CHAPTER 17
CONCLUSIONS AND RECOMMENDATIONS

§1. CONCLUSIONS

1. **Intentional Discrimination persists**.

   Intentional job discrimination, the "most obvious evil" that the Civil Rights Act of 1964 was intended to eliminate, is still potent. The Civil Rights Laws have broken the pre-1965 pattern of job allocation. Nearly 8.4 million workers are in higher level, better paying, jobs than they would have held under the employment patterns of 1975. This has produced a better qualified labor force. But this "new" labor force is faced with intentional job discrimination that affected two million minority and female workers in 1999.

2. Among minorities, Black workers are most seriously affected in numbers, followed by Hispanic workers, Asian-Pacific origin workers and Native Americans.

3. Forty industries are "equal opportunity discriminators" responsible for at least seventy five percent of the intentional discrimination against White Women, Blacks, Hispanics and Asians.

4. One industry cluster – Medical, Drug and Health related industries – is responsible for 20% of the intentional discrimination.

5. This discrimination is universal; it appears in all regions, in all industries and in all occupations we could measure. We studied only establishments with 50 or more employees. No "mom and pop" businesses were considered.

6. The "glass ceiling" is now visible. It appears in the sharp differentiation between the proportion of minorities and women as officials and managers, and the much larger proportion in the other occupational categories from which officials and managers normally come.

7. The number of establishments engaging in apparent intentional job discrimination is so large – 75,000 in the case of minorities, 60,000 in the case of women – that law enforcement alone cannot possibly produce changes in employment practices necessary to reduce this level of discrimination. Continuation of affirmative action programs is essential.

§2. RECOMMENDATIONS

The following recommendations are directed to the major participants in the equal employment opportunity arena.

The challenge of this study to government, to industry, to civil rights and women's organizations, to women and minorities, and to the people, is to improve the implementation of well-established principles of equal employment opportunity until the extremes of visible intentional discrimination are squeezed out of our employment practices.

Key Recommendations

The key recommendations of this study are:

- **Encourage and continue effective affirmative action programs**
- **Enable employers know where they stand in comparison with similar establishments in the employment of minorities and women.**

It is impossible to address the 75,000 establishments through formal law enforcement efforts. Congress was right in 1964 to make voluntary action the preferred means of improving opportunity for minorities and women, and it was right when it reaffirmed that principle in 1991. Affirmative action programs are intended to allow employers who have reason to be concerned that they might be discriminating to take steps to correct their practices.

1. **Employers should:**

   A. **Demand from the federal government the right to know where they stand vis-a-vis other similarly situated employers so they can decide whether they should take actions to address their situations.** Without such information from government, employers may remain unaware of their relative situations until harm is done that they might have been able to avoid. Most employers will be benefited by this information; either it will confirm their positive positions on equal employment opportunity, or give them opportunities to address situations that may have been more serious than they realized. [See Ch. 16, §11]

While two thirds of establishments did not appear to be engaged in patterns or practices of intentional discrimination, these establishments also need comparative statistical evidence to monitor their situations so they don't slip into difficulties, and to benefit from conclusions that they are at or above average as supportive evidence in discrimination charges that are brought against them.

B. Insist on being free to take affirmative action if the comparative statistics appear to justify it. When establishments are near the average utilization in a labor market, industry and occupation, affirmative action is presumptively legitimate, unless the underutilization of whites/males is extreme. (See Ch. 16).

C. Establish, through industry associations, programs to assist members whose employment practices are tarnishing the reputation of the industry, especially if the employer is in one of the 40 industry or 206 industry groups described in Ch. 15.

2. **The Federal Regulatory Agencies should:**

A. Lift the veil of ignorance.

The administration, be it Republican or Democratic, should lift the "veil of ignorance" about intentional job discrimination, by providing employers with the type of analysis that this study has developed. Employers will then know where they stand vis-a-vis their peer establishments so that they can decide what actions, if any, they should take to reduce their risk of liability. If the government fails to provide such information, EEO1 Inc., may provide information as discussed in Chapter 16.

B. Adopt a five year enforcement program to require employers in industries that are discriminating to take affirmative action to reduce intentional discrimination.

The administration should adopt a five year enforcement program to address the intentional discrimination described in this study. The program should emphasize employment opportunities, not money damages, unless "malice or reckless indifference" is found. The objective is to obtain legally binding promises from employers to take specified actions to address their situations in a form similar to that used by OFCCP, with the employer paying the costs of quarterly monitoring by outside experts. This program should be coordinated

and shared between the federal and state agencies involved in assuring equal employment opportunity in the private sector.

C. Focus on the 40 industries that discriminate against Women, Blacks, Hispanics and Asians, and on the rest of the 206 industries that discriminate against Women, Blacks and Hispanics.

These industries contribute 99 % of the intentional discrimination against Women, Blacks and Hispanics, and 84% of that against Asians. The five year program will require substantial allocation of enforcement funds and the development of expertise in dealing with the industries.

D. Focus on jobs, not lawsuits.

The EEOC, and to a lesser extent the OFCCP, have concentrated energies on collecting large sums of money in a few complex and time consuming lawsuits. As Justice O'Connor, has written, "[T]he victims of discrimination want jobs, not lawsuits."[178] The extent of intentional employment is so great that both agencies should concentrate on expanding employment opportunities, rather than collecting money damages. The private bar representing workers now has many members who are adept in managing large lawsuits and collecting large awards. They may need assistance from government resources, such as expert witnesses, but can carry the day-to-day burden of litigation effectively and at less cost to the government.

The federal agencies do need publicity for their accomplishments to demonstrate to Congress and constituencies. They should arrange with private lawyers for "credit sharing" the results of lawsuits that originated in governmental processes.

E. Engage state agencies in the effort to end intentional discrimination in the 206 industries.

EEOC now supports state fair employment agencies with funds to process individual complaints. That support should be expanded to allow states to proceed against those 206 industries whose activities are localized.

F. Extend the reporting requirements to all establishments of 50 – 100 employees.

This study shows that only 38% of this size establishment files the EEO-1 report (see Chapter 4, §1), and that 31% of those who report discriminate against minorities and women. (See Chapter 9, §5). The burden of submitting a computerized report is minimal when compared to the ability to identify discrimination against more than an estimated 250,000 workers.

3. The Congress should:

A. Mandate the Federal Agencies to adopt the above programs, offering increased budgets so they can proceed against the 206 industries while recognizing their case processing and compliance review responsibilities.

B. Authorize Federal Agencies (OFCCP and EEOC) to extend reporting requirements to cover the Age of employees so that older workers can get the benefit of analysis of reports under the Age Discrimination in Employment Act.

The analysis used in this study, modified to take account of the particulars of age discrimination would contribute to clarity and predictability in that field

4. The Federal Courts should:

A. Recognize the extent of intentional employment discrimination in their decisions on constitutional and statutory questions concerning the appropriate scope of affirmative action.

B. Reconsider the assumption of some judges that employers are likely to respond to numerical goals by adopting rigid quotas. The statistics demonstrate that this risk has not materialized. At least three counter-veiling factors explain why the assumption has not been borne out:

(1) **Economic incentives**. When faced with a clear cut difference in relevant job qualifications between a White/male and a minority/Female, the employer's interest in productivity–now a matter of corporate life or death– should lead it to hire or promote the more qualified person. The distant prospect of a discrimination claim would fade before the economic interests of the employer. If, as a consequence of affirmative action

employers consider candidates they might not have otherwise considered and find them qualified, employers should not be denied that opportunity.

(2) **Social incentives.** Despite the considerable improvement in the employment status of minorities and women since the 1960's, we still live in an era where the prejudices and stereotypes of the past influence our perceptions of racial and sexual characteristics thus posing another barrier to overextending affirmative action.[179] The 40 equal opportunity discriminator industries that discriminate against Blacks, Hispanics, Asians, and White Women, as well as the remainder of the 206 industries that discriminate against 99% of the Black and Hispanic victims suggest that these stereotypes and prejudices still influence employment decisions in the present.

(3) **Discrimination based on color**. The 40/206 industry tables suggest that a common thread running through the practices of a considerable number of establishments is a distaste for working with people who are not White.

5. State/Local civil rights agencies should:

A. Secure the EEO-1 data for their state from the EEOC.

B. Urge the interested groups, including employers, employers associations, civil rights groups and women's organizations in their state to review this study and make recommendations for state action.

C. Adopt policies favoring affirmative action by those establishments that risk a finding of discrimination based on statistics such as those in this Study.

D. Encourage Congressional and state legislative leaders to support state and federal programs to address the prevalence of intentional job discrimination as outlined in this Study.

E. Adopt systemic enforcement programs based on the methodology developed for this study, identifying targets with assistance of EEOC and OFCCP, and cooperate in joint federal and state enforcement programs.

6. Civil Rights and Women's organizations should:

A. Utilize this Study in public discussions of contemporary problems of job discrimination.

B. Cooperate with each other in legislative and public affairs matters because all have the same interest in eliminating intentional job discrimination by the 206 industries that discriminate against all those who they represent.

C. Evaluate governmental programs more by how many jobs they have helped minorities and women obtain, with less emphasis on how many complaints they processed, or how many dollars they obtained for individual workers.

D. Demand a concentrated and financed set of governmental programs addressing intentional job discrimination by the 206 industries, with the initial focus on the top 40 that discriminate against Women, Blacks, Hispanics and Asians.

E. Support the inclusion of a reporting system like EEO-1 requiring employers to report the age of their workers to protect rights under the Age Discrimination in Employment Act. That Act is applicable to workers 40 and over, a group which now includes larger numbers of minorities and women than in the past.

7. Lawyers for both employers and employees should:

Join forces to devise a system of arbitration that would be fair to both parties in resolving individual disputes that do not appear to have broad class based implications: one that is not "loaded" in favor of either party, taking account of the "repeat player" phenomena, and relative statistics. This would enable greater attention to establishments that appear to be engaged in a pattern of intentional job discrimination, while providing better justice for both employees and employers in individual cases.[180]

8. Colleges, Universities, High Schools and other research oriented institutions and individuals should:

A. Make use of the data in this report in research activities, and in evaluating the performance of federal and state agencies. The report will be available in PDF form at http://www.EEO1.com.

B. Integrate the data in this study into the work of other disciplines dealing with minority and female employment opportunity, labor relations, and other aspects of research involving human behavior.

§3. ENDNOTES

178. EEOC v. Ford Motor Co. 258 U.S. 219, 230 (1982)

179. Watson v. Fort Worth Bank And Trust, 487 U.S. 977 (1988).

180. See Alfred W. Blumrosen, MODERN LAW: THE LAW TRANSMISSION SYSTEM AND EQUAL EMPLOYMENT OPPORTUNITY, 172-174 (University of Wisconsin Press, 1993) proposing an administrative law judge program. Compare the EEOC's mediation program.