

**CHAPTER 7**  
**THE FOUR DEGREES OF INTENTIONAL DISCRIMINATION**

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**W**ithout the combination of statistical analysis and legal standards used in this study, legal analysts have tended to view “intentional discrimination” as one general concept. As we applied statistical analysis to the data, we observed differences in intentional discrimination, depending on the standard deviation analysis, and the length of time severe discrimination could be observed. The greater the standard deviations beyond two, the more persuasive is the case for discrimination.<sup>97</sup>

We observed a large number of establishments that were at least 2.5 standard deviations below the mean in 1999, meaning that there was only one chance in 100 that the result occurred by accident. This 1 in 100 chance is far more stringent than the criminal law standard of beyond a reasonable doubt, and certainly exceeds the civil law standard for proof that “more likely than not” the claimed discrimination occurred. **These establishments accounted for 91% of the minority affected workers and 90% of the female affected workers in our study. Furthermore, between 75 and 80% of those establishments are 3 or more standard deviations below the average, meaning that there is only one chance in 370 that the result occurred by accident.**

More surprising, we observed thousands of establishments that had been 2.5 standard deviations below the mean over a long period of time. The persistence of this discrimination plus the probability that it was indeed intentional suggests that it is deeply ingrained in corporate practice.

As a result of these observations, this study divides the concept of visible intentional discrimination into four components. They are “Hard Core,” “Clearly Visible,” “Presumed,” and “At Risk.” [Technical Appendix, §1] The differences are suggested in the following table:

**Table 1. LEGAL EFFECT OF VARIATIONS IN STATISTICAL ANALYSIS**

Standard Deviations	Probability			Legal Effect
	Chance	Not chance	Described in this study as:	
1.65	1 in 10	90%	<b>At Risk</b>	Admissible if relevant; weighed with all other evidence; worker must prove that he/she was discriminated against.
2.0	1 in 20	95%	<b>Presumed</b>	Admissible; creates presumption of discrimination; employer must prove it had only legitimate non-discriminatory reasons. As the probability of result occurring by chance declines, the presumption of discrimination strengthens and raises the risk that employer will lose litigation; most such cases settle.
2.5	1 in 100	99%	<b>Clearly Visible</b>	
2.5 over 9 yrs			<b>Hard Core</b>	

**§1. HARD CORE DISCRIMINATORS.**

These establishments not only demonstrate a severe statistical case of discrimination, but also reflect that this condition has existed over a long period of time. This suggests that the discrimination is persistent and has important support within the corporation. These establishments are so far below average in an occupation that there is only one chance in one hundred that the result occurred by accident (2.5 standard deviations), in 1999 and in either 1998 or 1997, and in at least one year between 1991 and 1996, and was not above average between 1991 and 1999. The category includes establishments that far exceed 2.5 standard deviations below the mean, and have been so for longer than nine years.

These hard core establishments account for 432,958 affected minority workers, or almost exactly half of those we have identified. Hard core establishments also account for 240,908 affected female workers – more than one third of those we have identified.

**Table 2. “Hard Core” Discriminators.**

HARD CORE DISCRIMINATION AGAINST MINORITIES AND WOMEN--1999								
	AGAINST MINORITIES				AGAINST WOMEN			
	Establishments		Affected Workers	Average Affected Workers	Establishments		Affected Workers	Average Affected Workers
	Percent	Number	Number	Number	Percent	Number	Number	Number
<b>Officials &amp; Managers</b>	3.1%	567	10,928	19	3%	791	16,081	20
<b>Professionals</b>	5.2%	1,252	50,599	40	5%	1,322	48,587	37
<b>Technicians</b>	6.9%	810	22,414	28	5%	581	13,817	24
<b>Sales Workers</b>	12.1%	3,938	95,587	24	4%	1,508	33,506	22
<b>Office &amp; Clerical</b>	8.0%	2,302	63,702	28	4%	1,112	28,757	26
<b>Craft Workers</b>	6.9%	776	16,991	22	8%	555	10,027	18
<b>Operatives</b>	9.7%	1,899	54,975	29	13%	2,019	48,705	24
<b>Laborers</b>	8.0%	920	21,935	24	8%	857	18,207	21
<b>Service Workers</b>	13.0%	3,475	95,827	28	3%	876	23,221	27
<b>Total Affected Workers</b>			432,958				240,908	
<b>Extrapolated Total Affected Workers</b>			649,267				343,398	

**§2. CLEARLY VISIBLE DISCRIMINATORS.**

These establishments are so far below average in an occupation that there is only a one in one hundred (1%) chance that the result occurred by accident (2.5 standard deviations), in 1999.

These clearly visible discriminators accounted for 359,220 of the minority affected workers, or one third of the affected minority workers, and 324,924, or nearly half, of the female affected workers.

**Table 3. “Clearly Visible” Discriminators.**

CLEARLY VISIBLE DISCRIMINATION AGAINST MINORITIES AND WOMEN--1999								
	AGAINST MINORITIES				AGAINST WOMEN			
	Establishments		Affected Workers	Average Affected Workers	Establishments		Affected Workers	Average Affected Workers
	Percent	Number	Number	Number	Percent	Number	Number	Number
<b>Officials &amp; Managers</b>	6.4%	1,146	14,432	13	6%	1,557	22,671	15
<b>Professionals</b>	9.0%	2,187	42,066	19	10%	2,926	63,529	22
<b>Technicians</b>	9.5%	1,120	18,370	16	10%	1,192	21,469	18
<b>Sales Workers</b>	11.4%	3,699	59,817	16	8%	2,753	44,704	16
<b>Office &amp; Clerical</b>	11.4%	3,268	56,896	17	10%	3,059	55,119	18
<b>Craft Workers</b>	10.1%	1,137	15,639	14	14%	928	11,107	12
<b>Operatives</b>	13.0%	2,550	45,876	18	15%	2,429	39,633	16
<b>Laborers</b>	15.0%	1,722	29,339	17	14%	1,475	22,807	15
<b>Service Workers</b>	14.3%	3,821	76,785	20	8%	2,206	43,884	20
<b>Total Affected Workers</b>			359,219				324,924	
<b>Extrapolated Total Affected Workers</b>			584,467				504,513	

**Together, Hard Core and Clearly Visible discriminators – both defined as at least 2.5 Standard Deviations below the average utilization of minorities or women (a 1 in 100 chance that it happened by accident) – account for ninety percent of affected Women and 91.5% of affected minorities.**

**§3. PRESUMED DISCRIMINATORS.**

These establishments are so far below average in an occupation that there is only a one in twenty (5%) chance that the result occurred by accident (2 standard deviations), in 1999. These establishments accounted for 74,087, or 8.5% of minority affected workers, and 62,563 or 10% of female affected workers.

**Table 4. “Presumed” Discriminators.**

PRESUMED DISCRIMINATORS AGAINST MINORITIES AND WOMEN--1999									
	AGAINST MINORITIES				AGAINST WOMEN				
	Establishments		Affected Workers	Average Affected Workers	Establishments		Affected Workers	Average Affected Workers	
	Percent	Number	Number	Number	Percent	Number	Number	Number	
<b>Officials &amp; Managers</b>	7%	1,201	7,404	6	4%	1,081	7,792	7	
<b>Professionals</b>	6%	1,479	11,621	8	4%	1,162	10,896	9	
<b>Technicians</b>	5%	609	4,372	7	5%	603	4,345	7	
<b>Sales Workers</b>	6%	1,897	14,696	8	4%	1,274	11,613	9	
<b>Office &amp; Clerical</b>	6%	1,637	12,058	7	2%	605	5,056	8	
<b>Craft Workers</b>	6%	667	4,298	6	10%	624	3,387	5	
<b>Operatives</b>	4%	822	6,049	7	6%	1,036	6,505	6	
<b>Laborers</b>	4%	474	3,135	7	5%	519	3,272	6	
<b>Service Workers</b>	5%	1,219	10,452	9	3%	931	9,697	10	
<b>Total Affected Workers</b>			74,087					62,563	
<b>Extrapolated Total Affected Workers</b>			127,349					104,221	

**§4. AT RISK DISCRIMINATORS.**

These establishments are so far below average in an occupation that there is only a one in ten (10%) chance that the result occurred by accident (1.65 standard deviations), in 1999. This finding, plus fact-specific evidence relating individual complainants to the occupation addressed by the statistics, with the statistics playing a supporting role, can establish discrimination. We do not know the specific facts in these situations and therefore report no “affected workers” in this category.

**Table 5. “At Risk” Discriminators.**

<b>"AT RISK" DISCRIMINATORS AGAINST MINORITIES AND WOMEN--1999</b>						
	<b>AGAINST MINORITIES</b>			<b>AGAINST WOMEN</b>		
	<b>Establishments</b>		<b>Affected Workers</b>	<b>Establishments</b>		<b>Affected Workers</b>
	<b>Percent</b>	<b>Number</b>	<b>Number</b>	<b>Percent</b>	<b>Number</b>	<b>Number</b>
<b>Officials &amp; Managers</b>	6%	1,053	NA	5%	1,184	NA
<b>Professionals</b>	5%	1,269		4%	1,254	
<b>Technicians</b>	5%	550		4%	523	
<b>Sales Workers</b>	5%	1,560		4%	1,499	
<b>Office &amp; Clerical</b>	5%	1,394		3%	952	
<b>Craft Workers</b>	5%	557		5%	336	
<b>Operatives</b>	4%	771		4%	562	
<b>Laborers</b>	4%	446		4%	403	
<b>Service Workers</b>	4%	949		4%	1,041	

**§5. SUMMARY**

**Table 6. Summary of Effect of Different Types of Discrimination on Minority and Female Workers In Establishments of 50 or More Employees In MSA's**

	Actual				Extrapolated			
	Minorities		Female		Minorities		Female	
	# Estab.	# Affected Workers	# Estab.	# Affected Workers	# Estab.	# Affected Workers	# Estab.	# Affected Workers
<b>Hard Core</b>	12,739	432,958	8,222	240,908	22,269	649,267	13,173	343,398
<b>Clearly Visible</b>	15,906	359,219	14,801	324,924	29,656	584,467	26,177	504,513
<b>Presumed</b>	6,782	74,087	5,696	62,563	13,099	127,349	10,534	104,221
<b>At Risk</b>	5,593	NA	5,590	NA	10,768	NA	10,541	NA
<b>All</b>		866,264		628,395		1,361,083		952,132

The total numbers of establishments may be less than the sum of the number of establishments in each degree because one establishment may discriminate against workers in more than one degree and would be counted twice. Each worker is counted once, so there is no double-counting in the totals of affected workers.

The way in which each type of discriminator affects minorities and women will be discussed in chapters concerning each group. The important point to note here is that Hard Core discriminators along with Clearly Visible discriminators, all of whom are 2.5 standard deviations or more below the average utilization, account for ninety percent of the affected workers identified in this study. Therefore, they present important issues of both affirmative action and enforcement of Equal Employment Opportunity Laws.

**§6. ENDNOTE**

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97. Hazelwood School District v. United States, 433 US 299 (1977), EEOC v. O & G Spring and Wire Forms Specialty Co., 38 F. 3d 872 (7th Cir. 1994).
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