

**CHAPTER 5  
MEASURING AND PROVING  
INTENTIONAL JOB DISCRIMINATION**

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American common law arising in the 19<sup>th</sup> century gave employers absolute freedom in dealing with employees. Employers had the right to hire, direct and fire employees for a “good reason, a bad reason or no reason at all.” This principle began to erode in the 1930's and is now qualified in many ways, including by federal and state anti-discrimination laws. Under these laws, employers have duties toward employees and applicants for employment that require them to assure equal employment opportunity.

**§1. PROFESSIONAL STANDARDS APPLICABLE TO MANAGEMENT’S EMPLOYMENT DECISIONS**

The common law has long required professionals to meet professional standards in establishing practices and procedures and making decisions that affect others within the orbit of their responsibilities. Making employment decisions is one of the functions of managing a business. Decisions that discriminate on the grounds of race, sex, or national origin cause injuries to workers just as surely as do badly designed products, negligently produced goods, the improper operation of equipment, or the failure to live up to the standard of care expected of professionals such as doctors, lawyers and accountants. An employer’s judgments about who to hire, promote or discharge, and how to organize and operate its employment practices, like other judgments made in the profession of management, are subject to the same standard that has been applied to the conduct of any profession.<sup>66</sup>

Professionals must live up to the standard of generally accepted business or professional practices.<sup>67</sup> This principal is codified as the “reasonably prudent person” in the law of personal injuries.<sup>68</sup> This principle has an important limitation. If an entire industry is engaged in substandard performance, compliance with its standards will not protect a profession or a business from liability.<sup>69</sup>

The duties not to discriminate embedded in Title VII, at the minimum, require employers to observe this principle in their employment practices. When an employer’s use of minorities or women is far below the average of other employers operating under the same circumstances, it appears to be failing in its duty to apply professional standards concerning equal employment of minorities or women.

We apply these principles in the present study. We know that the industry average utilization of minorities or women is neither “fair” nor “non-discriminatory,” because it includes the low level of minority/female employment of those who discriminate. We cannot tell whether small numbers of minorities in an industry is itself a result of discrimination, nor whether employment above the average assures non-discrimination, although it will enhance the credibility of an employer’s argument in individual cases that it had not discriminated.

Our use of the industry average in this study is only to provide a yardstick or benchmark to identify intentional discrimination among those who fall far below it. Because we accept the average for this purpose, we are able to identify intentional discrimination where there are substantial numbers of minorities or women already employed in an industry. These common law principles illuminate the interpretation and application of federal and state equal opportunity statutes. The primary federal statutory anti-discrimination law is Title VII of the Civil Rights Act of 1964.

## **§2. INTENTIONAL DISCRIMINATION UNDER THE CIVIL RIGHTS ACTS OF 1964 AND 1991.**

Intentional discrimination was the “most obvious evil” addressed by Title VII of the Civil Rights Act of 1964.<sup>70</sup> The elements of intentional discrimination have been developed over the years by both the Courts and Congress. In 1991, Congress codified the concept. It determined that intentional discrimination was established “when a complaining party demonstrates that **race, color, religion, sex or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.**”<sup>71</sup>

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The “intent to discriminate” need not be the sole factor in an employment decision. If an employer has both a legitimate reason for its practices and also a discriminatory reason, then it is engaged in intentional discrimination. This issue was first raised in 1964 during the long debate over the adoption of the Civil Rights Act. Senator McClellan proposed to limit the act to discrimination that was based “solely” on race or other statutory categories. This amendment was opposed by Sen. Magnuson: “the difficulty is that a legal interpretation or a court interpretation of the word “solely” would so limit this section as to probably negate the entire purpose of what we are trying to do.” The amendment was defeated.<sup>72</sup>

Therefore, the concept of intent is not the equivalent of “evil motive,” where a personal wish or desire to oppress women or minorities must be shown to be the only explanation for the harm done. Direct evidence of “evil motive” has never been required to prove intentional discrimination under the 1964 Civil Rights Act.

The Congress made this point clear in the Civil Rights Act of 1991, when it allowed compensatory and punitive damages in a limited category of “intentional discrimination” cases, where the plaintiff proves that the employer acted **“with malice or with reckless indifference to the federally protected rights of an aggrieved individual.”** The Supreme Court has decided that this provision applies only to “a subset of cases involving intentional discrimination.... The terms ‘malice’ and ‘reckless indifference’ pertain to the employer’s knowledge that it may be acting in violation of federal law, not to its awareness that it is engaged in discrimination..., an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages.”<sup>73</sup>

In addition, the Court noted that, “an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's "good-faith efforts to comply with Title VII. ... giving punitive damages protection to employers who make good-faith efforts to prevent discrimination in the workplace accomplishes Title VII's objective of motivating employers to detect and deter Title VII violations.”<sup>74</sup>

The “malice or reckless indifference” concept is closer to the “evil motive” concept that some have erroneously equated with “intent.”<sup>75</sup> Thus the intention that the statistics demonstrate need not be the sole reason for the employer’s actions.

It is no surprise that the 25 year old Supreme Court decisions permit statistics to establish intentional job discrimination. As recently as March 2002, the concept was discussed before the Supreme Court, by Glen Nager, a well known attorney for employers. The issue in the case was whether the doctrine permitting

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plaintiffs to establish discrimination by showing that an employer practice had a disparate impact on minorities or women employees, applied under the Age Discrimination Act. Justice Stevens suggested that such statistics might establish a prima facie case, even if the employer's motive was ultimately the issue.

Mr. Nager replied, "If we are talking about a disparate treatment case [where intent must be proved], I agree with you Justice Stevens, that in an appropriate case with an appropriate statistical presentation, a judge would be justified in saying that the plaintiff had presented enough evidence to require the employer to respond to a disparate treatment allegation.... Teamsters and cases like that say that statistics are admissible to prove intent, that a plaintiff couldn't have statistics alone as their prima facie case, but it would be about intent."

Neither any Justice nor opposing counsel challenged his statement of the law. After the argument, the Court dismissed the case.<sup>76</sup>

### **§3. USING STATISTICAL EVIDENCE COMPARING ESTABLISHMENTS**

The Supreme Court held in 1977 that a "pattern or practice" of intentional job discrimination exists when an employer treats some people less favorably than others as a "standard operating procedure – the regular rather than the unusual practice."<sup>77</sup> When there is statistical evidence that an establishment is employing minorities or women in such small numbers that the pattern is unlikely to have occurred by chance, the law presumes that the discrimination is intentional.<sup>78</sup> The Supreme Court has explained that "[a statistical] imbalance is often a telltale sign of purposeful discrimination.... In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination..."<sup>79</sup>

### **§4. STATISTICAL SIGNIFICANCE**

Statisticians have developed concepts to determine when it is unlikely that a given result occurred by chance. In many analyses, including this study, an event qualifies as "statistically significant" if there is less than one chance in twenty (5%) that it would have occurred by chance. This probability is defined as "two standard deviations." In some parts of this study, the value of 2.5 standard deviations is used. This value translates into one chance in 100 that the event observed occurred by chance, or a 99% certainty that it did not occur by chance. We apply these concepts to find the "sore thumbs" in each metropolitan area and in each industry and each job category.<sup>80</sup> In other parts, the value of 1.65 standard

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deviations is used to describe situations where there is one chance in ten that the observed event occurred by accident. (See Technical Appendix, §1.)

### §5. THE AVERAGE OR MEAN USED AS A “BENCHMARK” TO EVALUATE ESTABLISHMENTS

The average utilization of minorities or women in each MSA, industry and occupation is the “benchmark” by which we measure similar establishments. The basic building block of this study is the Metropolitan Statistical Area (MSA), treated as a labor market. We assume that all the establishments within an MSA draw on the same labor market.<sup>81</sup> We know that industries differ in their technologies, which affects the demands they make of this labor market. Therefore, we limit our search for discrimination within a labor market to establishments in the same industries. Further, industries differ in the type of workers they require, so we limit our search within industries, by comparing establishments only with respect to the same occupational categories.<sup>82</sup> The result is that there is no single “benchmark” for an establishment. The benchmark for an establishment with respect to professionals will depend on the labor market for professionals; the benchmark for sales persons will depend on the labor market for sales persons. In this way we measure each establishment only against similar establishments in the same labor market, same industry, and with the same occupational categories. We know that other similar employers have in fact achieved levels of minority and female participation under similar labor market and industry conditions.<sup>83</sup>

We are not concerned in this study with the fact that the industry average or “benchmark” is neither “fair” nor “non discriminatory” because employers who are discriminating against minorities/women are included in the average.<sup>84</sup> If an industry or a labor market as a whole has excluded minorities or women, we still use that average as the benchmark even though, by some other criteria, it might be considered discriminatory. The average is a measure of the actual behavior of employers under existing labor market conditions. The test for intentional discrimination is how far **below** this “benchmark” did a particular establishment fall in a particular job category in that industry and labor market.

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## §6. APPLYING THE LAW TO THE BENCHMARK

While the statistics may demonstrate that the result did not occur by chance, they do not explain why it did occur. This is the point where the law prescribes standards for evaluating the statistics. It is also a point of confusion because it involves the relationship between legal standards of conduct and the legal procedures by which these standards are implemented. One of the most elemental principles of civil procedure is that a person seeking relief must prove that he or she is entitled to it by evidence that his or her claim is “more likely than not” to be true. The minority or female complaining of discrimination normally must show that the facts, including the practices responsible for the discrimination, if specific employer’s practices are identifiable, meet that standard.<sup>85</sup> The employer need only rebut the claimant’s evidence; but need not establish that its version is true. But if an establishment’s utilization of minorities or women falls two standard deviations or more below the benchmark, this procedural rule is changed.

At that point the law presumes that these “deviant” results were produced by discrimination. The statistics, while not conclusive proof of discrimination, do have a powerful effect. They shift to the employer the obligation to show that non-discriminatory factors were responsible for the statistical result.<sup>86</sup> As this study shows, nearly one third of the establishments we have studied would face this prospect with respect to at least one of nine occupational categories. Conversely, two thirds of establishments would not, and some could take advantage of the statistics in defending against discrimination claims because the principle of the law is double edged. If an employer’s utilization of minorities or women is at or above the average, the employer may introduce the statistics to support its side of the case; in showing that it had a legitimate explanation for an action that is challenged as discriminatory.<sup>87</sup>

Employers who are two or more standard deviations below the average may assert a wide range of reasons to justify their situation. The methodology used in this study to analyze the statistics addresses many such reasons. Chapter 8 and the Technical Appendix discuss various explanations likely to be offered by employers, and the ways in which the methodology in this study addresses them. The existence of minority or female employment that is two standard deviations below the average requires those employers to show that the reasons they assert actually explain the low utilization of minorities or women.

As a practical matter, when two standard deviations is established, the employer will be forced to face a trial, often with a jury. This prospect is a major

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incentive for employers to settle before such trials, unless their attorney is quite sure of the adequacy of its defense.

Since employers do not generally obtain statistics that show whether or not they are two or more standard deviations below the benchmark, when complaints of their actions are filed they must develop such information in their own defense, or to counter statistics developed by the complaining party. There is a serious problem of inefficiency in this process. An employer needs to know whether it is in a zone of danger of liability for intentional systemic discrimination **before** it takes the action or adopts a procedure that is later complained of. As Justice O'Connor has said, "Victims of discrimination want jobs, not lawsuits."<sup>88</sup> Chapter 16 will discuss how an employer may obtain such information as part of the self-analysis of its employment practices.

## §7. ENDNOTES

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66. The Civil Rights Act of 1964 superceded conflicting state laws that permitted discrimination based on race, color, religion, sex or national origin, making employer judgments subject to the federal prohibition, and rejecting the common law exemption of employment decisions from legal standards.
67. The classic case is *The T.J. Hooper*, 60 F.2d 737, 740 (1932). A tug lost barges it was towing due to weather conditions that it could have avoided if it had carried an operating radio receiver that would have picked up weather information. The owners had not installed such equipment and defended on the grounds that it was not an industry custom to have radio receivers installed. Judge Learned Hand responded: “Is it then a final answer that the business had not yet generally adopted receiving sets? There are, no doubt, cases where courts seem to make the general practice of the calling the standard of proper diligence; we have indeed given some currency to the notion ourselves.... Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.... But here there was no custom at all as to receiving sets; some had them, some did not; the most that can be urged is that they had not yet become general. Certainly in such a case we need not pause; when some have thought a device necessary, at least we may say that they were right, and the others too slack.... We hold the tugs therefore because had they been properly equipped, they would have got the Arlington [weather] reports. The injury was a direct consequence of this unseaworthiness.”
68. See, e.g., PROSSER and KEETON ON TORTS, 5TH ed, §33 (1984); HARPER, JAMES and GRAY, THE LAW OF TORTS, 2d, §17.3 (1986)
69. See note 1, supra.
70. It has been suggested that we should focus the study on job discrimination generally, not on intentional discrimination, because the focus on intent will upset employers and the public will assume that intentional discrimination was carried on for an invidious purpose. There is another theory of discrimination called “disparate impact” which applies statistics such as those in this study without any inference that the employer has acted in bad faith. This theory was developed by the Supreme Court in 1971 in the case of *Griggs v. Duke Power Co.* 401 US 424 (1971). This theory was strongly opposed by the federal government during the Reagan Administration. U.S. Department of Justice, Office of Legal Policy, *Redefining Discrimination: Disparate Impact and the Institutionalization of Affirmative Action* (1987). It was severely restricted by the Supreme Court in 1989. *Wards Cove Packing Co. v. Atonio*, 490 US 642 (1989). Congress addressed that restriction during the first Bush administration, and reinstated the theory in the Civil Rights Act of 1991 Sec. 3, Sec. 105. Nevertheless it remains controversial, and its boundaries not clear, particularly in the area of statistics with which we are concerned. *Watson v. Fort Worth Bank And Trust*, 487 US 977 (1988). On the other hand, the standards for using statistics to identify intentional discrimination have been clearly spelled out by the Supreme Court and the Congress since 1977. This enables us to analyze the data with a clear understanding of its legal significance. The statistics developed in this study may, nevertheless, be utilized in establishing disparate impact discrimination.
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71. Sec. 703 (m) of Title VII. This Congressional judgment was made to reject the Supreme Court’s reasoning in *Price Waterhouse v. Hopkins*, 490 US 228 (1989). For a critique of the reasoning in *Price Waterhouse*, see Alfred W. Blumrosen, *Society in Transition II: Price Waterhouse and the Individual Employment Discrimination Case*, 42 Rutgers Law Review 1023 (1990).
  72. MODERN LAW, p. 73 and note 47.
  73. *Kolstad v. American Dental Ass’n*, 527 US 526, 535,536. (1999)
  74. *Id* at 546. [internal citations and brackets omitted]
  75. This study does not address the “malice or reckless indifference” concept.
  76. *Adams v. Florida Power Corp.*, #01-584, argued March 22, 2002, Certiorari dismissed as improvidently granted, 122 S.Ct. 1290 (April 1, 2002).
  77. *Teamsters v. United States*, 431 US 324, n.15 (1977).
  78. *Teamsters*, *supra*, *Hazelwood School District v. United States*, 433 US 299 (1977).
  79. *Teamsters*, 431 US 324, n. 20.
  80. See “sore thumb” diagram in Ch. 2, and the Technical Appendix.
  81. Where the job search is broader than the labor market, all establishments have similar opportunities to draw on the broader markets, and must report on the EEO-1 form in the MSA where the job is located.
  82. For example, Professionals in the Legal Services industry are likely to have different backgrounds from those in the aircraft manufacturing industry. This criteria also assures that we are not comparing Lawyers with Laborers.
  83. Concerns about the breadth of these categories are discussed in Chapter 8, and the Technical Appendix.
  84. A new industry that does not hire minorities or women in particular job categories may be engaging in discrimination that will not be visible in the statistical method we are using. Similarly, an old industry, like the construction industry, that has resisted equal employment opportunity seriously, may have few minorities or women in employment, and few establishments that appear to discriminate compared to others in the same industry. The industry standard does demonstrate what is practical under the existing realities of the labor market, even though there may have been discriminatory exclusion from the industry.
  85. This statement assumes the interpretations set forth in §105(a) of the Civil Rights Act of 1991 will generally be followed in allocating burdens of proof in “pattern and practice” cases. The pattern and practice standards are applicable to private litigation. Lindemann and Grossman, *EMPLOYMENT DISCRIMINATION LAW*, 3<sup>rd</sup> Edition, 44-47 (1996). Justice O’Connor’s opinion in *Watson v. Fort Worth Bank and Trust*, 487 US 977 (1988) suggests parallel proof processes in disparate treatment and disparate impact cases.
  86. *Bazemore v. Friday*, 478 US 385 (1986); *Teamsters*, note 12 *supra*; *Hazelwood*, note 13, *supra*.
  87. *Furnco Construction Co. v Waters*, 438 US 567 (1978).
  88. *EEOC v. Ford Motor Co.*, 258 US 2101, 230 (1982).
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