1999

Proceedings of the 1999 Annual Meeting, Association of American Law Schools Section on Employment Discrimination Law: Is There a Disconnect between EEO Law and the Workplace?

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PROCEEDINGS OF THE 1999 ANNUAL MEETING, ASSOCIATION OF AMERICAN LAW SCHOOLS SECTION ON EMPLOYMENT DISCRIMINATION LAW: IS THERE A DISCONNECT BETWEEN EEO LAW AND THE WORKPLACE?

(The following is an edited transcript of the proceedings of the section on Employment Discrimination Law at the AALS Annual Meeting, New Orleans, Louisiana, January 9, 1999.)

DOUGLAS D. SCHERER*: Good morning. The program description asks the question, "Is there a disconnect between existing EEO jurisprudence and the realities of the workplace and workforce of the Twenty-First Century?" Societal disapproval of employment discrimination is reflected in federal EEO laws that have been enacted during the last thirty-six years and in court interpretations of these laws. The goals of these laws are fairly clear. It is less clear how well these goals have been achieved. Of more importance for this morning's session, serious questions can be raised concerning the extent to which these laws connect to the forms of discrimination that are emerging and that are becoming visible as the workforce and workplace change. These issues will be addressed this morning by our superb panel of speakers.

In the order in which they will speak, our speakers are: Dr. Jim Sharf, Attorney Rick Seymour, Professor Maria O'Brien Hylton, and Professor Paulette Caldwell. Our first speaker, Dr. Sharf, is an industrial psychologist and a management consultant who assists employer clients with EEO compliance and litigation support. Earlier in his career, he was a staff psychologist with the EEOC and drafted the 1978 Uniform Guidelines on Employee Selection Procedures. Later, he served as special assistant to the EEOC Chair and drafted sections of

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the 1991 Civil Rights Act. We are very fortunate to have Dr. Sharf with us this morning.

Our second speaker will be Attorney Rick Seymour. Mr. Seymour is the Director of the Employment Discrimination Project of the Lawyer's Committee for Civil Rights Under Law, and is the premier Title VII class action litigator in the country. He has been the attorney for a party or an amicus curiae in most of the emloyment discrimination cases decided by the U. S. Supreme Court during the last fifteen years. He is co-author of the B.N.A. publication *Equal Employment Law Update* and publishes an excellent newsletter, *Civil Rights Act and EEO News*. He will provide a connection between theoretical doctrine and the realities of employment discrimination litigation.

Our third speaker will be Professor Maria O'Brien Hylton of Boston University School of Law, who teaches and writes in the field of employee benefits. Her extensive scholarship demonstrates that she is a thoughtful, original, and independent writer, and her recently completed casebook on employee benefits will be used by many people in this room and by a large portion of the professors across the country who teach employee benefits law. Her presentation will provide a bridge between employee benefits law and employment discrimination law. Those who teach employment law and employment discrimination law should realize that lawyers for plaintiffs are becoming increasingly sophisticated about ERISA and are looking for ERISA claims lurking in fact patterns that previously would have been viewed as raising only statutory discrimination or common law claims. Quite often, the ERISA claim is the one that is most likely to succeed.

Our fourth speaker will be Professor Paulette Caldwell of New York University School of Law. Professor Caldwell is well known for her work in the area of race, and her intersectionality scholarship helped develop the way we conceptualize the field of employment discrimination. We are very fortunate to have her with us this morning, to give us her thoughts and tie together the presentations of all four speakers.

JAMES C. SHARF, PH.D.*: I feel very ambitious, "carrying coals to Newcastle," speaking to you attorneys about the law, but I'll show you a view from the scientist-practitioner's standpoint, that of an industrial psychologist whose day-in and day-out work deals with the burdens defined by regulation, statute and professional employment testing standards. I also want to acknowledge my teacher, my very first law teacher, Rick Seymour, who is on the program here. Rick got hold of me back in 1972 when I was an aspiring assistant professor in the business school at American University, back in Washington. *Griggs*[1] had come down in 1971. I didn't know what *Griggs* was all about, but I was curious. Rick invited me to learn about employment law in his capacity as lead attorney at the Lawyers Committee for Civil Rights under Law. We challenged the "job-relatedness" of the then Federal Service Entrance Exam at the U.S. Civil Service Commission and won in the Federal District Court. At least as important as the court victory was the very first lesson I leaned under Rick's tutelage. This was the meanings of the words *pro bono*. I have never regretted that lesson.

The employment litigation trends I have written about are several. Let me give you my conclusions before discussing each in turn. Of surprise to most employers, first of all, is that over the last decade, employment litigation is more likely to have been "tort claims" brought under common law then employment discrimination claims brought under federal statutes. Second, when arguing under federal statute, plaintiffs' attorneys will allege disparate treatment so that they can argue before a jury where they are twice as likely to win than would be the case arguing disparate impact before a judge.

Third, common law settlements and judgments pay more in punitive and compensatory damages than capped awards available under federal statutes. The fourth trend I will show is that incumbents and former employees are almost seven times more likely to sue than applicants for employment. And finally, employers are four hundred times more likely to be sued by private plaintiffs' attorneys than by the EEOC.

Now, how do I get to these conclusions about these employment litigation trends? Well, follow me on this. Prior to Congress' passing the Civil Rights Act of 1991,[2] Title VII[3] and Americans with Disabili-

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* President, Sharf & Associates.

1. Griggs v. Duke Power Co., 401 U.S. 424 (1971).
2. Pub. L. No. 102-166, 105 Stat. 1071 (1991).
3. 42 U.S.C. §§ 2000e to 2000e-17 (1994).

ties Act (ADA)[4] claims were only heard before a judge, never before a jury. Monetary awards under these federal statutes were equitable "make-whole" relief, limited to reinstatement and reimbursement for back pay. Up until 1989, a post-Civil War statute known as Section 1981 of 42 U.S. Code[5] had been broadly used by plaintiffs' attorneys to obtain uncapped pain and suffering awards and punitive damages when racial disparate treatment was found in making any employment decision. Disparate treatment, as you know, is treating similarly situated individuals differently with respect to a prohibited classification such as race or gender. In 1989, however, the Supreme Court's *Patterson*[6] decision held that Section 1981 was limited to the making of contracts. Thereafter, only hiring decisions could be challenged under Section 1981.

All the while, over the past two decades, there has been a growing precedent of uncapped compensatory and punitive tort damages awarded by juries to plaintiffs who successfully challenge employment decisions under common law. I need not go into explanation of what common law is to you folks. I, however, am still waiting for a cogent explanation of what a tort is, but that's another discussion. Tort claims do not deal with contracts, such as the decision to hire or fire someone. Employment torts deal with civil wrongs against a person, such as pain and suffering resulting from employment decisions or discharge in violation of public policy. I found that tort claims are most frequently argued by plaintiffs challenging employers' layoff decisions. What can we conclude about employment tort trends?

What is confounding about trying to generalize from the precedent of common law decisions is that each state and the District of Columbia has its own set of judge-interpreted precedents. So a common law precedent in California, which Rick Seymour will point out is a hot-bed of tort litigation, may not offer much guidance to a litigator in New York State. It is the unpredictability of outcomes when dealing with common law decisions that gives employment risk mangers real heart-burn.

According to David Copus, a colleague in the Washington office of Jones Day:

> Tort theories pose enormous risks for all employers because of the increasing creativity of plaintiffs' lawyers, the increasing

4. 42 U.S.C. §§ 12101-12213 (1994).
5. 42 U.S.C. § 1981 (1994).
6. Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

> willingness of common law judges to find ways to permit plaintiffs to recover tort damages, and the essentially unlimited nature of tort damages. The risk from tort liability far exceeds the risk posed by federal statutory civil rights violations in almost every case.[7]

Where do federal statutes come into play when analyzing employment litigation trends? The Civil Right Act of 1991, sections of which I helped draft as Special Assistant to EEOC's Chairman, substantially increased employment risks beyond those under the Civil Rights Act of 1964 and its amendments in 1972. Section 102 of the Civil Rights of 1991 changed monetary incentives for plaintiffs' attorneys by now allowing for monetary compensatory and punitive damages in both Title VII and ADA cases involving intentional discrimination based upon the disparate treatment theory of discrimination.[8] Title VII and ADA plaintiffs now get a jury trial when damages are sought for employment decisions in which intentional discrimination is alleged. Under the Civil Rights Act of 1991, compensatory damages include future pecuniary losses, emotional pain and suffering, inconvenience, loss of enjoyment of life, and any other pecuniary losses. These damages are in addition to equitable "make-whole" relief such as reinstatement and back pay which had previously been available. Punitive damages are now awarded when a plaintiff can demonstrate that the employer acted with "malice" or with "reckless indifference."[9]

Figure 1 shows that between 1989 and 1995, 57 percent of all employment discrimination claims were brought under common law. Simply stated, more than half of all employment claims in the past decade were not based on federal EEO status. In addition to claims of discrimination, common law claims include intentional infliction of emotion pain and suffering and, to a lesser extent, invasions of privacy. Even though monetary damages are available under Title VII, tort damage claims are still brought under common law in a civil trial before a jury because there is no cap on monetary awards. In contrast, of course, the Civil Rights Act of 1991 caps individual claims at between $50,000 and $300,000 depending on the size of the employer. So as to Doug's first question posed to this panel which is, "Are the federal statutory remedies appropriate remedies for discrimination,?"

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7. D. Copus, *Employment Law 101 Deskbook,* NAT'L EMPLOYMENT L. INST. 56 (1996).
8. 42 U.S.C. § 1981a (1994).
9. *See* Kolstad v. American Dental Ass'n, 119 S. Ct. 2118 (1999).

Figure 1 shows they are not.

Among cases brought under federal EEO statutes, 18 percent of all employment cases involve claims of age, 9 percent race, 6 percent disability, and 10 percent other, primarily sex discrimination. Figure 2 shows a $408,000 average per award when combing both statutory and common law claims. Common law awards were above that average dollar figure. Given the absence of monetary caps under common law, it would hardly be in a plaintiff's interest to bring charges primarily on statutory grounds. Figure 1 basically shows the plaintiff's attorney's preference for alleging employment discrimination under common law, and the dollar amounts in Figure 2 convincingly reveal why this is so.

When I examined the EEOC's federal statute claims data, I found that the least likely charges, comprising about 2 percent each, are religious discrimination and comparable worth arguments. National origin claims have decreased somewhat over the past decade, remaining relatively constant at about 8 percent. Disability claims became actionable in 1992 and now comprise slightly more than 20 percent of all charges, a level that has been relatively constant for the last five years. Retaliation claims have increased year-by-year to the point today where they comprise about 20 percent of all claims. Sex discrimination accounts for about 30 percent of the claims. Notwithstanding press reports to the contrary, those sex discrimination figures have been quite constant over the past decade. What is notable in Table 1 is the declining significance of race claims. Although race discrimination accounted for 36 percent of the charges in fiscal year 1997, this figure has steadily deceased since the beginning of the decade.

With respect to EEOC's batting averages, notwithstanding several highly publicized class action cases, for most employers the EEOC is not the threat that it once was when it comes to the risk of litigation. An examination of all charges with the EEOC in 1994 reveals that "no cause" and "administratively closed," categories each accounted for about 30 percent of all changes. The latter, "administratively closed," typically consists of a charging party's failure to respond to Commission correspondence. One quarter of all charges were added to the "back log." This means that 88 percent of all charges either went into "back log," were administratively closed," or were "dismissed" for lack of merit. Eleven percent were otherwise disposed of, which includes finding a violation.

What is most revealing are the following two statistics with regard to EEOC enforcement. First, of all, in less than 1 percent of the cases was settlement reached after the commission issued a cause finding. Second, the commission filed suit in less than one half of 1 percent of all cases. Since fewer than half of all discrimination claims were brought under federal statutes, and since less than half of 1 percent of those involved the EEOC bringing suit, this means that the Commission was a party in less than one quarter of 1 percent of employment litigation. In other words, 400 claims are filed by plaintiffs' attorneys for each case brought by the EEOC.

According to David Copus who has worked for the EEOC and now represents employers: "Created by Congress with the best of intentions, 30 years later the EEOC has become little more than a paper shuffling agency."[10]

In 1997, a corporate sample from the *Fortune* One Hundred was asked to document their use of objective selection procedures. Forty-three corporations responded. Objective measures, primarily employment tests, were used in 40 percent of all selection employment decision-making. A similar survey done by my industrial-psychologist colleagues showed a similar base line – between 40 percent and 44 percent of all employment decisions involved the use of employment tests.[11]

Figure 3 shows the distribution of employment test use by business categories while Figure 4 shows which objective measures were used. Not surprisingly, interviews continue to be the universal workhorse of employment decision-making, used in about 99 percent of all employment decisions. But the 40 percent figure, for the use of an employment test, has been a quite consistent baseline. The second and third most frequently used assessments were resumes, and experience and education inquiries, each conducted by about 70 percent of corporate employers. The source of information was complemented by background checks which were conducted in about a third of the programs, and references were checked about a quarter of the time.

Table 2 shows EEOC's FY '97 charges summarized by statute and basis code. The right hand column "Percent of All Charges,"

10. D. Copus, "*Employment Discrimination Law Revisited,*" Presentation to Personnel Testing Council of Southern California, Los Angeles, CA. (Feb. 1997).

11. N. Tippins & S. Wunder, "Entry-level Management and Professional Selection: Best and Most Common Practices (Are They the Same?), Workshop presented at the meeting of the Society for Industrial and Organizational Psychology, St. Louis, MO (April 1997).

summarizes across Title 7, the Equal Pay Act, the Age Discrimination Employment Act, and the American with Disabilities Act. First of all, hiring accounted for only 7 percent of those charges, while discharge accounted for 47 percent. This means that as far as assigning risks in employment, an employer is seven times more likely to be sued by an incumbent or former employee than by an applicant.

Although used in 40 percent of the *Fortune* One Hundred and by 44 percent of the American Management Association member companies, objective test procedures did not even show up on the EEOC's radar. Challenges to employment tests account for three-tenths of 1 percent of all EEOC's charges. This lower risk profile for employment testing was also confirmed in separate surveys that Keith Pyburn of McCalla Thompson here in New Orleans conducted which further documented the decline in employment testing case law citations.[12]

Now, if we said that interviews are the most common employment decision-making systems, and challenges to hiring decisions represent only 7 percent of the charges, it is nevertheless likely that casual interviews would be displaced in place of more structured patterned interviews. Basically the reason is this. Ninety-none percent of all employment decisions involve interviews. A structured interview is looked at as a disparate impact instrument. It's objective; it is, in fact, not susceptible to disparate treatment kinds of challenges. It's the unstructured, discretionary type of casual interview that invites a disparate treatment argument which is, of course, advantageous to the plaintiff because it goes before a jury. Disparate impact, of course, goes before a judge.

So, the long-term trend is this. Objective procedures are a good risk management strategy. They are certainly cost effective in terms of the exposure for employment testing. Forty to 44 percent of all employment decisions use employment tests. The EEOC's figures show that three tenths of 1 percent involve employment tests. Recall that Figure 1 revealed that only 43 percent of all discrimination charges involve federal statutes. So that three tenths of 1 percent in terms of the Commission's base rate should be cut in half, given both combined statutory and common law bases. There is exposure base-rate of 44 percent test use but only about one to two tenths of 1 percent of the risk of litigation. When you look at the employment in-

12. K. Pyburn, "Trends in Cases Involving Employment Tests," Presentation to Personnel Testing Council of Northern California, Sacramento, CA (March 1996).

terview and other assessment procedures, the structured assessment lends itself to a disparate impact challenge. It is less risky for the employer to defend a disparate impact case because the plaintiff is twice as likely to win a disparate treatment case before a jury than an impact case before a judge.

So my overall conclusions are first that federal statutes are being superceded by common law claims and second that an effective employment risk strategy is to displace subjective, unstructured assessments in favor of objective selection procedures. I continue to maintain that the use of objective, job-related employment procedures is the cornerstone of a color and gender-blind society. This is not only a desirable public policy; it also makes good business sense because it lowers employment risk.

Thank you.

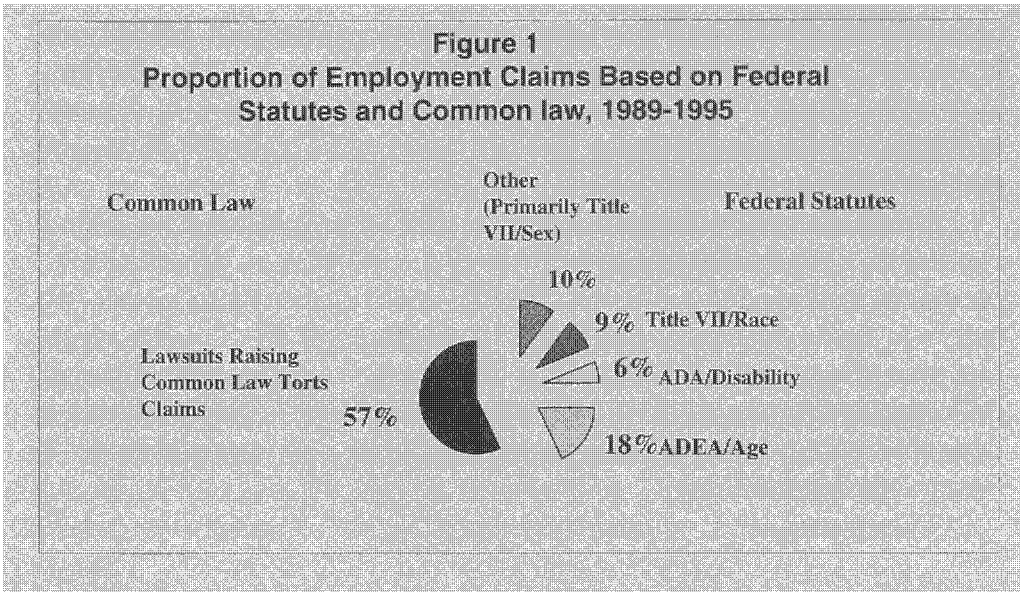
Figure 1
Proportion of Employment Claims Based on Federal Statutes and Common law, 1989-1995
Common Law
Other (Primarily Title VII/Sex)
Federal Statutes
10%
9% Title VII/Race
6% ADA/Disability
18% ADEA/Age
Lawsuits Raising Common Law Torts Claims
57%

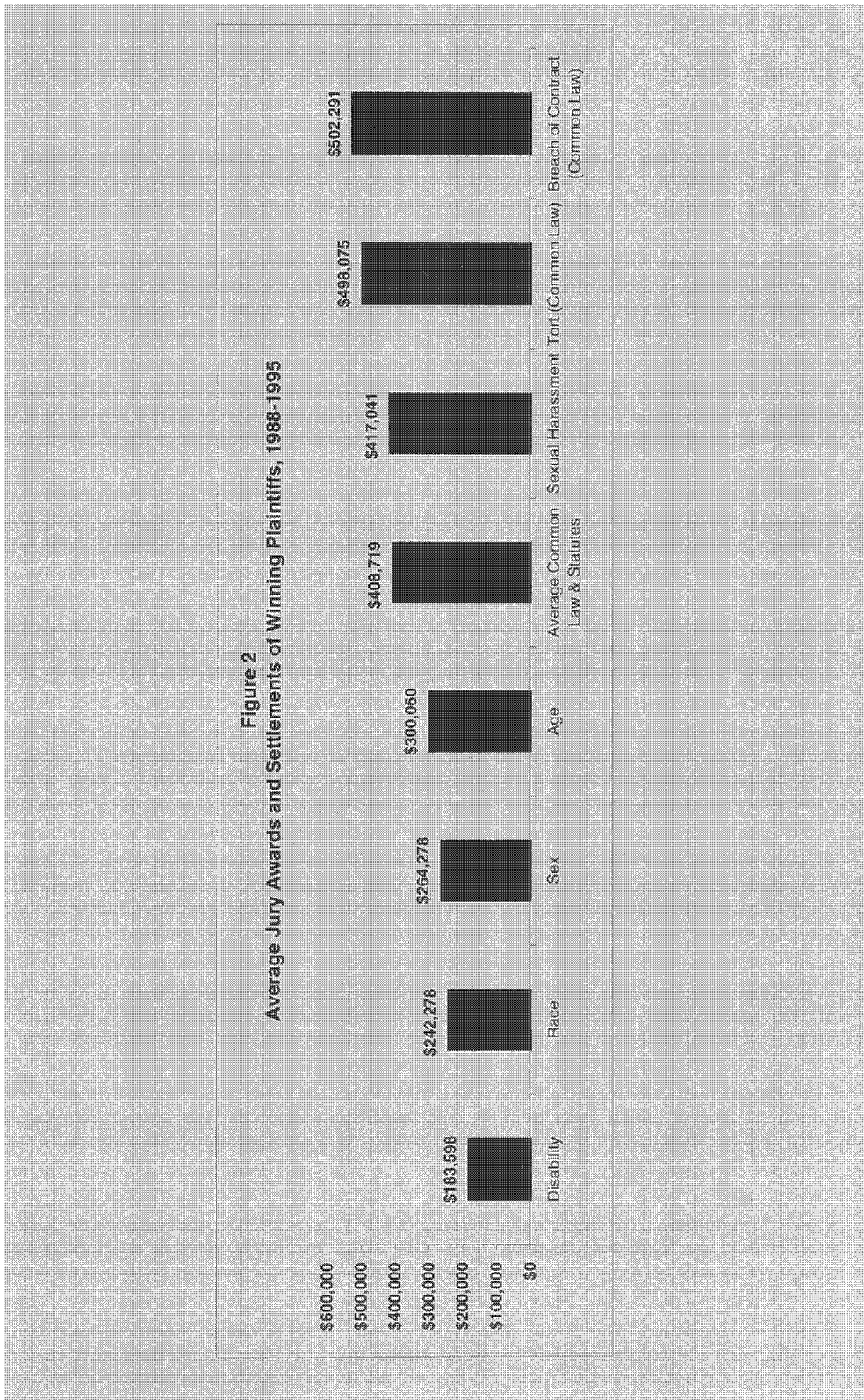
Figure 2
Average Jury Awards and Settlements of Winning Plaintiffs, 1988-1995
$600,000
$500,000
$400,000
$300,000
$200,000
$100,000
$0
$183,598
$242,278
$264,278
$300,060
$408,719
$417,041
$498,075
$502,291
Disability
Race
Sex
Age
Average Common Law & Statutes
Sexual Harassment
Tort (Common Law)
Breach of Contract (Common Law)

Figure 3
Psychological Testing by Business Category
Percentage Distribution
AMA Members, 1996

Testing Type	Manu-facture	Finance	Wholesale/ Retail	Bus./Prof. Serv.	Public Admin.	Non-Profit Orgs.	Other
Cognitive ability test	31.7	29.8	29.4	25.4	46.7	20.8	21.7
Interest inventory	10.7	14.9	9.8	14.9	-	12.5	9.6
Managerial assessment	21.7	19.1	25.5	20.9	33.3	15.0	17.5
Personality measurement	20.5	17.0	27.5	22.4	33.3	10.0	18.7
Physical ablility test	16.3	6.4	11.8	9.0	20.0	6.7	12.7
Any psch. testing	41.7	40.4	39.2	37.3	66.7	30.0	33.7
No psych. testing	58.3	59.6	60.8	62.7	33.3	70.0	66.3
Total percentage	100.0	100.0	100.0	100.0	100.0	100.0	100.0
(Number)	(429)	(47)	(51)	(67)	(15)	(120)	(166)

Source: 1997 American Management Association Survey: Workplace Testing and Monitoring. Table PSY (Banner 2).

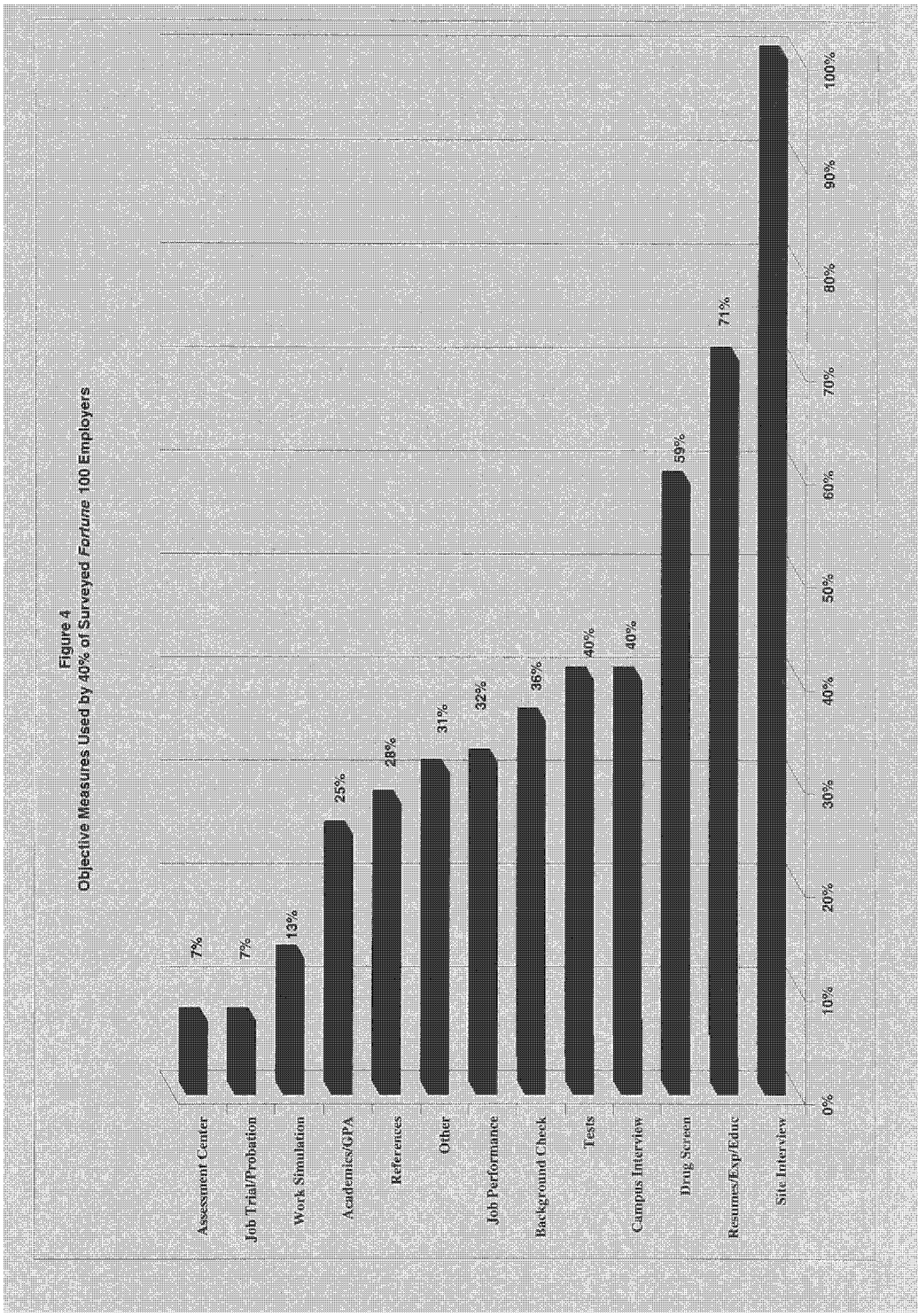
Figure 4
Objective Measures Used by 40% of Surveyed Fortune 100 Employers
Assessment Center
Job Trial/Probation
Work Simulation
Academics/GPA
References
Other
Job Performance
Background Check
Tests
Campus Interview
Drug Screen
Resumes/Exp/Educ
Site Interview
7%
7%
13%
25%
28%
31%
32%
36%
40%
40%
59%
71%
0%
10%
20%
30%
40%
50%
60%
70%
80%
90%
100%

TABLE 1: CHARGE STATISTICS FROM THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION FY 1990 THROUGH 1997

	FY 1990	FY 1991	FY 1992	FY 1993	FY 1994	FY 1995	FY 1996	FY 1997
Total Charges	62,135	63,898	72,302	87,942	91,189	87,529	77,990	80,680
Race	29,121	27,981	29,548	31,695	31,656	29,986	26,287	29,199
	46.7%	43.8%	40.9%	36.0%	34.8%	34.3%	33.8%	36.2%
Sex	17,815	17,672	21,796	23,919	25,860	26,181	23,813	24,728
	28.5%	27.7%	30.1%	27.2%	28.4%	29.9%	30.6%	30.7%
National Origin	7,236	6,692	7,434	7,454	7,414	7,035	6,687	6.712
	11.6%	10.5%	10.3%	8.5%	8.1%	8.0%	8.6%	8.3%
Religion	1,147	1,192	1,388	1,449	1,546	1,581	1,564	1,709
	1.8%	1.9%	1.9%	1.6%	1.7%	1.8%	2.0%	2.1%
Retaliation	7,579	7,906	10,932	12,644	14,415	15,342	14,412	18,113
	12.1%	12.4%	14.4%	14.4%	15.8%	17.5%	18.5%	22.5%
Age	14,719	17,550	19,573	19,809	19,618	17,416	15,719	15,785
	23.6%	27.5%	27.1%	22.5%	21.5%	19.9%	20.2%	19.6%
Disability	na	na	***1,048	15,274	18,859	19,798	18,046	18,108
			1.4%	17.4%	20.7%	22.6%	23.1%	22.4%
Equal Pay Act	1,345	1,187	1,294	1,328	1,381	1,275	969	1,134
	2.2%	1.9%	1.8%	1.5%	1.5%	1.5%	1.2%	1.4%

The number for Total Charges reflects the number of individual charge filings. Because individuals often file charges under multiple bases, the number of Total Charges for any given fiscal year will be less than the total for the eight bases listed.

** Statistics for FY 1996 are preliminary data.

*** EEOC began enforcing the Americans with Disabilities Act on July 26, 1992.

Source: U.S. Equal Employment Opportunity Commission, 1997.

TABLE 2: 1997 STATUTE/BASIS SUMMARY BY ISSUES

	Issues	Race	Relig	Origin	Title Retail	VII Sex	Other	Total VII	Total EPA	Total ADEA	Total ADA	Other STAT	Total Issues	Total CHGS	% VII CHGS	% CHGS	
A1	Advertising	18	0	3	3	18	2	26	0	7	4	0	37	31	.0	.0	A1
B1	Benefits	391	19	101	266	398	21	841	43	492	412	0	1788	1476	.4	1.8	B1
B1	Ben.Ret/Pen	46	9	19	35	44	4	118	9	282	72	0	481	384	.2	.5	B1
B3	Benefits Ins	34	1	14	34	58	3	102	2	84	184	0	372	308	.2	.4	B3
D1	Demotion	1228	40	260	729	1008	39	2314	62	803	586	0	3785	3058	3.9	3.8	D1
D2	Discharge	13714	878	3314	7438	10369	409	26566	276	7743	9743	0	44328	38159	45.2	47.2	D2
D3	Discipline	3129	161	637	2093	1658	78	5242	47	923	1074	0	7286	6209	8.9	7.7	D3
E1	Exclusion	71	6	39	73	59	6	162	6	24	19	0	211	178	.3	.2	E1
H1	Harassment	5759	529	1778	4720	4592	225	11458	155	1992	2507	0	16112	13497	19.5	16.7	H1
H2	Hiring	2312	153	574	592	1300	119	3798	20	2074	1433	0	7325	6244	6.5	7.7	H2
I1	Intimidation	913	71	269	1051	992	53	2054	33	341	367	0	2795	2345	3.5	2.9	I1
J1	Job Class	153	4	30	70	104	3	242	17	47	55	0	361	295	.4	.4	J1
L1	Layoff	881	41	373	387	711	34	1809	28	1137	655	0	3629	2976	3.1	3.7	L1
M1	Maternity	51	4	13	46	528	2	534	5	1	23	0	563	534	.9	.7	M1
O1	Other	1039	65	251	657	698	93	1950	40	445	588	2	3025	2549	3.3	3.2	O1
P1	Paternity	4	0	1	0	6	0	9	1	2	0	0	12	10	.0	.0	P1
P3	Promotion	4736	131	866	1759	2536	224	7164	162	1603	720	0	9649	8194	12.2	10.1	P3
P4	Med Ind/Exam	8	4	1	7	11	3	24	0	11	108	0	143	111	.0	.1	P4
Q1	Qualification	83	3	16	54	53	4	135	9	37	31	0	212	162	.2	.2	Q1
R1	Recall	169	4	39	68	105	3	308	4	155	197	0	664	541	.5	.7	R1
R2	Ref Unfavor	50	6	21	160	45	2	213	3	38	84	0	338	292	.4	.4	R2
R3	Referral	86	7	16	39	28	3	138	0	23	34	0	195	177	.2	.2	R3
R4	Reinstatement	147	11	32	102	132	7	321	1	135	575	0	1032	816	.5	1.0	R4
R5	Retire Unvol	22	10	11	20	15	5	63	0	234	90	0	387	298	.1	.4	R5
R6	Rees Accom	584	195	150	467	571	33	1427	17	657	5828	0	7929	6034	2.4	7.5	R6
S1	Segreg Fac	24	3	5	20	14	1	39	0	1	1	0	41	39	.1	.0	S1
S2	Segreg Loc	6	0	0	3	0	0	6	0	0	0	0	6	6	.0	.0	S2
S3	Seniority	94	1	19	33	60	6	158	6	73	49	0	286	231	.3	.3	S3
S4	Sex Harass	720	85	217	4397	9114	45	9314	135	282	343	1	10075	9332	15.8	11.5	S4
S5	Suspension	1364	67	250	765	652	42	2213	15	288	567	0	2973	2587	3.8	3.2	S5
T1	Tenure	32	10	22	34	51	2	85	5	23	12	0	125	96	.1	.1	T1
T2	Terms of Emp	7115	367	1577	4511	5129	283	12893	291	2465	2660	0	18309	15363	21.9	19.0	T2
T3	Testing	131	3	20	22	60	11	175	0	33	30	0	238	206	.3	.3	T3
T4	Training	689	19	115	262	340	34	1031	12	234	131	0	1408	1191	1.8	1.5	T4
U1	Union Rep	200	10	22	87	102	9	313	2	85	145	0	545	441	.5	.5	U1
W1	Wages	2996	100	622	1387	2491	111	5496	1000	1033	685	0	8214	6403	9.3	7.9	W1
Total Issues		48999	3017	11697	32391	44052	1919	98741	2406	23807	29902	3	198193	0			
Total Charges		29330	1712	6723	16368	24790	1014	58839	1136	15814	18133	0	.0	80896			
% Total Charges		36.3	2.1	8.3	20.2	30.6	1.3	72.7	1.4	19.5	22.4	0					

RICHARD T. SEYMOUR* : Thank you. I have a paper entitled "Affirmative Action" which provides excerpts from several editions of the book I do with a management attorney, *Equal Employment Law Update*.[13] It illustrates the largest disconnect that there is in the field of equal employment opportunity: the need, on occasion, to take race or gender into account in making employment decisions, and the legal constraints that make it difficult to do so.

If anyone doubts that there is sometimes a need to take race into account, consider that if you are running a police department and you have to assign somebody to try to infiltrate an ethnically oriented gang, whether it is Chicanos or blacks or Asians, it is very difficult to stage a successful infiltration if your police department is mostly white. You have to have the ability to do investigations that are effective with respect to all groups. But Title VII, of course, does not have a BFOQ for race, and the courts on both constitutional and statutory standards have been growing more restrictive on the permissible bases on which any employer can indulge in race-conscious or sex-conscious selection.

In a recent case, *Lutheran Church, Missouri Synod v. Federal Communications Commission*,[14] the court said that fostering diversity in programming is not an adequate basis for the FCC to be requiring licensees to demonstrate their EEO compliance. There are further proceedings that the FCC will hold, but that is a decision which theoretically can throw into question much of the activities of the Office of Federal Contracts Compliance Programs. From my perspective, this is a very troubling decision.

Boston Police Superior Officers Federation v. City of Boston[15] upheld an affirmative action promotion even though the employer based it on an erroneous belief that the promotion was required by a consent decree. The court found that, apart from the consent decree, the promotion was justified to remedy prior discrimination.

Taxman v. Board of Education of Township of Piscataway,[16] is an example of too many of the cases. *Taxman* was a Third Circuit case in which there was a teacher layoff, and there was no written af-

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13. RICHARD T. SEYMOUR & BARBARA BERISH BROWN, EQUAL EMPLOYMENT LAW UPDATE (1998).

14. 141 F.3d 344, 351 (D.C. Cir. 1988).

15. 147 F.3d 13, 23-24 (1st Cir. 1998).

16. 91 F.3d 1547 (3d Cir. 1996) (*en banc*), *cert. dismissed*, 118 S. Ct. 595 (1997).

firmative action plan that had anything to do with layoffs. There was a provision in the plan that said that the district wanted to increase the racial diversity of its faculty. The district had no basis for doing so because the statistics showed that minorities were actually over- represented in each of the schools of the school district compared with the availability figures. But put that aside. The plan said that when you have two equally qualified applicants, in order to promote diversity you flip a coin. Or you prefer the individual who is black. The district then applied that provision to a layoff. The school board members were not sure why they applied it to a layoff. There was only one deposition, of the president of the board. He failed to identity diversity as a basis for the decision that was being taken. When the deposition transcript got to him and he noticed that diversity was not identified as a basis, he altered his testimony in the addendum sheet that went back to the court reporter. So that is how diversity came into that case.

In a totally unplanned, uncoordinated, and unjustified fashion, there are a lot of those plans out there still. It is very easy for plaintiffs challenging the plans to knock them down. The *Taxman* case was sidetracked from a Supreme Court decision, but there is left standing a Third Circuit rule—like the Fifth Circuit rule—that providing a remedy for past discrimination is the only way to justify a group conscious selection. That means that if you are in a situation where you have a predominantly white or all white police force, perhaps because of some of the employment tests that public safety agencies routinely use, you're not going to be able to do anything about investigating crimes that require any undercover work. You're not going to be able to assign African American or Hispanic officers, even though some people in the minority community may find it more comfortable to deal with those officers when dealing with particular types of crimes.

Police Association of New Orleans v. City of New Orleans,[17] is another knock-down of diversity. *Hopwood v. Texas*,[18] is a case you all know about. *Hopwood* is interesting because it illustrates the kind of thumb on the scale that can occur in litigation. The University of Texas Law School had no interest in putting on any evidence of its own past discrimination, if any. It simply failed to address the question, relying instead on discrimination in all other levels of the Texas

17. 100 F.3d 1159, 1168–69 (5th Cir. 1996).
18. 78 F.3d 932, 935–38 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

educational system. Minority law students tried to intervene to put on that evidence. Their intervention was denied. So the case went to judgment based upon an incomplete record because no party had an interest in putting in any evidence of past discrimination no matter what its extent would be.

Black Fire Fighters Ass'n of Dallas v. City of Dallas,[19] knocked out a race-conscious selection practice because it could have benefited persons who could never have been victims of discrimination. A more carefully drafted provision could have passed muster if it were targeted at those persons who were more likely to have been victims of past discrimination than others.

Ensley Branch, NAACP v. Seibels,[20] says that you can take race into account where you have selection procedures that have disparate impact and have not been shown to be valid. One cannot use this stopgap remedy forever, however, because race-conscious measures may not be used in order to maintain a racial parity after the elimination of the effects of past discrimination. The goal is to develop valid selection procedures, or ones that have little or no disparate impact, or a combination of the two.

The Seventh Circuit has a couple of cases, *McNamara v. City of Chicago*,[21] and *Wittmer v. Peters*,[22] saying that there are situations in which operational needs might justify the use of race. That is the only circuit that has done this so far.

Tharp v. Iowa Department of Corrections,[23] says that you can assign correctional officers based on sex, where you have female inmates and you have particular guard positions in which guards would observe inmates while they're showering, using the restroom facilities, and so forth. I have to say that there is no parallel body of law when it comes to male inmates. Male inmates have been presumed not to be entitled to any privacy, but the situation is considered differently with respect to female inmates.

That's it for this paper. Let me describe what's going on in the field of employment discrimination law since you're all teaching that. I have to say I have a peculiar perspective on this. Since I've started doing this book for the American Bar Association and BNA, I have read about 4,000 published appellate decisions in the field of EEO

19. 19 F.3d 992, 995-97 (5th Cir. 1994).
20. 31 F.3d 1548, 1571-75 (11th Cir. 1994).
21. 138 F.3d 1219, 1222 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 444 (1998).
22. 87 F.3d 916, 920-21 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 949 (1997).
23. 68 F.3d 223, 226 (8th Cir. 1995), *cert. denied*, 517 U.S. 1135 (1996).

law over the last three years. It is an intensive type of experience, but it also gives one a sense of some broad currents and some areas where some changes in legal education may be very beneficial for all sides of the field.

There used to be, until the Civil Rights Act of 1991, a relatively stable number of fair employment cases filed annually in federal courts. While federal courts are much less important in states like California where there are superior state remedies, they are much more important in cases, across the South for example, where there are no state law provisions that entitle one to go into court. All Southern states have are the kind of the state-law provisions that will qualify them for a subsidy from the EEOC and some role in the investigation of complaints. Federal courts are more important in states like New York where no common-law torts are recognized. That is, they are recognized but they are trumped by the workers' compensation statutes that say they are the exclusive remedy.

The importance of federal statutory claims thus varies enormously from state to state. However, there was a relatively stable number of 8,000 to 9,000 new cases filed per year up through 1991. Then the number started to increase. It recently reached about 23,000 new fair employment cases filed per year. This is one out of every eleven and a half civil cases filed in the federal district courts. It would not be a mistake to call that a "crushing torrent," like a storm surge. And like any storm surge, it deforms the structures through which it passes and strange things begin to appear.

Most fair employment cases are not resolved by trial or by settlement; they are resolved by summary judgment. I take that back; there are no real figures on settlement. But of those cases that are not settled, a large majority are resolved by summary judgment. I'm not saying that that's wrong. I think it's probably inevitable given the crush of cases. Given the federalization of what had been previously many state and local crimes, and given the speedy trial act giving preference in scheduling to criminal cases, there is a narrowing window of opportunity for the entire civil case load of a federal district judge. And when there is a huge rush of new cases coming in, there is a reflexive action—cramp down on it in some way or another.

Some of the courts of appeals, like the Second and Seventh Circuits for example, have been increasingly cautioning that too many judges are weighing the evidence for themselves in deciding whether or not the case should proceed to trial. That is a real problem. There

are aberrations such as the judicial enthusiasm for "cram-down" arbitration. I use that pejorative term because if an individual sometimes wants to work in an industry, as in the securities industry where you have to fill out a U-4 form in order to register as a broker, you have to agree to arbitration or you cannot get a job.

If the employers in any industry get together in an association and decide to impose this type of rule across the board, you may be deprived of the only livelihood you know how to earn if you will not agree to the arbitration clause. Like the old Yellow Dog contracts, providing that "I will never join the union," this type of contract is an absolute barrier. It is difficult even to think of this as a contract, in the sense of it's being volitional on the part of the employee.

Some companies are putting these mandatory arbitration requirements in their application forms. You will not even be considered for a job unless you agree to it.

And what do you get when you agree? Well, we have a case, *Hooters of America v. Phillips*,[24] in which the company sued our client to prevent her filing a sexual harassment claim in court. The court described the facts: "Phillips alleges that in June 1996, Gerald Brooks, a Hooters official and the brother of HOMB's principal owner, sexually harassed her by grabbing and slapping her buttocks. After appealing to her manager for help and being told to 'let it go,' she quit her job against the company."[25] So, Hooters sued to force her into its arbitration system which is characterized by no compensatory damages, and punitive damages capped at one year's gross cash compensation. This amounted to about $13,000 in her case because most of her income came from tips. Her choice of arbitrators had to be made from a list, all the members of which were to be pre-selected by Hooters. There was no requirement of impartiality; the Three Stooges would have done perfectly well.

And this is far from the only arbitral system which stacks the deck in favor of the person who unilaterally set up the system. It's not like collective-bargaining arbitration where you have an institution, a union, there to protect the interests of employees, which knows who these players are and how these arbitrators have ruled in other cases, and which is there to deal with the workplace on an ongoing basis. There is not enough time to talk about the other things that are happening in arbitration except to say that it's a field in much

24. 173 F.3d 933 (4th Cir. 1999).
25. *Id.* at 935.

flux.

Substantively, the Supreme Court has knocked out a number of limiting doctrines adopted by the lower courts. *Harris v. Forklift Systems*[26] knocked out the Sixth Circuit's requirement of severe psychological injury for sexual harassment cases. *Faragher v. City of Boca Raton*[27] knocked out a series of hurdles that sexual harassment victims had had to climb and surmount in order to be able to keep their claim alive under the Eleventh Circuit's procedures. *Robinson v. Shell Oil Co.*[28] knocked out the holding of the Fourth Circuit that former employees have no protection whatsoever from retaliation. And if you look at the Supreme Court decisions, from the enactment of the Civil Rights Act of 1991 to the present, in every single case, the Supreme Court has decided in favor of the civil rights claim at least in part. The big exception is *Hazen Paper Co. v. Biggins*,[29] in which the Supreme Court said that, although the age discrimination act applies to stereotypes, it does not apply to things that are merely correlated with age, such as firing employees based upon how much they're earning. That may be a proxy for age, there may be a strong correlation between age and salary, but that is not a viable claim under the Age Discrimination in Employment Act unless the employer intended to discriminate on the basis of age through the use of this proxy. However, *Hazen Paper* also knocked out major restrictions on the availability of liquidated damages.[30] The Supreme Court has gotten religion, I would suggest to you, in this field over the last seven years, and is trying to redirect the lower courts toward the goals of the statutes that are at issue before them. This is a real change, a sea change. There is a major disconnection between the Supreme Court and the lower courts, and the Supreme Court, at least, is not bothered by the flood of cases. It, of course, does not have to deal with the flood of cases.

Now what are the problems that might be addressed by some renewed emphasis in the teaching of employment discrimination law? It seems to me that both sides in the field are afflicted by the problem of over-reliance on black-letter principles. The biggest realization that experienced EEO practitioners make is that there is virtually no rule that is an absolute. There is always a fact pattern that is going to

26. 510 U.S. 17 (1993).
27. 524 U.S. 775 (1998).
28. 519 U.S. 337 (1997).
29. 507 U.S. 604 (1993).
30. *Id.* at 616.

make the rationale for a particular rule inapplicable. Once one articulates what that exception ought to be, there is often broad acceptance of it. The problem is that too many new attorneys do not think enough about the purposes of the rules to be able to recognize in advance that there is an exception staring them in the face. That means that the lawyer for the employer or other defendant cannot advise the client accurately. It means that the lawyer for the plaintiff may be relying upon some protection of a black-letter rule that really does not apply. A renewed appreciation for nuance would help a great deal.

The second addressable problem I see is the failure—and I have to say that this is more the fault of plaintiffs' attorneys than defense attorneys—to look at the entirety of the employment experience as a transaction. Looking with blinders, with a rifle-shot focus on one particular aspect of the employment relationship, results in a failure to consider the bases on which employers really make their decisions. If an attorney focuses only on the one decision, she or he is not looking at what happens with other employees. It may be that the employer's treatment of others demonstrates that, whatever was going on here, it was not race, age, sex, or disability discrimination. The clearest example I can give of this is that when I was speaking a couple of years ago to a group of predominantly plaintiffs' lawyers in Wisconsin, I was giving the ten top reasons, the "Letterman List," for why so many summary judgments are granted against plaintiffs. One of the top reasons was that the plaintiff's lawyer made the fundamental mistake of showing that the basis for the employer's action was mistaken. And all of these pens, which had been vigorously scribbling, stopped in mid-air and mouths started to open. I made the point that the EEO laws are intentional discrimination statutes. Disparate treatment is based on intentional discrimination. So once an attorney has shown that the employer made a mistake, he or she has got to show that it was a deliberate mistake or else the attorney has merely shown a defense. It is the failure to look at the employment relationship in a larger angle, to have a broader focus, which leads attorneys to bring a lot of cases that never should have been brought and leads federal judges to say, as some have, that these cases make them feel like they're running a divorce court for the employment relationship. And I have to tell you that when you're before a federal judge who just had a couple of real stinking cases before him, it's like climbing a glass mountain without suction cups.

MARIA O'BRIEN HYLTON* : A few benefits-related areas have direct or indirect EEO implications that add to our ongoing discussion about disconnect. Three areas are of particular importance: Section 510 of ERISA[31], the anti-discrimination and retaliation provision of ERISA; the growing problem of worker classification being used explicitly for the purpose of denying benefits access ("plan participation" access under ERISA); and the 1984 COBRA Amendments[32] to ERISA, which are of special interest to those who deal with issues affecting disabled employees.

Section 510 of ERISA makes illegal any change in job status, which is motivated by a desire to deprive the employee of an ERISA benefit.[33] Section 510 only protects ERISA benefits; an employer who is motivated by a desire to deprive an employee of a non-ERISA benefit, and uses that desire in connection with some change of job status, may violate a state law, but certainly not Section 510 of the statute. The remedies[34] include reinstatement, front and back pay and, under some circumstances, it is also possible to get attorney's fees.

What is a job status change under Section 510? The statute enumerates eight or nine different job status changes that qualify. The most significant are termination, promotion, layoff and subcontracting. The paradigm case in Section 510 jurisprudence is *Folz v. Marriot Corp.*[35] The case involved a man, Folz, who had worked for a number of years as a mid-level manager at a Marriot Corporation hotel in Missouri. Mr. Folz had consistently received above-average or superior employment evaluations, occurring every four to six months, and experienced steady increases in pay, promotions, and various perks offered by the corporation. Marriot had, for a very long time, a self-insured plan. As the payer, Marriot received the doctors' diagnoses and notes.

This enabled Marriot to learn at an early stage that Mr. Folz had been diagnosed with multiple sclerosis. While his health remained steady, Mr. Folz's employment status declined over the next four months. For the first time, he began receiving both poor work evaluations, and write-ups in his file for very minor infractions of company

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31. Employee Retirement Income Security Act, 29 U.S.C. §§1001-1461 (1994).

32. Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82 (1986).

33. Employee Retirement Income Security Act §510, 29 U.S.C. § 1140 (1994).

34. *See* 29 U.S.C. § 1132 (1994).

35. 594 F. Supp. 1007 (W.D. Mo. 1984).

rules. In a span of slightly less than four months from the time his diagnosis was made, Folz was terminated. Marriot alleged poor performance and inability to perform his job. Mr. Folz subsequently sued under Section 510 and the Missouri district court ordered his reinstatement because his employer's explanation, poor performance, was pre-textual.[36]

Almost everyone who teaches Section 510 begins with the *Folz* case, in part, because it explicitly steals the *McDonnell Douglas*[37] burden shifting test from Title VII jurisprudence. There was, and remains, little federal common law under ERISA. The courts of the 1970's, in an attempt to understand and handle ERISA discrimination cases, found Title VII cases analogous and appropriated helpful jurisprudence.

A very important distinction is that Section 510 does not prohibit any kind of plan amendment which would effectively eliminate from coverage a benefit that might be consequential to a particular plaintiff; although it is now possible, in certain circumstances, that the ADA would prohibit that kind of plan amendment. The paradigm case is *McGann v. H&H Music Co.*[38] *McGann* was pre-ADA, and involved an individual who learned that he was infected with the AIDS virus. At the time he voluntarily notified his employer, the employer was not self-insured. Four months subsequent, the employer decided to self-insure. Interestingly, the only significant difference between the new self-insured plan and the old plan was that the new plan capped all benefits for AIDS in a lifetime amount of $5,000. There had been a $1,000,000 lifetime cap under the old plan. The sole distinction, between the otherwise identical plans, was with respect to AIDS. The plaintiff in *McGann* argued vigorously that this was a kind of targeted discrimination; that the employer made this change in the plan knowing the plaintiff was infected with the virus, and that he would need this kind of treatment in the coming months. The Fifth Circuit said he failed to state a claim made under Section 510.

The last term produced a fairly interesting case, *Inter-Modal*[39], in which Justice O'Connor, writing for a unanimous majority, made it clear that Section 510 apples both to pension and welfare plans.

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36. *Id.* at 10015.

37. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

38. 946 F.2d 401 (5th Cir. 1991), *cert. denied sub nom.* Greenberg v. H & H Music Co., 506 U.S. 981 (1992).

39. Inter-Modal Rail Employees Ass'n v. Atchison, Topeka and Sante Fe Ry., Co. 520 U.S. 510 (1997).

O'Connor makes it clear that Section 510 is broad; it doesn't matter whether the underlying benefit is a vested benefit, as in the pension context, or is a welfare benefit that never vests. It will be interesting to see what happens to *Inter-Modal* on remand.[40] *Inter-Modal* involved a group of employees in the Los Angeles area who worked at one of the world's largest crate stations, unloading cargo and preparing it for transport. The interesting problem in the case is what will happen when the employer asserts a business justification for the subcontracting out of the employee's jobs, which is what took place there. The cost savings comes entirely from a loss in benefits to the subcontracted out employees. There will be a fascinating discussion in the future over whether employers are still free under Section 510, to subcontract because most subcontracting decisions are motivated by cost savings. The newly leased employees will either not get health insurance any longer or they'll get a much less generous pension.

The classification problem is known by some as the problem of "temps who aren't temporary." The problem is one that really only arises where there are leased or contract employees who work for a particular leasing client for an extended period of time. This does not relate, for example, to temporary secretaries brought in for two months to fill in for someone on maternity leave, or even those brought in to work for five or six months. These are individuals, as in the *Microsoft*[41] case, who are leased and working for the same client for, sometimes, more than 15 years. Often these individuals are providing extremely highly skilled labor. They work in software, are lawyers, and are other professionals who find themselves functioning as leased contract workers for very long periods of time. The real question in this area is whether there is something about the nature of the time, combined with the indistinguishable nature of the work done by the leased worker and the common law employee, that encourages us at some point in time to think about the "leased" worker in a different way. Do we want to tell the contracting employer that when he has had the worker for fifteen years, and the worker's function is identical to those of the common law employees, that there is a point at which the employer has to make that employee eligible for the benefits plan? The issue in the continuing *Microsoft* case is whether or not the "leased" workers get to participate in the profit

40. *See* Inter-Modal Rail Employees Ass'n. v. Atchison, Topeka and Sante Fe Ry. Co 117 F.3d 1136 (9th Cir. 1997) (remanding case to district court).

41. Vizcaino v. Microsoft Corp., 120 F.3d 1006 (9th Cir. 1997), *cert. denied*, 522 U.S. 1098 (1998).

sharing plan, which is much more attractive than the health and disability plan.

The question is what to do about this group of individuals, many of whom look just like common law employees, who find themselves barred from the various welfare and pension plans the contracting employer offers. There are a number of reasons why we have seen this astronomical growth, in the last few years, in the use of long-term contract workers.[42] One of these is the avoidance of some of the requirements of ERISA itself. ERISA has, in its nondiscrimination rules,[43] a series of formulas that disfavor "top heavy plans." An employer is not allowed to create a welfare or a pension plan that is designed to channel moneys principally to the best compensated individuals in the organization and to do little, or nothing, for the less compensated. But ERISA, for purposes of this formulate calculation, only looks at "regular employees." It does not include leased employees.

In 1982, as part of TEFRA, the Tax Equity and Fiscal Responsibility Act Amendments that were passed, Congress said, for purposes of these tax-related calculations, the plan sponsor must include leased employees. The IRS then issued some interpretive guidelines that were problematic and difficult to understand. The guidelines were withdrawn, and new guidelines can be expected in 1999. The result is that there are now a series of artful draftings that elaborate on what the language of the plan document says. It is important to remember that, under ERISA, the employer controls, through the plan document, who participates in the plan, who is entitled to apply, and the required years of service to participate in the plan.

A few big cases are being litigated now. The Labor Department, at the end of 1996, sued Time Warner[44] over several thousand employees who claimed that they were common law employees of Time Warner and should therefore be entitled to participate in the plan. Allstate was sued, in July 1998, by a class of 10,000 temporary workers who also claimed to be common law employees.[45] The numbers and the sizes of these classes give a general feel for what a very serious part temporary workers play in the employment planning of certain employers. All these plaintiffs are seeking essentially the same

42. *See* Aaron Bernstein, *When Is a Temp Not a Temp?*, BUSINESS WEEK, Dec. 7, 1998, at 90.

43. 29 U.S.C. §1182 (Supp. III 1997).

44. Time Warner v. National Labor Relations Board, 160 F.3d 1 (D.C. Cir. 1998).

45. Bernstein, *supra* note 12, at 90.

thing, eligibility for plan participation.

Finally, the COBRA Amendments[46] are familiar to many in the EEO community, particularly those who have cases involving involuntary job changes. COBRA requires all employers who have an employee who experiences a "covered event," 90 percent of which are terminations, divorce or anything that changes an employee's eligibility for the health plan, to offer that employee 18 to 36 months[47] of health insurance coverage. COBRA does not apply to disability or other kinds of welfare plans. COBRA mandates health insurance coverage at 102 percent of the full group rate. This means that if an individual is in an 80/20 situation, i.e. when she was working the employer was paying 80 percent of the premium and the employee 20 percent, when she is terminated she will be responsible for the full 100 percent of the premium. This allows her to remain in the group, plus pay an additional 2 percent to cover administrative expenses provided for by the statute. For those who are worried about what might be best for a person who may have an ADA claim but who also might have experienced job loss – discriminatory or not, one has to consider COBRA. The experience rating with COBRA is, of course, always disastrous because of a massive adverse selection problem. The only individuals who elect to remain in the plan when terminated are those who know that they have a condition, or that a dependent or family member has a condition, which makes it well worth it for them to continue the large payments to the plan. Most others drop out, look for new employment, and hope not to get sick during the period of time it takes them to find a new job.

Despite the awful experience rating with COBRA, it is important to remember that an employer cannot deny COBRA benefits. The employer cannot prohibit, for example, a disabled employee, who has been terminated, from participating in the plan even if the termination was for cause. Thus, even if an employee did something dreadful and clearly deserves to be terminated, and there is no contemplated discrimination claim on behalf of that individual, you will probably still be looking at someone entitled to COBRA benefits. These kinds of cases include individuals terminated for embezzling money, as well as individuals terminated for committing criminal assaults against fellow workers and supervisors.[48] In each of these cases, the federal

46. Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82 (1986), *codified at* 29 U.S.C. §§ 1161 – 1169 (1994).

47. *See* 29 U.S.C. §1162 (2) (1994).

48. COBRA does permit an employer to deny health insurance continuation to employee

courts have said that the intent of Congress is clear, and that the benefit is simply triggered by the covered event, termination. Whether it was a justifiable termination is not important. Thus, when you have really bad ADA plaintiffs, people who do not have good stories to tell, and you're not eager to pursue their claims, these individuals might be encouraged, nonetheless, to pursue benefits under COBRA as a way of protecting their health insurance status during their search for new work.

PAULETTE CALDWELL*

I. INTRODUCTION

Our own experience tells us, and social scientists confirm, that we respond to each other on the basis of social categories, categories which carry stereotypes and myths that persist over time despite the most cogent contrary evidence. When individuals are members of more than one traditionally disadvantaged category, the discrimination they suffer may be different, often worse, than discrimination on the basis of one category alone. Yet most lawyers, judges, and human resource personnel do not acknowledge the fact of discrimination on the basis of multiple proscribed factors.

Employment discrimination laws are structured to handle discrimination one category at a time.[49] Yet individuals may face dis-

terminated for "gross misconduct." 29 U.S.C. § 1163(2) (1994). Where a court found that an employer's testimony on the employee's alleged gross misconduct was not credible, it found that the employee had been fired for "mere incompetency," which was not gross misconduct. Therefore, COBRA notice was required. Misna v. United Communications, Inc. 91 F.3d 876 (7th Cir. 1996); *see also* Moos v. Square D Co., 72 F.3d 39 (6th Cir. 1995) (employer held not to have violated ERISA when it denied severance benefits to an employee who had been discharged twice for having falsified his job applications with regard to his educational background. Severance plan allowed benefits to be denied where an employee had engaged in conduct which caused "material and demonstrable injury to the company."). However, an employee's discharge for operating a company vehicle while intoxicated was held to be for "gross misconduct," Collins v. Aggreko, Inc., 884 F. Supp. 450 (D. Utah 1995), as was a bank employee's discharge for alleged misuse of a company credit card and misrepresentation of the status of a customer's account to the SBA. Johnson v. Shawmut Nat'l Corp., 1994 U.S. Dist. LEXIS 19437 (D. Ma. 1994). A refusal to offer COBRA coverage to a terminated employee must be supported by a record which demonstrates that the employee actually committed or engaged in gross misconduct, not just that the employer had a good faith belief that the employee had engaged in gross misconduct. Kariotis v. Navistar Int'l Transport Corp., 131 F.3d 672 (7th Cir. 1997).

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49. This discussion is limited to the three major federal employment discrimination statutes, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17(1994); The Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-50 (1994); and the Americans with

crimination solely on the basis of one factor, or because of two or more factors separately,[50] or because of the combination or interaction of two or more factors.[51] In cases where the discrimination complained of results from the interaction of two or more factors, the factors may be prohibited bases for employment decisions under the same or separate anti-discrimination statutes.

Unlike the 1960's, when comprehensive federal anti-discrimination laws were initiated, today's workforce consist of large numbers of women, racial and ethnic minorities, and individuals affected with disabilities. All are present at every age including midlife and older ages. It should come as no surprise, therefore, that a growing number of discrimination claims involve the combined effects of more than one form of bias protected under one or more source of employment discrimination law.

The existence of multi-discrimination claims provides a useful point from which to consider the question whether or not a dysjuncture exists between the structure of employment discrimination law and the profile of today's and tomorrow's workforce. Such an inquiry allows for a fuller exploration of the misunderstandings about the nature of various forms of discrimination and their relationship one to another. An analysis of the judicial response to claims involving the intersection of two factors[52] under a single employment discrimination statute suggests that this response may be of limited utility for claims arising under disparate statutory protections.

The incidence of employment discrimination claims involving a variety of intersecting factors is not clear. Nevertheless, the changing demographics of the workforce suggest that such claims are likely to increase. Coupled with this likely increase, the general lack of sophistication by courts and employment discrimination professionals commands further education and study.

Disabilities Act 42 U.S.C. §§ 12101-12213(1994). However, employment discrimination plaintiffs may rely on multiple sources of state and federal statutory and state common law.

50. For example, an employer may discriminate on the grounds of race in hiring decisions and on the grounds of gender in compensation.

51. For example, an employer may hire black men and white women but discriminate against black women.

52. While it is possible for a single claim to involve the interaction of more than two factors under a single statute such as Title VII, which prohibits discrimination on the basis of race, color, sex, religion, or national origin, this article will only consider cases involving the interaction of two factors.

II. THE HISTORY OF INTERSECTIONAL LEGAL THEORY

A. Claims Under A Single Statute

Employment discrimination claims based on the intersectional effect of two bases for discrimination are not new, but the initial judicial response was to reject them as attempts either to create a protected group not recognized by law or to obtain more relief than Congress intended to provide. For Example, *in Degraffenreid v. General Motors Assembly Division*[53] in a combined claim brought by a black woman, the district court analyzed the race and sex claims as distinct and separate claims. It found no race bias because a black male had received a promotion and no sex discrimination because there were white females on the employer's staff.

In 1980, however, in an action brought by a black woman, the Court of Appeals for the Fifth Circuit reversed a district court's decision dismissing the plaintiff's complaint and held that black women constitute a subgroup for purposes of protection under Title VII.[54] The Ninth Circuit joined the Fifth in 1994.[55] Both courts rejected the initial judicial approach which prohibited the creation of distinct subgroups under Title VII as counter to the intention of Congress and an attempt to create a super-remedy not provided for by law.

The decisions of the Fifth and Ninth Circuits are supported by a substantial body of academic literature detailing the nature and incidence of intersectional bias.[56] However, it would be misleading to suggest that intersectional theory is firmly grounded in employment discrimination law. Strands of the *Degraffenreid* court's criticisms of intersectional claims under Title VII reappear in later decisions re-

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53. 413 F. Supp. 142, 145 (E.D. Mo. 1976), *aff'd in part, rev'd in part on other grounds*, 558 F.2d 480 (1977).

54. Jeffries v. Harris County Community Action Ass'n, 615 F.2d 1025 (5th Cir. 1980). In *Jeffries*, the plaintiff claimed she had been denied a promotion based on her race *and* sex operating together. The district court based its decision dismissing her complaint on the fact that a black man had received a promoted and the employer also employed white women. The Fifth Circuit noted that an employer could not defend against discrimination against black women by pointing to progress with respect to the treatment of blacks or women in general.

55. Lam v. University of Hawaii, 40 F.3d 1551, (9th Cir. 1994).

56. *See, e.g.*, Regina Austin, *Sapphire Bound*, 1989 WISC. L. REV. 539; Paulette Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L. J. 365; Maria Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U. L. REV. 817 (1993); *Judy Scales-Trent, Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.C.L. L. REV. 9 (1989).

jecting intersectional claims that involve two or more bases of discrimination protected under two or more separate statutes, and the reappearance of these criticisms could undermine the continued recognition of intersectional claims under Title VII.

B. Claims Involving Two Or More Statutes

The case for such claims under one statute, such as Title VII, is relatively easy to make.[57] However, claims involving discrimination protected against under two or more statutes present distinct theoretical and practical problems. To date, far fewer cases involving more than one statute have been adjudicated, and academic research on cross-statute multi-discrimination claims is sparse.[58] Nevertheless, the probable increase in the number of these claims in the future has attracted the attention of the Equal Employment Opportunity Commission[59] and the Glass Ceiling Commission.[60]

The response by courts to intersectional claims arising under separate employment discrimination statutes is mixed. Several district court decisions adopt the intersectional theory of the Fifth and Ninth Circuits in Title VII cases for claims arising across statutory protections, for example, combined claims alleging age and gender discrimination.[61] One such opinion permitted a plaintiff to proceed with a claim alleging discrimination on three distinct bases arising under three separate statutes—gender, age, and disability.[62] However

57. According to the Fifth Circuit in *Jeffries*, "an employer should not escape from liability for discrimination against black females by a showing that it does not discriminate against blacks and that it does not discriminate against females . . . [D]iscrimination against black females can exist even in the absence of discrimination against black men or white women." 615 F.2d at 1032. Notably, the court relied on Congress' use of the word "or" in Title VII as evidence that Congress intended to prohibit employment discrimination based on any or all of the listed characteristics. *Id.*

58. *But see* AMERICAN ASSOCIATION OF RETIRED PERSONS, EMPLOYMENT DISCRIMINATION AGAINST MIDLIFE AND OLDER WOMEN: HOW COURTS TREAT SEX-AND-AGE DISCRIMINATION CASES, 1, (1996). [hereinafter, "AARP STUDY"]

59. *See* Chris Vidas, *Labor Law: Combined Multiple Discrimination Claims Are Emerging Area of Employment Bias Law*, DAILY LAB. REP. (BNA) Aug. 13, 1996 at D23.

60. *See* GLASS CEILING COMMISSION REPORT, A SOLID INVESTMENT: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL 18 (1995).

61. *See, e.g.*, Good v. U.S. West Communications, Inc. 1995 U.S. Dist. Lexis 1968 (D. Ore. Feb. 16, 1995); Arnett v. Aspsin, 846 F. Supp. 1234 (E.D. Pa. 1994); *see also*, Blonder v. Evanston Hosp. Corp., 1992 WL 44404 (N.D. Ill. Mar. 2, 1992)(age-related disability).

62. Soggs v. American Airlines, Inc., 603 N.Y.S.2d 21 (N.Y. App. Div. 1993); *see also* Zell v. United States, 472 F. Supp. 360 (E.D. Pa. 1979), (alleging combined discrimination based on three factors—sex, age, and national origin—under two statutes).

the majority of cross-statutory claims have been rejected, often on the basis of reasoning that falls back on the position of the court in *Degraffenreid*: various federal employment discrimination statutes provide distinct protections for different forms of discrimination reflecting Congress' intention to treat them differently. These courts apparently distinguish *Jeffries* and *Lam*, which support protection against combined race and sex discrimination, on the ground that those cases close a loophole in Title VII. They thereby grant plaintiffs the full protection of one statute but do not support combined discrimination occurring across statutes. Accordingly, claims based on discriminatory factors protected under separate statutes must be analyzed as two distinct claims.[63]

Cross-statutory intersectional claims also present a practical problem which does not arise in intersectional claims under Title VII. The disparate impact proof model is available under Title VII and the Americans With Disabilities Act. A few early cases which recognize cross-statutory claims where a part of the claim alleged age discrimination have been allowed to proceed as disparate impact claims.[64] However, these cases were decided before the recent round of debate over the propriety of the disparate impact proof model for age discrimination cases. Therefore, even if courts permit cross-statutory claims to proceed, it is not clear whether disparate impact proof will be available in any claim based in part on age discrimination. To the extent the disparate impact proof model remains a viable anti-discrimination tool, limiting its availability in some cross-statutory claims could greatly affect their efficacy.[65]

63. *See* Murdock v. B.F. Goodrich Co., 1992 WL 393158 (Ohio Ct.App. Dec 30, 1992).

64. *See* Haskins v. Secretary of Health & Human Servs., 35 Fair Emp. Prac. Cases (BNA) 256 (W.D. Mo. 1984).

65. *See* Ellis v. United Airlines Health & Human Servs., Inc., 73 F.3d 999 (10th Cir.), *cert. denied*, 517 U.S. 1245 (1996)(no disparate impact proof allowed in age discrimination challenge by female applicants for flight attendant to the disparate impact of employer's weight requirements on older female applicants in comparison with weight allowances for incumbent female flight attendants).

III. THE CASE FOR EXPANDING THE REACH OF INTERSECTIONAL THEORY

The fact that most courts reject intersectional claims based on two or more sources of law designed to protect against distinct forms of bias raises two deeper concerns that are not reflected in the court decisions themselves. The initial problem is demographic. When Congress passed the employment discrimination legislation of the 1960's, it treated different forms of discrimination as if they presented distinct social and economic problems. It sought to protect women and racial minorities under Title VII and older workers under the ADEA. The two groups always overlapped, but they do so today to a greater extent than ever before. For example, eighteen million women over the age of 40 participate in today's workforce; 75 percent of women between the ages of 45 and 54, 50 percent of women between 55 and 64, and upwards of 10 percent of women over the age of 65 are employed or seeking employment.[66] It should be obvious that women in mid-life and older face the possibility of combined age and gender discrimination with respect to all aspects of employment.[67]

Second, different bases of discrimination are related in ways that are not reflected in the structure of employment discrimination laws. Congress understood when it passed Title VII that racism and sexism often arise from stereotypes, but, according to the 1965 report to Congress by the then Secretary of Labor, age discrimination does not.[68] Recent court decisions reflect a more enlightened view of age discrimination,[69] but they do not necessarily recognize that stereotypes about women and racial minorities persist, if not intensify, into midlife and older years.[70] Wherever possible, disability should be

66. *See* AMERICAN ASSOCIATION OF RETIRED PERSONS, EMPLOYMENT DISCRIMINATION AGAINST MIDLIFE AND OLDER WOMEN: AN ANALYSIS OF DISCRIMINATION CHARGES FILED WITH THE EEOC 1 (1997).

67. The AARP study identified 335 combined sex and age discrimination cases reported between 1975 and 1995. Eighty-one percent of these cases were brought by women. A smaller but significant number (16%) were brought by men. AARP STUDY, *supra* note 10, at 3.

68. REPORT OF THE SECRETARY OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT 21 (1965), (age discrimination does not result from "dislike or intolerance" or from "feelings about people entirely unrelated to their ability to do the job."); *id.* at 6, ("There are no such prejudices in American life which apply to older persons and which would carry over so strongly into the sphere of employment.").

69. In Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993), Justice O'Connor emphasized that the ADEA was enacted in response to Congress' concern that older workers were being denied employment opportunities on the basis of inaccurate and stigmatizing sterotypes.

70. *See, e g.*, Straka v. Francis, 867 F. Supp. 767, 771 (N.D. Ill. 1994) (Female flight attendants on planes chartered for professional sports teams complained of combined age and sex

taken into account and accommodated. Age, like race, gender, on the other hand, should be ignored.[71] This, notwithstanding the fact that the incidence of disability increases with age. Not irrationally, a person who becomes disabled after age 40 may fear losing protection against age discrimination by seeking to have his or her disability accommodated.

This misunderstanding about the relationship of various bases of discrimination is particularly relevant to the debate over the availability of disparate impact proof in age discrimination cases. The Supreme Court has acknowledged the utility of the disparate impact proof model in ferreting out stereotypes against women and racial minorities under Title VII[72] (and given its availability under the ADA, disabled individuals as well). Older women, racial minorities and disabled individuals may lose this protection whenever their claims involve age discrimination as a factor whether or not they present their claims under two or more statutes or exclusively under the ADEA.

IV. THE FUTURE OF INTERSECTIONAL THEORY

Determining the incidence of intersectional bias is not easy.[73] Courts and employment discrimination counsel lack sophistication about intersectional claims, and this lack of understanding may contribute to the low number of reported cases that present or address the problems of multi-discrimination claims. However, the changing demographics of the workforce alone may pose the greatest barrier to the expansion of intersectional theory. The spectre of myriad subgroups presenting claims both within and across statutory protections, coupled with the massive increase in all discrimination claims, may lead the courts or Congress to prohibit all intersectional claims. Moreover, in some cases, the use of intersectional theory may not be

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harassment in the comments of management employees about their physical appearance and attire. In addition, the plaintiffs were subjected to comments that they were too old to be flight attendants and should "not act like [passengers'] mothers.").

71. Race and gender-based affirmative action, of course, present special circumstances.

72. In Watson v. Fort Worth Bank & Trust Co., 487 U.S. 977 (1988), the Supreme Court held that the disparate impact proof model applied to subject as well as objective factors in part because of the existence of subconscious stereotypes and biases that could not be adequately policed through a disparate treatment theory requiring the proof of discriminatory motivation.

73. The AARP study, which relies on reported cases, notes the several limitations of this research methodology. AARP STUDY, *supra* note 10, at 1.

in the best interest of employment discrimination claimants. Finally, any attempt to preserve disparate impact liability for combined claims involving age discrimination as one factor may lead ultimately to a further watering down of the disparate impact proof model for all employment discrimination litigation.

In any event, the problem of combined or interactive discrimination warrants further study if we are to assure that our employment discrimination laws are suited to the realities of today's workforce and the workforce of the future. By the year 2000, two-thirds of new entrants to the labor force will be women and racial and ethnic minorities,[74] all of whom will also need protection against age and disability-based discrimination. The theoretical and practical problems presented by interactive claims can be solved with thoughtful innovation. This innovation will depend on further documentation of the incidence of interactive claims and on increasing the awareness of judges, lawyers and other employment discrimination professionals about the nature of such claims.

74. *See* GLASS CEILING COMMISSION REPORT, *supra* note 12.