attributes that Facebook uses to classify users); Till Speicher et al., *Potential for Discrimination in Online Targeted Advertising*, 81 PROC. MACHINE LEARNING RES. 1, 7 (2018), <http://proceedings.mlr.press/v81/speicher18a/speicher18a.pdf> [<https://perma.cc/LDW5-57UA>] (reporting retrieval of nearly 240,000 free-form attributes available on Facebook).

21. See Speicher et al., *supra* note 20, at 7; *Targeting Tips to Reach the Right People*, FACEBOOK BUSINESS, <https://www.facebook.com/business/a/facebook-ads-targeting-tips> [<https://perma.cc/8XGE-BK5Z>] (last visited Nov. 7, 2018); *Choose Your Audience*, FACEBOOK BUSINESS, <https://www.facebook.com/business/products/ads/ad-targeting> [<https://perma.cc/VMK5-3G58>] (last visited Nov. 7, 2018).

22. See *Targeting Tips to Reach the Right People*, *supra* note 21.

for example, targeting an audience that is politically conservative or excluding from their audience people labeled as interested in red wine or the Civil War.²³

There are at least three ways in which targeted online recruitment may have discriminatory effects, whether intended or not. First, employers might rely on a protected characteristic to include or exclude recipients from their targeted group. For example, they might limit their audience to only women, or to individuals between the ages of eighteen and forty.²⁴ Second, employers might choose their target audience by relying on attributes that appear to be neutral yet are closely correlated with protected characteristics.²⁵ For example, in areas with heavy residential segregation, limiting advertisements to people in certain zip codes can create a racially skewed applicant pool. Similarly, directing ads at users labeled with the attributes “Young & Hip” or “Millennial” will likely avoid older workers, and excluding users interested in “Nuestro Diario” will eliminate many Hispanics from the target audience.²⁶

The third way online advertising can have discriminatory effects is through Facebook’s “lookalike” audience tool.²⁷ To use this feature, advertisers provide Facebook with information about an existing group—the source audience—that it knows to be a relevant audience. In the recruiting context, the source audience might be an employer’s current workforce. Facebook then uses traits such as location, age, gender, and interests to find other Facebook users who are similar to the source audience.²⁸ If a company’s workforce is already biased along the lines of age, race, or sex, creating a “lookalike” audience that matches its current employees’ characteristics will simply perpetuate those biases and exclude people that belong to different demographic groups.

The first method—defining the target audience using a protected characteristic—generally involves an intentional choice on the part of the employer, and Facebook’s platform makes that kind of choice possible. ProPublica reported in 2016 that it was able to purchase housing ads on Facebook that excluded users with the attributes of African-American, Asian-

23. See Noam Scheiber, *Facebook’s Ad-Targeting Problem, Captured in a Literal Shade of Gray*, N.Y. TIMES (Sept. 28, 2017), <https://www.nytimes.com/2017/09/28/technology/facebook-ads.html> [https://perma.cc/W5LH-EGYR?type=image].

24. See Angwin et al., *supra* note 1.

25. Speicher et al., *supra* note 20, at 10.

26. See Speicher et al., *supra* note 20, at 9; Verne Kopytoff, *Tech Industry Job Ads: Older Workers Need Not Apply*, FORTUNE (June 19, 2014), <http://fortune.com/2014/06/19/tech-job-ads-discrimination/> [https://perma.cc/XW72-B5WF]. Though these groups do not specifically limit which ages are included, users who are sorted into them are people who have been labeled as such or like pages related to the labels; typically, this would attract younger audiences and disproportionately exclude people over a certain age.

27. *About Lookalike Audiences*, FACEBOOK BUSINESS, <https://www.facebook.com/business/help/164749007013531> [https://perma.cc/S935-22UW] (last visited Nov. 7, 2018).

28. *Targeting Tips to Reach the Right People*, *supra* note 21.

American, or Hispanic affinity.²⁹ Facebook subsequently announced that it would no longer accept ads for housing, employment, or credit that relied on ethnic attributes, but a follow-up study showed that targeting such ads on these bases was still possible.³⁰ Facebook has apparently not attempted to prohibit the use of sex or age categories for targeted ads.³¹ In the *Bradley* case, the plaintiffs were able to document numerous examples of job ads that targeted a restricted age range, such as T-Mobile's ad aimed at people eighteen to thirty-eight.³²

The second and third methods could also be used deliberately by an advertiser to restrict its audience on the basis of race, sex, or other protected category. In order to investigate this possibility, Speicher et al. tested whether a "malicious advertiser" could exclude certain groups by leveraging the extensive personal data available through Facebook.³³ They found, as suggested above, that many of the attributes collected by Facebook are strongly correlated with protected traits like race and could be used deliberately to "allow extremely biased targeting."³⁴ Speicher et al. also demonstrated that if an advertiser started with a highly biased source audience, it could use Facebook's lookalike audience feature to "effectively scal[e] the bias to much larger populations."³⁵

As Speicher et al. acknowledge, however, discriminatory bias in ad delivery might occur unintentionally as well.³⁶ When an advertiser relies on neutral attributes to select an audience, it may not always be obvious that doing so can skew the audience along demographic lines. Particularly, when multiple attributes are combined to define who to target, the interaction between those attributes may make it difficult to predict the effects that they will have on the composition of the audience. Similarly, because Facebook's algorithm determines what are the salient features of the source audience that will be used to select the lookalike audience, an employer relying on this tool may not realize its potential to target audiences which are biased in some way.

Other experimental studies have documented instances of biased delivery of employment ads, as well as the difficulty in determining the causes of the bias. Datta et al. ran an experiment in which simulated computer users were identified as male or female and engaged in identical web browsing activities to signal

29. See Angwin & Parris, Jr., *supra* note 8.

30. See Angwin, *supra* note 8.

31. See Valentino-DeVries, *supra* note 7 (Facebook vice president defended use of age as valid basis for advertising).

32. *Bradley v. T-Mobile*, No. 5:17-cv-07232, 2017 WL 6539268, para. 2 (N.D. Cal. Nov. 1, 2018).

33. Speicher et al., *supra* note 20, at 7–10.

34. Speicher et al., *supra* note 20, at 11.

35. Speicher et al., *supra* note 20, at 11. Speicher et al. also analyzed a third mechanism for targeting users—the custom audience. *Id.* at 4–7. We omit discussion of this targeting method because it is not as relevant to our analysis.

36. Speicher et al., *supra* note 20, at 2.

their interest in employment.³⁷ The experimenters found that Google served different ads relating to employment opportunities to male and female users. For example, an ad for a career coaching service for high-paying executive positions was shown far more often to male users.³⁸ Although the difference in ad delivery was significant, the authors reported that they could not “determine whether Google, the advertiser, or complex interactions among them and others caused the discrimination.”³⁹ They also acknowledged the possibility that the discriminatory effects might be entirely unintentional—resulting, for example, from the operation of algorithms that optimize clicks or other metrics.⁴⁰ Regardless of whether the discriminatory effects were inadvertent, they argued that their findings raise concerns because of their unjust social effects.⁴¹

In another study, Lambrecht and Tucker ran a field test of an ad promoting STEM (Science, Technology, Engineering, and Math) careers.⁴² Although the ad was intended to be shown on a gender-neutral basis, they found that twenty percent more men than women received it.⁴³ This difference was observed even though women were more likely to click on the ad if they received it.⁴⁴ Lambrecht and Tucker suggest that the gender disparity in delivery of the ad resulted from spillover effects in the ad ecosystem. More specifically, because younger women are a prized demographic for other advertisers, it is costlier to serve ads to them.⁴⁵ As a result, algorithms that optimize cost efficiency may produce a discriminatory pattern of ad delivery that effectively reduces women’s access to information about career opportunities.

These studies show that online targeting can result in unequal ad delivery. Determining the causes of the disparities can be difficult, however. Even when conducting a controlled study, researchers cannot always pinpoint the precise reasons why biased outcomes are observed.⁴⁶ Regardless of the cause, these methods of targeting ads can end up sorting people such that certain groups are systematically denied information about available jobs. When this works to

37. Amit Datta, Michael Carl Tschantz & Anupam Datta, *Automated Experiments on Ad Privacy Settings*, 1 PROC. ON PRIVACY ENHANCING TECHS. 92, 93 (2015).

38. *Id.* at 93, 102.

39. *Id.* at 105.

40. *Id.*

41. *Id.*

42. Anja Lambrecht & Catherine Tucker, *Algorithmic Bias? An Empirical Study into Apparent Gender-Based Discrimination in the Display of STEM Career Ads* (Mar. 9, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2852260 [<https://perma.cc/598J-S2F2>].

43. *Id.* at 2.

44. *Id.*

45. *Id.* at 24–25.

46. Without a field experiment or controlled study, it may be difficult to detect biased patterns in ad delivery. For this reason, auditing the operation of algorithms like online ad delivery systems is crucial for detecting discrimination. See Pauline T. Kim, *Auditing Algorithms for Discrimination*, 166 U. PA. L. REV. ONLINE 189 (2017).

exacerbate inequality or disadvantage along the lines of race, sex, or other protected characteristics, the results are a form of data-driven discrimination described in earlier work as “classification bias.”⁴⁷ Because classification bias risks deepening existing patterns of inequality, it should be a matter of significant policy concern. The next part considers the extent to which existing legal tools can reach this form of bias.

III. DISCRIMINATORY EMPLOYMENT ADS: A LOOK BACK

Before the mid-1960s, employment ads that specified race and gender requirements for employees were commonplace.⁴⁸ Postings typically specified if a man or woman was wanted for the job, and ads that sought applications only from whites, or from particular ethnic groups, were common. Title VII of the Civil Rights Act of 1964 changed all that. In addition to Title VII’s familiar prohibition on firing or refusing to hire workers because of race, color, religion, sex, or national origin, the statute includes a provision in Section 704(b) that makes it unlawful for employers to publish advertisements expressing a preference based on one of the protected categories.⁴⁹ When Congress passed the ADEA in 1967, it included nearly identical language forbidding employers from indicating age-based preferences in their job postings.⁵⁰

After Title VII became effective, job advertisements expressing racial preferences quickly disappeared, but the application of Section 704(b) to sex-specific ads was contested.⁵¹ The Equal Employment Opportunity Commission (“EEOC”) initially published guidance that allowed sex-segregated help-wanted columns so long as the text of the ad itself stated that the position was open to males and females.⁵² As newspapers continued to publish sex-segregated job ads under the EEOC’s sanction, women’s advocacy groups protested and rallied for stricter regulations. The National Organization for Women, which formed in 1966 partly in response to the EEOC’s failure to prohibit sex-segregated ads, put

47. Pauline T. Kim, *Data-Driven Discrimination at Work*, 58 WM. & MARY L. REV. 857, 890–92 (2017).

48. Nicholas Pedriana & Amanda Abraham, *Now You See Them, Now You Don’t: The Legal Field and Newspaper Desegregation of Sex-Segregated Help Wanted Ads 1965–75*, 31 LAW & SOCIAL INQUIRY 905, 906 (2006).

49. 42 U.S.C. § 2000e-3(b) (2012).

50. 29 U.S.C. § 623(e) (2012).

51. See Pedriana & Abraham, *supra* note 48, at 911.

52. See Guidelines on Discrimination Because of Sex, 30 Fed. Reg. 14926–28 (Dec. 2, 1965) (originally codified at 29 C.F.R. pt. 1604). The EEOC required that sex-segregated ads (1) “specifically state that the job is open to males and females” and (2) include in that section of the newspaper a boxed nondiscrimination disclaimer. The disclaimer had to make clear that separate sex male and female listings “specifically state that the job is open to males and females,” and were “not intended to exclude or discourage applications for persons of the other sex.”; Pedriana & Abraham, *supra* note 48, at 913 (quoting EEOC Press Release from September 22, 1965).

increased pressure on the EEOC to change its stance.⁵³ In 1968 the EEOC revised its guidelines to unequivocally declare that “the placement of job advertisements under separate male and female column headings violates the law.”⁵⁴

Around the same time, states and local governments passed their own employment discrimination statutes that created liability for employers who advertised in sex-segregated columns.⁵⁵ Many of these state and local laws also included “aiding and abetting” provisions holding non-employer entities liable for participating in discrimination by an employer.⁵⁶ Women’s advocacy groups successfully used these laws to argue that newspapers which published sex-segregated help-wanted ads were unlawfully “aiding and abetting” gender discrimination.⁵⁷

In 1973, the Supreme Court upheld the application of an “aiding and abetting” clause to a newspaper that published separate male and female employment columns,⁵⁸ and shortly thereafter, major newspapers throughout the country abandoned the practice.⁵⁹ Employers also stopped stating discriminatory preferences explicitly in their job ads, and as a result, the provisions forbidding discriminatory ads were largely forgotten in the following decades. Instead, litigants overwhelmingly focused on challenging adverse employment actions such as failure to hire or discharge under the disparate treatment and disparate impact theories of liability.⁶⁰

The growth in targeted online ads—and the risks of bias discussed in Part II above—raises questions of whether and when employers will be liable for the discriminatory effects of their recruitment practices. In this section, we discuss how past cases treated employers’ offline recruitment practices under the discriminatory advertising provisions, as well as under the more familiar

53. Pedriana & Abraham, *supra* note 48, at 913–14.

54. *Id.* at 914 (quoting Press Release, Equal Emp’t Opportunity Comm’n, EEOC Issues Guidelines on Classified Advert., Rules Separate Male-Female Ads Illegal, (Aug. 6, 1968) (on file with the EEOC Library)). The American Newspaper Publishing Association filed suit arguing that EEOC guidelines were not legally binding, but federal courts rejected the argument and held that EEOC interpretations should be accorded consideration. *See* Am. Newspaper Pub. Ass’n v. Alexander, 294 F. Supp. 1100 (D.D.C. 1968). *See also* Weeks v. S. Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969).

55. Pedriana & Abraham, *supra* note 48, at 916.

56. *See, e.g.*, N.J. STAT. ANN. § 10:5–12 (West 2018); N.Y. EXEC. LAW § 296 (McKinney 2017); CONN. GEN. STAT. ANN. § 46a–60 (West 2017).

57. *See, e.g.*, Passaic Daily News v. Blair, 308 A.2d 649 (N.J. 1973); Nat’l Org. for Women v. State Div. of Human Rights, 314 N.E.2d 867 (N.Y. 1974); State Div. of Human Rights *ex rel* Carey v. Binghamton Press Co., 67 A.D.2d 231 (N.Y. App. Div. 1979).

58. Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations, 413 U.S. 376, 391 (1973).

59. Pedriana & Abraham, *supra* note 48, at 906.

60. *See, e.g.*, Capaci v. Katz & Besthoff, Inc., 711 F.2d 647 (5th Cir. 1983).

theories of disparate treatment and disparate impact liability. Section A reviews the law addressing when employers are liable for their discriminatory advertising. Section B explores cases where employers' advertising and other recruiting practices provide evidence to support plaintiffs' disparate treatment and disparate impact claims.

A. *Liability for Discriminatory Advertising*

Section 704(b) of Title VII states:

It shall be an unlawful employment practice for an employer . . . to print or publish or cause to be printed or published any notice or advertisement relating to employment . . . indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin . . .⁶¹

The statute makes an exception if the position is one for which religion, sex, or national origin is a bona fide occupational qualification,⁶² but otherwise the prohibition seems quite absolute. Section 623(e) of the ADEA contains nearly identical language prohibiting advertisements expressing age preferences.⁶³ Liability under these provisions turns on whether an advertisement "indicat[es] any preference, limitation, specification, or discrimination" on a forbidden basis.⁶⁴ These prohibitions clearly forbid a job posting stating that the employer will only hire workers of a particular race, gender or age, for example, but it is less certain how they apply when the preferences are not expressed explicitly.

The EEOC has offered only minimal guidance in this area. As mentioned above, in 1968 it issued guidance stating that it considered the placement of help wanted ads in sex segregated columns to be "an expression of a preference, limitation, specification, or discrimination based on sex."⁶⁵ Thus, even if the content of an ad was gender neutral, it violated the statute when placed in a column indicating a preference for hiring males or females. Although the EEOC's guidance only addresses sex-segregated job listings, it suggests more

61. 42 U.S.C. § 2000e-3(b) (2012). This prohibition also applies to labor organizations, employment agencies, or committees that control access to apprenticeships or training programs.

62. Employer notices or advertisements "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." 42 U.S.C. § 2000e-3(b) (2012).

63. The ADEA language states that:

It shall be unlawful 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 age.

29 U.S.C. § 623(e) (2012).

64. 29 U.S.C. § 623(e) (2012).

65. 29 C.F.R. § 1604.5 (1968).

broadly that the context in which an ad appears can provide evidence of a discriminatory preference even if the text alone does not.

Regarding the analogous provisions in the ADEA, the Department of Labor, which was initially responsible for the statute's enforcement, issued an Interpretive Bulletin declaring that when advertisements "contain terms and phrases such as 'age 25 to 35,' 'young,' 'boy,' 'girl,' or others of a similar nature which indicate a preference for a particular age, range of ages, or for a young age group, such a term or phrase . . . is in violation of the Act"⁶⁶ The position of the Department appeared to be that using these terms, even absent an express intent to discriminate against older workers, was inherently discriminatory. The EEOC assumed responsibility for enforcing the ADEA in 1979,⁶⁷ and it has adopted the same position as its own guidance, reasoning that the use of such terms "tend[s] to limit or deter the employment of older workers."⁶⁸

Only a small handful of cases have interpreted the discriminatory advertising provisions of Title VII and the ADEA, and courts have found that liability turns on two distinct issues. The first considers when an advertisement indicates a discriminatory preference. The second concerns who can bring suit against an employer or other covered entity that publishes such an advertisement.

Determining when an advertisement is unlawful requires examining not just the use of specific words within the four corners of the ad, but also the overall context in which it is published. In one of the earliest published cases, *Hailes v. United Air Lines*, the defendant advertised for stewardesses in the "Help Wanted-Female" column but did not place a similar ad in the "Help Wanted-Male" column.⁶⁹ The plaintiff, a male applicant, saw the ad and sued, alleging discriminatory advertising.⁷⁰ The Fifth Circuit concluded that he had stated a claim for relief under 704(b), given the language and the context of the ad.⁷¹ Consistent with the EEOC's guidance, the court found that placing the ad in the "Help Wanted—Female" column "plainly indicates a preference for females"

66. 29 C.F.R. § 860.92(b) (1968) (effectively rescinded by 46 Fed. Reg. 47724 (Sept 29, 1981), and transferred from the C.F.R. by 52 Fed. Reg. 23812 (June 25, 1987)). This interpretation was created when the Department of Labor was responsible for enforcing the ADEA. When the responsibility shifted to the EEOC, the EEOC passed an almost parallel regulation codified as 29 C.F.R. § 1625.

67. Victoria A. Lipnic, *The State of Age Discrimination and Older Workers in the U.S. 50 Years After the Age Discrimination in Employment Act (ADEA)*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (June 2018), <https://www.eeoc.gov/eeoc/history/adea50th/report.cfm> [<https://perma.cc/2V6D-4WKJ>].

68. 29 C.F.R. § 1625 (2007).

69. *Hailes v. United Air Lines*, 464 F.2d 1006, 1008 (5th Cir. 1972).

70. *Id.*

71. *Id.* at 1009.

and that the inclusion of a statement by the airline that it was an “Equal Opportunity Employer” could not overcome that conclusion.⁷²

A case decided under Section 623(e) of the ADEA also focused on context to determine whether advertisements indicated a preference based on age. In *Hodgson v. Approved Personnel Service, Inc.*, an employment agency published over fifty advertisements with phrases such as: “recent college graduate,” “excellent first job,” “1–2 years out of college,” “recent high school grad,” “young executive,” “junior accountant,” “athletically inclined,” “career girls,” and “young office group.”⁷³ The Department of Labor filed suit, arguing that the use of these types of “trigger words” is a per se violation of Section 623(e).⁷⁴ The Fourth Circuit instead found that “that the discriminatory effect of an advertisement is determined not by ‘trigger words’ but rather by its context.”⁷⁵ Advertisements did not need to explicitly state “younger workers only” or restrict applicants to a certain age range to violate Section 623(e). On the other hand, not every use of a trigger word established a discriminatory preference. For example, the court found that the term “junior executive” simply described the seniority level of the advertised position, rather than carrying connotations of youth.⁷⁶ In contrast, using the terms “girls” or “career girls” was discriminatory because it conveyed that the company was not interested in older applicants.⁷⁷

In other cases, the expression of a discriminatory preference was quite obvious from the text of the ads. For example, one company published an ad seeking an accountant with the description: “[y]oung man with a college degree.”⁷⁸ The court found it “hardly open to debate that the defendant violated the unambiguous provisions of [Section 704(b)] by advertising for a *male* accountant.”⁷⁹ In another case, companies recruiting on a college campus checked a box indicating that they preferred to interview only male graduates, and the court had no difficulty concluding those employers had “indicated an express preference” to hire males.⁸⁰ The courts in these cases easily found that

72. *Id.*

73. 529 F.2d 760, 763, 765–66, 768 (4th Cir. 1975).

74. *Id.* at 765.

75. *Id.*

76. *Id.*

77. *Id.* at 767, n.14.

78. *Banks v. Heun-Norwood*, 566 F.2d 1073, 1074 (8th Cir. 1977). Although the court thought that the employer had clearly violated 704(b), it refused to find liability on the grounds that plaintiff was not “aggrieved,” an issue discussed further below.

79. *Id.* at 1076.

80. *McDonald v. Gen. Mills, Inc.*, 387 F. Supp. 24, 37 (E.D. Cal. 1974). The opinion does not make clear which section of Title VII the plaintiff had alleged was violated, but the court’s analysis of the job postings most easily fits with an allegation of liability under Section 704(b).

the employers had expressed discriminatory preferences, but the availability of relief turned on a second issue—whether the plaintiff could bring suit.⁸¹

In addition to showing that an ad violates 704(b), plaintiffs must show that they are “aggrieved” persons authorized to bring suit.⁸² In *Hailes*, the court easily found that posting a job for “stewardesses” in a “Help Wanted—Female” column violated 704(b), but it also considered whether the male plaintiff could sue.⁸³ The defendant, United Air Lines, argued that because Hailes never applied for a position, he was not aggrieved.⁸⁴ The court rejected that argument, but also declined to permit suit by “a mere casual reader.”⁸⁵ Instead, it held that a plaintiff challenging a discriminatory ad must have “a real, present interest in the type of employment advertised” and must show that the ad “effectively deterred” the plaintiff from applying.⁸⁶ Other courts have followed this reasoning by the *Hailes* court.⁸⁷

Requiring that private plaintiffs have a “real, present interest” in the employment properly ensures that they have a genuine stake in the litigation. They should be able to show that they are actively looking for work and would plausibly have been interested in an advertised position. However, insisting that they also prove that an ad “effectively deterred” them from applying is not justified by either the text or the purpose of the statute. Sections 704(b) and 623(e) flatly forbid advertisements that “indicat[e] any preference, limitation, specification, or discrimination” on a prohibited basis, with no additional requirement of proving that the advertisement had any specific adverse effects.⁸⁸ These provisions differ in this respect from the general anti-discrimination prohibitions found in Sections 703(a) and 623(a), which require some kind of adverse employment action or effect on complainants’ job opportunities to establish an unlawful employment practice.⁸⁹ Thus, as a textual matter, 704(b)

81. *Banks*, 566 F.2d at 1076; *McDonald*, 387 F. Supp. 24 at 34.

82. See 42 U.S.C. § 2000e-5(e) (2012) (describing when and how an aggrieved person can make a claim).

83. *Hailes v. United Air Lines*, 464 F.2d 1006, 1008–09 (5th Cir. 1972).

84. *Id.* at 1008.

85. *Id.*

86. *Id.* In the *Hailes* case, the “effectively deterred” requirement posed no difficulty because the plaintiff was able to demonstrate that he reasonably believed that applying to be a flight attendant would be futile. By allowing Hailes to sue even though he had not applied, the court acted consistently with cases holding that plaintiffs can pursue discriminatory failure-to-hire claims without having actually applied when doing so would be a “futile gesture.” There is, however, a difference between *permitting* a plaintiff to sue without having applied in a failure-to-hire case, and *requiring* a plaintiff to prove that an advertisement has deterred her application in order to bring a 704(b) claim. For reasons explained in text, the latter requirement is unwarranted.

87. See, e.g., *Banks v. Heun-Norwood*, 566 F.2d 1073, 1076 (8th Cir. 1977); *McDonald v. General Mills, Inc.*, 387 F. Supp. 24 (1974).

88. 42 U.S.C. § 2000e-3 (2012); 29 U.S.C. § 623(e) (2012).

89. 42 U.S.C. § 2000e-2 (2012); 29 U.S.C. § 623(a) (2012).

and 623(e) liability should turn solely on the nature of the employer's advertisements, not plaintiffs' reactions to them.

Requiring plaintiffs to demonstrate that they were deterred from applying may also undermine the purposes of those provisions, which is to forbid employers from publicly expressing their discriminatory preferences.⁹⁰ If a job seeker persists and applies for a job despite clearly discriminatory language, the employer should not escape liability on the grounds that it did not successfully deter the plaintiff's application. The plaintiff should still be considered an aggrieved party because the employer has expressly signaled that it devalues, if not outright rejects, applicants like her for reasons that are unlawful. If the employer rejects her application, she may also have a claim for discriminatory failure to hire, but the 704(b) or 623(e) violation should be recognized as an independent basis for liability.

B. Advertising and Recruiting Practices as Evidence of Discrimination

Although only a handful of cases have analyzed the discriminatory advertising provisions, courts also sometimes look at an employer's advertising and recruiting practices as evidence of discrimination under the general prohibitions against employment discrimination found in Title VII and the ADEA.⁹¹ These provisions forbid adverse employment actions such as failure

90. *Banks*, 566 F.2d at 1074–79, illustrates how such a requirement can undermine enforcement of 704(b). In that case, the employer escaped liability for publishing an advertisement seeking a “young man” as an accountant, a clear statutory violation, because the court found that the plaintiff had not been deterred by the ad. She had called to inquire about the position despite its discriminatory language, and persisted even after the company confirmed that it was seeking a man. It was only after the company made it clear that she would not be paid the salary she was seeking that she gave up applying. Ironically, if the plaintiff had been less determined and had not inquired about the job at all, she would have been considered “aggrieved” and could have pursued her 704(b) claim.

The court appears to have conflated the plaintiff's 704(b) claim with a claim of intentional discrimination. It cited *McDonnell Douglas v. Green*, the case that laid out the framework for establishing a prima facie case of discrimination, even though that framework has no relevance in a 704(b) case. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). As Judge Bright explained, “In *McDonnell Douglas*, the Supreme Court provided guidelines for establishing discriminatory conduct where the employer's conduct is so subtle that the plaintiff cannot prove discrimination directly. In the present case, the employer's conduct is neither subtle nor indirect. The employer here openly announced its interest in employing only males for the advertised position.” *Banks*, 566 F.2d at 1079 (Bright, J. Statement on denial of petition for Rehearing En Banc).

91. Title VII states that:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

to hire, or discharge, that are taken because of a protected characteristic, as well as other practices that have the effect of depriving individuals of employment opportunities on those bases.⁹²

Courts have generally recognized two routes for proving unlawful discrimination: disparate treatment and disparate impact.⁹³ Disparate treatment applies when an employer intended to discriminate on the basis of a protected characteristic.⁹⁴ Disparate impact, on the other hand, does not require intent—only that the employment policy or practice disproportionately affects a protected group.⁹⁵ Distinct from the possibility of violating the discriminatory preference provisions, an employer's advertising and recruiting practices can provide evidence supporting either a disparate treatment or disparate impact theory of liability.

When plaintiffs allege disparate treatment, an employer's advertisements expressing a preference based on a protected characteristic may serve as relevant evidence, strengthening the inference that it had a discriminatory motive when it refused to hire or fired members of that group. For example, in *Capaci v. Katz & Besthoff, Inc.*, the EEOC alleged that a company failed to hire and promote females at the same rate as males.⁹⁶ To support its claim of disparate treatment, the EEOC argued that the company's past advertising "indicated a preference

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (2012). The ADEA contains nearly identical language:

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age . . .

29 U.S.C. § 623(a) (2012).

92. 42 U.S.C. § 2000e-2(a) (2012). This provision is also known as § 703(a). Title VII has traditionally been interpreted as forbidding disparate treatment under § 703(a)(1). Kim, *supra* note 47, at 910–12. Disparate impact theory was originally recognized in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and has since been codified in § 704(k). In *Smith v. City of Jackson*, 544 U.S. 228 (2005), the Supreme Court held that the disparate impact theory also applied in age discrimination cases.

93. See, e.g., *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 569 (1978); Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 914 (2005) ("Early in its history, the Supreme Court adopted two definitions of the term [discriminate]: . . . disparate impact . . . [and] disparate treatment . . .").

94. See *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009); *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 985–86 (1988).

95. See Civil Rights Act of 1991 § 105, 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2018).

96. 711 F.2d 647, 651 (5th Cir. 1983).

for males in management openings and a preference for females in non-management positions.”⁹⁷ The ads sought applications from “qualified young men” for its management training positions, while seeking “counter girls” and “salesladies” for non-management jobs.⁹⁸ In addition, the latter advertisements were all placed in “Help Wanted-Female” newspaper columns, while ads for “a manager trainee, ‘career in management,’ fountain manager trainee and personnel director were found in the male columns.”⁹⁹ These ads undoubtedly violated Section 704(b), but rather than pursue liability under that section,¹⁰⁰ the EEOC argued that they provided evidence of the employer’s discriminatory intent in hiring.¹⁰¹ The Fifth Circuit agreed, finding the advertising evidence to be “useful and probative” in establishing the employers’ “motivation and hiring policies” and concluding that it showed an intent to discriminate based on sex.¹⁰²

Plaintiffs in ADEA cases have also attempted to use an employer’s allegedly discriminatory ads as evidence of age discrimination. In *Hodgson v. First Federal*, the Department of Labor (“DOL”) sought an injunction prohibiting an employer from engaging in age discrimination in the future.¹⁰³ As part of its evidence of discriminatory hiring, the DOL pointed to an advertisement the defendant had placed in the newspaper seeking a “young man” for the position of financial advertising assistant.¹⁰⁴ The court found that it was “substantive evidence of a policy of age discrimination” which, combined with other evidence in the case, justified the broad injunction sought by the DOL.¹⁰⁵ Similarly, in *Marshall v. Goodyear Tire & Rubber Co.*, the court relied on an employer’s job advertisement to find age discrimination.¹⁰⁶ The complainant, who was fifty-seven, had been fired and the company placed an ad seeking applicants between the ages of nineteen and twenty-six for the position shortly

97. *Id.* at 658–659.

98. *Id.*

99. *Id.* at 659.

100. It appears that by the time of the litigation, the company had ceased its discriminatory advertising practices and so there was no need for the EEOC to pursue injunctive relief to prevent further violations.

101. *Capaci*, 711 F.2d at 658.

102. *Id.* at 660, 666.

103. *Hodgson v. First Fed. Sav. & Loan Ass’n*, 455 F.2d 818, 820–21 (5th Cir. 1972).

104. *Hodgson*, 455 F.2d at 825–26.

105. *Id.* at 826–27. The district court originally issued an injunction prohibiting age discrimination in hiring bank tellers. *Id.* at 821. After reviewing advertisements that indicated age discrimination across a variety of positions, the Fifth Circuit held that the injunction needed to be broadened to include all jobs. *Id.* at 826–27. *See also* *DeBuhr v. Olds Prod. Co.*, No. 95 C 1462, 1996 WL 277644 (N.D. Ill. May 22, 1996) (finding that though the “advertisement does not alone directly support a claim for intentional discrimination, viewing [it] in light of the other statements made by [the president] it adds to the circumstantial evidence from which discriminatory intent might be inferred.”).

106. 554 F.2d 730, 732 (5th Cir. 1977).

afterward.¹⁰⁷ The court inferred from this evidence that the decision to discharge complainant “was tainted by the impermissible criterion of age.”¹⁰⁸

Arguments that an employer’s advertising practices are proof of intentional discrimination are not always successful. Rather, their impact depends upon the language and context of the ads, as well as other circumstances surrounding the allegedly discriminatory actions. For example, merely using the pronoun “his” in a job advertisement does not create an inference of sex discrimination.¹⁰⁹ Similarly, encouraging applications from degree candidates does not necessarily mean an employer is engaged in age discrimination.¹¹⁰ In another case, the court found that the use of phrases such as “young bankers,” “fresh new ideas and outlook,” and “new talent” in connection with a college recruiting program did not provide proof that “age discrimination was the standard operating procedure” in the employer’s dealings with existing employees of the companies it had acquired.¹¹¹ Thus, depending upon the circumstances, an employer’s advertising can support an inference that an employer has acted for discriminatory reasons.

Courts have also found that employers’ recruitment practices can give rise to disparate impact liability.¹¹² In a case from the Sixth Circuit, *United States v. City of Warren*, the Department of Justice filed suit against a municipality that did not have a single black employee out of a workforce of 1,500.¹¹³ The City of Warren was located in Macomb County, which was overwhelmingly white, and immediately adjacent to Detroit, which had a majority black population.¹¹⁴ Warren advertised its municipal employment opportunities in three newspapers with circulations in the County and in none of the newspapers with significant circulation in Detroit.¹¹⁵ There was no allegation that the ads themselves expressed a discriminatory preference in violation of Section 704(b). However, the employer’s recruiting practices as a whole were challenged as racially discriminatory.¹¹⁶ The Sixth Circuit agreed, finding that by publishing job notices only in outlets where black applicants were extremely unlikely to see

107. *Id.*

108. *Id.* at 735.

109. *Walette v. Thompson*, 373 F. Supp.2d 986, 992 (D.N.D. 2005).

110. *Boyd v. City of Wilmington*, 943 F. Supp. 585, 591 (E.D.N.C. 1996) (finding that word “candidates” is not listed in the EEOC regulation as one of the “trigger words,” does not carry “connotations of youth” as discussed in *Hodgson*, and does not indicate a preference for young applicants because it is merely part of the description of educational qualifications needed for the position).

111. *Stone v. First Union Corp.*, 203 F.R.D. 532, 549 (S.D. Fla. 2001).

112. *United States v. City of Warren*, 138 F.3d 1083 (6th Cir. 1998); *U.S. v. Brennan*, 650 F.3d 65 (2d Cir. 2011).

113. *City of Warren*, 138 F.3d at 1094.

114. *Id.* at 1088.

115. *Id.*

116. *Id.*

them, the City had created an effective barrier to black employment.¹¹⁷ The court concluded that Warren's "limitation of its applicant pool to residents of the overwhelmingly white city, combined with its refusal to publicize jobs outside the racially homogeneous county," had a disparate impact on black workers in violation of Title VII.¹¹⁸

Word-of-mouth and other informal recruiting practices may also give rise to liability for disparate impact discrimination.¹¹⁹ For example, in *Thomas v. Washington County School Board*, a black teacher sued alleging race discrimination in hiring when it failed to notify her of job openings after she had expressed interest in a teaching position.¹²⁰ The Board generally did not advertise teaching vacancies, but posted notices of available openings in its school buildings.¹²¹ Applicants therefore learned of opportunities primarily through word-of-mouth and were often relatives of current school employees. Because the plaintiff had not been aware of new job openings, she had been unable to apply.¹²² The plaintiff also produced evidence of at least forty-six cases of nepotism and the testimony of other black applicants who had been unable to apply because they were unaware of job openings.¹²³ The court found that "nepotism and word-of-mouth hiring . . . in the context of a predominantly white work force, serve[s] to freeze the effects of past discrimination."¹²⁴ Although the court did not find evidence of intentional discrimination, it permitted the plaintiff's disparate impact claim because the board's recruiting

117. *Id.* at 1094.

118. *City of Warren*, 138 F.3d at 1094. At trial, the United States offered evidence comparing Warren's applicant pools for police and firefighter positions before and after its advertising practices changed. *Id.* at 1092–93. When the city limited its advertisements to Warren and Macomb County in 1985 and 1986, zero of the 182 applications for firefighter positions, and one of the 400 applications for police officers were from black applicants. *Id.* at 1089. When the city advertised in Detroit newspapers in 1987, it "attracted 50 black applicants (6.2% of the total)." *United States v. City of Warren*, No. 86-CV-75435-DT, 1992 WL 509994, at *3 (E.D. Mich. Aug. 12, 1992), *rev'd in part*, 138 F.3d 1083 (6th Cir. 1998).

119. *See, e.g.*, *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 271 (10th Cir. 1975) (utilizing an employee referral system for hiring is an unlawful employment practice under Title VII where (1) an employer relies primarily or exclusively on such a method and (2) because of a history of past discrimination, the almost all white work force tends to perpetuate itself); *E.E.O.C. v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265, 1270 (11th Cir. 2002) (company had a practice of only hiring male waiters and it relied on an employee referral system that reinforced this discrimination); *United States v. Pasadena Indep. Sch. Dist.*, CIV. A. No. H–83–5107, 1987 WL 9919, at *27 (S.D. Tex. Apr. 18, 1987) (word-of-mouth recruitment and refusal to attend the historically black college's career fair was evidence of intentional discrimination); *Barnett v. W.T. Grant Co.*, 518 F.2d 543, 547 (4th Cir. 1975); *Parham v. Sw. Bell Tel. Co.*, 433 F.2d 421, 429 (8th Cir. 1970).

120. *Thomas v. Washington Cty. Sch. Bd.*, 915 F.2d 922, 923–24 (4th Cir. 1990).

121. *Id.* at 924–25.

122. *Id.*

123. *Id.* at 925.

124. *Id.*

practices “may discriminate against minorities as effectively as an intentionally discriminatory policy.”¹²⁵

In the offline world before social media and targeted advertising, discriminatory recruitment practices could give rise to employer liability under the advertising provisions of Title VII and the ADEA, or under those statutes’ more general provisions prohibiting unlawful adverse actions such as failure to hire or discharge. Liability under the discriminatory advertising provisions turned on proof that an advertisement or job posting expressed an unlawful preference—a determination made by looking not only at the words used in an ad, but also its entire context. Employers were also sometimes held liable for unlawful failure to hire or discharge when their recruiting practices either served as evidence of discriminatory intent, or were neutral in content, but had the effect of discriminating against protected workers.

IV. ASSESSING LIABILITY FOR ONLINE TARGETED RECRUITMENT

While the old help-wanted ads in newspapers could potentially have been seen by anyone, platforms such as Facebook and Twitter are desirable fora for employers to advertise precisely because they can target specific audiences.¹²⁶ Employers do not need to pay for ads served to a mass audience, but only to the most relevant and desirable groups of users.¹²⁷ This “microtargeting” winnows audiences down by excluding those outside the targeted group from seeing the ads at all. As discussed in Part II, sometimes that microtargeting can have the effect of excluding already disadvantaged groups along the lines of race, sex, age and other protected characteristics—an effect we referred to as classification bias.¹²⁸ In this Part we consider the extent to which existing anti-discrimination law can reach such recruiting practices. We first evaluate whether the provisions in Title VII and the ADEA forbidding discriminatory advertising might apply. We next consider whether these practices might give rise to liability under traditional disparate treatment and disparate impact theories.

125. *Thomas*, 915 F.2d at 925–26.

126. Angwin et al., *supra* note 1 (stating that “[t]he ability of advertisers to deliver their message to the precise audience most likely to respond is the cornerstone of Facebook’s business model.”).

127. See Angwin et al., *supra* note 1. The article details that it is “[t]he precision of Facebook’s ad delivery [that] has helped it dominate an industry once in the hands of print and broadcast outlets. The system, called microtargeting, allows advertisers to reach essentially whomever they prefer, including the people their analysis suggests are the most plausible hires or consumers, lowering the costs and vastly increasing efficiency.”

128. See *infra* Part II.

A. *Expressing Discriminatory Preferences Through Targeted Advertising*

Recall that there are three distinct ways in which employers' online recruitment practices might cause discriminatory effects. The first method involves using protected characteristics like sex or age to define the target audience. As discussed above, whether a notice expresses a discriminatory preference depends not just on its text or the use of certain words, but the overall context in which it appears. The recruitment ads that appear in someone's newsfeed are unlikely to include text or images that directly express a preference based on race, sex or age, but the *context* in which an ad is distributed may do so instead. For example, in the *Bradley* case, the plaintiffs collected numerous examples of job postings on Facebook in which the contents of the ads were neutral, and yet, the ads were deliberately targeted in a way that excluded older workers.¹²⁹ This age-based targeting was not visible from the ad itself. However, in the examples appended to the *Bradley* complaint, users who clicked on the "Why Am I Seeing This?" link¹³⁰ learned that the ad was targeted to persons in a particular age range, such as eighteen to thirty-five.¹³¹

A strong argument can be made that ads like these—which expressly rely on age to target a younger audience—are "indicating" a "limitation" or "specification" based on age in violation of Section 623(e). Similarly, if an employer sponsors career ads that are expressly targeted at only men or only women, it has indicated a preference that violates Section 704(b).¹³² Just like the sex-segregated newspaper columns in the 1970s, the criteria defining the target audience online should be part of the context relevant for determining the meaning of an advertisement today. And where an employer targets a group defined along the lines of race, sex, age, et cetera, it has clearly violated the prohibitions on discriminatory advertising.

As discussed in Part II above, there are two additional ways that targeted advertising can have discriminatory effects: using neutral attributes that act as proxies for protected characteristics and relying on a biased source audience to build a "lookalike audience."¹³³ It will be more difficult to prove that an

129. *Bradley v. T-Mobile*, No. 5:17-cv-07232, 2017 WL 6539268, para. 2–3 (N.D. Cal. Nov. 1, 2018).

130. The "Why am I seeing this?" feature was developed by Facebook in 2014 to address user concerns about how the platform targeted them based on their behaviors. The button is at the top of all advertisements. See Kozłowska, *supra* note 18; Todd Wasserman, *Facebook Will Now Tell You Why You're Seeing Those Ads*, MASHABLE (June 12, 2014), <https://mashable.com/2014/06/12/facebook-explains-ads/#u2VFN4UBEmqC> [<https://perma.cc/YM6G-9HSG>].

131. *Bradley*, 2017 WL 6539268, para. 2–3. The explanations given by Facebook typically do not explain all of the bases on which users are targeted. Thus, the targeting process is not entirely transparent and it is possible that discriminatory bases are not always revealed. See Kozłowska, *supra* note 18.

132. *Capaci v. Katz & Besthoff, Inc.*, 711 F.2d 647, 659 (5th Cir. 1983).

133. Speicher et al., *supra* note 20, at 11.

employer using either of these methods has violated the provisions prohibiting discriminatory advertising. There may be situations where a neutral attribute is so closely and obviously connected with a protected characteristic that relying on it may inherently express a discriminatory preference—for example, excluding users interested in BlackNews.com or *Nuestro Diario*.¹³⁴ Similarly, if the employer provides a source audience that was itself defined in a discriminatory way—for example, its current employees under the age of forty—then using the lookalike audience tool might indicate an unlawful preference. In many other situations, however, the connection between the choice of attributes or a source audience and any discriminatory effects will be far more subtle, making it difficult to argue that the resulting advertising indicates a discriminatory preference.

Assuming that an ad does express an unlawful preference, the second step in the analysis requires identifying who is entitled to bring a Section 704(b) or Section 623(e) claim. There may be a practical problem at the outset because the people most likely to be aggrieved are highly unlikely to learn about the discriminatory ads. Unlike sex-segregated columns which were plainly visible to anyone reading the newspaper, targeted advertising works by making ads visible only to the included group.¹³⁵ Those who are not in the included group simply will not see the ad. They will have no opportunity to ask “Why Am I Not Seeing This Ad?” or to learn about the discriminatory targeting criteria.

If users in the excluded group somehow become aware that they are not being shown ads, they can sue if they are “aggrieved” under the relevant statute. An individual who is actively seeking work and uses social media should be able to easily demonstrate a “real, present interest” in learning about job opportunities. As we have argued above, such a showing should be sufficient to authorize a plaintiff to enforce the prohibitions on discriminatory advertising.

Even if courts impose an additional requirement that plaintiffs show they were “effectively deterred” by an ad, excluded users will often be able to satisfy it. Not informing people of a job opportunity is a highly effective barrier. If potential applicants are excluded from receiving a recruitment ad, it follows that the discriminatory nature of the ad—namely its targeting criteria—deterred them from applying. Users who were deliberately excluded from receiving a job posting and failed to apply should therefore be considered aggrieved parties entitled to sue under Section 704(b) or Section 623(e).

A more difficult question is raised if a potential applicant, excluded from receiving targeted advertising, learns about the job through other means and applies. If she is required to show that she was effectively deterred, the fact that she applied may foreclose a discriminatory advertising claim, even if the employer has deliberately excluded users like her from receiving the ad on a

134. *Id.* at 9.

135. *Id.* at 1–2.

discriminatory basis. The employer might argue that because it used a variety of media to reach potential applicants, the fact that this particular plaintiff learned of the job opportunity means that she is not an aggrieved party. Such a result would be troubling, because even if that individual learned of the opportunity, members of the excluded group overall will be far less likely to become aware of it. The person who is in the best position to challenge the exclusionary advertising should not be precluded from doing so because she chose to apply anyway. Given the increasing significance of social media in the recruitment and hiring process, plaintiffs should be permitted to enforce the discriminatory advertising prohibitions so long as they have a genuine interest in the type of employment being advertised.

Regardless of whether “effective deterrence” must be proven to bring a discriminatory advertising claim, a plaintiff who applies and is rejected may be able to pursue a discriminatory failure to hire claim. That possibility is discussed in the next section.

B. Targeted Recruitment and Liability for Disparate Treatment or Disparate Impact

The discriminatory advertising provisions in Title VII and the ADEA directly forbid unlawful ads, but, as seen in Part III above, employers’ advertising practices in the offline world have also been held to support claims of disparate treatment and disparate impact. Similar arguments can be made in the online world. Rejected job seekers may be able to point to an employer’s targeting strategy to show either that the employer intended to discriminate, or that its neutral advertising practices were in fact unlawfully screening out potential applicants along the lines of race, sex or other protected characteristics.

Disparate treatment cases turn on employer intent, and therefore whether an employer’s online targeting strategy supports a finding of liability depends upon how clearly it indicates a discriminatory preference. If the employer expressly excludes some social media users from its target audience because of their protected characteristics, those choices strongly suggest that it intends to discourage members of those groups from applying. For example, if an employer directs its advertising only at men, or only at persons aged eighteen to thirty-five, a court may infer that a female or older applicant was rejected because of the employer’s discriminatory motive. Less explicit strategies, such as selecting an audience using neutral attributes or relying on the lookalike audience tool, may not clearly indicate a discriminatory preference, making it more difficult to infer motive from these choices.

Determining whether employer advertising provides evidence of intent in a disparate treatment case should closely parallel the analysis of whether the advertising is unlawful under Section 704(b) or Section 623(e). If the language of an ad and the context in which it is delivered indicate a “preference, limitation, specification, or discrimination” on a forbidden basis, then that advertisement

should also provide evidence of discriminatory motive. Conversely, ads that are not deemed unlawful under the advertising provisions should not be taken as proof of an employer's intent. Although these questions—whether an advertisement expresses a discriminatory preference and whether it evidences a discriminatory motive—are parallel, disparate treatment liability will require additional proof. Publication of a discriminatory ad itself constitutes a violation under Section 704(b) and Section 623(e); however, disparate treatment liability also requires the plaintiff to show that she suffered an adverse employment action and that the decision was made on a discriminatory basis.

When discriminatory effects result from targeting choices that rely on neutral attributes or the lookalike tool, it is less clear that those choices reflect a discriminatory motive. Without some evidence that the employer wanted to produce those effects, the observed bias may have occurred unintentionally. In such a situation, a disparate impact challenge would be more appropriate.

In many ways, discriminatory online targeting fits well with past disparate impact cases. In *City of Warren*, discussed above, the court found that the City of Warren's failure to publicize job openings outside all-white Macomb County gave rise to disparate impact liability.¹³⁶ By not publishing ads in newspapers with circulations in Detroit, which is located immediately adjacent, the City of Warren "produced a de facto barrier" for black applicants.¹³⁷ Today, if an employer used the "location" screening feature on Facebook to direct its ads only at residents with zip codes in an overwhelmingly white county,¹³⁸ the effect would be identical. Just as the court in *City of Warren* held that facially neutral advertising can violate Title VII, so too, courts today should find a disparate impact when employers target their recruitment ads using neutral attributes that disproportionately exclude users along the lines of race or other protected bases.

In a similar fashion, the word-of-mouth recruitment cases suggest that when the lookalike audience tool has discriminatory effects, an employer may be liable for disparate impact. The word-of-mouth cases recognize that when a workforce is overwhelmingly white, reliance on informal methods of publicizing job opportunities will exclude nonwhites from applying for those positions, effectively discriminating against them.¹³⁹ The lookalike audience feature is closely analogous to word-of-mouth recruiting. If an employer uses its current workforce, or some other set of people, as a source audience, and that set excludes certain demographic groups, the resulting lookalike audience is likely to similarly exclude those groups from receiving notice of job opportunities.

136. *City of Warren*, 138 F.3d at 1094.

137. *Id.*

138. *Reach People in the Areas Where You Do Business*, FACEBOOK BUSINESS, <https://www.facebook.com/business/a/location-targeting> [<https://perma.cc/A53S-RQ4B>] (last visited Nov. 8, 2018).

139. *See, e.g., Thomas v. Washington Cty. Sch. Bd.*, 915 F.2d 922, 925 (4th Cir. 1990).

Even though reliance on the lookalike tool may appear neutral, it may work “as effectively as any intentionally discriminatory policy”¹⁴⁰ to perpetuate bias. Just as in the word-of-mouth cases, such an effect should be sufficient to show disparate impact.

Of course, there will be complications and difficulties of proof in pursuing a disparate impact theory. For example, proof of a disproportionate impact has typically turned on statistical evidence of a disparity using workflow data. In a world in which employers micro-target their recruitment efforts and seek to identify “passive applicants,” disputes will arise about how to identify the relevant population against which any disproportionate impact should be measured. Employers will also argue that their targeted recruiting practices are justified. The responses of some employers to the allegations in the *Bradley* complaint are illustrative.¹⁴¹ One employer argued that age-based targeting was justified because it was the most cost-effective way of reaching individuals who were most likely to submit an application.¹⁴² Another argued that its age-targeted Facebook ads were “part of a broader recruitment strategy” and that it “advertises across many mediums” and hires on a nondiscriminatory basis.¹⁴³ Thus, employers will likely defend their practices on the grounds that their overall recruitment efforts, of which social media ads are only one part, do not discriminate against or hinder opportunities for anyone.

Many questions remain to be worked out, such as what kind of statistical evidence will suffice to trigger scrutiny of an employer’s recruitment practices and what reasons are sufficient to justify those practices when they are systematically biased against disadvantaged groups. However, in answering those questions, courts should not mechanically apply the details of disparate impact doctrine as it has developed to meet other types of employer practices. As one of us has argued elsewhere, classification bias that results from data-driven employment processes is not the same as the written ability tests or seniority systems that initially gave rise to the disparate impact doctrine.¹⁴⁴ As a result, the doctrinal superstructure that has grown up around disparate impact theory does not quite fit the challenges posed by new technologies for sorting

140. *Id.*

141. Jeff Larson et al., *These Are the Job Ads You Can’t See on Facebook If You’re Older*, PROPUBLICA (Dec. 19, 2017), <http://projects.propublica.org/graphics/facebook-job-ads> [<https://perma.cc/JHX8-EEDS>].

142. A spokesperson for Goldman Sachs defended limiting distribution of its ads about entry level positions to people eighteen to sixty-four because those sixty-five and older are more likely to click on ads but are very unlikely to apply. That pattern makes the ads more costly without increasing the yield of applicants. Angwin et al., *supra* note 1.

143. Statement by UPS. *See* Larson et al., *supra* note 143.

144. *See*, Kim, *supra* note 47, at 907–09. *See also* Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 716 (2006).

and screening workers.¹⁴⁵ The *theory* of disparate impact certainly applies—namely the idea that some practices that are neutral on their face can nevertheless have discriminatory effects. Where those practices constitute arbitrary barriers to job opportunities for disadvantaged groups, they ought to be forbidden. The *details* of how that theory ought to be applied to specific situations, however, needs to be adjusted given that practices like targeted online advertising are quite different from the context in which disparate impact doctrine first developed.

As explained in earlier work, there is ample room in Title VII's text for developing an effective response to new forms of discrimination.¹⁴⁶ In 1991, Congress codified disparate impact doctrine in Section 703(k) of the statute, but it left intact the language of Section 703(a)(2), which makes it unlawful for an employer to "limit, segregate, or classify his employees or applicants . . . in any way which would deprive or tend to deprive any individual of employment opportunities" because of race, sex or other protected characteristic.¹⁴⁷ New technologies like targeted online recruitment operate precisely by classifying applicants in ways that "tend to deprive" some of them of employment opportunities, and when those classifications coincide with protected class lines they run afoul of the prohibition in Section 703(a)(2). While existing disparate impact doctrine is captured in Section 703(k), the prohibitions in Section 703(a)(2) arguably continue to have independent force,¹⁴⁸ providing room for the development of doctrine that can more closely respond to the challenges posed by technologically-driven forms of exclusion, such as those that can occur with targeted online recruitment.

V. CONCLUSION

The ability to precisely target which types of people will receive employment ads online is transforming how companies recruit new employees. By leveraging the vast amounts of data available about social media users, employers can reach a broader range of qualified candidates more efficiently. However, relying on extensive personal data to target the recipients of online job ads also risks sorting people in ways that exclude already disadvantaged groups from receiving critical information about job opportunities. The legal issues raised by online recruiting are not entirely novel. Existing anti-discrimination law offers some tools for addressing the more blatant forms of discriminatory advertising. However, online recruiting is not the same as the old help-wanted ads in the newspapers, and so, if the law is to effectively combat systematic disadvantage and inequality in a data-driven world, it will have to evolve as well.

145. Kim, *supra* note 47, at 860.

146. *Id.* at 909–16.

147. 42 U.S.C. § 2000e-2(a)(2) (2012).

148. Kim, *supra* note 47, at 915.