

BOOK REVIEWS

EMPLOYMENT DISCRIMINATION LAW. By Barbara Lindemann Schlei and Paul Grossman. Washington, D.C.: The Bureau of National Affairs, Inc., 1976. Pp. liii, 1472. \$39.50.

*Reviewed by Alfred W. Blumrosen**

The publication of treatises concerning the law of employment discrimination, such as the one reviewed here, marks a new stage in the growth of this branch of the law. A legal explosion has taken place in the field of employment discrimination law, an area of practice which was virtually non-existent a scant decade ago.¹ Employment discrimination complaints are now being filed with the EEOC at the rate of more than 50,000 a year,² and some 4,000 employment discrimination cases were filed in the federal district courts in fiscal year 1975.³

As employment discrimination law expands, more and more lawyers will be involved. In the early volumes of fair employment practice reports, one who had worked in the field could recognize counsel in most of the cases. Today this is no longer true. Thousands of inexperienced lawyers are coming into the field with a need for an initial exposure to what has quickly become a complex discipline. This influx underlies the popularity of short courses on employment discrimination and the need for well-organized texts.

I.

In meeting this need, the Schlei-Grossman book is extraordinarily successful. All of the leading cases are there. The litigation issues are carefully spelled out, at least to the point of giving the working lawyer a basis on which to approach specific problems. Thus, as a tool for lawyers who need sufficient knowledge to begin a close analysis and disposition of a

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THE FOLLOWING CITATION WILL BE USED IN THIS BOOK REVIEW:

B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (1976) [hereinafter cited as EMPLOYMENT DISCRIMINATION LAW].

1. The first major effort to organize materials in this field was M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT (1966).

2. 9 EEOC ANN. REP. 51 (1975) (56,000 complaints filed in FY 1974).

3. [1975] DIR. OF ADMIN. OFFICE OF U.S. COURTS, ANN. REP. 223 (Table 33).

problem, the book is unique and admirable. I find only two weaknesses, both of which are matters of emphasis rather than omission.

There seems to be an under-emphasis of the problems raised by *Curtis v. Loether*⁴ and Justice Rehnquist's concurring opinion in *Albemarle Paper Co. v. Moody*,⁵ with respect to the possibility for a jury trial under 42 U.S.C. § 1981, and the implications of that possibility for the conduct of both plaintiff and defendant. *Curtis* held that the seventh amendment's command that the right to jury trial be preserved "[i]n suits at common law" applied to actions brought under section 812 of the Civil Rights Act of 1968.⁶ Both the majority in *Curtis* and Justice Rehnquist in his *Albemarle* concurrence suggested that jury trial rights in employment discrimination suits might depend in part upon the relief demanded by the plaintiff.⁷ Thus, plaintiffs may be tempted to eschew the opportunity for general damages under 42 U.S.C. § 1981 and other laws⁸ in order to avoid a jury trial. The implications of this problem are mentioned⁹ but not adequately explored in the material.

A second and perhaps more serious objection is the under-emphasis on prevention of suit and the settlement process. I fear that we may tend to give lip service to the desirability of informal means of compliance while turning Title VII into a lawyer's technical playground.¹⁰ This is a mistake which bodes ill for the broader effort to improve employment opportunities for minorities and women. Litigation and settlement are inexorably linked in the

4. 415 U.S. 189 (1974).

5. 422 U.S. 405, 441 (1975).

6. 42 U.S.C. § 3612 (1970).

7. While it specifically declined to express an opinion on the subject, the *Curtis* Court deemed it "instructive" to contrast the provisions of the 1968 Civil Rights Act with the analogous section of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) (1970), 415 U.S. at 196-97. The stated ground for distinction was the 1968 Act's authorization of suits for "actual and punitive damages," a traditional common-law remedy requiring a jury trial, as opposed to the 1964 Act's restriction of allowable relief to "reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g) (1970).

Justice Rehnquist elaborated on the jury trial issue in his *Albemarle* concurrence. Addressing the remedial section of Title VII directly, he stated:

To the extent . . . that the District Court retains substantial discretion as to whether or not to award backpay notwithstanding a finding of unlawful discrimination, the nature of the jurisdiction which the court exercises is equitable, and under our cases neither party may demand a jury trial. To the extent that discretion is replaced by awards which follow as a matter of course from a finding of wrongdoing, the action of the court in making such awards could not be fairly characterized as equitable, . . . and would quite arguably be subject to the provisions of the Seventh Amendment.

422 U.S. at 443.

8. There is an excellent discussion of state and common law remedies in chapter 23 of *EMPLOYMENT DISCRIMINATION LAW*.

9. See *EMPLOYMENT DISCRIMINATION LAW* 1010-11.

10. This is an old concern. See Blumrosen, *The Crossroads for Equal Employment Opportunities: Incisive Administration or Indecisive Bureaucracy?*, 49 NOTRE DAME LAW. 46 (1973).

actions of lawyers for the government, the plaintiff and the defendant. Any large-scale effort to inform the bar, such as is undertaken in this book, should pay more attention to the alternatives to litigation.

This issue is not completely ignored in the materials. For example, a sound process for handling individual claims of discrimination in an informal manner is set out in chapter 18.¹¹ One of the more interesting aspects of the book is the emphasis in chapter 35 on Federal Rule 68, the offer-of-judgment rule, which gives a defendant post-filing leverage to induce a settlement. However, there is no thorough discussion of such questions as the various formulas for measuring back pay, which are important in both the litigation and the settlement contexts. There is some discussion of this matter, but all lawyers, whether they represent the government, plaintiffs or defendants, would benefit from a more extensive analysis of the various proposals for measuring back pay which the courts have developed. The nuts and bolts of the settlement process should be discussed as thoroughly as the time for filing suit or the determination of an appropriate class.

II.

The dilemma of the legal analyst is that in order to organize a body of law, it is necessary to classify materials. The classification system may then itself influence the growth of the law by its emphasis on certain directions. If there is a way of avoiding this dilemma, it lies in viewing court pronouncements as statements of principles subject to further evolution, rather than as rules of law set in concrete. This would lead a writer to be perhaps more tentative and hesitant in the classification process than were the authors. Yet such a hesitancy might have made the material less useful for the practitioner.

Granting that a classification system is necessary, I have some reservations about the one utilized by the authors. Their theory is that discrimination can be divided into four categories—disparate treatment, the present effects of past discrimination, adverse impact, and reasonable accommodation. The development of this theoretical structure accounts for the first quarter of the treatise. However, late in the book they introduce a fifth factor, motive or intent. In discussing the proof problems arising out of *McDonnell Douglas Corp. v. Green*,¹² the authors write that

When approaching the proof or disproof of a disparate treatment case, the ultimate focus of the inquiry, and thus the proof, is whether or not the decision or action in question was 'racially premised.' In other words, motivation and intent are the ultimate issue . . . in contrast to

11. See EMPLOYMENT DISCRIMINATION LAW 524-30.

12. 411 U.S. 792 (1973).

the two other theories of discrimination, which focus on the *consequences* of employment practices, not simply the motivation.¹³

Thus, "disparate treatment" is said to be a method of proving "evil motive" rather than an independent category of discrimination.

I think that the classification and order of presentation chosen are unfortunate. Discrimination would be more clearly understood and cases more easily analyzed under a classification system which began with evil intent, moved on to unequal or disparate treatment, and concluded with adverse effect.¹⁴ Disparate treatment was viewed initially as a way of proving evil motive, as the authors suggest. The adverse effect concept is a new and important development in the field, which must be carefully mastered by lawyers. I therefore applaud the authors' emphasis on *Griggs v. Duke Power Co.*,¹⁵ which they have placed first in the book. However, the deferral of any discussion of evil motive as a basis for discrimination until the latter part of the book is not helpful. Furthermore, I disagree with the above-quoted suggestion that the "disparate treatment" concept of discrimination is no more than a way of proving evil motive. The authors were correct in initially treating disparate treatment as discrimination, not as evidence of something else; but in the passage quoted above, they take back a good bit of what they had given.

I also have difficulty with the authors' classification of "reasonable accommodation" as a separate category of discrimination applicable to religion.¹⁶ Most religious discrimination cases are readily analysable under the adverse effect rule of *Griggs*. A policy which requires employees to work on Saturdays has an adverse effect on those who are not able to do so by virtue of religion. Unless the employer can demonstrate that business necessity requires their attendance, he is in violation of the statute. If a less drastic means of achieving his objective is available, the employer may not utilize the more drastic means.¹⁷ The business necessity defense necessarily encompasses the question of whether the employer could accommodate the religious needs of his employees. In short, I believe the duty to "accommodate" is an implicit aspect of the business necessity defense, and not a separate category of discrimination.

Is this simply an academic quibble or is it a more substantial question? If Title VII is read as imposing a duty to accommodate in religious matters, serious constitutional questions arise.¹⁸ If the statute is read as imposing a

13. EMPLOYMENT DISCRIMINATION LAW 54 (footnotes omitted) (emphasis in original).

14. See generally Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972).

15. 401 U.S. 424 (1971).

16. See EMPLOYMENT DISCRIMINATION LAW, ch. 7.

17. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

18. The Supreme Court has granted certiorari in a case which may deal with such issues.

duty not to discriminate, those constitutional questions are less momentous. To avoid calling into question the validity of Title VII, it is important to use a legal concept of discrimination which remains within the control of the courts. Judges may adapt and shape that concept as the needs of the time require. But if there is an independent duty to "accommodate," then Congress has asserted an extraordinary and possibly unconstitutional power to require an individual to modify his actions to fit the religious convictions of his neighbors. Such a broad power is not required to eliminate religious discrimination. I think that the long-term impact of treating religious accommodation as a separate category ill serves the cause of expanded employment opportunity.

Part V of the book, which separates the treatment of problems relating to race and color, national origin, native Americans and sex, produces a kind of redundancy, particularly in the sex area. I believe the concepts of discrimination are equally applicable regardless of the particular basis involved. If one understands this point, however, the material dealing with various specific problems is well presented.

There are some problems arising from the continuous stream of Supreme Court decisions in the field. For example, *Franks v. Bowman Transportation Co.*,¹⁹ which appears in full in the third discussion of seniority,²⁰ should (along with part of *Albemarle Paper Co. v. Moody*²¹) be the primary case in the initial analysis of the seniority discrimination problem. I suspect that the scheme of the book was set in concrete (if not in type) by the time *Franks* was decided, and it was necessary to slot it somewhere. Because of its importance, it should have been placed in the initial discussion of seniority.

Efforts by unions and employers in a collective bargaining relationship to eliminate discrimination have been taken into account by a number of courts in apportioning liability between them. These decisions are intended to encourage the parties in collective bargaining relationships to clean their own house and are therefore important in any consideration of settlement. The possibility of shifting liability to the other party by seeking the elimination of discrimination should have received greater emphasis than the authors' indirect references to it in Chapter 19.²²

These shortcomings do not detract from the value of the book as a lawyer's guide through what has in a short time become a maze of law. The

Hardison v. Trans World Airlines, 527 F.2d 33 (8th Cir. 1975), cert. granted, 97 S. Ct. 381 (1976).

19. 424 U.S. 747 (1976).

20. See EMPLOYMENT DISCRIMINATION LAW 477.

21. 422 U.S. 405 (1975).

22. EMPLOYMENT DISCRIMINATION LAW 565.

book has a comprehensive index in which I was able to find relevant research references to all the matters on which I would have wanted further discussion. As a practitioner's guide through Title VII, in the best sense of the phrase, it is an admirable product.

III. .

In the preface to *Employment Discrimination Law*, the authors state that they intended their book to be of "equal value to practitioner and student."²³ The second goal was less successfully accomplished. I fear that the student will fail to achieve a sense of direction and growth in the law from the materials themselves. The absence of sociological, historical and political science materials from the book detracts from its utility for the study of the legal process in this infinitely fascinating and changing area of human behavior. The book is more in line with traditional casebooks which emphasize doctrinal developments, but I doubt that advanced law students require another doctrinal course. Rather, they need to gain a broader understanding of the interrelationship between the legal system and other facets of society. I know of no better field of law for teaching about that interrelationship than this. The case materials, the historical materials, and economic data lend themselves well to this study. That dimension is not present in this book.

There may be a contradiction inherent in the very purpose of the authors. I am not sure it is possible to prepare materials which are as superbly designed as these for thoughtful practicing attorneys and which, at the same time, will illuminate the underlying subject matter in ways that will be of most value to law students. The treatment of individual claims revolving around *McDonnell Douglas Corp. v. Green*²⁴ illustrates this point. As a doctrinal treatment of discharge and refusal to hire cases, the material is cogent and accurate. But in its evaluation of the historical sweep of the period 1972 to 1976 in connection with the concept of "pretextuality," it fails to note that the Supreme Court has moved away from the apparent rigidity of the prima facie case concept of *McDonnell Douglas*. This is of little moment to busy practitioners who need to know what the rule is. It is of great importance, however, to students who are seeking a sense of the direction and growth of the law.

One other example may be in order. In connection with *Washington v. Davis*,²⁵ the authors suggest that the significance of the case lies in the willingness of the Court "to accept professionally approved methods of establishing job-relatedness despite noncompliance with the 1970 EEOC

23. *Id.* at xv.

24. 411 U.S. 792 (1973); see *EMPLOYMENT DISCRIMINATION LAW* 1147 *et seq.*

25. 426 U.S. 229 (1976).

Guidelines,'²⁶ thereby pitting *Washington v. Davis* against *Albemarle Paper Co. v. Moody*²⁷ somewhat more directly than the Court believed that it was doing.²⁸ But *Washington v. Davis* can be analyzed as a case in which the entry-level job (a seventeen-week assignment as a police trainee) was subject to a written test which had been validated. The employer had not validated the test with respect to the higher level job of policeman, but the employer is not required under the EEOC Guidelines to validate tests for higher level jobs. The normal posture for advocates of equal employment opportunity would be to *oppose* an employer's effort to use entry level tests which evaluated potential for performance at higher level jobs—a reversal of the posture of the parties in *Washington v. Davis*. Questions such as these are or should be grist of the law student's concern, and their absence from this material makes the book less useful for teaching purposes.

Perhaps there is a legal equivalent of the Heisenberg principle. Perhaps one must choose whether to isolate the legal system at a point in time and see it in its manifold dimensions, which the authors have done admirably, or to view it as an evolving institution which responds to the underlying pressures, desires and needs of the society of which it is a part, thereby sacrificing some clarity and precision.

I strongly recommend this book for practitioners, and intend to keep my copy handy for those occasions when I function as a consultant. I also strongly recommend the book as a ready reference work for law teachers who may lack familiarity with some areas of employment discrimination law; in particular I suggest reading the section dealing with litigation, which is extraordinarily good. I would not recommend, however, that it be used by law students where the objective is, or should be, an understanding of the evolution of the legal system.

26. EMPLOYMENT DISCRIMINATION LAW 102.

27. 422 U.S. 405 (1975).

28. See *Washington v. Davis*, 426 U.S. at 250-51.

