BOOK REVIEW

Federal Statutory Law of Employment Discrimination. CHARLES A. SULLIVAN, MICHAEL J. ZIMMER & RICHARD F. RICHARDS. The Michie Co., The Bobbs-Merrill Co., Indianapolis, New York and Charlottesville, 1980. Pp. v, 874.

The evolution of a field of law may be measured by its legal literature. In 1966, Sovern published the first modern text in the field of equal employment opportunity law,[1] which addressed Title VII of the Civil Rights Act of 1964.[2] It was brief and general because there was little case law. By 1976, there were 14 volumes of fair employment practice cases. In that year, Schlei and Grossman published their text, *Employment Discrimination Law*.[3] This was a thoughtfully organized book which included verbatim extracts of virtually all of the important cases which had been decided up to that time.

The short five years since then has produced another 10 volumes of cases. The number of Supreme Court decisions has increased and the number of new "legal issues" has expanded. It is becoming impossible to reproduce the important cases in a text.

In response to this expansion of the law, Zimmer, Sullivan and Richards have sought to move the legal literature into a new phase. Their text is based on the premise that the field can best be mastered by an analytical approach which encompasses the case law and other developments, rather than by reproducing parts of the major opinions. It includes lucid introductions to statistics and psychology, two disciplines which have extensive applications in equal employment law.[4] The text concludes with a careful examination of the processes of conciliation which Congress intended to be the centerpiece of Title VII enforcement.[5] The authors are among the few to make Title VII negotiation the subject of formal legal analysis. Their efforts to encourage systematic thinking about the conciliation process under Title VII are to be applauded.

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[1] M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT (1966), reviewed by this reviewer, 14 U.C.L.A. L. REV. 721 (1967).

[2] Civil Rights Act of 1964, 78 Stat. 253 (codified at 42 U.S.C. §§ 2000e-2000e-17 (1964)).

[3] B. SCHLEI AND P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (1976), reviewed by this reviewer, 1977 DUKE L.J. 279.

[4] C. SULLIVAN, M. ZIMMER & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION, chs. 1.8, 2.2 (1980) [hereinafter cited as FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION].

[5] *Id.* ch. 14. *See also* A. BLUMROSEN, BLACK EMPLOYMENT AND THE LAW, ch. 2 (1971).

The book contains a good balance between abstract theory of Title VII law and practical material relating to some of the more interesting procedural, class action, and discovery problems.[6] It is well worth having at hand for both scholarly and practical purposes.

The authors are exactly on target in identifying basic theoretical questions which must trouble lawyers, judges, and students. They are perceptive in identifying the complexities in the various theories of discrimination under Title VII. In addition, they are candid about the policies which underly their analysis. They believe in the principles of the equal employment opportunity law, are skeptical about "countervailing" considerations, and would give the law a broad interpretation. They believe that race and sex consciousness is necessary in certain situations to "remedy past societal discrimination."[7] The remainder of this review expresses reservations about some of their conclusions, but not about their underlying policy perspective.

I. Disparate Impact and Disparate Treatment

The Supreme Court has identified two theories of Title VII discrimination: disparate treatment and disparate impact. The disparate impact of a neutral employment practice is illegal regardless of intent, in the absence of business necessity.[8] Disparate treatment is evidence of discriminatory intent, purpose, or motive. The authors believe that the disparate treatment concept is the broader of the two, and that "disparate impact" may prove disparate treatment.[9] There is a vast difference between the two theories. A showing of adverse impact shifts the burden of proof of business necessity to the employer,[10] while a showing of discriminatory purpose shifts only the burden of going forward with evidence of a legitimate business.[11] The authors are wrong in concluding that the purpose or intent theory is as broad as the "impact" approach. Their effort to "merge" the two theories leads to another error.

The Supreme Court has articulated a legal standard or norm against which to evaluate the employers' practices. The key statement, quoted by the authors, is:

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[6] Federal Statutory Law of Employment Discrimination, *supra* note 4, chs. 3, 6, 7.

[7] *Id.* at vi.

[8] *Id.* ch. 1.

[9] *Id.* at 20.

[10] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[11] Texas Dept. of Community Affairs v. Burdine, 101 S. Ct. 1089 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

> Absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population of the community from which employees are hired.[12]

This is an important *normative* statement. It expresses the court's view of what ought to happen under the statute. It is not a "prediction" in terms of probabilities. It is certainly not rooted in history. A non-discriminatory society might be one in which members of various groups tend to concentrate in different occupations. Our patterns of employment, however, have resulted from slavery and cultural subordination, and the statutory goal of a non-discriminatory society makes this a proper legal standard against which to measure an employer's conduct. This general standard illuminates the proof required under either the "impact" or the intent theory. The Supreme Court has adopted a "two or three standard deviation" test for proof of intentional discrimination. The authors assume that this standard is also applicable to proof of disparate impact.[13] This is not the case. The standard deviation approach is appropriate to prove illegal purpose because it eliminates the likelihood that the differences occurred by chance. But the adverse impact standard is less rigorous. It describes situations in which an employer ought to justify its practices on business necessity grounds, regardless of intent.

The authors express a fondness for "sophisticated" statistical techniques for identifying "adverse impact." They are critical of the relatively simple "80 percent" or "4/5" rule of the Uniform Guidelines on Employee Selection Procedures (hereinafter referred to as UGESP).[14] This "rule of thumb" compares the ratio of hirings or promotions of white/males with that of minorities/females. "Adverse impact" exists if the ratio of hirings of minorities or women is less than 80 percent of the ratio for white males. The discussion of the "sophisticated" statistical techniques is informative. But I wonder if these techniques are "sophisticated," or only complicated? Do we not run the risk of losing the forest of race and sex discrimination midst the trees of statistics?

The authors correctly note that the method of identifying "adverse impact" is the "intuitive judgment" of the courts.[15] I think the

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[12] FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION, *supra* note 4, at 22 (quoting International Bhd. of Teamsters v. United States, 431 U.S. 324, 339-40 n.20 (1977)).

[13] *Id.*

[14] 29 C.F.R. § 1607 (1978). FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION, *supra* note 4, at 48-51.

[15] FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION, *supra* note 4, at 14.

law should stay that way. "Statistical significance" may be one way to prove discriminatory purpose because it virtually eliminates chance, but it is unnecessary and unduly burdensome and complex when applied to the "adverse impact" standard. That standard must be sufficiently simple to be applied by employers in the administration of their own employment systems. We cannot expect each employer to have a statistician at hand, but we can expect them to be able to do simple formulas. This is the functional value of the UGESP "4/5" or "80 percent" rule. It can be applied by employers alone, and by government officials "on the scene" without the counsel of statisticians. The authors nod only briefly toward these realities.[16]

II. The Bottom Line

The authors are critical of the "bottom line" principle, which measures adverse impact by the "overall result" of the employer's hiring practice, rather than by the "impact" of each component of that process. If the overall process for a job does not have an adverse impact, the "bottom line" theory would disregard the adverse impact of particular components.[17] This theory permits an employer whose system has a component with adverse impact to "cancel out" that impact by hiring or promoting appropriate numbers of minorities or women from among those deemed qualified. If the objective of the law is to improve employment opportunities of minorities and women, and an employer acts in such a way as to further that objective, the law should not trouble that employer in the absence of deliberate discrimination. What is the social gain in viewing each segment of the employer's practices separately? Is it to avoid the possibility of evasion of Title VII liability? If so, that can be dealt with severely in any subsequent proceeding. Is it to benefit a particular member or members of the minority/female group as compared with other such persons? Equitable claims of particular women or minorities as against other minorities or women normally cannot be resolved on equal employment opportunity grounds.[18] Other equitable con-

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[16] *Id.* at 50. I participated in the development of the UGESP, a fact which may influence my view of the issue. *See* Blumrosen, *The Bottom Line in Equal Employment Guidelines; Administering a Polycentric Problem*, 33 Ad. L. Rev. 323 (1981), for a discussion of the process by which the principle was developed.

[17] *See* Blumrosen, *The Bottom Line Concept in Equal Employment Opportunity Law*, 12 N.C. Cent. L.J. 1 (1980).

[18] This is subject to the qualification that victims of the employer's prior "discrimination" must be made whole. But the "bottom line" theory holds that where the employer has "cancelled out" adverse impact, there is no "discrimination" in that process and there are no "victims." The employer's prior and separate discrimination, of course, is not "cancelled out" by its subsequent

siderations must be invoked. Title VII does not seek to single out the "most worthy" among minorities or women and require the employer to benefit them.

In *Teal v. Connecticut*,[19] the Court of Appeals for the Second Circuit rejected the "bottom line" concept in a manner which suggests a concern for the "equities" of certain black workers. Black plaintiffs had been doing the work for up to two years when they failed a written test. They were to be replaced by blacks who had not done the work, but had passed the test. The court held that the test was illegal because it screened out a higher proportion of blacks than of whites despite the fact that the employer had hired a higher percentage of black than of white applicants. One can certainly be skeptical about a civil service system which uses written tests rather than performance evaluations in considering persons for promotion. But the black plaintiffs in *Teal* were in precisely the position of thousands of civil service workers who have had temporary assignments but who have not received promotions. As long as the employer hired an appropriate percentage of blacks into the jobs in question, Title VII should not be used to correct judicially perceived infirmities in the civil service system.

The authors contend that the "bottom line" approach is inconsistent with *Griggs v. Duke Power Co.*[20] and *Dothard v. Rowlinson*,[21] and "allows discriminatory practices to be insulated from judicial scrutiny."[22] This statement assumes the point at issue: whether, as a matter of policy, an employer should be held to have discriminated when it meets the "bottom line" standard.

The authors argue that *Dothard* and *Griggs*, "focus on the components of the selection process that plaintiffs challenged without reference to any overall impact of the selection process."[23] This is not true. *Griggs* addressed practices which, "operate to disqualify Negroes at a substantially higher rate than white applicants."[24] *Dothard* not only quotes *Griggs*, but states "a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern."[25] Both cases dealt with prac-

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acts. Thus, if an employer has discriminatorily assigned blacks to certain jobs, its later hiring of other blacks to "white" jobs will not reduce its liability for the initial discrimination.

[19] 645 F.2d 133 (2d Cir. 1981).

[20] 401 U.S. 424 (1971).

[21] 433 U.S. 321 (1977).

[22] FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION, *supra* note 4, at 51.

[23] *Id.* at 49.

[24] 401 U.S. at 426.

[25] 433 U.S. at 329.

tices which "operate to exclude Negroes"[26] (*Griggs*) or "work in fact disproportionately to exclude women from eligibility for employment"[27] (*Dothard*). Neither *Griggs* nor *Dothard* involved an advisory opinion on a component of a selection process which did not harm minorities or women. Both were rooted in the realities of economic harm to the plaintiff class.

I believe the "bottom line" is a necessary concept to implement the principles of Title VII because it tells employers that there is "light at the end of the tunnel." Without this, the incentive to take affirmative action is reduced.

III. Affirmative Action: Formal and Informal

The authors develop an interesting distinction between *United Steelworkers v. Weber*[28] and *McDonald v. Santa Fe Trail Transportation Co.*[29] *Weber* approved an organized affirmative action plan in which fifty-percent of spaces in a training program were reserved for blacks. *Santa Fe Trail* disapproved "ad hoc" affirmative action in which the employer discharged two whites who engaged in theft, but not their black associate. The authors seem prepared to accept this distinction as consistent with the principles of Title VII. I am not.

In the workaday world, much "affirmative action" will end up appearing to be "ad hoc." Affirmative action plans for hiring or promoting percentages of minorities or women ultimately are reflected in individual hiring or promotion decisions. These decisions often involve weighing the merits of competing candidates. When an employer makes such a judgment, it will appear to be an "ad hoc" determination. Thus, the distinction between formal and "ad hoc" affirmative action may break down in operation. But beyond that, the distinction fails to take account of the objective of the statute to improve employment opportunities of minorities and women, particularly in job situations from which they have been restricted. If an employer has reason to contribute to this effort, and selects minority or female applicants from the pool of qualified applicants, it should have the benefit of this statutory purpose if sued for "reverse discrimination." The law should not restrict the right to take affirmative action to those employers who are organized in a bureaucratic manner.[30]

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[26] 401 U.S. at 431.

[27] 433 U.S. at 329.

[28] 443 U.S. 193 (1979).

[29] 427 U.S. 273 (1976).

[30] The authors' view is apparently that of the Seventh Circuit in Lehman v. Yellow Freight Sys., Inc., 651 F.2d 520 (7th Cir. 1981). That case invalidated informal affirmative action on

Santa Fe Trail is not a "reverse discrimination" case. The "reverse discrimination" issue arises only when minorities/women and whites/males compete for scarce opportunities and the employer favors the minority or female. *Santa Fe Trail* did not involve that situation. The black and whites were not in competition. The whites did not want the employer to discharge the black, in order to hire them. Thus *Santa Fe Trail* is simply irrelevant to the "reverse discrimination-affirmative action" issue.[31]

It is time to develop the elements of a "reverse discrimination" case, consistently with the principles of Title VII.[32] However, the authors' distinction between "formal" and "ad hoc" affirmative action is not a useful method of implementing the statutory policy.

IV. *GRIGGS* AND THE AGE DISCRIMINATION IN EMPLOYMENT ACT

The authors believe that the purposes of the Age Discrimination in Employment Act (hereinafter referred to as ADEA)[33] are furthered by applying the "disparate impact" theory. This is a fundamental mistake for two reasons. First, it is not what Congress intended. The report of the Secretary of Labor on which the ADEA is based distinguishes between the use of specific age limits on hiring and termination based on stereotypes about older workers, and practices which "bear more strongly on older workers" than on younger ones.[34] The former were to be made illegal; the latter were not to be made illegal but were to be addressed by a variety of other programs.

Secondly, the prime beneficiaries of the ADEA are white males in their fifties and sixties. They are also the beneficiaries of traditional discrimination against minorities and women. To give them the bene-

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grounds I consider "speculative." The other circuits which have passed on the matter have upheld the bottom line approach. EEOC v. Greyhound Lines, 124 F.E.P. 7 (3d Cir. 1980); Hameed v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local Union No. 396, 24 F.E.P. 352 (8th Cir. 1980); Rice v. City of St. Louis, 607 F.2d 791 (8th Cir. 1979); Blizard v. Frechette, 601 F.2d 1217 (1st Cir. 1979); EEOC v. Navajo Refining Co., 593 F.2d 988 (9th Cir. 1979); Friend v. Leidinger, 588 F.2d 61 (4th Cir. 1978); Hernandez v. Phelps Dodge Refining Co., 572 F.2d 1132 (5th Cir. 1978); Smith v. Troyan, 520 F.2d 492 (6th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976).

[31] This was noted by the Court itself. 427 U.S. at 280-81 n.8.

[32] *See* Parker v. Baltimore & Ohio R.R. Co., 325 F.2d 134 (4th Cir. 1981).

[33] 29 U.S.C. §§ 621-634 (1976).

[34] SECRETARY OF LABOR, THE OLDER AMERICAN WORKERS—AGE DISCRIMINATION IN EMPLOYMENT (1965). The authors' view is shared by the Second Circuit, Geller v. Markham, 635 F.2d 1027 (1981), *cert. denied*, 101 S. Ct. 2028 (1981), but is apparently not shared by other circuits. *See* Kephart v. Institute of Gas Tech., 630 F.2d 1217 (7th Cir. 1980); Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 736 (5th Cir. 1977); Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975).

fit of the *Griggs* principle will inevitably slow the process of affirmative action for minorities and women.

The authors, and the Equal Employment Opportunity Commission,[35] apparently do not see this as a problem. But it is an inevitable and important element in the decision as to whether the "*Griggs* Principle" is applicable to the ADEA. In my view, the Congressional purpose of the ADEA can be accomplished without the "adverse impact test." The use of the "impact test" creates quixotic results in the ADEA which are not present in Title VII cases. It might invalidate practice which favors many older workers, such as promotion from within and "step" increases based on longevity.

CONCLUSION

The authors correctly identified the need for a text which attempts a synthesis of Title VII law. They have undertaken this task in the spirit of support for the policies of equal employment opportunity. They have made a thought provoking and sensitive analysis. My disagreements with some of their conclusions does not detract from my admiration for the thorough and comprehensive quality of their effort.

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[35] Proposed Regulations, 44 Fed. Reg. 68858 (Nov. 30, 1979).

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