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Volume 3, Number 1 1999

Proceedings of the Academy for Studies in Business Law

April 7-11, 1999
Myrtle Beach, South Carolina

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Co-Editors
Western Carolina University

The Proceedings of the
Academy for Studies in Business Law
are published by the
Allied Academies, Inc., PO Box 2689, Cullowhee, NC, 28723.

The Academy for Studies in Business Law is an affiliate of the Allied Academies, an international, non-profit association of scholars whose purpose is to support and encourage the exchange of knowledge.

Proceedings of the Academy for Studies in Business Law

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USE OR ABUSE OF THE VOID FOR VAGUENESS DOCTRINE: AFTER A QUARTER OF A CENTURY, WHAT HAVE WE LEARNED?

Joseph S. Falchek, King's College

ABSTRACT

Twenty-seven years ago, the Supreme Court of the United States in the case of Papachristou vs. City of Jacksonville invalidated the City's municipal ordinance as being "void for vagueness" under the due process clause of the Fourteenth Amendment. Firmly entrenched for more than a quarter of a century, the void for vagueness doctrine is once again being examined by the Supreme Court in the case of the City of Chicago vs. Morales et. al. (US 97-1121). Argument occurred in December of 1998, however no decision has been rendered. The paper discusses how the void for vagueness doctrine has been used in the courts over the years in one form or another. The doctrine has permeated the legal system in order to support, interpret, defend and/or invalidate statutes, ordinances and regulations. Most recently, the reasoning behind the doctrine has even extended to justify relationships of a personal nature. Only time will tell if the Opinion of the Supreme Court will follow precedent, or break new ground.

DRUG TESTING VERSUS HIV TESTING

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ABSTRACT

Drug testing seems to have become an accepted aspect of the employment screening process in corporate America. There have also been periodic discussions regarding establishing mandatory HIV testing for health care workers as another employment screening technique. Currently, there are no organized efforts underway to mandate HIV testing for either health care workers or any other segment of the civilian population. The purpose of this paper is to review the rationale for both drug and HIV testing and to examine differences in public attitudes regarding testing.

INTRODUCTION

American workers have come to accept several types of employer monitoring and regulation of what could be considered private behavior. For example, pre-employment drug screening in the private sector is now considered routine. Furthermore, employers monitoring employee e-mail, installing surveillance cameras in work areas, and requiring employees who smoke to pay higher health insurance premiums are common practices than seem to encroach on employees' private lives.

Other forms of screening and testing have been suggested from time to time. When public concern about the AIDS epidemic was at a peak, there was a push to require HIV testing for health care workers and patients. More recently, the Department of Defense began DNA profiling for uniformed military personnel, and some have suggested DNA screening of infants at birth. However, drug screening is the most widely accepted form of mandatory testing to date. Drug testing seems to be considered an acceptable practice by private sector employers, the courts, and the general public. The purpose of this paper is to review the rationale for both drug and HIV testing and to examine explanations for differences in attitudes regarding testing.

DRUG TESTING

Workplace drug testing to screen for illegal drug use and drug abuse began in the early 1970s. Today, pre-employment drug screening and random testing for drug use are commonly used in many organizations. Employers use drug tests to minimize, if not eliminate, workplace injuries due to drug use and to reduce the costs of illness, absenteeism, and theft associated with drug abuse (Crant & Bateman, 1989). In the 1980s, it was estimated that the costs of drug abuse (excluding alcohol) to employers was $25 billion per year (Crant & Bateman, 1989). In a 1998 study, the estimated cost of drug use to employers was estimated at $75 to $100 billion annually (Bahals, 1998). In 1982, three percent of Fortune 500 companies screened employees for illegal drug use (Crant & Batement,

1989). In 1998, 95 percent of Fortune 500 companies conducted pre-employment drug screening (Bahals, 1998).

The productivity argument is used to justify drug testing. According to the productivity argument, employers have a proprietary right to regulate the purchased time of the employee. By extension, the employer may also regulate behavior outside the workplace that affects the employee's productive capacity at work (Caste, N. J., 1992). Employers argue that illegal drug use, as well as inappropriate use of prescription drugs, has a negative impact on job performance. Moreover, the drug use threatens the safety of coworkers and customers. Both the courts and the public seem to have accepted this argument. Currently, a private employer may screen employees with pre-employment drug testing, investigate accidents by drug testing those involved, and conduct random drug tests.

While the legal right of a private employer to drug test is not longer an issue, the appropriate procedures remain an area of disagreement and some litigation. Issues on which employees and employers continue to disagree include privacy, negligence, defamation, and rights under the Americans with Disabilities Act (ADA) (Bahls, 1998). The courts have dealt with the invasion of privacy argument against drug testing through court imposed standards that require employers avoid unnecessary intrusion and apply a reasonable cause standard to determine the appropriateness of employer drug-testing requests. Negligence issues arise as a consequence of false positive testing results. Defamation issues develop when testing results have not been kept confidential. A framework has evolved within which employers are free to adopt drug testing policies and to test within court defined limits. By placing limits on the employers' latitude to test, the courts provide some protection for the privacy rights of individuals.

HIV TESTING

Public sentiment urged mandatory HIV testing for health care workers due to the "Acer incident." Dr. David Acer, a dentist in Stuart, Florida, stirred public fear about the safety of dealing with health care workers. In 1990, Dr. Acer died of AIDS. Of Dr. Acer's 2000 patients, 1100 have reported to health officials that they have been tested for HIV. To date, six of Dr. Acer's patients who had no other exposure have tested HIV positive. Kimberly Bergalis, the first patient of Dr. Acer who tested positive for HIV, brought national attention to the idea of mandatory HIV testing of health care workers (Wall Street Journal, 1993).

While gravely ill, Ms. Bergalis testified before a congressional hearing seeking to secure legislation for mandatory testing of health care workers. Ms. Bergalis died in 1991, and her legacy was public sentiment in favor of mandatory testing of health care workers. To date, the CDC (Centers for Disease Control) states that the Acer cases remain the only documented instances of HIV transmission from health care workers to patients (American Health Consultants, 1993). After the Acer incident, studies of more than 15,000 patients cared for by 32 HIV positive health care workers revealed not a single case of transmission from health professional to patient (Pogash, 1992).

Legislation was introduced in the early 1990s to require mandatory testing of health care workers. The legislation was based on the premise that HIV testing of health care workers would protect patients from infection. The legislation was never passed. While there are some instances in

which HIV testing is routinely done (blood donations and members of the military), there are currently no instances where private sector employees require to mandatory HIV screening.

Like drug testing, the general rationale for requiring HIV testing is a productivity or safety argument. More specifically, the following are reasons employers consider HIV testing or testing for any other potentially disabling disease or genetic condition:

Identification of employees or potential employees who are unusually susceptible to workplace risks.
Identification of employees whose health may be adversely affected by exposure to workplace toxins.
Identification of employees or potential employees who may become permanently unable to work.
Identification of employees who are likely to incur substantial health care bills.
Identification of employees or potential employees whose health status may pose a risk to others (SHRM, 1999).

ARGUMENTS FOR HIV TESTING FOR HEALTH CARE WORKERS

Driven by the public fear and apprehension about HIV, the arguments for mandatory HIV testing focused on the following points (Beck, 1992, Noll, et. al., 1993):

Mandatory HIV testing protects the patient. This was essentially a safety argument stimulated by the Kimberly Bergalis incident. The public saw mandatory testing as protection from possible infection.

Testing would promote early identification and treatment for the HIV-infected employee. Accidental infection is an occupational hazard for health care workers. Routine testing would lead to earlier diagnosis and treatment, to an improvement in quality of life, and to increased life expectancy for the health care worker.

Testing would identify employees who should work and practice in a protected environment. HIV infected health care workers may have severely depressed immune systems and should be protected from exposure to infection. This is both a safety and a productivity based argument for testing. With knowledge of a worker's HIV positive status, they could be assigned to jobs that would be less threatening to their health.

Testing prevents the spread of the HIV virus. Similar to the argument that HIV testing would protect patients, this is essentially a safety argument. The meaning of "direct threat" in the context of HIV or AIDS has not been determined by the Supreme Court. However, the Court has left open the possibility that in certain environments or jobs a person who is HIV positive can pose a direct threat to the health and safety of others (North Carolina Employment Law Letter, July 1998).

Testing would help the employee who contracts HIV from work exposure qualify for worker's compensation. HIV at any stage of development is a disability under ADA. Periodic testing after employment would help health care workers who contract HIV from work exposure demonstrate that the infection was employment related. A pre-employment HIV condition would not qualify for worker's compensation benefits. There are approximately 100 health care workers who die each year as result of all types of infections resulting from needlesticks.

Mandatory HIV testing would be consistent with other forms of mandatory screening. Many health care workers submit to random drug screening as well as other forms of testing during annual employment physicals. If one's HIV status could impact the worker's ability to carry out their job responsibilities, then HIV testing is no different than other forms of mandatory screening and testing.

Testing could be a marketing tool for health care institutions. Patients may prefer to go to a facility where employees are tested regularly for HIV. It could be perceived that patient risk of infection from health care workers would be lower. Since patients may choose a facility that tests over one that does not test, mandatory testing could lead to increased revenues for the hospital (Beck, 1992, Noll, et. al., 1993).

ARGUMENTS AGAINST HIV TESTING FOR HEALTH CARE WORKERS

The arguments against mandatory HIV testing have focused on the following points (Beck, 1992, Noll, et. al., 1993):

The risk of transmission of HIV from health care employees to patients is minimal. Data from the CDC indicate that the "Acer Incident" is the only documented case of HIV transmission from a health care worker to patient. The risks of being infected with HIV after having an invasive procedure done by an HIV positive surgeon is less than 0.003%. The data simply do not support the need for mandatory HIV testing.

Most health care employees do not perform "exposure prone" procedures. The CDC has recommended that "exposure prone" procedures be identified and that workers who perform such procedures know their HIV status. Exposure prone procedures are defined as those that present a risk of percutaneous injury to the health care worker. Such an injury would pose a risk that the worker's blood would come in contact with patient's body cavity, subcutaneous tissues, or mucous membranes. This exposure could cause HIV infection from worker to patient. Studies have shown that most health care workers do not perform "exposure prone" procedures. Health care workers (primarily nurses) perform several invasive procedures that place them at risk of contracting HIV from infected patients rather than patients contracting HIV from health care workers. Consequently, the need for widespread mandatory HIV testing of health care workers is not supported.

Negative results do not conclusively indicate the absence of HIV infection. Because antibodies may not be present immediately after infection, a "false negative" may result. Mandatory testing will not identify health care workers in the early stage of infection, and the test results are not always conclusive. Therefore, the need for mandatory testing is not justified.

HIV testing is not cost effective. The estimated per worker costs of HIV testing are $65 if the results are negative and $250 per worker if the results are positive. The George Washington University AIDS Policy Center estimated that a one time screening of all health care workers would cost at least $525 million. The cost of mandatory testing of all health care workers on a quarterly basis has been estimated at over one billion dollars per year. Others (Phillips, Lowe, Kahn, Lurie, Avins, and Ciccarone,1994) have suggested that one time testing of just physicians, surgeons and dentists could cost as much as $51.6 million. Moreover, public health officials predict that testing of health care workers would have little impact on the spread of AIDS. According to Dr. Paul Volberding, president of the International AIDS Society, "Mandatory testing would result in an invasion in a lot of people's privacy with almost no return on investment" (Silberner, 1991).

Silberner's point of view was supported by a study of the cost effectiveness of HIV testing of physicians and dentists in the United States (Phillips, et. al., 1994). These authors analyzed policies for mandatory testing of physicians, surgeons, and dentists and found that "cost effectiveness varies tremendously under different scenarios." Under a medium risk scenario, mandatory testing might avert 25 infections at a cost of $27.9 million or $1,115,000 per infection averted. While their results do not support or oppose mandatory HIV testing, the ethical implications of mandatory testing require cost effectiveness estimates be determined with greater certainty.

Mandatory HIV testing would violate the health care workers' autonomy to decide what is best for themselves. This argument against mandatory HIV testing is based on the doctrine of informed consent which states that health care workers and patients are entitled to be informed of the need for a test or medical procedure before it is performed. Mandatory HIV testing would be a clear violation of this doctrine.

Mandatory HIV testing would violate the privacy and confidentiality rights of health care workers and would result in job discrimination. Anyone who has been tested is at risk of inadvertent disclosure of the test results or inappropriate prying by curious employees. Furthermore, individuals with HIV continue to be stigmatized by health care workers as well as the general public (Green & Platt, 1997; DiIorio, 1997; Crawford, 1996; Connors & Heaven, 1995). Other forms of discrimination are also possible. A hospital might mandate that HIV infected health care workers cannot provide direct patient care and thus prevent the worker from performing their primary job responsibilities. The HIV infected health care worker may be denied promotions and other job opportunities because their employer may be concerned about the person's ability to perform their job over time (Beck, 1992, Noll, et. al., 1993).

HIV TESTING FOR OTHER POPULATIONS

Although the mandatory HIV testing debate has focused on testing health care workers, there are cases where HIV testing is mandated. HIV testing is required for military personnel and prison inmates in some states (Noll, Merrell, & Byers, 1993).

In the military, uniformed personnel are tested for HIV every two years. Military personnel are screened for HIV before leaving the U.S. for overseas assignment and before returning to the United States. The reasons for mandatory HIV testing in the military are as follows:

The need to ensure a safe blood supply in emergencies,

The difficulty of providing appropriate care for HIV-positive personnel in remote areas,

The potential for exposure of HIV-positive personnel to exotic diseases during overseas assignments, and

The detrimental risks of live-virus vaccines to HIV positive persons (Noll, Merrell, & Byers, 1993).

Some states require mandatory HIV testing for prisoners, sex offenders, and prostitutes. The purpose of the testing is to protect employees who were in contact with these individuals. Three states required HIV testing of individuals applying for a marriage license. The logic for testing before marriage was identification of infection would prevent transmission to partners. All three states have repealed laws requiring testing of marriage license applicants.

WHY IS MANDATORY HIV TESTING NOT THE NORM?

Given the public's acquiescence to employer sponsored drug testing, one might assume that the public would also accept HIV testing. Since the flurry of interest in mandatory HIV testing for health care workers abated, there have been no further organized efforts to pursue such a policy. There are several possible reasons why mandatory HIV testing is not the norm for employees in health care or other private sector employers.

In 1991, the CDC introduced and recommended the adoption of universal precautions aimed at preventing the transmission of HIV through casual contact rather than recommending HIV testing. In spite of the fear, panic, and ignorance prevalent at the time, the universal precautions were quickly adopted by the health care industry. Using the CDC's Universal Precautions in conjunction with the OSHA Bloodborne Disease Standard, the rate of possible HIV transmission from worker to patient can be reduced to almost zero (Noll, et al., 1993).

The Health and Human Services Department's assessment of the risk that an HIV positive worker would transmit HIV to patients during invasive procedures showed that mandatory testing was not justified. Furthermore, the incidence of HIV transmission from a health care worker to a patient is extremely low. There is only one documented case. Finally, current medical evidence continues to show that HIV cannot be transmitted from one person to another through casual contact. Given the absence of proof that HIV positive employees pose a threat to co-workers or customers, there is little support for testing employees not directly involved in the delivery of services that present an opportunity for the exchange of bodily fluids (Wyld, 1992).

Possible reasons for the lack of interest in mandatory HIV testing among private sector employers are legal issues surrounding HIV/AIDS. For example, according to the ADA being HIV positive is classified as a disability. The ADA protects qualified disabled individuals who, with or without a reasonable accommodation, can perform the essential functions of the position that the person holds or desires. While HIV screening could provide information on whether an employer had to accommodate an employee, the information itself could be problematic for the employer. Knowledge of impairment under the ADA would trigger the employee applicant protections under the act. Finally, the cost of a testing program for HIV similar to the program used for drug testing and screening could be significant. The cost of HIV screening and the cost of accommodating HIV positive employees or job applicants could be overwhelming for an employer.

The public's attitude about an individual's HIV status is different from the public's attitude regarding drug use/abuse. Being HIV positive continues to carry a stigma, and people are still fearful of HIV positive persons in spite of several years of public education. However, HIV is a disease with a biological basis, and most people understand that you cannot become infected through casual contact. Drug use (either abuse of prescription drugs or use of illegal drugs) is generally perceived as a personal choice that can be prevented.

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LIABILITY OF REAL ESTATE BROKERS AND SALESPERSONS FOR DISCLOSURE OF OFF-SITE ENVIRONMENTAL CONDITIONS

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ABSTRACT

The doctrine of caveat emptor, as it applies to disclosure by sellers and their agents, of matters concerning residential real estate, continues its process of erosion. Of particular note is the New Jersey case of Strawn v. Canuso involving disclosure of environmental conditions produced by hazardous substances discharged from a nearby landfill. The case represents a unique expansion of matters subject to disclosure by embracing off-site conditions, and is a natural extension of common law doctrines which impose on sellers the responsibility for making buyers aware of material matters which affect the value and desirability of property.

This paper examines the law regarding disclosure in residential real estate sales, and applies these historic legal principles to the requirement of disclosing off-site environmental conditions.

HOW ARBITRATORS ADDRESS SEXUAL HARASSMENT CASES

Stephen D. Owens, Western Carolina University

ABSTRACT

The problem of employment-related sexual harassment is one of the most controversial issues affecting employee-employer relations today. This paper will examine how arbitrators have decided cases where the issue of sexual harassment was present. It will attempt to discern how arbitrators deal with the public policy issue of sexual harassment in the private forum of an arbitration hearing. Several representative arbitration awards and relevant court cases will be examined and discussed.

INTRODUCTION

One of the most controversial issues affecting employee-employer relations today is the problem of employment-related sexual harassment. Guarantees under Title VII of the 1964 Civil Rights Act that employees need not tolerate sexual abuse in the workplace were confirmed by the Supreme Court in *Meritor Savings Bank v. Vinson* (477 U.S. 57). In addition to statutory protection, employees with union representation can also seek protection from workplace sexual harassment through their collective bargaining agreement (CBA). The great majority of such agreements contain a provision where the parties state their intent to provide a workplace free from sex discrimination. Indeed, the pertinent language in the typical CBA is quite similar to the statutory provisions prohibiting sex discrimination. Consequently, arbitrators will have to deal with legal principles when deciding whether a proven act of sexual harassment constitutes just cause for discipline or discharge. This paper examines a representative number of cases where arbitrators decided issues of sexual harassment. Emphasis is placed on how arbitrators have decided this sensitive public policy issue in the private forum of grievance arbitration.

SEXUAL HARASSMENT AND PUBLIC POLICY

Sexual harassment has become a pervasive problem in the American workplace of the 1990's. Certainly the drama of the Clarence Thomas-Anita Hill dispute was "enough to enrage the most passive women and make even liberated men squirm" (Crow & Koen). Sexual harassment occurs in all types of private sector industrial settings as well as the public sector workplace. Such behaviors, if left unchecked, will reduce organizational effectiveness by placing psychological, social, and economic stress on employee victims.

Two distinct forms of sexual harassment are now recognized by the Equal Employment Opportunity Commission and the courts: *quid pro quo* and hostile environment. *Quid pro quo* sexual harassment is more easily identified and involves demands for sexual favors in return for a promotion, higher pay, or some other employment benefit. *Quid pro quo* cases rarely, if ever, occur in the arbitral forum because it is the supervisor who is usually charged with sexual harassment.

Hostile environment cases, however, are much more commonly decided by arbitrators. Such cases usually involve a male employee who has been disciplined for harassing his female co-worker. He then grieves the fairness of the discipline under the "just cause" provision of the labor agreement. In its *Vinson* decision in 1986, the Supreme Court applied Title VII to workplace sexual harassment by stating that the existence of a hostile working environment is a form of sexual harassment and falls under Title VII. Crow and Koen conclude from *Vinson* that a complaint of hostile environment must show that the conduct was "(1) sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment and (2) unwelcome" (Crow & Koen, 6).

A key question left unanswered from *Vinson*, however, concerns the criteria to be used to determine whether conduct was unwelcome and sufficiently pervasive to amount to sexual harassment. That question was addressed in 1993 by the Supreme Court in *Harris v. Forklift Systems* (114 S.Ct. 67). The Court held that a plaintiff need not show severe psychological injury to prevail on a sexual harassment claim. An abusive work environment, even one that does not seriously affect an employee's psychological well being or cause an injury, can detract from an employee's job performance.

In its decision in *Harris*, the court more clearly set forth an operational definition of a discriminatorily "abusive work environment" under Title VII. The decision should provide guidance to labor, management, and industrial relations practitioners as they grapple with workplace sexual harassment. However, despite the Harris decision, labor arbitrators can be faced with a unique set of issues when deciding sexual harassment cases.

QUESTIONS AND ISSUES FOR ARBITRATORS

The use of labor arbitrators as a forum for settling workplace disputes is by now a well accepted practice in the industrial relations arena. In one of the three cases in the *Steelworkers Trilogy* (363 U.S. 574,583), the court said that national labor policy should favor resolution of workplace grievances through arbitration because of an arbitrator's knowledge of the parties' needs and the "common law of the shop." However, the so-called "common law of the shop" has now expanded to include a complex array of new workplace issues. With the growing body of reported arbitration decisions involving sexual harassment, various important substantive and evidentiary issues have become apparent. Issues such as nature of the grievances, quantum of proof, and remedies are particularly noteworthy.

Nature of Grievances

The most straightforward and common grievance occurs when the accused harasser grieves under the just-cause doctrine of the agreement. Here the accuser, not the victim, brings the grievance; the victim is most likely a fellow member of the collective bargaining unit. The arbitrator often decides this type case by applying the "tests" of just cause to the fact situation. However, when the victim is the grievant and names a supervisor, co-worker, or other non-bargaining unit employee as the harasser, the case becomes more complicated. Crow and Koen state the problem accurately in this type case:

> The burden of proof changes, appropriate remedies are not as easy to define, and the arbitration may take place concurrent with an outstanding EEOC complaint. This type of grievance becomes even more complex when the person charged with sexual harassment is a vendor, customer, client, or other business-related person (Crow & Koen, p.9).

Quantum of Proof

The three categories of proof usually mentioned in connection with arbitration awards are: (1) a preponderance of the evidence (more persuaded than not), (2) clear and convincing evidence (pretty certain), and (3), proof beyond a reasonable doubt (completely convinced). The non-legalistic setting of the arbitral forum usually calls for an open and flexible approach to the admission of evidence. Which of the three categories are more likely to be applied in sexual harassment cases? Some suggest that it depends on the nature of the case. That is, in cases involving *quid pro quo* sexual harassment, the stakes for the accused can be quite high; a more stringent quantum of proof will likely be applied (Crow & Koen, p.10). However, in hostile environment harassment cases, a lower order of proof will be more appropriate (Kelly, p.47).

Remedies

The issue concerning the extent of an arbitrator's remedial powers was recently examined by Sinicropi. He concludes there are two approaches to the issue: the "legal authority" view and the "policy" view. In the former, the arbitrator receives his/her remedial power from the labor agreement and/or the law. The latter view examines the extent to which the particular remedy will effect the parties and their collective bargaining relationship (Sinicropi, p.548). Due to changing societal conditions and workplace demographics, there may be a tendency for arbitrators to fashion remedies more in tue with the changing times. In sexual harassment cases where the victim's grievance is upheld, an arbitrator's remedial action could include discharge, transfer of the victim or harasser, compensation for the victim for both actual and punitive damages, and payment for counseling or therapy.

DECISIONAL STANDARDS USED BY ARBITRATORS

The great majority of arbitration cases containing sexual harassment issues involve a grievance protesting the disciplinary action taken against the grievant. The issue facing the arbitrator entails whether the action taken against the accused employee/harasser was for just cause. The so-called "just-cause standards" play a prominent role in arbitral decisions. The seven now well-accepted criteria for establishing just cause have evolved from Daugherty's decision in 1966 in *Enterprise Wire Co.* (46 LA 359). These "tests" for just cause include the following seven questions:

1. Was there proper notice of the possible or probable consequences of the employee's conduct? Obviously, it is difficult for an employer to justify a disciplinary action

against an employee if it can be shown that the employee had no knowledge of either the rule or the consequences of its violation. However, in cases involving sexual harassment, rules cannot be promulgated to cover every conceivable workplace behavior. For example, in situations where a particular type of behavior is accepted as normal by some but perceived as sexually abusive by others, there can be problems in meeting the first test. However, employers can strengthen their hand by clearly stating the rules and penalties for hostile environment sexual harassment.

2. Was the rule reasonable and business-related? Here the key question is whether the sexual harassing behavior interfered with the operations of the enterprise. Of course, it shouldn't be difficult to document the effect of sexual harassing behavior on employee productivity and morale. However, problems can occur when arbitrators are faced with cases involving off-premises sexual harassment.

3. Was there a proper investigation that the company's rule was in fact violated? To meet the third standard, management must make every effort to fully consider the case circumstances and accord the grievant due process.

4. Was the company's investigation conducted fairly and objectively? This criterion is straightforward and places the requirement on management to conduct a full and impartial inquiry into the incident without any preconceptions of the grievant's guilt.

5. Was there proof of the grievant's misconduct? Demonstrating proof of actual misconduct in sexual harassment cases can be troublesome. However, there are three aspects that can be useful in showing misconduct: evidence of coercion, the victim's reaction to the alleged behavior, and the negative consequences to the victim's job performance (York, p. 833).

6. Have the rules against sexual harassment been applied in a non-discriminatory manner? It is important to show that others charged with violations of workplace rules are treated evenhandedly.

7. Does the degree of discipline match the seriousness of the offense and the employee's record with the company? In hostile environment sexual harassment cases the seriousness of the offense can vary from case to case. Thus, the degree of severity in such cases is often difficult to determine.

SURVEY OF REPRESENTATIVE CASES

A search of available published cases involving issues of sexual harassment reveal a variety of fact situations. A sample of several different cases has been selected to demonstrate these issues and resulting arbitral decisions.

Grievant as Sexual Harasser - Discharge Upheld

In the great majority of cases, the grievant, a male employee, protests the discipline given him for his harassment of a female co-worker. Arbitrators are, for the most part, quite sensitive to sexual harassment issues and fashion their decisions accordingly. Especially in cases involving offensive touching or other forms of immoral conduct, discharge penalties are more likely to be upheld. For example, discharge was proper where a male employee twice pulled up the sweatshirt of a female co-worker even though the incident initially went unreported (90-1 ARB @8223). In the case the company had no regulations regarding sexual harassment; however, the arbitrator held this to be insignificant since the grievant knew his actions were serious violations of workplace behavior. In a similar case involving the presence of a hostile environment, management's decision to discharge was upheld where the grievant had engaged in a pattern of offensive behavior (brushing against females, massaging their shoulders, pinching, and physically restraining them). Here the arbitrator used the "clear and convincing" standard of proof due to the "type of sexual harassment case" before him (92-1 ARB @8001). Discharge has also been upheld where the victims were non-employees. In one representative case, the grievant made service calls for a municipal gas company. In the one incident involving a female client at her residence, the arbitrator found just cause for terminating the grievant where his comments, his written note, and improper physical contact (grabbing the customer) amounted to "egregious sex harassment" (92-2 ARB @8328). In another unique case, a female union steward with thirty-two years service was discharged for attempting to disrupt a female co-worker's family life and reputation at work. Here the grievant had sent a handwritten note to the victim's husband which stated that the co-worker was having an affair with her supervisor. The arbitrator found that the grievant's action had created a psychologically repressive work environment and that discharge was consistent with the company's past history of dealing with sexual harassment (87-1 ARB @8088).

Grievant as Harasser: Lesser Discipline Imposed

Management will often act quickly and aggressively to deal with sexual harassment situations. Often, however, management's action is deemed to be too severe by arbitrators. For example, in a case where discharge was reduced to a suspension, the arbitrator found that the grievant's actions were not "maliciously motivated." Moreover, the employer had not followed the principle of progressive discipline; it was the grievant's first offense (404 AAA 4). Another case involved a situation where the grievant made an inappropriate remark to a female supervisor. The discharge was converted to a suspension without pay because no sexual remark occurred and no hostile environment was created (92-1 ARB @8040). Similarly, an arbitrator ruled discharge to be an excessive penalty

where a male employee repeatedly wore his bermuda shorts "well below the normal waistline" and thus created an "offensive working environment" for a female employee (399 AAA 6). A lesser penalty was imposed because the grievant was not put on notice that such behavior could jeopardize his employment. Discharge for sexual harassment was also reduced where it was shown that management did not clearly warn the grievant that his behavior was objectionable; other notices concerning the company's sexual harassment policies were found to be deficient (90-1 ARB @8257). The grievant had sent the female co-worker a series of affectionate notes and later tried to kiss her. It was not until the kissing incident that she complained to management about the grievant's behavior. Another rather unique case contained elements of sexual harassment which were considered in the decision to overturn an employer's disciplinary action. The case involved discharge of a female production worker for hitting and kicking a male co-worker. It was shown that her outburst was triggered by her co-worker's improper sexual advances. The arbitrator considered the sexual abuse to be an extenuating factor in his decision to reduce the discharge to a seven-month disciplinary layoff (390 AAA 7).

Grievant as Supervisor

One case was found where a supervisor was charged with sexual abuse, disciplined, and grieved the action in a non-union organization which had adopted an in-house grievance-arbitration procedure (93-1 ARB 8641). A subordinate with whom the grievant previously had a sexual relationship claimed that the grievant was making unwelcome advances toward her. The arbitrator reinstated the discharged grievant because the only evidence to support the alleged sexual misconduct was in the form of hearsay. No back pay was awarded, and the employer was given two options: to place the grievant in a non-supervisory position and/or require him to see a professional counselor under the employer's Employee Assistance Program.

CONCLUSION

This review of some of the representative arbitration cases involving sexual harassment revealed the following characteristics:

1. Arbitrators rarely preside over grievances brought by the victim of sexual harassment.

2. Employers tend to act decisively and often discharge the grievant for cause.

3. Most cases involve a male co-worker/co-union member who is the harasser/grievant.

4. Arbitrators uphold discipline given employees who harass customers and clients outside the workplace.

5. Where there is no evidence of moral turpitude, arbitrators are quite likely to impose discipline short of discharge--especially where the case involves hostile environment harassment.

6. Employees disciplined for sexual harassment involving improper and unwelcome physical contact are more likely to lose at arbitration.

7. While arbitrators do not adhere to strict rules of evidence, the quality of proof must be sufficient to find misconduct in the form of sexual harassment. Evidence which involves the victim's word against the grievant's or containing hearsay will probably not meet an acceptable quantum of proof.

The review of the literature and an examination of some of the available awards demonstrate that the parties continue to use the arbitral forum to adjudicate sexual harassment grievances. This is not surprising since the grievance-arbitration procedure is now a well established and accepted component of the U.S. industrial relations system . As employers promulgate antisexual harassment policies, arbitrators can expect to decide more and more such cases. Since sexual harassment is prohibited by public policy, arbitrators must take care to fashion their awards so as to not deprive the parties of their contractual and statutory rights.

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SEXUAL HARASSMENT IN THE WORKPLACE: EMPLOYER LIABILITIES & DEFENSES

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ABSTRACT

During its 1997-1998 term the Supreme Court handled two significant Title VII Civil Rights cases dealing with employer liability for sexual harassment of employees. In both cases, Faragher v. City of Boca Raton and Burlington Indus. v. Ellerth, a majority of seven held an employer could be liable for damages to employees who had neither filed formal complaints about harassment nor been denied a promotion or reassigned in retaliation for refusal to acquiesce to unwanted sexual advances. In addition, the Court for the first time gave employers some suggested defenses that could be used to counter such suits.

Following these two decisions it is possible for legal counsel to advise human resource directors on defensive steps to take to defend against these types of actions. The authors will attempt to create a table which can be consulted by such directors to see if their companies have taken the appropriate actions to overcome such charges by former employees.

In addition, one federal circuit using the two Supreme Court decisions held an employer liable for damages to a former employee who had been sexually harassed by customers! What's an employer to do? The authors believe there are defenses which are appropriate here also.

INTRODUCTION

Last term the United States Supreme Court issued three opinions dealing with sexual harassment in the workplace. (*Faragher, Burlington,* and *Oncale v. Sundowner Offshore Services, Inc.*, 1998*)* In two of those cases, *Faragher* and *Burlington*, the employees were female and the harassers were male supervisors; however, in neither case had the employees ever notified management of the situation. Also, the harassing supervisors had never taken any retaliatory action against the female employees. In *Burlington* the supervisor implied that the employee should make herself more attractive and go out with him. In *Faragher* the supervisors subjected the female employees to a hostile working environment. In both cases the employees never filed a complaint while employed. Instead, they quit and then sued. The Court felt it was time to give some guidance to American business as to what steps and procedures should be taken to defend against sexual harassment suits. In essence the Justices felt that not all cases of sexual harassment should result in the employer being automatically liable for the acts of its supervisors. However, following its two

holdings, an appellate court applied the Court's analysis to a case involving harassment of an employee by customers and held the employer liable! (*Lockard v. Pizza Hut, Inc.*, 1998)

FARAGHER and *BURLINGTON*

In *Faragher* the court saw the issue as under what circumstances may an employer be held liable under Title VII (42 U.S.C. § 2000e) for the acts of a supervisor whose sexual harassment of subordinates created a hostile work environment amounting to employment discrimination. It held that an employer would be vicariously liable for discrimination caused by the supervisor; however, the employer could raise an affirmative defense regarding the reasonableness of the employer's conduct and the victim's behavior. Ms. Faragher had worked as a lifeguard for the city of Boca Raton during the summers of 1985-1990 to help pay for college. She quit in June 1990 and filed suit in 1992 alleging that her supervisors had created a sexually hostile environment at the beach by repeatedly subjecting her and other female lifeguards to uninvited and offensive touching and lewd remarks. One supervisor had said he would never promote a woman and another had told her, "Date me or clean the toilets for a year." All Faragher wanted from the city was nominal damages, court costs, and attorney's fees. In 1986 Boca Raton had adopted a sexual harassment policy and revised it in 1990. However, it never issued copies of the policy to the lifeguards at the beach. Faragher never complained to higher management about the two supervisors who had touched her and verbally abused her. But she did discuss the objectionable behavior with a third supervisor who told another female lifeguard that the city just didn't care. Finally, in 1990, two months before Faragher resigned another former lifeguard wrote to the city's personnel director to complain about the behavior of the two supervisors. The complaint was investigated and the city reprimanded the two and required them to choose between a suspension without pay or forfeiture of annual leave. The district court held the behavior of the two supervisors sufficient to create an abusive working environment. It held the city liable under three theories: first, the harassment was pervasive enough to support an inference that the city had constructive knowledge of it; second, under agency law the city was liable because the supervisors were acting as its agents when they committed the offensive acts; third, the third supervisor's knowledge of the harassment and failure to act created liability for the city (*Faragher*, 2281). The court awarded Faragher one dollar in nominal damages.

A Court of Appeals panel reversed the judgment. While agreeing that the conduct of the two supervisors was sufficient to create a hostile work place, it did not believe the city was liable. The panel based its reasoning on the fact that the supervisors were not acting within the scope of employment when harassing the female lifeguards and that the city did not have constructive knowledge of their acts by virtue of frequency or of the third supervisor's actual knowledge. In a 7-5 decision, the Court of Appeals, sitting *en banc*, upheld the panel's decision.

Justice Souter, writing for the majority of the Supreme Court, noted that since the court had first cited agency law as being applicable to Title VII cases in *Meritor Savings Bank* v. *Vinson* (1986), the Courts of Appeal had struggled to create standards with which to judge the liability of employers for supervisory hostile environment harassment of employees. In many cases the appellate courts had ruled against the employee because under agency principles the employer was not being benefitted by the offensive behavior of the supervisor, nor were the supervisor's actions taken with

the intent to benefit the employer. Here the court held that an employer could be vicariously liable to an employee for the actions of an immediate supervisor in creating a hostile environment. But the court gave employers an affirmative defense which consisted of two prongs. If the employee had neither been fired nor denied a promotion by the offending supervisor, the employer could show that it had exercised reasonable care to prevent and correct any sexually harassing behavior by its supervisors, and that the employee had unreasonably failed to exercise the reporting methodologies communicated by the employer to employees via published policy statements or the employee handbook to report abusive actions of supervisors. (*Faragher*, 2292-2293) The court felt that to meet the first prong an employer had to show it had promulgated an anti-harassment policy. To meet the second prong, an employee failure to use the published complaint procedure would suffice. The court noted that this two part affirmative defense would not be available where the supervisor's harassment concludes with assertive action such as termination, demotion, or unpleasant reassignment.

Applying this test to Ms. Faragher, the court reversed the Court of Appeals and reinstated the trial court decision. Boca Raton failed the first prong of the test because it had not communicated its policy against sexual harassment to the beach employees and it made no attempt to keep track of the conduct of its beach supervisors. Also, the city's policy did not give the employee a choice with whom to lodge a complaint other than her immediate supervisor.

In the *Burlington* case, decided the same day as *Faragher*, Justice Kennedy writing for the same 7 justice majority (Justices Scalia and Thomas dissented) held as had Justice Souter that an employee who refuses unwelcome and threatening sexual advances from a supervisor, but suffers no adverse job action such as termination, demotion, or unfavorable reassignment, may recover damages from the employer without showing that the employer was negligent. Kimberley Ellerth had been employed as a salesperson in a Burlington division in Chicago from March 1993 to May 1994. The man Ellerth accused of sexually harassing her was not her immediate supervisor, but one above her supervisor. He was located in New York. However, he had authority to make hiring and promotion decisions subject to the approval of his supervisor, who signed the paperwork. In the summer of 1993, while on a business trip with her New York supervisor, he invited Ellerth to join him at the hotel lounge where he made remarks about her breasts. When she made no response, he told her to loosen up and warned, "You know, Kim, I could make your life very hard or very easy at Burlington." (*Burlington*, 2262) In March 1994 Ellerth was being interviewed by her New York supervisor for a promotion. He told her he had doubts about her because she was not "loose enough" and reached over to rub her knee. She got the promotion; however, when he called to announce it, he told Ellerth, "you're gonna be out there with men who work in factories, and they certainly like women with pretty butts/legs." (2262) Ellerth quit a short time later without giving the supervisor's behavior as the reason. Three weeks later she did send a letter to Burlington explaining she had quit because of the supervisor's behavior.

During her brief time at Burlington, Ellerth never informed anyone in authority about the supervisor's conduct despite knowing Burlington had a policy against sexual harassment. In October 1994, after receiving a right-to-sue letter from the Equal Employment Opportunity Commission (EEOC), she filed suit alleging Burlington engaged in sexual harassment and forced her constructive discharge. The district court granted summary judgment to Burlington because while acknowledging that the supervisor's behavior created a hostile work environment, Burlington had no knowledge of

his actions because Ellerth had not used its complaint procedures. The Court of Appeals *en banc* reversed in a decision which produced eight separate opinions and no agreement as to a rationale. The appeal court judges agreed the case was about vicarious liability, but they could not agree on the standard to apply. Justice Kennedy said the Supreme Court had granted *certiorari* to help in defining appropriate standards of employer conduct in sexual harassment situations. The issue as he saw it was whether an employer would be vicariously liable for a supervisor who created a hostile work environment by making threats to alter an employees conditions of employment based on sex, but did not carry our the threat. Justice Kennedy applied agency law as the court had done in *Meritor* and *Faragher*. The court focused on the agency principle concerning vicarious liability for intentional torts committed by a supervisor misusing his delegated authority in accomplishing the tort because of the existence of the agency relation.(*Burlington*, 2268) Kennedy noted approvingly that whenever a supervisor took a tangible adverse action against a subordinate based on sexual harassment every federal Court of Appeals found vicarious liability. He cited this as a correct application of the aided in the agency relation standard. So, a tangible employment action, e.g., firing, hiring, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits, would be a significant change in employment status. Tangible employment actions are within the purview of the supervisor who has been empowered by the company to make economic decisions affecting employees under his control. Therefore, a tangible employment action taken by a supervisor becomes for Title VII purposes the act of the employer because it is the employer who performs the official act. The majority of the court felt that Title VII as written by the Congress was designed to encourage the creation of anti-harassment policies and effective grievance machinery. (*Burlington*, 2270) Justice Kennedy cited the two prong test enunciated in *Faragher* as well. This case was remanded to the district court where Burlington would have an opportunity to raise the affirmative defense and prove it.

APPELLATE DECISIONS SINCE *FARAGHER* & *BURLINGTON*

The Supreme Court sent other sexual harassment cases that had been up on *certiorari* back to the Courts of Appeals with instructions to apply the new holdings enunciated in *Faragher* and *Burlington* to them. In *Harrison* v. *Eddie Potash, Inc.* (1998) the 10th Circuit remanded the case to the trial court. It held the supervisor had actual authority over Harrison and misused that authority to sexually harass her; however, the supervisor took no tangible employment action against her. The appeals court instructed the trial court to permit the employer to try to meet the affirmative defense that Harrison had not taken advantage of its anti-harassment policy. However, the court noted that while Potash had an official anti-harassment policy, the evidence in the record indicated Harrison had not been aware of that policy prior to her supervisor's harassment of her. If this were so, then under the holding in *Faragher* Harrison would be entitled to a favorable ruling, thereby reversing the original trial court decision.

In *Lockard* v. *Pizza Hut, Inc.* (1998) two months after *Harrison*, another panel in the same federal appellate circuit held that a franchisee would be liable for the sexual harassment of a female waiter by customers. Pizza Hut, Inc., the franchisor, had issued a policy on sexual harassment of employees by supervisors and customers. This handbook was given to each new employee when

hired, and the employee was required to sign a statement acknowledging receipt and review of the manual. A grievance procedure was included which specified talk to your manager first and if not satisfied go up the line to the area manager, and human resource manager. Pizza Hut also had a specific publication dealing with sexual harassment. It contained scenarios of harassing behavior and stipulated that such behavior whether committed by "supervisory or non supervisory personnel, co-workers or customers is specifically prohibited." The franchisor also had a booklet for supervisors which specifically ordered managers to take steps to correct customers who harass employees such as asking the customer to stop and asking the customer to leave if the behavior persisted.(1066) Ms. Lockard was hired as a waitress by A & M Food Services, Inc., the franchisee. She was directly supervised by Mr. Jack, her shift manager. Ms. Lockard had signed the receipt for the employee handbook. Her duties included closing the store at 10 p.m. on weekdays and 11 p.m. on weekends. On the evening of November 6, 1993, two men who had eaten at the restaurant previously and had made unwelcome remarks to her, i.e., "I would like to get into your pants," arrived for service. Ms. Lockard had informed Mr. Jack that she did not like waiting on them, but did not tell him why. No one wanted to wait on them, including male waiters. Mr. Jack instructed Ms. Lockard to wait on them. She seated them and one of them told her she smelled good and asked her what type of perfume she was wearing. She replied it was none of his business, and he grabbed her by the hair. She told Jack that her hair had been pulled and she did not want to wait on them and asked Jack to find someone else to do so. Jack refused her request. She returned to their table with a pitcher of beer at which time one of the men pulled her to him by her hair, grabbed her breast, and put his mouth on it. Ms. Lockard immediately told Jack she was quitting and wanted to go home. Although Pizza Hut called the next day to ask what had happened and offer her a position which would not involve waiting tables, she declined to return to work. Pizza Hut denied to the EEOC that it was liable on the grounds that Jack had only become aware of the customer harassment the night of November 6. As a result of the incident, Ms. Lockard underwent two years of therapy for post-traumatic stress and depression. When she returned to work for a home health care provider it was with the agreement that she only helped female patients.

Ms. Lockard sued Pizza Hut, Inc. and A & M Food Service, Inc., alleging a Title VII claim of hostile sexual environment. The jury returned a verdict of in Ms. Lockard's favor and against both defendants in the amount of $200,000.

On appeal the defendants claimed that the abuse suffered by Ms. Lockard was not so severe as to warrant compensation. The court citing *Harris* v. *Forklift System, Inc.* (1993) noted that the conduct complained of need not be so abusive as to result in a nervous breakdown. The standard for determining an actionable hostile work environment could include the following list of factors: the frequency of the objectionable conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work. Ms. Lockard alleged Jack created a hostile work environment when he refused to confront the two harassing male customers or assign one of the male waiters to serve them. The court disagreed with the defendant's argument that a single incident of physically threatening conduct was insufficient to create an abusive environment.

Next, A & M Services argued that an employer could not be held vicariously liable for the harassing conduct of customers. The court noted that EEOC regulations specifically provided that

an employer may be liable for acts of non-employees, with respect to sexual harassment of employees, where the employer knows or should have known of the conduct and failed to take corrective action. It was noted by the court that the First, Eighth, and Ninth Circuits has held employers liable for harassment of employees by non-employees. The Tenth Circuit panel adopted the position of the other three circuits and agreed to apply a negligence theory of liability for harassing acts of customers. "In cases involving harassment by co-workers, as opposed to harassment perpetrated by supervisory employees, the only basis for employer liability available is a negligence theory. Because harassment by customers is more analogous to harassment by co-workers than by supervisors, we hold the same standard of liability applies..."(1074) Thus, the employer became liable when Ms. Lockard informed Mr. Jack of the customers' behavior and he took no immediate steps to ask them to stop, leave the restaurant, or ask one of the male waiters to serve them. The court held that Mr. Jack was placed on notice of the customers' behavior because Ms. Lockard had told him of the hair pulling incident and had told him three prior times that she did not wish to serve them. The court noted that Mr. Jack failed to follow the guidelines laid out in Pizza Hut's policy manual, which was to immediately investigate and take action including asking the customers to leave. The court held that Pizza Hut, Inc. was not an employer of Ms. Lockard and reversed the trial court ruling on its liability, but it affirmed in all other aspects against the franchisee, A & M Food Services, Inc.

CONCLUSION

So, what's an employer to do to avoid liability to employees for a hostile work environment caused by sexual harassment in the work place by supervisors or customers?

In cases where the harasser is an upper management supervisor, such as a president of a small corporation as in *Harris*, proprietors, partners, or corporate officers vicarious liability will apply without further inquiry. (Weiss, p. 300) In cases where the supervisor commits a tangible employment action, such as firing, denial of promotion, demotion, or reassignment to a less desirable position, the employer will be vicariously liable without further inquiry. In cases where the employer should have known or knew of the harassment and failed to take corrective action, the employer has contributed to the employees harm through its own breach of duty under a negligence standard and is thus vicariously liable for the harassment as in *Lockard*. When Ms. Lockard complained to Mr. Jack about the behavior of the customers when they pulled her hair, he was put on notice of his duty to act. It became foreseeable that further harm might occur to Ms. Lockard. Thus, when Mr. Jack ordered her to return to the table and keep serving these two customers, the employer became vicariously liable for the harm that ensued. This same standard would apply with co-workers who harassed an employee. In cases where the no tangible employment action is taken by a supervisor harassing an employee, the employer has a two prong affirmative defense which it can assert. First, that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and second, that the employee unreasonably failed to take advantage of the employer's handbook procedures for notifying human resources personnel about sexual harassment. In *Lockard*, Pizza Hut, Inc. had certainly met the second prong of the test. But it failed the first prong when Jack ordered Ms. Lockard to continue to serve the customers. Thus, employers need to educate and train supervisors on the appropriate actions to take when an employee puts them on notice about a

harassing customer or co-worker. And employers need to train supervisors on proper behavior toward subordinates. If the employer has not published and distributed a policy against sexual harassment and had the employee sign a form acknowledging receipt of the policy, that alone would suffice to establish a lack of reasonable care under most negligence standards. Thus, in *Faragher* Boca Raton lost because first, it had not distributed its policy to the lifeguards, and second, because it had not given the employee anyone else to report harassment to if the employee's immediate supervisor was the harasser. Therefore, a real and meaningful investigation plan is essential for the employer.

Table 1 is an attempt by the authors to help the human resource manager and reader visualize in what situations an employer would be able to assert the new two prong test created in *Faragher* and *Burlington.*

Table 1

HARASSER TYPE	HARASSER ACTION	EMPLOYER DEFENSES
High Ranking Executive	Verbal or Physical Abuse	None
Tangible Employment Action	Termination, Demotion	None
Employer Knew or Should Have Known of Acts of Harasser	Employer had forewarning of behavior because employee complained and failed to act	Two Prong Test: 1. Did the employer have a published and distributed anti-harassment policy; 2. Did the employee use the specified notice procedure to alert the employer.
Co-Worker	Verbal or physical abuse	Two Prong Test
Lower Ranking Supervisors	No tangible action taken against employee	Two Prong Test
Customer	Verbal or physical abuse	Two Prong Test

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CHANGES: THE EFFECT OF AFFIRMATIVE ACTION ON THE RECRUITMENT OF ACCOUNTING PROFESSORS

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ABSTRACT

The purpose of the paper is to examine the effect of affirmative action and equal employment opportunity legislation on the recruitment process for accounting professors. Specifically, this paper examines the effect of affirmative action on the availability of information concerning open positions for accounting professors. Placement advertisements in The Accounting Review were examined for a 40-year period starting in 1956. Results indicate that affirmative action and equal employment opportunity legislation dramatically affected job market advertising. Significant changes in the number of positions posted, the wording of the advertisements, and the type of schools advertising were noted following passage of this legislation.

INTRODUCTION

In 1996, newly minted Ph.D.s and ABDs looking for tenure-track accounting positions in academia commonly turned to the Placement Information section of *The Accounting Review*. The October 1996 issue, for example, contained 55 advertisements for positions ranging from Dean to Assistant Professor located throughout the United States and in Hong Kong. A typical advertisement read as follows:

> University of Utah School of Accounting expects to have positions for new faculty members, pending funding, beginning in the 1997-98 academic year. Priority will be given to candidates with strength in accounting information systems and financial accounting. Applicants should possess a Ph.D., D.B.A., or be close to completion. All applicants are expected to have a commitment to quality research and teaching excellence. Rank will be considered subject to applicant's qualifications and school needs. The School of Accounting and the David Eccles School of Business are both accredited at the undergraduate and graduate levels by the AACSB. Bachelors, M.B.A., M.Pr.A., and Ph.D. programs are offered. The application deadline is

> February 1, 1997, or until the position is filled. Please send application including proposal or working paper, vita and three letters of reference to Steve Manaster, Associate Dean, David Eccles School of Business, University of Utah, Salt Lake City, UT 84112. The University of Utah is an Equal Opportunity/Affirmative Action Employer and encourages nominations and applications from women and minorities and provides reasonable accommodations to the known disabilities of employees.

The October, 1961 Job Placement section told a far different story. The 1961 issue contained only five advertisements of which four were positions sought rather than jobs available. The sole advertisement for an open position read as follows:

> Midwest University will need two men for Accounting staff for 1962 academic year. Interested in Ph.D. with or without C.P.A., but will also consider C.P.A. and Masters degree combination.

What happened to change the face of placement advertising so drastically? We believe that government regulation pertaining to affirmative action (AA) and equal employment opportunity (EEO) significantly changed a step of the recruitment process, in particular, the placement and wording of position advertisements. While disagreement exists as to the success of such regulation, it is clear that change has occurred. This paper reviews the changes that occurred in job placement advertising for accounting professors over the 40-year period from 1956 through 1995 and then attempts to explain those changes in terms of AA/EEO legislation as well as alternative hypotheses.

METHODOLOGY

A common means of filling open positions is to advertise in an academic journal received by those individuals meeting the qualifications for the position being filled. A journal that fulfills this requirement is *The Accounting Review (AR)*, one of the primary publications of the American Accounting Association (AAA). While *AR* does not include all positions available, it was for many years the primary advertising medium for academic accounting positions and thus provides ready evidence of the changes that have occurred over the time span investigated.

Advertisements appearing in the Placement Information section of *AR* were collected for the period from January 1956 through October 1995. *AR* is published quarterly, thus advertisers were able to place postings four times per year. In 1956, advertisements were free and word limit was not specified. During subsequent years, placement fees were established increasing from $50 to $250 with accompanying word limits ranging from 100 words to 150 words. In 1996, the AAA changed its placement advertising rules. Educational institutions placing job postings were allowed to advertise in any or all of the three association-wide journals. Thus, advertisers were given the choice of advertising in *AR*, *Accounting Horizons*, or *Issues in Accounting Education*. In 1998, advertisers were offered the additional option of advertising on the AAA web page. Because of these changes, which resulted in an expanding and increasingly diversified set of options for educational institutions seeking to fill open positions, we elected to stop data collection with the 1995 calendar year.

To improve interpretability and relevance, the following steps were taken: 1) Postings were frequently published multiple times so duplicate listings were excluded wherever possible. 2) Advertisements were very cyclical and it appeared that educational institutions advertised the first year of their biennial budget. As such biennial periods clearly differed from state to state, we arbitrarily elected to start with the even year and present the postings in two-year periods. 3) Our interest resided primarily in entry-level tenure track accounting positions. Therefore, postings for other positions such as chairman, endowed chair, temporary postings, and nonteaching or nonaccounting positions were excluded. 4) Each advertisement was considered a single posting. Thus, although some advertisements referred to more than one position, they were counted only once. 5) Postings at educational institutions in other countries were excluded as they were not subject to the AA/EEO requirements present in the United States.

The resultant sample, shown in Table 1, consisted of 2,118 tenure-track job postings placed in *AR* during the 40-year period from 1956 to 1995. Over 550 educational institutions in each of the 50 states and the District of Columbia sought to fill open positions. Postings were evenly split between accredited and nonaccredited institutions at 49% and 45%, respectively. Approximately 6% of the sample (121 postings) did not specifically identify the institution placing the advertisement.

TABLE 1: JOB POSTINGS 1956 to 1995

Biennial Period	Total Job Postings	Accredited	Nonaccredited	Tier 1	Tier 2	Unranked
1956-57	0	0	0	0	0	0
1958-59	1	0	0	0	0	1
1960-61	11	0	0	0	0	11
1962-63	23	0	2	0	0	23
1964-65	22	1	6	0	0	22
1966-67	43	1	21	0	1	42
1968-69	43	5	25	0	4	39
1970-71	52	5	37	1	2	49
1972-73	59	10	36	1	3	55
1974-75	151	58	82	13	23	115
1976-77	154	65	87	8	24	122
1978-79	149	63	85	6	35	108
1980-81	185	89	95	16	36	133
1982-83	164	82	82	15	34	115
1984-85	191	113	78	16	38	137
1986-87	198	110	88	14	42	142
1988-89	193	117	75	15	44	134
1990-91	195	121	74	12	46	137
1992-93	141	93	48	11	37	93
1994-95	143	102	41	18	40	85
Total	2118	1035	962	146	409	1563

Job postings were position advertisements from ***The Accounting Review*** 1956 to 1995.
Accredited and nonaccredited refer to AACSB accreditation status of the advertising institution. The total of accredited and nonaccredited does not add to 2118 due to 121 institutions that were unidentified and whose accreditation status could not be determined.
Tier 1, Tier 2, and unranked are based on Carcello et al. [1994]'s identification and ranking of research schools.

BACKGROUND

During the 1960's, passage of the Civil Rights Act of 1964 set the stage for the changes in employment practices which would occur on university campuses in the 1970's. Title VI of this Act stipulated conditions required of recipients of federal funds while Title VII forbid discrimination by employers or unions, whether public or private, on the basis of race, color, sex, or national origin. Initially, universities were exempted from Title VII.

Later work by the 92nd Congress extended antidiscrimination coverage specifically to college campuses and to faculty. The Equal Opportunity Act of 1972 amended Title VII of the Civil Rights Act of 1964 to specifically prohibit employment discrimination in any public or private educational institution. It also added teeth to the original act by vastly increasing the enforcement powers of the Equal Employment Opportunity Commission (EEOC). Although the EEOC had been created in 1964 under Title VII to handle discrimination complaints, its funding and power were originally very limited. It was allowed only to investigate charges, make findings, and assist in resolving disputes. The Equal Opportunity Act of 1972 provided the EEOC with the ability to sue on behalf of workers suffering from discrimination and broadened its jurisdiction to include state and local government employees as well as employees of educational institutions.

Title IX of the Education Amendments of 1972 prohibited sex discrimination by educational institutions receiving federal funds and established potentially severe penalties. Institutions violating the provisions of Title IX became subject to the termination of federal assistance programs and thus the loss of federal funds. Subsequent Supreme Court decisions made clear the full impact of Title IX. In 1982, the Supreme Court reiterated in the case of North Haven Board of Education v. Bell that the provisions of Title IX did indeed apply to sex discrimination in employment practices at educational institutions, not just discrimination against students. In 1984, the Supreme Court determined that the receipt of federal funds by students attending an institution was sufficient to make an institution liable under Title IX [Lindgren et al. 1984]. As a result of these cases, virtually every educational institution became subject to Title IX and thus vulnerable to the loss of federal funds for noncompliance.

FINDINGS AND DISCUSSION

Finding 1: The number of job postings increased during the 1970's.

Finding 1a: Few job postings existed prior to the 1970's. Figure 1 displays the number of postings by biennial period from 1956-57 to 1994-95. Of the 2,118 postings over the 40-year period, less than 10% (143) of the total occurred prior to 1970. Thus, during the 1950's and 1960's, it appears that few, if any, open positions for accounting professors were advertised.

The recruitment process for academic accounting positions was thus similar to that described by Caplow and McGee in 1961 [p. 110]:

> In order to secure the very best man available, the department simultaneously announces the opening in many quarters and obtains a long list of candidates named

> by their sponsors. When a sufficient number of high-caliber candidates have applied for the position, the department members sift and weigh the qualifications of each most carefully in order to identify the one who best meets their requirements.

Although intended to create a diverse and complete list of good candidates, the process was hampered by the fact that the simultaneous announcement would involve only institutions and individuals known to the department. Potential candidates from unknown institutions would never hear about or be nominated for open positions.

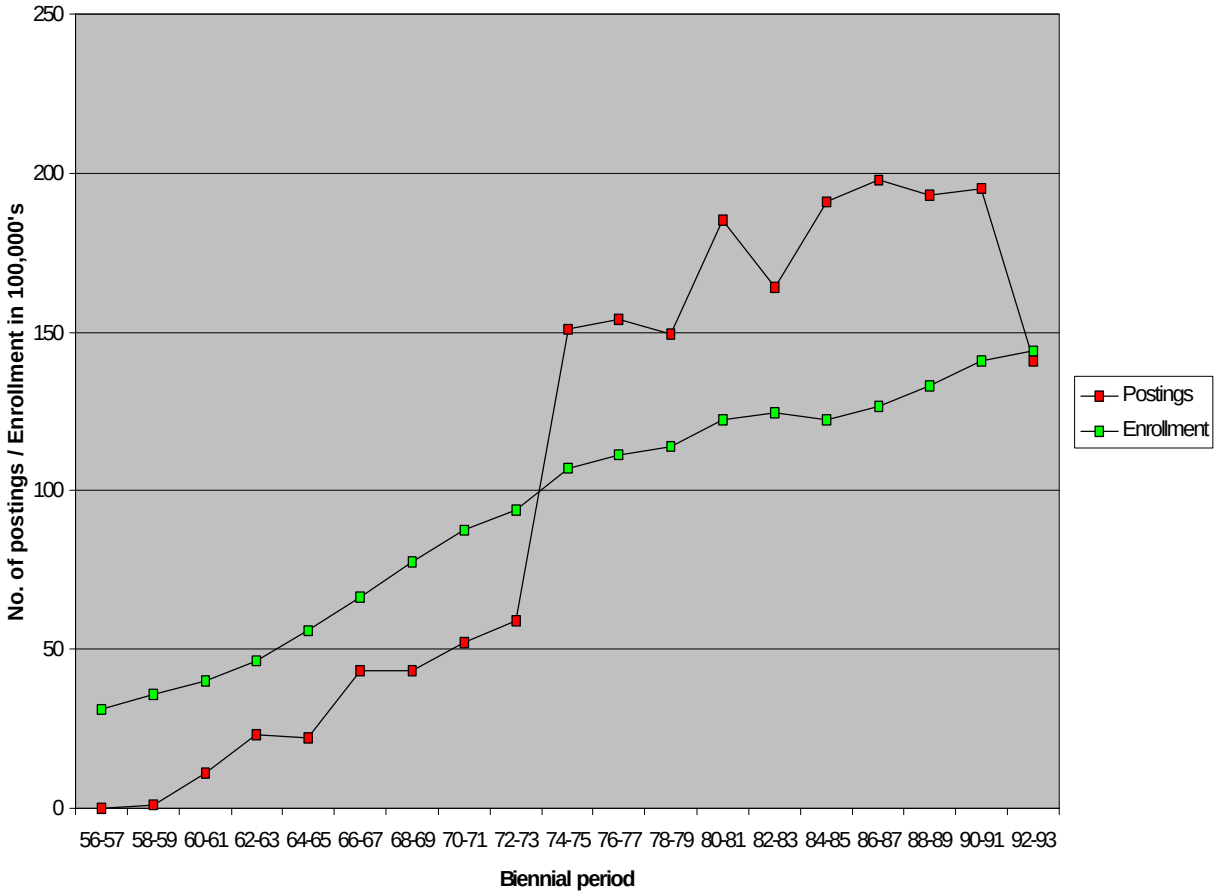
Anecdotal evidence further supports this finding. Placement in an entry-level academic position in accounting in the 1950's and 1960's was largely a matter of where you went to school and who your dissertation committee knew. Positions were filled via informal word-of-mouth advertising and recruiting missions by search committees to selected Ph.D.-granting institutions.

Finding 1b: The number of job postings increased dramatically in 1974-75. The number of postings jumped from 59 to 151 in 1974-75 and remained at higher levels from that point onward. What happened in 1974-75 to cause such a significant increase? We believe that the enactment of Title IX in 1972 and the empowerment of the EEOC forced educational institutions to adopt affirmative action programs. Failure to do so would have resulted in exposure to potentially massive liability as well as the loss of federal funding. The adoption of affirmative action policies and programs, in turn, led to changes in the placement and wording of job postings.

Employers are held responsible for both intentional and unintentional discrimination. Discrimination can occur inadvertently when an employment practice results in a disparate impact on a particular group. Word-of-mouth advertising and recruitment on selected campuses are recruitment practices that are viewed as potentially discriminatory [Weis and Fine 1993]. The friends and contacts reached via word-of-mouth recruiters typically exhibit similar racial and ethnic backgrounds as well as being the same sex. Recruitment of graduates at selected doctoral programs restricts candidates to persons in those programs that historically may have excluded certain groups. As a result, the rights of potential applicants, including minorities and women, are violated because they are never informed of the openings and do not have the same opportunity to apply for the positions.

An alternative hypothesis suggests the Vietnam War as the cause of the increase in job postings. Beginning with the Tonkin Gulf Resolution in 1964, the Vietnam War escalated throughout the mid-1960's accompanied by increasing antiwar activities. U.S. troop strength peaked in spring of 1969 followed by the demonstration at Kent State in 1970. College enrollment was a well-known and acceptable means of avoiding the draft; thus, as the war effort increased, draft-age males enrolled in college. The rise in job postings then could be viewed as resulting from increased college enrollments caused by students attempting to avoid the draft. This hypothesis is refuted for two reasons. First, the lottery was instituted in 1970; student status thus became irrelevant during the 1970's. Second, as shown in Figure 1, while total college enrollments (averaged for each biennial period) did indeed increase steadily throughout the 40-year period including the early 1970's, a jump comparable to that seen in job postings was not evident.

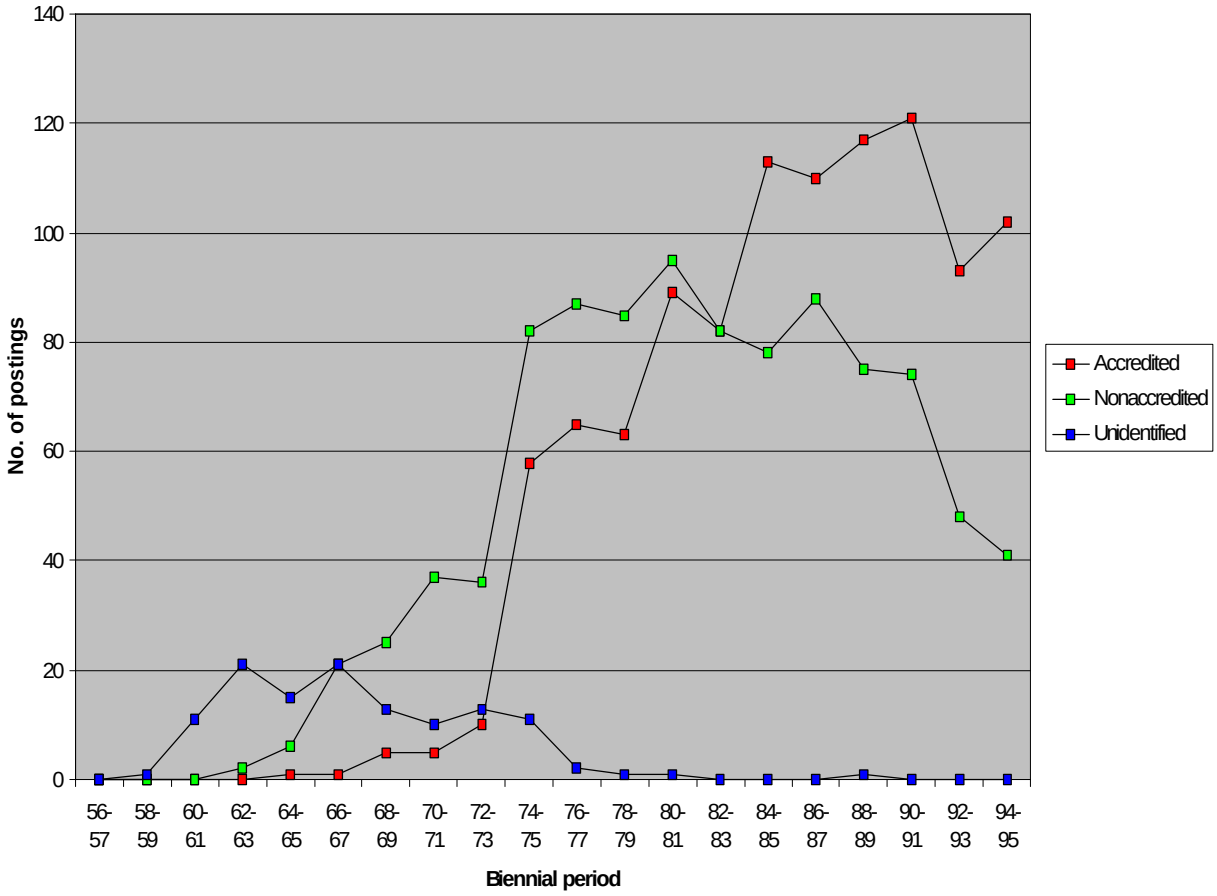
FIG. 1: Job Postings vs. College Enrollment - 1956 to 1995



Finding 2: The wording in the ads changed.

Finding 2a: Schools placing job postings did not specifically identify themselves during the 1950's and 1960's. Figure 2 illustrates the fact that unidentified postings outnumbered identified positions for the first decade under review (1956-57 to 1964-65). The appearance of anonymous position advertisements then began to decline so that after 1974-75, they were an unusual occurrence. Adoption of affirmative action programs required schools to ensure that open positions were clearly and widely advertised so as to eliminate inadvertent discrimination. Anonymous job postings would defeat the purpose of advertising.

FIG. 2: Job Postings 1956 to 1995 - Accredited vs. Nonaccredited / Unidentified Schools



Finding 2b: References to sex and age requirements disappeared by the early 1970's. Intentional discrimination was evident in recruitment practices of the 1960's. Although infrequent, some ads appearing during that decade specified applicant gender requirements, usually for males. Such references had disappeared completely by mid-1969. References to age requirements were the unique contribution of advertisements by state colleges in southern California which required applicants to fall within in a specific age range, namely 25 to 35. These references were eliminated by mid-1972. The combination of Title VII and the Age Discrimination Employment Act has made it unlawful to indicate a preference for race, color, religion, sex, national origin, or age unless the preference is a bona fide occupational qualification.

Finding 2c: References to equal opportunity and/or affirmative action became a standard component of position advertisements. Ads beginning in October 1972 included references to being an equal opportunity or affirmative action employer. By January 1975, virtually all of the job posting

advertisements contained references to AA and EEO. A means of avoiding liability and potential problems arising from discrimination lawsuits is active participation in an affirmative action program with the goal of providing equal opportunity for employment to all qualified candidates. The adoption of such programs and their reference in placement advertising reflect the impact of AA/EEO legislation on the placement advertising for accounting professors.

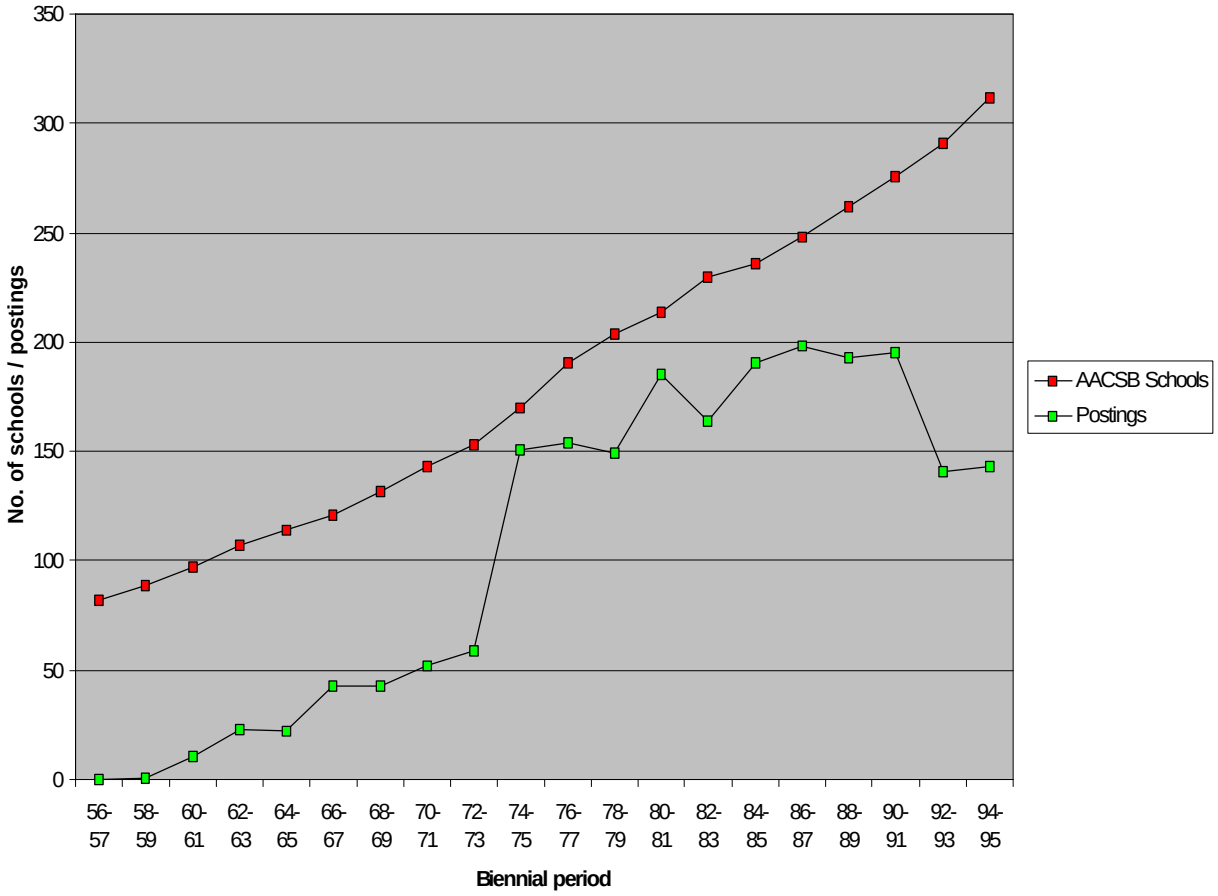
Finding 3: The types of educational institutions placing job postings changed.

Finding 3a: Accredited schools began advertising in 1974-75 where they had not advertised previously. Figure 2 compares position advertisements placed by accredited schools with those placed by nonaccredited schools. Nonaccredited schools advertised earlier than accredited schools and placed a greater number of job postings until the mid-1980's. Steady growth in enrollments impacted nonaccredited as well as accredited schools, adding new positions and placing pressure on the schools to recruit new accounting professors. Why did nonaccredited schools rely more heavily on job postings? Nonaccredited schools did not have the same degree of ready access to the informal network used for recruitment during the 1950's and 1960's. They tended to employ fewer Ph.D.s and were less active research-wise than the accredited schools. This placed them at a disadvantage when using word-of-mouth and contact with dissertation committees to fill open positions. As a result, they used position advertising.

The AACSB (renamed The International Association for Management Education in 1997) was originally formed in 1916 to facilitate the exchange of information among schools of business. By 1959, the AACSB had become the premier accrediting association for schools of business. Although its membership represented only about 20% of the number of schools granting degrees in business, they were considered the Establishment of the system. AACSB members accounted for roughly 75% of the total number of undergraduate degrees conferred in business and included the most prestigious universities, both public and private. As business schools and accounting programs grew, they increasingly sought AACSB accreditation so that by 1984-85 the majority of schools advertising for accounting professors were accredited.

An alternative hypothesis suggests that growth in the number of accredited schools over time explains the change in the mix of advertisements placed by accredited versus nonaccredited schools. Figure 3 indicates that increases in the number of accredited schools potentially explain only part of the increase in postings. The total number of accredited schools at the end of the 72-73 biennium was 153; seventeen (17) schools were added during 1974-75 to bring the total to 170, an increase of approximately 11%. During that same time period the number of job postings from accredited schools jumped from 10 to 58, or an increase of almost 500%.

FIG. 3: AACSB Schools vs. Job Postings - 1956 to 1995

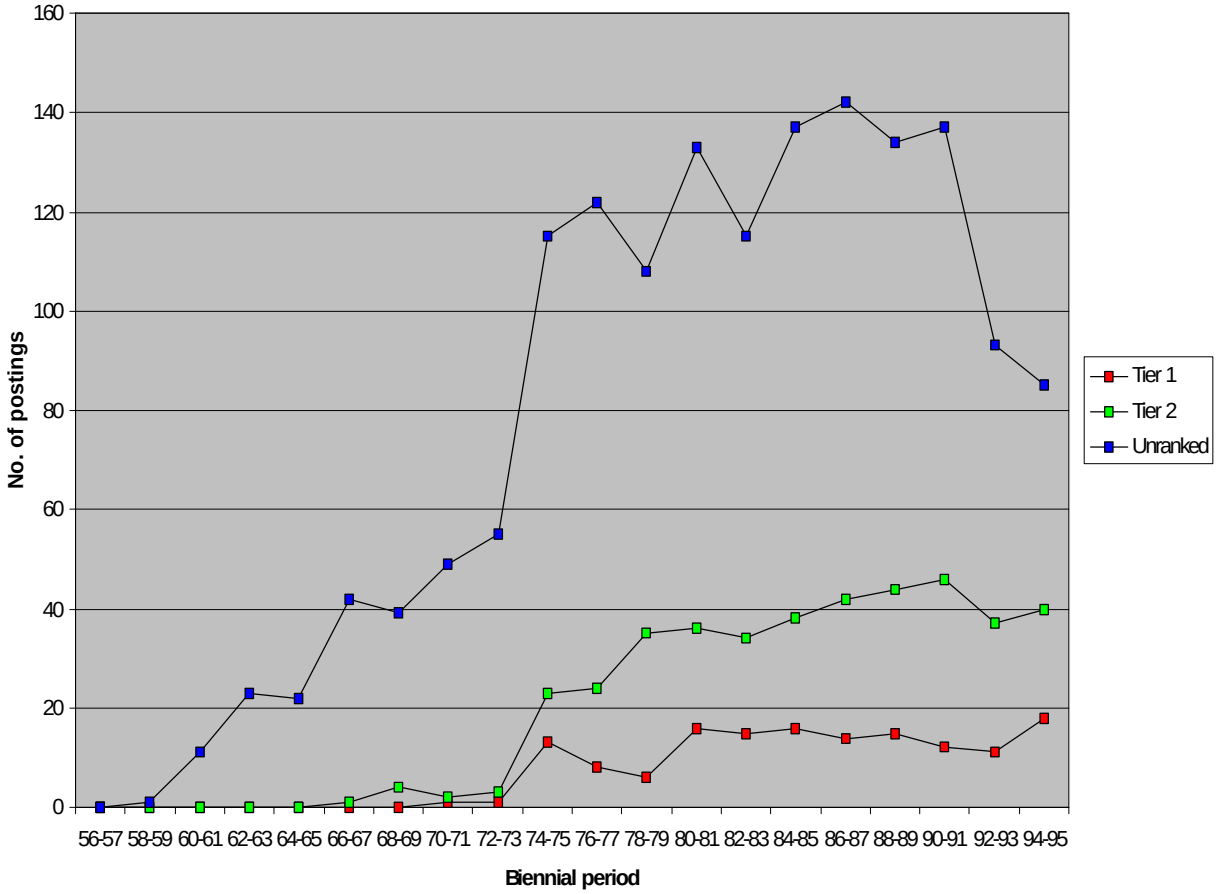


Finding 3b: The top research schools began advertising in 1974-75 where they had not advertised previously. Figure 4 compares the Tier 1 and Tier 2 schools with the unranked schools. Tier 1 and Tier 2 research schools were identified by Carcello et al. [1994]. Schools identified as Tier 1 schools were those ranked in the top 15 in terms of publications in academic journals by either faculty or graduates based on a study of research productivity by Bublitz and Kee [1984]. Tier 2 schools were 61 additional doctorate-granting institutions. Tier 1 and Tier 2 schools together comprised 90% of the doctoral institutions listed in Hasselback's *Accounting Faculty Directory* in 1991.

Job postings by unranked schools were predominant throughout the 40-year period. The first position advertisement by a Tier 2 school did not appear until 1966-67 followed by the first Tier 1 job posting in 1970-71. Job postings by both Tier 1 and Tier 2 schools increased significantly in 1974-75 followed, in general, by continued advertising after that point in time.

The participation of some Tier 1 and Tier 2 schools could be viewed in some respects as reluctant compliance as six of the 83 schools advertised only once during the entire 40-year period. Six others did not advertise at all. It seems highly unlikely that they had no positions or only one position to fill during that time period.

FIG. 4: Job Postings 1956 to 1995 - Tier 1, Tier 2, and Unranked Schools



CONCLUSIONS

Based on the findings above, we argue that AA and EEO government regulation significantly changed placement advertising for accounting faculty positions. Positions that were heretofore filled by word-of-mouth and network contacts were openly advertised in a national and well-read outlet, increasing access to minorities and other protected groups. Whether or not such increased access has been successful is a question that we do not attempt to answer in this paper. We note, however, the changing political climate for affirmative action as evidenced by the Hopwood decision striking down race-based admissions practices at the University of Texas and the passage of the California Civil

Rights Initiative (CCRI) amending the California State Constitution. The CCRI prohibits preferential treatment on the basis of race, color, sex, ethnicity, or national origin. Future studies of job postings may wish to focus on these changes and their impact on open advertising of available faculty positions.

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