CHAPTER 8
ANTICIPATING EXPLANATIONS FOR LIMITED EMPLOYMENT OF MINORITIES OR WOMEN

While statistics may demonstrate that a very low utilization of minorities and women compared to similar establishments did not occur by chance, they do not explain why it did occur. The law presumes that these "deviant" results were produced by discrimination, but permits employers to demonstrate that non-discriminatory factors alone were responsible.[98] A wide range of reasons may be presented to explain why an establishment is so far below the average utilization of minorities or women that it falls into the area of discrimination. The methodology used in compiling these statistics addresses some of these reasons.

Employers bear the burden of persuasion that the reasons presented actually explain the low utilization of minorities or women whenever the establishment is two or more standard deviations below the average.

Twenty years ago, Justice Rehnquist explained the basis for the presumption of discrimination:

> "A prima facie case...raises an inference of discrimination only because we presume that these acts, if otherwise unexplained, are more likely than not based on consideration of impermissible factors…. And we are willing to presume this largely because we know from experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. *Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not that the employer, who we generally assume acts only with some reason, based his decisions on an impermissible consideration such as race."*[99] [Emphasis added]

The methodology used in this study addresses many possible legitimate explanations that employers may produce when faced with these statistics. With these reasons addresed, the statistical analysis is supported by the common sense likelihood of intent to discriminate.

§1. "IT HAPPENED BY CHANCE."

In this study, establishments are identified as engaging in intentional discrimination only where there is no more than one chance in 20 that the low minority/female utilization occurred by chance. However, we found that 90% of the discriminating establishments were at least 2.5 standard deviations below the average utilization by their peers. This means that there were no more than one in 100 chances that the result was accidental. To assure that these establishments had enough employees in the specific job category so that the statistics are reliable, only establishments with at least twenty employees in the relevant job category are compared, thus avoiding the "small numbers" problem.[100]

§2. LABOR MARKETS – MSAS – DIFFER IN THE PARTICIPATION OF MINORITIES/ WOMEN.

By comparing establishments only with others in the same MSA, regional variations are automatically eliminated. All the employers being compared share the common characteristics of the labor market. More details on this issue appear in Chapter 4, and the Technical Appendix.

§3. RESIDENTIAL SEGREGATION AND TRANSPORTATION DIFFICULTIES MAY ACCOUNT FOR LOW UTILIZATION.

This objection is applicable only to minorities with respect to jobs that are low paying so that the worker is not likely to have a car. Women, of course, live in all residential areas. The barriers that transportation poses for minority workers are aggravated by residential segregation, but are otherwise not unique to minorities. Some people are willing to travel long distances and under uncomfortable circumstances to go from home to work. Preference for work locations near residence are highly mixed, and, given residential segregation, could work in both directions. The assumption that minorities are more likely to reside in the cities and that some of the jobs in which they are interested may be in exurbia, and that they are unwilling or unable to travel to work will be true in some circumstances, not in others. A classic illustration of willingness to travel is the daily light rail commute of largely white office workers to the central city with returning trains filled with largely minority domestic workers.

Our data is not specific with respect to locations within a metropolitan area, and excludes all establishments outside metropolitan areas. The MSA itself is a construct that usually follows county lines. Business establishments may be either just in or just out of MSA's, or nowhere near the edges. Thus errors either way are equally likely. An employer wishing to raise this objection in a particular case will have an opportunity to prove its validity. More specific research may be done on this issue in the future.[101] More details on this issue appear in Chapter 4, §4 and the Technical Appendix.

§4. THE MSA DATA COVERS A MUCH LARGER AREA THAN THAT FROM WHICH AN EMPLOYER MAY RECRUIT, AND THEREBY GIVES MISLEADING INFORMATION.

This objection may have weight in some circumstances, particularly with smaller employers who operate in a neighborhood where recruiting is done by word of mouth with employees recommending their friends and neighbors.[102] However, the establishments included in this study are not "mom and pop" operations. They each have at least 50 employees, and the vast majority has more than 100.

Certainly for enforcement purposes, government agencies that have more detailed geographic information should use it in exercising their discretion.[103] But the argument has its limits. The employer should be required to show that if the narrower area of the "neighborhood" were used, its employment pattern would be

different from that produced by the MSA data, and its statistics would not create a presumption of discrimination. If that showing were made, the question would arise whether the recruitment practice was *itself* discriminatory. Under appropriate circumstances, such "word of mouth" recruiting may violate Title VII because it unreasonably restricts job information.[104] [See Chapter 4, §4.]

However, if the employer is aware that the EEO-1 statistics suggest that it appears to be discriminating, it can readily examine whether there is validity to the claim of over-inclusiveness and either prepare its explanation or alter its practices. While kept in ignorance, it is likely to do neither.

§5. AN EMPLOYER MAY REQUIRE DIFFERENT TYPES OF WORKER SKILLS THAN ITS PEERS.

By comparing establishments only within the same labor market, industry and occupation, inter-industry differences that might otherwise explain differential employment patterns are prevented. Similarities in the production process within an industry make it likely that the employers in the same industry seek the same types of skills.

By comparing the same job classifications in the same industry, the study assures that the type of work done within each classification is similar (e.g. technicians in the air transport industry perform similar work, but it is different work from technicians in the computer manufacturing industry). This method of matching skills within industries also helps to address the objection that the occupational categories are too broad to be meaningfully compared. It also assures that the comparisons involve persons with roughly similar levels of education. "Professionals" are not being compared to "laborers." [Technical Appendix, §1]

§6. THERE ARE NO QUALIFIED MINORITY/FEMALE WORKERS IN THE JOB CATEGORY.

The presence of significant numbers of women/minorities in the labor market, industry and job category make this argument untenable. Comparisons are only made where there are sufficient numbers of employees in the industry and job category to constitute a "labor market" in which employers may recruit and hire employees. There must be at least 120 employees in the local labor market, industry and occupation, as well as three establishments with at least 20 employees in that industry and occupation. Measuring availability by the average of those currently performing the same types of work creates a benchmark that virtually eliminates doubts about abilities, qualifications, or existence of workers. There are no "hypothetical" workers in this study; all the employees who are used in the comparisons were reported on the EEO-1 form.

§7. MINORITY/FEMALE EMPLOYEES ARE NOT AVAILABLE FOR WORK.

The presence of significant numbers of employees in the same labor market, industry and job category demonstrates their availability as well as their qualifications. While it is sometimes argued, for example, that "women don't like to do these jobs," our analysis demonstrates they are doing the jobs – but not in the discriminating establishments.

In earlier years, there were serious questions of qualifications because of educational as well as work restrictions on both minorities and women. The improvement that has taken place since then means that the pool of qualified minorities and women has increased, thus making the defense of unavailability less available. As the pool of qualified minorities/women increases, then the employer's opportunity to assert the "I can't find any qualified ones" argument diminishes. Our methodology assures that similarly situated employers have been able to find "qualified ones."

§8. OTHER EMPLOYERS HAVE ABSORBED ALL QUALIFIED MINORITIES/WOMEN IN OUR LABOR MARKET.

All workers are free to change jobs, or to seek improved employment opportunities. While employees reported on the EEO-1 form were employed by the reporting employer at the time of the report, their availability in the labor market is presumed by law and by free market economic theory. The assumption

of "instant mobility" is not wholly realistic because many workers have invested energies with their present employer where they may have better competitive opportunities (due to, for example, seniority or individual contractual promises of advancement). However, in the present era, where job security is no longer so common and employee "loyalty" has been undermined by changes in the employment relationship, an increasing proportion of employees are likely to be mobile. An employer seeking employees may try to promote from within, or to hire those presently working for another establishment in the same industry, or seek workers from elsewhere or from other industries.

Our definition of the labor market as limited to the particular industry and occupational category under consideration is a very narrow one. Each occupational category may contain workers who could carry their skills to other industries. Lawyers and Laborers may move from one industrial setting to another. Employers are not limited to seeking out those already employed in the industry. They may seek workers who are currently employed outside the labor market or from among employers who do not report because of their small size. They may seek those who are qualified but are under employed, or hire new entrants to the labor market; or those currently gaining education, training or experience that will equip them for the labor market. In addition, a significant proportion of employed workers, at any time, are seeking to change employers.[105] Establishments that are two standard deviations below the average utilization share whatever constraints or opportunities the peer establishments face, including the opportunity to recruit outside the labor market.

The pool of qualified and available workers need not be as large as the employer would need to eliminate the effects of its discriminatory practices.[106] An employer seeking to end its pattern of discrimination will increase hiring/promotion of minorities/women as vacancies become available. Employers may neither fire whites/males to hire minorities/women nor hire or promote minorities/women exclusively. Even if an employer sought to hire or promote minorities/women into half of its vacancies, the number needed would depend on the number of vacancies. Since the average number of victims of discrimination is less than 30 per establishment, the effort to reduce or eliminate the shortfall may not be difficult for some employers. Assuming a vacancy rate of 20% per year for an establishment with 100 employees, the employer at the maximum would seek out ten minority or female qualified workers per year, until it was satisfied that it was no longer at risk.[107]

§9. MINORITIES/FEMALES DID NOT APPLY OR DO NOT WANT TO DO THIS KIND OF WORK.

This justification is not available unless the establishment has undertaken serious recruiting efforts.[108] The availability of minorities/women is in part a function of demand. As demand increases, supply will follow. Minorities/women may be unaware of vacancies, because the "word of mouth" method of spreading information may not work for them. The establishment may be new and without recognition in minority/female circles, or it may have existed for some time and have a reputation as unfriendly to minorities/women.

A claim that minorities or women were not interested in a specific kind of work must be established by an employer as a fact.[109] This claim is unlikely to succeed where other establishments in the same labor market and industry have obtained markedly higher utilization rates, thus indicating interest, availability and qualifications among minorities/females.

§10. THE EMPLOYER WAS INATTENTIVE TO THE RACE/SEX COMPOSITION OF THE WORKFORCE.

It was "color and sex" blind. Given the extensive discussion of race/sex discrimination in both the public area and in the employer community, the argument that the employer was not aware of the limited race/sex composition of its work force is inherently improbable. This argument, in the context of the statistical analysis, is akin to a generalized "good faith" claim that the Supreme Court rejected twenty five years ago:

"The company's evidence, apart from the showing of recent changes in hiring and promotion policies, consisted mainly of general statements that it hired only the best qualified applicants. But affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion."[110]

§11. IT IS UNREASONABLE TO EXPECT EMPLOYERS TO STOP ALL OTHER HIRING OR PROMOTION UNTIL THEY REACH THE AVERAGE UTILIZATION OF MINORITIES AND WOMEN.

Any actions employers take to reduce their risks of liability must be within the framework of existing law concerning affirmative action. One basic principle of that law is that employers may not fire incumbent employees for the purpose of

taking affirmative action. [See Chapter 16, §6] Another principle honored in action is that employers should not try to fill more than half of their vacancies in order to meet their objectives. Since we assume the objective is not necessarily to reach the average, but to get off the "radar screen" so they will not suffer in litigation, they need, as a practical matter, to bring their minority/female employment under the 1.65 standard deviation level. Since the average number of victims is under fifty, it should not be difficult for employers to meet the standard over a period of time.

This study presupposes the value of giving employers a broad leeway to make employment decisions, and singles out only those who appear to abuse that leeway. Two thirds of the establishments did not appear to be discriminating in the sense used in this study. For the other one third, the duty that the methodology used here would imply is only to achieve what the other two thirds have already done.

This is a far easier burden than Judge Hand imposed on the tug owners in 1932 in a situation similar in essence to the analysis proposed in this study. In 1932, radio was still a new phenomenon for obtaining weather information, and it had not become customary in the tug industry. In 2002, the analysis of the EEO-1 data in this study is new and has not become customary among employers. But it is an analysis of existing practices of the establishments we studied; we know that their practices of inclusion of minorities and women have become customary. As Judge Hand wrote, while finding tug boat owners negligent for failing to provide then new radios, "… 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."[111]

§12. ENDNOTES

98. Bazemore v. Friday, 478 U.S. 385 (1986)

99. Furnco Construction Corp v. Waters, 438 US 567, 577 (1978). This comment was directed to the inference of discrimination arising under McDonnell Douglas v. Green, 411 US 792 (1973). The presumption of intentional discrimination that arises upon a showing of two standard deviations is stronger than the "McDonnell Douglas" prima facie case. The employer bears the burden of persuasion in rebutting the presumption. Bazemore v. Friday, 478 US 385 (1986). Under the McDonnell Douglas formulation, the employer's burden is only to "articulate a legitimate non discriminatory reason," not to prove that it was the reason. See Hicks v. St.Mary's Honor Center, 509 US 502 (1993). Under Hicks, evidence that an employer's utilization of minorities/women was more than two standard deviations below that of peer establishments would be admissible in an individual case as evidence on the issue of discrimination when the statistics related to the occupation at issue.

100. See Chapters 4 and 9.

101. EEOC/OFCCP have the exact names and addresses, including zip codes, and have the capability of refining the analysis we are using. We do not have that information. To obtain it from EEOC, we would have had to agree to allow the agency to review our study. We opted for academic freedom, rather than subjecting our study to any agency supervision. We expect that subsequent studies may take advantage of the more detailed information to enhance or modify the results we have obtained. In this first study of intentional job discrimination using EEO-1 data, begun in 1998, we concluded that the issue was sufficiently politically charged that any review by the government, regardless of the party in power, would be inappropriate.

102. "We said the passive stance is the cheapest method of recruitment. It may also be highly effective in producing a good work force. There are two reasons. The first is that an applicant referred by an existing employee is likely to get a franker, more accurate, more relevant picture of working conditions than if he learns about the job from an employment agency, a newspaper ad, or a hiring supervisor. The employee can give him the real low-down about the job. The result is a higher probability of a good match, and a lower probability that the new hire will be disappointed or disgruntled, perform badly, and quit. Second, an employee who refers someone for employment may get in trouble with his employer if the person he refers is a dud; so word of mouth recruitment in effect enlists existing employees to help screen new applicants conscientiously." Judge Posner in Consolidated Services Inc. v. EEOC, 289 F.2d 233, 236 (7th Cir. 1993).

103. The discretion was misused in our view in Consolidated Services Inc, supra, because it involved a conflict between two protected groups, Blacks and Asian Pacific people. Surely with massive discrimination against minorities going on, the EEOC had better things to do with their discretionary resources than to facilitate a "squabble over the crumbs."

104. Alfred W. Blumrosen, The Duty of Fair Recruitment Under the Civil Rights Act of 1964, 22 Rutgers L. Rev. 465 (1968), reprinted, A.W. Blumrosen, BLACK EMPLOYMENT AND THE LAW, 218-295, Rutgers University Press (1971).

105. For the 1999 figures, See U.S. Census Bureau, Statistical Abstract of the United States: 2000, p. 411, Chart 657. The statistics on job seeking by employed workers reflect Census Bureau categories, which roughly translate into EEO-1 categories as follows: Officials and Managers–4.2 %; Professionals–4.6%; Technical workers– 4.8%; Sales– 5.3%; Clericals– 4.3%; Craft workers– 3.9%; Operatives– 3.6%– Laborers– 5%; Service– 4.9%. The highest proportion of such employees is in the 20-24 age group (7.3%); the lowest in the 65 and up group (1.2%); the highest proportion (5%) is among those with bachelor's degrees or higher; the lowest proportion (2.7%) less than high school diploma. There is little difference in the search habits of men and women.

    Additionally, during the 1997-1999 years, 3,275,000 workers lost their jobs due to plant closings or relocations, slack work or shift abolishment. U.S. Census Bureau, Statistical Abstract of the U.S.: 2000, p. 415, chart number 666. These workers were presumably qualified and were released through no fault of their own. Nearly 75% obtained subsequent employment. These workers were released at the height of the economic expansion of that period. In more recent times, the numbers will probably be higher. There may be a further reservoir of available and qualified workers due to the more recent down turn of the economy.

106. See United Steelworkers v. Weber, 443 US 193 (1979).

107. The twenty percent turnover rate was suggested in Robert B. Reich, THE FUTURE OF SUCCESS: WORKING AND LIVING IN THE NEW ECONOMY,14 (Vintage edition, 2002)

108. Barbara Lindemann and Paul Grossman, EMPLOYMENT DISCRIMINATION LAW, 3d Ed., 698-713 (1996); Alfred W. Blumrosen, BLACK EMPLOYMENT AND THE LAW, pp.218-303 (1971).

109. See EEOC v. Sears, Roebuck & Co., 839 F.2d 302 (7th Cir. 1988).

110. Teamsters, 431 US 324, 343, n 24 [internal quotations omitted].

111. The T. J. Hooper, 60 F.2d 737, 740 (1932). See Chapter 5, note 2.