

# HIRING BY THE NUMBERS:

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The cuisine is superb, the ambiance, decidedly upscale. The world famous restaurant takes pains to make certain that each guest's dining experience is memorable. Waiters—clad in tuxedos—are everywhere. And despite the fact that the fashion today is gender *neutral*, here the wait-staff is not. For at this dining establishment there is seldom a *waitress* in sight. Why not? That question implicates an issue that has plagued employers and confounded employees for nearly 30 years. When do numbers alone constitute evidence of illegal job discrimination? The case of *Equal Employment Opportunity Commission v. Joe's Stone Crab, Inc.*, 969 F. Supp. 727 (S.D. Fla. 1997) revisits the issue of statistics as proof of discrimination under Title VII of the Civil Rights Act of 1964.

Joe's Stone Crab is a fourth-generation family-owned business specializing in stone crabs and a "fine dining" atmosphere. It grew gradually to its size at the time of trial of between 230 and 260 employees, including 70 food servers. The serving staff was mostly male and Joe's had a "reputation" for not hiring women. While identifying no evidence of intentional discrimination, a federal district court in Florida held that Joe's recruitment of food servers, and in particular its "unsupervised" delegation of hiring authority and 'subjective' hiring standards, had a disparate (or adverse) impact on women as a group.<sup>i</sup> The court retained jurisdiction in the case for a three-year period in order to supervise hiring practices at the restaurant. An initial decision on damages was issued on August 12, 1998.<sup>ii</sup>

*"We want the facts to fit the preconceptions.  
When they don't, it is easier to ignore the facts than to change the preconceptions."  
Jessamyn West  
The Quaker Reader (1962)*

At trial Joe's argued that the lack of women food servers was a direct result of its extremely low turnover and the fact that women rarely applied for this position. As Joe's pointed out, the restaurant is owned and managed by a woman, employs women in virtually every other job category and women actually predominate as department heads at Joe's. As for the apparent lack of female interest in the wait staff positions, Joe's pointed to the fact that its formal presentation style requires the lifting and carrying aloft of unusually heavy trays, a task that may make the job less attractive to women. Joe's also theorized that women may be more concerned about working in the deteriorating neighborhood than the male servers who applied for the positions. Joe's argued further, that whatever the reasons for the lower female applicant rate, it was that lower rate that produced the disparate statistics, *not* the hiring practices at Joe's.

*"They also serve who only stand and wait."  
Areopagitica, John Milton (1608-1674)*

The court, on the other hand, recounted the male serving tradition in fine dining establishments, not only at Joe's, but in the American fine dining industry, an industry the court said, "emulates the European fine dining restaurant model." *Id.* at 732.<sup>iii</sup> According to the EEOC and the court, it was stereotypical reference to this model and the restaurant's *undisciplined* and *subjective* hiring procedures that produced the gender disparity—not any failure of interest by women. The court went on to rely on Joe's reputation in the server community during the pre-charge (EEOC) period as justification for ignoring actual applicant-flow data in favor of relatively raw census figures:

There was a widely-held belief among workers in the Miami food serving industry that Joe's would not hire women for food server positions. One witness testified, "It was like (sic) common knowledge that they didn't hire women at the [quoting a woman who worked as a wait person at another restaurant]. *Id.* at 733.

Joe's vehemently contested the admissibility and reliability of this reputation evidence. But the court believed that "the existence of such a reputation is highly relevant to whether Joe's actual applicant-flow data reflects the available labor pool."

*Id.* at 733-734.<sup>iv</sup> The court said that evidence of Joe’s reputation was [not] “offered as proof of conduct consistent with the reputation, as proof of Joe’s hiring practices themselves, or as proof of bad character or intent to discriminate,” rather the

[evidence of Joe’s reputation was admitted solely to establish the existence of the reputation, and not for any other purpose.” But elsewhere the court reneges on its own assurance by implicitly holding Joe’s responsible for its reputation:

From this and other testimony in the record [referring to the statements of female servers in the community who had not applied at Joe’s], the court finds that Joe’s historical practice of not hiring women as food servers resulted in the commensurate reputation.

*“Statistician: A man who can go directly from an unwarranted assumption to a preconceived conclusion.”*  
Anonymous

With this statement, the court completed its circle of reasoning: Joe’s employed few women as waiters because of its reputation of not hiring women; Joe’s had a reputation of not hiring women because it employed few women as waiters. The rationale is particularly troubling in this case because there was no evidence of discrimination independent of the statistics. In similar fashion, it is sometimes argued that the use of doubtful evidence to support a *prima facie*—that is, *preliminary*—finding is a matter of small legal consequence. Such a finding merely shifts the burden of articulation from the plaintiff to the defendant. In fact, however, there is nothing at all mere about this shifting of the burden, since the difficulty of proving oneself innocent of discrimination turns out to be great indeed.

*“Thou shalt not sit with statisticians  
nor commit a social science.”*  
W.H. Auden (1907-1973)

There are few issues in employment discrimination litigation as confusing and as often misapplied<sup>v</sup> as the use of statistics to prove discrimination. In *Joe’s* the court seems to find that disparity itself is synonymous with discrimination. But while comparative statistical analysis, properly done, might tend to show that a specific relationship—like hiring and gender—is not *random*, the social scientist would not assume that even significant deviations from *expected* ratios were *caused* by the factor in question. When statistics are used as a test for discrimination, gender cases may be particularly sensitive to “false positives.” That’s because gender would seldom be completely independent of all other relevant factors; examples that apply most particularly in this case include experience, physical strength, endurance, work

schedule, willingness to work in a “bad” neighborhood and preference (application rate). The effects of gender correlation are not trivial, and perhaps this is one reason why many courts vastly prefer data on the actual rate of application over the more general census data.

But the court in *Joe’s* rejected the actual application data, finding it tainted by the restaurant’s reputation. The court stated that it “must select alternate data.” 969 F. Supp. at 736. The court did recognize that the positions at Joe’s required a relatively high experience level. The EEOC testifying expert initially proposed that the appropriate availability percentage was 44.1 percent based on raw census data for food servers in Miami Beach—making no adjustments for the very high skill and physical demands of work at Joe’s or for the possible disparate rate of interest in the job. This statistic lumped servers at Denny’s, buffet servers and cocktail servers in pubs, in the same category as fine dining servers. The court ultimately endorsed alternate applicant availability data constructed from “refined” census figures adjusted for earnings. Past earning capacity was used as a “proxy for experience, and, by extension, experience as a proxy for qualification.” This method resulted in a female availability rate of 31.9 percent. The court looked at two distinct time periods: the 4-year period before the EEOC charge (1986-1990) and the post-charge period (1991 and after). From the statistical “yardstick” chosen by the court, it was not a great leap for the court to find disparity in the comparison of availability to the actual number—zero—of women hired during the pre-charge 4-year time period:

[E]ven if the applicant pool had contained only 5% women, let alone the 31.9% estimate that the court has found reliable, mere chance could not explain Joe’s failure to hire a single woman. Joe’s zero female hiring rate leads inexorably to the *conclusion that some discriminatory influence is at work...*” Certainly the statistics presented in this case, most notably the statistics for the five year pre-charge period during which not one female food server was hired, are substantial and persuasive. They support the inference that the restaurant’s uncircumscribed delegation of hiring *caused* the disproportionate exclusion of women from server positions. *Id.* at 342.

In the post-charge time period, Joe’s did better in terms of statistics hiring 18 women out of a total 88 new hires (22 percent). Due perhaps to publicity of the case, the rate of female applicants for the waitperson positions had increased and, as before, Joe’s female hire rate mirrored the actual numbers of women who applied. Based on the same census-derived 31.9 percent availability figure, however, the court found that disparate impact discrimination tainted both hiring periods. The court placed an affirmative obligation on Joe’s to remedy the effects of its reputation:

By failing to address its entrenched reputation and the resulting effect on the roll call [attendance] Joe's left undisturbed a significant factor causing the ongoing exclusion of women from server positions.

*"You can not feed the hungry on statistics."*  
David Lloyd George (1883-1945)  
British Prime Minister

The EEOC investigation of Joe's was part of a more general agency initiative targeting several high-profile eating establishments for investigation of hiring practices that had allegedly led to overwhelmingly male wait staffs. Among those investigated were the "21" club (New York), Pat O'Brien's Bar (New Orleans) and Mansion on Turtle Creek (Dallas).<sup>vi</sup> The *Mansion* case in particular—when compared to study in contrasts, not just in results and in legal analysis, but specifically in the use of statistical evidence in adverse impact cases.

The EEOC sued the Mansion in 1993 claiming that the hotel had not hired a woman for a serving position in its main dining room in more than 8 years. The thrust of the case was statistical disparity, very much as it was in *Joe's*. In fact, the EEOC presented the same statistical expert, Elvira Sisolak, who made similar conclusions based on a similar statistical analysis in both cases. The Mansion argued at trial that it could not hire more women because qualified female servers were few and rarely applied.<sup>vii</sup> This argument also, mirrored that made by the defense in *Joe's*. In the *Mansion* case, however, the court essentially accepted the employer's conclusion that (for whatever reason) "women remain under-represented in the [applicant] pool of wait persons who possess fine dining skills." *Id.* at 891. The court ruled in favor of the Mansion on summary judgment in 1995 and the decision was upheld by the Fifth Circuit on appeal.

Though there were many differences in the courts' fact findings in the two cases, the primary distinction seems to be a difference in how the courts applied the respective burdens of proof and their use of statistics.<sup>viii</sup> The *Mansion* court held that "an individual's earnings are not an accurate predictor of whether that individual has fine dining skills (based on the growth of casual, but expensive restaurants.)" The court also concluded that "the EEOC's statistical analysis did not define the relevant labor pool correctly . . . accordingly, the conclusions reached by Plaintiff's expert. . . have no probative value." There are other problems with the use of a wage "proxy" for skill or interest.<sup>ix</sup> *Joe's* utilizes a fairly broad bracket of earnings. And even if earnings are a proxy for skill and experience—then any gender skewing within that wage bracket would have an impact on the statistical hiring rate. Since women on average earn less than men, it is probable that women were disproportionately represented at the low end of the earnings bracket. The availability number chosen is thus more arbitrary than real. The inexorable zero may well have been the result of some degree of reliance on

stereotype (whether intentional or unintentional), but it was still the EEOC's burden to provide and prove the discrimination and to prove the appropriate yardstick. This they did not do.

*"Out of the air a voice without a face  
proved by statistics that some cause was  
just in tones as dry and level as the place."*  
The Shield of Achilles  
W.H. Auden (1907-1973)

Although there is no question that gender in some way correlated with the hiring results at Joe's, that correlation may have been "caused" by many factors unrelated to the employer. Men and women are both inherently and socially different. And while overlap in interests, skills, and qualifications between the two groups may usually exceed average differences, an expectation of essential sameness on an individual issue may be dead wrong. In adopting the 31.9 percent figure, the *Joe's* court apparently did recognize that men and women may differ in qualifications, but ignored any possibility that there are cultural and biological differences influencing the interests of men and women in the job position in question. If there is a difference in interests or preference rates between men and women, a blind statistical analysis would indicate disparity where no discrimination exists.

In the *Joe's* case, there was evidence that the waiters needed endurance as well as strength. Though many women may be physically capable of carrying such trays, that fact does not necessarily require the conclusion that women prefer a job that includes such a requirement at the same rate as do men. Conversely men who work as servers may disproportionately seek out the more difficult and higher-paying wait staff work—caring less about the physical strain. Such a hypothesis may not adequately address the complete lack of female hires for a 4-year period at Joe's. It raises serious concerns, however, as to the 39.1 percent yardstick of availability employed by the court. And even assuming, *arguendo*, that 31.9 percent did represent the "qualified" female applicant pool, it does not follow that qualified women would have sought out the waiter positions at Joe's at the same rate as qualified men. Significantly, during both the post-charge and the court supervised post-trial annual "roll-call" at Joe's, the actual number of women applying for wait staff positions did not reach the supposed availability level found by the Court.<sup>x</sup>

*"The truth is more important than the facts."*  
Frank Lloyd Wright (1867-1959)

What is the message of *Joe's Stone Crab*? Employers who find that segments of their workforce show large gender differences in hiring or promotion rates, or can be characterized by the inexorable zero, would be well advised to carefully review their hiring practices, and the supervisors who implement them, for signs of bias. But *Joe's* may send a more sinister message—that statistics alone may convict an employer of sex discrimination—even when the difference in application or selection rate is not demonstrably related to any particular employer practices. If employers are forced to take the rap for differences which they did not cause, a prudent employer might take gender-conscious steps to "fix" the perceived disparities.

Did someone say quota?

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<sup>i</sup> The court repeats the "no intent" finding throughout the opinion. In fact, the court notes that the evidence portrays owner/managers who have been courageous in opposing overt discrimination. For example, *Joe's* was picketed for two years when the owners insisted on hiring African-American employees who had been excluded from union membership because of race." \_\_\_\_\_, 969 F. Supp. at 731.

<sup>ii</sup> *Joe's* was ordered to pay four women a total of \$150,000 in lost wages. Under the order, the four would-be *Joe's* waiters will receive between \$15,000 and \$71,000 to cover the differential between their actual employment elsewhere and the higher earnings they could have achieved in the more lucrative *Joe's* positions. In some cases, the judge calculated the lost wages starting years before the women even interviewed for employment at *Joe's* because the women said they were initially deterred by *Joe's* reputation for hiring only men.

<sup>iii</sup> The court cited a New York Times article: Frank J. Prial, *Who Says Women Can't Do This Job?*, N.Y. TIMES, October 23, 1996; and Emily Post's Etiquette Guide as supporting the "deeply rooted cultural traditions [of male only wait staff]." The Emily Post reference was as follows:

Take for example, this dictum by America's ultimate arbiter of propriety and decorum: "If the servants are efficient and well trained, a small (that is for no more than twelve) formal dinner may be beautifully handled by a cook, a butler, and a footman. The footman may be replaced by a maid, but at a truly formal dinner, men should serve the meal."

<sup>iv</sup> At one point, the court in *Joe's* even seems to rely on double-hearsay rumor evidence: Her [the EEOC expert] testimony is bolstered by the witnesses who reported hearing *rumors* in the Summer of 1991 that *Joe's* would be hiring women in response to charges of discrimination brought by the Labor

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<sup>v</sup> With apologies due to Benjamin Disraeli. Mr. Disraeli is reported to have told Mark Twain: "There are three kinds of lies: lies, damned lies, and statistics." Disraeli (1804-1881).

<sup>vi</sup> *EEOC v. Turtle Creek Mansion*, 1995 WL 478833, 70 Fair Empl. Prac. Cas. (BNA) 899, (N.D. Tex. 1995), *aff'd.*, 82 F.3d 414 (5th Cir. 1996); *EEOC v. Pat O'Brien's Bar, Inc.*, (not reported in F. Supp.), 61 Fair Empl. Prac. Cas. (BNA) 1685 (E.D. La. 1993). *American Civil Liberties Union web site* (visited January 9, 1998) <http://www.aclu.org/news/w102396c.html>.

<sup>vii</sup> Like *Joe's Stone Crab*, the appropriate statistical yardstick was also a factor in *EEOC v. Turtle Creek Mansion*, 1995 WL 478833 (N.D. Tex. 1995). But the *Mansion* court explained that it must proceed with caution in light of the Fifth Circuit's warning that [t]he cases do not yet specify what level of qualification for employment is sufficient to undergird such a statistical case, "*Id.*, citing *EEOC v. American Airlines, Inc.*, 48 F.3d 164. (5th Cir. 1995). The court concludes that the EEOC's statistical analysis did not define the relevant labor pool correctly. Accordingly, the conclusions reached by Plaintiff's expert, Elvira Sisolak, have no probative value." Sisolak was the EEOC statistical expert in the *Mansion* case.

<sup>viii</sup> Compare the *Mansion* court's discussion on very similar evidence presented by the same EEOC statistical expert as was used in *Joe's*:

Even where statistical analysis is inadequate, Courts are skeptical of attempts to explain away the "inexorable zero" in hiring. See *Capaci v. Katz & Besthoff, Inc.*, 711 F.2d 647, 662 (5th Cir. 1983). Such an "inexorable zero" exists in this case and is of concern to the Court. Upon consideration, however, the Court concludes that Defendant has presented credible explanations for the under-representation of female wait persons in the main Dining Room and Private Dining Service.

*EEOC v. Turtle Creek Mansion*, 1995 WL 478833 at \*9.

Elsewhere the *Mansion* court commented:

Regardless of whether the revised analyses constituted an improvement, the Court finds that Plaintiff's statistical study is fatally flawed for a more fundamental reason: the census data fails to reflect the qualifications needed for the positions at issue. The Court acknowledges Sisolak's testimony that no further refinements in the census data are possible. Nevertheless the Court finds that the census data includes job categories, such as cocktail waitresses and room service waitresses, that are irrelevant to an analysis of Defendant hiring in the main Dining Room and Private Dining Service. Similarly, the Court finds that the census data does not reflect the length of time an individual has worked as a waiter or waitress or the type of establishment where the individual works. Plaintiff contends that income can accurately serve as a proxy for the varied skills Defendant requires. Defendant expert Karen MacNeil, rebutted this contention based on the existence of a growing number of casual but expensive restaurants. The Court credits [this] testimony, which indicated that an individual's earnings are not an accurate predictor of whether that individual has fine dining skills. Finally the Court notes that Sisolak failed to make an adjustment that was possible: a geographic adjustment to account for the commuting patterns of Defendant employees. *Id.* at \*8.

<sup>ix</sup> At least one court has rejected income level as a valid indicator or indication of interest. See, *Gay v. Waiters' & Dairy Lunchmen's Local 30*, 489 F. Supp. 282, 304-05, 22 FEP 281 (N.D. Cal. 1980)

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(rejecting the use of income to define the application pool because it fails to consider other relevant factors including job preference), *aff'd*, 694 F.2d 531 (9th Cir. 1982). Ordinarily, the best evidence of applicant interest is actual application-flow data. But where no valid application-flow data are available, some employers have sought to prove preference after the fact. Courts are divided over the use of job interest surveys as a substitute for applicant-flow data to show divergence of interest in the workforce. Compare *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 320-21, 45 FEP 1257 (7th Cir. 1988) (job interest survey successfully used to rebut plaintiffs statistical analysis) to *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 326, 62 FEP 11 (N.D. Cal. 1992) (court rejected an employer's post-litigation use of a job interest survey.)

<sup>x</sup> ELLEN FORMAN, *Joe's Stone Crab Feels Job Bias Pinch*, SUN-SENTINEL FT. LAUDERDALE, October 8, 1997; CAL THOMAS, *Crabbing At Joe's: The EEOC Says More Women Should Work There, Whether They Want To or Not*, CHICAGO TRIBUNE, October 15, 1997.