Partial Picture Issue Undermines Chadbourne Pay Equity Case

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Campbell v. Chadbourne & Parke, the pay equity suit filed in the Southern District of New York in August 2016, is commonly discussed as a proposed $100 million dollar class action. And it does contain a feature found in virtually all discrimination suits that have secured recoveries approaching or exceeding $100 million. Such suits have been based on statistical analyses that are fundamentally unsound for failure to examine data on everyone subject to the challenged processes.

In 1988, in a *Public Interest* article titled "Illusions of Job Segregation," I explained the unsoundness of discrimination claims based on disproportionality in the types of jobs into which persons of different racial/ethnic or gender groups were hired. To begin with, commonly where such claims were alleged many or most persons hired into the putatively less desirable jobs were solely interested in those jobs.

But the more fundamental problem with claims in such cases was that they treated persons hired as if they comprised all persons seeking the more desirable jobs. A sound statistical analysis requires examination of the entire universe of persons seeking the more desirable jobs. That universe includes (in fact, usually would be largely comprised of) persons who, having been offered no job or declining an offer for a less desirable job, were not hired at all.

That is, suppose that women are 90 of 100 persons hired into job X and men are 90 of 100 persons hired into job Y. Even if all women hired into job X were interested in job Y, without information on persons not hired at all, it is not possible to know whether men comprised 90 or 50 (or any other) percent of persons seeking job Y.

A year later, in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), the Supreme Court employed the same reasoning to reject a claim that minorities were disproportionately hired into cannery rather than non-cannery jobs, observing that the labor pool in the plaintiffs' analysis was "at once both too broad and too narrow." It was too broad, the Court reasoned, because most cannery workers did not seek non-cannery jobs, and it was too narrow because it did not include the many persons not employed in cannery jobs who were part of the labor market for non-cannery jobs.

Notwithstanding that reasoning in *Wards Cove* seemed to foreclose so-called claims of "assignment discrimination" or "job segregation," cases involving such claims secured substantial recoveries in the 1990s, as I discussed in "Multimillion-Dollar Settlements May Cause Employers to Avoid Hiring Women and Minorities for Less Desirable Jobs to Improve the Statistical Picture," *National Law Journal* (Mar. 27, 1995). That article focused on the recently-filed putative class action *Butler v. Home Depot*, which alleged that the employer had segregated its female employees into jobs with little opportunity for advancement. Despite the analytical

flaw in the case, however, after being certified as a class action, it would be settled for $87.5 million in 1997.

The same analytical problem exists in claims that minority borrowers disproportionately received subprime mortgage loans or otherwise received higher cost loans, as in the Department of Justice's cases against Countrywide Financial and Well Fargo Bank that were settled for $335 million and $175 million earlier in this decade (and the case against JP Morgan Chase Bank settled in January 2017 for $54 million). Statistical analyses in these and like lending cases involving loan terms (as distinguished from loan denials or approval) invariably suffer from failure to examine data on loan applicants who received no loan, among other reasons, because they found the offered terms to be unacceptable, as I have discussed in "The Perverse Enforcement of Fair Lending Laws," *Mortgage Banking* (May 2014).

The same problem exists with analyses of claims of discrimination in compensation in employment, in two ways. Such analyses fail to examine data on persons who declined offers of hire because the compensation offered was too low. They also fail to examine data on persons who left the organization because of dissatisfaction with salary progression or for any other reason.

Sometimes there is reason to believe that some groups will be more willing to accept terms than others in ways that can be expected to have a particular effect on statistical analyses. In the lending context, the belief that there exists widespread discrimination against minority loan applicants – promoted by large settlements like those mentioned above and a plethora of lending disparities studies – would tend to prompt minority borrowers to accept loan terms where similarly-situated white applicants would pursue other options. That would tend to cause analyses of loan terms actually received to show discrimination against minorities regardless of any actual discrimination.

Paragraphs 20 and 21 of the amended complaint in the *Campbell* case are intended to suggest that there exists widespread discrimination against women regarding both access to law firm equity partnership and compensation among equity partners. If many women lawyers believe that there does exist widespread discrimination of this nature, that is a reason for some women to accept partnership offers or remain in partnership situations under compensation terms where similarly-situated male lawyers would explore other options. In consequence, as in the lending context, analyses solely of persons accepting a particular situation would tend to show discrimination regardless of the reality.

With regard to both lending and compensation, if there in fact exists widespread discrimination against certain groups, these patterns would be exacerbated. For, not only would certain groups more commonly explore other options, but those groups would more commonly find their explorations to bear fruit.

Also regarding both lending and compensation, there may be other factors variously affecting the readiness of different demographic groups to accept particular situations and doing so in ways that could affect statistical analyses in any number of ways. The essential consideration, however, is that it is not possible to determine whether people are treated

differently without examining what happened to everyone subject to the process at issue, not just those persons who agreed to accept a particular situation.

Further treatments of this issue may be found in my "The Mismeasure of Discrimination," Faculty Workshop, University of Kansas School of Law (Sept. 13, 2013), amicus curiae brief in *Texas Department of Housing and Community Development, et al. v. The Inclusive Communities Project, Inc*., Supreme Court No. 13-1731 (Nov. 17, 2014); comments to the Commission on Evidence-Based Policymaking (Nov. 14, 2016)