THE REALITY
OF INTENTIONAL JOB DISCRIMINATION IN
METROPOLITAN AMERICA – 1999

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The views expressed are those of the authors, not necessarily those of the Foundation or the University.
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He has written MODERN LAW: THE LAW TRANSMISSION SYSTEM AND EQUAL EMPLOYMENT OPPORTUNITY, (1993,
University of Wisconsin Press); BLACK EMPLOYMENT AND THE LAW (1971, Rutgers University Press), and numerous law review articles, including "Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination." (1972) which has been cited by the U. S. Supreme Court in two decisions. His essay "Six Conditions for Meaningful Self Regulation" was awarded the Ross Prize by the American Bar Association in 1983. In 1993, he was a Fulbright Scholar in South Africa, where he examined whether U.S. equal employment experience would be useful in the post-apartheid period. In 1995, he was a resident scholar at the Rockefeller Institute Conference and Study center in Bellagio, Italy.
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RUTH GERBER BLUMROSEN is adjunct Professor of Law at Rutgers Law School, Newark New Jersey, and former associate Professor at Rutgers Graduate School of Management. She received her BA and Law degrees from the University of Michigan. She assisted in the establishment of the U.S. Equal Employment Opportunity Commission in 1965, where she was acting director of compliance. She was consultant to EEOC Chair Eleanor Holmes Norton in 1979-80, concerning guidelines under the Equal Pay Act and wage discrimination issues, U.S. EEOC, Hearings on Job Segregation and Wage Discrimination. She participated in development of EEOC policy statement on impact of layoffs on minorities and women. She was consultant on Equal Employment Opportunity, U.S. Department of Health and Human Services, 1980-81; Advisor, New Jersey Commission on Sex Discrimination in the Statutes, prepared analysis of state pay practices which was basis for action by Governor's Task Force on Equitable Compensation, 1974-77, a member and Hearing Officer, New Jersey Governor's Committee on minority and female opportunities in state contracting, 1991-93. In 1993, she was a Fulbright Scholar in South Africa, examining whether U.S. equal employment experience would be useful in the post-apartheid period. In 1995, she was a resident scholar at the Rockefeller Institute Conference and Study center in Bellagio, Italy. She has published in the field of wage discrimination including Wage Discrimination, Job Segregation and Title VII of the Civil Rights Act of 1964, 12 University of Michigan Journal of Law Reform 397 (1979), cited by U.S. Supreme Court in County of Washington v. Gunther, 452 U.S. 161 (1981); Wage Discrimination, Job Segregation: The Survival of a Theory, 14 Univ. of Michigan Journal of Law Reform 1 (1981); Wage Discrimination Revisited, 8 Women's Rights Law Reporter 109 (1984); Remedies for Wage Discrimination, 20 Univ. of Mich. Journal of Law Reform, 99, (1986). She has also written on the concept of work sharing as alternative to layoffs, and the use of unemployment compensation to facilitate part time employment. She is co-author of Downsizing and Employee Rights, 50 Rutgers Law Review 943 (1998). She has litigated under New Jersey Anti-Discrimination laws in the case which established the federal constitutionality of state fair housing laws (Levitt v. New Jersey, 31 N.J. 514, 363 U.S. 418 (1960), and has represented male flight attendants denied their rights under the Equal Pay act in Klask v. Northwest Airlines, 57 FEP Cases 1147, 1152 (D. Minn. 1989, 91).
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The thousands of men and women involved in the implementation of Title VII of the Civil Rights Act of 1964 on all sides of all issues, whose lives we shared.

The millions of men and women whose efforts made the Civil Rights Act of 1964 and its implementation an evolving achievement of American democracy.
To the memory of all those who shared in the adoption of the Northwest Ordinance of 1787 that prohibited slavery and provided that “schools and the means of education shall forever be encouraged.”
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</tr>
</tbody>
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Intentional discrimination was “the most obvious evil” that the Civil Rights Act of 1964 was designed to prevent. Is intentional discrimination still a potent force restricting job opportunities for women and minorities? Or, is it what University of California Regent Ward Connerly suggested in 1998, “Black Americans are not hobbled by chains any longer. We’re free to compete. We’re capable of competing. It is an absolute insult to suggest that we can’t.”¹ Which is it: a “level playing field,” or an uphill struggle for women and minorities against intentional job discrimination that favors whites/males?

This question is answered in a four year, 1,400 page study of the race color and sex of employees in large and mid sized private business establishments – THE REALITIES OF INTENTIONAL JOB DISCRIMINATION IN METROPOLITAN AMERICA – 1999, by Rutgers Law School Professor Alfred W. Blumrosen and adjunct Professor Ruth G. Blumrosen. Supported by a grant from the Ford Foundation to Rutgers University, the study is based on employers’ annual reports to the Federal Government involving 160,000 establishments employing 37 million workers. It involved a computer analysis of these reports combined with Supreme Court and Congressional rules to identify “patterns and practices” of intentional job discrimination of the Supreme Court and Congress.

In 1991, Congress confirmed that intentional discrimination exists when “race, color, religion, sex or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”² “Intent to discriminate” is not the equivalent of “evil motive,” where a personal wish or desire to oppress women or minorities is the only explanation for the harm done. If an employer has both a legitimate reason for its practices and also a discriminatory reason, it is engaged in intentional discrimination.

The study found that intentional job discrimination continues on a major scale. Blacks, Hispanics, Asian Pacific workers and White Women who have the knowledge, skills, abilities, and experience to compete are deprived of that opportunity by intentional discrimination between a quarter and a third of the time they seek such opportunities.

• In 1999, intentional discrimination affected two million minority and female workers. It exists in every region of the country, in each of nine occupational categories from officials and managers to labor and service jobs.
• Seventy five thousand establishments discriminated intentionally against 1.3 million minorities; while 60,000 establishments discriminated intentionally against 952,000 women. Despite the persistence of intentional discrimination, the majority of establishments did not appear to engage in it. As a result, minorities and women have increased their participation in the labor force and in their proportion in better paying jobs.

• Forty industries were “equal opportunity discriminators” -- discriminating against 75% of the Blacks, Hispanics, Asian-Pacific workers and White women who were affected. The top ten of these industries were Hospitals, Eating and Drinking Places, Department Stores, Grocery Stores, Nursing and Personal Care Facilities, Computer and Data Processing Services, Hotels and Motels, Telephone Communications, Commercial Banks and Motor Vehicles and Equipment Manufacturing.

• Medical, Drug and Health related industries alone accounted for 20% of Women, Blacks, Hispanics and Asian Pacific workers affected by discrimination.

• Ninety percent of the affected workers were subjected to discrimination that was so severe that there was only one chance in 100 that it occurred by accident. That is far more than enough to trigger a legal presumption of intentional job discrimination.

• Between one third and one half of this discrimination was caused by “hard core” establishments that had been discriminating for at least nine years.

§5. BACKGROUND OF THE STUDY

Private employers of 100 or more employees and government contractors of 50 or more employees have been required to file annual reports, called EEO-1 reports, since 1966 with the U.S. Equal Employment Opportunity Commission and the Department of Labor. The study obtained computerized versions of these reports from the EEOC with the names and identifying addresses of employers expunged to preserve employer confidentiality. The statistics only identify the state and Metropolitan Statistical Area in which establishments are located.

Intentional job discrimination was identified by examining establishment reports in each metropolitan area by industry. Within each industry, nine occupational categories were examined separately. In this way, the average utilization of men and women, Blacks, Hispanics and Asians in each industry and occupational category within each metropolitan area was obtained. Establishments that were so far below the average utilization of minorities or women that it was
unlikely to have occurred by chance, stood out “like sore thumbs” in this analysis. They are presumed by law to be intentional discriminators under legal rules developed since 1977. In that year, the Supreme Court 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...” In law suits, employers would have the opportunity to show that the statistics were inaccurate or that they had only good reasons for the abnormally low utilization, a burden that is difficult to satisfy. The study suggests that most establishments facing these statistics would settle rather than litigate.

Workers affected by this discrimination were measured by the difference between the number actually employed and the number that the apparent discriminator would have employed if it had employed minorities/women at the average. This is the standard the Supreme Court has applied in cases of intentional discrimination. There is no single average in the study. For each occupation in each establishment, the average utilization varies depending on the number of qualified available workers in the labor market, industry and occupation. The average is not a quota—it is a fact, showing how similar employers have employed minorities and women in the same occupation under the same labor market and industrial circumstances.

The study addresses some of the most common employer explanations for such low levels of minority and female employment, such as women aren’t interested in the work, [they are doing the same work for other similar employers]; no qualified workers were available. [qualified workers were available because they were doing the same type of work for other employers.]

§6. THE BURDEN OF DISCRIMINATION

What is the risk that a minority or woman will face discrimination because of their race, sex or national origin when seeking an employment opportunity? The study found that the probability of discrimination varied with the kind of job being sought. The table below describes the probability of discrimination by occupational category. The percentages apply each time a person sought an employment opportunity, be it employment, promotion, assignment, layoff, discharge or other employment related activities.
Risk of Discrimination because of race, sex, national origin each time a job opportunity is sought in the occupation.

<table>
<thead>
<tr>
<th></th>
<th>Blacks</th>
<th>Hispanics</th>
<th>Asian</th>
<th>Women</th>
</tr>
</thead>
<tbody>
<tr>
<td>Officials and Managers</td>
<td>26.6%</td>
<td>21.8%</td>
<td>24.6%</td>
<td>18%</td>
</tr>
<tr>
<td>Professionals</td>
<td>27.6%</td>
<td>20.7%</td>
<td>30.8%</td>
<td>23%</td>
</tr>
<tr>
<td>Technical workers</td>
<td>29.1%</td>
<td>21.9%</td>
<td>30.2%</td>
<td>23%</td>
</tr>
<tr>
<td>Sales</td>
<td>39.5%</td>
<td>28.1%</td>
<td>27.3%</td>
<td>20%</td>
</tr>
<tr>
<td>Office and Clerical</td>
<td>31.8%</td>
<td>21.8%</td>
<td>26.4%</td>
<td>19%</td>
</tr>
<tr>
<td>Craft workers (skilled)</td>
<td>28.7%</td>
<td>27.1%</td>
<td>35.0%</td>
<td>37%</td>
</tr>
<tr>
<td>Operatives (semi skilled)</td>
<td>33.2%</td>
<td>33.4%</td>
<td>42.8%</td>
<td>38%</td>
</tr>
<tr>
<td>Laborers</td>
<td>34.9%</td>
<td>34.4%</td>
<td>43.6%</td>
<td>30%</td>
</tr>
<tr>
<td>Service workers</td>
<td>40.3%</td>
<td>34.0%</td>
<td>38.1%</td>
<td>19%</td>
</tr>
<tr>
<td>All comparisons</td>
<td>34.1%</td>
<td>35.0%</td>
<td>39.0%</td>
<td>23%</td>
</tr>
</tbody>
</table>

§7. BLACK WORKERS MOST SERIOUSLY AFFECTED

Despite the initial focus of the Civil Rights Act on Black workers, and the improvement that has taken place since, Black workers still bear the severest brunt of this discrimination. They constitute less than half of all minority workers reported, but they were 57% of all workers affected by discrimination. Fifteen percent of all Black workers were so affected in 1999, while 11% of both Hispanics and Asian Pacific workers were affected.

- Thirty five thousand business establishments discriminated against 586,000 Blacks. Ninety percent of these Black workers were affected by establishments that were so far below the average utilization that there was only a 1 in 100 chance that this happened by accident and half by “hard core” employers who had been discriminating for at least nine years.

- Hispanic workers were 33% of minority workers reported, and they constituted 28% of those affected by discrimination or 283,000 workers.

- Asian Pacific workers were 17% of the minorities, and 15% -- or nearly 150,000 -- of those affected by discrimination.

- The data about Native American workers was too sparse to draw conclusions.
§8. IMPROVEMENT IN PROPORTION OF MINORITIES AND WOMEN EMPLOYED BETWEEN 1975 AND 1999

The bright spot in this study of intentional discrimination, is that between 1975 and 1999, minorities increased their participation in the labor force by 4.6 million workers beyond the increase resulting from economic growth; and women similarly increased their participation by 3.8 million workers. In absolute numbers, minorities went from 4 million workers in 1975 to more than 11 million in 1999; women went from 8 million workers in ’75 to 17.5 million in 1999. More important, all groups increased their share of “better jobs” as officials, managers, professionals, technical and sales workers.

§9. FORTY INDUSTRIES THAT WERE ‘EQUAL OPPORTUNITY DISCRIMINATORS’

The study identified 40 industries that were “equal opportunity discriminators,” discriminating against more than 75% of the Black, Hispanic, Asian, and White Women workers affected by discrimination.

[Continued on next page.]
### Additional highlights of the Study include:

- **The largest number of establishments discriminating against both minorities and women employed between 100 and 500 workers.** 22,000 establishments of that size discriminated against minorities, 20,000 against women. These establishments contributed about half the intentional job discrimination against both minorities and women.

- **Separate studies for each state and each metropolitan area where there is data are included in the nationwide study.** “Discrimination, like politics, is essentially local,” the study states. “We hope this material will be studied by
those interested in civil rights to try to address this discrimination in each state and metro area.”

§10. AFFIRMATIVE ACTION STILL NECESSARY

The study concludes that intentional discrimination is still so pervasive that affirmative action programs continue to be necessary. “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.

The statistics from this study will be helpful to all groups concerned with employment discrimination, the Study concludes. Employers would like to know where they stand compared to others; enforcement agencies and courts may use the information and those interested in civil rights can measure progress using the data. However, the Blumrosens doubt that the Federal Government, under either a Republican or Democratic administration is likely to use the study in ways they have suggested.

To address the needs of employers and workers, the Blumrosens have incorporated as EEO1.Inc., to make information available without identifying the names and addresses of any employer. The Study will be published on the web site, EEO1.com. This site will also include a program, the Discrimination Calculator, to enable workers and their representatives to find the likelihood of discrimination in labor markets, industries and occupations of interest to them without cost. Employers who are interested in comparative data and others who are entitled to it, may consult EE01.com to find out how to obtain such data.

§11. RECOMMENDATIONS

1. **Employers** should demand access to information that will tell them where they stand compared to similar employers so that they can decide whether to take affirmative action; they should insist that they be free to take such action whenever the statistics warrant it. Industries that exhibit serious discrimination should establish programs to assist their members whose employment practices tarnish the industry reputation.

2. **The Federal Government** should provide statistical information to employers so that they will know where they stand; adopt a five year enforcement program
based on the statistical analysis and incorporate state and local government efforts, focusing on the 40 and 206 industries identified in the Study, and seeking increased employment, leaving litigation over damages to the private bar. They should also extend the reporting requirement to all establishments with 50 or more employees.

3. Congress should mandate these federal programs, and provide additional funding to proceed against the 206 industries, and extend the reporting requirements to identify the age of employees, to facilitate enforcement of the age discrimination act.

4. The Federal Courts should recognize the prevalence of intentional job discrimination in constitutional and statutory decisions on affirmative action; reconsider the assumption that employers are likely to adopt rigid programs without individualized proof that such was the case and recognize that intentional discrimination appears to reflect the unwillingness of roughly one third of establishments to work with people who are not “White.”

5. State and Local Civil Rights Agencies should secure EEO-1 data, urge interested groups to examine this study and initiate actions in their state based on the information. In addition, they should cooperate with the federal and other state agencies in enforcement programs; support affirmative action where statistics justify it, and encourage state and federal legislative leaders to address the prevalence of intentional discrimination as identified in this study.

6. Civil Rights and Women’s organizations should use this study in public discussions of discrimination; cooperate with each other in legislative and other public affairs because they have a mutual interest in eliminating job discrimination, particularly in the 40 industries that discriminate against all the groups they represent; evaluate government programs more by how many jobs are obtained and less by how many cases are processed, or how many dollars individual workers obtain; demand a focused set of governmental programs to address the 40/206 industries, and support expansion of the EEO-1 reports to the age act and all establishments of 50 or more workers.

7. Lawyers for both workers and employers should develop a fair arbitration system for dealing with individual discrimination cases, so that resources can be focused on patterns or practices of discrimination.

8. Universities, colleges, high schools and research oriented institutions should make use of this study in research activities, and should integrate this study into the work of other disciplines concerned with labor relations and human behavior.
§12. Endnotes

1. Interview on “60 Minutes” by Mike Wallace, Aug. 2, 1998, transcript, p. 22.
2. Sec. 703 (m) of Title VII.