BOOK REVIEW

EMPLOYMENT DISCRIMINATION LAW. By Barbara Lindemann Schlei and Paul Grossman. Bureau of National Affairs, Inc., Washington, D.C., 1976. Pp. 1,472. $39.50.

There are those who will say that Barbara Schlei and Paul Grossman's *magnum opus*[1] on employment discrimination law will quickly become obsolete, that many of the cases it cites and the legal principles it discusses will be modified or reversed in the next few years, causing the value of the book to gradually decrease in direct proportion to the development of the law. These critics will be wrong. As long as there are unresolved issues in this complex area of the law,[2] the courts will turn for guidance to the landmark cases decided in the first decade of litigation under title VII of the Civil Rights Act of 1964.[3] These cases will be the foundation upon which judicial and administrative decisions will be built for many years to come.

Employment Discrimination Law combines many of the features of a textbook, a hornbook, a law review article, an historical study, and a how-to-do-it manual. It is an encyclopedia of knowledge on a subject which may be misunderstood by more people than tax law. As the first significant and comprehensive work in this area since title

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1. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (1976). Cover to cover, the book contains nearly 1,500 pages, and includes a foreword by Norbert A. Schlei, a former U.S. Assistant Attorney General who helped draft the Civil Rights Act in 1963, six pages of acknowledgements to the 38 practitioners who contributed draft chapters of the book, a 21 page table of contents, 1,313 pages of text, a 36 page table of cases (with approximately 1,600 citations), and a 95 page appendix of laws and regulations.

2. Very few issues can yet be considered resolved, because relatively few cases have reached the United States Supreme Court. *See, e.g.*, Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976) (affirming last-hired, first-fired seniority system even though blacks were those who were last hired); Contractors Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971) (approving affirmative action plan for hiring among building contractors, promulgated by Executive order); Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970) (affirming holding that an employer may not continue to award formerly "white jobs" on the basis of seniority attained in other formerly white jobs without consideration of seniority attained in formerly "Negro jobs"). *But see* Gilbert v. General Elec. Co., 425 U.S. 989 (1976) (reversing the Fourth Circuit which had previously held that a disability benefits plan which excludes disabilities arising from pregnancy constitutes unlawful discrimination based on sex).

3. Pub. L. No. 88-352, 78 Stat. 253 (1964) (current version at 42 U.S.C. §§ 2000e -2000e13, -2000e15 to 2000e17 (1964 & Supp. V 1976); 42 U.S.C.A. § 2000e14 (Supp. 1977)). There are, of course, a number of other avenues for the relief of discrimination in employment. These avenues are reviewed in chapters 21-23 of the book. B. SCHLEI & P. GROSSMAN, *supra* note 1, at 599-690. Title VII is, however, by far the most complete and developed route and the one most frequently followed.

VII was enacted, it is a compulsory reference work for all who are forced to grapple with title VII, including labor attorneys, personnel managers, public agency administrators, union officials, and, perhaps most importantly, representatives of state and federal fair employment practice commissions.

While the book is essentially a research tool, the authors do not purport to lay down the law in absolute terms. They realize that, from an historical perspective, the ink is not yet dry on title VII, and the law is still in its formative stages. Thus, historical and legislative insights into the background of title VII and the internal procedures of the Equal Employment Opportunity Commission [EEOC]—the statute's administering agency—are interspersed throughout the book.[4] With the historical perspective constantly in mind, the authors set forth and analyze in a textbook format the basic principles established by recognized lines of judicial authority. They further explain how the lower courts have adapted or expanded these principles to fit particular fact patterns, and indicate what results these principles are likely to produce in the future.

Several technical features add substantially to the practical value of this book for educational and research purposes. The authors utilize the law school casebook technique of reproducing portions of the principal cases, supplemented with textual references to other cases dealing with similar issues. Throughout the volume extensive footnote material documents and expands the authority for points of law under discussion.[5] Although the book is divided into thirty-nine distinct chapters, a thorough system of cross-references is necessitated by the fact that employment discrimination problems generally raise a number of legal issues.

Employment Discrimination Law is a wealth of research, discussion, analysis, suggestions, and guidelines for the practicing lawyer or student. Much pragmatic advice is provided by the authors, drawn from a large number of experienced practitioners in the field.[6] Such pragmatic advice might otherwise be unavailable except at the expense

4. *See, e.g.*, B. SCHLEI & P. GROSSMAN, *supra* note 1, at 185-89 (religious discrimination); *id.* at 416-18 (reprisal and retaliation); *id.* at 860-62 (jurisdictional requirements); *id.* at 1022-25 (EEOC internal litigation procedures).

5. In addition, virtually all cited cases are followed by a parenthetical statement of their holdings. The practitioner using this book will obtain a sizeable savings in research time.

6. *See* B. SCHLEI & P. GROSSMAN, *supra* note 1, at xvii-xxii. Despite the fact that a substantial number of contributors drafted chapters for the book, the authors edited and rewrote all contributions, *id.* at xxii, so that a consistent style and form is obvious throughout.

of a substantial hourly fee. For example, the book suggests methods for dealing with a variety of problems, including the industrial psychologist serving as an expert witness;[7] the factors to be considered in attacking, defending, or structuring the use of subjective criteria in employment decisions;[8] and the basic rules for preemployment inquiries.[9] Plaintiffs are advised on how to support a case alleging discriminatory discharge,[10] and employers are advised on how to defend such a case.[11] Both sides receive recommendations on the use of discovery procedures.[12] The book also contains suggestions to employers on how to respond to an EEOC investigation,[13] and on how to word affirmative action plans in order to avoid admissions of discrimination.[14]

Employment Discrimination Law has a multilevel appeal. For the experienced practitioner, sophisticated litigation strategies are discussed.[15] For the novice, there are lengthy explanations of terminology and concepts;[16] for the student, the authors highlight the open issues and the rationale by which resolutions might be reached.[17] Since there are few who fall into the first category, and more issues are open than closed, Schlei and Grossman have directed their efforts at the large majority of their readers who need the basic tools. Thus, the first 232 pages of the book explain the different *types* of discrimination, such as disparate treatment and adverse impact, while the next 206 pages describe how the unlawful practices might affect specific protected classifications—race or sex, for example.

Throughout the book, the authors define their terms, explain their theories, and support their conclusions with logical analysis. Even

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7. *Id.* at 126-28. The authors' writing style is generally restrained and professional, but in this section they seem unable to resist the use of alliteration. For example, they warn of the expert's "potential of proplaintiff prejudice," recommend those whose "professional views are neither polarized nor expressed in polemics," and discourage use of experts more interested in "quick pap for profit than professionalism in personnel selection." *Id.* at 126. Fortunately, such lapses are rare.
8. *Id.* at 177-79.
9. *Id.* at 454-56.
10. *Id.* at 521-22.
11. *Id.* at 524-26.
12. *Id.* at 1135-42.
13. *Id.* at 809-15.
14. *Id.* at 766.
15. *See, e.g., id.* at 523 (reasons why plaintiffs should avoid class actions in discharge cases); *id.* at 846-49 (methods and considerations in aggregating multiple entities in title VII suits); *id.* at 1145-46 (the use of offers of judgment under FED. R. CIV. P. 68).
16. *See, e.g., id.* at 66-67 (jargon of employment related testing); *id.* at 510-11 (general discussion of legal issues involved in discharge cases); *id.* at 1161-93 (the use of statistics in discrimination cases).
17. *See, e.g., id.* at 181 (future use of scored tests); *id.* at 474-77 (effect of discriminatory practices in the administration of a seniority system); *id.* at 691-730 (the possible existence of reverse discrimination in the imposition of minority quotas in the implementation of affirmative action plans).

the reader with only limited exposure to title VII should have little difficulty in his comprehension of this book. Where a particular legal issue is still "open," Schlei and Grossman set forth the arguments on both sides. Such issues include the proper placement of the burden of proving the availability of alternative employment practices with less adverse impact than the challenged practice,[18] the requirement that an employment practice be found unlawful in order to maintain a case alleging retaliation for opposing the practice,[19] and the proper construction to be given the scope of the EEOC's investigative powers.[20]

The subject of employment discrimination generally evokes clearly partisan viewpoints, and much of the literature in this field tends to reveal the author's orientation, either accidently or by choice. Schlei and Grossman have avoided this pitfall through careful, balanced editing, no mean achievement when dealing with thirty-eight coauthors whose reputations were largely built on their success in advocating the position of either employer or employee. Schlei and Grossman are not neutrals themselves: Barbara Schlei, has been the District Counsel for the EEOC's very active Los Angeles office since 1967; Paul Grossman is a partner in a prominent California law firm which represents management in labor law matters. Their distinct backgrounds and experience enable them to perceive the different facets of each issue. Their combination has produced an objective and professional analysis of the law.

The authors' objectivity has not, however, prevented them from expressing their own opinions and viewpoints. Often they are critical of the EEOC. On more than one occasion, they chide the EEOC for its poor administration.[21] At other times they contend that the agency has misinterpreted or ignored the statute: For example, they state that the EEOC position on employer liability for retaliation "does not seem tenable in view of the statutory language,"[22] and elsewhere they point out that "the EEOC has quite literally interpreted the BFOQ [Bona Fide Occupational Qualification] exception on sex out of existence."[23] Schlei and Grossman are also not bashful about attacking currently prevailing legal theories. In one section, they explain why, "in our view, the doctrines that title VII cases are 'necessarily' class actions and appropriate for 'across-the-board' treatment have been loosely

18. *Id.* at 134-35.
19. *Id.* at 428-31.
20. *Id.* at 779-800.
21. *See id.* at 769-70, 802.
22. *Id.* at 430.
23. *Id.* at 279.

used and frequently misunderstood."[24] In several sections, they predict the direction the law will take in the future. Thus, after examining the conflicting arguments on whether title VII requires that the benefits of state protective laws be extended to males, or that such laws be invalidated outright, the authors state that "[i]n our view the ultimate outcome of the extension versus invalidation issue will and should be invalidation."[25]

The law of employment discrimination is vibrant, dynamic, and expanding rapidly. These characteristics make practicing in the area stimulating, but risky. Yesterday's court decisions, upon which the attorney bases today's advice, may be reversed tomorrow. The authors of *Employment Discrimination Law* faced the same problem. When analyzing existing legal principles in this area, Schlei and Grossman were rarely able to find, or rely upon, long lines of authority. In addition, they had to avoid undue reliance upon recent district court decisions, for their longevity is doubtful.[26] Often they have to justify their choice of case authority by their own interpretation of title VII. It was a unique endeavor, and one that could have been accomplished only by authors with considerable experience and expertise in the area.

The value of this book will, of course, depend upon how it is used. Few people will read the entire work. Furthermore, undertaking such a task would almost certainly be counterproductive, because the mind could not sort out nor retain such an abundance of information. To obtain optimum benefit from *Employment Discrimination Law*, the researcher should turn to the book, as needed, for a basic understanding of specific, limited issues. For example, the employer who is confronted with a request by an employee for permission to be absent on certain religious holidays will want to review chapter 7, concerning accommodation of religious beliefs, and the employment agency which seeks knowledge of its liability under title VII should study chapter 20. In all circumstances, however, the book is only a starting point, a foundation. Schlei and Grossman, with a combined 20 years of participation in the development of title VII law, would be the last ones to claim that their book is or contains the final word on any given legal issue. The reader must update all relevant cases, trace all

24. *Id.* at 1095.
25. *Id.* at 305.
26. For example, Waters v. Heublein, Inc., 8 Empl. Prac. Dec. 908 (N.D. Cal. 1974), which is presented and discussed in B. SCHLEI & P. GROSSMAN, *supra* note 1, at 833-34, was reversed by the Ninth Circuit in late 1976. Waters v. Heublein, Inc., 547 F.2d 466 (9th Cir. 1976). The authors frequently cite EEOC administrative decisions, but such decisions have no force of law, and are thus useless in court. They may, however, be useful to the practioner in dealing with the agency itself.

legal authority into his own jurisdiction, and apply legal principles to specific facts. While the book is generally written in terms understandable to the layman, individuals who are affected by title VII, such as personnel directors, union officials, and government representatives, should supplement the book with legal counsel. The attorney may himself turn to *Employment Discrimination Law* as his first resource; but, additionally, he will have the expertise necessary to apply the book's general legal principles to the facts of a particular case.

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