Unlucky Stores: Are They All Guilty of Discrimination?

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Almost since the day Title VIII of the 1964 Civil Rights Act became law, more than a qua4rter century ago, people have been trying to prove that a group has been discriminatorily excluded from some job by pointing to the group's high representation in some other job.

One of the more succinct rejections of that approach occurred in the Northern District of California in 1979. In *Edmunds v. Southern Pacific Transportation Co.*, 19 FEP Cases 1052, the court rejected claims that Hispanics were discriminatorily assigned to laborer rather than operating craft jobs when there was no evidence of discrimination against Hispanics seeking the latter jobs. The court observed, simply and accurately: "Plaintiffs imply that Southern Pacific must deny Hispanic applicants jobs they seek and qualify for because it has 'too many' of them. Such is not the law."

It would be another decade before the Supreme Court would reach the same conclusion. In *Wards Cove Packing Co. v. Atonio*, 490U.S. 642 (1989), the high court issued an opinion that has been justly criticized for cavalierly reversing 18 years of precedent concerning the employer's burden in justifying employment procedures that disadvantage minorities or women. But the opinion was exactly on point in its rejection of an approach to statistical proof that was as pernicious as it was illogical.

Wards Cove involved an Alaskan cannery whose noncannery workers had minority percentage roughly in keeping with the minority percentage of the labor market from which those workers were recruited buy with minorities filling a far higher proportion of the less-desirable cannery jobs. Plaintiffs argued that minorities should have been equally distributed between cannery and noncannery jobs, and the 9th U.S. Circuit Court of Appeals essentially agreed. While the case had a superficial appeal in light of what some would term a "resemblance to a plantation economy," the Supreme Court correctly recognized not only that such internal comparisons could not prove discrimination but that the plaintiffs' argument was an invitation to employers to avoid liability by hiring fewer minorities for the less-desirable jobs.

The key to the court's analysis lay in its observation that what the plaintiffs claimed was the labor market for noncannery jobs was "at once both too broad and too narrow." It was too broad, the court maintained, because most cannery workers did not seek noncannery jobs; and it was too narrow because it did not include the many persons not employed in cannery jobs who were part of the labor market for noncannery jobs.

The latter point is of particular consequence beyond the peculiar facts of the Wards Cove case. Very often individuals in the less-desirable jobs will be qualified for and interested in the better jobs, and those individuals will thus be part of the relevant pool for the better jobs. But typically they will make up only a small part of that pool, with the great majority of the pool being comprised of persons who were not hired at all and whose racial or sex composition we may know nothing about.

This is why seemingly sophisticated regression analyses of persons actually hired, though they may take into account numerous variables reflecting qualifications and interests, cannot actually prove anything about whether an employer discriminatorily excludes one group from its better jobs. Often the employer that discriminatorily excludes a group from both its better and its poorer jobs will come out looking better than the one that treats the group equally with regard to all jobs.

Somehow, however, the Wards Cove decision did not spell an end to misguided litigation that relies solely on analyses of persons actually hired. On Aug. 18, 1992, in *Stender v. Lucky Stores*, 92 Daily Journal D.A.R. 13246, in the Northern District of California, the court cited *Wards Cove* to the effect "that a

statistical analysis comparing segments of an employer's workforce is inadequate to carry plaintiff's burden of proof," noting as well that this aspect of the Wards Cove ruling had not been altered by the Civil Rights Act of 1991. Nevertheless, the court went on to find that the employer had discriminated in the "initial placement" of women - in this case evidently meaning that women were not fairly considered for the Grocery Department, where they comprised 35 percent of new hires. The court reached that conclusion not because women comprised more than 35 percent of persons seeking such jobs but because women were 84 percent of hires in the Deli-Bakery and General Merchandise departments.

Worse, the court found that among the reasons punitive damages might be warranted in this case was that the employer "abandon[ed] two affirmative action programs despite continued evidence of a gross gender imbalance in the Deli-Bakery and General Merchandise departments."

It is hard to know what may happen if the Lucky Stores decision is appealed, since, so far as the decision itself reveals, the defendant appeared not to question the basic legitimacy of analyses that look solely at persons hired. Actually, such approaches often will favor defendants when the job applied for is carefully examined. Frequently the data will reveal the hardly surprising fact that just about everybody who gets hired is hired for the job he or she applied for. In *Lucky Stores*, the defendant sought to show that close to 85 percent of both men and women were hired into the jobs for which they applied. The court happened to reject that evidence because of certain statistical problems, though they were problems unrelated to the essential flaw of the defendant's analysis. The real reason the analysis ought to have been rejected is that even if 100 percent of persons hired were hired for the job they applied for, that tells us nothing about whether the female percentage of persons seeking jobs in the Grocery Department was 35 percent (the same as the female percentage of Grocery Department hires) or a substantially higher figure. To know that, we need also to know the make-up of the persons who were not hired.

The same considerations that invalidate internal comparisons at the firm level apply as well when we look beyond the firm to an industry or occupation. Like a firm, an industry or occupation has numerous applicants for its better jobs, who, failing to secure the better jobs in that industry or occupation, look elsewhere for comparable opportunities. Yet efforts to identify discrimination within an industry or occupation by looking solely at persons working in the industry or occupation are commonplace. One of the most recent examples is a study in the placement patterns of minority male and female law faculty appearing in the July 1992 issue of the Southern California Law Review, which found, among other things, that minority women were hired into less prestigious law schools than minority men. But without looking at the entire universe of persons seeking the better jobs, including persons never hired at all, such studies can prove neither the presence not the absence of discrimination.

Fortunately, unlike individual firms, and industry or occupation is rarely a single actor that might consciously choose to correct perceived imbalances through the hiring of fewer minorities or women into the less desirable positions. For example, a relatively unprestigious law school has no incentive to improve the image of law schools in general by declining to hire a minority female candidate.

At the firm level, however, whether it be a grocery chain, bank, insurance company, railroad, retailer, or telephone company, to cite but some of the situations where initial placement claims have been pursued, at times successfully - the incentives to reduce minority or female representation in jobs is real. Lucky Stores apparently chose not to respond to those incentives, perhaps to its dismay. As to the separate question of whether it excluded women from its better jobs, no one seems yet to have made a reasoned effort to find the answer.