

Harrison v. Lewis, C.A. 79-1816 (D.D.C. 1982) (Oberdorfer, J), unpublished order on the merits, June 2, 1982; relief order 559 F. Supp. 943 (D.D.C. 1983)

Plaintiffs alleged that the Maritime Administration (MarAd) discriminated against black females in hiring secretaries, and against blacks and females in promotion (favoring white males) to other positions. In one sense this case is similar to *State v. Gibbs*, in which the opposing expert was the chairman of the Yale University statistics department. In *Harrison*, plaintiffs' expert was John Van Ryzin, a young and personable professor of statistics at Columbia University. Van Ryzin had little experience in litigation, and little experience with federal government personnel policies. Timothy Wyant and Stephan Michelson were LRA's experts, for the defendant.

The first problem in this case from the early 1980s—from federal hiring and promotions that had occurred mostly in the 1970s—was in data. Race data were available for persons ever employed at the Maritime Administration, which would include some who had been rejected, and later hired. LRA (at that time ERI) was able to increase the number of known race rejects by 50 percent, by assuming that people who applied to one federal job would have applied to others. We used race data from the Office of Personnel Management where they matched the social security number of rejected applicants to MarAd who had obtained other federal positions.¹

Plaintiffs sensibly abandoned their data and used ours. Plaintiffs also abandoned their initial analysis, which was (as was typical at the time) based on merging all applicants and all winners to all jobs into one conceptual labor pool. A calculation comparing the percent of white male hires from that pool to the percentage white-male in the pool convinced plaintiffs that MarAd had discriminated in favor of white males. However, that calculation implicitly assumes that all applicants are eligible for all positions. In particular, it assumes that persons applying for entry-level jobs were being rejected from higher grade jobs. The percentage black among applicants declined the higher the grade. Thus this “single pool” approach systematically created the impression that blacks were being denied high level jobs, when in fact they had not applied and were not eligible for them. Not only is that calculation clearly spurious, but Van Ryzin understood and agreed that it was as soon as we described our multiple pools analysis procedure.

1 Because courts like to see “statistical significance,” and because using race data only from race-known applicants limited the number of rejected applicants in our tests, LRA also ran simulations in which we randomly assigned race to those without one. That increased the number of observations. We assigned race to race-unknown applicants in the same proportion (black or white) as all applicants. That way we “knew” their race as well as their outcome, hired or not. Judge Oberdorfer suggested that we assign race to unknown *rejected* applicants in the same proportion as the race of known rejected applicants. LRA pointed out that incorporating MarAd's behavior toward applicants in a measure of their race only works if we assume that the decision was race-neutral, not a good assumption in this litigation.

The allegation included entry level positions up to high level GS 18 positions. LRA agreed that, given the limited information we had about applicants to clerical positions, black females seemed to have been under-hired. They may have had less skill or other reasonable reasons why they were not hired, but neither we nor MarAd knew that to be true, and so plaintiffs' allegation at that level was accepted without contention by the defense. Plaintiffs therefore became known as "the prevailing party," even though the court did not find for them in any other class issue.

Every position below some maximum grade is in a "Line of Promotion." That is, promotion is achieved by attaining a standard of performance and tenure. The first line of analysis in such a situation is how long it takes to go from grade X to grade X+1. Had the progress of females or blacks been slower than that of white males?

To perform such an analysis requires that we know the maximum grade in a line of promotion, which could have been 10, 11 or 12. Beyond one's maximum line of promotion grade, there might be higher grades, but one attained them by competing for an announced opening. We were delighted to have, on the other side, a statistician who understood how to estimate differential time to promotion by race and gender, using survival analysis. That is, in this rare instance, we did not have to argue about methodology.

However, Van Ryzin did not understand the data. Because maximum grade per line varied, one had to analyze time-to-promotion only up to that maximum, and then gather data on announcements and competition lists to analyze higher grades. Van Ryzin assumed that all lines promoted internally up to GS 13 when, in some lines, the higher grades in that range were attained only through competition. Whether there was discrimination on the part of MarAd officials, whether potential applicants thought there would be such discrimination had they applied, we do not know. The fact is that few blacks entered competitions for higher grades. When they did, they were promoted equally with whites.

It is true that if you do not compete you cannot win, but it is also true that if you do not compete you present no basis for a statistical test of discrimination. Van Ryzin's finding that blacks failed to rise in the higher grades at the same rate as whites was not correct. He was observing the behavior of black MarAd employees, not promotion decisions made by executives.

Unfortunately, Judge Oberdorfer's opinion on the merits was not published even in those places where "unpublished" opinions *are* published (such as FEP Cases). Nor do we have a copy. However, one can infer much of it from his relief order. Defendant prevailed in its statistical analysis, although defendant admitted discrimination at some lower grade levels, and individual complaints were heard separately.