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Employment Discrimination Law

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BOOK REVIEW

EMPLOYMENT DISCRIMINATION LAW. By Barbara Lindemann Schlei and Paul Grossman. Washington, D.C.: BNA Books. 1976. Pp. vii + 1472. Hardbound, \$39.50; Student Edition, \$22.50.

*Reviewed by Cynthia A. Mertens**

Title VII of the Civil Rights Act of 1964, as amended, has become the primary weapon in the battle against employment discrimination in the United States.¹ Initially, Title VII was enacted to combat blatant discrimination based on race, color, religion, sex and national origin, and it has been effectively used to this end in numerous instances.² However, subtler and thus more complex forms of discrimination had to be eradicated before any semblance of equality could exist.

The result has been the development of a diverse body of law applying Title VII to instances of discrimination never contemplated by its framers.³ Because of the complexities involved and because of the rapid changes taking place in the law, little of a comprehensive nature has been written on the subject. Though a number of valuable introductory manuals and articles are available, as are some textbooks,⁴ not until the publication of Schlei and Grossman's book has there been a complete reference guide to employment discrimination law.

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1. 42 U.S.C. § 2000e (1975).

2. For example, sex and race segregated facilities have been successfully challenged under Title VII. *Evans v. Sheraton Park Hotel*, 503 F.2d 177 (D.C. Cir. 1974) (sex-segregated locals of waitresses and waiters); *United States v. Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971), *cert. denied sub nom. Locomotive Eng'rs v. United States*, 406 U.S. 906 (1972).

3. *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976) (fictional seniority awarded to identifiable victims of past discrimination); *Johnson v. Pike Corp. of America*, 332 F. Supp. 490 (C.D. Cal. 1971) (employer prohibited from discharging employee because of excessive garnishments).

4. S. AGID, *FAIR EMPLOYMENT LITIGATION MANUAL, PROCEDURAL GUIDE AND SAMPLE DOCUMENTS* (1974); G. COOPER, H. RAAB, & H. RUBIN, *FAIR EMPLOYMENT LITIGATION* (1975); NATIONAL EMPLOYMENT LAW PROJECT, *LEGAL SERVICES MANUAL FOR TITLE VII LITIGATION* (rev. ed. 1975); *SEX DISCRIMINATION IN EMPLOYMENT: APPLICATION OF TITLE VII* (M. Dunlap ed. 1975); R. Specter & P. Spiegelman, *Employment Discrimination Action Under Federal Civil Rights Act* in 21 AM. JUR. TRIALS 1-227 (1974).

In contrast to most of the material available in the employment litigation area, *Employment Discrimination Law* is a well-balanced presentation of the issues from both plaintiffs' and defendants' perspectives. This balance springs from a unique combination of the authors' talents. Schlei has been with the Equal Employment Opportunity Commission (EEOC) since its inception in 1965 and has been heavily involved with plaintiffs' litigation. Grossman's firm, on the other hand, represents management in labor disputes, and he specializes in the defense of employment discrimination lawsuits. Thus, a pro-plaintiff or pro-defense bias is happily absent. The result is a scholarly, exhaustive work, and the practitioner using the text is the beneficiary.

Schlei and Grossman divide the text into ten parts. Some parts contain chapters which are independent and complete sources of references in and of themselves; others necessarily interrelate. The chapters on the handicapped, the aged, the Equal Pay Act,⁵ the Civil Rights Acts of 1866 and 1871,⁶ the National Labor Relations Act⁷ and the executive orders⁸ are self-contained. These areas are treated in an introductory fashion, although numerous references to additional sources are provided.

On the other hand, substantive and procedural issues which arise under Title VII are explored in meticulous detail. Issues found in one part may be presented from a different perspective in another. For example, Part V discusses discrimination on the basis of a protected classification, *e.g.*, race and color, national origin, and sex. Part VI addresses discrimination as it arises in specific employment situations: entering the work force, seniority and layoff, and discharge. Of course, discrimination in these latter situations must be on the basis of a protected classification to come within Title VII, and thus there are frequent references to the previous chapters in Part V. This method of cross-referencing to chapters in different parts of the book is executed systematically and with clarity.

A look at the structure of *Employment Discrimination Law* provides some idea of its strengths and weaknesses. While

5. 29 U.S.C. § 206(d) (1975).

6. 42 U.S.C. §§ 1981, 1983, 1985 (1975).

7. 29 U.S.C. §§ 151-68 (1975).

8. Exec. Order No. 11,246, 3 C.F.R. 402 (1976); Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (1967).

the text as a whole is excellent, it begins with an overview of Title VII which is so brief as to be inadequate for the uninitiated attorney or student. This weakness is overcome by the remaining chapters which provide the detail necessary for a complete understanding of the statute.

The first four parts, which cover chapters two through eight, provide an orientation to the substantive aspects of Title VII. The "Disparate Treatment," "Present Effects of Past Discrimination," "Adverse Impact," and "Reasonable Accommodation" categories or theories of discrimination are consecutively presented and discussed. The authors give an easily digested introduction to each theory, followed by relevant, carefully edited cases, and clear, lucid commentary.

An examination of Part III, Adverse Impact, illustrates the authors' comprehensive treatment of a substantive Title VII area. The chapter on Scored Tests instructs the reader in the various methods used to prove a test's validity. The treatment is admittedly introductory in nature, as industrial psychology's testing methods are beyond the scope of the text. However, the appendix does include a document published by the Division of Industrial-Organizational Psychology, American Psychological Association, entitled "Principles for the Validation and Use of Personnel Selection Procedures," which elaborates on validation methods and contains a useful glossary of terms used in validation research, as well as a list of additional references. The authors also footnote to general industrial psychology books which attorneys may find useful when confronted with a test validation problem.

After a short primer on validation strategies, the chapter on Scored Tests continues with a brief history of the role of industrial psychology in personnel selection. This subchapter traces the evolution of industrial psychology and the guidelines developed by the EEOC and other government agencies on the use of the scored tests.

The authors next confront the plaintiff's burden of demonstrating the adverse impact of the test on a protected group and the use of statistics to achieve this end, and the defendant's burden of proving that the test is job-related and thus usable. It is the major problem in the area and most of the important cases are included, while others are summarized to illustrate a particular point.

The last few pages in the Scored Tests chapter provide practical suggestions for the use of expert witnesses from the

industrial psychology field, and paragraphs on the requirements of job analysis, the significance of the criterion of job performance and on the subject of test bias.

The next chapter in the Adverse Impact part is entitled "Nonscored Objective Criteria" and focuses on the use of such objective criteria as education, experience, performance, arrests, convictions, and garnishments in making employment decisions. The authors analyze the *Griggs v. Duke Power Co.*⁹ test for determining the legality of such criteria, then present a list of provocative, unanswered questions, *e.g.*:

Griggs also does not discuss how "substantial" the disparate effect must be before the defendant must justify business necessity

Another unanswered question is the nature of the statistical proof which must be offered to prove the substantial disparate effect of a specific objective requirement

Also unanswered is the question of which unscored objective criteria must be validated in accordance with the EEOC's testing guidelines.¹⁰

Several cases follow which address one or more of the non-scored objective criteria listed above. Commentary throughout elaborates on relevant aspects of the decisions.

The last Adverse Impact chapter analyzes subjective criteria and the extent to which such may violate Title VII. A list of ten factors has been compiled to be considered by anyone "attacking, defending or structuring"¹¹ the use of subjective criteria. Some of the factors suggested are practical and easily implemented: "Vacancies ought to be announced so that all interested candidates can have an opportunity to apply;" "Initiation of the bid should be with the employee, not the supervisor, maximizing the possibility of indications of interest."¹² Others are extremely difficult to implement on the practical level: "Those constituent factors looked to as indicative of the requisite competence in the job to be filled should not be unduly vague."¹³ Still others might be practical but for the expense: "The most important element of any method of

9. 401 U.S. 424 (1971).

10. B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 133 (1976).

11. *Id.* at 178.

12. *Id.* at 179.

13. *Id.* at 178.

selection is to determine the traits which are necessary to successful job performance. This of course requires an initial determination of the essential elements of the job. Thus, there should be a job analysis"¹⁴

Those employers who can implement Schlei and Grossman's procedures should do so as a defense to future challenges. Those who cannot will have a good idea of what may be imposed on them should their subjective criteria be successfully challenged in court.

To summarize, Schlei and Grossman treat the adverse impact theory of discrimination in a scholarly and comprehensive manner. The materials provide the practitioner with a means by which to evaluate an employment practice which has an adverse impact on a protected class. This treatment of the adverse impact theory is representative of *Employment Discrimination Law's* treatment of the additional three theories, as well as that of the numerous other substantive areas addressed by the authors.

The part on Title VII procedures, Part IX, is likewise substantial. The authors' treatment of this area can be illustrated by an examination of the chapter on Jurisdiction. The elements of a charge of discrimination, standing to file, appropriate respondents, and exemptions and exclusions are all discussed. The pertinent provisions of the Act are quoted, followed by a summary of the various courts' interpretations or the authors' own interpretation of the provisions. An occasional court opinion or EEOC decision is included where appropriate. Issues which arise infrequently and which other sources omit are covered. For example, several pages are devoted to the theories involving aggregation of multiple entities in order to meet the requirement that the employer have fifteen or more employees.

The authors point out inconsistencies among the courts on various issues such as when the 90-day filing period begins to run and whether the EEOC must retain jurisdiction over a charge for 180 days prior to issuing the right-to-sue letter.

Other procedural areas discussed are the EEOC's administrative process, Title VII jurisdiction, timeliness, election and exhaustion of remedies, litigation procedure, and litigation initiated by governmental agencies such as the EEOC and the

14. *Id.*

Justice Department. The litigation section focuses on class actions, discovery, proof, and the various types of relief obtainable under Title VII, and includes a chapter on attorneys' fees.

In covering the exemptions and exclusions under Title VII, the authors carefully cross-reference to other chapters in the text where several exemptions were previously encountered. They then elaborate on those not covered elsewhere: bona fide private membership clubs, exemption of elected officials, aliens employed outside the United States, the Communist exclusion, the security clearance exclusion and veterans preferences.

The attorney who is without background in employment discrimination law will find Schlei and Grossman's text to be invaluable. The most useful approach for the uninitiated is to examine the first four parts in depth, and then to refer to his or her area of specific interest. The examples and suggestions interspersed throughout the materials provide the seeds for innovative analysis. Attorneys faced with a unique or infrequently litigated issue will be able to use the ideas presented to develop their theories and to weigh their chances of success.

While *Employment Discrimination Law* is not a litigation manual, in that pleading and discovery forms are not included, it is, by far, the most complete reference manual on the law available. The text of Title VII and of the EEOC Regulations and Guidelines are contained in the book's appendix. Also included is a sample settlement agreement and general release and the previously discussed document entitled "Principles for the Validation and Use of Personnel Selection Procedures." All cases presented or cited are listed in a voluminous Table of Cases, and the Topical Index contains well over 2,000 topics and subtopics.

Employment Discrimination Law must be on the desk of every practitioner in this field and in all law libraries. The volume is also an excellent teaching tool. There is no question that the authors' two primary objectives have been met; the book is of "significant and equal value to practitioner and student and of substantial value to the sophisticated non-lawyer," and is "balanced and non-partisan."¹⁵

15. *Id.*, preface.