

GRADES ARE NO LONGER JUST FOR STUDENTS: FORCED RANKING, DISCRIMINATION, AND THE QUEST TO ATTAIN A MORE COMPETENT WORKFORCE

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INTRODUCTION

The Declaration of Independence states that “all men are created equal.”¹ While persons may be inherently equal, no individual *performs equally* in recital of his employment duties. Performance variations lead most employers to adopt systems of performance management² that essentially “award” the achievers and “penalize” the inefficient. Some companies implement formal performance management systems, while others appraise employees informally using loose and indistinct criteria.³ Thus, there are literally scores of “systems” in effect throughout the United States.

There is a growing trend among companies—mostly large corporations—to engage in a method of management where employers conduct employee performance appraisals and then use the evaluations to rank the employees against each other from “[b]est to worst.”⁴ This performance management system is commonly

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¹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

² See, e.g., DICK GROTE, *THE COMPLETE GUIDE TO PERFORMANCE APPRAISAL* ix (1996).

³ See *id.* at pp. 36-80 (profiling various models of performance evaluation).

⁴ John Greenwald, *Rank and Fire: Attrition Isn't Working, So Best-to-Worst Grading is Gaining—and Those on the Bottom Get the Boot*, *TIME*, June 18, 2001, available at 2001 WL 22574432. Approximately twenty percent of companies use a formal ranking system. *Forced Rankings: Tough Love or Overkill?*, *HRFOCUS* (Inst. of Mgmt. & Admin., New York, N.Y.), Feb. 2002, available at 2002 WL 5659587 [hereinafter *Overkill*]. Many other companies informally utilize grading in their performance management systems. *Id.* Some contend that the increase in use of forced ranking is the result of a slowing economy, which has tightened the job market and caused employers to place more emphasis on merit based pay. Matthew Boyle, *Performance Reviews: Perilous Curves Ahead*, *FORTUNE*, May 28, 2001, available at 2001 WL 2172786. See also Carol Hazard, *Forced Rankings in Legal Tangle: Employee Lawsuits Brewing at Capital One*, *RICHMOND-TIMES DISPATCH*, June 4, 2002, available at 2002 WL 7201556 [hereinafter

referred to as “forced ranking.”⁵ Many prominent companies advocate forced ranking as an effective way to eliminate ineffective employees and to reward superior performance, but the technique is receiving substantial attention and severe criticism.⁶ Whatever the reason for the burgeoning use of forced ranking as the preferred system of performance management, there is no question it is a growing trend that is highly criticized and is generating lawsuits.⁷ Forced ranking is a mounting plaintiff’s target, and plaintiffs accuse it of creating a law school type mentality, where employees sabotage each other because the grading is on a curve.⁸ Lawsuits filed around the country allege that forced ranking systems are easily abused and that the models create discrimination on the basis of age, gender, race, and citizenship.⁹

Hazard, *Lawsuits Brew*]. When the economy is stagnant, the job market narrows. *Id.* As a result, there is less change in employment through attrition. Greenwald, *supra* note 4. Forced ranking can be a useful tool in eliminating employees staying with a company for job security, versus employees who are looking to contribute meaningfully. *Id.*

⁵ Forced ranking is also identified by other names, but this Comment addresses the model solely as forced ranking. Employees are evaluated using various criteria, and employers then use those evaluations to rank the employees from “best to worst” or on some type of bell curve; an employee’s “rank” is often used to determine if his job performance merits a wage/salary increase or whether it is stellar enough to justify a promotion, or poor enough to warrant a lay-off or termination. See Reed Abelson, *Companies Turn to Grades, and Employees Go to Court*, NEW YORK TIMES, Mar. 19, 2001, available at LEXIS, News; Brent M. Longnecker, *Rank & Yank: The Problems with Forced Ranking*, at <http://www.workforce.com/archive/feature/22/29/72/index.php> (Aug. 3, 2001) (last visited Apr. 5, 2003) (on file with author).

⁶ See, e.g., Abelson, *supra* note 5, available at LEXIS, News.

⁷ See, e.g., Hazard, *Lawsuits Brew*, *supra* note 4, available at 2002 WL 7201556. Critics allege that forced ranking systems grade employees by using nonobjective criteria, and then make use of those grades to determine pay and possible termination. Abelson, *supra* note 5, available at LEXIS, News. The grading system forces employers to identify some employees as low performers. *Id.* Multiple lawsuits have called the practice discriminatory, claiming that forced ranking performance management systems have a disparate impact on certain protected classes. *Id.*; see also discussion of disparate impact at Parts IV.A. and IV.B.1 of this Comment; examples of litigation involving forced ranking models at Part II.B. Conversely, the proponents of the system argue forced ranking raises the bar of performance and increases the quality of a workforce. *Id.*; see also *Overkill*, *supra* note 4, available at 2002 WL 5659587.

⁸ Del Jones, *More Firms Cut Workers Ranked at Bottom to Make Way for Talent*, USA TODAY, May 30, 2001, available at 2001 WL 5463668. Many critics believe forced ranking discourages teamwork. Greenwald, *supra* note 4, available at 2001 WL 22574432. The mentality, some argue, is that employees are afraid that if they help each other, the person they assisted may get a better “grade” than they do. *Id.*

⁹ Jones, *supra* note 8, available at 2001 WL 5463668; see also discussion and accompanying notes *infra* Part II.B. for examples of litigation stemming from the use of forced ranking systems.

Companies differ as to the precise criteria or ranking models they utilize,¹⁰ but generally, forced ranking involves employers evaluating employees according to certain criteria and then ranking the employees against each other based on their evaluations.¹¹ Ultimately, the employees are given some type of “grade.”¹² Numerous variations of the forced ranking management system exist.¹³ Generally, forced ranking involves the use of three categories that include some manifestation of superior, average, and below average/needs improvement.¹⁴

Part I of this Comment explores the underlying purposes of why companies conduct performance appraisals, the functions the appraisals serve, and why many companies are moving toward forced ranking as the preferred method of performance management. Part II details various forced ranking models that corporations employ, and concludes by assessing recent litigation addressing the use of forced ranking management systems and the challenges those models present. Part III scrutinizes the mixed views over the effectiveness and ability of forced ranking to fairly evaluate employees without creating a disparate impact on protected classes, noting both the disdain and favor the system generates. Finally, Part IV reviews the colorful development of the disparate impact theory, including what is required for a plaintiff to prove a *prima facie* case of disparate impact, and what defenses are available to an employer whose forced ranking model is challenged under the disparate impact theory. This analysis concludes that forced ranking does not, as some commentators suggest, inherently create a disparate impact on protected classes. Rather, disparate impact analysis must instead be applied to forced ranking systems on a case-by-case basis, because each model employs different criteria. Furthermore, Part IV postulates risk-management measures employers may undertake to avoid or reduce the risk of costly litigation brought by employees claiming that a company’s forced ranking performance management system creates a disparate impact on protected classes.

¹⁰ See discussion and accompanying notes *infra* Part II.A.

¹¹ See, e.g., Geoffrey Colvin, *We Can't All be Above Average*, FORTUNE, Aug. 13, 2001, available at 2001 WL 2173120 [hereinafter Colvin, *Above Average*].

¹² *Id.*

¹³ See, e.g., *Overkill*, *supra* note 4, available at 2002 WL 5659587.

¹⁴ See discussion of models *infra* Part II.A.

I. THE NEED FOR AN EVALUATIVE SYSTEM

A. *General Purpose of Performance Evaluation Systems*

Undoubtedly, some type of performance management system is necessary to evaluate an employee's job performance.¹⁵ If employees are not consistently and uniformly evaluated, a multitude of problems could result.¹⁶ Some of those problems include employee confusion regarding how they are expected to perform and what they are expected to do; those not performing may be overlooked and their behavior left uncorrected, while those employees exemplifying outstanding performance may not be justly rewarded causing their productivity to decrease.¹⁷ Furthermore, if a personnel decision is challenged, a company may not be equipped with an adequate defense of its decision.¹⁸ Employers must be able to terminate employees who are not performing, and appraisal systems can be an effective tool in rewarding and increasing efficiency and productivity, while removing those individuals not satisfying company standards.¹⁹

The use of performance evaluation systems has dramatically increased since World War II.²⁰ In fact, performance evaluations remain the leading source of data for decisions determining raises and promotions.²¹ Evaluating employees is justifiable, because measurement of past behavior is a good indicator of how employees are likely to perform in the future.²² Typically, employees who were

¹⁵ Decreased productivity by the American worker is largely the result of a breakdown in the administration of performance appraisals. JOE BAKER, JR., CAUSES OF FAILURE IN PERFORMANCE APPRAISAL AND SUPERVISION 7 (1988).

¹⁶ *Id.* at 9.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 7. Many companies view forced ranking as a tool that enables them to better focus on the employees producing the best results. *Overkill*, *supra* note 4, available at 2002 WL 5659587; see also RONALD B. MORGAN & JACK E. SMITH, STAFFING THE NEW WORKPLACE: SELECTING AND PROMOTING FOR QUALITY IMPROVEMENT 252 (1996); John Edward Davidson, *The Temptation of Performance Appraisal Abuse in Employment Litigation*, 81 VA. L. REV. 1605, 1607 (1995) (noting the widespread use of performance appraisals as a method to increase both efficiency and productivity among employees); *id.* at 1608 (indicating performance evaluation systems are an effective method to attaining a more competent workforce, to identify company needs, and to convey company objectives—the ultimate result being a more profitable and efficient company).

²⁰ Deborah L. Rhode, *Occupational Inequality*, 1988 DUKE L.J. 1207, 1228 (1988).

²¹ MORGAN & SMITH, *supra* note 19; see also Davidson, *supra* note 19, at 1609 (noting the extensive utilization of performance appraisal systems in the United States).

²² MORGAN & SMITH, *supra* note 19, at 323; see also Davidson, *supra* note 19, at 1609.

exemplary workers in the past will remain so, while those who were not consistently valuable are not likely to change notably.²³

Equally important, however, is the necessity for guidance and structure so that each employee knows what is expected of him.²⁴ When employees are provided with the requisite information regarding what type of performance is essential to succeed within their company, it becomes easier for employers to make distinctions between the employees in their labor pool.²⁵ Performance evaluations are an invaluable tool in large corporations where poor job performance may perpetuate unnoticed.²⁶ Performance management systems that judge employees performing the same tasks against clear, objective, and relevant criteria, result in evaluations that serve as an effective tool in identifying both exceptional and unsatisfactory employee performance.²⁷ Ultimately, refusing to acknowledge or failing to notice deficient employee performance generates tension among a company's best employees.²⁸ Eventually, the employer will experience the aftermath of ignored or unnoticed low productivity and performance in its pocket.²⁹ Employment decisions that are inadequately documented may also lead to costly litigation.³⁰ Presently, the majority of lawsuits alleging

²³ MORGAN & SMITH, *supra* note 19, at 323.

²⁴ JACK WELCH WITH JOHN A. BYRNE, JACK: STRAIGHT FROM THE GUT 156 (2001) [hereinafter WELCH].

²⁵ *Id.* at 157.

²⁶ *Id.*

²⁷ See MORGAN & SMITH, *supra* note 19, at 322-27.

²⁸ Colvin, *Above Average*, *supra* note 11, available at 2001 WL 2173120. A survey of thousands of employees revealed fifty-nine percent of those surveyed wanted their companies to eliminate the underperformers. Geoffrey Colvin, *Make Sure You Chop the Dead Wood: Mass Layoffs Won't Work if You Can't Get Rid of Weak Managers*, FORTUNE, Jan. 22, 2001, available at 2001 WL 2172249 [hereinafter Colvin, *Dead Wood*]. Only seven percent of those surveyed believed their companies were eliminating underperformers. *Id.*

²⁹ A recent survey revealed that a company maintaining employees who perform poorly creates a vicious cycle that blocks development for promising employees, causes productivity and morale to plummet, induces promising employees to leave the company, and ultimately results in fewer star employees being attracted to the company. Colvin, *Dead Wood*, *supra* note 28, available at 2001 WL 2172249. Employees surveyed who had worked for companies that failed to weed out the low and/or underperformers, commented that the experience "prevented me from learning, hurt my career development, prevented me from making a larger contribution to the bottom line, made me want to leave the company." *Id.* (internal quotes omitted).

³⁰ See ALEXANDER HAMILTON INSTITUTE, PERFORMANCE APPRAISALS: THE LATEST LEGAL NIGHTMARE 8 (1986) [hereinafter PERFORMANCE APPRAISALS] (noting the value of documented performance appraisals at any level of work, and citing a case where an employer terminated an employee at his gas station after making general

discrimination challenge an employee's discharge.³¹

B. Rationale Behind Forced Ranking as the Preferred Performance Management System

Approximately one-quarter of all Fortune 500 companies utilize a forced ranking performance management system.³² Corporations use forced ranking to make clearer distinctions between their best and worst employees by ensuring that management is honestly evaluating them.³³ Forced ranking compels management to identify a percentage of a company's employees as unsatisfactory performers.³⁴

Conducting employee performance appraisals is undoubtedly a difficult and unpleasant task.³⁵ Anxiety typically abounds for both the employee and management at the mere mention of the need to conduct a performance appraisal.³⁶ Nonetheless, performance evaluations are one of the most essential responsibilities that management must undertake.³⁷ As mentioned previously, there are many reasons why employers should utilize performance evaluations. A well-reasoned, consistent system can produce meaningful results that are positive to a company, because the evaluations affect future company performance.³⁸ A management system that is properly implemented and documents the justifications for an employee's evaluation could shield a company from litigation resulting from alleged wrongful dismissal of an employee.³⁹ Managers not utilizing a company's performance management system could be generating a plaintiff's litigation tool. If an employee brings an action for

criticisms of the attendant's work, but never documented the employee's performance in a formal evaluation; the employee gas station attendant won his case); *see also* *Dare v. Mont. Petroleum Mktg. Co.*, 687 P.2d 1015 (Mont. 1984).

³¹ John J. Donahue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 984 (1991).

³² Some of the Fortune 500 companies utilizing a forced ranking performance evaluation system include General Electric, Hewlett-Packard, Sun Microsystems, Intel, and Cisco. Christine A. Amalfe & Heather A. Adelman, *Forced Ranking: Latest Plaintiffs' Target*, 10 N.J.L. 1554, Aug. 13, 2001, at 10; *see also* discussion of corporate models *infra* Part II.A.

³³ Abelson, *supra* note 5, available at LEXIS, News.

³⁴ *Id.*

³⁵ Max Messmer, *Measuring Staff Performance*, (The Metropolitan Corporate Counsel, Inc.), Aug. 2000, at 38 (Northeast ed.).

³⁶ *Id.* Employees fear being "graded," while evaluations cause apprehension for management who fear the potential repercussions presented by employees receiving negative evaluations. *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

wrongful dismissal or discrimination and no documentation exists to justify his dismissal, a court may assume the employee's performance was satisfactory.⁴⁰

Because management is often uncomfortable evaluating employees' weaknesses and informing them of those deficiencies, standard performance evaluations tend to produce "false kindness."⁴¹ The end result is that if an employee is eventually laid off or fired, he may be shocked because he received appraisals indicating his performance was satisfactory.⁴² Jack Welch, former Chief Executive Officer ("CEO") of General Electric ("GE"), recalls a situation in his book, where he asked a manager at GE why he gave a particular employee a stellar appraisal when he knew the employee did not deserve it.⁴³ The manager's response was that he was trying to be "a nice guy" by protecting an employee who was not performing adequately.⁴⁴ Unlike "traditional" performance appraisals, forced ranking systems have the potential to make management's job easier, because forced ranking requires management to eliminate employees who are not satisfying company standards, and at the same time the system demands continuous improvement.⁴⁵

II. FORCED RANKING SYSTEMS IN PRACTICE

A. Corporate Models

Commentators suggest that GE is the innovator of the modern forced ranking system.⁴⁶ GE is a major corporation employing more

⁴⁰ Messmer, *supra* note 35, at 38; *see also* Davidson, *supra* note 19, at 1618 (commenting that the performance evaluation "has been as effective a shield as it has been a sword," because poor evaluations that are well documented serve as protection for employers against wrongful dismissal claims by providing nondiscriminatory and legitimate reasons for an employee's termination); PERFORMANCE APPRAISALS, *supra* note 30, at 17 (noting the value of candid appraisals, and stating that inflated evaluations may destroy an employer's opportunity to overcome an employee's wrongful discharge claim).

⁴¹ *See, e.g.*, WELCH, *supra* note 24, at 58.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* Jack Welch indicates that these false appraisals came back to haunt him when GE was forced to downsize in the 1980s. *Id.*; *see also* Davidson, *supra* note 19, at 1610 (noting that supervisors commonly refrain from honestly evaluating a marginal employee because they "wish to avoid 'playing God' by ruining an employee's record").

⁴⁵ Julie Crane, *Forced Ranking—The Right Way*, (Fair Measures, [www.FairMeasures.com](http://www.fairmeasures.com/)), May 15, 2001, *available at* <http://www.fairmeasures.com/whatsnew/articles/new237.html> (last visited Apr. 5, 2003) (on file with author).

⁴⁶ *See, e.g.*, Hazard, *Lawsuits Brew*, *supra* note 4, *available at* 2002 WL 7201556.

than 300,000 employees and 4,000 senior managers.⁴⁷ “[M]ore than just touchy-feely good intentions” are needed to produce a true and effective performance appraisal in such a large corporation.⁴⁸ When Jack Welch took over management of GE, he was shocked and dismayed to find that the company was rife with underperformers.⁴⁹ Mr. Welch realized that the pool of underperformers in GE’s workforce was largely a consequence of management’s unwillingness to bear the often unpleasant task of conferring on an employee a poor evaluation—even when a poor evaluation may be well deserved.⁵⁰ The forced ranking system Mr. Welch implemented is referred to at GE as the “vitality curve.”⁵¹

GE’s vitality curve requires that managers rank their employees (management included) by the top twenty percent (“Top 20”), the middle seventy percent (“The Vital 70”), and the bottom ten percent (“The Bottom 10”).⁵² Ultimately, the distinctions are arrived at by sorting out the “A,” “B,” and “C” players.⁵³ Requiring managers to “[rank] employees on a 20-70-10 grid forces managers to make tough decisions and allows the top performers to be justifiably rewarded so they stay happy and willing to grow with the company.”⁵⁴ The forced ranking promotes efficiency within the company,⁵⁵ and GE maintains that not removing the bottom ten percent early in their careers

⁴⁷ WELCH, *supra* note 24, at 156.

⁴⁸ *Id.*

⁴⁹ *Id.* at 58.

⁵⁰ *Id.*

⁵¹ *Id.* at 158.

⁵² *Id.* According to Mr. Welch, ranking employees continually raises the bar and caliber of the GE workforce. WELCH, *supra* note 24, at 158. The result, is that the employees at the top must continue to exhibit the qualities and performance required to stay there, while those on the bottom are generally forced to leave. *Id.*

⁵³ *Id.* The employees in the “A” category are passionate, committed to bringing about results, open minded, and have room to grow. *Id.* The “As” “make business productive and fun at the same time.” *Id.* Mr. Welch refers to these “A” category qualities as the “four Es” of GE leadership: high *energy*, ability to *energize* others, an *edge* to make tough decisions, and an ability to *execute* and deliver on pledges. *Id.* “The Bs are the heart of the company and critical to its operational success.” WELCH, *supra* note 24, at 159. The Bs, however, do not possess the same passion that the “As” do. *Id.* The “C” employee fails to get the job done. *Id.* at 160. “C” players enervate others and procrastinate. *Id.* “Cs” are not valuable enough as employees to justify expending time on them. *Id.*

⁵⁴ *Id.* Rewarding the top performers with stock options, raises, and promotions helps GE maintain its best employees. WELCH, *supra* note 24, at 160. GE loses less than one percent of its “As” per year. *Id.*

⁵⁵ Jack Welch is quoted as saying, “A company that bets its future on its people must remove that lower 10 percent, and keep removing it every year—always raising the bar of performance and increasing the quality of its leadership.” Abelson, *supra* note 5, available at LEXIS, News.

would be to do them a disservice.⁵⁶ The company regularly reassesses its system based on employee feedback.⁵⁷

Other companies also use forced ranking systems. At least prior to its current reorganization efforts, Enron force ranked its employees biannually on a five-point scale.⁵⁸ Employees were differentiated into tiers by “superior” (top five percent), in the middle were the “excellent” (thirty percent), “strong” (thirty percent) and “satisfactory” (twenty percent), while the “needs improvement” were on the bottom (bottom fifteen percent).⁵⁹ Employees falling in the bottom fifteen percent were placed on probationary status and given a period of six months to meet the requisite standard or be terminated.⁶⁰

Microsoft Corporation (“Microsoft”) conducts performance evaluations and force ranks its employees twice a year.⁶¹ Management assigns each employee a scaled rating from 1.0 to 5.0 and then ranks the employee among the other members in his division.⁶² Within each work group, twenty-five percent must be rated 3.0 or below, forty percent will be rated 3.5, and only thirty-five percent will receive a rating of 4.0 or higher.⁶³ Salary adjustments, stock option awards, and promotional opportunities are offered according to the employee’s rank.⁶⁴ Management provides employees who are unhappy with their rank the opportunity to appeal.⁶⁵

Ford Motor Company’s (“Ford”) original forced ranking system created enormous controversy.⁶⁶ In fact, Ford’s system was so

⁵⁶ “There’s no cruelty like waiting and telling people late in their careers that they don’t belong—just when their job options are limited and they’re putting their children through college or paying off big mortgages.” WELCH, *supra* note 24, at 162.

⁵⁷ Pamela Williams, *The Secret Sacking Tool*, AUSTRALIAN FINANCIAL REVIEW, May 4, 2002, at 21. A recent decision by GE to award employees with stock options was based on employee feedback indicating that they felt demoralized by GE’s use of forced ranking. *Id.*

⁵⁸ Greenwald, *supra* note 4, available at 2001 WL 22574432.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Order on Plaintiffs’ Motion for Class Certification and Defendant’s Motion for Partial Summary Judgment at 3-4, *Donaldson v. Microsoft Corp.*, No. C00-1684P (W.D. Wash. 2001) [hereinafter Pechman Order].

⁶² *Id.* at 4.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Abelson, *supra* note 5, available at LEXIS, News.

⁶⁶ Ford’s original system mandated strict quotas that required certain employees be placed in the category of poor performance. Mark Truby, *Ford Ends Grading Quotas: Automaker to Stop Mandating the Number of Bad Reviews*, DETROIT NEWS, July 10, 2001, at 1 [hereinafter Truby, *Grading Quotas*]. It sparked widespread dissent among both employees and management, and led to a multitude of discrimination suits. *Id.*

controversial that the company overhauled its original system and instituted a new version.⁶⁷ The original system gave employees grades of “A,” “B,” or “C,” forcing ten percent to be graded “A,” eighty percent “B,” and ten percent “C.”⁶⁸ Managers receiving a “C” were not eligible for bonuses or raises, and were thereafter put on notice that another consecutive “C” rating could result in the manager’s demotion⁶⁹ or termination.⁷⁰ Ford’s ultimate goal was to eliminate deficient employees who might otherwise “fall through the cracks” using traditional employee evaluations.⁷¹ Ford’s revised forced ranking system variegates employees by “top achievers,” “achievers,” and those “needing improvement.”⁷² The new system does not mandate a specific percentage of employees for each category,⁷³ nor does it prevent low ranked managers from receiving a bonus or merit increase.⁷⁴

Sun Microsystems (“Sun”) also diverged from its original forced ranking system.⁷⁵ Instead, Sun adopted a more “employee friendly” approach that provides employees with supplemental resources to treat the root cause of poor performance, rather than automatically terminating employees falling in the bottom category.⁷⁶ Sun’s “new and improved” forced ranking model reduces its number of tiers from five to three.⁷⁷ The revised model characterizes employees by the top twenty percent (“superior”), the middle seventy percent (“Sun Standard”), and the bottom ten percent (“underperformers”).⁷⁸ Interestingly, this is the same breakdown as

⁶⁷ Mark Truby, *Jac the Knife Falls Under Ford Axe*, EDMONTON SUN, Nov. 2, 2001, at DR4 [hereinafter Truby, *Jac the Knife*]. Ford’s original forced ranking system was revamped as a result of devastated morale. *Id.* Some argue that Ford’s original system, implemented by former CEO Jacques A. Nasser, led to his demise. *Id.*

⁶⁸ Truby, *Grading Quotas*, *supra* note 66, at 1.

⁶⁹ *Id.*

⁷⁰ Truby, *Jac the Knife*, *supra* note 67, at DR4.

⁷¹ Truby, *Grading Quotas*, *supra* note 66, at 1. Ford studied GE’s forced ranking policy closely. *Id.* After observing the effectiveness of forced ranking at other companies, especially GE, Ford decided to implement its own system in an attempt to cease the shuffling around of underperformers within other divisions of the company. *Id.*

⁷² Amalfe & Adelman, *supra* note 32, at 10.

⁷³ *Id.*

⁷⁴ Williams, *supra* note 57, at 21.

⁷⁵ *Overkill*, *supra* note 4, available at 2002 WL 5659587.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Greenwald, *supra* note 4, available at 2001 WL 22574432; see also *Overkill*, *supra* note 4, available at 2002 WL 5659587.

GE's "vitality curve" which commentators agree is largely successful.⁷⁹ At Sun, the bottom ten percent have the choice of leaving with an exit package or following a plan to improve their performance,⁸⁰ a plan that includes one-on-one coaching to help them meet the requisite standard.⁸¹

B. Recent Litigation Stemming from Forced Ranking Performance Management Systems

As mentioned previously, forced ranking is a controversial method of performance management and is generating a firestorm of litigation. Some major corporations (including Capital One Financial Corporation,⁸² Ford Motor Company,⁸³ Microsoft Corporation,⁸⁴ Conoco, Inc.,⁸⁵ and a GE subsidiary⁸⁶) have had complaints and lawsuits filed against them alleging discrimination claims based on their use of forced ranking.

⁷⁹ See *supra* Part II.A.

⁸⁰ *Overkill*, *supra* note 4, available at 2002 WL 5659587. The human resources department at Sun indicates the purpose of the new system is to divert employees' attention away from the grade and toward improving their performance. *Id.*

⁸¹ Greenwald, *supra* note 4, available at 2001 WL 22574432. Sun CEO Scott McNealy stated that the bottom ten percent are the employees Sun "love[s] . . . to death." *Id.* The "love" is offered by the opportunity to receive personal coaching to meet the Sun standard, but if that "love" is not reciprocated, those employees falling in the bottom ten percent will face their "death" in the form of a prompt exit. *Id.*

⁸² Hazard, *Lawsuits Brew*, *supra* note 4, available at 2002 WL 7201556. Capital One's system mandates that eight to twelve percent of employees receive a grade of "3s" (below expectations) or "3 pluses" (approaches expectations), ten to fifteen percent receive "5 minuses" (excellent) or "5s" (outstanding), and the remaining employees fall in between the categories. Carol Hazard, *Virginia's Capital One Said to be Firing High Performers with Big Salaries*, May 4, 2002, available at 2002 WL 21242669. Since Capital One instituted its system in 2001, approximately one dozen complaints alleging age discrimination have been filed against the company with the Equal Opportunity Commission. *Id.* An attorney representing former Capital One employees indicates that "[i]f the charges are not resolved at the administrative level, we fully intend to file [a] class action suit under the Age Discrimination and Employment Act." *Id.*

⁸³ Ford settled two class action suits alleging race and gender discrimination in 2002 for \$10.5 million, as well as an individual claim for an undisclosed amount. Mark Truby, *Ford Settles Bias Suit*, DETROIT NEWS, Mar. 27, 2002, available at 2002 WL 14872212 [hereinafter *Ford Settles*]. See also notes 87-95 and accompanying text.

⁸⁴ See notes 99-124 and accompanying text.

⁸⁵ The U.S. Department of Justice filed suit against Conoco, Inc., alleging the company discriminated against United States citizens by favoring foreign workers. Hazard, *Lawsuits Brew*, *supra* note 4, available at 2002 WL 7201556. The suit was settled in 2002 for an undisclosed amount. *Id.*

⁸⁶ The action against the GE subsidiary is pending and alleges age and race discrimination. Hazard, *Lawsuits Brew*, *supra* note 4, available at 2002 WL 7201556. The lawsuit seeks class action status, which was not yet granted at the time this Comment was written. *Id.*

Many employees filed lawsuits as a result of Ford's first forced ranking system, claiming it was discriminatory against older workers and white males.⁸⁷ Ford denies that it changed the initial system because it unfairly targeted white males or older employees.⁸⁸ Instead, Ford maintains that the initial forced ranking model was changed as a result of complaints from management that the original system produced a negative effect on morale.⁸⁹ In response to Ford's denial, AARP commented that companies often use forced ranking as a tactic to force out older employees.⁹⁰ Two class action suits were filed in Michigan as a result of Ford's original forced ranking system adopted in January 2000.⁹¹ *Streeter v. Ford*⁹² was brought by older white males claiming Ford's forced ranking system had "a disparate impact on Caucasians, males, and older workers."⁹³ *Siegel v. Ford*⁹⁴ alleged Ford's forced ranking system was used to give older workers poor evaluations to essentially weed them out, thereby creating a disparate impact on older employees.⁹⁵ Ford reached a settlement with these plaintiffs in 2001, agreeing to pay them more than \$10.5 million.⁹⁶ In March 2002, Ford settled another high profile lawsuit filed by former human resources manager John Kovacs.⁹⁷ Mr. Kovacs' case alleged reverse discrimination, claiming Ford's ranking program unfairly targeted older white males.⁹⁸

Former employees filed lawsuits against Microsoft alleging its forced ranking model creates a disparate impact on African Americans and women because it is inherently and excessively subjective in nature, resulting in evaluations that are subject to bias.⁹⁹

⁸⁷ Truby, *Grading Quotas*, *supra* note 66, at 1.

⁸⁸ *Ford Ends Quotas on Performance*, United Press International, July 10, 2001, available at LEXIS, News [hereinafter *Ford Ends Quotas*].

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Amalfe & Adelman, *supra* note 32, at 10.

⁹² *Streeter v. Ford Motor Co.*, No. 01-105949-CL (Mich. Circ. Ct. Wayne Co. Feb. 21, 2001).

⁹³ Amalfe & Adelman, *supra* note 32, at 10.

⁹⁴ *Siegel v. Ford Motor Co.*, No. 01-102583-CL (Mich. Circ. Ct. Wayne Co. Jan. 23, 2001).

⁹⁵ Amalfe & Adelman, *supra* note 32, at 10. See discussion *infra* note 185 (noting the current circuit split over whether disparate impact applies to ADEA claims).

⁹⁶ *Ford Settles*, *supra* note 83, available at 2002 WL 14872212.

⁹⁷ *Id.*; see also *Kovacs v. Ford Motor Co.*, File No. 01-121039-NO (Mich. Circ. Ct. Wayne Co. June 21, 2001).

⁹⁸ See, e.g., Mark Truby, *Ford Countersues in Reverse Bias Case*, DETROIT NEWS, Sept. 5, 2001, available at 2001 WL 5112213.

⁹⁹ *Setback for Bias Suit Against Microsoft*, SEATTLE TIMES, Nov. 17, 2001, available at 2001 WL 3527084. The complaint in *Donaldson v. Microsoft Corp.*, filed in the Western

The lawsuits reflect dissatisfaction on the part of some minorities and women with respect to the alleged effects of Microsoft's ranking system.¹⁰⁰ Microsoft employee Peter M. Browne, one of the corporation's highest ranking African American employees, filed a lawsuit against the company in October of 1999.¹⁰¹ Mr. Browne's suit alleged race and age discrimination and cited Microsoft's grading system as one of the corporation's discriminatory practices that generates a disparate impact on African Americans and older employees.¹⁰² Mr. Browne claimed Microsoft's forced ranking system required that he and other managers rate employees without the use of objective criteria.¹⁰³ The result, according to Mr. Browne, is that the most highly rated employees are typically those who socialize with and are most like the managers.¹⁰⁴ More often than not, this means that those employees receiving favorable ratings and promotions¹⁰⁵ are white males.¹⁰⁶

On May 8, 2001, the United States District Court for the District of Washington granted summary judgment for Microsoft on all five counts of Mr. Browne's complaint.¹⁰⁷ With respect to the disparate impact claim, the court stated that Mr. Browne did not show that Microsoft's evaluation criteria creates a disparate impact on African American and older workers.¹⁰⁸ The court stated that statistical evidence is the only way to prove that Microsoft's ranking system induces a disparate impact.¹⁰⁹ The plaintiff, the court posited, "failed to make the requisite showing,"¹¹⁰ and Mr. Browne instead offered

District of Washington on October 4, 2000, alleged Microsoft's rating system "permits managers, who are predominantly white males, to rate employees based upon their own biases rather than based upon merit." Abelson, *supra* note 5, *available at* LEXIS, News. Microsoft maintains that its system is both fair and helpful, gives the highest compensation to those who deserve it, and contains its own system of checks and balances. *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Browne v. Microsoft Corp., No. C99-1665C (W.D. Wash. 2000). *See also* Abelson, *supra* note 5, *available at* LEXIS, News.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Amalfe & Adelman, *supra* note 32, at 10.

¹⁰⁵ Mr. Browne contended he was repeatedly passed over for promotions that were given to younger, non-black males who were less qualified than he. Plaintiff's Second Amended Complaint and Demand for Jury Trial at 3, Browne v. Microsoft Corp., No. C99-1665C (W.D. Wash. 2000).

¹⁰⁶ Amalfe & Adelman, *supra* note 32, at 10.

¹⁰⁷ *See* Order of the Hon. John C. Coughenour at 2, Browne v. Microsoft, No. C99-1665C (W.D. Wash. 2001) [hereinafter Order of Coughenour].

¹⁰⁸ *Id.* at 5.

¹⁰⁹ *Id.* at 4.

¹¹⁰ *See* discussion *infra* Part IV.A., setting forth a what a plaintiff is required to

“bottom line evidence of racial imbalance” which the Supreme Court¹¹¹ expressly rejects as sufficient to prove disparate impact exists.¹¹²

In another suit brought against Microsoft filed in October 2000, Monique Donaldson, an African American woman and former Microsoft employee, filed a complaint on behalf of herself and all similarly situated Microsoft employees challenging Microsoft’s alleged pattern and practice of race and sex discrimination resulting from discrimination in performance appraisals.¹¹³ Specifically, plaintiffs challenged Microsoft’s forced ranking system, calling it “excessively subjective,” and alleged that the system is used to generate evaluations based on the biases of managers—who are predominantly white males—rather than on appraisals that are based on employee merit.¹¹⁴ The evaluations are the primary tool at Microsoft for awarding compensation increases and promotion

demonstrate to establish a *prima facie* case of disparate impact.

¹¹¹ See *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 657 (1989) (indicating that a plaintiff does not set forth a *prima facie* case of disparate impact by producing “bottom line” evidence that a racial imbalance exists in the company); see also *infra* notes 155-56 and accompanying text for an explanation of “bottom line” evidence.

¹¹² Order of Coughenour, *supra* note 107, at 5. Mr. Browne filed an appeal with the Ninth Circuit. Telephone Interview with Jerry McNaul, Esquire, McNaul Ebel Nawrot Helgren & Vance, P.L.L.C. (Feb. 2002) [hereinafter McNaul Telephone Interview]. The author of this Comment contacted Jerry McNaul, attorney for Mr. Browne, to inquire as to the status of the pending appeal. According to Mr. McNaul, Mr. Browne’s case was argued before the Ninth Circuit on July 12, 2002. See E-mail from Jerry McNaul, Esquire, McNaul Ebel Nawrot Helgren & Vance, P.L.L.C., to Meredith L. Myers, Comment Author (Sept. 4, 2002, 1:53 EST) (on file with author) [hereinafter McNaul E-mail]. Mr. McNaul was unable to provide the author with any additional information, because the Ninth Circuit entered a protective order in late 2001, cloaking the case in secrecy. *Id.* All records were sealed and the attorneys on both sides were prohibited from discussing or commenting on the action. McNaul Telephone Interview, *supra* note 112. When the author contacted Mr. McNaul in late August 2002, the gag order remained in place. McNaul E-mail, *supra* note 112. As of the date this Comment was written, the Ninth Circuit had not yet entered a decision. *Id.*

¹¹³ Class Action Complaint at 2, *Donaldson v. Microsoft Corp.*, No. C00-1684 (W.D. Wash. 2000) [hereinafter *Donaldson Complaint*]. Ms. Donaldson’s claims rested on alleged “violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, the Civil Rights Act of 1991, 42 U.S.C. § 1981a, the Civil Rights Act of 1871 and 42 U.S.C. § 1981.” *Id.*

¹¹⁴ *Id.* at 3; see also Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129 (1999) (discussing the existence of unconscious biases); Davidson, *supra* note 19, at 1611 (noting the existence of a subconsciously biased performance evaluation); Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN. L. REV. 587, 607 (2000) (stating studies reveal that race and sex influence performance evaluations despite equal qualifications among candidates).

decisions.¹¹⁵

In an order dated November 16, 2001, United States District Judge for the Western District of Washington, Marsha Pechman, denied class action status to plaintiffs' complaint and concluded that "Microsoft's managerial system is not inherently flawed," but rather appears to be "a well-crafted combination of both objective and subjective measures."¹¹⁶ Judge Pechman reasoned that in order to demonstrate Microsoft's ratings system is detrimental to its employees, plaintiffs would need to proffer evidence of disparate impact¹¹⁷ or disparate treatment¹¹⁸ arising from Microsoft's ranking system.¹¹⁹ Judge Pechman found that plaintiffs failed to satisfy that burden.¹²⁰ The order explained that plaintiffs could have shown disparate impact if they had submitted clear statistical evidence that proved Microsoft's performance management system created significant adverse effects on women and African Americans.¹²¹

¹¹⁵ Donaldson Complaint, *supra* note 113, at 3.

¹¹⁶ Pechman Order, *supra* note 61, at 12. The court further noted that each employee is in a salary ladder that requires certain attributes be met in order for an employee to move up the ladder. *Id.* Judge Pechman reasoned that while employees are graded on a bell curve, the subjectivity that is inherent in such a ranking is tempered by the advance notice employees are given as to what is required for them to meet their job expectations, and the fact that any employee who believes he was unfairly graded may appeal his grade. *Id.* at 13.

¹¹⁷ See discussion of disparate impact *infra* Part IV.A.

¹¹⁸ "Disparate treatment" is not being addressed in this Comment. In an effort to better comprehend the scope and impact of the court's decision, however, the author will provide the reader with a working definition of disparate treatment. A *prima facie* case of disparate treatment is set forth by a plaintiff who proves that *intentional* discrimination took place by an employer. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The basic elements of a *prima facie* case of disparate treatment are: (1) the plaintiff belongs to a racial minority; (2) the employer was seeking applicants for a job that the plaintiff applied and was qualified for; (3) but was nonetheless rejected; and (4) after the plaintiff was rejected, the position remained open and the employer continued to seek applicants of similar qualifications as the plaintiff. *Id.* Once the plaintiff proves a *prima facie* case of disparate treatment, the burden shifts to the employer to proffer a legitimate and nondiscriminatory reason for the plaintiff's rejection. *Id.* The plaintiff is given the opportunity to rebut the employer's justification by demonstrating that the employer's offered reason is merely a pretext for discrimination. *Id.* at 804. See also Christopher Dee, *Disparate Impact and Subjective Employment Criteria Under Title VII*, 54 U. CHI. L. REV. 957, 958 (1987).

¹¹⁹ Pechman Order, *supra* note 61, at 5.

¹²⁰ According to the opinion, "broad managerial discretion in employment practices is not itself discriminatory." *Id.* Plaintiff would have to "establish a link between Microsoft's practices and some *measurable impact* on women and African American employees" to challenge the subjectivity of Microsoft's employment practices. *Id.* at 12 (emphasis added).

¹²¹ Pechman Order, *supra* note 61, at 12. For a cursory discussion of disparate treatment, see *supra* note 118. Cf. Jane Howard-Martin, *A Critical Analysis of Judicial*

Instead, plaintiffs data was contradictory to their claims, and in fact suggested that “women and African Americans received *greater benefits* than their white male counterparts,” which in effect “cancelled out” the data suggesting a negative effect existed.¹²² The court granted summary judgment for Microsoft on all but one count, which permitted Ms. Donaldson to pursue individual disparate treatment claims against Microsoft.¹²³ Plaintiffs appealed to the Ninth Circuit, but then reached a confidential settlement with Microsoft while the request for appeal was pending.¹²⁴

III. FORCED RANKINGS: A MIXED REACTION BY COMMENTATORS

The litigation spurred by the use of forced ranking clearly demonstrates the method is highly controversial.¹²⁵ Like most performance evaluation methods, forced ranking consists of both positive and negative aspects. While there are arguments on both sides, however, this Comment ultimately concludes that force ranking employees is not *per se* illegal.

The most significant and recurring justification proffered for the use of forced ranking is that it eliminates the tendency for management to give employees evaluations that do not accurately and honestly reflect employee performance.¹²⁶ In the fairy tale “The Emperor’s New Clothes,” the Emperor’s court told him he looked “superb” in his new clothes.¹²⁷ In fact, however, the Emperor was not wearing any clothing.¹²⁸ Nonetheless, the Emperor’s court told him

Opinions in Professional Employment Discrimination Cases, 26 HOWARD L.J. 723, 729 (1983) (commenting that “[d]isparate impact is a more attractive theory than disparate treatment for most plaintiffs[,]” because a plaintiff need not show the alleged discrimination was intentional).

¹²² Pechman Order, *supra* note 61, at 6 (emphasis added).

¹²³ Pechman Order, *supra* note 61, at 22, 24-25.

¹²⁴ E-mail from Julie Goldsmith, Esquire, Cohen, Milstein, Hausfeld & Toll, P.L.L.C., to Meredith L. Myers, Comment Author (Aug. 29, 2002, 9:36 EST) (on file with author) [hereinafter Goldsmith E-mail].

¹²⁵ See *supra* Part II.B.

¹²⁶ Managers or supervisors often permit their company’s evaluation system to function ineffectively to avoid open conflict. BAKER, *supra* note 15, at 7. Essentially, by fearing the repercussions of giving an employee an honest evaluation, managers are ignoring the inherent function of a performance evaluation and its potential to improve an employee’s performance. *Id.* When problems with an employee are revealed in an evaluation, but simply ignored and left uncorrected, the evaluation becomes valueless and nothing more than a waste of time and energy. *Id.* Once management and employees have noticed that the performance evaluation serves no real purpose, they both lose faith in the method. *Id.*

¹²⁷ MARK R. EDWARDS & ANN J. EWEN, 360° FEEDBACK: THE POWERFUL NEW MODEL FOR EMPLOYEE ASSESSMENT & PERFORMANCE IMPROVEMENT 3 (1996).

¹²⁸ *Id.*

what they thought he *wanted* to hear.¹²⁹ As the Emperor well knew, people often tell others what they *want* to hear rather than what they *need* to hear.¹³⁰ When the Emperor asked the most trusted members of his court to *anonymously* reveal to him what they “really” thought of his new clothes, the members told him the truth—that the Emperor was not wearing any clothes.¹³¹

Many companies favor forced ranking, because candid evaluations tell an employee what he *needs* to hear, which has a direct causal relationship to the employee’s possibility for advancement within the company, his ability to receive promotions, raises and other incentives.¹³² Forced ranking generates an “effect” by providing employees with candor that “can overcome false self-perceptions, blind spots, and just plain ignorance.”¹³³ Employees who are not content with their rank may not perceive the “effect” as positive. Eliminating deficient employees, however, allows a company to operate more productively, and may even save an employee’s job if the forced ranking makes the employee aware that he is not performing at the level expected by his company.¹³⁴

Although some commentators find forced ranking extremely useful, the method is also widely criticized and is often referred to as “rank and yank.”¹³⁵ The most common criticism is that the criteria used to rank employees lacks objectivity.¹³⁶ Critics argue the criteria subjects the evaluations to bias and generates a disparate impact on

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 3-4.

¹³² Many company executives advocate forced ranking as a way to compel managers to be more honest in evaluating workers. The result is that managers make clearer distinctions among employees, because they are forced to single out employees not satisfying company standards. Claude Lewis, *Does Worker Grading Fuel Bias?*, PHILADELPHIA INQUIRER, Mar. 23, 2001, available at LEXIS, News.

¹³³ EDWARDS & EWEN, *supra* note 127, at 4.

¹³⁴ *Id.* at 4-5. Some proponents of forced ranking argue that the reason the method produces severe criticism, is because it requires “changing a deeply rooted corporate culture” where every employee was always “doing fine.” Colvin, *Above Average*, *supra* note 11, available at 2001 WL 2173120. Former GE CEO Jack Welch is likely the biggest advocate of forced ranking. *Overkill*, *supra* note 4, available at 2002 WL 5659587. See notes 46 to 57 and accompanying text. Another corporate advocate of forced ranking is Hewlett-Packard’s CEO Carly Fiona. *Overkill*, *supra* note 4, available at 2002 WL 5659587. Ms. Fiona referred to Hewlett-Packard’s system as “management the way it was originally intended to be.” *Id.*

¹³⁵ See, e.g., Boyle, *supra* note 4, available at 2001 WL 2172786.

¹³⁶ While criteria such as “teamwork” and “communication skills” are an integral part of an employee’s performance, they are “fuzzy qualitative criteria” that are hard to gauge objectively. See *id.*

protected classes of employees.¹³⁷ Another criticism is that forced ranking requires management to penalize an employee who is good, but not great, when the employee is ranked against the rest of his superstar team.¹³⁸ Many employees contend that forced ranking is demoralizing and creates a competitive environment of intense internal conflict, eliminating the possibility for teamwork and cooperation.¹³⁹

IV. DISCRIMINATORY IMPACT ON STATUTORILY PROTECTED GROUPS: THE DISPARATE IMPACT THEORY

A. *Development of the Disparate Impact Theory*

Employers are not precluded by law from developing criteria or methods to evaluate employee job performance,¹⁴⁰ and the use of subjective criteria is not *per se* illegal.¹⁴¹ Title VII of the Civil Rights Act of 1964 (“1964 Act”),¹⁴² however, prohibits employers from making distinctions among employees based on “race, color, religion, sex, or national origin.”¹⁴³ Section 105(a) of the Civil Rights Act of 1991 (“1991 Act”) ¹⁴⁴ amended section 703 of Title VII of the 1964 Act, further expanding the protections afforded to employees, because the addition of subsection (k) makes disparate impact an “unlawful employment practice.”¹⁴⁵

Disparate impact is a “fuzzy word” that is interpreted in varying

¹³⁷ Abelson, *supra* note 5, available at LEXIS, News; see also Lewis, *supra* note 132, available at LEXIS, News.

¹³⁸ See Boyle, *supra* note 4, available at 2001 WL 2172786. Forced ranking critics argue that if companies are more selective in who they hire, the result will be a workforce full of “A” players. Longnecker, *supra* note 5, at <http://www.workforce.com/archive/feature/22/29/72/index.php>. Consequently, there would be no need for forced ranking. *Id.*

¹³⁹ *Overkill*, *supra* note 4, available at 2002 WL 5659587. By force ranking more than half of a company’s employees as average, critics argue the system encourages “mediocre performance” and opens a “Pandora’s Box” of problems such as infighting, bias, and litigation—which ultimately impacts a company in a negative way. *Id.*

¹⁴⁰ See Mack A. Player, *Applicants, Applicants in the Hall, Who’s the Fairest of Them All? Comparing Qualifications Under Employment Discrimination Law*, 46 OHIO ST. L.J. 277 (1985).

¹⁴¹ See, e.g., Crane, *supra* note 45, available at <http://www.fairmeasures.com/whatsnew/articles/new237.html>; *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988).

¹⁴² 42 U.S.C. §§ 2000e-2000e-17 (2002).

¹⁴³ 42 U.S.C. § 2000e-2(a) (2002).

¹⁴⁴ Pub. L. No. 102-166, 105 Stat. 1071 (1991).

¹⁴⁵ 42 U.S.C. § 2000e-2(k)(1) (2002).

ways.¹⁴⁶ The Supreme Court defined disparate impact in *International Brotherhood of Teamsters v. United States*,¹⁴⁷ stating that claims of disparate impact involve the use of “employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.”¹⁴⁸ Furthermore, a plaintiff need not prove a discriminatory motive existed in order to prevail on a theory of disparate impact.¹⁴⁹

The Supreme Court first recognized that disparate impact liability is encompassed in Title VII of the 1964 Act in *Griggs v. Duke Power Co.*¹⁵⁰ The Supreme Court further expanded the reach of disparate impact liability, holding unanimously in *Watson v. Fort Worth Bank & Trust*¹⁵¹ that disparate impact analysis could be applied to the subjective criteria of an employer’s selection procedures “in appropriate cases.”¹⁵² According to the Court, the “premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.”¹⁵³

Although confirming that disparate impact analysis may be applied to subjective employment practices, the Supreme Court narrowed the plaintiff’s reach substantially in *Wards Cove Packing Co.*

¹⁴⁶ See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 624 (1989); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988); *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

¹⁴⁷ 431 U.S. 324 (1977).

¹⁴⁸ *Int’l Bhd.*, 431 U.S. at 335 n.15.

¹⁴⁹ *Id.* Cf. discussion of “disparate treatment,” *supra* note 118. See also Howard-Martin, *supra* note 121.

¹⁵⁰ 401 U.S. 424 (1971). The *Griggs* Court acknowledged that “The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude [minorities] cannot be shown to be related to job performance, the practice is prohibited.” *Id.* at 431; see also CHARLES A. SULLIVAN, MICHAEL J. ZIMMER & REBECCA HANNER WHITE, *EMPLOYMENT DISCRIMINATION LAW AND PRACTICE* 235 (3d ed. 2002) [hereinafter SULLIVAN ET AL.].

¹⁵¹ 487 U.S. 977 (1988).

¹⁵² *Id.* at 991.

¹⁵³ *Id.* at 987; see also Wax, *supra* note 114 (discussing the existence of two forms of biases—the “conscious” which encompasses deliberate or purposeful animus, the “unconscious” which is an automatic and inadvertent form of bias, and how the unconscious bias may have a spillover effect into employee performance appraisals); SULLIVAN ET AL., *supra* note 150, at 251 (“Immunizing subjective employment practices from impact attack could encourage employers to abandon objective job selection measurements in favor of subjective ones that could easily mask discriminatory intent or that could give effect to subconscious stereotypes or prejudices.”).

v. Atonio,¹⁵⁴ by holding that a plaintiff may not establish a *prima facie* case of disparate impact by merely pointing to “bottom line” disproportion.¹⁵⁵ Rather, “a plaintiff must demonstrate . . . a . . . particular employment practice . . . has created the disparate impact under attack.”¹⁵⁶

Congress, in response to the *Wards Cove* decision, codified disparate impact in the 1991 Act.¹⁵⁷ Essentially, Congress reversed the *Wards Cove* burden of proof allocation in disparate impact cases, provided new definition to what a plaintiff is required to demonstrate to establish a sufficient case of disparate impact discrimination, and rejected the Court’s definition of the business necessity defense set forth in *Wards Cove*.¹⁵⁸

Today, in the wake of changes brought about by the 1991 Act, a plaintiff seeking to establish a *prima facie* case of disparate impact must first identify the practice challenged, and then prove that the employer’s use of the challenged practice causes “a sufficiently disparate impact on a statutorily protected group.”¹⁵⁹ This standard can be a difficult hurdle for plaintiffs when the challenged employment practice is not easily discernable.¹⁶⁰ An example of an easily discernable employment practice would be a test identified by a plaintiff as a barrier to the employment of minorities within a particular company.¹⁶¹ The focus of disparate impact theory is “upon the adverse effect of a *particular* practice or selection device on an appropriate labor pool.”¹⁶² Because forced ranking systems often encompass a combination of both objective and subjective criteria, it

¹⁵⁴ 490 U.S. 642 (1989).

¹⁵⁵ *Id.* at 657. Merely demonstrating that a racial imbalance exists in the workforce is considered bottom line evidence of disproportion and insufficient to satisfy the burden of demonstrating a sufficient case of disparate impact. Rosemary Alito, *Disparate Impact Discrimination Under the 1991 Civil Rights Act*, 45 RUTGERS L. REV. 1011, 1015 (1993).

¹⁵⁶ *Wards Cove*, 490 U.S. at 657.

¹⁵⁷ Alito, *supra* note 155, at 1013-14.

¹⁵⁸ *Id.* at 1014.

¹⁵⁹ SULLIVAN ET AL., *supra* note 150, at 246; *see also* Anderson v. Douglas & Lomason Co., Inc., 26 F.3d 1277, 1284 (5th Cir. 1994) (rejecting a disparate impact claim where “plaintiffs merely launched a wide-ranging attack on the cumulative effects of [their employer’s] employment practices. The disparate impact model is not the appropriate vehicle from which to launch such an attack.”). Demonstration by a plaintiff that a company has an “overall lack of women or minorities in a particular workplace or job classification” is generally insufficient to show a disparate impact exists. SULLIVAN ET AL., *supra* note 150, at 246. Instead, a plaintiff must specifically identify the practice he believes is creating a disparate impact on his class. *Id.*

¹⁶⁰ *See id.* at 246-47.

¹⁶¹ *Id.* at 247.

¹⁶² *Id.* at 248 (emphasis added).

may prove difficult for plaintiffs to point to the precise criteria they believe are creating the disparity.

If an employee successfully establishes a *prima facie* case of disparate impact, employers may defend their policy by setting forth their own evidence to rebut the employee's evidence of disparate impact.¹⁶³ While the burden is initially on the plaintiff-employee to prove his *prima facie* case, if the employee makes his case, the burden of proof and persuasion then shifts to the defendant-employer to show that "the challenged practice is *job related* . . . and consistent with *business necessity*."¹⁶⁴

Congress left the meaning of the terms "job related" and "business necessity" undefined, resulting in ambiguity and many unanswered questions.¹⁶⁵ The only guidance Congress provides for those seeking to define the terms "job related" and "business necessity," is in an Interpretive Memorandum¹⁶⁶ referred to at Section 105(b) of the 1991 Act.¹⁶⁷ The Interpretive Memorandum, however, leaves much unresolved and does little to remedy the debate.¹⁶⁸ The Interpretive Memorandum merely directs courts to the Supreme Court's decisions preceding *Wards Cove*, including *Griggs*, and indicates that the Interpretive Memorandum is the sole source of legislative history to be relied on when interpreting the terms.¹⁶⁹ The result is continued uncertainty, because the Court's decisions

¹⁶³ See 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2002); see also Alito, *supra* note 155, at 1016-17; SULLIVAN ET AL., *supra* note 150, at 280-83; Kay H. Hodge, *The Age Discrimination in Employment Act*, SG060 ALI-ABA COURSE OF STUDY 337, 346-47 (Mar. 2002).

¹⁶⁴ 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2002) (emphasis added); see also Alito, *supra* note 155, at 1021; Jack M. Beerermann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981, 1026 (2002); Daniel M. Tardiff, *Knocking on the Door: Finally an Answer from Within for Employment Testers*, 32 LOY. U. CHI. L.J. 909, 923-24 (2001).

¹⁶⁵ See, e.g., Alito, *supra* note 155, at 1021-40. See also Tardiff, *supra* note 164, at n.120 (discussing that due to the 1991 Act's vagueness in defining the terms "business necessity" and "job related," there is potential for a conservative federal bench to define the terms along the lines of the Supreme Court's *Wards Cove* decision).

¹⁶⁶ The Interpretive Memorandum may be found at 137 CONG. REC. S15,276 (daily ed. Oct. 25, 1991).

¹⁶⁷ Pub.L. No. 102-166, 105(b) Stat. 1071 (1991); see, e.g., Alito, *supra* note 155, at 1018-19; Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 666 (2001).

¹⁶⁸ See Michael Carvin, *Disparate Impact Claims Under the New Title VII*, 68 NOTRE DAME L. REV. 1153, 1160-61 (1993) (stating Congress "punted" by failing to give meaning to what the terms business necessity and job related mean, and by failing to resolve the debate).

¹⁶⁹ See, e.g., Alito, *supra* note 155, at 1018-19; Jolls, *supra* note 167, at 666.

involving the terms' definitions have been anything but uniform.¹⁷⁰

Relying on the decisions preceding *Wards Cove*, as Congress requires in its Interpretive Memorandum,¹⁷¹ if a defendant-employer cannot demonstrate that an exclusionary or discriminatory practice is related to job performance¹⁷² and is a reasonable measure of job performance,¹⁷³ the practice will be prohibited.¹⁷⁴ Under *Griggs*, if an employer's proffered justification for the use of the challenged practice is to upgrade its labor pool, a court must find the rationale insufficient to establish that the discriminatory practice is "job related" or a "business necessity."¹⁷⁵ More often than not, empirical data is preferred to corroborate a precise connection between the challenged practice and the employer's justification for it.¹⁷⁶ In some cases, the Supreme Court *requires* employers to justify their defenses with empirical data.¹⁷⁷ At other times, however, the Court states that such "validation criteria" are not explicitly required, because some qualities such as ambition, loyalty, and common sense cannot be measured quantitatively through validation criteria.¹⁷⁸ "While *Griggs* . . . [and] *Dothard* . . . adopted a strict approach . . . *Watson* reflect[ed] a more lenient view of the job relatedness and business necessity defense."¹⁷⁹ Congress, however, appears to align with the *Griggs* model through its express reference to the case in its Interpretive Memorandum.¹⁸⁰ If the defendant-employer sufficiently rebuts plaintiff's *prima facie* case by proving that its performance evaluation system is job related and a business necessity, the plaintiff may still prevail¹⁸¹ if he can show that an "alternative employment practice"¹⁸²

¹⁷⁰ SULLIVAN ET AL., *supra* note 150, at 286; *see also* Susan S. Grover, *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 GA. L. REV. 387, 393 (1996) (indicating that the Court's prior decisions were not consistent with each other, requiring that the interpretation of "business necessity" and "job related" rely on policy and theoretical underpinnings).

¹⁷¹ *See supra* note 166.

¹⁷² *See Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

¹⁷³ *See id.* at 436.

¹⁷⁴ *See id.* at 431.

¹⁷⁵ 401 U.S. 424 (1974).

¹⁷⁶ SULLIVAN ET AL., *supra* note 150, at 286.

¹⁷⁷ *See Dothard v. Rawlinson*, 433 U.S. 321, 332 (1977) (rejecting defendant-employer's justification for the challenged practice, because the defendant-employer failed to provide empirical data to support its argument).

¹⁷⁸ *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988).

¹⁷⁹ SULLIVAN ET AL., *supra* note 150, at 289.

¹⁸⁰ *Id.* Conversely, Congress made no mention of the more lenient approach set forth in *Wards Cove*. *Id.*

¹⁸¹ This surrebuttal offered to plaintiffs is not withstanding a threshold showing of disparate impact. It is still required that plaintiff prove a *prima facie* case of disparate

exists that would produce the same effect as the challenged practice and the employer refuses to adopt it.¹⁸³

The history of disparate impact since *Griggs* and *Watson* remains complicated and confusing to apply.¹⁸⁴ In fact, courts still engage in debate while trying to discern the scope of the theory of disparate impact.¹⁸⁵

impact in conjunction with the fact that an alternative employment practice exists. See *Bryant v. City of Chi.*, 200 F.3d 1092, 1094 (7th Cir. 2000) (stating that if the defendant-employer rebuts plaintiff's initial *prima facie* case, the burden shifts back to the plaintiff for another opportunity to present her case by proving an alternative existed to the challenged practice that would serve the same purpose); *Price v. City of Chi.*, 251 F.3d 656, 659 (7th Cir. 2001) (rejecting plaintiff's claim that an alternative would have a lesser impact on African Americans because plaintiff did not sufficiently prove that the present method the employer was using created an adverse impact); see also Susan Marie Connor & Tom H. Luetkemeyer, *Employment Discrimination and Discharge*, ILLINOIS ICLE HANDBOOK ON EMPLOYMENT TERMINATION 2, 2.51 (Apr. 2002); Hodge, *supra* note 163, at 346-47.

¹⁸² The meaning of "alternative employment practice" is not easily discernable. See Michael J. Zimmer, *Individual Disparate Impact Law: On the Plain Meaning of the 1991 Civil Rights Act*, 30 LOY. U. CHI. L.J. 473, 484-503 (for a thorough discussion of the definition of "alternative employment practice"). For purposes of this Comment, the author uses the meaning set forth by the Supreme Court in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (indicating that alternative employment practices include "other tests or selection devices, without a similarly undesirable racial effect, [that] would also serve the employer's legitimate interest . . .").

¹⁸³ 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2002). However, plaintiff is required to prove that the alternative employment practice "would be equally as effective as the challenged practice in serving the employer's legitimate business goals." *Wards Cove*, 490 U.S. at 661 (citing *Watson*, 487 U.S. at 998). The *Wards Cove* Court recognized that courts should be cautious in mandating that an employer adopt a plaintiff's alternative business practice, because courts are less qualified than employers to reform a business practice. *Id.* at 661.

¹⁸⁴ See Zimmer, *supra* note 182, at 473-74 (noting Congress' choice to leave the definitions of business necessity and job relatedness open to interpretation based on the Court's decisions preceding *Wards Cove* has "raise[d] as many questions as it [has] answered").

¹⁸⁵ SULLIVAN ET AL., *supra* note 150, at 243. While the issue of disparate impact theory has been squarely addressed and found to encompass Title VII actions, there is currently a circuit split on the issue of whether the theory applies to the Age Discrimination in Employment Act (ADEA). See *Lyon v. Ohio Educ. Ass'n & Prof. Staff Union*, 53 F.3d 135, 138 (6th Cir. 1995) (disparate impact theory not available under ADEA); see also *EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073, 1078 (7th Cir. 1994) (disparate impact theory not available under ADEA); *Frank v. United Airlines*, 216 F.3d 845 (9th Cir. 2000) (disparate impact theory is available under ADEA); *Ellis v. United Airlines* 73 F.3d 999, 1001 (10th Cir. 1996) (disparate impact theory is not available under ADEA). The Court has determined that disparate impact does not apply to discrimination claims arising under section 1981. *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 389 (1982); see also SULLIVAN ET AL., *supra* note 150, at 245 (noting circuit split over the application of the disparate impact theory to ADEA claims).

B. *Application of Disparate Impact Theory to the Forced Ranking Method of Performance Evaluation*

1. Disparate Impact: Is it too early to know?

It would be impossible to determine, and careless to state, that forced ranking performance management systems by nature create a disparate impact on statutorily protected classes.¹⁸⁶ While critics may, in fact, make valid and notable comments, their criticisms are public policy/management arguments and not legal arguments. Forced ranking is legal,¹⁸⁷ as is using subjective criteria to conduct performance evaluations.¹⁸⁸ Rather, it is when employers blatantly ignore or fail to recognize that a particular facet of their forced ranking model is creating, or has the potential to create, a disparate impact on statutorily protected groups that they encounter problems.¹⁸⁹ In essence, it is an employer's "failure to cover its bases" that generates potential dilemmas.¹⁹⁰ The law sets forth precisely what is required for a plaintiff to prove disparate impact.¹⁹¹ Consequently, employers should be prepared to combat potential litigation through judicious risk-management.

There is no study proving that forced ranking inherently produces a disparate impact. As discussed in Part III, virtually every case filed challenging a company's forced ranking model has been settled, granted summary judgment, or is presently on appeal—with the most recent appeals¹⁹² being cloaked in confidentiality.

¹⁸⁶ Despite requests to squarely address the alleged disparate impact of forced ranking systems, the Supreme Court has not yet entertained this request. At least for now, determining whether forced ranking creates a disparate impact on protected classes must involve a case-by-case analysis. Each company's forced ranking system is unique, which will require each plaintiff challenging the effects of a particular system to proffer statistical evidence. As the Court held in *Wards Cove*, "bottom line" statistics are insufficient. See *supra* notes 154-56 and accompanying text. Instead, a plaintiff must provide statistical evidence that establishes a substantial disparity exists. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95 (1988).

¹⁸⁷ See, e.g., *Crane*, *supra* note 45, available at <http://www.fairmeasures.com/whatsnew/articles/new237.html>.

¹⁸⁸ See, e.g., *Watson*, 487 U.S. 977.

¹⁸⁹ See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) (stating that practices or procedures that maintain prior discriminatory effects are illegal—even if they appear neutral on their face).

¹⁹⁰ This Comment argues a company can insulate itself from losing in litigation by taking certain risk-management measures. See discussion *infra* Part IV.B.2.

¹⁹¹ See discussion *supra* Part IV.A.

¹⁹² The appeal filed by Peter M. Browne against Microsoft Corporation is shrouded by a protective order. McNaul Telephone Interview, *supra* note 112. All records are under seal and the attorneys have been ordered not to speak about the case. *Id.*

Nonetheless, employers should not sit idly by dawdling under the umbrella of status quo. It would be foolish for employers to ignore the rise in litigation resulting from the use of forced ranking. Employers can look to the law regarding disparate impact to determine how courts will evaluate whether or not their performance evaluation systems cause a disparate impact,¹⁹³ and it would be prudent for companies to utilize the framework provided by the case law and statutes to ensure that their forced ranking model is in compliance with the framework provided by the Supreme Court and Congress.

2. Risk-Management Measures

Some litigation is an inevitable result and costly aspect of employment decisions.¹⁹⁴ Fortunately, safeguards are available to employers—the choice is ultimately theirs as to whether they choose to utilize those safeguards. One of the most powerful protections available to employers is the “virtual roadmap” of protection afforded by a close examination of the current state of anti-discrimination law. The virtual roadmap for analyzing the legality of a company’s forced ranking system is a disparate impact analysis.¹⁹⁵ While there are no failsafe protections, this Comment proposes that an employer can utilize knowledge afforded by the law prophylactically. Consider why motorists wear safety belts. Safety belts are prophylactic measures. Wearing a safety belt in an automobile does not prevent an accident, nor is it a guarantee that a motorist who wears a safety belt will not be injured if involved in an accident. Nonetheless, studies reveal that safety belts are highly effective tools that, when worn properly, reduce a motorist’s chance of morbidity and mortality.¹⁹⁶ Similarly, companies utilizing protective measures before employment

¹⁹³ See discussion *supra* Part IV.A.

¹⁹⁴ See Lauren M. Hollender & Martha L. Lester, *Termination Guidelines; How Employers Can Reduce the Risk of Litigation During Downsizing*, 9 EMPLOYMENT LAW STRATEGIST 1, 1 (Dec. 2001) (noting that poorly planned employment decisions may require a company to defend itself against costly litigation; while no employment decision is without risk, steps may be taken by companies employer to minimize the risks of employment decisions); Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 954 (1982) (observing the pressure that is placed on employers to avoid litigation costs by adopting performance evaluation systems that have no adverse impact on protected classes at the outset); Davidson, *supra* note 19, at 1615 (commenting on the enormous “financial, psychological and reputational costs” employment litigation places on employers).

¹⁹⁵ See discussion *supra* Part IV.A.

¹⁹⁶ See, e.g., *Benefits of Safety Belts and Motorcycle Helmets: Report to Congress 1996*, U.S. DEPARTMENT OF TRANSPORTATION NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, at i (on file with author).

litigation arises may not completely avoid litigation, but may be able to mitigate its impact.

The purpose of this Comment is not to propose that an alternative employment practice exists.¹⁹⁷ Nor does this Comment make a blanket suggestion that utilizing forced ranking systemically creates a disparate impact on statutorily protected groups.¹⁹⁸ As discussed previously, it does not.¹⁹⁹ Rather, this Comment suggests that a number of risk-management measures exist that employers may implement or follow to protect themselves from the potential for litigation this employment practice appears to have.²⁰⁰

It would be prudent for a company to conduct statistical studies to ensure its forced ranking model is not generating a disparate impact on protected classes that is not otherwise justified by a valid business necessity defense, and that no alternative employment practice exists that would accomplish the same goal its forced ranking model seeks to effectuate.²⁰¹ To do this, a company must first question why it is choosing to utilize forced ranking.²⁰² The company must be prepared to prove that the goal it seeks to achieve is critical to the company's success, and that the employment practice is vital to achieve the company's goals.²⁰³ If the company can demonstrate that the rationale underlying its choice to use a forced ranking system is to solve an internal problem or to add value to the company or its workforce, it has likely articulated a strong argument.²⁰⁴

In addition to performing empirical studies, employers should be thoughtful when formulating the criteria for employees' evaluations and when creating the format for the forced ranking model—always mindful of the “disparate impact virtual roadmap.”

¹⁹⁷ See *supra* notes 181-83 and accompanying text.

¹⁹⁸ See *supra* notes 186-87 and accompanying text.

¹⁹⁹ See *supra* notes 186-91 and accompanying text.

²⁰⁰ See Crane, *supra* note 45, available at <http://www.fairmeasures.com/whatsnew/articles/new237.html>; *Employee Evaluations—Does Your Company Earn an 'A'?*, 10 CALIFORNIA EMPLOYMENT LAW LETTER 4 (Mar. 5, 2001) [hereinafter *Employee Evaluations*]; see also Hollender & Lester, *supra* note 194, at 3-5.

²⁰¹ See Hollender & Lester, *supra* note 194, at 3-5 (noting the necessity that employers conduct statistical analysis to ensure their employment practices do not generate a disproportionate adverse impact on protected classes); see also discussion Part IV.A.

²⁰² See, e.g., Hollender & Lester, *supra* note 194, at 3-5.

²⁰³ Grover, *supra* note 170, at 429-30; see also MORGAN & SMITH, *supra* note 19, at 326. Cf. Len Biernat, *Subjective Criteria in Faculty Employment Decisions Under Title VII: A Camouflage for Discrimination and Sexual Harassment*, 20 U.C. DAVIS L. REV. 501, 516 (1986-1987) (observing courts' reluctance to get involved in business decisions due to their lack of expertise).

²⁰⁴ See *id.*

Forced ranking systems are legal so long as employers execute them properly.²⁰⁵ Employees should be provided with advance notice of the new policy,²⁰⁶ and given clearly articulated objectives and measurable expectations.²⁰⁷ The model formulated needs to deepen the employee's understanding of his performance so that he may work on areas in which he may be weak.²⁰⁸

Once the forced ranking system is successfully implemented, employers should continue practicing certain risk-management measures. Companies must comply with any reforms to Title VII that would affect them.²⁰⁹ Furthermore, supervisors or managers conducting appraisals must be properly trained²¹⁰ and given specific written instructions with unambiguous guidelines on the purpose of the employee's evaluation, the manner in which it will be used, the process for completing the evaluation, warnings regarding certain biases, and clear-cut criteria²¹¹ on which supervisors are to base their judgments.²¹² Supervisors must be instructed to carefully document justifications for the given judgment on each criterion,²¹³ citing specific examples where possible.²¹⁴ If practicable, employers should try to combine information from various sources and allow more than

²⁰⁵ *Overkill*, *supra* note 4, available at 2002 WL 5659587.

²⁰⁶ *See id.*; Hollender & Lester, *supra* note 194, at 2 (observing the importance from a risk-management perspective of giving employees advance notice of employment decisions).

²⁰⁷ *See Employee Evaluations*, *supra* note 200; *Overkill*, *supra* note 4, available at 2002 WL 5659587; MORGAN & SMITH, *supra* note 19, at 326.

²⁰⁸ Bruce Pfau et al., *Does 360-Degree Feedback Negatively Affect Company Performance?*, HRMAGAZINE (June 1, 2002), available at 2002 WL 7664616.

²⁰⁹ Biernat, *supra* note 203, at 543.

²¹⁰ *See PERFORMANCE APPRAISALS*, *supra* note 30, at 50 (discussing a study where evaluations given by supervisors who received a training course on how to conduct effective evaluations, solicited the most positive responses from the employees evaluated); MORGAN & SMITH, *supra* note 19, at 326 (in addition to written instructions, supervisors or managers performing employee evaluations should be trained in how to reduce rating contamination, and how to discuss with an employee his evaluation); *Employee Evaluations*, *supra* note 200.

²¹¹ The criteria used to evaluate employees should be rationally related to company goals and values. *See* Messmer, *supra* note 35; *see also* discussion *supra* Part III.A.

²¹² MORGAN & SMITH, *supra* note 19, at 326.

²¹³ *See* Player, *supra* note 140, at 300 (remarking that when an employee's evaluation reflects poor job performance, the employer should cite specific examples regarding why that determination was reached).

²¹⁴ *See Overkill*, *supra* note 4, available at 2002 WL 5659587 (commenting that to assist a company in avoiding claims of bias in evaluations, it is important for employers to provide concrete examples in an employee's evaluation of what is deemed good and bad performance).

one person to evaluate an employee.²¹⁵ Equally important, however, is the need to articulate to employees the goals and functions the ranking system seeks to serve.²¹⁶ Implementing such a practice develops a system of checks and balances on the forced ranking system—which may ultimately guard against unconscious bias.²¹⁷ A copy of the evaluation should be provided to the employee and be signed by both the employee and the person who evaluated him.²¹⁸ The employee should receive an opportunity to discuss his performance evaluation and subsequent ranking with his employer,²¹⁹ and be afforded the opportunity to challenge his ranking through an internal dispute system.²²⁰

Companies must also ensure that the evaluations used to force rank their employees are taken seriously²²¹ and are utilized and conducted consistently.²²² This may include evaluating managers on their ability to conduct fair evaluations that satisfy company goals.²²³ Periodic monitoring of the forced ranking management system should take place to maintain the reliability and integrity of the system, and to evaluate whether it is still sufficiently satisfying corporate goals.²²⁴ Moreover, in an attempt to guard against bias and discrimination, employers may want to consider implementing diversity awareness training for managers conducting performance evaluations.²²⁵

CONCLUSION

This Comment explored the controversial performance management system referred to as forced ranking. Forced ranking is strongly advocated by employers who seek to compel managers to

²¹⁵ Biernat, *supra* note 203, at 545 (observing that fair personnel decisions are more likely to result when an employer uses information from a variety of sources, and that utilizing such a system has the potential to reduce discrimination).

²¹⁶ See, e.g., Pfau et al., *supra* note 208, available at 2002 WL 7664616.

²¹⁷ *Id.*; see also Wax, *supra* note 114 (setting forth what unconscious bias is).

²¹⁸ Davidson, *supra* note 19, at 1628 (observing that requiring both parties to sign an evaluation and then giving the employee a copy of the appraisal puts an employee on notice that his performance is well documented).

²¹⁹ MORGAN & SMITH, *supra* note 19, at 326.

²²⁰ See *Overkill*, *supra* note 4, available at 2002 WL 5659587.

²²¹ *Employee Evaluations*, *supra* note 200.

²²² See BAKER, *supra* note 15, at 7 (noting that one of the inherent problems with performance appraisals is the failure of employers to utilize the evaluations, consequently permitting their performance management systems to function ineffectively).

²²³ *Employee Evaluations*, *supra* note 200.

²²⁴ MORGAN & SMITH, *supra* note 19, at 327.

²²⁵ Wax, *supra* note 114, at 1184-85.

provide employees with candid feedback.²²⁶ Traditional performance evaluations consistently permit underperformers to maintain their status within a company, because managers fear the potential repercussions from employees who receive negative evaluations.²²⁷ The end result is a company rife with underperformers, and whose ultimate productivity and profit suffer. Forcing managers to rank employees against each other requires managers to take an honest look at their workforce, while allowing them to eliminate employees not satisfying company standards.

The battle cry of plaintiffs opposed to forced ranking systems is that they create a disparate impact on protected classes of persons. This Comment summarized what is required for a plaintiff to prove a *prima facie* case of disparate impact, discussed the defenses available to defendant-employers, and ultimately concludes that because statistical data is required to prove disparate impact, it would be imprudent to attach a systemic accusation of disparate impact on forced ranking. Instead, each challenged forced ranking system will likely require a case-by-case analysis. By engaging in carefully planned risk-management measures, however, employers can greatly reduce, if not eliminate, their chances of losing in litigation challenging their forced ranking performance management systems.

²²⁶ See discussion *supra* Part III.A.

²²⁷ See *id.*