Proving Appearance-Related Sex Discrimination in Television News: A Disparate Impact Theory

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A double standard exists in television news. Although both male and female anchorpersons must meet substantial image requirements, anchorwomen are generally forced to conform to a much narrower and more demanding ideal of youth and beauty.¹ Thus, one former television news executive notes, “TV men can age on camera, they can be bald and fat . . . but women must remain attractive. It’s a function of our society.”²

Societal norms help to explain this phenomenon. The results of viewer surveys and other market research tools play a significant role in the evaluation of anchors.³ By design or application, however, such tests place a more critical emphasis on the attractiveness of newswomen than on that of newsmen.⁴ Therefore, reliance upon these tests by television executives may constitute illegal sex discrimination.

Title VII of the Civil Rights Act of 1964 explicitly prohibits sex discrimination in employment.⁵ Furthermore, it forbids employers from relying on discriminatory customer preferences as a basis for making business decisions.⁶ Despite this statutory protec-

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¹ B.A. 1989, University of California at Berkeley; J.D. Candidate 1994, University of Chicago.
² See notes 19-26 and accompanying text.
⁵ See notes 23-26 and accompanying text.
⁶ Title VII of the Civil Rights Act of 1964, 42 USC §§ 2000e-2000e-17 (1992) (“Title VII”). Under section 2000e-2(a)(1), it is unlawful for an employer “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 . . . sex.” 42 USC § 2000e-2(a)(1).
⁷ See notes 113-19 and accompanying text.
tion, few lawsuits have challenged the apparent prevalence of appearance-related discrimination against anchorwomen.

Those cases that have been litigated have been largely unsuccessful attempts to prove individualized, intentional discrimination. Such disparate treatment claims,7 however, are not the sole basis for sex discrimination actions under Title VII. The statute also provides for disparate impact claims,8 under which a plaintiff may challenge the actual employment practices which adversely affect her gender as a whole.8 To date, no newscaster has attempted to bring a sex discrimination suit under this theory.

This Comment argues that disparate impact claims may provide a more successful means by which anchorwomen can prove unlawful, appearance-related discrimination than disparate treatment claims. By focusing on potentially illegitimate employment practices, rather than employer motivation, such claims force both employers and courts to examine the image-based tests upon which television decisionmakers rely.

Part I of this Comment examines the prevalence of sex discrimination in television news, paying particular attention to its effects on anchorwomen. Part II discusses Title VII of the Civil Rights Act of 1964 and explains, in theory, how disparate impact doctrine could be much more useful than disparate treatment doctrine in appearance-related sex discrimination cases. Finally, Part III applies the theory to the case of Craft v Metromedia, Inc.,0 in which television anchorwoman Christine Craft unsuccessfully challenged television appearance standards under a disparate treatment theory, to demonstrate disparate impact theory’s potential

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7 Disparate treatment analysis holds that differential treatment of similarly qualified persons justifies an inference of intentional discrimination when such treatment disadvantages individuals of protected groups and the employer cannot produce an acceptable explanation. See notes 61-68 and accompanying text.


0 42 USC § 2000e-2(k)(1)(A). For an example of a disparate impact suit, see Dothard v Rawlinson, 433 US 321 (1977) (plaintiff, a prison guard, challenged height and weight requirements as having an adverse effect on women applicants).

10 572 F Supp 868 (W D Mo 1983), aff’d in relevant part and rev’d in part, 766 F2d 1205 (8th Cir 1985).
effectiveness and to reveal how other female newscasters might successfully approach a similar suit.

I. SEX DISCRIMINATION IN TELEVISION NEWS

A. Television News and the Prevalence of Appearance Standards

News programming is gradually replacing many of television's traditional offerings.11 Because it is cheaper to produce than general entertainment, it is currently the principal profit generator for many local stations12 and a vast, prime time moneymaker for the networks.13 Within this framework, many news broadcasts are increasing their entertainment component to compete not only with one another, but also with other television alternatives.14 Thus, the line between news and entertainment is blurring.

Not surprisingly, these changes have created new expectations for both male and female television newscasters. As show business values replace news judgment,15 an anchorperson's success may depend more on stage appeal than reporting ability. Indeed, one television consultant posited, "I think we are moving into the Ken and Barbie school . . . where the most important requirement for an anchor is to be young and good looking."16

That television news emphasizes form over substance is troubling in and of itself.17 This trend towards the "glamorizing" of broadcast news is even more problematic, however, because it has had particularly onerous effects on women in the profession.

Although Christine Craft, plaintiff in the highly-publicized Craft v Metromedia, Inc18 case, is thus far the only woman to litigate an appearance-related sex discrimination suit, she is certainly not the only female newscaster to be subjected to intrusive appearance requirements. For example, when Judy Woodruff became a

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13 Zoglin, Time at 70 (cited in note 11).
14 Id ("[O]nce these shows enter the arena with Knots Landing and The Cosby Show, they must play by the same rules.").
15 Henry, Time at 57 (cited in note 3).
16 Smith, NY Times at C20 (cited in note 12).
17 Phyllis Kaniss reports that television news serves as Americans' main source of information. Phyllis Kaniss, Making Local News 241 n 3 (University of Chicago Press, 1991). In a study conducted for the American Society of Newspaper Editors, moreover, 58 percent of respondents chose television as their most reliable source of local and state news while only 31 percent selected newspapers. Id at 241 n 2. Thus, television's shift away from "hard" news may mean that the American public is becoming less informed about both current events and politics.
18 766 F2d at 1205. See notes 102-12 and accompanying text.
news anchor in Atlanta in 1972, she was ordered to cut her shoulder-length hair. Mary Alice Williams, now an anchor for NBC, was advised in 1979 to change her eye color with tinted contact lenses. More recently, forty-four year old Diane Allen, anchorwoman for a CBS-owned television station in Philadelphia, filed an age and sex discrimination complaint with the Equal Employment Opportunity Commission after her employer moved her from the 11:00 p.m. to the 5:30 p.m. newscast in order to replace her with someone who could "soften" the late-night male anchor. A thirty-one year old woman was hired to do so.

Anchormen have not entirely escaped appearance-related scrutiny. A number of male newscasters working alongside Christine Craft, for example, were advised to lose weight and to pay more attention to their wardrobes. Yet appearance requirements for anchorwomen remain far more prevalent and intrusive than those applied to anchormen. The television station for which Craft worked often required its female personnel to change clothes at the station before going on air. No such indignity was ever required of the station's male personnel. A recent report by the Gannett Center on Media Studies, finding that male anchors are generally twenty years older than their female counterparts, confirms the existence of broad-based, appearance-related inequity between the sexes. Thus, appearance standards for television newscasters are undermining the ability of anchorwomen to compete on an equal basis with anchormen.

B. The Role of the Anchorperson

Emphasis on an employee's appearance, particularly one who spends time in front of a television camera, may not be particularly unreasonable. Even Craft, recognizing the demands of the visual medium for which she worked, admitted that the maintenance of a "professional, business-like appearance" was obviously critical to

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19 Henry, Time at 57 (cited in note 3).
20 Id.
21 Kate Maddox, CBS Hit with Age, Sex Bias Complaint, Electronic Media 4 (June 15, 1992).
22 Id.
23 Craft, 766 F2d at 1213.
24 Id.
25 Id.
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her employer's success. The difficulty with current standards of attractiveness, however, is that they place much more emphasis on an anchorwoman's appearance than on her professional skills. Thus, the current standards not only perpetuate demeaning stereotypes regarding women's abilities, but also undercut women's careers.

The anchorperson's role is more complex than television appearance standards suggest. Despite the glamorization of the news, anchors are not simply good-looking announcers who read from teleprompters. On the contrary, they are professional journalists who must tackle varied and increasingly competitive assignments. For example, as news broadcasts at both the national and local levels expand the number of investigative reports in their programming schedules, newscasters must frequently interview national and international leaders directly. They are also responsible for writing and editing copy, selecting appropriate video footage, and assisting in the ordering of stories. Although anchors are less involved in daily newsgathering than other television reporters, they substantively contribute to the broadcasts.

Moreover, an anchor's professional ability seems to contribute significantly to his or her viewer popularity. Studies on the characteristics of television news personalities confirm the importance of non-appearance-based anchoring skills in determining a newscaster's audience appeal. In one such survey, researchers divided newscasters' traits into two dimensions: likability and competence. Likability included the categories of appearance, dress, personality, voice, and warmth; competence included knowledge, ability, and analytical dexterity. Both dimensions proved to be

27 Craft, 766 F2d at 1214 n 11.
28 Judy Mann, a reporter for the Washington Post, described the effects of television on the way society views women:

Television, whatever else it does, is a mirror of society. The Craft case shows that the mirror does not come close to reflecting the presence and interests of half of society. It is as distorted a picture of America as an amusement hall mirror.

30 Id.
31 Id.
32 Id.
33 Kaniss, Making Local News at 105 (cited in note 17).
35 See id at 66.
36 Id.
"distinct in viewer's minds and to provide separate criteria for evaluation of any single personality." Thus, good looks alone satisfy neither the demands of the profession, nor of the public; legitimate public acceptance requires that an anchorperson develop skills in critical judgment, analysis, and authoritative news delivery through both education and experience.

C. The Double Standard

Women first gained considerable access to television news careers in the early 1970s and have since made notable strides. Despite their efforts, however, women have failed to achieve fully equal employment status with men. Their professional competence remains undervalued and underrewarded. Although women have outnumbered men in journalism schools for more than a decade, they are still significantly underrepresented in important journalistic roles, including that of anchorperson. For example, a 1990 survey found that only seven of the seventeen evening network news anchors were women, and only four women were among the fifty reporters appearing most frequently on the nightly news. Even more troubling, anchorwomen earn, on average, 23 percent less than their male counterparts.

Much of this inequality may be attributable to the damaging effects of television news attractiveness standards. One writer explains, "For all the advances women have made in the TV-news business, glamour and sex-appeal still play a primary role in the way female journalists are chosen and utilized at both the national and local level." Attractiveness standards thwart the careers of anchorwomen by emphasizing the importance of appearance over ability and by defining standards of female and male success differently.

The pervasive influence of attractiveness standards operates in a variety of ways. Such requirements may, for example, place underqualified women in positions for which they have neither adequate training nor experience at the expense of others who may be far more professionally competent. This leads to a perception of

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38 Id.
36 Id at 21.
33 Stilson, Channels at 20 (cited in note 37).
women, generally, as being incapable of succeeding in challenging news positions or as having to rely on qualities unrelated to merit. At the local level, for example, many station managers are said to hire "very pretty women" for their "on-camera appeal," minimizing the importance of their other qualifications. Thus, if the anchorwoman performs poorly, the hiring station manager may "confirm [his or her] own perceptions that women fall short when it comes to delivering top-flight news reports." Even if she performs well, however, her tenure may be limited, for she may be replaced as soon as her youthful beauty wanes.

Moreover, appearance standards impede qualified anchorwomen who have worked diligently from achieving prominence and prestige. Because of an overemphasized beauty requirement, these women often do not receive the respect afforded to their male peers. Individuals such as Craft, for example, may be labelled inadequate, despite their valuable work contributions, because they do not conform to a very narrow conception of the female ideal. According to one source, those newswomen not beautiful enough to be selected for the "network draft" are resigned to "pedestrian career path[s]."

Attractiveness standards may furthermore strip experienced newswomen of their jobs as soon as their once-beautiful faces reflect signs of aging. A television executive explains, "You're just not going to see your wife or mine, tired and ragged, on TV." Instead of being rewarded for achievement and loyalty, women who have "served their time, chased stories all over the nation and the world, and earned the lines on their faces and the authority in their voices," are often discarded in favor of a less weathered—and less qualified—pretty face. In contrast, newsmen with

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41 Id at 21.
42 Id.
43 Craft was praised for her "outstanding achievement in journalism" by a resolution of the California Senate. Sanders & Rock, Waiting for Prime Time at 147 (cited in note 28). However, although the news station for which Craft co-anchored experienced both improved ratings and profits during her tenure, both her station managers and the court found her demotion to be justifiable on the basis of ten viewer focus group sessions and a phone survey. Craft, 766 F2d at 1216.
44 Stilson, Channels at 22 (cited in note 37), quoting Dr. Joe Foote, chairman of Southern Illinois University at Carbondale's radio-television department.
48 Marlene Sanders, an award-winning news veteran of thirty-five years, adds, "[F]or all my years of experience, the networks wouldn't be interested in me . . . because of my age and my style. It's ridiculous." Stilson, Channels at 22 (cited in note 37).
"decades more experience with key overseas or top Washington assignments" are often considered to be ideal anchormen.49

II. TITLE VII AND APPEARANCE-RELATED SEX DISCRIMINATION

A. Title VII of the Civil Rights Act of 1964

Title VII makes it unlawful for an employer 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 . . . sex."50 Judicial interpretation of the statute reflects a willingness to allow employers a moderate role in shaping employee image. Such interpretation does not, however, permit employment policies which would be unfairly detrimental to either sex.

Under Title VII, courts have delineated the boundaries of permissible and impermissible appearance standards. For example, courts have generally upheld gender-based distinctions in employer dress and grooming codes when the standards "are reasonable[,] imposed in an evenhanded manner on all employees,"51 and do not offer a significant employment advantage to either sex.52 Such codes, when sensibly applied, are within an individual's power to alter. The courts therefore reason that these regulations have only a minor effect on employment opportunities.53 In such instances, courts treat the regulations as permissible management decisions made in the interest of a company's image and success.54

The courts, however, have not permitted employment practices that distinguish between employees on the basis of sex or a subclass of sex. Thus, an employment classification which discrimi-

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49 Id.
51 Knott v Missouri Pacific Railroad Co., 527 F2d 1249, 1252 (8th Cir 1975) (holding that hair length regulations for male employees, but not for female employees, is part of a valid, comprehensive grooming code applicable to both male and female railroad employees). See also Baker v California Land Title Co., 507 F2d 895 (9th Cir 1974) (upholding hair length regulations for male title company employees); Lanigan v Bartlett & Co. Grain, 466 F Supp 1388 (W D Mo 1979) (holding that employer's dress code prohibiting women from wearing pantsuits in the executive office portion of a grain company's home office is reasonable).
52 Knott, 527 F2d at 1252.
53 Id.
54 See, for example, Fagan v Natl Cash Register Co., 481 F2d 1115, 1125 (DC Cir 1973) ("Good grooming regulations reflect a company's policy in our highly competitive business environment. Reasonable requirements in furtherance of that policy are an aspect of managerial responsibility.").
nates against a subclass of all women, such as all women with preschool children, is illegal. Classification based on subsets of sex is known as "sex-plus" discrimination, as it specifically disfavors those individuals of a certain sex "plus" some other identifying characteristic.

By encompassing such diverse appearance requirements as dress codes and age-related beauty, television news attractiveness standards combine permissible and impermissible elements of appearance regulation. Anchorwomen must therefore prove that their employers' image demands extend beyond the "grooming codes" allowed by Title VII into the realm of illegal discrimination. To do so, they must be able to force both employers and courts to thoroughly unpack the contents of these standards. Only disparate impact analysis will allow them to do so.

B. The Theories of Disparate Treatment and Disparate Impact

A plaintiff may establish her prima facie case of sex discrimination under Title VII using either a disparate treatment or disparate impact theory. Under the former, she alleges that her employer intentionally discriminated against her because of her sex; under the latter, she claims that a seemingly neutral employment policy has had an adverse impact on members of her sex, and is therefore illegal, regardless of her employer's intent. The Civil Rights Act of 1991 adds new dimensions to both discrimination theories. Its additions to disparate impact doctrine may prove particularly helpful in appearance-related discrimination suits.

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* The concept of sex-plus discrimination originated in the case of Phillips v Martin Marietta Corp., 400 US 542 (1971). In Phillips, the Court implied that discrimination with respect to a subclass of one sex can violate Title VII.

* Circuit courts have subsequently elaborated on the sex-plus notion. See, for example, Sprogis v United Airlines, Inc., 444 F2d 1194 (7th Cir 1971) (invalidating as discriminatory an airline's policy requiring female flight attendants to be unmarried). Thus, Title VII is not merely confined to discrimination between men and women, but also prohibits discrimination among women.

* A strong argument may be made suggesting that all appearance discrimination is especially harmful to women and that Title VII should be amended to make it entirely impermissible. See Mary Becker, Cynthia Grant Bowman, and Morrison Torrey, Cases and Materials on Feminist Jurisprudence: Taking Women Seriously (West Publishing Co., 1993). Such a position, however, has not gained majority acceptance.

* See notes 88-101 and accompanying text.


1. Disparate treatment analysis.

The Supreme Court first articulated the disparate treatment theory of discrimination in *McDonnell Douglas Corp. v Green*.

This model focuses on the employer's motive. A plaintiff must initially show that her employer intentionally treated her differently because of her sex or a sex-related factor. In the television news context, she might point to differences in treatment between herself and a similarly situated male, such as a co-anchor. Alternatively, she might introduce discriminatory statements made by her employer to justify the inference that the employer acted on discriminatory motives.

The plaintiff's burden at this stage is not onerous. Once she produces evidence suggesting that the employer's decision was likely to be based on a discriminatory motive, she has established her prima facie case. Her employer is then given the opportunity to "rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason."

However, the employer's burden is similarly light, for its proffered reasons need not have actually motivated the employment decision at issue. At all times, the burden of persuasion remains with the plaintiff. She sustains the burden of demonstrating that the employer's proffered reason did not actually motivate the employment decision, but was merely a pretext for discrimination.

Pursuant to the Civil Rights Act of 1991, suits for intentional discrimination may now be tried before a jury. Therefore, anchorwomen bringing disparate treatment lawsuits may now benefit from the empathy of their peers. No such right existed during

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61 411 US 792, 802 (1973). This case involved discrimination based on race. Subsequent cases have made clear that the same analysis extends to sex discrimination. See, for example, *Texas Department of Community Affairs v Burdine*, 450 US 248 (1981) (applying disparate treatment analysis to public sector gender discrimination suit); *Price Waterhouse v Hopkins*, 490 US 228 (1989) (applying disparate treatment analysis to claim alleging gender discrimination in partnership decisions of private accounting firm).


63 *Burdine*, 450 US at 254.

64 *Id* at 256.


66 While it is unclear whether the introduction of jury trials to disparate treatment litigation would actually increase a plaintiff's likelihood of winning, the legislative history of the Civil Rights Act of 1990 indicates that businesses resisted the granting of jury trials, claiming it would subject them to the lawsuit "lottery." Kevin M. Clermont and Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 Cornell L Rev 1124, 1125 (1992), citing Civil Rights Act of 1990, Joint Hearings on HR 4000 before the House Committee on Education and Labor and the Subcommittee on Civil and Constitutional Rights of
Christine Craft’s litigation. Thus, both the district and circuit
court judges trying her case rejected the affirmative findings of dis-
crimination by advisory juries and instead entered judgment for
Metromedia. A second favorable addition resulting from the 1991
Act is the availability of compensatory and punitive damages in
disparate treatment cases, a change that should increase the incentive
for reluctant plaintiffs to bring suit. Neither of these two adv-
antages is available in a disparate impact case.

2. Disparate impact analysis.

In contrast to disparate treatment theory’s emphasis on in-
tent, the disparate impact theory of discrimination, first articu-
lated by the Supreme Court in Griggs v Duke Power Co., focuses
on the results of particular employment actions. To establish a
prima facie case of disparate impact in a sex discrimination suit, a
plaintiff must show that an employer’s decisionmaking criteria
produce a substantial adverse impact on women, or a subclass of
women, because of their sex. Thus, an anchorwoman could estab-
lish a prima facie case by demonstrating that older-looking women,
brunette women, or heavy women are more substantially affected
by a television station’s focus groups than similarly-situated men.
Traditionally, courts have been responsive to the use of statistics
buttressed by testimonial evidence in establishing a plaintiff’s
prima facie case. However, where statistical evidence is unavail-
able, strong non-statistical evidence alone is often adequate.

Once the plaintiff has met the burden of proving a challenged
employment practice caused disparate impact, the employer may
not merely articulate a justification for its practice, as required

the House Committee on the Judiciary, 101st Cong, 2d Sess 96 (1990) (statement of Victor
Schachter).

67 See Craft, 572 F Supp at 868; Craft, 766 F2d at 1205.
69 401 US 424, 431 (1971) (“The Act proscribes not only overt discrimination but also
practices that are fair in form, but discriminatory in operation.”).
70 Id.
71 See notes 57-58 and accompanying text.
72 See, for example, Alabama v United States, 304 F2d 583, 586 (5th Cir 1962).
73 See, for example, Teamsters, 431 US at 338 (using both statistics and testimonial
evidence to prove disparate impact).
74 Chicano Police Officers Association v Stover, 526 F2d 431, 439 (10th Cir 1975), va-
cated, 426 US 944 (1976) (holding that paucity of data should not defeat disparate impact
claim); Bunch v Bullard, 795 F2d 384, 395 (5th Cir 1986). But see Williams v Tallahassee
Motors, Inc., 607 F2d 689, 693 (5th Cir 1979) (suggesting that small companies may be
immune from statistical claims because of small universe problem). See also notes 129-32
and accompanying text.
under disparate treatment analysis. Rather, the employer must also prove the practice's job-relatedness and business necessity.\textsuperscript{76} The Civil Rights Act of 1991 clearly establishes that the burden of persuasion and production actually shifts to a disparate impact defendant after a plaintiff's prima facie case is established.\textsuperscript{76}

C. Disparate Impact: A Comparative Advantage

The availability of both a jury trial and greater damage awards for claims of intentional discrimination may increase the appeal of the disparate treatment theory for anchorwomen plaintiffs. Nevertheless, disparate impact theory possesses two very powerful advantages of its own: beneficial burden-shifting and a validation requirement. Together, these advantages suggest that disparate impact analysis should be the preferred method of proving appearance-related sex discrimination.

1. Burden-shifting and subjective decisionmaking.

Burden-shifting provides a substantial advantage to disparate impact plaintiffs by forcing the defendant to demonstrate the business necessity of its employment practices once the plaintiff has established her prima facie case. In contrast, the burden of proof in a disparate treatment case remains, at all times, with the plaintiff.\textsuperscript{77} The particular advantage of burden-shifting to disparate impact plaintiffs "will often be the difference between winning and losing."\textsuperscript{78}

This evidentiary difference is particularly meaningful because of a recent broadening of the applicability of disparate impact analysis. Prior to the Supreme Court's 1988 decision in \textit{Watson v Fort Worth Bank and Trust},\textsuperscript{79} disparate impact had been applied only to objective employment criteria.\textsuperscript{80} In \textit{Watson}, a black bank

\textsuperscript{76} Under the Civil Rights Act of 1991, business necessity is specifically defined by case law. According to \textit{Griggs}: "[I]f an employment practice which operates to exclude cannot be shown to be related to job performance, it is prohibited." 401 US at 431. See also \textit{Connecticut v Teal}, 457 US 440, 451 (1982) (holding that an employer must "demonstrate that the examination given . . . measure[s] skills related to effective performance").

\textsuperscript{77} See Peter M. Fanken, ed, \textit{Labor and Employment Law} 56 (American Law Institute, 6th ed 1992). Prior to the 1991 Act, the question as to whether the plaintiff retained the burden of persuasion was strongly disputed. Id.

\textsuperscript{78} See note 64 and accompanying text.

\textsuperscript{79} 487 US 977 (1988).

\textsuperscript{80} In \textit{Griggs}, the Supreme Court invalidated diploma and test requirements not shown to be necessary to job performance. 401 US at 427-28. The Court's subsequent cases contin-
employee who had been rejected for four promotions sued her employer for relying on the discriminatory subjective judgment of white supervisors in the promotion selection process. The Court held that "disparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests."\textsuperscript{81} Otherwise, the plurality reasoned, employers might insulate themselves from disparate impact liability merely by combining both subjective and objective criteria into their selection systems.\textsuperscript{82}

Introducing subjective factors into disparate impact analysis accomplishes a number of favorable results. By definition, something that is subjective is discretionary, for it "reflects the state of mind or the feelings or temperament of the . . . person thinking."\textsuperscript{83} Discretionary decisionmaking has long been the practice of many employers, particularly where the managerial and professional skills of employees, more difficult to analyze than test scores or educational levels, are at issue.\textsuperscript{84} Prior to Watson, such discretion was difficult, if not impossible, to question. The Court's explicit application of the disparate impact doctrine to subjective processes, however, dispelled any notion that discretionary decisions are immune from impact analysis. Watson thus broadens a Title VII plaintiff's ability to address qualifications for many white-collar jobs previously unchallenged by disparate impact doctrine, including that of anchorperson.\textsuperscript{85}

The inclusion of subjective processes also aligns disparate impact doctrine much more closely with disparate treatment doctrine. Unlike objective thought, which may be defined as "free
from personal feelings, subjective thought necessarily includes a decisionmaker's own judgments. Thus, instead of relying on test scores or other quantifiable requirements, subjective decisionmakers must depend upon their own intuitions. In one sense, then, subjective disparate impact is based upon some level of intent, even if subconscious, and is thus very much like systemic disparate treatment, where an employer intentionally engages in a "pattern or practice" of discrimination. The only difference, of course, is that the disparate impact plaintiff need not prove whether her employer harbors an invidious purpose. She need only demonstrate that the subjective criteria have a disproportionately adverse effect on women. Thus, the introduction of subjective analysis to disparate impact brings it substantively closer to disparate treatment, yet allows it to retain evidentiary advantages unavailable in the latter.

2. The validation requirement.

Perhaps the most advantageous feature of disparate impact analysis for the anchorwoman plaintiff is its validation requirement. Unlike a disparate treatment defendant, a disparate impact defendant may not merely proffer a legitimate reason for its employment procedures, but must actually prove the procedures' business necessity. Validation refers to an employer's use of "professionally acceptable methods" to demonstrate that its hiring and promotion procedures are "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job . . . for which candidates are being evaluated." Three different validation techniques have been cited for use in disparate impact analysis: (1) content validation, which "measures performance of tasks that constitute a relatively complete sample of those called for on the job"; (2) criterion-related validation, the primary form of empirical validation to date, which analyzes "the relationship between performance on a test or other 'predictor' and performance on the [relevant] job," to ensure that the predictor actually predicts job performance; and (3) construct

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86 Webster's Encyclopedic Unabridged Dictionary of the English Language 993 (Dilithium Press Limited, 1989) (defining "objective").
87 For a discussion of systemic disparate treatment, see Teamsters, 431 US at 357.
88 Albemarle Paper Co. v Moody, 422 US 405, 431 n 29 (1975), citing 29 CFR § 1607.5(b)(5).
90 Id at 1018.
validation, which focuses on the measuring of mental capacities presumed important for job performance, to ensure that these "constructs" actually bear on job performance.91

Unfortunately, because these types of validation have been utilized previously to validate only objective, rather than subjective systems, their usefulness in appearance-related discrimination suits may be limited. Content validation, for example, might discover the extent to which reporting skills such as writing, production, and editing are tested by television surveys and focus groups. It is unlikely, however, that any of these traditional forms of validation might adequately test the subjective elements inherent in television appearance standards. The plurality in Watson, in which supervisory ratings of employees were based on such subjective criteria as alertness, ambition, appearance, courtesy, and dependability,92 suggested that the difficulty in validating subjective tests might be a justification for lessening an employer's validation burdens.93

Yet this difficulty need not obviate the validation requirement.94 A number of experts argue that subjective systems are, in fact, capable of validation to the same degree as are objective systems.95 Thus, the American Psychological Association ("APA") submitted an amicus brief in Watson arguing that validation of subjective systems is practicable if such systems are formal and scored, and that Title VII should be read to require employers to use "psychometrically sound and job-relevant selection devices."96 Indeed, some lower courts have adopted a similar position, suggesting that subjective systems might be validated by strict record-keeping and formal guidelines to ensure that discretionary decisions are based on identifiable goals rather than discriminatory attitudes.97

91 Id at 1019.
92 Watson v Fort Worth Bank and Trust, 798 F2d 791, 812 n 26 (5th Cir 1986).
93 Justice O'Connor stated, "[C]ommon sense, good judgment, originality, ambition, loyalty, and tact . . . cannot be measured accurately through standardized test[s]." Watson, 487 US at 991.
95 Id at 270.
96 Brief for the American Psychological Association as Amicus Curiae in Support of Petitioner, reprinted in Daily Labor Report (BNA) 213 at D1, D5, D10 (Nov 5, 1987).
97 See, for example, Hester v Southern Railway Co., 349 F Supp 812, 817 (N D Ga 1972), rev'd on other grounds, 497 F2d 1374 (5th Cir 1974) (advocating record keeping of supervisory decisions). One commentator explains, "When an attribute cannot be measured . . . assessors must record their observations and impressions regularly and systematically. In some circumstances, once they are so 'scored' or recorded, they can be subject to the
Thus television focus groups and viewer surveys might be improved through a deliberate recordation system. Both those administering and those taking such tests should be required to thoroughly describe their thought processes and their own criteria for assessing anchorwomen. Validation of these writings could help to differentiate between legitimate and illegitimate questions and responses.

As part of the validation process, the existence of alternatives to an employment practice having a disparate impact must also be explored. Title VII case law demands that an employer institute any available alternative system that has a lesser impact, so long as it serves the employer's job needs. Thus, Title VII requires television stations to revise those criteria both susceptible to abuse and replaceable. One commentator suggests that the category of appearance might be replaced by "neatness of appearance" and "appropriateness of attire." Such alternatives might be less prone to abuse and are furthermore consistent with permissible grooming code standards. At the very least, validation of subjective criteria would force television executives to assess their systems and revise "conventional criteria which are either unnecessarily vague or are of questionable usefulness in predicting ability to perform on the job."

III. Disparate Impact Applied

An appearance-related sex discrimination suit will be more powerful and convincing if brought under a disparate impact theory rather than under a disparate treatment theory. The Craft case demonstrates the problems posed by a disparate treatment analysis of appearance-related sex discrimination and suggests methods by which a disparate impact analysis would overcome such difficulties.

same validity analyses as other scored instruments." Rose, 25 San Diego L Rev at 90 (cited in note 83), citing APA brief. A record-keeping requirement is included in the Uniform Guidelines, and is mandatory under Title VII. Id at 91.

Albemarle, 422 US at 425 ("[I]t remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest.").


See notes 51-58 and accompanying text.

In *Craft*, television executives not only censured the plaintiff's wardrobe, but also derided her facial structure, which is clearly illegal sex discrimination since no anchormen were ever subjected to such stringent physical criticism. The defendant furthermore engaged in "sex-plus" discrimination by relying upon different age-related appearance standards for anchormen and anchorwomen and using viewer surveys and focus groups which placed more exacting, stereotypical demands on women than on men.

The district court in *Craft*, however, ignored the impermissible elements of defendant Metromedia's behavior, concluding, "While we believe the record shows an overemphasis by [the station] on appearance . . . [the station's] appearance standards were shaped only by neutral professional and technical considerations." Thus, the court addressed only the grooming-code elements of Metromedia's actions and failed to reach the impermissible elements of its appearance requirements. On appeal, this conclusion was affirmed.

A. Appearance Standards and Customer Preferences

The thrust of the *Craft* suit was the defendant employer's "concern with appearance—whether the station's standards for on-air personnel were stricter and more strictly enforced as to females than as to males." *Craft* contended that Metromedia maintained standards that were both based on "stereotyped characterizations of the sexes" and more stringently imposed on women than on

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102 *Craft* was purported to possess "'below-average aptitude' in matters of clothing and makeup." *Craft*, 766 F2d at 1210, quoting 572 F Supp at 878.

103 Dress requirements are impermissible if they involve "demeaning stereotypes as to female characteristics and abilities or stereotypical notions of female attractiveness." *Craft*, 766 F2d at 1215 n 12. Thus, wardrobe regulations that are designed to play upon an anchorwoman's "softness and femininity" may be impermissible in and of themselves. See *Carroll v Talman Fed Savings and Loan Association of Chicago*, 604 F2d 1028, 1032-33 (7th Cir 1979) (invalidating regulation requiring that only women wear uniforms). But see note 51.


105 *Craft* not only testified that Metromedia maintained test files for older perspective anchormen without maintaining corresponding files for older anchorwomen, see id at 37, but also that one of the defendant's executives explicitly told her that she was "too old." *Craft*, 766 F2d at 1209.

106 *Craft*, 766 F2d at 1215.

107 Id at 1207.

108 Id at 1210.
men. To buttress her argument, Craft introduced evidence suggesting that the focus groups and surveys conducted to assess viewer response to her broadcasts were both biased and inflammatory. To one group of interviewees, for example, the focus group moderator asked, “Is she a mutt? Let’s be honest about this.”

While the district court made some mention of the impropriety of the defendant’s reliance on such viewer surveys, it nevertheless upheld the station’s business judgment, stating, “The news business may indeed have its quirks and vagaries . . . but consultant’s [sic] reports and ratings routinely serve as the basis for personnel changes.” Ironically, when Craft introduced evidence on appeal that another source of market research, viewer ratings, rose quite impressively during her tenure, the court simply retorted, “This shows only that broadcast market research is an inexact science.”

The Craft court’s selective tolerance of viewer surveys and focus groups was misplaced. Under disparate treatment doctrine, customer preferences are not a valid justification for discriminatory hiring practices. Title VII was enacted to prompt employers “to discard outmoded sex stereotypes posing distinct employment disadvantages for one sex.” Thus, policies such as Pan American Airway’s hiring of only female flight attendants and an international corporation’s hiring of only male corporate officers have been struck down despite claims that they were justified by customer preference. One court explained, “[I]t would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether sex discrimination was valid. Indeed, it was . . . these very prejudices the Act was meant to overcome.”

In contrast, disparate impact doctrine may allow the use of customer preferences in some circumstances. For example, a law firm might permissibly hire only those attorneys possessing law de-

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109 Id.
110 Craft, Too Old, Too Ugly, and Not Deferential to Men at 120 (cited in note 104).
111 572 F Supp at 879.
112 766 F2d at 1216.
113 Diaz v Pan Am World Airways, Inc., 442 F2d 385, 388 (5th Cir 1971).
114 Knott, 527 F2d at 1251.
115 Diaz, 442 F2d at 385.
116 Fernandez v Wynn Oil Co., 653 F2d 1273 (9th Cir 1981).
117 Diaz, 442 F2d at 389.
DISPARATE IMPACT THEORY

degrees if its clients prefer attorneys so trained. While the require-
ment of a professional degree adversely affects those who have
been unable to pursue higher education, it is based on the legiti-
mate interest of hiring well-trained attorneys. Furthermore, reli-
ance on such merit-based criteria does not perpetuate discrimina-
tory stereotypes in any immediate or obvious manner.

Yet disparate impact doctrine should not permit the use of
customer preferences to validate television news appearance re-
quirements. Such discriminatory appearance standards do not re-
fect an employer's need for expert employees. On the contrary,
their adverse effect on women reflects a systematic, subjective bias.
Much like Pan American's preference for the "courteous personal-
ized service" of female flight attendants which was struck down
under disparate treatment analysis, television appearance require-
ments are based on blatantly discriminatory stereotypes. They en-
able employers to rely on the preferences of their consumers in-
stead of having to defend their own, impermissible actions. Thus,
by analogy to disparate treatment doctrine, such standards should
be held impermissible even under a disparate impact analysis.
Given that subjective decisionmaking is now included in disparate
impact theory, all subjective decisionmaking, including that of the
customer, should be scrutinized under this doctrine. Illegitimate
preferences revealed through viewer surveys are no exception.

B. The Prima Facie Case

Perhaps the greatest difficulty for a plaintiff bringing a dispa-
rate impact claim is establishing her initial prima facie case. Over
the years, statistical analysis has been the preferred method of
showing disparate impact, not only because it has been the only
proof available in many cases, but also because it lends itself
well to the study of objective criteria, which, until the Civil Rights
Act of 1991, was the only basis upon which disparate impact
rested. Thus, in Griggs, the plaintiffs established that the use of
high school diploma and intelligence examination requirements ad-
versely impacted black job applicants by showing that 34 percent
of white males and only 12 percent of black males had completed

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118 "[T]he principles of test validation developed under Title VII do not apply to pro-
fessional licensing examinations." Woodward v Virginia Bd of Bar Examiners, 420 F Supp
211, 214 (E D Va 1976), aff'd per curiam, 598 F2d 1345 (4th Cir 1979).

119 Diaz, 442 F2d at 387.

120 See Marcel C. Garaud, Legal Standards and Statistical Proof in Title VII Litiga-
high school in the employer's state. They furthermore revealed that use of the company's standardized examinations resulted in a 58 percent passage rate for white applicants, as opposed to only 6 percent for black applicants.

In an action such as Craft's, however, because of the small number of potential newscasters actually applying for and receiving offers to work at individual television stations, demonstrating a statistically significant incidence of discrimination might be burdensome. This difficulty, known as the small universe problem, results from the fact that underrepresentation based on only a small amount of data may reflect chance rather than discriminatory practices. In other words, only a small number of employment decisions will be likely to be included in the plaintiff's data because of the sparse number of anchors in any newsroom. Thus, the reliability of the data as an indicator of discriminatory conduct must be questioned.

In the past, moreover, those plaintiffs who have established prima facie cases of disparate impact have generally proven either sex discrimination alone, or sex-plus discrimination, on the basis of purely quantifiable, objective attributes. For a more subjective analysis based on general appearance, a plaintiff may be unable to compose a statistical test relying on factors other than sex, weight, and age—which, of course, are not the only factors potentially relevant to a discriminatory defendant. Craft, for example, noted that the station executives were unhappy with her appearance not only because they disliked her wardrobe, but also because "one eye is smaller than the other, and [her] jaw is square."

These difficulties alone, however, should not preclude a plaintiff claiming appearance-related sex discrimination from bringing a case under a disparate impact theory. A number of courts that have recognized the potential statistical problems given a small universe of data have nevertheless chosen to allow such evidence. Some, on fairness grounds, recognize that "the smallness of a sample should not be grounds ... for rejecting the type of protection

123 Bunch, 607 F2d at 693.
124 Id.
125 See, for example, Dothard v Rawlinson, 433 US 321 (1977) (challenging height and weight regulations for prison employees as discriminatory against women applicants).
126 Craft, Too Old, Too Ugly, And Not Deferential to Men at 41 (cited in note 104).
the civil rights statutes afford."\textsuperscript{127} Other courts simply accept such data to avoid insulating employers from their discriminatory tactics.\textsuperscript{128} Still others accept a small universe where corroborating evidence of disparate treatment\textsuperscript{129} is strong and the likelihood of a random discrepancy is slight.\textsuperscript{130} Thus, if a plaintiff should choose to introduce quantifiable evidence that an employer's decisionmaking process disproportionately affects anchorwomen, sample size need not be a disqualifying factor.

C. Appearance Standards and the Role of the Court

Craft's Title VII claim may very well have failed because neither court reviewing her case thoroughly analyzed the viewer evaluations upon which her employer relied to demote her. Neither court truly inquired whether the questions posed by such evaluations, or the answers given in return, were impermissibly based on sexual stereotypes held by either the questioners or the responding viewers. Instead, both courts relied on the television studio's—in fact, the television news industry's—general practice of utilizing viewer preferences to retain or dismiss news anchors.

Pursuant to the disparate treatment framework utilized in the Craft case, however, deference to a defendant's business practices was predictable. Under this doctrine, the defendant employer must merely enunciate some legitimate reason for disfavoring the plaintiff. Because Metromedia asserted some plausible, albeit feeble, sex-neutral reasons for its displeasure with Craft, such as her lack of knowledge about Kansas City, where the station was located, and an apparently low level of "enjoyment of her job,"\textsuperscript{131} the court could presumably satisfy itself with the defendant's rebuttal.

If, however, Craft's case had been brought under a disparate impact theory, the defendant's burden would have been much more onerous. Rather than merely enunciating any legitimate reason for demoting Craft, Metromedia would have been responsible for proving the business necessity of its employee testing proce-
dures. It would thus have been required to validate its viewer surveys and other image criteria by showing that they "bear a demonstrable relationship to successful performance of the jobs for which [they were] used." Such validation would force both defendant and court to assess the true nature of potentially discriminatory testing procedures.

CONCLUSION

When faced squarely with the question as to whether Metromedia's emphasis on appearance was unjustifiable, the court in Craft recoiled. It claimed, "[W]e are not the proper forum in which to debate the relationship between newsgathering and dissemination and considerations of appearance and presentation—i.e., questions of substance versus image—in television journalism." Yet courts prior to Craft certainly decided difficult discrimination issues, even in the face of great public discord, and courts following Craft must do the same. Title VII was not designed to meet the approval of those harboring biases and prejudice; it was designed to eliminate bias and prejudice. Thus, it is clearly "the court's function to weigh the cost of excluding protected groups against the cost of interfering with employer choices." Difficult questions regarding substance and image in television news certainly are within a court's competence and duty to resolve.

The disparate impact model should not be overlooked by anchorwomen who seek to prove appearance-related discrimination. This model provides a powerful validation tool that forces employers to confront potentially discriminatory selection and retention tests. It is therefore much more powerful than a disparate treatment model for women facing appearance discrimination in all industries.

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133 766 F2d at 1215.
134 The Supreme Court, in Brown v Bd of Education of Topeka, 347 US 483 (1954), is perhaps the most notable example.
135 See notes 114-17 and accompanying text.