

APA MAGAZINE

The Magazine for the Polygraph Professional

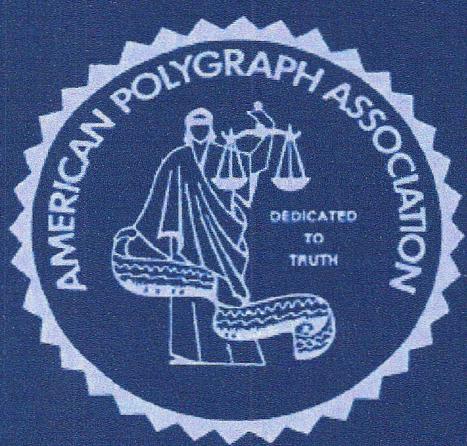
A Literature Review Of Polygraph
Countermeasures

And The Comparison Question Technique
P. 81

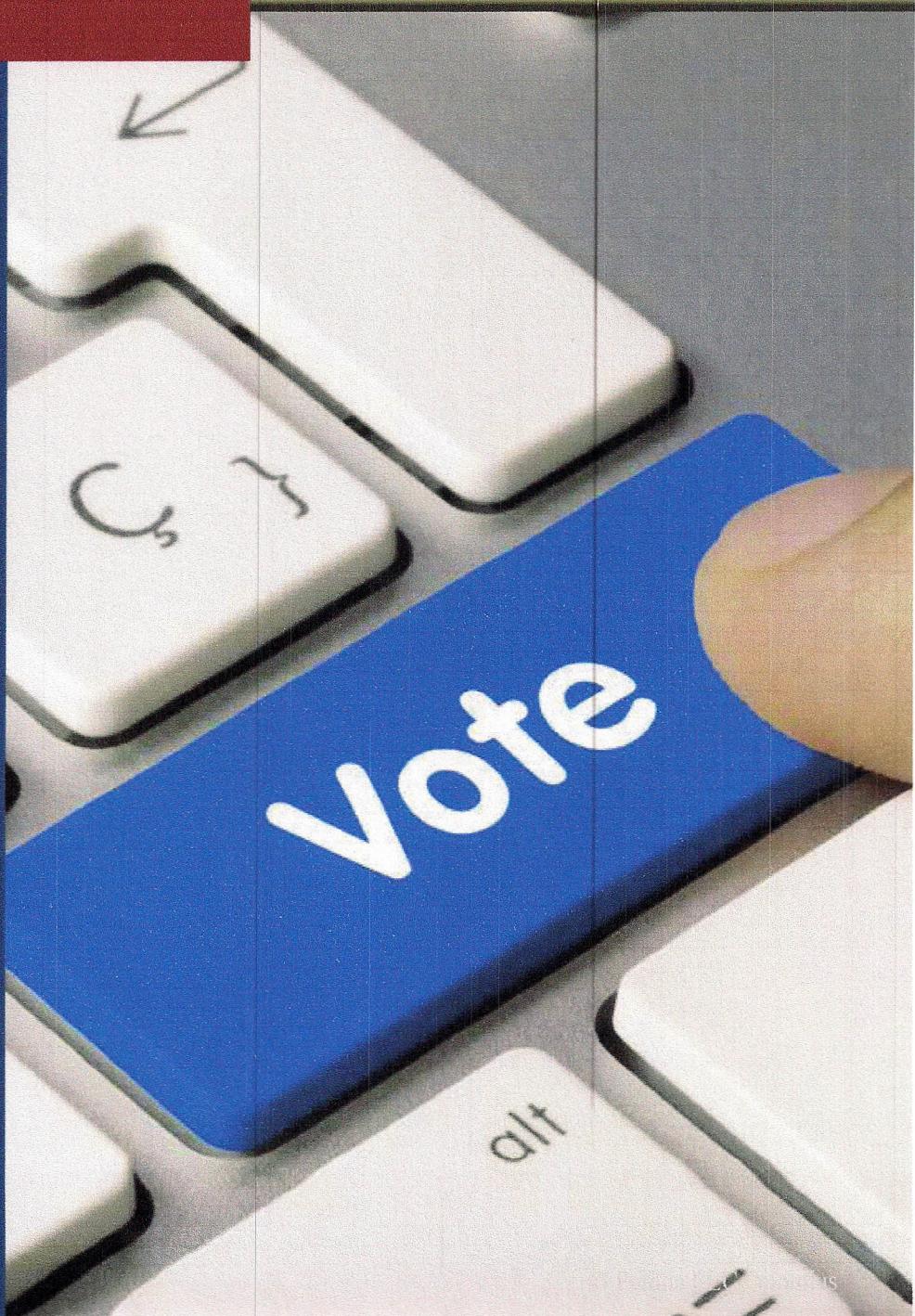
May/June 2015
Volume 48,3

ELECTIONS

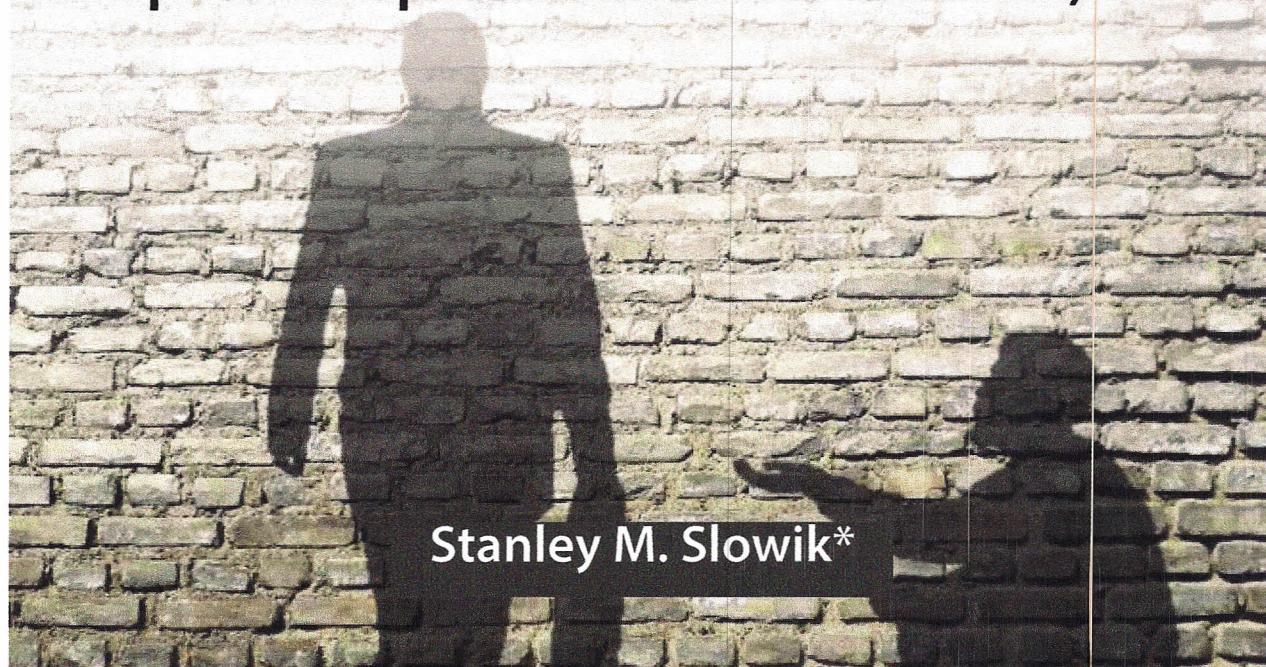
2015



July 5-11



Disparate Impact and EEOC v. Freeman, 2015



© Fotolia LLC/Jonathan Stutz

Stanley M. Slowik*

As discussed recently in the APA Magazine(1), the Obama Administration has been, laudably, trying to raise awareness about racism and sexism in the United States. The Equal Employment Opportunity Commission (EEOC) recently tried use the concept of disparate impact to allege racism and sexism in employment decisions, housing mortgages and the administration of criminal justice. Disparate impact, simplistically, occurs when a particular group defined as protected by some employment or civil rights law, experiences a statistically signifi-

cant and adverse impact as a result of some identified practice. Statistically significant, in turn, has traditionally been defined by the 4/5ths Rule or 80%. Disparate impact often involves a practice that, on the surface, appears neutral but has a disproportionate effect on different identified groups. For example, both male and female applicants might be required to take the same physical agility test as part of an employment selection process. Physical agility tests that have been properly validated for the specific job-related tasks found in jobs such as patrol officer

*Stanley M. Slowik is a long time contributor and the author of one of the first federally recognized high quality research studies of polygraph validity. The author has attempted to convey the opinions of recent federal reports and court decisions which are not necessarily his own or those of the American Polygraph Association.

or firefighter consistently produce test results with males passing or scoring higher than females. Such tests have a clear, statistical gender bias (disparate impact), even though there was never any intent to discriminate. They are legal because through job analysis they are based upon real, work-related tasks. Previously, researchers and test vendors attempted to overcome this gender bias by weighting the physical agility test scores in favor of female applicants using percentile rankings(2). This approach, however, is unlikely to survive legal scrutiny in light of the consistent Supreme Court decisions striking down the use of race and gender based quotas and affirmative action programs. In addition, changes to the Civil Rights Act of 1991 specifically prohibits the use of different cut-scores or other statistical manipulation to employment test scores and results (3). In essence, legally, employers cannot use gender or racial bias to create gender or racial equality.

Disparate treatment, however, is very different from disparate impact in that it requires intent, e.g. requiring only women to take and pass the physical agility test. In these cases, bias in hiring based on race and gender have been allowed to correct a prior wrong. Historically, if a practice was found to have a disparate impact on a protect-

ed group, the employer would then have the opportunity to show that the practice was job-related and consistent with business necessity and no less adverse alternative evaluation method was available. It should be noted that business necessity has nothing to do with private sector enterprise but rather applies to all organizations, public and private, and refers to things that are necessary for the organization to exist or function. If a practice having a significant disparate impact upon a protected group could be shown to be relevant to performance and business necessity (validated), it was considered legal (4). The EEOC and the U.S. Attorney General's Office have challenged these historical interpretations, determining, in short, that if there were a significant, statistical disparity, this alone should be sufficient to prove a racist or sexist motive. This interpretation however, has very been rebuked in unusually strong terms by the federal District and Appellate Courts, at least with regard to employment practices.

Employment Decisions

In EEOC v. Kaplan Higher Education Corporation (5) the EEOC maintained that Kaplan's use of credit record checking with applicants seeking employment in positions with access to the company's financials, cash and

student financial aid information was a racist and therefore an illegal practice due to disparate impact on African American applicants. The Sixth Circuit found to the contrary for Kaplan and upon appeal affirmed, specifically mentioning the EEOC's "laughable" disparate impact analysis, writing that the EEOC "flunked all of the factors" required in a Daubert analysis (6) and that credit records contained no information identifying the race of the person. Even more troubling to the Court was the fact that the EEOC was aware that Kaplan only instituted credit record checking after they had caught their employees stealing student financial aid payments and that the U.S. Department of Education imposed severe penalties on institutions that misuse student financial aid information, almost the very definition of job-related business necessity. Further, the Court found the EEOC's allegation of racism hypocritical after it was shown that the EEOC itself used the same credit checks as Kaplan for 84 of the agency's 97 job positions because, as the EEOC's handbook states "overdue just debts increase temptation to commit illegal or unethical acts as a means of obtaining funds to meet financial obligations", precisely the same business necessity Kaplan cited in its defense.

Most recently, in EEOC v. FREEMAN (7),

the Fourth Circuit found and affirmed in favor of employer's use of criminal and credit record checks in hiring, a practice which the EEOC alleged were both racist and sexist practices because of disparate impact against African American and male job applicants. As was the case in Kaplan, the Court found a "mind boggling" number of errors and unexplained discrepancies in the EEOC's disparate impact analysis. In perhaps one of the more remarkable observations, one judge's written opinion warned that:

"The EEOC must be constantly vigilant that it does not abuse the power conferred upon it by Congress, as its significant resources, authority, and discretion will affect those outside parties they investigate or sue... The Commission's conduct in this case suggests that its exercise of vigilance has been lacking... It would serve the agency well in the future to reconsider how it might better discharge the responsibilities delegated to it...."

Since these are both very recent decisions it is too soon to evaluate whether they will have any effect on the Ban The Box movement that has already resulted in legislation restricting public employers use of criminal record background checks (*ibid, Compliance*).

At the heart of both the Kaplan and Freeman decisions were the studies using of statistical analysis to prove disparate impact. Very few polygraph examiners have ever conducted or published research involving statistical analysis and may not even recognize when studies are being conducted in a less than objective manner without someone having to explain the analysis. In the words of the federal courts:

"Proof of disparate impact requires reliable and accurate statistical analysis. The inevitable focus on statistics in disparate impact cases requires a very high standard of proof. Merely pointing to statistical disparities is not sufficient. They must show that a practice has caused exclusion of applicants because of their membership in a protected group."

The Department of Justice Bureau of Justice Statistics has consistently reported that males are four times as likely to be arrested and convicted of serious crimes, particularly crimes of violence, than females. The Bureau also consistently reports a two to one disparity along racial lines (8). These statistics merely reflect that different groups have different outcomes at different rates. No one should conclude, for example, that sexism is twice as

common as racism. Statistical correlations often have nothing to do with causation. Polygraph examiners who conduct screening examinations often have the applicants' NCIC and DMV reports prior to the examination and can sometimes compare the records to polygraph admissions of actual conduct. When a person's recent, work related past is being used to predict what they might do in the future if hired, the admissions of what they say they did are a more accurate basis of prediction than what appears on the record after charge and plea bargaining. In short, the Bureau's disparity statistics, when viewed without any other information, neither prove nor disprove sexism or racism.

Studies in neuroscience and behavioral biology indicate that testosterone has a considerable influence in tendencies toward physical aggression and risk behaviors. Not surprising, then, sexual misconduct, financial corruption and violence all tend to not only statistically correlate with gender but, in fact, biological gender differences may heavily contribute to the cause of the disparity (9). The EEOC studies however, concluded that sexism was at least primary if not the sole cause of the statistical gender differences and therefore the disparities in arrest and conviction rates. The four federal courts completely dismissed this finding because they found that

the study's poor design and "cherry picked data" failed to consider other obvious causes: biological differences predispose men to engage in violence and risk more so than women.

Racial disparities are far more difficult to causally explain but one fact often overlooked is the way some of the data used by the Bureau of Statistics has been gathered. Shortly after the original Uniform Guidelines were published in 1979, the EEOC in conjunction with the Office of Personnel Management and Departments of Justice, Labor and Treasury published Adoption of Questions and Answers to Clarify ... Uniform Guidelines (10). In this seminal document, all the federal agencies charged with oversight of the Guidelines clearly state that while employers are required to collect and maintain both gender and racial data, they are not required to report intra-category differences.

"Q/A 17: There is no obligation to make comparisons for subgroups, e.g. white male, white female, black male, black female..."

It is therefore quite possible that some of the racial differences in the arrest and convictions rates are not so much racial as gender influenced. The take-away from all of this might be best summed up by the Freeman trial court

(11) citing ipse dixit and previous decisions involving studies using statistical analysis.

If there is too much of a gap between the study's findings, the quality of the data and study methodology, then even the most rigorous statistical analysis doesn't make it true simply because the researchers say the statistics prove it true (12).

Background Investigators and polygraph examiners can avoid winless arguments about race and gender by creating hiring standards based on commissions of recent, work related activities and leave postulations about the causes of statistical disparities to the federal courts. Also, while very few employers possess the resources of Kaplan or Freeman, the judiciary appears to be very much aware that supposed neutral federal agencies such as the EEOC can abuse their authority and still be held accountable.

1. *Compliance Update: Employment Practices and Procedures*, APA Magazine, V48, N1, pp51-56, Jan/Feb, 2015
2. *Questions Regarding Fitness Standards*, <https://www.cooperinstitute.org/vault/2440/web/files/684.pdf>, pp 6-9
3. *Civil Rights Act of 1991, Section 106*, www.eeoc.gov/eeoc/history/35th/thelaw/cra_1991.html
4. *Uniform guidelines on employee selection procedures*, Equal Employment Opportunity Commission, Civil Service Commission, Department of Labor & Department of Justice, Federal Register, 43, 38290-38315, 1978
5. *EEOC v. Kaplan Higher Education Corporation*, 2014 WL 1378197 (6th Cir. 2014)
6. *Ibid*, pp 5-7
7. *EEOC v. Freeman*, No.13-2365, 2015 U.S. App. (4th Cir.Feb 20, 2015)
8. *Bureau of Justice Statistics*, www.bjs.gov
9. *Women After All: Sex Evolution and the Evolution of Male Supremacy*, Konner, M., W.W. Norton & Company, March, 2015
10. *Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures*, EEOC et al, FR Vol 44, No 43, March 2, 1979
11. *EEOC v. Freeman*, 961 F. Supp.2d 783, Dist Court, D. Maryland, 2013
12. *General Electric Company v. Joiner*, 522 U.S. 136. 146, 118 S.Ct.512, 139, L.Ed 2nd 208 (1997)