CHAPTER 6
INTENTIONAL DISCRIMINATION DEMONSTRATED BY STATISTICS

The "two standard deviation" rule is established in both Supreme Court and lower court decisions. Where relevant statistics reveal that an establishment is two standard deviations or more below the average in an occupation in an industry, the law imposes major consequences.

§1. THE CONSEQUENCES OF THE TWO STANDARD DEVIATION RULE

The most important legal consequence is that the employer may not secure a summary dismissal of an employee's case, by a judge sitting alone. It must face a full evidentiary trial, sometimes before a jury.[89] When a court refuses to dismiss such cases, most of them are settled before trial. If a trial does take place, the employer has the burden to show that it did not discriminate, once the two standard deviation rule has been satisfied. It must disprove or explain away the statistics. Thus the law treats the finding of two standard deviations so seriously that it requires employers to make the case that they did not discriminate. As do the courts, this study gives serious weight to the two standard deviations principle to identify apparent intentional discrimination.

The two standard deviation rule creates a presumption of discrimination, but it is not a "floor" under which statistical evidence cannot be used. Statistical evidence of a general practice of discrimination has been admitted even where the difference from the expected is as low as 1.65 standard deviations (one in 10 likelihood of a random result).[90] One Court of Appeals has concluded that such evidence is admissible when it is only one standard deviation from the average.[91]

We have used the more conservative minimum of 1.65 standard deviations. Where the statistics are between 1.65 and 2 standard deviations, employer liability depends on specific evidence while the statistics play a supporting role. While these statistics do not create a presumption of discrimination – as does a finding of two standard deviations – they do identify establishments that are "at risk" of liability if other significant evidence is present. While employers may wish to know if they are at 1.65-2 standard deviations below the average utilization so that they may take action to reduce their risk, we have no way of knowing specific facts in individual cases, and cannot know what proportion of them might result in liability. Therefore we have not attributed any "affected workers" to such establishments.

§2. IDENTIFYING THE NUMBERS OF "AFFECTED WORKERS" WHERE DISCRIMINATION IS FOUND.

Where intentional discrimination appears, as where an establishment is two standard deviations or more below the average utilization in the same labor market, industry and occupation, the law requires relief to individuals injured, and also redress for the loss of employment opportunities to minorities and women. The measure of this loss is the difference between the employment opportunities provided by such an establishment and the average that similarly situated establishments provide. "Affected workers" are the number of minority/female workers who would have been employed, promoted, or retained if the establishment had utilized minorities or women at the average in which they are employed in the local labor market, industry and occupational category. In general, these remedies require the employer to increase the utilization of minorities and women until the effects of the discrimination have been eliminated.[92] That condition is reached when the employer utilizes minorities/women at the average level of their participation in the work force to which the employer was compared.

It is not sufficient for an employer to reduce the level of disadvantage of minorities or women so that it is less than two standard deviations below the benchmark; it must approach the benchmark itself. This is to be done while recognizing opportunities for whites/males.[93] We have applied these principles in order to estimate the extent to which intentional discrimination has deprived minorities/women of employment opportunities. We use the exact numbers that the statistical analysis of the EEO-1 reports produce,

recognizing that in the realities of industrial and legal life this kind of precision is difficult to achieve; and that the numbers provide a guide post, not a rigid formula.

The number of "affected workers" in this study is identified by comparing each establishment with other establishments in the same occupational category in the same industry and labor market.[94] Nationwide, we have comparisons between Minorities and Whites in 106,775 establishments employing 34,084,344 workers including 8,193,331 minorities. We have comparisons between men and women in 108,130 establishments employing 26,553,084 workers including 13,415,559 women. Nationally, putting the extrapolation for non-reporting employers to one side, we identified 1,361,083 affected Minorities and 952,131 affected Women.[95] The "Minority" analysis considers all minorities (Native Americans, Hispanic, Blacks, and Asians) as a group, whereas the analysis of Blacks, Hispanics, Native Americans, and Asians considers each minority group separately. Thus, an establishment may have a low utilization of Blacks, for example, but may have an average utilization of Minorities, if it has higher than average utilization of Asians, Hispanics and/or Native Americans. Thus, the affected number of Minority workers will not be the sum of Black, Hispanic, Asian, and Native American affected workers.

This study does not address the question of whether these "affected workers" are entitled to personal relief. The statute of limitations may have run on them; they may be satisfied with the work they are doing; they may have left the labor market; or they may be entitled to relief. The concept of "affected workers" identifies the extent of the harm the establishment has caused and the corresponding extent of an appropriate remedy. The employer may secure minority or female workers from any source, including other employers in the same or other industries or labor markets. Workers are constantly shifting between employers and industries, and are constantly entering and leaving the labor market.

§3. IN THIS STUDY, NUMBERS ARE NOT QUOTAS. THEY ARE FACTS.

As the Supreme Court decisions cited above and others illustrate, numbers alone do not constitute quotas; it is the reason for which the numbers are used, the basis on which the numbers are selected and the manner in which they are used that may constitute illegal preferential

treatment under Title VII. This is illustrated succinctly by Justice O'Connor's analysis that a quota is a "rigid numerical requirement that must unconditionally be met" whereas a goal is "a benchmark for measuring compliance with Title VII and eliminating the lingering effects of past discrimination."[96] The average utilization of minorities and women in this study in each labor market, industry and occupation, is a fact, rather than a goal or quota. It is a statement of the utilization of minorities and women achieved by similar establishments in similar circumstances. When an establishment falls so far below the average that it is not accidental. The law attaches a judgment of apparent discrimination. Our methodology uses the average as a "benchmark" and applies it only to "measure compliance with Title VII." The employer is free to demonstrate that it had only legitimate non-discriminatory and job related reasons for the practices that produced the discrimination. In Chapter 8, many of the justifications that employers may be expected to claim are addressed by our methodology. The Technical Appendix, §2, also addresses some of these issues.

§4. ENDNOTES

89. Virtually all cases concerning discrimination that have been litigated contained individual evidence of individual facts that "brought the statistics convincingly to life." In two cases brought by EEOC based on statistics alone, the Seventh Circuit found for the employer. We assume that where statistics show 2 standard deviations or more below the average, there will be such supporting evidence.

90. EEOC v. American National Bank, 652 F2d 1176, 1188-1192 (4th Cir. 1981); rehearing en banc denied, 680 F.2d 965 (4th Cir. 1982).

91. EEOC v. American National Bank, note 2, supra.

92. Sheetmetal Workers Local 28 v. EEOC, 478 US 421 (1986).

93. Sheet Metal Workers Local 28 v. EEOC, 478 US 421 (1986); Wygant v. Jackson Board of Education, 476 US 267 (1986); Johnson v. Transportation Agency, Santa Clara County, 480 US 616 (1987); United Steelworkers v. Weber, note 32, supra. See Barbara Lindeman and Paul Grossman, EMPLOYMENT DISCRIMINATION LAW, 1760-1765 (3d Ed., 1996).

94. Chapter 17 considers the extent to which affirmative action may be appropriate in light of statistics of the type we are considering here.

95. The national numbers of affected workers in various categories are discussed in Chapter 9, and in Part III, dealing with individual states.

96. Sheetmetal Workers Local 28 v. EEOC, 478 US 421 (1986).