

About This Report

This report examines the changes to employment policies and practices mandated as part of sex and race employment discrimination litigation. The report is based on the analysis of more than 500 consent decrees (court supervised pre-trial settlements) that were negotiated by the U.S. Equal Employment Opportunity Commission (EEOC), the U.S. Department of Justice (DOJ) or private law firms, and in-depth study of the negotiation and implementation of four sex discrimination consent decrees. It makes recommendations on how to improve the effectiveness and reach of employment discrimination consent decrees. The research was made possible by generous funding from the Ford Foundation.

The report was prepared by Ariane Hegewisch, Study Director at the Institute for Women's Policy Research (IWPR); Cynthia Deitch, Ph.D., Associate Professor of Women's Studies, Sociology, and Public Policy at George Washington University, and Affiliated Researcher at IWPR; and Evelyn Murphy, Ph.D., Founder and Director of the WAGE Project.

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The Institute for Women's Policy Research (IWPR) conducts rigorous research and disseminates its findings to address the needs of women, promote public dialogue, and strengthen families, communities, and societies. The Institute works with policymakers, scholars, and public interest groups to design, execute, and disseminate research that illuminates economic and social policy issues affecting women and their families, and to build a network of individuals and organizations that conduct and use women-oriented policy research. IWPR's work is supported by foundation grants, government grants and contracts, donations from individuals, and contributions from organizations and corporations. IWPR is a 501(c)(3) tax-exempt organization that also works in affiliation with the women's studies and public policy programs at George Washington University.

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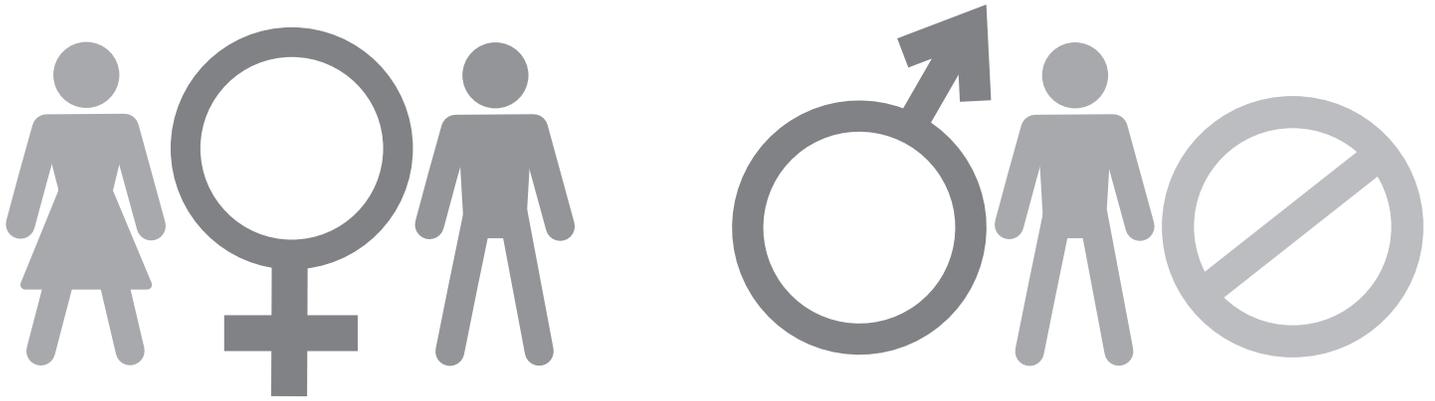
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Ending Sex and Race Discrimination in the Workplace: Legal Interventions That Push the Envelope

Ariane Hegewisch, Cynthia Deitch, and Evelyn Murphy

Foreword

The women's labor force has experienced dramatic change since the devastating 1911 fire at the Triangle Shirtwaist Factory in New York City that destroyed the lives of 146 young women, most of them recent immigrants. The fire was the result of unsafe and unhealthy working conditions, and ignited public outrage. Coalitions of the feminist women's community, the labor movement, the immigrant rights movement, and legislators—first in the states and then at the national level—began to offer support and give attention to the women's working conditions. While early efforts focused on eliminating abuses such as overcrowding, lack of exits and safety procedures, and unsafe machinery, attention moved on to focus on minimum wages, hours of work, the right to organize, and, eventually, equal employment opportunity. Lifelong waged work was rare for women in the early twentieth century; today, a hundred years later, it is commonplace.

Beginning with the enactment of the Equal Pay Act in 1963, followed by further groundbreaking legislation including Title VII of the Civil Rights Act in 1964, Title IX of the 1972 Amendments to the Higher Education Act, the Pregnancy Discrimination Act in 1978, and the 1993 Family and Medical Leave Act, women have been battling in the courts to force businesses and organizations to comply with the rights guaranteed them under the law. Class action lawsuits, provided for under Title VII, have been a primary means to gain injunctive relief—remedies ordered by the court that are designed to change workplace practices that result in gender and race segregation in job assignments, unequal pay and promotions, disparate working conditions, or depressed hiring of women or minorities. In many cases settled before final verdicts are reached, plaintiffs, defendants, and the courts enter into consent decrees to address the workplace inequities experienced by the plaintiffs. These cases know no boundaries. They include not only professional women but women at all levels in workplaces—including many low-income women from diverse racial and ethnic identities—who may experience outrageous conditions at work such as sexual assault and rape.

In presenting this report, *Ending Sex and Race Discrimination in the Workplace: Legal Interventions That Push the Envelope*, the Institute for Women's Policy Research (IWPR) sheds light on the important roles of class action lawsuits and consent decrees on the heels of another historically significant event in the lives of America's working women, the oral argument in the U.S. Supreme Court on the certification of the class action in the *Dukes v. Wal-Mart* case. Today, Wal-Mart is the largest employer in the United States and the plaintiffs in the case seek to represent 1.5 million current and former female employees of Wal-Mart whom they allege are paid less and promoted less often than men. In filing its *amicus curiae* brief in the case, IWPR relied on the results of the multi-year research project that examined more than 500 court-supervised employment discrimination settlements involving alleged sex and/or race discrimination in employment that are presented in this report.

Ending Sex and Race Discrimination in the Workplace: Legal Interventions That Push the Envelope finds that injunctive relief in certified class action settlements effectively tackles discrimination and bias in the workplace. The report also finds that injunctive relief is a critical but underutilized feature of Title VII that can impact the overall workplace, not only for those who file the complaints. Large cases that are highly visible, such as the Wal-Mart case if it goes forward to judgment or settlement, likely also change the behavior of many other employers. Title VII has fueled progress for women in the workplace and class action has been the key to winning

systemic changes that have a large impact. Especially among large employers, class action helps to balance an unequal power relationship.

IWPR assembled an outstanding team to conduct the important research reported on here. Led by Ariane Hegewisch, Study Director at IWPR and an expert in human resources practices, the team also included Evelyn Murphy, Director of the WAGE Project, which seeks to provide women with information and powerful tools to help them right their wages, and Cynthia Deitch, Professor of Women's Studies and Sociology at George Washington University, an institution with which IWPR is pleased to be affiliated in many ways.

The report summarizes findings about the 502 consent decrees in the IWPR–WAGE Consent Decree Database created in the course of the research and presents case studies in four industries: public corrections, agriculture (specifically egg processing), aerospace manufacturing, and financial services. The cases run the gamut from the most egregious forms of sexual harassment, to pervasive pay and promotion discrimination. Notably, the report finds that, for injunctive relief to effectively tackle bias and discrimination, human resource decisions need to be transparent and managers held accountable. Measurement and monitoring are important aspects of the accountability process. The report contains many recommendations for attorneys both in the private bar and in the government agencies who craft the language of consent decrees, along with recommendations to help businesses strengthen their personnel policies and compliance with the injunctive relief in consent decrees.

The cases studied are also notable because they drive home the point that at the core of each lawsuit are individual women who suffered unfair and inequitable treatment simply because they were trying to earn a living. Fortunately for us and for all workers, they had the courage to come forward and press their claims to their conclusion.

Most importantly, the report concludes that certified class action lawsuits and consent decrees reduce employment discrimination.

The Ford Foundation, IWPR's strongest and most consistent funder across its nearly 25 years, graciously provided funding to conduct this research and stuck with us as we began to understand the complexity of the issues, and realized it required more time and more resources than originally anticipated. This project has also entailed the creation of an important new tool, now publicly available without charge to attorneys and academic researchers, the IWPR–WAGE Database, housed at Civil Rights Litigation Clearinghouse.

We hope this report will exemplify our core mission by being of service to policymakers and those who implement our fair employment policies: the courts, private attorneys, and public enforcement agencies, including the U.S. Equal Employment Opportunities Commission and the U.S. Department of Justice. We look forward to its use as a reference manual by all those working in the field of employment discrimination and consent decrees, and as a teaching tool in continuing legal education programs. As researchers we hope the work presented here and the resources in the database will lead to the exploration of additional innovative options that will eventually culminate in the preparation of more effective consent decrees and judgments in future cases.

—Lenora Cole, Ph.D.
Chair of the Board, Institute for Women's Policy Research

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Our final thanks go to Margo Schlanger and Denise Heberle from the Civil Rights Litigation Clearinghouse for their generous help with generating our consent decree sample, and for hosting the legal documents for the consent decrees examined in this research.

List of Abbreviations

ADA	Americans with Disabilities Act of 1990
ADAAA	Americans with Disabilities Amendments Act of 2008
ADEA	Age Discrimination in Employment Act of 1967
AEFA	American Express Financial Services
AFSCME	American Federation of State County and Municipal Employees
BAI	Banc of America Investment Services
BOA	Bank of America
DCDOC	District of Columbia Department of Corrections
DOJ	U.S. Department of Justice
DOL	U.S. Department of Labor
EEO	Equal Employment Opportunity
EEOC	U.S. Equal Employment Opportunity Commission
EPA	Equal Pay Act of 1963
FDO	Field Diversity Officer
FLMSP	First Line Management Selection Process
FOP	Fraternal Order of Police
IAM	International Association of Machinists
IAWFES	International Association of Women in Fire and Emergency Services
ICADV	Iowa Coalition Against Domestic Violence
IP	Industrial psychologist
JAG	Job Aggregation Group
MSDW	Morgan Stanley Dean Witter
MUNA	ICADV's bilingual legal clinic
MWOP	Metropolitan Women's Organizing Project
NASD	National Association of Securities Dealers
NASDAQ	National Association of Securities Dealers Automated Quotations
NLRA	National Labor Relations Act
NLRB	National Labor Relations Board
NYSE	New York Stock Exchange
OFCCP	Office of Federal Contract Compliance Programs
OSI	Office of the Special Inspector
PGFD	Prince George's County Fire Department
SEC	Securities and Exchange Commission
SI	Special Inspector
SPEEA	Society of Professional Engineering Employees in Aerospace
TRO	Temporary restraining order
UAW	United Auto Workers
UAW	United Auto Workers
VTVPA	Victims of Trafficking and Violence Protection Act of 2000

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Executive Summary

Race and sex discrimination in employment, covering recruitment, pay and compensation, training and promotion, was made illegal by Title VII of the Civil Rights Act of 1964. Successful employment discrimination lawsuits may result in *individual relief*, such as monetary compensation for individual victims of discrimination and *injunctive relief*, such as changes to the employer's human resource management policies and practices aimed at creating a workplace free of discrimination for all workers. Very few employment discrimination lawsuits, however, actually result in injunctive relief. Those that include injunctive relief most commonly are court-supervised pre-trial settlements called consent decrees.

This report draws on the IWPR/WAGE Consent Decree Database to analyze the injunctive relief awarded in 502 sex and/or race discrimination settlements that became effective between 2000 and 2008. We find that some consent decrees provide innovative and far-reaching remedies to counter previous sources of inequality, whereas others require little more than posting notices and conducting diversity awareness training. The Database includes a sample of U.S. Equal Employment Opportunities Commission (EEOC) consent decrees, and all publicly accessible U.S. Department of Justice (DOJ) and privately litigated class-action consent decrees. In addition, the report examines detailed case studies to show how injunctive relief was negotiated and implemented in particularly innovative consent decrees.

Results of the IWPR/WAGE Consent Decree Database Analysis

- Many EEOC and DOJ consent decrees address only one major employment practice, such as sexual harassment or discrimination in pay, promotions, or hiring; private class action settlements typically address multiple discriminatory practices. Case studies suggest that discrimination often is the result of more than one employment practice. For example, sexual harassment may go hand in hand with discrimination in promotions or hiring.
- All private class action settlements include at least some measures shown by social science research to be most effective in producing sustained change toward greater equality; such effective injunctive relief is less common among decrees resulting from cases brought by the EEOC and DOJ. Effective injunctive relief refers to measures that create transparency in hiring, promotion, compensation and training and hold supervisors accountable for equality outcomes. Many EEOC and DOJ decrees mandate little more than publicly posting and/or revising equal employment opportunity (EEO) policies and conducting diversity/sexual harassment training, measures that, unless linked to more detailed organizational interventions, are likely to be less effective.
- In interpreting these findings, we suggest that EEOC attorneys are more reluctant than private attorneys to be prescriptive in consent decree negotiations for fear that their advice might be used by employers as defense against future discrimination charges. The EEOC is also constrained by lack of resources when initially investigating complaints. This lack may lead to a more limited framing of charges that then limits the scope of permissible injunctive relief. The EEOC further lacks resources during litigation and enforcement. For example, the EEOC has very limited budgets for using external experts.

Sexual Harassment in the DC Department of Corrections and Other Large Employers

- Change in organizations with systemic levels of sexual harassment requires that a person be in a position with sufficient authority and resources to enforce the consent decree. This is shown by detailed study of *Neal v. DC Department of Correction (DCDOC)*, *EEOC v. Mitsubishi*, *EEOC v. Dial Corp.*, and *U.S. v. Prince George's County, Maryland, Fire Department (PGFD)*. The Special Investigator (SI) in *Neal v. DCDOC* was one such person, as were the independent monitors in the EEOC cases. A counter example is offered in PGFD, where, in the absence of such independent monitor(s), the decree appeared less successful in reducing sexual harassment.
- A sexual harassment policy and grievance procedure, even when court ordered, is not sufficient to stop harassment. Other research shows that employees need to have confidence that complaints will be taken seriously and will not lead to retaliation and that offenders will be punished. Employee attitude surveys are one way to assess confidence in sexual harassment grievance procedures.

Sexual Harassment of Migrant and Immigrant Women in Agribusinesses and Food Processing

- The case study of *EEOC v. DeCoster*, and other EEOC decrees from the agricultural industry, highlights the egregious sexual harassment and violence—including repeated rape—that is often a routine part of work for undocumented women workers in low-wage jobs. It also shows that women workers are protected under Title VII, irrespective of their immigration status.
- Key for successful litigation has been the EEOC's cooperation with community groups and legal advice centers to gain the trust of the women workers, and with immigration authorities to ensure that the women are free to come forward without fear of deportation. Surprisingly perhaps, prosecuting such rapes does not appear a priority for criminal investigations.
- EEOC agribusiness consent decrees are best practice examples of addressing discrimination in an integrated way. Injunctive relief includes measures directly targeted at eliminating sexual harassment (such as holding sexual harassment training and creating grievance procedures), measures to address occupational segregation and discrimination in hiring and training practices, and measures to ensure that both current and future workers are informed about their employers' responsibilities for providing a workplace free of discrimination and harassment. Integrated workplaces and occupations have lower rates of harassment.

Discrimination in Pay and Promotions in Aerospace Manufacturing

- The class action settlement of *Beck v. Boeing* addresses discrimination in pay and promotions. It shows how a set of formally neutral pay policies may, when unchecked, lead to a persistent and ever growing gender wage gap. It also highlights a set of comprehensive policies designed to eliminate such pay discrimination, organized around one important principle: that there needs to be accountability and transparency about the consequences of decisions relating to gender equality.

Discrimination in Pay and Promotions in Financial Services

- Since 1995, female and African-American male financial advisors have repeatedly charged their employers with discrimination in pay, promotions, hiring, account and lead distribution,

retaliation, and recruitment. The *Kosen v. American Express Financial Advisors* (AEFA) consent decree established a comprehensive charging pattern for documenting this discrimination and was the first in the industry to specify detailed mandates for each discriminatory practice, including developing a statistical, gender-neutral methodology for distributing leads and accounts.

- More recent decrees in this industry placed increasing requirements on the professional development of women and minority brokers while abandoning numeric goals for representation of these employees. The methodology for allocating leads and accounts was fine-tuned so that ingrained historic bias did not further disadvantage female financial advisors. Accountability also evolved in these consent decrees.
- Confidentiality clauses, requiring that all data from the negotiation and implementation of the consent decree be destroyed or returned to the employer upon the termination of the consent decree, however, have remained a part of consent decrees from *AFEA* onward. Such confidentiality clauses preclude any systematic third-party assessment of the effect of these consent decrees.

Recommendations for Making Injunctive Relief More Effective

- **Consent Decrees Should Reflect Standard EEO Best Practice:** We recommend that injunctive relief be aligned more closely to standard human resource management advice regarding EEO and diversity. This includes creating transparency of the criteria for decisions in recruitment, compensation, and promotions; mandating supervisory accountability for EEO outcomes; analyzing compensation and promotion decisions for potential bias to ensure that managers have information about the effect of decisions; appointing a senior manager to oversee EEO compliance; and establishing a multi-year time frame for ensuring that organizational change has taken root.
- **Establishing a “Systemic Injunctive Relief Taskforce:”** We recommend that the EEOC set up a Systemic Injunctive Relief Taskforce to increase capacity building and knowledge sharing in the EEOC and DOJ; such a Taskforce would require dedicated funding sources and enhance the EEOC and DOJ’s access to up-to-date social science research on effective EEO organizational interventions.
- **Developing Tools for Monitoring Sexual Harassment:** Recognizing the particular difficulties with establishing effective monitoring in relation to sexual harassment, we recommend that the EEOC more widely mandate independent monitors in sexual harassment cases and take the lead in developing measures of change beyond the number of complaints and time taken to respond to complaints. Such measures need to address employers’ fear of litigation yet provide tools for assessing real change in the underlying sexual harassment climate, such as the greater use of anonymous employee surveys as part of injunctive relief.
- **More Training and Resources for EEOC Charge Recording and Investigation Process:** We recommend that more training and resources be made available for the initial charging and investigation process of EEOC complaints to ensure that all aspects of discrimination are captured in a charge, and that narrow charging records do not restrict the breadth of the litigation or the possibility of broad effective injunctive relief should a consent decree resolve the litigation.

- **More Extensive Best Practice Advice for Small- and Medium-Sized Employers:** The negotiations over injunctive relief in large class action cases typically involve a detailed examination of current human resource management practices and up-to-date best practice input on how to reconfigure such policies. We recommend that the EEOC investigate how such systematic review and best practice advice might be integrated in the consent decree negotiation process with smaller employers; mandating independent monitors as part of consent decrees might be one avenue for providing such input.
- **Improved Legal Education on Effective Injunctive Relief:** We recommend that instruction on injunctive relief in employment discrimination litigation become standard components of basic legal education and be available through continuing legal education (CLE), for both lawyers and judges. It should reflect up-to-date social science and human resource management research on measures most likely to create sustained improvements in EEO outcomes in organizations.
- **Forums for Knowledge Sharing between Public and Private Lawyers:** We recommend establishing regular forums for exchanging experiences with negotiating and implementing injunctive relief between EEOC and DOJ lawyers, and lawyers working in private and non-profit practice.
- **Long-Term Monitoring of Public Sector Organizations:** We recommend exploring legislative resolutions or executive orders to permanently extend reporting requirements for public sector employers that were subject to employment discrimination consent decrees; reporting requirements on hiring and retention in nontraditional occupations (such as fire-fighting) and/or the anonymous employee surveys related to sexual harassment could become part of the existing oversight of publicly funded organizations.
- **Establishing a Central Depository of Monitoring Data Related to Consent Decrees:** Confidentiality clauses in consent decrees make it impossible to systematically evaluate the effect of specific injunctive relief, and thus reduce our collective learning on effective and efficient response to employment discrimination. We propose that the EEOC establish a central depository for monitoring reports generated as part of consent decrees and make these accessible on the same basis as EEO-1 forms, guaranteeing confidentiality but providing a means for a more objective evaluation of consent decree measures to be fed back to those negotiation decrees.
- **Union Training:** We found little evidence of active involvement by unions in negotiating or implementing injunctive relief in consent decrees. We recommend that unions investigate how they might play a greater role when consent decree measures are negotiated, and provide more training and support for their members and shop stewards to monitor the implementation of consent decree measures and flag potential problems for those officially charged with enforcing compliance.
- **National Data Collection on Discrimination at Work:** We recommend developing an official tool for collecting nationally representative information on the level, extent, and type of discriminatory work practices, to be administered at regular intervals, to help establish better metrics for EEO policymaking and enforcement.



Chapter 1

Study Rationale, Methods, and Overview of Report

Title VII of the 1964 Civil Rights Act prohibits employers (in firms with at least 15 employees) from discriminating in their employment practices on the basis of race, color, religion, sex, or national origin (see Box 1); Title VII also makes it illegal to retaliate against workers who complain about discrimination (irrespective of whether the discriminatory practice directly affects them or a colleague). The 1964 Civil Rights Act established the Equal Employment Opportunity Commission (EEOC) as the agency responsible for promoting nondiscriminatory employment practices and administering and enforcing Title VII. This includes the power, since 1972, to sue employers in Federal courts.¹ Key to Title VII is the notion that enforcement action should be “prophylactic,” that is, it should lead employers to scrutinize their employment practices to ensure that they are nondiscriminatory (Bisom-Rapp 2001). Litigation under Title VII in this sense has the dual role of providing individual remedies for the workers who were the subject of discrimination or retaliation, but also to make concrete interventions through injunctive or organizational relief to ensure a better nondiscriminatory work environment for current and future workers not directly involved in a claim. Indeed, such injunctive or organizational relief was the original purpose of Title VII (Staudmeister 1996).

Although Title VII banned employment discrimination, it did not require specific actions to achieve this objective. Consent decrees step into this gap by specifying changes to policies and employment practices designed to prevent employment discrimination from recurring. Consent decrees are court approved and enforced settlement agreements that are negotiated by the parties to a lawsuit. The defendant—the employer—does not formally admit to any guilt, but nevertheless agrees to a program of action to remedy past and present discrimination. Most discrimination lawsuits never go to trial but are instead settled by consent decree. Consent decrees have become an important means of forcing institutional change in employment settings. Consent decrees seek both to enable women and other victims of discrimination to recover some portion of the financial losses that they suffered as a consequence of discrimination at work and to change workplace behavior, policies, and practices to eliminate gender and other bias. The injunctive relief provisions of consent de-

Consent decrees are court approved and enforced settlement agreements that are negotiated by the parties to a lawsuit.

Injunctive relief in consent decrees may mandate a broad range of new human resource management practices to reduce discrimination.

¹ The EEOC's range of responsibilities for enforcement were expanded in 1978 to include the Equal Pay Act of 1963 (EPA), the Age Discrimination in Employment Act of 1967 (ADEA) and the Pregnancy Discrimination Act of 1978, and subsequently, the Americans with Disabilities Act of 1990 (ADA), and the Americans with Disabilities Amendments Act of 2008 (ADAAA).

Consent decrees provide the potential for unusually direct and extensive intervention in the internal management practices of employers to create a less discriminatory work environment.

crees may mandate redesigning promotion or job assignment systems; developing new recruitment and hiring procedures to broaden the pool of job applicants; introducing new training or mentoring opportunities; integrating new performance management systems for supervisors; or creating training programs to address sexual harassment, diversity, and equal opportunity. Consent decrees may specify actions, desired outcomes, timetables, and intra-organizational collaboration to achieve specified goals. They typically are in force for two to three years.²

Box 1. Extract from Title VII of the Civil Rights Act: Unlawful Employment Practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his^a compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization—

- (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
- (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
- (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

^a "His" was used in the original legislation, as was the custom at the time, even though it applied to men and women.

Source: 42 U.S.C. Sec. 2000e-2. [Section 703]

² The average duration of employment discrimination consent decrees has fallen substantially since the 1970s and 1980s, when they were typically in place for five to 10 years (Schwarzschild 1984) and it was not uncommon to have open-ended decrees, in force until the court ruled that it was no longer required to ensure a nondiscriminatory workplace.

Consent decrees hence provide the potential for unusually direct and extensive intervention in the internal management practices of employers to create a less discriminatory work environment. Each year several hundreds of employment discrimination consent decrees are negotiated and formally entered into by court. Yet to date, with a few notable exceptions, they have received little systematic attention. The purpose of this report, and of the IWPR/WAGE Consent Decree Project, is to examine how this potential lever for changing discriminatory employment practices, and thus for creating a level playing field where men and women can prosper and advance irrespective of their sex, race, religion, or national origin, is used in practice.

The IWPR/WAGE Project Methodology

We approached this task in two ways. First we collected and coded more than 500 decrees concerned with discrimination in employment that became effective between 2000 and 2008. All codings and consent decrees are publicly accessible so that others concerned with remedying employment discrimination can access and examine decrees for themselves (instructions for accessing the codings and decrees are in Appendix I). The Database focuses on sex and race/ethnic origin discrimination consent decrees, and includes litigation brought on behalf of both men and women. Although our research is particularly concerned with sex and race discrimination as it affects women, the cases in the IWPR/WAGE Consent Decree Database provide the basis for various other inquiries. The Database includes consent decrees negotiated by the EEOC, the U.S. Department of Justice (DOJ), and by private law firms (further details on the decrees in the Database are provided in Chapter 2).

Second, with the help of an expert panel of lawyers and social scientists, we selected a small number of decrees for a more qualitative analysis of how the injunctive relief in decrees was conceived, negotiated, and implemented. The qualitative analysis focused on two issues: sexual harassment and pay discrimination. The research provides a granular account of the patterns and practices among the parties when they shape consent decrees. The case studies concern very different workforces, including undocumented migrant workers in agribusinesses, primarily African-American women working in uniformed services, professional women working in financial services, and women working in a large manufacturing plant, both in production and in administrative functions. They involve decrees negotiated by the EEOC and private law firms (Table 1). It was our original intention to also include at least one case litigated by the DOJ; unfortunately the DOJ declined our invitations to participate in the study. Apart from providing insight into many employment contexts, in which women, and some men, faced egregious discrimination and brought lawsuits, the case studies were chosen specifically for having innovative and potentially far reaching injunctive relief. The following decrees were selected:³

Neal v. DC Department of Corrections (DCDOC) was a case charging sexual harassment of and retaliation against both uniformed officers (prison guards) and clerical and other work-

All IWPR/WAGE coded consent decrees are publicly accessible so that others concerned with remedying employment discrimination can access and examine decrees for themselves.

³ The Project also included an in-depth case study of the impact of two consent decrees concerned with the hiring and promotion of African Americans and Hispanics on the Boston police department, (*Castro v. Beecher and Massachusetts Association of Afro-American Police Inc. v. Boston Police Department*). The decrees became effective in 1974 and 1980 and were only lifted in 2004 (Murphy and Northeastern University School of Law Legal Skills in Social Context 2008). The decrees are an example of first generation consent decrees, imposed until there was positive proof that they were no longer required; now consent decrees typically are in place for shorter and set numbers of years, and will only be extended if there is positive proof of noncompliance and/or continued discrimination. This case study is not included in this report because such long-term, results-oriented decrees are now rare in employment discrimination, and because it primarily addresses race discrimination against men.

The DeCoster decree involved considerable negotiations between the EEOC and immigration authorities, led to the first provision of U visas in a case of employment discrimination, and highlighted the important role of community and religious organizations in bringing claims on behalf of vulnerable workers.

ers at the DCDOC. The consent decree was effective from 2002 to 2005. Those bringing the complaint were primarily African American. The case illustrates the obstacles faced by African-American women in relatively decent-paying, unionized, public sector jobs with good benefits and potential promotion prospects. Like many decrees collected for this study, *Neal* mandated changes in department policy and enforcement, training, and procedures. More unusually, it mandated creating and empowering the Office of Special Investigator (OSI), with authority for designing and implementing the mandated changes, using outside investigators for sexual harassment complaints, establishing an employee ombudsperson and advisory committee, and creating a sexual harassment complaint hotline. Evident efforts are made in the decree for extending the office and the power of the Special Investigator (SI) beyond the term of the consent decree. The decree is additionally of interest because of the active involvement of several union shop stewards in helping women file the sexual harassment charges. *Neal* is one of the relatively rare cases where class certification was won for a sexual harassment lawsuit.

EEOC v. DeCoster was a case charging sexual harassment of some of the most vulnerable workers, undocumented Hispanic female workers in agri-industrial egg processing facilities. The consent decree was effective from 2002 to 2005. Responding to complaints that immigrant workers who processed eggs were fondled, groped, and sometimes raped in the workplace, the EEOC charged employment discrimination under Title VII. The immigrant women, whose identities remained protected throughout the case, were helped to file charges with the EEOC by the Iowa Coalition against Domestic Violence (ICADV). The decree requires creating and distributing a corporate antiharassment policy, sexual harassment training, as well as keeping records and reporting to the EEOC, and to that extent, is fairly typical of EEOC consent decrees for sexual harassment charges. The decree involved considerable negotiations between the EEOC and immigration authorities, led to one of the first provisions of U visas⁴ in a case of employment discrimination, and highlighted the important role of community and religious organizations in bringing claims on behalf of vulnerable workers.

Table 1.
Overview of Case Studies in IWPR/WAGE Consent Decrees Project

	<i>Beck v. Boeing Corp</i>	<i>EEOC v. Decoster</i>	<i>Kosen v. American Express Financial Services</i>	<i>Neal v. DC Dept. of Corrections</i>
Sexual Harassment	(•)	•	(•)	•
Pay/Promotion/Hiring	•		•	
Mainly Black or Hispanic Worker		•		•
Sector	Manufacturing	Agribusiness	Finance	Corrections
Duration of Decree	2004–2007	2002–2005	2002–2006	2002–2005
Private or Public Sector?	Private	Private	Private	Public
EEOC or Private Law Firm?	Private	EEOC	Private	Private

(•) Sexual harassment charges were not formally part of class certification, but were addressed in the consent decree.

⁴ U visas are specifically designed to provide residency and work permits to non-U.S. citizens who were the subject of violent crime and assist U.S. authorities with the investigation of such crimes; see Chapter 4 below.

Beck v. Boeing was a case brought by both hourly and salaried women at Boeing, who charged that the company paid them less, discriminated against them in promotions, and gave them more limited overtime opportunities than it gave to men. The consent decree was effective from 2004 to 2007. Discriminatory pay patterns were first highlighted in a U.S. Department of Labor Office of Federal Contract Compliance Programs (OFCCP) investigation, leading to some amendments to payment structures. Yet the plaintiffs' case was strengthened significantly by statistical data, collected by the company, demonstrating that significant pay and promotion gaps between men and women remained following the OFCCP investigation. The consent decree is very detailed, specifying both what steps Boeing will take to close the gaps in pay and promotions and detailed metrics for assessing change; it also provides for a detailed monitoring function through the class counsel. The case is interesting for illustrating how payment practices, which seem fair on the face of it, may, if left unchecked, reinforce and deepen pay inequality between men and women.

Kosen v. American Express Financial Services (AEFA): In this case, female financial advisors charged both sex and age discrimination in hiring, pay, promotion, and other terms of employment, such as access to lucrative accounts and clients or training required for advancement, mentoring, and funds for business development. The consent decree was effective from 2002 to 2006. The consent decree is innovative in developing new statistical tools for account and lead distribution and other remedies unique to the demands of a financial advisor's job. Since *Kosen*, several further high profile cases have developed similar approaches. Our analysis overviews the evolution of consent decrees involving this particular professional position within the financial services sector.

The case studies draw on interviews conducted with more than 40 individuals involved with negotiating or implementing the selected consent decrees and other decrees selected for comparison purposes, as well as upon public documents associated with the lawsuits.⁵ The original intent of the case studies was to assess the effect of consent decrees on the actual employment practices in those organizations, during and beyond the duration of decrees, and to include in our assessment the experiences of women employed by the organizations. Yet the fear of potential future litigation and confidentiality clauses regarding data exchanged during the implementation and monitoring of consent decrees between defendant and plaintiff lawyers made this unfeasible, not least because such an inquiry might have created unacceptable risks for employees in those companies. We nevertheless believe that this study, together with references to established social science research on how organizations change and are held accountable, will provide lessons on how to push the envelope, increase the potential effect of consent decrees, and fulfill the intent of Title VII.

⁵ We promised confidentiality to individuals interviewed for this study. Examples of categories of people interviewed include EEOC and private plaintiff attorneys, consent decree monitors, and a few employer side attorneys. Many of the interviewees shared experience with multiple cases, beyond the ones we selected. The publicly available documents associated with the lawsuits that we used included motions, memoranda, and judicial rulings filed in court, but varied by case. For *Neal v. DCDOC*, for example, there were many more legal documents in the public record because it had gone through a jury trial and appeal.

We examine charging patterns and organizational remedies in relation to sexual harassment, hiring, promotion, and pay discrimination.

Remedies designed to address employment discrimination comprehensively with detailed measures and specified accountability targets are significantly more likely in private class action settlements.

Differences between EEOC, DOJ, and Private Class Action Consent Decrees

In the next chapter of this report we take a closer look at the role of consent decrees in legal challenges to employment discrimination in the United States, and, after a brief description of the IWPR/WAGE Consent Decree Database, provide a statistical overview of, first, the type of charges and complaints that are taken up in consent decrees, and second, the injunctive relief that is negotiated in consent decrees. We examine both charging patterns and organizational remedies in relation to sexual harassment, hiring, promotion, and pay discrimination and find considerable differences between consent decrees negotiated by public lawyers, that is, the EEOC and the DOJ, and those negotiated in private class action cases. Typically EEOC and DOJ decrees address only charges related to one of those major issues and use a limited package of remedies—primarily posting information regarding the employer’s commitment to nondiscrimination and providing diversity or Equal Employment Opportunity (EEO) training. Remedies designed to address employment discrimination comprehensively with detailed measures and specified accountability targets and integrated approaches suggested by social science research to be most likely to generate sustained change to employment practices are significantly more likely in private class action settlements. Such differences in charging patterns and relief packages negotiated by private law firms, the EEOC, and the DOJ are due to a number of factors, including the fact that the EEOC and the DOJ negotiate a substantial number of consent decrees on behalf of individual plaintiffs, whereas privately litigated employment discrimination decrees, all certified class action cases, by definition involve many plaintiffs and substantial patterns and practices of discrimination. Yet differences in the complexity of charging patterns and injunctive relief packages typically also hold when comparing only the largest EEOC and DOJ cases with privately litigated cases.

Sexual Harassment against Women Working in Uniformed Services

Chapter 3 examines sexual harassment against women in nontraditional jobs, particularly in uniformed services. The *Neal v. DCDOC* case, and three other cases examined more closely for comparison, shows the need, and potential benefit, of creating a strong independent monitor or inspector to oversee the implementation of new policies and procedures. Social science research on women in uniformed services occupations reviewed for this chapter documents considerable sexual harassment as women moved into these previously predominantly male workplaces that are traditionally associated with masculine gender stereotyping. Women’s share of correction occupations has grown substantially in recent decades, faster than their share, for example, of firefighter occupations. There is some indication that nationally, women of color in corrections are more likely than white women to be single mothers and to be seeking career advancement.

The chapter charts the history of sexual harassment and sexual harassment litigation at the DCDOC. The DCDOC had been subject to litigation aimed to address pervasive sexual harassment since the late 1970s. As a result of an earlier lawsuit, it was already under court order to introduce substantially new sexual harassment policies and grievance procedures—policies that looked reasonable on paper, but did not stop sexual harassment. The *Neal* decree adopts a different approach through the creation of the Office of the Special Inspector (OSI) with extensive power and authority concentrated in one individual, inde-

pendent of the Department hierarchy for the duration of the consent decree. Most details on how to revise and carry out policies were left to the SI, and adequate resources were provided. This approach appeared reasonably successful in addressing sexual harassment during the decree, but it is less clear that the focus on efforts to combat sexual harassment continued once the decree formally ended.

The chapter then examines two other sexual harassment decrees, *EEOC v. Mitsubishi* and *EEOC v. Dial* (a soap manufacturer). Both cases were large employer, large plaintiff class, large monetary settlement, sexual harassment consent decrees settled by the EEOC with considerably more detailed and extensive injunctive relief provisions than most EEOC cases in our database. They stand out among the decrees we examined (other than *Neal*) for the explicit authority given the external monitors, in each case a team of three who had the authority and responsibility to make recommendations on sexual harassment policies, procedures, and training. We conclude that the *Mitsubishi* and *Dial* consent decrees offer an effective model of specified authority for the external monitors whereby the employer is required to implement the monitors' recommendations within a limited time or appeal them to the court.

The final decree examined in this chapter, *U.S. v. Prince George's County Fire Department (PGFD)*, also addresses sexual harassment and retaliation complaints against a uniformed service public safety agency with a unionized workforce (all four cases in this chapter involve unionized workers). The PGFD decree was negotiated and monitored by the DOJ and attempted to address a serious problem of sexual harassment and assault of women firefighters by men who were volunteer as well as career firefighters; unfortunately it did not succeed, at least not during the decree or its extension. The DOJ acknowledged efforts of EEO officers within the PGFD but found that several policies and procedures specified in the consent decree were not actually adopted or implemented during the duration of the decree. Although formally a single-plaintiff complaint, the PGFD decree specified more extensive remedies than most single-plaintiff decrees, but lacked the provision of an external monitor or the dedicated resources found in the *Neal*, *Mitsubishi*, or *Dial* decrees.

The chapter concludes with three broad lessons for the effectiveness of consent decrees: First, it is important for a consent decree to mandate a position for someone with sufficient authority and resources to enforce implementation of the consent decree, such as the SI in the case of *Neal v. DCDOC*, or the independent monitors in *EEOC v. Mitsubishi* or *EEOC v. Dial*. Second, it is not sufficient simply to have a sexual harassment grievance reporting and investigation procedure, even a court-ordered one, if female and male employees do not have confidence that complaints are taken seriously, that offenders will be punished, and that they are protected from retaliation. We recommend the conduct of employee attitude surveys as a source for establishing employees' confidence in existing grievance and complaints procedures. Third, the case studies in this chapter and social science research suggest the following ingredients for effective sexual harassment policies, to be considered by all employers: multiple avenues for reporting sexual harassment complaints; timely, confidential responses to complaints, investigations by competent, trained, and objective investigators supported by adequate resources; supervisory accountability for following EEO policies and maintaining a nonhostile environment, and the inclusion these issues in the performance evaluation of supervisor and managers.

EEOC v. Mitsubishi and EEOC v. Dial stand out among the decrees we examined (other than Neal) for the explicit authority given the external monitors.

Their immigration status gives women only very limited options to challenge sexual harassment and sexual violence on the job.

The EEOC cases affirm that the right to a workplace free of discrimination or harassment applies to all workers, irrespective of their immigration status.

Sexual Harassment against Women Immigrant Workers in Agribusiness

Chapter 4 addresses sexual harassment of women immigrants working in agribusiness and food processing. Many immigrant women in these businesses are undocumented and fill many of the lowest paid and least safe jobs in the United States. Added to poor employment conditions are high levels of sexual harassment and sexual violence on the job; their immigration status gives women only very limited options to challenge such conditions. The case study of *EEOC v. DeCoster*, a case brought on behalf of 11 immigrant women from Mexico and Guatemala who faced repeated rape and sexual harassment by male supervisors in their jobs in an egg processing plant in Iowa, shows that EEOC employment discrimination litigation can play a role in challenging even the worst type of discrimination. The women's primary concerns were fear of deportation and maintaining anonymity. Key to gaining the women's trust and to the successful prosecution of the Iowa egg processing plant was the close involvement of an Iowa nonprofit organization, the Iowa Coalition Against Domestic Violence (ICADV), specifically its bilingual legal clinic MUNA. Although in many ways the injunctive relief package in the DeCoster consent decree appears routine, the success in providing work and residency permits for some plaintiffs, and an explicit recognition of the work of ICADV through a financial award make this consent decree remarkable.

Other EEOC cases reviewed in this chapter, particularly *EEOC v. Tanimura & Antle* and *EEOC v. Rivera Vineyards* include a more detailed specification of injunctive relief. The cases are one outcome of the EEOC's targeted outreach campaign to address the working conditions of the lowest paid and least protected workers; the strategy was adopted at the end of the 1990s and, in California, led to close cooperation with community groups and nonprofits working with migrant and immigrant communities. The *Tanimura* decree included detailed requirements for publicity in newspapers and radio about the settlement and employers' duty to prevent sexual harassment at work. The *Rivera Vineyards* decree is highlighted because it combines charges of sexual harassment with charges of discrimination in recruitment and job allocation, a combination that is rarely explicitly addressed in consent decrees but a common hazard for women working (or trying to work) in traditionally male occupations. The decree specifies training opportunities for women, and how such training should be provided so that it does not expose women to threats of sexual violence and harassment. Finally the chapter highlights the case of *EEOC v. Kovacevich 5 Farm*, a case ostensibly about hiring discrimination, but also targeted at addressing potential harassment. The case was brought when women migrant workers alerted the EEOC to the fact that the Farm had not hired a single woman in a five-year period; it thus prevented the women from working side by side with male family members who would be able to provide protection against sexual violence at work by male supervisors.

The cases reviewed for this chapter show horrendous violence and abuse at work; they show the potential of challenging such violence when the EEOC works jointly with community groups to build trust and increase workers' awareness of their rights, and affirms that the right to a workplace free of discrimination or harassment applies to all workers, irrespective of their immigration status. But the EEOC's work to address egregious violence at work also highlights the lack of involvement of the police in many of these cases. The serious crime of rape at work needs to be addressed as a criminal justice matter as well as an extreme instance of sexual harassment in a workplace.

Pay Discrimination through the Lens of Consent Decrees

Chapters 5 and 6 address pay discrimination. The case study decrees reviewed in these chapters, *Beck v. Boeing* and *Kosen v. AEFA* are both leading edge examples of encouraging organizational change by providing detailed, custom-made specifications of required change and by ensuring that the change program is backed up by specific metrics for measuring progress.

The complaints that are addressed in consent decrees provide vignettes of the discriminatory employment practices that lead to the persistent gender wage gap: assumptions that, as “secondary” earners, women’s earnings are not as important as men’s; sexual and other harassment to keep women out of better paying jobs; higher standards for women to qualify for promotions than for men; less pay for women than men doing jobs at same or comparable levels of skill, experience, and qualifications; barriers to participation in training and development programs essential for promotion; lower access to overtime or weekend shift work on the untested assumption that women, because of childcare and other family care giving responsibilities, would be unable to perform it.

Chapter 5 focuses on the *Beck v. Boeing* consent decree, a large sex discrimination lawsuit that was filed in 2000 and settled in 2004 for \$72.5 million for a class of 29,000 women. The pay setting practices challenged in the case show how formally neutral policies may import into the company pre-existing pay gender inequality and lead to a further growth in wage inequality over time. Boeing set its entry level wages by authorizing managers to hire at the existing salary plus x percent; typically women earned less than men, and hence the same x percent resulted in lower absolute dollar amounts for women than for men, even if they were recruited to equivalent jobs. The gaps were then further amplified because annual salary and performance increases were also provided in percentage terms. The decree addressed this by developing a new tool to set entry level wages based on internal and external male and female comparators, thus setting women’s entry level salaries with reference to the general labor market for a position, no longer just the women’s labor market.

The consent decree is aimed at creating objective and transparent foundations for compensation decisions. This includes preparing comprehensive job descriptions that clearly specify the skill, knowledge, and experience requirements for different types of jobs; making the criteria set out in job descriptions part of annual performance evaluations; holding line managers accountable for conducting performance evaluations annually; providing clear guidelines on how to translate performance evaluations into salary increases; and annually conducting a disparate impact analysis to ensure that salary distributions are not biased. In the decree Boeing also agreed to move to a more standardized process for promotions, moving away from a practice where such decisions may be made by a single manager. The decree introduces a formal system for record keeping and allocation of overtime and weekend work, to reduce potential gender bias. Last, the decree includes new grievance and complaints procedures and innovative processes for ensuring that people complaining of sexual or other harassment are protected from retaliation. Although the decree involved protracted negotiations between the company and plaintiff representatives, it benefited from high level expertise and best practice knowledge on both sides, and from a commitment to come up with detailed solutions that address both the need to address discrimination and to have solutions that work in a business context. Although confidentiality agreements did not allow us to evaluate change in the company, according to the lawyer who monitored progress for the plaintiffs, the decree effectively created change.

Beck v. Boeing and Kosen v. AEFA are both leading edge examples of encouraging organizational change by providing detailed, custom-made specifications of required change and specific metrics for measuring progress.

The decree introduces a formal system for record keeping and allocation of overtime and weekend work, to reduce potential gender bias.

As with other large class action decrees, confidentiality agreements have prevented an independent evaluation of changes due to the decree.

The consent decrees discussed in Chapter 6 address discrimination in pay and promotion against female personal financial advisors, an occupation where earnings highly depend on bonus payments, business development funds, and account allocation. The chapter presents lessons from a dozen class action lawsuits against financial services companies from 1995 through 2010. During this period, time and again, women and African Americans charged their employers with discrimination in pay, promotions, hiring, account and lead distribution, retaliation, and recruitment. The chapter pays particular attention to the consent decree of *Kosen v. AEFA*, the first case involving litigation on behalf of financial advisors to develop detailed charging patterns and packages of injunctive relief, which have characterized most settlements in the industry since then. The *AEFA* decree was the first consent decree in this sector to specify in detail the mandated programmatic relief for each element of discriminatory behavior, including procedures for promotions, methodology for distributing leads and accounts, as well as goals for hiring and promotion. The consent decree also spelled out in detail the data to be gathered and reported for each element of change, the time periods for reporting, and the office internally responsible for implementing the consent decree. As with other large class action decrees, confidentiality agreements have prevented an independent evaluation of changes due to the decree; yet in view of the plaintiff side attorney charged with monitoring the data during the decree, this intervention and the new tools developed created effective change.

Although the first settlements in the financial service industry emphasized monetary relief, *AEFA* and all subsequent consent decrees established comparable demands for programmatic and monetary relief. The specification of injunctive relief changed over time as the business settings involving financial advisors changed. The methodology for allocating leads and accounts was fine-tuned over time so that ingrained historic bias did not further disadvantage female financial advisors. Accountability measures also evolved in these consent decrees. Later consent decrees placed increasing requirements on the professional development of women and minority brokers while abandoning numeric goals for representation of these employees.

The specification of injunctive relief changed over time as the business settings involving financial advisors changed.

A review of consent decrees settled after *AEFA* reveals some noteworthy patterns: monetary awards to individual class members were modest even though news headlines trumpeted multimillion dollar settlements. Over time, several financial services employers were the target of multiple class action lawsuits involving the same charges; the cases that let to substantial settlements typically involved the same group of plaintiff lawyers, as well as some of the nation's largest law firms represented employers.

One element of these consent decrees remained constant from *AEFA* onward: the confidentiality clauses. Confidentiality clauses required all material from the negotiation of the consent decree through its implementation to be destroyed or returned to the employer upon the termination of the consent decree. These strictures preclude any systematic third-party assessment of the effect of these consent decrees on discriminatory behavior by employer.

Recommendations

The report concludes with a set of recommendations for increasing the potential effect of injunctive relief. It highlights the need for injunctive relief in consent decrees to address the elimination of employment discrimination comprehensively, in recognition of the interaction of discrimination in hiring, promotion, compensation, and harassment in creating barriers to equal advancement. It suggests that more resources and training be invested to ensure

that such a broader approach is reflected in the initial record and investigation of charges so as not to limit the scope of appropriate injunctive relief if charges result in full litigation.

The chapter highlights the crucial role of establishing accountability by ensuring that employment and compensation decisions are based on objective and transparent criteria; by establishing methodologies and commitment to measure the gender and race outcomes of decisions, and by feeding back the results of decisions to the decisionmakers so that they have objective information for making future decisions and can be held accountable. The Chapter recognizes the difficulties with establishing accurate measures of change in relation to sexual harassment and offers some suggestions for addressing these. The recommendations highlight using external monitors, funded as part of the injunctive relief in consent decrees, as a means for ensuring adequate time resources for monitoring compliance. Monitors, when suitably qualified, are also a source of good practice advice for employers. We argue that monitors, which are currently rarely used in smaller cases, should be of particular relevance to smaller employers without a dedicated HR function.

The case studies reviewed in the report highlight numerous sophisticated practices to design and monitor the outcomes of policies. Yet the case studies also demonstrate that such methodologies constantly evolve in response to changing business practices. Key to the effectiveness of decrees is not any particular methodology or policy, but the availability of up-to-date expertise and advice when consent decrees are negotiated. Such expertise, in the form of expert consultants, is typically available in large private class action suits; it also needs to be available when the EEOC and DOJ negotiate decrees. The report ends with a plea for better data on the effect of injunctive relief on gender and race differentials; although consent decrees typically generate considerable monitoring data, these data are typically inaccessible for outside evaluation because of confidentiality clauses. We propose that the EEOC establish a central depository for monitoring reports generated as part of consent decrees, guaranteeing confidentiality but providing a means for a more objective evaluation of the effect of nonmonetary relief on employment practices.

The report highlights the need for injunctive relief in consent decrees to address the elimination of employment discrimination comprehensively, in recognition of the interaction of discrimination in hiring, promotion, compensation, and harassment.



Chapter 2

From Discrimination Charge to Consent Decree

A substantial proportion of employers each year are the subject of a Title VII related charge. One recent study (covering 1990 to 2002) found that in a typical year 13 percent of establishments had at least one charge of sex discrimination, and 20 percent of race discrimination (Hirsh and Kornrich 2008).⁶ Another study, also analyzing EEO-1 forms, showed that during a 30-year period, more than one-third of employers had faced a charge of discrimination (Kalev, Dobbin, and Kelly 2006). Approximately a quarter of such charges are formally substantiated, but only a few lead to full litigation and injunctive relief.

To charge an employer with discrimination or retaliation in court, an employee must first make a claim of discrimination to the EEOC.⁷ The EEOC will try to mediate, and if mediation fails, the EEOC is then under the statutory obligation to investigate the claim (EEOC 2002). Procedures for public employees are slightly different, but initial charges are also investigated by the EEOC. If the EEOC investigation finds reasonable grounds for the charge, it will then invite the parties to work with the EEOC to find a solution without resorting to litigation. If attempts at conciliation fail, the EEOC will issue a Notice of Right to Sue, which gives the plaintiff(s) 90 days to lodge a claim against the employer in a Federal court, independently or by using a private law firm. In a minority of such cases the EEOC will decide to litigate directly against an employer on behalf of the claimant (The plaintiff in these cases is the EEOC). A negative finding by the EEOC does not preclude individuals from taking a claim to the courts.

Between 2000 and 2008, the EEOC received 735,293 charges, an average of 81,700 charges of employment discrimination per year (see Appendix C).⁸ Of all charges, approximately 36 percent claimed race discrimination, 30 percent sex discrimination, 11 percent national origin discrimination, 20 percent disability discrimination, and 23 percent age discrimination. Religious discrimination was the subject of fewer than 3 percent of charges. Additionally 29 percent charged retaliation (EEOC 2010a). A charge might involve more than one type of discrimination; the EEOC does not publish the share of multiple issue charges.

To charge an employer with discrimination or retaliation in court, an employee must first make a claim of discrimination to the EEOC.

⁶ The study is based on a 1 percent sample of firms which submitted EEO-1 forms (formally known as “Employer Information Reports”) to the EEOC in 2002; EEO-1 forms must be submitted by any firm employing at least 100 workers and by federal contractors with at least 50 workers. The EEO-1 report requires a count of employees by job category and then by ethnicity, race and gender; for more information see <http://www.eeoc.gov/employers/eeo1survey/faq.cfm>

⁷ The procedures are slightly different for Federal job applicants and employees charging violations under the Equal Pay Act; see EEOC at <http://www.eeoc.gov/employees/charge.cfm>.

⁸ Since 2008, claims have increased significantly, numbering close to 100,000 in total for all types of alleged discrimination in 2010; 36 percent of these alleged race discrimination, and 29 percent sex discrimination (EEOC 2010a).

As a standard practice EEOC and DOJ consent decrees include both injunctive and individual relief. It is much less common for employment discrimination charges to involve injunctive relief when plaintiffs are represented by private law firms.

Although the EEOC does not routinely publish the proportion of claims resolved by mediation prior to an investigation or the share of investigations that lead to a reasonable charge finding, an evaluation of EEOC charges in 2004 found that approximately one-third of charges were resolved prior to an investigation. Of the charges investigated, the EEOC classified about one in five as including strong prima facie evidence of discrimination, leading to more in-depth investigation (Hirsh and Kornrich 2008), whereas one in seven charges resulted in a positive Notice of Right to Sue (Hirsh 2009); among the charges the study investigated, those involving sex discrimination had a slightly higher likelihood to result in a reasonable cause finding than those involving race discrimination (4.7 percent and 3.2 percent respectively; Hirsh and Kornrich 2008: 1405).

Fewer than half of 1 percent of all charges are directly taken up in litigation by the EEOC as merit suits, on average 275 per year during the past decade (Table C2).⁹ The EEOC's ability to litigate cases is strongly limited by budgetary constraints; between 2000 and 2008, the EEOC's total litigation budget was always below \$4 million in each year, and indeed was higher at the beginning of the decade than in 2008 (EEOC Office of General Counsel Annual Reports, various years). The total annual litigation budget of the EEOC is thus smaller than the legal fees in many individual privately litigated class action suits. Under these circumstances the EEOC is forced to be selective with the cases it litigates, and in 2005 launched a Systemic Task Force to improve the targeting and national coordination of its cases (Silverman 2006); alas, no dedicated additional funds were made available to the Task Force.¹⁰

Litigating charges brought against state and local employers, after their initial investigation by the EEOC, is the responsibility of the DOJ. The EEOC does not separately publish how many of the charges investigated were made against public employers. The DOJ litigated fewer than 10 cases per year during the last decade (Table A1).

Consent decrees are the primary means for the EEOC and DOJ of settling discrimination charges that lead to full litigation. Four out of five claims litigated by the EEOC result in consent decrees (Table C2). As a standard practice EEOC and DOJ consent decrees include both injunctive and individual relief, whether the decree was negotiated on behalf of one person or a thousand (EEOC 2005). It is much less common for employment discrimination charges to involve injunctive relief when plaintiffs are represented by private law firms. Typically, only those cases that achieve class certification¹¹—a process that often takes several years and extensive resources, thousands of pages of dispositions, claims and counter-claims, and may involve hundreds of workers—include injunctive relief. No precise data are available, however, because increasing numbers of privately litigated employment discrimination consent decrees are confidential, unlike the EEOC and the DOJ that insist on all consent decrees being public as a matter of course (EEOC 2005). This makes it much more difficult to assess the type of injunctive relief negotiated in private litigations, let alone allow any evaluation of its effectiveness (see also Chapter 5).

⁹ A small number of cases may also arise out of an EEOC Commissioner's Charge, an investigation of an employer (or industry) if the Commissioner has reasonable suspicions of a pattern or practice of employment discrimination.

¹⁰ Given that it frequently takes several years for a case, particularly a larger case, to move from filing charges to consent decrees, it is unlikely that this initiative will already be reflected in the consent decrees we examined.

¹¹ The requirements for class certification (known as Rule 23), are listed in <http://www.law.cornell.edu/rules/frcp/Rule23.htm> (among many other sources).

The IWPR/WAGE Consent Decree Database

Before looking in greater detail at the type of charges addressed in discrimination litigation, a few words about the IWPR/WAGE Consent Decree Database are in order. The Database was set up to provide a comprehensive analysis of consent decrees addressing sex and/or race/national origin discrimination¹² in employment that became effective between 2000 and 2008; other bases for litigation, such as age, religion, or disability discrimination, are only included in as far as these are combined with sex or race discrimination charges (Table A1 provides an overview). The individual and injunctive relief in each of the 502 consent decrees was coded, and as far as possible, supplemented by other sources with information about the number of employees, sector, and annual revenue of the employer (see Appendix B for coding notes).¹³

The Database includes, to the best of our knowledge, all sex and/or race discrimination consent decrees¹⁴ concluded by the DOJ (45), all privately litigated consent decrees that were publicly accessible (34); and a sample (slightly more than one in five, 22 percent) of all EEOC sex and/or race/national origin consent decrees (423). The EEOC sample includes all cases we could identify with a large benefiting party (40 or more), and a randomized sample of cases with medium and single benefiting parties.¹⁵ Additionally, the Database oversamples EEOC pay discrimination cases: pay discrimination charges account for less than 3 percent of all EEOC consent decrees (Table C2) but 8.7 percent of EEOC decrees in the Database (Table A1). These selection criteria result in a slight over-representation of EEOC race discrimination decrees in our Database (race discrimination is addressed in 43 percent of the Database decrees; Table 2) compared to all EEOC merit suits where sex discrimination charges outnumbered race discrimination suits by more than two to one (Table C2). Among all charges received by the EEOC, race discrimination claims are more common than sex discrimination claims (EEOC 2010a).¹⁶ Privately litigated consent decrees are proportionately considerably more likely to address race discrimination than EEOC or DOJ consent decrees (Table 2).

The Database includes 67 consent decrees that address national origin discrimination; 48 do so along with race and/or sex discrimination, comprising 8.1 percent of all sex discrimination decrees, 17.9 percent of all race discrimination decrees (Table A2), and 35.6 percent (data not shown) of decrees involving both sex and race discrimination. The other 19 national origin cases involve national origin alone, without race, sex or other discrimination covered by Title VII.

A basic statistical description of the consent decrees in the Database, by the main litigating parties, the charges, and issues addressed in decrees and information about the gender,

The individual and injunctive relief in each of the 502 consent decrees was coded, and supplemented with information about the number of employees, sector, and annual revenue of the employer.

¹² Although we collected consent decrees for national origin discrimination lawsuits and included them in the Database, we do not analyze them separately in this report.

¹³ Because of the difficulties in collecting meaningful revenues and employment data for state and local employers, this information is not included in the Database for DOJ consent decrees.

¹⁴ For the purposes of this report we will use the term “consent decree” for all settlements concluded pre–full jury trial. We included all “consent-decree-like” privately litigated settlements, that is, settlements that are court approved and supervised, irrespective of whether they were formally named that way in the legal documents.

¹⁵ The classification of EEOC decrees as having a large benefiting party was based on information provided by the EEOC and seemed to have changed somewhat in 2007 and 2008, switching from one primarily focused on plaintiffs and other directly involved in a settlement (the definition we were interested in) to a broader one, referencing total employment of the defendant, making this selection criteria less consistent for the last two years.

¹⁶ The EEOC E-RACE initiative was launched in 2007 with the objective of improving the EEOC’s systematic response to race discrimination; see <http://www.eeoc.gov/eeoc/initiatives/e-race/goals.cfm> for more details.

race, ethnic background, and occupation of the workers (plaintiffs) and the size, sector, and revenue of the employers (defendants) is provided in Appendix A (Tables A1–A26). Copies of the actual consent decrees can be freely accessed through the IWPR/WAGE collection of the Civil Rights Litigation Clearinghouse.¹⁷

Table 2:
An Overview of the IWPR/WAGE Consent Decree Database, 2000–2008

	EEOC		DOJ		Private	
	Count	% ^a	Count	% ^a	Count	% ^a
Type of Charge	423	100	45	100	34	100
Sex discrimination	262	61.9	30	66.7	16	47.1
Sex alone ^b	211	49.9	26	57.8	12	35.3
Race discrimination	182	43.0	17	37.8	19	55.9
Race alone ^b	121	28.6	11	24.4	14	41.2
Sex & Race	39	9.2	4	10.1	1	2.9
National origin discrimination	58	13.7	3	6.7	6	17.6
National origin alone ^b	18	4.2	1	2.2	0	0.0
Type of Lawsuit						
Class action/similarly situated	129	30.5	12	26.7	34	100
Individual plaintiff/claimant and not similarly situated	190	44.9	20	44.9	0	0
Other not similarly situated	104	24.6	13	28.9	0	0

Note:

^a Percentages do not total to 100 percent because categories shown are not mutually exclusive and not all categories are shown; a fuller description of the decrees in the Database is provided in Table A1.

^b ‘Sex alone,’ ‘race alone,’ or ‘national origin alone’ means not combined with any other types of discriminatory behaviors covered by the EEOC.

Source: IWPR/WAGE Consent Decree Database 2010.

A Comparison of Charges Addressed in EEOC, DOJ, and Privately Litigated Consent Decrees

There are considerable differences in the basic characteristics of decrees litigated by the EEOC, the DOJ, and private law firms.¹⁸ First is that all privately litigated decrees were concluded as part of class action lawsuits (Table 2). Class action certification is the prerequisite for large financial settlements, and without class action certification injunctive relief is unlikely. Given the considerable risk and expense entailed in pursuing class action, private class action suits tend to focus on larger employers; more than two-thirds of privately litigated consent decrees involve employers with at least 10,000 employees (Table A7), and all have 20 or more awardees.

Without class action certification injunctive relief is unlikely.

¹⁷ Instructions on how to access consent decrees are in Appendix A.

¹⁸ Our category of “private law firms” also includes nonprofit lawyers. As previously explained, this category includes only publicly available consent decrees/settlements in cases with class action certification; we do not have data on other privately litigated employment discrimination settlements. Kotkin (2007: 108) in her analysis of such cases found that 85 to 90 percent included a confidentiality agreement, and that, where nonmonetary relief was included, was typically limited to “reinstatement” or “promotion” but did not include broader change to policies or practices.

By contrast, the EEOC and the DOJ by statute may litigate a case as if it were class-action-like, without having to obtain class certification in court, if their investigations find that the discriminatory behaviors are part of a larger pattern and/or practice that affect other similarly situated workers. In principle, this should prompt the EEOC to focus on discriminatory practices, which affect a substantial number of workers. Yet, even though the Database oversampled larger EEOC decrees, less than a third of EEOC consent decrees in the Database are class-action-like; indeed 44.9 percent involve only a single person, without other similarly situated workers. The share of such single cases is almost identical for the DOJ (Table A1).¹⁹ There might of course be exceptionally egregious single cases of discrimination that warrant the intervention of the EEOC, instead of leaving it up to the complainant to find a private law firm to get relief from the employer; yet given the EEOC's mandate to systematically address discrimination, and given the proportionately small number of cases the EEOC is able to litigate overall, one might perhaps expect a smaller share of such individual nonsystemic cases. The EEOC is significantly more likely than the DOJ or than class action lawsuits to deal with smaller employers. More than one-fifth of consent decrees (where it was possible to find employment data) in the Database were negotiated with employers with fewer than 100 employees (and it is likely that most decrees for which such information could not be established—30.7 percent of the EEOC sample—also involve smaller employers; Table A7). Given the number of employees working in small firms, addressing discrimination in smaller employers seems an important statutory role of the EEOC. Yet single nonsystemic cases are not limited to small firms, and indeed, many of the consent decrees concluded with small firms address more systemic patterns of discrimination (at least according to the information available from consent decrees).

The data suggest that individual cases are considerably more likely in some regions of the country than others; they are also significantly more likely in race discrimination than sex discrimination cases (Table A7). The prevalence of individual cases was addressed in the EEOC Systemic Discrimination Taskforce report:

[W]e found that the EEOC does not consistently and proactively identify systemic discrimination. Instead, the agency typically focuses on individual allegations raised in charges. There are few incentives for working on systemic cases, and the Commission's systemic efforts are neither coordinated nor consistent throughout the country. In addition, the Commission's technology framework does not support a nationwide systemic practice. (Silverman 2006)

Although the Database includes a sample of consent decrees settled since the Systemic Discrimination Task Force report, these should not be expected to already reflect a shift in litigation strategy. Systemic cases by their nature might take more than a year to prepare and litigate, and will be unlikely to have resulted in a consent decree by 2008.

Given the EEOC's mandate to systematically address discrimination, and given the proportionately small number of cases the EEOC is able to litigate overall, one might perhaps expect a bigger share of systemic cases.

¹⁹ EEOC complaints and consent decrees typically use the term "and similarly situated" employees to indicate that its investigation suggests that a case is class-action-like; there is no clear formal definition of when a case will be treated as class-action-like, a case with two or three plaintiffs might be described as "similarly situated," or not. We coded cases as "single" where the case mentions only a single person, and does not claim that the discriminatory action affected that person plus others "similarly situated."

Because of the reluctance of the courts to recognize sexual harassment as more than an individual problem, it is much more difficult to achieve class certification in sexual harassment cases.

Charging Patterns for Sexual Harassment and Promotion Cases

Physical or verbal harassment based on sex, race, or ethnic origin is the most frequently addressed issue in consent decrees. Sexual harassment is addressed in 55.5 percent of sex discrimination claims in the Database, and in slightly fewer than half of all consent decrees addressing both sex and race discrimination (Table A2). The proportion of sexual harassment cases among all EEOC and DOJ cases is twice as high as for private consent decrees, and significantly perhaps, more than 90 percent of sexual harassment consent decrees in the Database exclusively deal with sexual harassment, without addressing other issues, such as discrimination in pay, promotions, or hiring. Sexual harassment suits are much less common among privately litigated consent decrees; only six (17.6 percent) address it explicitly, and in only two of these cases is sexual harassment the main complaint and the basis of class certification (Table 3). One of these cases, *Neal v. DC Department of Corrections (DCDOC)*, is discussed in depth in Chapter 3. Because of the reluctance of the courts to recognize sexual harassment as more than an individual problem, it is much more difficult to achieve class certification in sexual harassment than in pay, hiring, or promotion cases where it is easier to establish statistical patterns:

Sex harassment as a class is very difficult to get certified, because the nature of injury is very individualized, and frankly, the nature of the harassment can frequently be individualized, unless you're like Dial, where all the employees work in the same facility. And when you have branches all across the country, it's very difficult to get a sex harassment class certified. (Plaintiff attorney)

Retaliation can take the form of denial of promotion, denial of other opportunity for advancement, and/or less desirable job assignments.

Several of the private plaintiff lawyers we interviewed echoed these views and said that although there was evidence of serious sexual harassment in the cases they were pursuing, because of the difficulties of getting a class certified, they did not pursue sexual harassment as part of a motion for class certification for pay and promotion discrimination (although, as the case studies in Chapters 4 and 5 show, they nevertheless may succeed in including provisions addressing sexual harassment in the injunctive relief that is negotiated).

Compared to all consent decrees in the Database, sexual harassment cases are much more likely to include a formal complaint of retaliation or constructive dismissal (that is, the person who is being harassed leaves her job because conditions have become untenable). Retaliation charges are 50 percent higher among EEOC sexual harassment cases than all EEOC cases, and constructive dismissal is more than twice as likely (Table 3 and Table A1).²⁰ Often, retaliation takes the form of denial of promotion, denial of other opportunity for advancement, and/or less desirable job assignments. Sometimes this may be deliberate retaliation. Other times it may be the result of a practice of separating the complainant from the alleged harasser for the woman's supposed protection and comfort. Yet, even though the detailed descriptions in complaints and consent decrees would often suggest that women might have lost out in promotions, and certainly that the decision process for making promotion decisions was tainted, rarely, in fewer than 5 percent of EEOC or DOJ sexual harassment cases (Table 3), did such treatment result in a charge of discrimination in promotion.

²⁰ Legally, retaliation is an "adverse action" against a "covered individual" for participating in a "protected activity." This includes trying to keep someone from "opposing a discriminatory practice, or from participating in an employment discrimination proceeding." See <http://www.eeoc.gov/laws/types/facts-retal.cfm> for details.

This lack of inclusion of promotion charges in consent decrees is a broader feature differentiating the decrees in the Database. Most (88.2 percent) of all privately litigated consent decrees address promotion issues, but only 20.0 percent of DOJ decrees and only 11.1 percent of EEOC decrees do (Table A1). Promotion issues are almost twice as likely to be addressed in race discrimination than sex discrimination charges (24.3 and 13.6 percent respectively, Table A2), but also in EEOC or DOJ race discrimination cases are included in fewer than 20 percent of cases, compared to 89.5 percent of private cases. It is not intuitively clear why the EEOC is proportionately so much less likely to address promotion charges; one explanation might lie in the manner in which claims are initially documented and investigated. This is a matter of concern because discussions with EEOC and DOJ staff suggest that, if a charge is not included in the initial formal investigation of a case, it is likely to substantially limit the type of relief that may be negotiated if a case should be chosen to be litigated later (IWPR/WAGE Consent Decree Project Expert Panel 2010).

The lack of inclusion of promotion charges is a broader feature differentiating the sexual harassment decrees in the Database.

Table 3.
Sexual Harassment Consent Decrees in the IWPR/WAGE Database, 2000 to 2008

	EEOC		DOJ		Private	
	Count	% ^a	Count	% ^a	Count	% ^a
Type of Charge						
Sexual harassment as part of all suits	150	35.5	15	33.3	6	17.6
Sexual harassment (SH) only ^b (% of all cases in Database)	139	92.6	14	93.3	2	33.3
SH and pay (as % of SH cases in Database)	7	4.7	0	0	3	50.0
SH and promotions	6	4.0	1	0.7	4	66.7
SH and hiring	4	3.5	0	0	3	50.0
SH and retaliation	97	64.7	5	33.3	3	50.0
SH and termination	40	26.4	2	13.3	2	33.3
SH and constructive dismissal	51	34.0	2	13.3	1	16.6
Type of Lawsuit						
Class action/similarly situated	65	43.3	4	26.6	6	100
Individual plaintiff/claimant and not similarly situated	46	30.7	10	66.7	0	0
Other not similarly situated	39	26.0	1	6.7	0	0

Note:

^a Percentages do not total to 100 percent because categories shown are not mutually exclusive and not all categories are shown.

^b 'Sexual harassment only' defined as not including charges of discrimination in hiring, pay or promotions; after the first row percentages are calculated as percent of all sexual harassment cases (150).

Source: IWPR/WAGE Consent Decree Database 2010.

Hiring Discrimination Charges

Occupational and industry segregation by gender, that is, men working primarily in jobs done by men, and women in jobs done by women, is a persistent and marked feature of the U.S. labor market (Hegewisch et al. 2010). Such segregation is a major contributor to the gender wage gap (Blau and Kahn 2007). Although some of this segregation might be due

EEOC v. Abercrombie & Fitch illustrates the systematic discrimination in hiring and promotion faced by African-American, Hispanic, and Asian women, who could be hired into the lowest paying jobs, but had no opportunity to advance into the more prestigious jobs.

to preferences, social science evidence suggests that hiring discrimination plays a considerable role in keeping women out of certain jobs, or in “sorting” women into predominantly female, lower paid jobs (see for example Fernandez and Mors 2008; Reskin and Roos 1990). Evidence from social science research suggests that sex and race or ethnic background continue to be a factor when employers make decisions about whom to employ. Bertrand and Mullainathan (2004) found employers were significantly less likely to respond to job applications from applicants with “African American” rather than “White” sounding names but otherwise identical levels of experience and education; Neumark, Bank, and Van Nort (1996) found women to be significantly less likely to be hired in higher paying restaurant jobs; Goldin and Rouse (2000) found a significant increase in the likelihood for women to be hired as musicians in symphony orchestras once initial tryouts were conducted behind a screen, making it impossible for selectors to exert any gender bias in assessing performance. Solberg (2004) compares survey data on men’s and women’s preferences for certain jobs with their actual representation in those jobs; women’s actual representation falls considerably short of what we would expect from the expressed preferences, suggesting that something—assumed to be discrimination—is keeping them out of those jobs. Hulett, Bendick, Thomas, and Moccio (2007) specifically focus on the underrepresentation of women among firefighters. They use a slightly different method (by comparing women’s share in jobs that are similar to firefighting in status, physical demands, and pay) but come to a similar conclusion: that hiring discrimination, rather than women’s preferences, is a major explanatory factor in reducing women’s share of higher status and higher paid jobs.

Table 4.
Hiring Discrimination Consent Decrees in the IWPR/WAGE Database, 2000 to 2008

	EEOC		DOJ		Private	
	Count	% ^a	Count	% ^a	Count	% ^a
Type of Charge						
Hiring discrimination as part of all suits (% of all cases in Database)	63	14.9	13	28.9	11	32.4
Hiring discrimination only ^b (as % of hiring cases in Database)	52	82.5	11	84.6	0	0
Hiring and sexual harassment	5	7.9	0	0	3	27.7
Hiring and pay	3	4.8	0	0	8	72.3
Hiring and promotions	8	12.7	2	15.4	10	90.9
Hiring and retaliation	13	20.6	1	7.7	4	36.4
Hiring and termination	10	15.9	0	0	5	45.5
Hiring and constructive dismissal	3	4.8	0	0	1	9.1
Type of Lawsuit						
Class action/similarly situated	33	52.4	7	53.8	11	100
Individual plaintiff/claimant and not similarly situated	21	33.3	1	7.6	0	0
Other not similarly situated	9	14.2	5	38.5	0	0

Notes:

^a Percentages do not total to 100 percent because categories shown are not mutually exclusive and not all categories are shown; after the first row, percentages are calculated in relation to all hiring discrimination cases.

^b ‘Hiring discrimination only’ defined as not including charges of sexual harassment or of discrimination in pay or promotions.

Source: IWPR/WAGE Consent Decree Database 2010.

The consent decrees in the IWPR/WAGE Database provide concrete examples of the nature of hiring discrimination, both based on sex and race/ethnic background. Hiring discrimination is the basis of 87 consent decrees in the IWPR/Wage Database (17.3 percent of cases); hiring discrimination is part of close to three of ten DOJ consent decrees and almost a third of private class action settlements (Table 4). Hiring is part of 27.3 percent of decrees that address both sex and race discrimination. The case of *EEOC v. Abercrombie & Fitch* illustrates the systematic discrimination in favor of white men in hiring and promotion to better paying jobs in this clothing chain, and the double discrimination faced by African-American, Hispanic, and Asian women, who could be hired into the lowest paying jobs, but had no opportunity to advance into the more prestigious (and better paid) jobs.

EEOC v. Abercrombie & Fitch explicitly addresses charges in hiring, promotion, and termination. Yet this is not common among hiring cases litigated by the EEOC or the DOJ. As is the case regarding sexual harassment, hiring charges addressed in EEOC or DOJ consent decrees typically are the major employment discrimination that is addressed, unlike in private certified class actions where hiring discrimination charges typically are part of a broader pattern of discriminatory employment practices. Almost all of the privately litigated settlements jointly address discrimination in hiring and promotions, both key to providing equal access to good jobs. Fewer than one in ten EEOC or DOJ decrees combine charges of hiring and promotion discrimination.

Pay Discrimination Charges

Pay discrimination charges are not common among complaints to the EEOC. Fewer than one in 10 charges concerns pay discrimination claims (Hirsh 2008); among cases pursued in the courts by the EEOC only one in twenty concerned wages during 2002 to 2008 (Table C2). Pay discrimination charges based on sex may be brought under both Title VII of the Civil Rights Act and the Equal Pay Act, and are both enforced by the EEOC. Charges under the Equal Pay Act are even less common than more general wage discrimination claims, accounting for only 2.2 percent of all cases resolved by the EEOC during 2000–2008.²¹ This is likely to be less of an indication of the absence of wage discrimination and more of the difficulties in identifying discrimination and pursuing a discrimination claim. Many employers, particularly in the private sector, discourage or prohibit sharing pay information. According to a recent nationally representative survey, six out of ten workers in the private sector said that discussion of pay information was prohibited or discouraged by their employers, compared to only one in seven workers in the public sector (IWPR 2010a). Even where pay information is available, the Equal Pay Act imposes considerable hurdles on proving discrimination because of the narrow construction of the definition of equal work in the Equal Pay Act (see U.S. Senate Committee on Health, Education, Labor, and Pensions 2010 for a more detailed discussion). Studies have further shown that pay and promotion cases are significantly less successful when heard by a jury than are sexual harassment cases (Eisenberg 1989; Oppenheimer 2003; Selmi 2001). In response, private as well as EEOC and DOJ attorneys might be more reluctant to pursue such cases through the courts.

Many employers, particularly in the private sector, discourage or prohibit sharing pay information.

²¹ As discussed above, to get a sufficient sample for analyzing pay cases, we oversampled wage related consent decree when developing our sample; 8.7 percent of cases in the Database address pay discrimination, compared with 5.2 percent of EEOC merit cases.

Table 5.
Pay Discrimination Cases in the IWPR/WAGE Database, 2000 to 2008

	EEOC		Private		DOJ	
	Count	% ^a	Count	% ^a	Count	% ^a
Type of Charge						
Pay discrimination as part of all suits (% of all cases in Database)	37	8.7	19	55.9	1	2.2
Pay only ^b (as % of all cases)	23	62.2	0	0	1	0
Pay and sexual harassment	7	18.9	3	15.8	0	0
Pay and promotions	9	24.3	18	94.7	0	0
Pay and hiring	3	8.1	8	42.1	0	0
Pay and retaliation	12	32.4	6	31.6	0	0
Pay and termination	5	13.5	8	42.1	0	0
Type of Lawsuit						
Class action/similarly situated	16	43.2	19	100	0	0
Single plaintiff/claimant and not similarly situated	13	35.1	0	0	1	100
Other not similarly situated	8	21.6	0	0	0	0

Notes:

^a Percentages do not total to 100 percent because categories shown are not mutually exclusive and not all categories are shown.

^b 'Pay only' defined as not including charges of sexual harassment or of discrimination in hiring or promotions.

Source: IWPR/WAGE Consent Decree Database 2010.

The lack of a combination of pay discrimination with promotion discrimination charges among EEOC litigated decrees is striking.

Most privately litigated decrees address pay discrimination (55.9 percent). Pay litigation, as already discussed, is much less common among EEOC cases, and an exception among DOJ decrees (only one of the consent decrees settled in the nine years under review); the lack of pay discrimination charges pursued by the DOJ might be due to the greater pay transparency in the public sector (IWPR 2010a), but might also be a reflection of litigation strategies.²²

Pay discrimination charges are approximately equally likely to arise as part of a sex or a race discrimination charge (12.7 percent and 10.1 percent respectively; Table A2). There are cases from all different categories of workers, from service workers, laborers and helpers, technicians, and officials and managers; yet compared to all cases in the Database, a higher share of pay cases address discrimination claims of professionals (9.2 percent of all decrees compared to 40.4 percent of pay discrimination decrees address claims of professionals).

In most pay cases litigated by the EEOC, pay discrimination is the only major employment practice addressed (62.2 percent; although such "sole" cases are less common than in EEOC sexual harassment or hiring litigation; Tables 3, 4, and 5). Although pay decrees are more likely to be framed as class action suits than other EEOC decrees (43.2 percent compared to 30.5 percent), most are not, and more than one-third of these (35.1 percent) involve

²² Since concluding data collection for this project, the National Equal Pay Enforcement Task Force established an interagency initiative among the EEOC, the DOJ, and the Department of Labor (DOL) to coordinate the enforcement of wage discrimination laws; one objective is to strengthen systemic enforcement of wage discrimination (White House 2010)

only a single claimant (Table 5). The sole DOJ pay discrimination case also concerns a single claimant. Perhaps even more so than in relation to sexual harassment, the lack of a combination of pay discrimination with promotion discrimination charges among EEOC litigated decrees is striking.

All but one of the privately litigated pay discrimination cases also address discrimination in promotion and the remaining case addresses hiring discrimination as well as pay (*Fermin Colinderes v. Quietflex Manufacturing*). Fewer than a quarter of EEOC pay cases address promotions (24.3 percent; Table 5).

Promotions (or rather lack of promotions) are a major component of employees' earning advancement during their working careers; although the evidence on gender differences in promotions is somewhat mixed, women's underrepresentation particularly in the higher echelons of organizations is beyond doubt and a significant contributor to the continuing wage gap.²³

In summary, there are marked differences in the basic characteristics of the complaints addressed in consent decrees by the EEOC, the DOJ, and private law firms. As one would expect, given the hurdles of achieving class certification in court, private class action consent decrees address more issues and deal with larger employers than other consent decrees. Nevertheless, the high numbers of consent decrees addressing only an individual claim, without charging broader applicability to similarly situated workers, is noticeable. Some might also argue that comparing the private attorney cases, which by definition are all fairly large class action lawsuits, with the mostly smaller EEOC cases is inappropriate. Yet the imbalance in the range of charges addressed in decrees also holds when we include only the largest EEOC decrees in this analysis (defined here as having 20 or more plaintiffs/claimants or awardees). All 34 of the private attorney cases in the Database as well as 56 EEOC cases are in this large case category. The data (not shown) clearly show that EEOC consent decrees are much less likely to involve pay and/or promotion charges than are private attorney consent decrees. These differences are both substantial in size and statistically significant ($p < .001$ for chi square). A major question is whether the profile of EEOC cases will change as a result of the greater focus on systemic cases following the setting up of the EEOC's Systemic Task Force in 2006.

Promotions (or rather lack of promotions) are a major component of employees' earning advancement during their working careers.

A Comparison of Injunctive Relief in EEOC, DOJ, and Privately Litigated Consent Decrees

We will now turn to the main concern of our report: the policies, programs, and processes negotiated in consent decrees as injunctive relief. What is immediately striking is the stark distribution of measures across the spectrum of consent decrees. Two measures are present in almost all consent decrees in the Database: 1) a public posting or distribution of the employer's EEO policy and commitment to nondiscriminatory employment policies, and 2) sexual harassment or diversity/EEO training. Measures that increase accountability for ensuring and advancing EEO for managers, analyze compensation or promotion patterns, mandate changes related to detailed personnel policies in recruitment or promotions, or create new training and development opportunities are considerably less common (Figure 1).

²³ See Lang (2010) for the most recent evidence on women's underrepresentation in managerial positions; Blau and De Varo (2007) on gender differences in promotions rates and their link to wage progression; Blau and Kahn (2007) on factors contributing to the gender wage gap; Pema and Mehay (2010) on the role of discrimination in job assignments for differences in promotion rates and pay in the public sector.

Two measures are present in almost all consent decrees in the Database: 1) a public posting or distribution of the employer's EEO policy and commitment to nondiscriminatory employment policies, and 2) sexual harassment or diversity/EEO training.

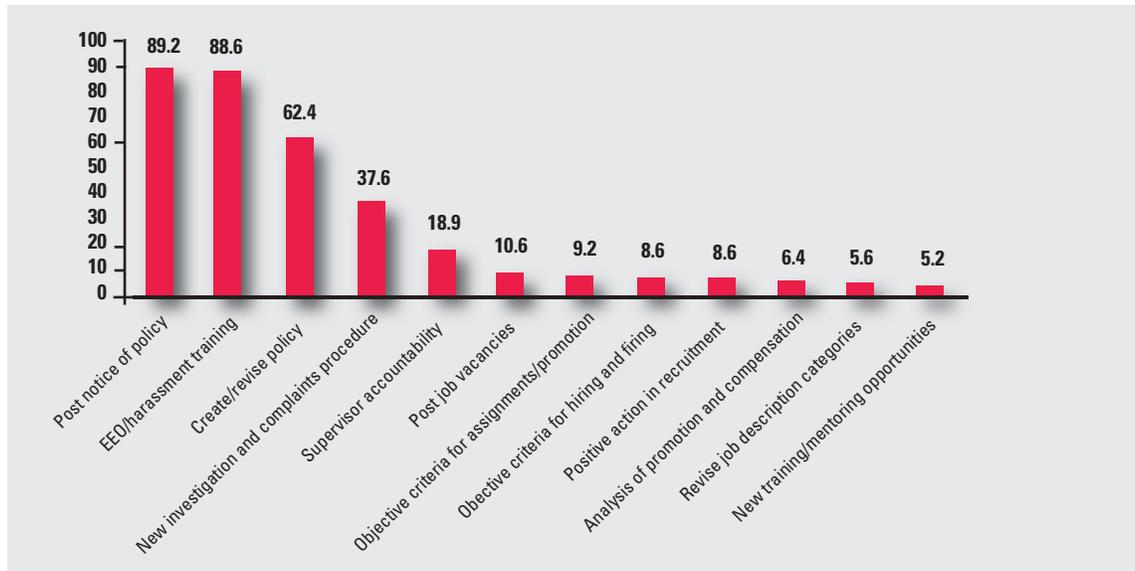
Sexual Harassment or Diversity/EEO Training

Nine out of ten EEOC decrees include requirements for posting the employer's EEO policy and providing sexual harassment/diversity training for employees (Table 6). The section of the consent decree requiring EEO or harassment training is generally specified in considerable detail, listing who should receive training, how many hours of training should be provided, and whether the training has to be delivered in person or if electronic (online) delivery is permitted. Typically, training is mandated, at a minimum, for HR staff, management, and supervisors, but frequently for all employees. The amount of training required is usually a minimum of two to three hours annually for the duration of the decree. There also generally is a requirement for the content and the provider of the training to be approved by the EEOC before the training can be delivered. Proof of compliance with the EEO/harassment training requirement is always specified as part of the records employers have to provide to show compliance with the terms of the decree. Organizational research on the effect of EEO training on diversity in organizations found the value of this type of training uncertain, if not questionable. A large national study of the relationship between EEO policies and the presence of women and African-American men in management during a 30-year period in firms required to submit EEO1 forms found diversity training to have a negative, and sexual harassment a neutral, effect on the diversity of the higher echelons of organizations (Kalev, Dobbin, and Kelly 2006). This finding applies to all employers; it changes slightly for those who were actually the subject of OFCCP compliance reviews or employment discrimination lawsuits. In those organizations the effect of diversity or harassment training on the diversity of management teams becomes slightly positive, but still small, and significantly smaller than measures that entail organizational accountability and structurally incorporate resources and responsibility for progress in affirmative action goals (Kalev and Dobbin 2006). As they suggest, "...there is more to segregation than rogue managers exercising bias. Thus, appointing special staff members and committees to rethink hiring and promotion structures may be more effective than training managers not to ask their secretaries to make coffees, and not to exclude minorities from football pools." (Kalev, Dobbin, and Kelly 2006: 591).

Legal and organizational scholars have additionally expressed considerable skepticism of organizations' motivation for introducing diversity and harassment training and grievance procedures, arguing that such policies are introduced primarily as a defense against potential liability in lawsuits, and less to create a nondiscriminatory and nonharassing working environment for women (Bisom-Rapp 2001; Dobbin 2009; Dobbin and Kelly 2007; Edelman, Uggen, and Erlanger 1999). Grossman (2003: 3) has argued that since Judge Kennedy argued in the U.S. Supreme Court decision in *Burlington v. Ellerth* in 1998 that "the purpose of Title VII is the creation of anti-harassment policies and effective grievance mechanisms," the emphasis in achieving compliance with the stated intent of the law, to prevent harassment and discrimination, has shifted to an assessment of whether organizations comply with "judicially created prophylactic rules." She further points to the institutionalization of this emphasis on form over substance in organizational routines, so that companies seeking liability insurance coverage typically require supervisors to receive EEO/harassment training (Grossman 2003: 10). Bisom-Rapp, Stockdale, and Cosby (2007: 285) conclude that there now is a widespread (and dangerous) "acceptance by employment lawyers and judges of harassment and diversity training as vaccination against and antidote for discriminatory work environments." Bendick, Egan and Lofhjelm (2001) argue that the key to the effect

Figure 1.

Injunctive Relief in the IWPR/WAGE Database 2000–2008: Percentage of Consent Decrees That Include Each Remedy (n=502)



Source. IWPR/WAGE Consent Decree Database 2010.

of diversity/EEO training is its delivery as part of, rather than as a substitute for, an overall program of change, which includes detailed interventions in organizational policies and routines, and is supported by a broader long-term commitment to change in an organization. Such concrete goals and change efforts are not commonly specified in EEOC or DOJ decrees (see also Table 7).

The subject of diversity and harassment training was an issue discussed with a group of EEOC regional attorneys. Our discussions with EEOC lawyers found that in general they at least partially share the researchers' skepticism about its value, and because of this believe that they need to closely monitor its delivery:

...[Defendants] say "oh we have sexual harassment training sessions once a year," sometimes what you find out when you dig into that, in the middle of the sexual harassment training, guys will be cat calling, hooting, and laughing and so on, and the managers will stand there and not do anything and so the training done poorly sends the message rather than that sexual harassment is a bad thing, that sexual harassment ain't so bad and it's all just a big joke. An ill-conceived and ill-delivered training program can not only not do any good, it can effect real damage. (EEOC regional attorney)

EEOC regional attorneys said they scrutinized selected training providers as a means of quality control, often insisted on reviewing training materials ahead of time, and maintained the right to attend sessions personally. They were interested in technical advice on what type of training might work best in changing behaviors, and, particularly, in view of employers' pressure for using online training rather than in-person training, for example, although there did not appear to be channels in the EEOC that would facilitate a systematic

An ill-conceived and ill-delivered training program can not only not do any good, it can effect real damage.

Table 6.
Injunctive Relief in the IWPR/WAGE Database, 2000 to 2008

Type of Remedy	EEOC (n=423)		DOJ (n=34)		Private (n=45)	
	Count	% ^a	Count	% ^a	Count	% ^a
	423	100	45	100	34	100
Post notice of policy	389	92.0	33	73.3	26	76.5
Diversity/harassment training	386	91.3	32	71.1	27	79.4
Create/revise policy	250	59.1	35	77.8	28	82.4
New investigation and complaints procedure	143	33.8	20	44.4	26	76.5
Supervisor accountability	73	17.3	5	11.1	17	50.0
Establish objective criteria for assignments and promotion	17	4.0	4	8.9	25	73.5
Positive action in recruitment	23	5.4	5	11.1	15	44.1
Post job vacancies	24	5.7	6	13.3	23	67.6
Analysis of promotion and compensation	8	1.9	3	6.7	21	61.8
Revise job descriptions/categories	14	3.3	1	2.2	13	38.2
New training/mentoring opportunities	10	2.4	0	0	16	47.1

Note:

^a Percentages do not total to 100 percent because categories shown are not mutually exclusive and not all categories are shown.

Source: IWPR/WAGE Consent Decree Database 2010.

The key to the effect of diversity/EEO training is its delivery as part of, rather than as a substitute for, an overall program of change.

exchange of such experiences. Yet there is another function of prescribed training in consent decrees, one that receives less attention in the literature. The person seen as most appropriate for delivering such training might not be an organizational behavior specialist but the defense lawyer. The objective is less one of “soft” organizational change, and more one of re-inforcing the message that discriminatory practices and harassment are illegal and costly:

I think personally that the one time [training] may be effective is when the defense lawyers do it and say, “look what just happened in this case—we just had to pay this much money” and that may be something people remember. (EEOC regional attorney)

Another EEOC regional attorney expressed this enforcement message similarly:

I kind of feel in some ways that training in [consent decrees] is effective, and the reason why is that the [consent decrees] that we have negotiated and settled, I don’t think that we have ever had repeat players like from the same company where workers in the same company will complain of, for example, sexual harassment so even though when people go through the sexual harassment training and at that particular time may not see the benefit of it, I think it does effect the management that they do take it a little more seriously. (EEOC regional attorney)

In this sense the function is similar to publicly posting the consent decree and EEO policy. The training reinforces the message to management that their behavior is under scrutiny, and that they will be held accountable, and ideally it sends that message to both management and workers.

Requirements to Prepare or Revise EEO or Sexual Harassment Policies

Many of the cases addressed by the EEOC involve smaller employers who might not have written human resource management policies, let alone a dedicated human resource or EEO person:

I just want to say I think [training] can be beneficial particularly when you have smaller employers because many times we've seen that they didn't even have a sexual harassment policy before the EEOC intervened. So not only do we get the training we get the policy, and we mandate that the training is done across the board for employees and management, and I think that sometimes that can help because it's starting from the ground up... (EEOC regional attorney)

Overall, our data show that 74.4 percent of the sexual harassment consent decrees and 54.8 percent of other decrees require a new or revised policy; 55.4 percent of sexual harassment decrees (and 28.6 percent of others) require a new or revised investigation and complaint procedure. Typically consent decrees require that the employer revise the sexual harassment policy and procedure within so many days (often 30, 60, or 90 days) and submit the revised policy for EEOC (or DOJ) approval.

Yet although the EEOC seems particularly focused on establishing and communicating to the employer the need to adhere to EEO policies and procedures through training and the public posting of notices, overall EEOC decrees are less likely than other decrees to mandate an actual revision of EEO policies or new or revised grievance and complaints procedures (Table 6). Perhaps surprisingly, given the U.S. Supreme Court ruling in the *Ellerth* and *Faragher* cases, even in sexual harassment decrees only slightly more than half of the EEOC decrees mandate revised or new grievance procedures, compared to three quarters of DOJ decrees and all of the private class action decrees. Although companies, particularly smaller ones, might look to the EEOC for EEO advice, the EEOC, in its dual role as both the institution defining good practice and the institution responsible for litigating against bad practice, may not feel able to respond. In the words of an EEOC attorney:

We don't want to get in the policy of drafting HR policies. So we will often say "your sex harassment policy should include x, y, z," but we don't want to give them a policy so that they can hold it up later and say "why are you suing us? You approved this policy and that's our policy." So we try to be very careful. (EEOC attorney)

Another attorney echoed the same sentiment:

...Our office's position is that we don't make any recommendations, we only vote up or down because we don't want to seem to be seen to be giving them indemnity, indemnifying them against any future suits (EEOC regional attorney)

The training reinforces the message to management that their behavior is under scrutiny, and that they will be held accountable, and ideally it sends that message to both management and workers.

Although companies, particularly smaller ones, might look to the EEOC for EEO advice, the EEOC, in its dual role as both the institution defining good practice and the institution responsible for litigating against bad practice, may not feel able to respond.

EEOC attorneys recognize the potential limitations in this approach, particularly for smaller employers:

Especially when you have small employers or employers that aren't that well represented what can you do? I mean they are kind of at a loss and they are looking to us as a resource. ...you know my office's view is you're not supposed to draft the best policy for them, you are just supposed to revise it to make sure it's acceptable. (EEOC regional attorney)

In large class action cases in the process of negotiating a decree, companies receive extensive external input on up-to-date non-discriminatory human resource management practices.

In one consent decree, *EEOC v. Vista Management Associates*, the EEOC included an explicit waiver to prevent such cause of action: "Under no circumstances shall the EEOC, by commenting or electing not to comment upon Vista's proposed changes or amendments, be deemed to have waived its right to investigate any alleged adverse effects of said policy upon equal employment opportunities."

Private attorneys are under no such constraints, and as can be seen in the case studies in the following chapters, in large class action cases in the process of negotiating a decree, companies receive extensive external input on up-to-date best practices of non-discriminatory human resource management practices. This is also the case in the large EEOC class action cases, such as the cases of *Mitsubishi* and *Dial* discussed in Chapter 3. Hence, it is particularly smaller companies, with less sophisticated human resource management policies in the first place, who receive less extensive HR and EEO interventions.

Recent legal scholarship has characterized the EEOC approach as one focused on rule-making rather than problem-solving, and at stopping blatantly discriminatory behavior rather than more subtle and structural forms of discrimination (Green 2003; Sturm 2001). Schlanger and Kim (2008) characterize this pattern in EEOC decrees as mandating "not transformation, but routinization" of employers' human resource management practices.

Requirements Related to Recruitment, Promotion, and Training and Development

Yet the routinization does not extend to specific personnel policy areas. Ensuring that, as routine requirements, all jobs are publicly advertised, that promotion and hiring decisions are made by a panel rather than an individual line manager, and that the distribution of performance ratings and merit awards is routinely compared between departments and managers have been shown to have a positive effect on diversity outcomes in organizations. Such provisions are rare in consent decrees. Only slightly more than 5 percent of EEOC consent decrees include any detailed provisions relating to recruitment or hiring. Even though research suggests that sexual harassment, for example, is more frequent where women are in the minority of the workforce, and indeed is used to keep them in a small minority, fewer than 5 percent of EEO sexual harassment decrees include any provisions related to recruitment or hiring. Research suggests that formalizing recruitment policies, particularly when these are informed by EEO goals (as they would be in the context of negotiating a consent decree), results in more applications from women and minorities (Holzer and Neumark 2000) and that adopting formal recruitment policies (including publicly posting jobs) leads to a higher share of women in management (Reskin and McBrier 2000).

As discussed above, retaliation is a common feature of sexual harassment claims, and a detailed reading of decrees often finds that such retaliation takes the form of lack of promo-

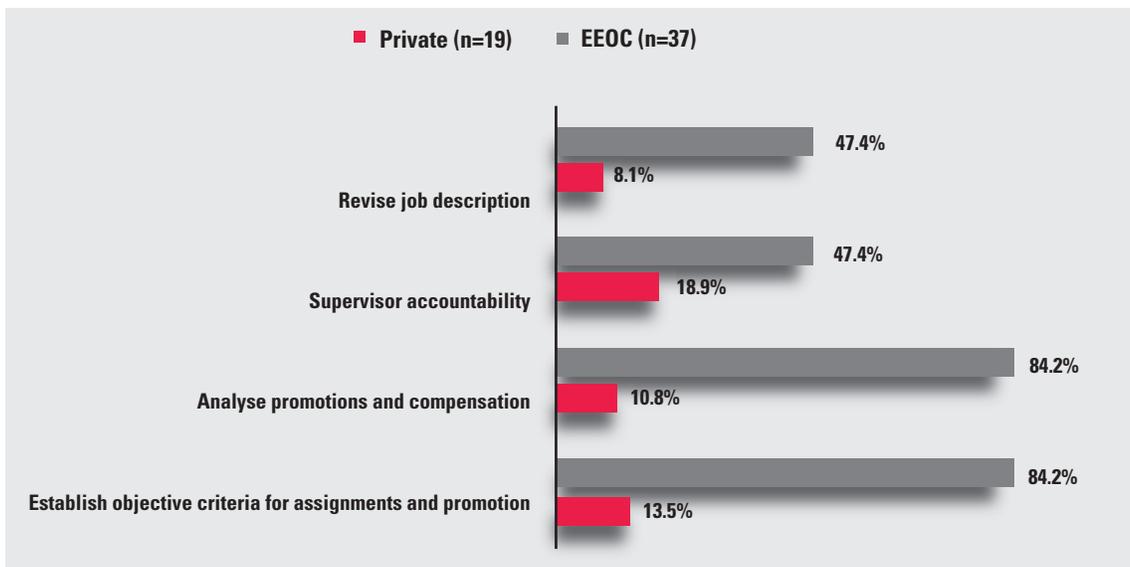
It is particularly smaller companies, with less sophisticated human resource management policies in the first place, who receive less extensive HR and EEO interventions.

tions or unfair selections for terminations (see also Chapter 3). Yet, of 150 EEOC consent decrees addressing sexual harassment, only four (2.7 percent) negotiated detailed procedures for job assignments or promotions. In sexual harassment decrees, preventing retaliation is not the only reason for including requirements related to promotions, terminations, and training and development. A study of women’s progress in the legal profession, for example, noted a marked ambivalence among male managers about mentoring female colleagues: “In a climate of heightened sensitivity and ambiguity about sexual mores in the workplace, the main concern is that the relationship will be misconstrued as a sexual liaison or possibly a cover for sexual harassment.” (Fuchs-Epstein et al. 1995: 355). This ambivalence resulted in reduced opportunities for women to build up the necessary breadth and depth of experience to allow them to advance at the same rate as male colleagues. Even though such measures are unlikely to be a magic wand for removing such tensions, including explicit measures to address promotion and advancement is one way to ensure that the elimination of sexual harassment truly creates equality of employment opportunity.

A similar absence of detailed policy is found in EEOC decrees dealing with pay discrimination (only one DOJ decree addresses pay discrimination; Table 5). Most pay discrimination consent decrees litigated by private law firms mandate that the employer analyze promotion and/or compensation decisions and establish objective criteria for assignments and promotions; close to half of privately litigated decrees also include provisions to increase supervisory accountability or prepare or revise job descriptions (Figure 2). By contrast only 18.9 percent of EEOC negotiated pay decrees include procedures in relation to supervisory accountability; only 13.5 percent include a reference to establishing objective criteria for assignments and promotions; 10.9 percent of EEOC pay decrees include an obligation to analyze promotions and/or compensation data; even fewer mandate a review of job descriptions

Fewer than 5 percent of EEOC sexual harassment decrees include any provisions related to recruitment or hiring.

Figure 2.
Injunctive Relief in Pay Discrimination Consent Decrees



Source: IWPR/WAGE Consent Decree Database 2010

It is relatively straightforward to track how a sexual harassment complaint is being addressed, in what period, and with what consequences. It is more difficult to assess whether employees feel confident in making complaints in the first place.

(Figure 2).²⁴ Indeed close to three quarters of EEOC pay decrees (72.9 percent) do not include any of the above measures; in contrast all of the privately litigated or DOJ decrees include one or more of these issues.

Measuring the Extent of Sexual Harassment

Sexual harassment cases present an additional problem: developing effective measures for assessing whether sexual harassment has effectively been stopped. It is relatively straightforward to track how a sexual harassment complaint is being addressed, in what period, and with what consequences. It is more difficult to assess whether employees feel confident in making claims in the first place. A high level of complaints might be an indication that the new policy is working, and that employees trust the new procedures, whereas the absence of complaints might be due to employees' continued fear of retaliation or sense that management is hostile or indifferent to the issues (Hunt et al. 2007; Marshall 2005; Thomas 2004). Indeed, as Bell, McLaughlin, and Sequeira (2002) point out, empirical research on the efficacy of sexual harassment policies in preventing and reducing sexual harassment is scarce. One way forward might be to mandate employee attitude or climate surveys, which would provide employees with a confidential means of voicing concerns over harassment and would provide a means for human resource managers to identify potential areas needing attention. Employee surveys were one of the tools implemented as part of the *Neal v. DCDOC* decree discussed in Chapter 3. Yet using attitude surveys is very rarely included in sexual harassment (or other) decrees. EEOC attorneys told us that they had tried to include attitude surveys in decrees, but had failed when judges took the side of the defendants who argued that this was an undue burden and interference. Employers are particularly concerned that surveys might reveal patterns of discrimination, leading to future litigation. Thus they choose (and appear to succeed with this strategy in front of judges) to ignore the potential benefits from systematic reviews and rely on individual claims and incidents, rather than to address issues systematically. Sturm (2001) highlighted the same response in an earlier study.

Monitoring and Implementing Consent Decrees

The legal unit's responsibility for a case does not end when the court enters a consent decree. The next step is monitoring defendant's implementation of the resolution and, if necessary, taking steps to obtain compliance either informally or formally. (EEOC Regional Attorneys' Manual, Section IV.E)

Most consent decrees are "effective" for at least a year, and close to half (48.1 percent) for more than two years (Table A19). Four out of ten (39.4 percent) private class action decrees in the Database are in force for more than three years, as are slightly more than one-fifth of the largest EEOC decrees (21.8 percent); 19 EEOC decrees as well as four of the privately

²⁴ As explained earlier, the EEOC sample includes single-plaintiff/claimant cases whereas the private attorney sample does not. Additional analysis of the data in Figure 1 determined that even if single-plaintiff/claimant cases are excluded, there are substantial and statistically significant differences between EEOC and private cases ($p < .05$ for post job notice, establish criteria for promotion, and analyze compensation using a chi square test with $n=42$ multiple plaintiff pay cases; $p < .09$ for supervisory accountability). However, as previously noted, the privately litigated sample has much larger cases, on average, in number of plaintiffs or awardees.

litigated and three of the DOJ decrees were in force for at least five years. During that period typically the defendant—the employer—has to prepare detailed records on progress and formally is under the oversight of the court. Both private and EEOC attorneys stated that there were no hard and fast rules regarding the optimal length of a decree; although some stated that particularly in severe cases, a minimum of five years was required to ensure that change would become engrained, others reported that in some organizations long decrees might almost be counterproductive because of the tensions and hostility they might generate. Also, in larger employers/large cases, preemptive change might already begin while the settlement negotiation process is underway, at the instigation of both corporate counsel and the management side attorneys; although the motivation for such preemptive change might partly be that—to preempt extensive court monitoring by trying to convince a judge that change has already taken place—it nevertheless means that discriminatory practices are already in the process of being addressed before the decree becomes effective. In this sense, the duration of a decree is subject to negotiation, and depends on the specific circumstances at hand, yet particularly in more substantial cases, at least three years appeared advisable (see also Chapter 6).

Typically in consent decrees there will be a named person or specific functional manager employed by the defendant with responsibility for preparing the reports that are required in compliance with the decree. In discussion, EEOC regional attorneys also noted that in their experience the mere process of having to keep records, knowing that there is someone to be accountable to, is a powerful enforcement tool:

I find reporting probably the most important thing [in enforcement] in the normal case, not because we go out and check it because we don't have the resources to do it, but if you have got a sexual harassment case and you say: any time you have a sexual harassment complaint you have to tell us who and what you did about it, then what we have done is create a situation where they have to think about it each time. Particularly in a hiring case or something like that, you have to tell us how many applications you get, how many African Americans you hire from that group.... Again, it does not tell them what they have to do, but if they know that they have to tell us what they are doing, I've found that that's what I care about more than anything else in the average consent decree. (EEOC regional attorney)

A small number of consent decrees goes beyond this and explicitly mandates appointing or creating a dedicated internal position with responsibility for overseeing the implementation of the consent decree. Kalev, Dobbin, and Kelly (2006) found that organizations with dedicated resources and clear lines of responsibility for EEO outcomes were significantly more likely to make progress in the diversity of their management teams than other organizations. Altogether, 7 percent of decrees explicitly specify such an internal function, rising to 15.6 percent of DOJ decrees and 26.5 percent of privately litigated decrees (Table A17), as well as 14.2 percent of the largest EEOC decrees (class-action-like cases with at least 20 awardees).

All attorneys we interviewed pointed to making employer-defendants accountable on record as a powerful tool for getting compliance with the consent decree. Yet, both private and EEOC attorneys also recognized that their ability to actually monitor detailed developments and identify incidents of noncompliance was limited. Sometimes employees who

Particularly in severe cases, a minimum of five years duration for a consent decree is required to ensure that change becomes engrained.

The mere process of having to keep records, knowing that there is someone to be accountable to, is a powerful enforcement tool.

...when successful, monitors fulfill a combined role of enforcing change and of providing guidance and consulting advice to the employer about how to best go about creating change.

continued to be employed by the defendant would alert plaintiff counsel to consent decree violations. EEOC attorneys reported returning to the premises of an employer, as a show of force and authority, in response to reports, for example, that the consent decree notice was no longer on display, but such actions are rare. Resources are clearly one factor limiting the capacity for detailed oversight; another is the need and desire by all parties for the defendant organization to move beyond the lawsuit contestation. A private class counsel described this as follows:

After you've had a settlement, a lot of people want to move on, and I encourage it, because they can't be in a crisis mode forever. Well, with moving on often means that they're less attentive. They're less vigilant about what's going on. They're less willing to cooperate in an investigation, and so it becomes that much harder to do follow up that isn't simply based on reviewing workforce data to look for objective patterns of things that you're worried about. (Private plaintiff attorney)

To address the lack of dedicated resources and the need for an authoritative person(s) on the ground with responsibility for overseeing, if not helping with, making the injunctive relief in a decree happen, numerous decrees mandate appointing one, or more, external monitors with the authority to oversee and evaluate the implementation of the decree for its duration. External monitors are exactly that: "external" to both the employer and the plaintiffs. They are neither captive to biases of the employer who resists change, nor are they subject to the pressures of plaintiff's counsel to get on to other cases. Their purpose and focus is on implementing the consent decree. External monitors are appointed in 9.6 percent of all consent decrees in the Database, 7.3 percent of EEOC decrees (20 percent in large EEOC cases), 6.7 percent of DOJ decrees, and 41.2 percent of private class action decrees (Table A17); external monitors are significantly more likely in sexual harassment than other decrees. Monitors in large cases are not necessarily an alternative to establishing clear internal lines of responsibility for compliance with the consent decree; many large decrees may do both (see for example *EEOC v. Abercrombie & Fitch*).²⁵

Our interviews with monitors and attorneys suggest that, when successful, they fulfill a combined role of enforcing change and of providing guidance and consulting advice to the employer about how to best go about creating change. In private class action cases, appointing an independent monitor might help to overcome tensions and hostility that might have arisen in the often prolonged settlement negotiations between corporate and plaintiff counsels. Given the EEOC's ambivalent position regarding providing specific policy advice,²⁶ such a function might be particularly relevant in EEOC decrees. Most regional attorneys reported that it was only possible in exceptional cases to include an external monitoring function in a decree, yet at least one region reported a move toward including an external monitor (paid for as part of the general relief package negotiated in the decree) as a standard component of their decrees:

The good thing about the monitoring is that it is paid by the employer, and we design the CD that way. I think the monitor is key to everything. (EEOC regional attorney)

²⁵ In the Database internal and external monitors were coded as alternatives, which might lead to an underestimation of the decrees that included mandates both for appointing external monitors and for appointing in addition a named internal compliance officer.

Effective Packages of Organizational Intervention

The consent decrees analyzed in the IWPR/WAGE Database showed marked differences both in relation to charging patterns and the complexity of injunctive relief between the institutions negotiating consent decrees. The EEOC's Regional Attorney Manual specifies: "For both monitoring and enforcement, it is important that the consent decree sets forth clearly what the defendant is required to do, when the defendant is required to do it, and the consequences for failure to do so" (EEOC 2005, Section IV.E). Our review of basic patterns of injunctive relief negotiated in consent decrees suggests that there are marked differences in the ambition and complexity of the policy packages that are mandated in EEOC, DOJ, and privately litigated class action decrees; these differences are primarily but not solely a reflection of the "size" of law cases (that is, of the number of plaintiffs/ the size of the class of workers whose situation is addressed in a decree).

Table 7.
High Impact Injunctive Relief in EEOC, DOJ, and Private Class Action Consent Decrees, 2000–2008

	EEOC/DOJ	EEOC/DOJ	EEOC/DOJ	Private Attorney
	Single Awardee/ Claimant (n=217)	2-19 Awardees/ Claimants (n=189)	20+ Awardees/ Claimants (n=62)	Certified Class (n=34)
	% ^a	% ^a	% ^a	% ^a
Most Effective Injunctive Relief Remedies				
Post notice of job openings	3.2	4.2	24.2	64.7
Take positive action in recruitment/hiring	0.9	5.8	24.2	44.1
Provide job training/mentoring opportunities	1.4	0.5	9.7	47.1
Require supervisory accountability (for EEO implementation)	12.4	18.5	25.8	50.0
Establish objective criteria for assignments and promotions	2.8	1.6	21.0	73.5
Establish objective criteria for hiring and terminations	3.2	4.2	25.8	35.3
Analyze promotion and compensation data	1.8	0.5	9.7	58.8
Revise job descriptions/categories	1.4	1.1	16.1	38.2
Appoint monitor for compliance with consent decree	8.3	13.2	32.8	79.4
ANY of the above "most effective" remedies	22.7	35.4	65.6	100.0
NONE of the "most effective" remedies	77.3	64.6	34.4	0.0

Note:

^a Percentages do not total to 100 percent because categories shown are not mutually exclusive and not all categories are shown.

Source: IWPR/WAGE Consent Decree Database 2010.

²⁶ As we discussed above, the ambiguous position is due to the dual role of the EEOC as both plaintiff counsel, in effect, and enforcement agency, a duality that leads EEOC attorneys to be cautious in providing policy advice that defendants may claim as indemnity against future liability (according to our interviews with EEOC attorneys and staff).

***All of the privately
litigated class action
decrees include at least
one of the most
effective organizational
interventions.***

Table 7 focuses on organizational interventions that have been highlighted in social science research as being particularly likely to change discriminatory work environments, as well as being standard components of performance enhancing human resource management practices (see for example American Management Association 2007; Armstrong et al. 2010; Arthur and Doverspike 2005; Bielby 2000). All of the privately litigated class action decrees include at least one of these interventions; each of these interventions is less likely to be included in EEOC than in private class action decrees, and a third of even the most class-action-like decrees negotiated by public lawyers at the EEOC and the DOJ do not include any of these (Table 7).

EEOC and DOJ decrees are much more likely to mandate only the public posting and/or revising of EEO policies and EEO-related diversity training without adding more detailed requirements. Forcing an employer to publicly post their commitment not to discriminate or allow harassment, particularly in the context of an official legal investigation and reinforcing such messages through training to managers and employees may certainly play a role in empowering employees to challenge what they perceive as discriminatory actions. It may also provide an added impetus to supervisors and HR managers to ensure that they stay within the law. But it is unlikely to be as effective as including detailed mechanisms for making personnel and management decisions more accountable and transparent.

Our purpose in this chapter is not to criticize the EEOC, but rather to identify the most effective remedies found in consent decrees. For the scope of responsibility Congress has given the EEOC, the agency has been underfunded since it was established. Over the years, more responsibilities were added through amendments to Title VII, such as pregnancy discrimination, the ADA, and the ADEA, without commensurate funding. As the following chapters show, effective injunctive relief not least depends on resources for up-to-date industry and occupation specific expertise and monitoring, resources that the EEOC typically does not have. The following chapters draw on examples both from the EEOC and private class action decrees to provide examples of how effective injunctive relief with greater transparency and accountability may be negotiated and implemented through consent decrees.



Chapter 3

Injunctive Relief When Sexual Harassment Is “Business as Usual:” The *Neal v. DC Department of Corrections* Consent Decree with Comparisons to Other Cases*

Introduction

Neal v. Director, DC Department of Corrections (DCDOC) is one of the consent decrees that pushes the envelope. We selected it for in-depth study for several reasons. The Neal lawsuit revealed egregious harassment of hundreds of African-American women over several decades. The consent decree created an outside, independent Special Inspector (SI) position with much greater authority and responsibility than anything similar in other consent decrees we examined. At the same time, it spelled out policy changes and sexual harassment training requirements in less specificity than certain other major cases, leaving the details to the SI. Drawing on interviews with key players along with examining an extensive collection of documents²⁸, we investigated how the SI model worked and how it compares to other approaches.

The chapter proceeds by reviewing the larger organizational and occupational context for women’s employment and sexual harassment in public safety agencies, such as departments of corrections and fire departments; it then launches into the details of *Neal v. DCDOC*, the focal point of the chapter. The *Neal* consent decree is subsequently compared, first, to two other large, pattern and practice, class action sexual harassment consent decrees—*EEOC v. Mitsubishi* and *EEOC v. Dial*—and second, to *U.S. v. Prince George’s County, Maryland, Fire Department*, a consent decree resulting from a sexual harassment lawsuit by a woman firefighter.²⁹ We conclude with common themes, larger lessons, and recommendations.

Women Employed in Corrections and Fire Departments

Social science research on women in uniformed services occupations such as police, firefighters, and corrections officers documents problems with sexual harassment as women

The Neal lawsuit revealed egregious harassment of hundreds of African-American women over several decades.

* This chapter was prepared by Cynthia Deitch, George Washington University and Institute for Women’s Policy Research.

²⁸ We interviewed plaintiff and employer counsel as well as attorneys who served as special inspectors during the Neal consent decree, a sexual harassment trainer for the consent decree, and a complaint investigator for the consent decree. We tried but were unable to interview other DCDOC officials or former employees. For background on the lawsuit and the DCDOC, our research was informed by newspaper coverage of the lawsuit and trial, and several thousand pages of legal documents collected for this and an earlier research project (Deitch and Fechner 1996).

²⁹ Our sources for *Dial* and *Mitsubishi* are documents, including *Dial* monitors’ reports, a focus group interview including EEOC attorneys involved in negotiating the *Dial* and *Mitsubishi* consent decrees, and an interview with a monitor for the *Dial* and *Mitsubishi* consent decrees. For PGFD, we only have legal documents because the DOJ attorneys were not permitted to speak about any cases.

**Studies of women in
corrections point to the
sexualized and gendered
setting of many
corrections facilities.**

moved into these previously all-male occupations that are traditionally associated with masculine gender stereotypes (Martin and Jurik 2007). There is evidence to support the theory that sexual harassment (self-reported experience) increases in predominantly male work settings (Gruber 1998; Willness, Steel, and Lee 2007). Other research suggests employment discrimination in general is greater in more hierarchical organizations with large power differentials (Ilies et al. 2003); the paramilitary uniformed services are very hierarchical. However, there are no data to show whether or not sexual harassment is more common in uniformed services than in other occupations with similar gender ratios.

Opportunities for women in corrections began to expand after Title VII of the 1964 Civil Rights Act was expanded to cover state and local governments in 1972. Even with expanded Title VII rights, additional court battles were required for women to win the right to employment in corrections facilities housing men. American Corrections Association data cited by DiMarino (2009) indicate that the percentage of women in corrections employment has grown from 12 percent in 1969 to approximately 37 percent in 2008.

Martin and Jurik (2007) review several studies and available data indicating that African Americans have made more inroads into corrections than white women. Women of color in corrections are more likely than white women to be single mothers and to be seeking career advancement (Belknap 1991; Maghan and McLeish-Blackwell, 1991). To our knowledge, most, if not all, of the *Neal* class members were African-American women, although white women were also employed by the DCCOC, but in smaller numbers; the alleged harassers in the *Neal* lawsuit included both white and African-American men. Women, as a group, compared to men, are more likely to cite the absence of other employment opportunities as a reason for entering corrections. Studies of women in corrections point to the sexualized and gendered setting of many corrections facilities whereby definitions of competence tend to be associated with what are perceived as masculine characteristics such as physical aggression, ability to confront violence, and using force. In such a setting, social scientists hypothesize, men may view the presence of women as a threat to their masculinity, and/or they may view women as lacking abilities and characteristics associated with competence on the job (Martin and Jurik 2007; Pogrebin and Poole 1997).

The scale and scope of the sexual harassment at the DCDOC, as described below, may make it appear as an extreme case and therefore atypical. However, studies of correction workers' responses to sexual harassment suggest that many of the experiences of women at the DCDOC were not unusual. In a study of women and men employed in seven county jail and adult detention facilities, Pogrebin and Poole (1997: 50) found that "much of the harassment was blatant where female officers expressed concern that some of their male colleagues actually believed they were entitled to sexual favors with female coworkers." This was also a sentiment expressed by both uniformed and nonuniformed women at the DCDOC when interviewed by plaintiff attorneys for the *Neal* lawsuit (Deitch and Fechner 1996).

Pogrebin and Poole (1997: 53) also found that the prevailing opinion of female officers in all seven facilities was that "the elimination of sexual and gender harassment in local corrections organizations was dependent on top administrators enforcing policies against sexual harassment." In a study of the effect of sexual harassment on corrections workers, Savicki, Cooley, and Gjesvold (2003) found that although men and women did not differ on burnout or organizational commitment, harassment was a pervasive contributor to burnout and decreased commitment measures among women. Based on their own research as well as other studies, Pogrebin and Poole (1997) conclude that sexual harassment of women corrections

workers by their male colleagues and supervisors impedes the acceptance of women into the work culture, which robs women of important training, peer support, sponsorship, and access to inside information for job assignments and promotional opportunities. Their conclusion holds for other male-dominated occupations as well.

The ongoing problems of sexual harassment at the Prince George's County Fire Department (PGFD) that we discuss toward the end of this chapter is part of the larger context of women employed in firefighting occupations in the United States. Social science research on sexual harassment in organizations has repeatedly found a small female minority in a traditionally male occupation associated with increased problems for women with sexual harassment (Willness, Steel, and Lee 2007). In contrast to estimates of as high as 37 percent for women as a percentage of corrections employees (DiMarino 2009), female firefighters remain a tiny fraction of a predominantly male workforce, despite some increases in the raw numbers of female firefighters in recent decades. Hulett et al. (2008) use U.S. Census data to estimate that women as a percentage of firefighters increased to only 3.7 percent in 2000, up from less than 1 percent in 1980. Similarly, Bureau of Labor Statistics data published by the National Fire Protection Association (2009) show women's share of the firefighting workforce increased from 1 percent in 1983 to only 4.8 percent in 2008.

National surveys of firefighters document problems of sexual harassment similar to those alleged at the PGFD. A 1995 survey by the International Association of Women in Fire and Emergency Service of 551 women in fire departments across the United States found that most (88 percent) had experienced sexual harassment at some time in their careers, with 69 percent facing ongoing harassment at the time of the survey; 30 percent of those who had been harassed had never filed a complaint or reported it to a supervisor. Of those who had reported, more than half (55 percent) reported only negative experiences, such as an undesired transfer and/or retaliation (as in the PGFD case), or no investigation or response (IAWFES, n.d.). Asking somewhat different questions on similar topics, *A National Report Card on Women in Firefighting* (Hulett, et al. 2008) surveyed 675 women and men firefighters in 48 states; 43 percent reported verbal harassment, 30 percent sexual advances, 6 percent assaults. Additionally 32 percent were exposed to pornography on the job, among other indicators of a hostile environment. Furthermore, 65 percent reported that they were not aware of any grievance procedures for reporting such complaints and 23 percent answered that supervisors failed to address problems they did report. The report concludes, "our surveys and interviews clearly documented that, when women get hired, their experiences almost universally fall well outside legal boundaries for equal opportunity and non-harassment," and that "our interviews confirmed a direct relationship between harassment in a department and tolerance for it by the department's senior managers." We find these conclusions highly relevant for both the DCDOC and PGFD case studies that follow.

Sexual Harassment at the DC Department of Corrections

Bundy v. Jackson, Landmark 1981 Appeals Court Decision

Complaints of sexual harassment at the District of Columbia Department of Corrections (DCDOC) go back at least to the 1970s. In 1977, Sandra Bundy, a vocational rehabilitation specialist employed at the DCDOC since 1970, filed a lawsuit charging her employer with failing to respond to her several years' of sexual harassment complaints. In the landmark 1981 *Bundy v. Jackson* decision, the Court of Appeals found the hostile environment at the DCDOC to be one where sexual harassment was "business as usual" and "standard

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She filed complaints and subsequently experienced retaliation for years. Newer employees whom she trained were promoted above her.

operating procedure.” The appellate court decision was one of a handful of cases credited with directly paving the path to the 1986 *Meritor Savings Bank v. Vinson* U.S. Supreme Court decision that recognized the hostile environment claim of sexual harassment as constituting sex discrimination under Title VII of the 1964 Civil Rights Act. Bundy was also the first time an appeals court ruled that Title VII liability existed for sexual insults.

Although the *Bundy v. Jackson* decision helped change sexual harassment law in the United States, sexual harassment continued as business as usual inside the DCDOC. Harassers received little or no penalty, and men with a history of harassment charges against them were promoted to high level administrative positions. For example, Delbert Jackson was the named defendant in Bundy because he was the director of the agency at the time the lawsuit was filed; yet Jackson was also a former harasser of *Bundy*, before he became her supervisor, and was later promoted to Director.

The *Bundy* case resulted in a permanent court-ordered injunction against sexual harassment at the DCDOC. On paper, the policies adopted after *Bundy* appear fairly comprehensive for their time, as we describe below. The DCDOC frequently pointed to its formalized sexual harassment policy and complaint procedure as a defense in subsequent EEOC investigations of charges of sexual harassment.

The Neal Lawsuit

Also in the 1970s, Bessye Neal took a job at the DCDOC. In her first years at the DCDOC, Neal was subjected to intense sexual harassment, both verbal and physical. As an example of physical abuse, her breast was squeezed so hard in one incident that it was bruised. The perpetrator was able to brush off the incident claiming he thought he was squeezing an orange. Another of Neal’s harassers was, in fact, Delbert Jackson, who once demanded that Neal meet him in a hotel room during work hours. She filed complaints and subsequently experienced retaliation for years. Newer employees whom she trained were promoted above her. In unsuccessful efforts to force her to quit, she was at various times forced to work in a closet, a restroom, and next to a broken window in winter. She continued to make complaints about her treatment and about the harassment and mistreatment of other women. Eventually, Bessye Neal brought her complaints to the Washington Lawyers’ Committee for Civil Rights and Urban Affairs, where they were kept on file (Deitch and Fechner 1996).

Teresa Washington arrived in the records office of the DCDOC in 1992, eager to receive training to do her job correctly, and with hopes to advance. The head of the records department, Edward Paylor, made it clear that the only way she would get the training she desired was with him. He insisted that she come to his house for training. When she refused his sexual advances, he moved her workspace to a basement and generally made it difficult for her to complete her work satisfactorily. Unable to extricate herself from ongoing harassment from Paylor, and unsatisfied with the ineffective internal complaint process, Washington called a women’s employment rights hotline operated by a local advocacy group, the Metropolitan Women’s Organizing Project (MWOP) to seek help. Holly Fechner, an MWOP member and attorney recruited several law school students to help collect information on the sexual harassment of Washington and a number of other DCDOC employees, and brought the resulting report to the Washington Lawyer’s Committee where Attorney Joe Sellers and his colleagues put the newly documented problems together with the Neal file and others already on hand (Deitch and Fechner 1996).

A Title VII lawsuit was filed in 1993 with eight named plaintiffs (*Neal v. DCDOC*). Class certification was won, making Neal/Bonds³⁰ one of only a handful of class action sexual harassment lawsuits ever filed at that time, and only the second involving a public agency. A 1995 trial resulted in the first jury verdict for a class action sexual lawsuit, awarding \$1.4 million to six of the named plaintiffs with awards for the rest of the class to be determined. The class included both uniformed and nonuniformed employees. The trial decision was overturned at the appellate level on technical grounds. Before commencing a second trial, an \$8 million settlement was reached and a consent decree signed in 1997. The consent decree did not go into effect until 2002, after hundreds of decisions and appeals of individual awards were completed. The court appointed a Special Master, who oversaw hearings for determining awards and other relief for individual class members and monitored retaliation complaints during the 1997–2002 period, and was appointed as the first Special Inspector.

Two related lawsuits filed around the same time as the Neal lawsuit show how widespread and systematic sexual harassment was. Another woman (Joyce Webb), who had been harassed by Paylor, filed and won substantial damages in an individual lawsuit, separate from the class action, and women prisoners filed their own class action lawsuit against the DCDOC (*Women Prisoners v. District of Columbia*), for sexual harassment and abuse, among other issues.

The Failure of the Bundy Injunction to Stop Sexual Harassment at the DCDOC

Next, we analyze how the policies enacted in response to the permanent injunction of the earlier *Bundy* lawsuit failed, and whether the policies from the Neal consent decree corrected those failures. The *Bundy* injunction policy included mandatory sexual harassment training with yearly refresher sessions for all employees. In reality, however, the training was not always given to everyone and what was provided was frequently treated as a joke. Employees with sexual harassment complaints against them were sometimes sent for remedial training during which they sat around watching movies unrelated to sexual harassment, according to one of the plaintiff attorneys.

As a result of the earlier *Bundy* lawsuit, a special complaint procedure for sexual harassment was established. Unlike other department grievances, a sexual harassment complaint could be made to a supervisor or anywhere higher in the chain of command all the way up to the director, or to an EEO officer. A complaint could be written or oral. Although these provisions sound promising, in reality, women were routinely dissuaded from filing complaints; complaints that were filed were often lost or ignored; if complaints were investigated, the investigations were sloppy and used inappropriate criteria such as “proof beyond a reasonable doubt.” Retaliation against women who refused sexual advances and against those who complained, was rampant (Deitch and Fechner 1996).

In his 1995 “Memorandum Opinion on Classwide Injunctive Relief,”³¹ following the *Neal* jury verdict, Judge Royce Lamberth reviewed evidence presented at trial that documented the

Women were routinely dissuaded from filing complaints; complaints that were filed were often lost or ignored; if complaints were investigated, the investigations were sloppy and used inappropriate criteria.

³⁰ Anyone searching for the Neal case might be confused by the name changes. The case was initially filed as Bonds, because alphabetically Sharon Bonds was the first named plaintiff. It was later changed to Neal by plaintiff attorneys. When Margaret Moore became the DCDOC director, during the lawsuit, she was the named defendant (*Neal v. Moore*), but she later petitioned the court to remove her name leaving the case to become *Neal v. Director, DCDOC*. The 1996 Appeals Court decision appears as *Bonds v. District of Columbia*. The consent decree is listed as *Neal v. Director, DCDOC*.

³¹ The injunctive relief ordered by the Judge in 1995 included many provisions proposed by the plaintiffs’ attorneys that subsequently appear in the consent decree. The 1995 injunctive relief did not go into effect because the jury verdict was overturned on appeal.

Simply having a court-ordered policy in place that appears comprehensive on paper does not at all guarantee fair or legal treatment of sexual harassment complaints, nor does it protect the employer against subsequent lawsuits.

following flaws in the DCDOC sexual harassment complaint procedure: Appointed members of fact-finding investigative committees lacked training in sexual harassment law, lacked appropriate investigation methods, and lacked independence due to ties with parties to the complaint or with previous sexual harassment complaints. Investigations and determinations were not timely. Witnesses named by complainants often were not interviewed. Fact-finding decisions were subject to review by superiors who were frequently not independent on the matter. Disciplinary actions, if any, were not proportionate to the severity of the offense. Although employees could raise sexual harassment complaints outside the normal chain of command, to an immediate supervisor or any superior up through the director, supervisors frequently failed to pass complaints up the chain of command, as required, and when complaints were passed through multiple hands, confidentiality was lost. Although complaints could be oral or written, supervisors frequently failed to respond to complaints at all.

A key point for our project is that many of the sexual harassment consent decrees that we examined included provisions for the employer to create or revise a sexual harassment policy and complaint procedure and submit the policy/procedure for EEOC or DOJ approval. We also know that courts view the existence of a policy and complaint process as elements of an affirmative defense, especially after the *Faragher* and *Ellerth* 1998 U.S. Supreme Court decisions, and that many employers adopt formal policies and procedures for addressing sexual harassment in order to help protect their organizations from lawsuits and liability. The extensive documentation we have on policies and practices at the DCDOC under the *Bundy* injunction—before the *Neal* consent decree—shows that simply having a court-ordered policy in place that appears comprehensive on paper does not at all guarantee fair or legal treatment of sexual harassment complaints, nor does it protect the employer against subsequent lawsuits. By comparing the policies and structures enacted as a result of the *Neal* consent decree with those that existed previously, we can evaluate what the consent decree changed.

The Neal Consent Decree: What Changed? What Worked?

And so our big push there was to have an office created, have a person created who would really have power in the system to discipline people. (Plaintiff attorney)

Innovative Features of the Neal Consent Decree

The *Neal* decree then was drawn up specifically to overcome the failure of the previous approach to sexual harassment. The most innovative feature of the *Neal* decree compared to other consent decrees we have examined was the creation of the Office of the Special Inspector (OSI) with extensive power and authority concentrated in one individual, independent of the Department hierarchy for the duration of the consent decree. Most details on how to revise and carry out policies were left to the Special Inspector, and adequate resources were provided. The consent decree charged the SI with revising the complaint procedure in consultation with Department officials, improving access to the complaint procedure, and hiring and supervising outside investigators with legal training for investigating sexual harassment and retaliation complaints. The SI was given responsibility with broad leeway for establishing a revamped sexual harassment training program. An added feature of note was a provision for continuing the OSI functions after the consent decree expired. Other innovations were that the consent decree specifically required the SI to appoint an employee ombudsperson and an employee advisory committee to work with and advise

the SI on sexual harassment policy, and establish a 24-hour hotline to an external call center for receiving complaints (as one of multiple points to make a complaint).³²

Ombudsperson: The role of the employee ombudsperson, as specified in the consent decree, was to help monitor compliance on sexual harassment, provide feedback to the SI on potential or actual problems, be available to employees confidentially to hear complaints about sexual harassment and retaliation, and serve as a mediator for complaints if a complainant wanted mediation. The SI described the ombudsperson as the “go to” person in the department who made sure that meetings happened, people showed up for investigations, etc. The SI also emphasized how important and useful it was that the person who served as ombudsperson was a longtime employee who was trusted and respected by all sides, and had not been involved in the lawsuit. The ombudsperson duties became part of the individual’s written job description. Based on praise for the ombudsperson from multiple sources, we conclude this was an effective innovation.

Advisory committee: The concept of the employee advisory committee was to provide feedback from employees to the SI on the effectiveness of training, how the new policies were working, and to serve as a resource for “matters related to sexual harassment or related retaliation” for other employees. The SI was to select members after soliciting candidates, and to ensure that all levels and units of the Department were represented. The consent decree states that the advisory committee meets at the discretion of the SI, and that the SI could decide after one year whether to continue the committee.

During the decree, the SI used the advisory committee to help publicize new policies and procedures, to evaluate and improve the sexual harassment training, and more generally as the SI’s “eyes and ears on the ground,” which was especially important because the SI was not on the premises most of the time. The SI who appointed the advisory committee reported that the committee came up with the idea of anonymous employee surveys, which were in turn conducted to assess the climate of opinion and perceptions of the new policies. The SI told us: “We had posters of the Employee Advisory Committee all around so that people could see faces of the people that they knew they could go to talk to about it. They could see the faces of the employees who were involved in this issue. And that sent a positive message.” Our interviews strongly suggest that the employee advisory committee was indeed effective in advising the SI during the consent decree.

Hotline: The purpose of the 24-hour hotline was to provide an additional, confidential vehicle for employees on any shift or at any time, to communicate a complaint or problem to the SI without having to go through any DCDOC personnel. The SI contracted an external call center and created a script with questions for them to use in response to complaints. When the call center received a complaint, they emailed a report to the SI who made sure that the caller was contacted by the OSI within 24 hours. The hotline received several calls per month and was relatively inexpensive to maintain, according to the SI.

Training: The consent decree stipulated that the SI, in conjunction with the Department, would design sexual harassment training, select materials, hire instructors, and supervise the ongoing training, and that the SI or the trainers would keep records of training. What was specified in the DCDOC consent decree is less detailed on training than some consent de-

The Employee Advisory Committee came up with the idea of anonymous employee surveys, which were in turn conducted to assess the climate of opinion and perceptions of the new policies.

³² The consent decree stated that SI was to assess whether to continue the above three initiatives after one year; in practice, the above initiatives did not get established until the second year, under the second SI.

...strong, convincing evidence from multiple sources that the grievance and investigation procedure introduced by the consent decree and implemented by the Special Inspector was a significant improvement over what went before.

crees we examined, but, as noted earlier, it gave authority over training to the SI. The SI was personally involved in researching and writing the new training curriculum, and revised it as needed. The SI contracted a civil rights and women's rights attorney to coordinate the training. The training coordinator described, in an interview, discussion, airing of disagreements and conflicts, some recalcitrance, but also a perception of making a difference. Both the SI and the training coordinator emphasized to us the importance of keeping it interesting, and making sure refresher courses did not simply repeat earlier sessions. We conclude that a great deal of attention was given to planning, implementing, and improving sexual harassment training during the Neal consent decree.

Did It Work?

We found strong, convincing evidence from multiple sources that the grievance and investigation procedure introduced by the consent decree and implemented by the Special Inspector (SI) was a significant improvement over what went before and, overall, an effective policy during the life of the consent decree. We base this conclusion on the following: First, we compared the written provisions of the new policy (DCDOC 2004) with the failings of the previous policy that were revealed during the trial and found new provisions that clearly address previous failings. Second, our interviews with the individuals who served as independent Special Inspectors during the life of the decree provided insight into how they implemented the decree and what obstacles they encountered. Third, the DCDOC counsel was very positive about the effectiveness of the grievance procedure implemented by the consent decree, and the effectiveness of the SI during the decree. Fourth, we found independent assessment of the work of the SI in a detailed report of a hearing conducted by the District of Columbia Office of Employee Appeals of a harasser's appeal of his suspension under the consent decree policy, plus an administrative judge's opinion of a subsequent appeal by the same harasser (Government of the District of Columbia 2010).

As referenced above, a hearing of a harasser's appeal of his suspension by the SI (Government of the District of Columbia 2010) included partial transcripts of testimony by the SI, the outside investigator hired by the SI to conduct the investigation, several women with complaints of harassment, witnesses, and the accused harasser. The testimony presented, as well as the assessment and conclusion of the hearing officer, all supported the professionalism, thoroughness, fairness, and reasonableness of the work of the OSI. The hearing officer's decision was upheld by an administrative judge in a subsequent appeal by the same harasser. These documents gave us valuable insight into the functioning of the OSI during the decree.

The appeal document cited above, however, also illustrates several limitations faced by the SI. Some level of sexual harassment continued to occur during the consent decree, which is not unexpected; an increase in complaints after a new policy is implemented may mean there is more confidence in the procedure. At least some employees remained concerned about retaliation; the hearing document quotes the SI as stating that several women were reluctant to participate or file complaints for fear of retaliation. The appeal also quotes the SI as stating that she believed the record of the harasser merited termination but that her hands were tied once the hearing officer reduced the penalty to 120 days suspension because "a provision in the collective bargaining agreement that prohibits the deciding official from increasing the penalty recommended by the Hearing Officer" (Government of the District of Columbia 2010). Despite these obstacles, the success of the SI in turning around decades of ineffective policy and unpunished abuse is impressive, to say the least.

We argue that it was the effectiveness of the consent decree, and the work of the SI in particular, that made a difference, and not simply the fact, publicity, or monetary effect of the lawsuit. For years after the Neal lawsuit was filed but before the consent decree was entered, despite extensive media coverage, a court injunction against further acts of sexual harassment and retaliation, a court-appointed special master, and a supposed zero-tolerance policy, sexual harassment and retaliation continued. For example, court records (*U.S. v. David Roach*) show that a woman who filed sexual harassment charges in 1995 (while the trial was proceeding) was still subjected to unfair internal investigations that resulted in “no probable cause” findings followed by discipline for the woman complainant, including proposed discharge, for supposedly filing false reports and impugning an alleged harasser. We offer the above example as evidence that it was not simply the fact or publicity of the lawsuit that led to change, rather the consent decree policies made a difference.

Social science research using surveys on sexual harassment consistently shows that three key organizational characteristics associated with higher levels of self-reported experiences of harassment are employee belief that complaints will not be taken seriously, that harassers will not be punished, and that those who make complaints will suffer negative consequences (Hulin, Fitzgerald, and Drasgow 1996; Willness, Steel, and Lee 2007). We found ample evidence to conclude that during the life of the consent decree, the OSI was effective in changing at least two³³ previously problematic aspects of the organizational climate by demonstrating that complaints would, indeed, be treated seriously and by implementing meaningful sanctions against offenders. Given the scope and long history of the sexual harassment problem at the DCDOC, the effectiveness of the OSI, however short-lived, is impressive and shows the possibility for consent decrees to make a difference even in adverse circumstances.

What Made the Neal Consent Decree Effective?

We identify five characteristics of the sexual harassment policy and complaint procedure resulting from the Neal consent decree that seem to have made it effective and an improvement over what went before. These are (1) authority, (2) independence, (3) confidentially, (4) competence, and perhaps most important, (5) resources.

Authority: The consent decree gave the SI sufficient authority to make a difference. This included authority to act on the results of investigations; not just to make recommendations. It included “final authority” to impose penalties on harassers, including suspension without pay, and to reverse retaliatory discipline against employees who complained of harassment. Although the SI did not have final authority for recommendations of termination because that action was governed by the collective bargaining agreement and city personnel rules, imposing suspension without pay for up to six months was a substantial penalty.

Independence: The OSI position and structure created by the Neal consent decree explicitly mandated an individual (the SI) and a process that was legally and financially independent of the agency hierarchy for the three-year duration of the decree. This independence meant that the District of Columbia had to pay for the services and staff of the OSI, but the DCDOC Director did not control the funds and the SI did not report to the Director. Such independence was critical, we believe, in establishing the credibility of the SI and the com-

We argue that it was the effectiveness of the consent decree, and the work of the Special Inspector in particular, that made a difference, and not simply the fact, publicity, or monetary effect of the lawsuit.

³³ We lack sufficient evidence to assess whether the consent decree and the SI made a substantial difference in reducing employee fear of negative consequences for lodging a complaint.

Everyone we interviewed emphasized the importance of adequate resources to implement the policy and the competent investigation procedures.

plaint process. It also enabled the SI to do her/his work without interference. The SI reported monthly to the court.

Confidentiality: The consent decree mandated that the SI set up a 24-hour hotline for sexual harassment complaints, as noted above. The hotline was an outside number (outside the agency). This ensured both access and confidentiality for employees on all shifts and locations. It improved confidentiality for both the complainants and the alleged harassers. Supervisors, at any level, who received sexual harassment complaints, were to submit them directly to the OSI, and not pass them along the chain of command; this also improved confidentiality.

Competence: The consent decree and the SI established the use of outside investigators with legal training to investigate sexual harassment complaints. The investigators hired were lawyers. This was a much needed remedy for the inconsistent and inappropriate standards and processes used previously, as discussed above.

Resources: Everyone we interviewed emphasized the importance of adequate resources to implement the policy and the competent investigation procedures. In the period after the 1995 Neal jury verdict until the consent decree went into effect (2002), the DCDOC was under a court injunction against further acts of sexual harassment and retaliation stemming from incidents of retaliation against plaintiffs and witnesses during the trial. There were court appointed special masters charged with overseeing parts of the sexual harassment complaint process, especially retaliation against complainants and witnesses. The descriptions we heard were that although there were some efforts to clean up the complaint process during this period, there were no resources for doing it well. The consent decree provided the resources needed for the SI to work as many hours as needed in any week or month, hire expert antiharassment trainers, hire highly qualified investigators, activate the employee advisory committee, and otherwise effectively carry out the consent decree. Plaintiff attorneys and former special inspectors emphasized in interviews that resources mandated in the settlement were crucial to making this happen.

Right person for the job: An additional critical factor that is not easily mandated in a consent decree or policy was having a capable person in the SI position at a critical time. Without a highly qualified individual who used the powers provided to push for change, paid attention to detail, and developed collaborative relationships with relevant parties, the authority and resources might not have made a difference. The risk of concentrating so much responsibility in one individual, however, is that if the person appointed does not have the necessary integrity and commitment, the consent decree would not be effective.

Could It Be Replicated Elsewhere?

Given our analysis that the exceptionally strong role of the SI, on one hand is highly unusual for consent decrees, and on the other hand is key to the effectiveness of the Neal decree, what are the chances that it could be applied elsewhere? To answer, it is important to consider the conditions that made creating the strong SI necessary and possible. The fact that the DCDOC was a public agency may have made government (court-appointed) intervention more acceptable than it might be by a private sector employer. The DCDOC had a history of disregarding court orders related to retaliation against plaintiffs and witnesses in the *Neal* lawsuit, and already had several other court-ordered special masters supervising other aspects of the agency's work; most other cases lack that history as justification for court intervention. Finally, because there had been an earlier jury trial, the judge had al-

ready signaled, through his 1995 injunctive relief order, that if the case went to trial and the injunctive relief was up to the judge, he would impose the strong Special Inspector position proposed by plaintiffs. Because of these conditions it is perhaps unlikely that courts will grant such extensive authority to an SI as in the *Neal* consent decree. Yet the history that led to the *Neal* lawsuit also demonstrates the failure of conventional approaches, and the need for strong external intervention in an organization with pervasive and extensive sexual harassment. We will return to the broader lessons and examples of effective practices at the end of the chapter.

What Else Might Have Been Included?

Although the *Neal* decree is very innovative in some respects, in other ways it appears more conventional. The provisions specified in the decree are narrowly focused on sexual harassment. Other provisions, most notably supervisory accountability for equality of opportunity, are missing.

Supervisor Accountability: Many of the provisions in the Neal consent decree were proposed by the plaintiff attorneys after the initial jury verdict, and appeared in Judge Lamberth's "Memorandum Opinion on Classwide Injunctive Relief." Interestingly, one provision found in the above injunctive relief document but absent from the subsequent consent decree was the section on supervisor accountability. The 1995 opinion by Judge Lamberth stated: "Development of a performance evaluation system that ensures that all supervisors are accountable...must be a goal of the court. Otherwise, there cannot be systemic change to the Department's 'business as usual' approach that the court has witnessed." The Judge's 1995 motion went on to state: "The SI will be expected to develop, recommend and ensure implementation of revisions to the Department's method of evaluating job performance." This was not in the 1997 consent decree. The revised policy developed under the SI does state that supervisors and managers are responsible for implementing sexual harassment policies and procedures, and that managers and supervisors who fail to report sexual harassment or fail to take appropriate action to resolve sexual harassment complaints will be subject to disciplinary action (DCDOC 2004). The latter statement is weaker than what the judge and plaintiff's attorneys originally wanted and less than the *Mitsubishi*, *Dial*, and *PGFD* decrees (discussed later in this chapter) specify. However, another interpretation is that the *Neal* consent decree intentionally left details, such as supervisory accountability, to the SI rather than spelling out provisions in the consent decree. Yet as a result, to our knowledge, there was no attempt to systematically integrate responsibility for creating a work environment free of sexual harassment, and more broadly, free of discrimination, in the performance evaluations and promotion criteria for supervisors and managers.

Career Advancement Opportunities and Promotions: Sexual harassment remedies in *Neal* and most other consent decrees are not integrated with other equal opportunity measures, such as providing more opportunities for job training and mentoring or establishing objective criteria for job assignments and promotions. Yet, sexual harassment and retaliation often have negative career consequences. For example, women plaintiffs in the *Neal* lawsuit alleged that they were denied promotions or denied the training opportunities needed to qualify for promotions because they refused sexual advances and/or they filed complaints of sexual harassment. Supervisors could fire a probationary year employee without having to demonstrate objective reasons, a policy that facilitated quid pro quo harassment and retaliation with impunity. At higher levels in the career ladder, a single member of a promotion deter-

Without a highly qualified individual who used the powers provided to push for change, paid attention to detail, and developed collaborative relationships with relevant parties, the authority and resources might not have made a difference.

Yet, sexual harassment and retaliation often have negative career consequences. For example, women plaintiffs in the Neal lawsuit alleged that they were denied promotions or denied the training opportunities needed.

mination panel could “blackball” a candidate for promotion, another policy frequently abused by alleged harassers. The individual relief section of the consent decree addressed remedies for past suffering by plaintiffs who could prove injuries from retaliation. Yet the injunctive relief does not specify systems and procedures, or accountability measures, that would make such retaliation more difficult. Such provisions are included in some other decrees (see for example *Beck v. Boeing*, Chapter 5). We argue that as part of the general injunctive relief, a proactive, more equitable, less arbitrary system of job training and promotion for all employees might help protect against some of the quid pro quo harassment and retaliation.

The Union Role: Throughout our research on consent decrees we have tried to investigate what role, if any, unions have played or might play. The existence of a union is mentioned in less than 5 percent of the consent decrees. In a few cases, the lawsuit is brought against the union as well as the employer, as in *U.S. v. City of Pontiac and Local #376 Fire Fighters Union*. In other cases, the consent decree may mention that certain provisions apply or do not apply to unionized workers, that the consent decree does not invalidate provisions of the collective bargaining agreement, or that the union is a place to send or post notices related to the decree.

Neal is one of the few cases where we know a little more about the role of the union. The collective bargaining agreement included a clause explicitly protecting employees against sexual harassment before the *Neal* lawsuit. One of the named plaintiffs was a male shop steward, Tyrone Posey, who had been repeatedly and severely retaliated against for his persistent efforts, in his union role, to help women document and file sexual harassment complaints. At least one other named plaintiff was a shop steward, and another had been in the past, before being promoted to a nonunion rank. At the DCDOC, there were a few other shop stewards who had suffered retaliation for active efforts to help women resist sexual harassment. At the time the lawsuit was filed, the union held a rally in support of the workers filing the suit.

Between the filing of the lawsuit and the start of the jury trial, the DCDOC employees voted out the Teamsters and voted in the Fraternal Order of Police (FOP) as their collective bargaining agent. The plaintiffs who had been active in the union, were affiliated with the former Teamsters’ local and were never supported by the new FOP local leadership. According to one of the plaintiff attorneys, union support for the lawsuit was greater earlier on, but once it appeared that union members were being disciplined for harassment, and in some views, taking the heat for managers, union support waned. During the consent decree, union shop stewards were among the members of the employee advisory committee appointed by the SI. Ideally, we might want to see greater union involvement in implementing a sexual harassment consent decree as suggested, for example, by Crain and Matheny (1999) in a discussion of *Mitsubishi*. At the national level, several unions have suggested policies and programs for a more proactive union role against sexual harassment. The American Federation of State County and Municipal Employees (AFSCME)³⁴, for example, recommends passing local resolutions to go on record against sexual harassment; educating members through union sponsored speakers, workshops, and literature as well as jointly sponsoring training with the employer; conducting membership surveys to assess the extent of sexual harassment problems; and including training sexual harassment grievance procedures in shop steward training, among other actions.

³⁴ AFSCME has locals in departments of corrections in many jurisdictions.

What Happened after the Consent Decree Expired?

Several developments independent of the *Neal* consent decree or issues of sexual harassment may have affected what happened to sexual harassment policies and practices after the consent decree expired in 2005. An unrelated change in the agency directorship immediately coincided with the expiration of the consent decree. Several independent observers we interviewed expressed the opinion that the consent decree policies probably would have continued to a greater extent if the previous director had remained. During the period of the consent decree, substantial downsizing of the DCDOC workforce took place, from approximately 4,000 employees at the time the lawsuit was filed to about 900 by 2005. There was also an increased use of contract employees during the consent decree, unrelated to the decree. Although it is difficult to evaluate exactly how changes in the workforce affected sexual harassment policies or practices, these changes undoubtedly helped shape the post-consent decree employment context.

The information we found for what happened to the sexual harassment policy after the consent decree expired in 2005 is somewhat mixed, and we do not claim to have the full picture. The DCDOC claimed that all policies established by the consent decree or the Special Inspector remain and have been reconfirmed each year. On paper, the official policy remains unchanged—to the extent that the documents we found online and were provided by the Department were not updated to provide current names, contact information, etc. We know that the SI did not continue as proposed in the consent decree, although there is an occasional outside investigator contracted to investigate sexual harassment complaints. The employee advisory group remains on paper but we have the distinct impression that it is not active. We were unable to establish whether the ombudsperson was replaced when the individual who had served in that role retired (in 2008) after continuing for several years after the consent decree expired. The original external hotline number, although still published in some DCDOC documents, is not a working number. We were told that the outside investigator's contact number is publicized to employees; however, the policy document we were shown had only the nonfunctioning hotline number.

It is clear that resources were again a problem, especially immediately after the consent decree expired, although not the only problem. We heard credible accounts of outside investigations being requested by the DCDOC, but the investigator not being paid, and of sexual harassment training requested after the training provider was informed she would no longer be paid for any services. (Problems of contractors not getting paid by the DC government is not unique to sexual harassment training and investigation.) Pro bono sexual harassment trainers were so put off by the lack of seriousness with which their training was treated by DCDOC authorities that they refused to come back, according to one report. At some point, remaining funds not used by the OSI during the consent decree went into the District's budget, but, according to one source, eventually were available and used by the DCDOC for continuing sexual harassment training and investigation. The question of resources is not only about the availability of funds, but also the willingness to commit funds for high quality sexual harassment training and complaint investigation purposes.

Information on lawsuits related to sexual harassment complaints at the DCDOC filed after the consent decree expired show that at least some sexual harassment problems continue. We have found District Court rulings on lawsuits filed by a contract employee against the DCDOC for sexual harassment and retaliation by a regular employee, as well as a law-

During the consent decree, union shop stewards were among the members of the employee advisory committee appointed by the Special Inspector.

...it is not surprising that policy was less effective after the transition from a fully functional Office of Special Inspector, to an occasional outside investigator.

suit by a regular employee alleging sexual harassment (including rape) and retaliation, by a contractor³⁵ (e.g., *Brown v. Corrections Corporation of America* 2009 and *Simms v. District of Columbia* 2010), and charges of repeated physical and verbal sexual harassment of employees due to sexual orientation (Associated Press 2006).³⁶ The descriptions of the alleged incidents of sexual harassment and retaliation in the legal documents suggest that a climate conducive to such behaviors persists, although we cannot judge whether it is as bad or pervasive as before the consent decree. Although disheartening, it is not surprising that policy was less effective after the transition from a fully functional Office of Special Inspector, to an occasional outside investigator.

Comparisons with Other Sexual Harassment Consent Decrees

We will now briefly turn to two other large, pattern and practice, class action sexual harassment decrees, *EEOC v. Mitsubishi* (effective 1998) and *EEOC v. Dial* (effective 2003), which used a slightly different model for creating external authority to implement consent decrees. Next, we discuss another public safety agency with unionized, uniformed services employees, focusing on *U.S. v. Prince George's County Fire Department* (effective 2003), which did not use such a model.

Mitsubishi and Dial

EEOC v. Mitsubishi, filed in 1996 with several hundred plaintiffs, mainly auto assembly line workers, and settled with a consent decree effective 1998–2001, received much media attention as the largest sexual harassment “class action” lawsuit ever settled.³⁷ Many of the innovative features of the *Mitsubishi* consent decree were replicated in a subsequent settlement of *EEOC v. Dial*. Both the *Mitsubishi* and *Dial* consent decrees were negotiated by EEOC attorney John Hendrickson along with his colleagues in the EEOC Chicago District Office, and both had long-time women’s employment rights advocate Nancy Kreiter as the EEOC-nominated member of the three-person team of external monitors.³⁸

In *EEOC v. Dial*, women in an Illinois soap products manufacturing facility alleged that male coworkers and supervisors propositioned them for sex, groped them, called them derogatory names, circulated and posted pornography, and stalked them at the plant and after work. The women alleged that harassment occurred in the presence of supervisors who did nothing and sometimes engaged in the misconduct, and that *Dial* failed to investigate complaints of harassment or take meaningful action to stop it. *Dial* was filed in 1999 but the allegations of sexual harassment and retaliation cover incidents dating back to 1988. The case was settled and consent decree became effective in 2003. *Dial* involved fewer plaintiffs (90 at *Dial* compared with 300 at *Mitsubishi*), and the *Dial* plant had fewer employees overall than did

³⁵ The DCDOC sexual harassment policy clearly states that it applies to contractors and volunteers as well as employees. However, under Title VII, an employer is not liable for the sexual harassment of contract workers who do not meet the legal definition of employee.

³⁶ Same sex sexual harassment is a violation of Title VII under the U.S. Supreme Court decision in *Oncale* (1998); sexual orientation discrimination is covered by the District of Columbia Human Rights Act, but not Title VII. Claims of harassment due to sexual orientation were not included in the *Neal* settlement.

³⁷ Although, EEOC lawsuits do not go through the legal process of class certification required of private cases, in response to challenges by *Mitsubishi*, a federal district court decided that the EEOC could bring a pattern and practice class action lawsuit against *Mitsubishi*; both the EEOC and the media refer to *Mitsubishi* as a “class action” lawsuit.

³⁸ Because our consent decree database covers decrees that became effective 2000–2008, the *Mitsubishi* decree of 1998 is not officially part of the database; but because it is widely considered such a landmark settlement, and was a model for the subsequent *Dial* decree, we examine the *Mitsubishi* and *Dial* decrees together. Also see Murphy (2005) for other discussion of the *Mitsubishi* consent decree.

the Mitsubishi facility. Both plants were unionized; the union was a defendant along with the employer in *Mitsubishi* but not in *Dial*. Both primarily involved women in blue collar jobs.

External Monitors

The *Mitsubishi* and *Dial* consent decrees stand out among the decrees we examined (other than *Neal*) for the explicit authority given the external monitor. In *Mitsubishi* and *Dial* the wording of the consent decree is identical in requiring a team of three monitors, who are supposed to reach consensus and make recommendations on sexual harassment policies, procedures, and training. The employer then has 21 days to implement the recommendations or file an appeal with the court. Thus, the authority of the monitors is very strong, with a presumption that recommendations will be enacted absent court intervention.

The *Dial* consent decree gave an employee who filed a sexual harassment complaint investigated by Dial the option to appeal Dial's decision to the complaint monitor (one of the external monitors). Information on how to contact the monitor to appeal was provided in writing to the complainant. If the monitor disagreed with Dial's remedy, the monitor could try to resolve the disagreement with Dial, and if that failed, bring it to the EEOC for final adjudication. The *Mitsubishi* consent decree stated that the complaint monitor will oversee the investigation of sexual harassment complaints. The *Dial* consent decree was less explicit in exactly how much the complaint monitor oversees versus periodically reviews complaints. Both *Mitsubishi* and *Dial* gave the monitors oversight with leverage in the complaint and remedy process, although in a less direct way than did the *Neal* consent decree. We conclude that the *Mitsubishi* and *Dial* consent decrees offer an effective model of specified authority for the external monitors whereby the employer is required to implement the monitors' recommendations within a limited time or appeal them to the court.

The Mitsubishi and Dial consent decrees stand out among the decrees we examined (other than Neal) for the explicit authority given the external monitor.

New Complaint and Investigation Procedures

Both the *Mitsubishi* and *Dial* consent decrees called for "convenient, confidential, and reliable mechanisms" for reporting sexual harassment. Specifically, they required a 24-hour hotline, operated by an outside contractor, to receive discrimination complaints, including but not limited to sexual harassment complaints. The *Dial* monitors' reports found that the hotline was used only once for a sexual harassment complaint in the 2.5 years of the consent decree, although it was used for other discrimination complaints (Galland, Jones and Kreiter 2004, 2005, 2005a). As noted, the *Neal* consent decree also required a hotline, as did several other consent decrees in our database. The *Mitsubishi* and *Dial* consent decrees required the widespread posting of the names and phone numbers of two human resource department officials who could be contacted with sexual harassment complaints. Employees were not limited to lodging complaints with these two individuals or with the HR department.

According to the monitors' reports, Dial received only five sexual harassment complaints during the consent decree, whereas, a monitor who served in both cases indicated that there were hundreds of complaints during the *Mitsubishi* consent decree. As discussed earlier (Chapter 2), a low number of complaints, as at Dial, may indicate that efforts to stop sexual harassment are working; a higher volume of complaints, as at Mitsubishi, may indicate that the new complaint and investigation policy is effective.

Unlike many consent decrees that simply mandate a revised sexual harassment complaint and investigation procedure without specifying any parameters, the *Mitsubishi* and *Dial* consent decrees specify details including a best-efforts requirement of three weeks to complete

Disciplinary outcomes were key to success in all three organizations (Mitsubishi, Dial, and DCDOC), according to the respective monitors.

investigation of complaints of sexual harassment and retaliation, and an additional seven days to prepare findings and propose remedial action. These consent decrees also provide for timely communication of the finding and remedy to all parties, and provide the complainant the right to appeal the remedy if she/he feels it is inadequate. Unlike the *Neal* consent decree, the *Mitsubishi* and *Dial* consent decrees did not require direct involvement by the monitors in conducting or supervising the investigation of sexual harassment and retaliation complaints or in the determination of the complaint outcome and any penalties. The chief monitor, in both the *Dial* and *Mitsubishi* decrees, was required to serve as “complaint monitor” and review the investigations and outcomes decided by the company.

Disciplinary outcomes were key to success in all three organizations (Mitsubishi, Dial, and DCDOC), according to the respective monitors. The *Dial* monitors’ report for the first year reported only one sexual harassment complaint (Galland, Jones and Kreiter 2004). The employer’s investigation and finding resulted in the termination of the harasser. The monitors commented that the termination sent a strong message.

Zero Tolerance

Both the *Dial* and *Mitsubishi* consent decrees stipulated a no or zero tolerance sexual harassment policy. In the case of *Dial*, a no tolerance policy was already in place when the consent decree went into effect. It may have been one of the changes instituted after the lawsuit was filed but before the settlement. As suggested in several studies (Pryor and Fitzgerald 2003; Stockdale et al. 2004), a zero tolerance policy does not guarantee that no further harassment occurs. A strict zero tolerance policy might have unintended consequences. The *Dial* monitors’ reports noted that employee surveys found that women indicated a preference for not reporting less serious harassment; the monitors questioned whether the no tolerance policy made women less likely to report what they perceived as minor harassment (Galland, Jones and Kreiter 2004, 2005, 2005a). The monitors expressed concern that a routine pattern of reluctance to report minor incidents could lead to tolerance for forms of sexual harassment behavior. We note that a zero tolerance policy did not appear to stop complaints at Mitsubishi. Most sexual harassment consent decrees in our database (91.1 percent), including the *Neal* consent decree, did not stipulate zero tolerance. Although available information suggests that consent decree implementation was effective in radically changing sexual harassment behavior in the Mitsubishi and *Dial* plants, we have no evidence that including zero-tolerance language was or was not critical.

A strict zero tolerance sexual harassment policy might have unintended consequences.

Supervisory Accountability

One key provision emphasized in the *Mitsubishi* and *Dial* consent decrees was supervisory accountability. The *Mitsubishi* and *Dial* consent decrees clearly stated that training for supervisors and managers makes clear that harassment and retaliation by supervisors and managers will result in disciplinary action and that tolerating sexual harassment among subordinates is not acceptable. Upon recommendation by the monitors, *Dial* revised its performance evaluation form for supervisors to include the handling of EEO issues. The *Mitsubishi* and *Dial* monitor whom we interviewed stressed the importance of reaching the frontline supervisors:

But in terms of the implementation and making sure that there is a workplace free from discrimination, I don’t think there are any more important players than first line supervisors, because that’s who the main interaction is between—employees

and management. It's that first level of supervision. And if that first level of supervision is either—is part of the problem, or not taking responsibility for the problem, or not understanding the problem, not implementing, not communicating there is not a chance of turning anything around. And so how do you get that buy-in? Well, you need really good training and you need to develop the right tools that help those supervisors, but then you have to hold them accountable.

The Union Role

Most or all of the employees suing for sexual harassment at Dial, Mitsubishi, and the DCDOC were unionized. Earlier, we discussed the role of the union at the DCDOC. We have no information on the role of the union at Dial. The media and labor scholars paid some attention to the union's relationship to the *Mitsubishi* lawsuit (Crain and Matheny 1999). Although the union was not originally named as a defendant, the United Auto Workers (UAW) joined the lawsuit voluntarily at the consent decree stage so that it could be part of the consent decree resolution. This is an interesting model for other unions to consider.

The union contract at Mitsubishi did not have an equal opportunity clause or a statement prohibiting sexual harassment, whereas the DCDOC contract did. Prior to the lawsuit the union at Mitsubishi had proposed an EEO clause but was resisted by management. There were reports that union women experiencing sexual harassment tried to file grievances with shop stewards but were not successful (Crain and Matheny 1999). Overall, individual shop stewards at the DCDOC, especially named plaintiff Tyrone Posey, were heroic in efforts to stop sexual harassment before the lawsuit, and individuals were active on the advisory committee during the consent decree, but institutionally the union had no role (Deitch and Fechner 1996). In contrast, at Mitsubishi, there seems to have been much less individual assistance to women who were harassed, but there was ultimately an official union role in the lawsuit and consent decree once the union joined the lawsuit as a party to the consent decree.

In criticism of conventional wisdom that sexual harassment among union members presents a conflict of legal obligation for unions under the duty of fair representation (DFR), Crain and Matheny (1999) suggest that unions need to see sexual harassment as a threat to job security for women members and that stopping sexual harassment by members against members before management or courts step in is in the interests of all union members. They conclude that when unions don't step in as advocates for women with sexual harassment complaints, women's organizations, the EEOC, and plaintiff attorneys become women's bargaining agent, supplanting the union.

Firefighters Fighting Sexual Harassment at the PGFD

Along with *Neal*, there are four other sexual harassment lawsuit consent decrees involving uniformed services employees and/or public safety agencies in our database. Three involve police departments and one a fire department. All four were filed as single-plaintiff individual cases and were litigated by the Department of Justice. We selected one case, *U.S. v. Prince George's County Fire Department* (PGFD), to explore in somewhat greater detail.

An examination of *U.S. v. PGFD* contributes to a broader understanding of consent decrees through (a) comparisons with the DCDOC, (b) promising remedies with potential to “push the envelope” further than most consent decrees, and (c) problems of implementation that underscore the importance of monitoring—in this case, by the DOJ. Like *Neal*, PGFD involved sexual harassment and retaliation complaints against a unionized, uniformed serv-

Although the union was not originally named as a defendant, the United Auto Workers (UAW) joined the lawsuit voluntarily at the consent decree stage so that it could be part of the consent decree resolution.

ice, public safety agency with a unionized workforce and a paramilitary organizational structure located in the Washington, DC, metropolitan area. The *PGFD* decree covered “civilian” (nonuniformed) as well as “career” (uniformed) employees as did *Neal*.

PGFD Consent Decree Provisions

Although it was a single-plaintiff lawsuit, the *PGFD* consent decree included more detailed remedies than most other single-plaintiff consent decrees, in part because a revised policy was included as an appendix. Promising features included strong statements on supervisor accountability, specific disciplinary measures, protecting complainants against unwanted transfers, a strong prohibition against pornography, and an attempt to tackle vexing problems (of sexual harassment and discipline) related to the dual volunteer and career force.⁴⁰ If implemented as promised, these provisions might provide effective tools for combating sexual harassment and might be models for other consent decrees and other fire departments.

As examples of the detailed and promising provisions, the consent decree required the *PGFD* to re-write all supervisor and manager job descriptions to specify EEO responsibilities, and required awareness of and commitment to EEO policy as a factor in the performance evaluation and promotion of supervisors and managers. Supervisors have specified responsibilities for immediately responding to and taking action on allegations of sexual harassment, posting information, etc. Another strong provision was that the policy appended to the *PGFD* decree included more entailed disciplinary measures than we found in most other consent decrees, whereby an employee found to have violated sexual harassment or other EEO policy could not be eligible for a promotion to a higher rank for a six-month period for a minor violation, or a one-year period for a serious violation, and could not be eligible for any type of performance award for a year.

The *PGFD* decree, signed in 2003, clearly states that the display of pornography in any form “in those areas of all fire stations where employees would, in the normal course of their employment or tours of duty spend time” is forbidden. However, this broad ban on pornography was not included in the May 2004 revision of the previous, 1999, General Order 1-6 on EEO policy (Prince George’s County 1999, 2004) leaving us to wonder whether and how it was publicized and enforced.

Compared to the Special Inspector in *Neal*, the *PGFD* did not have any single position with adequate authority to make the required changes. The mandated EEO officer was supposed to be neutral in receiving and investigating complaints but was an employee with other obligations and departmental relationships that could compromise that neutrality. It is not clear what qualifications and training were required for the EEO officer. The EEO officer could only recommend findings and discipline to the fire chief, but did not make final rulings. The consent decree basically continued the EEO officer position that already existed in the 1999 version of General Order 1-6, but had not been effective in responding to the complaints in the lawsuit. Although no independent monitor was appointed, the DOJ attorneys played an active role in monitoring during the decree.

Like Neal, PGFD involved sexual harassment and retaliation complaints against a unionized, uniformed service, public safety agency with a unionized workforce and a paramilitary organizational structure .

⁴⁰ Unlike other consent decrees we examined, the *PGFD* had the problem of crafting policy to stop harassment of employees by volunteers as well as paid (professional) firefighters. Among fire departments, however, this is not unusual. Nationally, there were an estimated 6,000 mixed (volunteer and professional) fire departments as of 2005, constituting 20 percent of all U.S. fire departments; another 73 percent were all volunteer and only 7 percent all professional (Long 2005).

Implementation Problems

The DOJ found numerous problems with the lack of implementation of the consent decree by the PGFD. The fire department failed to meet deadlines for adopting the new policy enumerated in the decree (*U.S. v. PGFD* Joint Motion 2004; 2005). The policy adaptations proposed by the fire department were challenged by the DOJ in correspondence from the DOJ to county officials.⁴¹ Exercising its rights under the consent decree, and showing concern with progress in implementing the decree, the DOJ requested interviews with 13 employee and volunteer members of the PGFD as well as several senior staff toward the end of the second year of the decree. As a result of the interviews, the DOJ communicated to the PGFD that it had **failed** to implement the following consent decree requirements: (1) implementing the required Volunteer Service Directive, (2) clarifying the responsibilities of volunteer fire chiefs, (3) ensuring that sexual harassment and retaliation complaints were reported to those qualified to receive them and that informal complaints did not subvert the policy agreed to in the decree, (4) notifying fire stations of the names and contact information of EEO officers, (5) facilitating contact with the EEO officers, and (6) visibly and clearly posting EEO policies in all fire stations. In addition, the report noted problems in the job allocations for the EEO officers and investigators, in the rise of sexual harassment allegations, and in the need for continuing training for employees and supervisors (DOJ 2005).

Throughout the duration of the decree, deadlines were missed. The county and the DOJ jointly had to file an extension for time to complete the mandated sexual harassment training. The DOJ was responsible for the training. The extension request states that the firm contracted by the DOJ to conduct training was not able to complete the training until after the two-year decree was scheduled to expire. Only the initial training required by the consent decree was completed during the two-year period. There was also a joint motion to extend the decree for an additional 90 days because the policies affecting volunteer members had not been implemented.

Sexual harassment of employee firefighters by volunteer firefighters remained an ongoing problem during the decree, and was never resolved, according to the DOJ (DOJ 2005, 2006). Complaints of serious sexual harassment incidents increased during the decree. On the one hand, it is not unusual for complaints to increase after a new grievance procedure is introduced (Willness, Steel, and Lee 2007); the increase might reflect increased confidence in the new procedure as well as continuing problems of sexual harassment. On the other hand, in this case, the new complaints that occurred during the consent decree included a rape and a near rape, and reports that some career female firefighters were refusing to work shifts in volunteer fire stations, especially in the absence of career (nonvolunteer) supervisors.

At the conclusion of the consent decree, the final letter from the DOJ to the PGFD outlined continuing problems, noted concerns regarding the volunteer personnel and leadership, discussed a failure to discipline a high-ranking officer despite an investigation that sustained a sexual harassment complaint, and commented on several training policies that adversely and disproportionately affect women. These problems notwithstanding, the DOJ conceded

Sexual harassment of employee firefighters by volunteer firefighters remained an ongoing problem during the decree, and was never resolved.

⁴¹ Our analysis of problems in the implementation of the PGFD consent decree was informed by and greatly benefited from research on the legal documents conducted for IWPR by Mary Kuntz; copies of the various cited communication from the Department of Justice to Prince George's County officials are on file with IWPR.

The existence of a zero tolerance sexual harassment policy before the lawsuit did not stop the harassment and retaliation.

that the PGFD had complied with provisions of the consent decree so that no further extension would be sought; indicated that they (the DOJ) were substantially satisfied that the career supervisory and nonsupervisory personnel had significantly changed attitudes and practice; praised the work of specific EEO officers, concluding that the workplace had improved for female career personnel (DOJ 2006).

Although not mentioned anywhere in the consent decree, the subsequent May 2004 revised policy document declares a zero tolerance sexual harassment policy, as did the previous 1999 document. The existence of a zero tolerance policy before the lawsuit did not stop the harassment and retaliation behavior, and it obviously did not protect the PGFD against the lawsuit, all of which reinforces our skepticism, raised earlier, about the usefulness of zero tolerance terminology in sexual harassment policies.

Overall, 74.4 percent of the sexual harassment consent decrees in the IWPR/WAGE Database require a new or revised policy; 55.4 percent of sexual harassment decrees require a new or revised investigation and complaint procedure. Typically consent decrees require that the employer revise the sexual harassment policy and procedure within so many days (often 30, 60, or 90) and submit the revised policy for EEOC (or DOJ) approval. Our examination of the *PGFD* case reveals that stating such requirements in the decree does not guarantee that the prescribed policies will be adopted, let alone fully implemented even when the new policy is spelled out in more detail than most when the consent decree is signed. Unlike the *Neal*, *Mitsubishi* and *Dial* decrees, in *PGFD* there was no dedicated independent authority to provide detailed oversight of implementation; although DOJ lawyers clearly paid detailed attention to the case, they did not have access to the same resources, in time or funds, to ensure change happened. We do not know whether there would have been a more successful challenge to sexual harassment in *PGFD* with such resources, but the experience in *Neal* suggests that that might have been the case.

Conclusion and Recommendations

We conclude this chapter with a brief consideration of the larger context of sexual harassment in the workplace. Sexual harassment is costly to employers in multiple ways. Most obvious, perhaps, is the risk of liability and accompanying legal fees, damage awards, and negative publicity resulting from litigation. Even without litigation, research (e.g., Lengnick-Hall 1995) shows that sexual harassment also costs organizations in the form of negative effects on employee recruitment, retention, productivity, absenteeism, and increased sick leave costs. On the individual level, experiencing sexual harassment leads affected employees to lowered work satisfaction, less commitment to the organization, lower productivity, and psychological withdrawal from their work and the organization (Willness, Steel, and Lee 2007). Numerous studies document the negative effect of sexual harassment on affected employees, including job effects as noted above, as well as psychological effects such as anxiety, depression, and in more serious cases, PTSD, and physical health consequences (Willness, Steel, and Lee 2007). Thus, potential lawsuits are not the only cost of sexual harassment and not the only reason for employers to find ways to stop it.

Thinking about the larger context of workplace sexual harassment discussed above, there are several common lessons we gleaned from the different consent decree experiences examined in this chapter. First, it is important to have someone such as the Special Inspector in *Neal*, or a team such as in the three monitors in *Mitsubishi* and *Dial*, with sufficient responsibility and authority to enforce implementation of the consent decree and the policy

reforms it mandates. Critical features for effectiveness were that the external monitors⁴² were independent of the employer and, as court appointed monitors, accountable to the court. Adequate resources for both independent monitoring and policy implementation were key according to various parties we interviewed. In our analysis, the consent decrees in the EEOC-litigated *Mitsubishi* and *Dial* sexual harassment lawsuits were of comparable innovation and effectiveness as the privately litigated *Neal* decree.

One of the best hopes for long-term change is that when the consent decree expires, an individual within the organization with sufficient authority and responsibility will continue enforcement of the EEO policies that worked during the decree. Kaley, Dobbin, and Kelly (2006) show that having someone in a high-level position responsible and accountable for effective implementation of EEO policies more generally is a critical variable in making a difference. Murphy (2005) explains that the serious commitment to change by the CEO was a key factor to successful implementation and continuation of consent decree policies at Mitsubishi. The *Neal* consent decree tried to build in continuation of the Office of Special Inspector after the decree ended, although that expectation was not realized, perhaps partly due to a change in directorship. Lack of any individual or position with sufficient power and commitment appeared to be one of the obstacles to consent decree implementation at the PGFD.

A second broad lesson is that it is not sufficient simply to have a sexual harassment grievance reporting and investigation procedure, even a court-ordered one as at the DCDOC prior to the *Neal* consent decree, if, as the social science research literature (e.g., Hulin, Fitzgerald, and Drasgow 1996) suggests, employees do not have confidence that complaints are taken seriously, that offenders will be punished, and that complainants won't suffer adverse career consequences. At both *Dial* and the DCDOC, the external monitors initiated anonymous employee surveys to assess employees' perceptions and feelings about the newly instituted sexual harassment policies and grievance procedures. The surveys were useful according to the monitors interviewed. The surveys were not mandated by the consent decree at *Dial* or the DCDOC; however we found a few consent decrees that did require employee surveys. We understand from interviews with plaintiff and defense attorneys that employers often resist mandated employee surveys in a consent decree for fear of future liability. Our recommendation is that independent monitors and EEO consultants appointed in conjunction with consent decrees seriously consider employee surveys, and that employers genuinely concerned with stopping sexual harassment also consider such surveys. Because most sexual harassment is never reported, a lack or low level of complaints is not an adequate indicator of whether existing policies are working or whether sexual harassment behavior is occurring. Employers need to know whether employees are aware of existing policies, trust them, believe they are fair and effective, or fear retaliation—before these problems are documented in a lawsuit.

A third broad lesson concerns ingredients of effective sexual harassment policies that should be considered not only in consent decrees but by all employers, including those without a court order. Multiple avenues for reporting sexual harassment complaints; timely, confidential responses to complaints; and investigations by competent, trained, and objective investigators supported by adequate resources are elements of effective practices evident

Sexual harassment is costly to employers in multiple ways, in the form of negative effects on employee recruitment, retention, productivity, absenteeism, and increased sick leave costs.

⁴² Although, as noted in Chapter 1, external monitors are somewhat more common in sexual harassment (15.6 percent) than other consent decrees (7.2 percent), they are used in only a minority of cases.

during the consent decrees at the DCDOC, as well as Dial and Mitsubishi. The quotes provided earlier from a monitor and a judge make strong arguments for holding supervisors accountable for following EEO policies and maintaining a nonhostile environment and for including these issues in the performance evaluation of supervisors and managers, a policy specifically required in only a minority of sexual harassment or other consent decrees.⁴³

⁴³ In the IWPR/WAGE Database, supervisory accountability is specified somewhat more frequently in sexual harassment decrees (26.9 percent) than other decrees (14.9 percent) but most do not include it.



Chapter 4

Sexual Harassment against Women Immigrant Workers and *EEOC v. DeCoster**

Introduction

I have never had another case like it. I have had sexual harassment cases and they are all bad. I've had racial harassment cases; they're all bad. I've had, obviously, many kinds of discrimination cases; discrimination is always bad. But the level and the degree of discrimination in the *DeCoster* case exceeded anything that I had been personally involved in, because women were getting raped in the case. And we've had other rape cases, and all rapes are bad. But the rape cases we've had before involved one woman; this involved multiple women. (EEOC regional attorney)

On August 15, 2001, the Iowa Coalition Against Domestic Violence (ICADV) filed a charge with the EEOC on behalf of Mexican women farm workers, accusing the DeCoster egg processing plant in Iowa (Iowa Ag) of maintaining a hostile work environment in violation of Title VII of the 1964 Civil Rights Act (as amended). The charges included the rape of women workers by supervisors, sexual harassment, discriminatory treatment of Mexican workers on the basis of national origin, and actual and threatened retaliation, including the threat of bodily harm. The case was settled 14 months later with a consent decree specifying a 38 month duration. According to the EEOC regional attorney who litigated the case, it was the worst case he had ever experienced during his long career at the EEOC.

The injunctive relief package in *EEOC v. DeCoster* follows the basic template used by many EEOC harassment decrees: it mandates distributing the company's sexual harassment statement and an official notice of the EEOC's investigation of DeCoster to all employees with their paycheck, as well as to all new employees hired during the effective period of the consent decree; it mandates that all documents are produced in both English and Spanish; and it mandates annual EEO training for all supervisors during the course of the decree, provided by an outside training provider mutually agreed upon by the EEOC and the company. As in many other decrees, it mandates that the company allocate responsibil-

The charges included the rape of women workers by supervisors, sexual harassment, discriminatory treatment of Mexican workers on the basis of national origin, and actual and threatened retaliation, including the threat of bodily harm.

* This chapter was prepared by Ariane Hegewisch, Study Director at the Institute for Women's Policy Research.

This decree, negotiated by the EEOC on behalf of undocumented immigrant women, demonstrates that the prohibition against employment discrimination in Title VII applies to all workers, irrespective of their immigration status.

ity for record keeping and reporting to a named employee (although less typical is an explicit mandate that the record keeping function should be “compensated at the appropriate rate and time”); that the company provide to the EEOC a record of all complaints of sexual or national origin discrimination or retaliation made by employees or job applicants; provide copies of the company’s revised antiharassment and antiretaliation policies; and provide a written record annually of compliance with the training requirement.

We selected this case for study less because of specific provisions in the consent decree than because of the way in which it addresses the claim of the undocumented immigrant women workers who were its subject. The complainants, whose case was argued by the EEOC, were undocumented women immigrants, who worked at the DeCoster egg-packing plant, where they had been subjected to sexual harassment up to and including rape. The complainants’ names were kept confidential throughout the case. As part of the settlement, women were provided with U visas, which allowed them to remain, and work, in the United States. U visas are specifically designed to provide residency and work permits to non-U.S. citizens who were the subject of violent crime and assist or are willing to assist U.S. authorities with the investigation of such crimes. The women in the DeCoster case were among the first people in the United States to receive such visas.⁴⁵

The decree provides damages of \$1.3 million to 11 individual women; sets up a class fund for \$125,000 for additional victims who might not have come forward during the investigation; and awards \$100,000 to ICADV, in recognition of the crucial work it performed for immigrant women. The amount of settlement dollars puts the DeCoster decree in the top 5 percent of all EEOC decrees in the IWPR/WAGE Database in terms of monetary relief. Most striking is the award to the ICADV; while it is not uncommon for private class action settlements to provide some funds for nonprofit organizations instrumental in bringing the case, such an award is rare among EEOC cases. The award is in recognition of the crucial role played by ICADV in bringing the suit and facilitating its resolution. Perhaps most crucially, this decree, negotiated by the EEOC on behalf of undocumented immigrant women, demonstrates that the prohibition against employment discrimination in Title VII applies to all workers, irrespective of residency status.

This chapter begins with a more detailed discussion of the circumstances leading to the *DeCoster* decree, its negotiation, and implementation. The chapter then highlights other EEOC consent decrees that address sexual harassment of immigrant women workers. The analysis in this chapter is based on both primary and secondary sources, including a review of legal documents, newspaper and scholarly articles, and interviews with lawyers and other professionals involved in negotiating these cases.

From Immigration Advice to Discrimination Charge

Honest to God, everything was pretty much a bluff. I knew that they would never take the stand. That was that. So how do you start negotiating, knowing that your client will never go to trial? (Plaintiff attorney)

⁴⁵ The regulations for the provision of U visas were introduced as part of the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA). Congress had passed the basic principles for a U visa a few years earlier but the INS had not issued regulations to specify the circumstances under which the U visa could be issued.

The immigrant population in Iowa more than doubled during the 1990s, and rose by another 23 percent between 2000 and 2008, although compared to other states, the share of foreign-born residents remains low among the total population of Iowa (Migration Policy Institute 2009). The sudden influx of foreign workers was a result of official recruitment campaigns the state undertook in response to the rapidly falling share of young and working-aged people in its population. Migrants and immigrants from Mexico and Central America were recruited particularly to work in low-wage agricultural jobs in Iowa. Although some of these workers succeeded in obtaining official work permits, the inflow of undocumented workers also increased in response to the demand for workers willing to work at low wages. Pearson and Sheehan (2007) cite estimates that in 2006 a substantial part of the immigrant population—between 55,000–85,000 people—was undocumented workers. These workers are part of an estimated 11 million undocumented workers in the United States; four million of them are estimated to be women (Hoefler, Rytina, and Baker 2010). Government estimates suggests that at least 60 percent of agricultural workers in the United States are undocumented immigrants, as well as one fifth or more of workers in meat processing plants and restaurant kitchens (see Bauer and Ramirez 2010).

The hero of this case may well be a bilingual attorney working at the Iowa Coalition Against Domestic Violence (ICADV) who filed the charge with the EEOC on behalf of the Mexican and Guatemalan immigrant women. Since 1996 ICADV had a dedicated legal clinic, called MUNA, devoted to addressing the needs of immigrant workers in the state. MUNA regularly organized legal clinics in rural Iowa for migrant and immigrant workers and focused in particular on problems of domestic abuse for immigrant women. MUNA went in to communities to provide advice on immigration, domestic violence, and employment issues. The MUNA attorney had noticed the same group of women returning to her clinics repeatedly, asking for help regularizing their status as undocumented workers. At the third visit in a period of four of five months, the attorney reported asking the women outright: “You guys keep coming to me. I have a file open for you. I have told you that there is no remedy (regarding your immigration status). What else is going on?” At that point, she was in a private session with one woman, whose precise and chilling words she says she still remembers: “I want help maybe because I’m tired of having sex at work.” The lawyer’s first thought was that the woman might be a sex worker, and she asked her whether she was working as a prostitute. But the woman replied, “No, I work at Iowa Egg Farms. I don’t want to have sex there anymore.”

Iowa Egg Farms is located in Clarion, in rural Iowa. It is owned by Austin Jack DeCoster and managed by his son Peter DeCoster. DeCoster is the fifth largest egg producer in the United States with egg-and-chicken and hog processing plants in several U.S. states. Jack and Peter DeCoster most recently were in the public eye when they had to appear before a Congressional panel⁴⁶ because eggs from their Iowa plants were found to be the source of outbreaks of salmonella, poisoning at least 1,600 people throughout the United States (Layton 2010). The company’s problems with the law date back to long before the latest salmonella outbreak. During the last 30 years, the company has been the subject of a long string of prosecutions for everything from pollution, health, and safety violations; wage and hour

These workers are part of an estimated 11 million undocumented workers in the United States; four million of them are estimated to be women.

⁴⁶ The hearing of the Committee on Energy and Commerce and its Subcommittee on Oversight and Investigations was held on September 22, 2010.

During the last 30 years, the company has been the subject of a long string of prosecutions for everything from pollution, health, and safety violations; wage and hour violations; and, repeatedly, for employing undocumented workers.

violations; and, repeatedly, for employing undocumented workers. Charges include, in 1988, fines for 184 labor standard violations at a DeCoster egg-and-chicken farm in Maine; in 1992, keeping as many as 100 workers from Texas, Mexico, and Central America in conditions akin to slavery; and in 1996, a fine of \$3.6 million against the company for continuing health and safety violations, including using child labor, failure to pay overtime to workers working 80 to 100 hours, and failure to comply with previous orders to install safety guards. Then-Secretary of Labor Robert Reich called the working conditions “as dangerous and oppressive as any sweatshop we have seen” (MacGillis 2010; Rimer 1996). At the time the EEOC brought charges against the company, it was also under investigation for employing undocumented workers, leading to major fines and prison sentences.

The company was using labor subcontractors to hire workers. According to attorneys involved in the case, managers at the DeCoster egg plant were mostly Iowa-born white Americans; the supervisors were mainly legal immigrants from Mexico and Guatemala. The supervisors accused in this case of actually committing the rapes and harassment were also subject to legal proceedings for illegal trafficking of undocumented workers.

Filing suit against DeCoster in this matter presented considerable challenges. Altogether about 16 or 17 women came forward in the group set up by MUNA to support the women (11 of these were officially included in the settlement). The women reported repeated rapes and sexual harassment. Yet from the outset the women made it clear to the MUNA attorney that they would not publicly testify against the employer. She knew that without such testimony it was unlikely that any judge or jury would find in their favor.

The women wanted help on immigration, and they wanted the rapes to stop. That’s all they wanted....The direction from my clients was they would never talk about [the rapes and harassment] publicly. They said: We will never testify against the perpetrators. You know they know where we live, they recruited us from our little towns and little villages, so obviously, we’re not going to testify against them, we’re not going to tell anybody anything bad about them, because they can retaliate. We are concerned about our family members. (Plaintiff attorney)

Apart from this fear of retaliation, the women were also extremely concerned about maintaining their employment. Some of the women were sole wage earners in their families. There were few alternative employment opportunities for them, and not only because of their lack of formal work permits. Most of the women had very limited English, and for some of them Spanish was their second language (Mayan being their first). Coming to the United States typically was a hazardous and dangerous process, and they were unwilling to do anything that might jeopardize the work that they found, even though it came with terrible conditions.⁴⁷ In the view of an EEOC lawyer involved with the case, the fact that the women came forward at all under these circumstances is testimony to the severity of their situation:

I think that it was an expression of the level of desperation of these women that they got to a point where they decided that they had to come forward regardless

⁴⁷ See also Bauer and Ramirez 2010 for recent research and interviews with undocumented women workers in food production and agriculture in the United States.

of the consequences because they couldn't keep living out the hellish existence that they had been forced to live in. (EEOC attorney)

Most women continued to work at DeCoster during the preparation of the case despite the horrendous experiences they had had at the plant because their options were severely limited. Fear for their livelihood was not the only reason for the women's unwillingness to openly testify against their employer. At least some of the married women were also afraid that their husbands would not believe their innocence and might react with violence.

MUNA faced another type of problem when deciding how to proceed with the case. For MUNA to bring a private class action case would require substantial resources, which MUNA and the IACDV did not have. Further, the MUNA attorney, who had extensive experience at the legal clinic on sexual and domestic violence, thought that she did not have the necessary depth of employment discrimination expertise to litigate this case. She therefore contacted William Tamayo, an EEOC lawyer working in San Francisco, who in 1999 had negotiated a \$1.85 million settlement in a case involving the systematic sexual harassment of migrant and immigrant women working for Tanimura & Antler, a large California lettuce and vegetable grower (see below). At Tamayo's suggestion, the case was taken to the EEOC's Milwaukee office, with regional responsibility for Iowa, and filed.

As a first step after the official filing of discrimination charges, the EEOC applied for a temporary restraining order (TRO) against DeCoster to stop the sexual harassment. In apparent response to the TRO, the two supervisors who had been the worst perpetrators of the sexual violence against the women workers fled the country. The court's order also had made clear that DeCoster was forbidden from retaliating against the women, including reporting them to the immigration authorities. The next step for those seeking a way to protect the victims of this workplace violence was finding a way of addressing the undocumented status of the women, which they did through U visas, discussed below.

The women were extremely concerned about maintaining their employment. Some of the women were sole wage earners in their families.

The Broader Context of Employment Rights of Undocumented Workers

Outreach sessions conducted by the EEOC San Francisco Office have repeatedly identified sexual harassment as a major problem for female workers in California's large agricultural sector and resulted in prioritizing such cases for litigation (O'Hara 2000; Tamayo 2009). The women who reported harassment and discrimination were not able to challenge employers on their own because they feared deportation and retaliation; as well, they often had limited English language and literary levels. As O'Hara explains, as the government agency charged with enforcing Title VII, and able to litigate in its own name, the EEOC can pursue litigation against the employers where the women cannot.

The EEOC (2002) states unequivocally that it is "the settled principle that undocumented workers are covered by the federal employment discrimination statutes and that it is as illegal for employers to discriminate against them as it is to discriminate against individuals authorized to work." The statement further emphasizes that the EEOC will neither inquire about the legal status of workers in an investigation, nor make the work status a criteria when considering the merits of a case. In 2002, in the wake of the U.S. Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB* had initially led some management lawyers to suggest that undocumented workers were no longer entitled to any remedies in discrimination law cases (Tamayo 2009). The *Hoffman Plastic* case involved an undocumented Mexican worker who was fired by the company for union organizing; the National

The EEOC will neither inquire about the legal status of workers in an investigation, nor make the work status a criteria when considering the merits of a case.

Labor Relations Board (NLRB) found in his favor that the termination had violated the National Labor Relations Act (NLRA) and ordered back pay and other relief. The decision was appealed because the worker had fraudulently used a friend's birth certificate as proof for his legal status. The Supreme Court, in a 5-4 ruling, ruled that because of this fraudulent use of documents to establish employment eligibility, the worker was not entitled to any back pay. Several legal decisions since have clarified that this ruling does not apply to remedies awarded in relation to Title VII discrimination litigation (see Tamayo 2009: 266–68).

Also relevant for the position of undocumented workers involved in EEOC charges is the case of *Holiday Inn Express*, a hotel located in downtown Minneapolis (Horstman 2000). In this case, instead of just firing workers who were trying to organize union representation at their workplace, the company had called the immigration authorities to alert them to the fact that the workers were undocumented. The EEOC and the NLRB successfully intervened, managing to stop deportation of the workers who had already been put on a plane to Mexico, charging national origin discrimination, retaliation, and violations of the NLRA (National Immigration Law Center 2000). *Holiday Inn Express* established that denouncing undocumented workers to the INS in response to discrimination complaints was illegal retaliation. As part of the case, most of the workers concerned were given temporary work visas. The EEOC lawyer litigating the case was Dennis McBride, who was later responsible for litigating the *DeCoster* case.

Negotiating the EEOC v. DeCoster Consent Decree

Regularizing the Immigration Status: U Visas for Victims of Violence

Coincidentally, but fortunately, soon after MUNA filed a charge with the EEOC on behalf of the immigrant women, the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) became law. The Act included a provision for visas for victims of sexual violence who were assisting the authorities with prosecuting the perpetrator of such violence (so-called “U visas”). The MUNA attorney thought that this provision in the new law might make it possible to get legal immigration status for the immigrant women. She remained unsure how the authorities would interpret the statutory requirement that beneficiaries of the provision show willingness to assist the authorities, and whether the women's reluctance to publicly testify would defeat relying on the new law. However, the EEOC attorney involved in the case, who knew of the new statutory provision for U visas because of the EEOC Regional Office's involvement in the *Holiday Inn Express* hotel case, also thought the new provisions in the VTVPA might be used to help the immigrant women. Even with the attorneys agreeing, however, finding a solution required extensive cooperation with various government agencies:

At different times in the case, I consulted and worked with the sheriff of Wright County, Iowa, the district attorney of Wright County, the FBI, the U.S. Attorney's office for the Northern District of Iowa, the Mexican Consulate in Omaha, the—what was then the Omaha district office of the Immigration and Naturalization Service. And I'm sure I'm leaving out various other governmental entities. (EEOC attorney)

Four women received U visas as a result of the case.

Close cooperation between the ICADV and the EEOC was crucial in giving the women the confidence to persist with the case. The EEOC had three female bilingual investigators who helped build the case. Meetings were held in the basement of a local church. Through MUNA, the women also had access to individual counseling and support to help them cope with their traumatic situation. The lawyers involved in the case stressed the importance of respecting the wishes of the women, and of not imposing decisions on them in the case.

We never did anything that the women didn't want to do. We didn't make them feel like they were not in control. We worked through the people that they trusted and that were working already with them, through the church, through the nurses. We worked through a strong network. (EEOC attorney)

According to a lawyer knowledgeable about the case, it was no secret to DeCoster that the women were unlikely to openly testify in court, and that for this reason, it would be difficult for the case to succeed in front of a jury. Nevertheless, the severity of the accusations significantly strengthened the hand of the EEOC and made it possible for them to negotiate strong individual and injunctive relief.

Initially, DeCoster opposed any settlement. Negotiations were highly acrimonious. Later DeCoster appointed Bonnie Campbell as its consultant for the case and the company changed strategy. Campbell had been Iowa's first female Attorney General. She was a well know Democrat and, in 1995, had been appointed by President Clinton to be the first head of the U.S. Department of Justice's newly created Violence Against Women office. Her appointment as an advisor to Jack DeCoster came as something of a shock to those engaged in negotiating the case on the plaintiff side. It is not clear what caused this change in strategy; the simultaneous prosecution of the company for employing undocumented workers might have played a role. Apart from advising the company on its strategy and being part of their negotiating team, Campbell also initiated training sessions on sexual harassment and discrimination law for managers of the company, even before the case was settled (a strategy frequently used by defense lawyers in an attempt to convince the court that the company has taken steps to address the alleged discriminatory practices).

Like other decrees studied, the decree also provides for creating an internal position officially responsible for monitoring compliance with the terms of the decree. Campbell was hired to fulfill that role. In her memory, she held that role only for a brief period, and was not aware of who took over after her. The company did not have an HR person.

Sexual Harassment and EEO Training

The consent decree, as is common in sexual harassment decrees, explicitly mandates providing harassment and EEO training annually while the decree is in force. The EEOC attorney stressed the importance of training in this case, as a way of reinforcing to the workers that the owners of the company were ultimately responsible for anything committed by their supervisors.

Of course, you know, Jack DeCoster and the other managers were not the perpetrators. From the women's perspective, the bad guys were the supervisors, the ones that raped. And I think, they couldn't quite comprehend that the DeCoster family had an obligation to ensure their safety at that level. They felt this, being raped,

The EEOC had three female bilingual investigators who helped build the case.

The EEOC attorney stressed the importance of training in this case, as a way of reinforcing to the workers that the owners of the company were ultimately responsible for anything committed by their supervisors.

was criminal activity. Some of the rapes happened in the plant, some of the rapes outside of the plant. So they were confused about who truly was ultimately responsible. (EEOC attorney)

For the same reason the EEOC insisted on preparing sexual harassment policies, and on distributing these to all current and new workers.

I really didn't consider any of those items negotiable because there was such a strong need for training. This is a company that didn't have a single clue about how to treat its workers, as far as I could tell. So we had to have the Spanish-language policies; we had to have injunctive relief; we had to have training; we had to have all those things in there. (EEOC attorney)

The Effect of the Consent Decree

As we mentioned at the outset, the decree allocates \$100,000 to the ICADV. The funding was awarded in part to acknowledge the role of ICADV in bringing the case but also to support its work more generally. According to a plaintiffs' lawyer, it was understood at the time of the settlement that ICADV would use part of these funds to conduct training and advice sessions for the female workers at the plant, yet this is not explicitly specified in the decree. The company, however, subsequently refused to provide access to ICADV and no training and advice sessions were held by ICADV at the plant. The company did agree, however, to allow a local rape crisis center to provide two training sessions at the plant, albeit of a more limited nature than those originally planned.

The decree was in force between 2002 and 2005; during that time and in the years immediately following, MUNA was not aware of any new complaints related to sexual harassment or violence in the plant. However, by 2009, MUNA was actively involved in supporting new cases.

Getting Out the Message

Getting the message out to other women who might be in a similar situation and also to employers as a reminder of their legal obligations was important to both the EEOC and the ICADV. As soon as the case was officially filed, press attention was high. The MUNA lawyer reported being bombarded by press inquiries. Several journalists came to town wanting more details. Responding to press queries, but more importantly ensuring that the women's privacy was respected and that none of the names were leaked took a substantial amount of time and resources for both MUNA and the EEOC. Both organizations found it sometimes frustrating not to be able to use the case to draw attention more widely to the severe sexual harassment experienced by the undocumented workers at DeCoster.

The case nevertheless received considerable coverage in local papers, although primarily in English language publications and less so from Spanish language press or other media sources, which might have been used by immigrant workers. ICADV reported that after the case settled there was a marked increase in demand for outreach materials and information from both employers and churches and other community organizations working with immigrants. Yet the EEOC did not receive any other similar charges in the region, which the EEOC attorney took to be an indication of a level of fear and distrust in the official government institutions, rather than an indication of the absence of harassment.

Other EEOC Harassment Cases on Behalf of Women Immigrant Workers

The case of *EEOC v. DeCoster* is one of a growing number of cases litigated by the EEOC that addresses the intersection of sexual harassment and national origin discrimination. Seventeen of the 67 national origin cases in the IWPR/WAGE Database formally charge both sexual harassment and national origin discrimination (11.3 percent of all sexual harassment cases). Such cases involve a range of employers and workers but primarily concern workers in low wage jobs, many of them immigrants. In 1999, the EEOC made it one of its national priorities to target charges by low wage immigrant workers in recognition of their particular vulnerability to discrimination (Tamayo 2009). In the remainder of this chapter we discuss two of these cases that, like DeCoster, address sexual harassment of immigrant women working in agriculture and food processing, but that develop a more comprehensive set of injunctive relief than did *DeCoster*.

EEOC v. Tanimura & Antle: Negotiating Publicity as Part of Injunctive Relief

EEOC v. Tanimura & Antle, brought by the EEOC San Francisco office, was the first large class action case that systematically challenged sexual harassment in the agricultural industry. The case was brought by Bianca Alfaro, a Mexican woman and single mother, who was forced to have sex as a condition for being hired during two different seasons. When she protested against further harassment, she was fired. Her boyfriend, who objected to her treatment, was also fired (Tamayo 2009). The EEOC negotiated a settlement of \$1.85 million for them and other similarly situated workers. Following this success, the EEOC brought several other cases resulting in large settlements that address charges of sex discrimination in combination with national origin (see also Tamayo 2009).

Tanimura & Antle is a large international corporation with \$500 million in sales of lettuce and other vegetables annually. The consent decree, effective for three years, applied to its operations throughout California and Arizona. The decree included a detailed and extensive relief package. Like the *DeCoster* consent decree, it mandated extensive sexual harassment training, to be provided annually to all employees at each of the main locations at the beginning of the harvesting season. It also mandated for the training sessions to be introduced either in person or via video by a personal statement from one of the owners of the company, encouraging women who experienced harassment to come forward and to “affirm that such harassment will no longer be tolerated” (*EEOC v. Tanimura & Antle*, Section 19). In addition it contained a requirement for developing and distributing new policies on sexual harassment. In particular, it included an explicit statement detailing the responsibility of supervisors for preventing sexual harassment, to be distributed to supervisors, in both English and Spanish.

The decree also names two of the hiring agents and supervisors who committed harassment and explicitly prohibits their rehiring during the term of the decree (*EEOC v. Tanimura & Antle*, Sections 30–31). This practice is also followed by other similar decrees negotiated by the San Francisco office of the EEOC. Temporary debarment from employment may appear a rather mild response to rape. It is worth noting that the EEOC does not have the power to prosecute criminal offenses and that, according to Tamayo, cooperation from the police in addressing such cases has generally been limited. Thus, rape and sexual violence in the workplace, as a term or condition of employment, becomes effectively an issue of sexual harassment, a form of discrimination under Title VII, enforceable by the EEOC.

When she protested against further harassment, she was fired. Her boyfriend, who objected to her treatment, was also fired.

The role of the press and media in getting out the message about their rights to immigrant communities was already touched on in our discussion of *DeCoster*. The *Tanimura & Antle* decree incorporated responsibility for communicating the settlement to the immigrant community directly into the injunctive relief. The settlement included detailed lists of the publications where notices about the settlement needed to be published, when they should be published (to coincide with the hiring season), and included a schedule of radio broadcasts in each of the locations, specified down to the time of day when such broadcasts needed to be booked to increase the likelihood that a broadcast would reach the intended audiences (Exhibit G of the consent decree). An attorney involved in the case reported that they found radio to be the most effective medium for reaching workers in the agricultural industry; many workers might not be able to read and, with long working hours, do not have time to watch TV (O'Hara 2000). Although the announcements formally invited workers who might have been subject to sexual harassment or retaliation to come forward because of their potential entitlement to funds from the class fund, they also clearly stated that sexual harassment is illegal, and that its prevention is the employer's responsibility.

EEOC v. Rivera Vineyard: Tackling the Intersection between Sexual Harassment and Hiring Discrimination

EEOC v. Rivera Vineyards highlights how occupational segregation increases the exposure to potential sexual harassment for women in agricultural jobs. It was brought on behalf of female Hispanic workers, working in a vineyard. The case was filed in 2003 by the Los Angeles office of the EEOC and charged sexual harassment, segregating and excluding women from certain jobs, and retaliation. It was settled in 2005 for \$1,050,000. The complaints in the case include

unwelcome touching of female employees' breasts, stomachs, buttocks, forcing women to engage in unwelcome sexual conduct, soliciting sexual favors in exchange for favorable terms and conditions of employment, unwelcome derogatory comments about women, and unequal opportunities of employment for women. (*EEOC v. Rivera Vineyards, Inc.* Amended Complaint Sec.12)

The charges include rape of women workers by Hispanic male supervisors (EEOC 2005a). Unlike many sexual harassment cases, the complaints also address excluding women from work in specific jobs reserved for men; like many sexual harassment cases, the charges include retaliation of not hiring the women back after they reported harassment.

The decree mandates employing an EEO consultant. It specifies in considerable detail requirements for new policies, grievance procedures, sexual harassment/EEO training, and developing new performance evaluation procedures. The decree (Section G) further stipulates requirements to hire, recruit, and retain women into the positions from which they were previously excluded: pruning, vine tying, girdling irrigation and swamping, all traditionally higher paying positions. The decree includes explicit hiring goals (specified for different types of jobs) and mandates using print and radio media to advertise jobs, announcing recruitment campaigns to named advocacy groups working with female migrant workers, publicly posting jobs, and distributing notices of job openings to all current employees with their pay checks. The decree includes another important provision that directly addresses the need to create such job opportunities for women while protecting them from exposure to

EEOC v. Rivera Vineyards
highlights how occupational segregation increases the exposure to potential sexual harassment.

sexual harassment. Many of these jobs would require some initial training; given that women were previously excluded from these jobs, such training would likely be provided by male workers, and might expose women to potential harassment. The decree specified designating a job related training area, and that “any job related training shall be conducted in designated areas and/or in the presence of a female supervisor” (Section F).

Hiring discrimination was also a key charge addressed in another case involving a vineyard in California. In this case, *EEOC v. Kovacevich 5 Farms*, the fact that the owner of the vineyard, during a four-year period, and despite posting more than 300 seasonal farm worker positions annually, had refused to hire a single woman (EEOC 2008). Although this case does not appear to be about sexual harassment, indirectly sexual harassment was a key issue in deciding to litigate the case: it was brought by women who had male relatives who worked at the vineyard, and who wanted to be able to work for the same employer as their husbands and brothers worked, as the most effective way of ensuring that they would not be sexually harassed. The hiring discrimination meant that they had to find work elsewhere, with greater potential danger of sexual harassment by male supervisors (Tamayo 2009: 265).

Conclusions

Some of the highest awards achieved in consent decrees negotiated by the EEOC in recent years concern the sexual harassment of women immigrants working in agriculture and food processing. The decrees provide examples of the often horrendous employment situations for immigrant women, including extensive sexual harassment and rapes, in addition to low wages, long working hours, unsafe working conditions and limited options to move to another job. Women who are undocumented are least likely to be able to challenge these conditions on their own. The consent decrees reviewed in this chapter demonstrate the potential of the EEOC and Title VII employment discrimination litigation for protecting the most vulnerable workers irrespective of their immigration status, and indeed, for regularizing their immigration status.

The *DeCoster* decree and other EEOC decrees addressing sexual harassment of immigrant and migrant women workers in agribusiness highlight the crucial role of community groups and advice centers as intermediaries between the women and the official government authorities. Without the work of the ICADV, it is highly unlikely that it would ever have been possible to get redress for the women working at DeCoster. Although the case in Iowa has remained unique, in California the EEOC’s targeted outreach and cooperation with groups working with migrant and immigrant workers has resulted in a number of high-level litigations and settlements.

The decrees reviewed in this chapter push the envelope also in the way they frame individual and injunctive relief. The *DeCoster* decree, although the injunctive relief in other ways is standard, recognizes the crucial role of outside advice centers in providing employment advice and assistance to populations the EEOC is unlikely to reach. The *Tanimura & Antle* decree goes one step further and includes an explicit mandate for paid advertising and broadcasting to ensure that workers find out about their rights, and the employers’ obligations to prevent sexual harassment. Although press work is an essential part of the EEOC’s work in educating employers about their obligations under Title VII (and the potential consequences if they run afoul of Title VII), it is rare for decrees to make the employer responsible for getting out the message through the media. The *Rivera* and *Kovacevich 5 Farms*

The DeCoster decree recognizes the crucial role of outside advice centers in providing employment advice and assistance to populations the EEOC is unlikely to reach.

decrees are noteworthy because they address sexual harassment comprehensively, as part of broader employment discrimination in hiring and job segregation.

Finally, a cautionary note: The EEOC, with the help of nonprofit community organizations, has been able to address some cases of egregious sexual violence at work. Notable in these cases has been the absence of criminal prosecutions, or indeed, of active involvement of the police. The serious crime of rape needs to be addressed as a criminal justice matter as well as an extreme instance of sexual harassment in the workplace.



Chapter 5

Pay Discrimination through the Lens of Consent Decrees: *Beck v. Boeing**

Introduction

On February 25, 2000, 37 women filed a class action lawsuit against the Boeing Company, in Seattle, Washington.⁴⁹ They argued that they had “been denied, based on their gender, desirable job assignments, promotional opportunities, management positions, training, equal pay, overtime, tenure, comparable retention ratings, bonuses and other benefits and conditions of employment.”⁵⁰ More than four years later, on May 14, 2004, the case settled for \$72.5 million, for a class of 29,000 past and present employees.⁵¹ The *Beck v. Boeing* case illustrates a number of factors that contribute to the gender wage gap: formally neutral wage setting policies that over time lead to a growing gender wage gap; unchecked assumptions about women as primary caregivers that limit women’s earnings opportunities; promotion and hiring decisions made by individual managers, rather than by a team of people using a structured process, that are likely to lead to gender bias and reduced opportunities for women. This case was selected because, through the consent decree, the company developed a range of policies and procedures for making pay and promotion decisions more transparent and equitable. The decree provides examples of how to design comprehensive and quantifiable accountability measures.

This chapter begins with a brief general discussion of the gender wage gap. It then provides a few examples from cases in the Database to illustrate of the barriers to pay equality identified in the social science research. The chapter then turns to a detailed discussion of the charges in *Beck v Boeing*, the solutions developed to address discrimination through the consent decree, and the evidence that the decree made a difference.

...unchecked assumptions about women as primary caregivers limit women’s earnings opportunities.

* This chapter was prepared by Ariane Hegewisch, Study Director at IWPR.

⁴⁹ The claim alleged violations of the Equal Pay Act of 1963, 29 U.S.C.A. §206(d), and of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(f)(3) as well as state law claims under the Washington Law Against Discrimination, RCW 49.60. During the same period, the company was also subject to charges of race discrimination and of national origin discrimination; these cases were not successful.

⁵⁰ Second Amended Class Action Complaint. They proceeded under both disparate impact and disparate treatment theories. Plaintiff’s Trial Brief 12.

⁵¹ The original claim covered a class of 42,000 women but the court limited the application of the claim to 29,000 past or present female employees in Boeing’s Puget Sound facilities.

The discrimination revealed in lawsuits suggests that we are still far from a situation where women can freely choose higher paying male occupations.

Discrimination and the Gender Wage Gap

There recently has been considerable discussion of the reasons for the persistent gender wage gap. On average, women working full-time earn only 77 cents for each dollar earned by men per year, and progress in closing the gender wage gap has slowed down markedly compared to earlier decades (IWPR 2010b). The gender wage gap is even larger for African-American and Hispanic women: African-American women in 2009 earned only 62 percent, and Hispanic women only 53 percent of median annual earnings for white men (IWPR 2010b). There is no single factor accounting for the gender wage gap. Pay discrimination is prohibited under Title VII of the 1964 Civil Rights Act, which has a broad prohibition of discrimination regarding compensation, and under the Equal Pay Act of 1963 (EPA).⁵² The EPA makes it illegal for employers to pay a person less than someone of the opposite sex for “equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions” (EPA Section 3d(1)). Such outright discrimination of women being paid less for doing the same work as men, however, is only one factor accounting for the gender wage gap because often men and women do not do the same work; occupational gender segregation remains a persistent feature of the U.S. labor market (Hegewisch et al. 2010). Blau and Kahn (2007) estimate that occupational gender segregation and the fact that women are much more likely than men to work in the lower paid service industries than men together account for almost half of the gender wage gap. Where women and men work in the same occupation, lower promotion rates to senior management are another factor contributing to women’s lower median earnings, as discussed in Chapter 2. When examining the pay distribution in organizations, the questions therefore are not only whether women and men are receiving the same pay for the same work, but also whether women have the same opportunity as men to work in the highest paid jobs and whether they have equal opportunities to advance up the ranks.

Finding evidence of differences in promotion rates or in the distribution of jobs between women and men in itself is not evidence of discrimination; indeed, some commentators argue that discrimination no longer is a significant factor in accounting for the wage gap, and that instead differences in male and female earnings are due to women’s choices: to become mothers and to work in lower paid jobs that are mainly done by women (Furchtgott 2010; O’Neil 2010). The employment discrimination experiences of women revealed in lawsuits resulting in consent decrees suggest that we are still far from a situation where women can freely choose higher paying male occupations without fear of harassment or barriers to hiring, and with the same access to promotions, compensation, and overtime earnings as their male colleagues.

Take for example, *McLaughlin v. SPD Technologies, Inc.* In 1988 Jean McLaughlin was hired as a ‘purchasing secretary’ by SPD Technologies, a company producing electric power delivery systems. During the next ten years she was repeatedly promoted, first to assistant buyer/secretary, then to buyer, and then to senior buyer. Despite her impressive progress, she was consistently paid less than her male colleagues. When she complained to one supervisor, he told her she should not expect to make as much as her male colleagues. When she complained to another, she was told that she did not need a pay increase because her salary

⁵² Typically gender pay discrimination charges are brought both under Title VII and the EPA; see also Chapter 1.

was supplementary to her husband's. When she was recommended for a promotion to purchasing manager by another supervisor, she was told by another manager that she needed to obtain formal certification for the position even though none of the male purchasing managers had such a qualification; even then she persevered and obtained the qualification. The company instead appointed a less qualified man, without the certification the company had demanded from her, to the position. Additionally she was asked to train newly hired male senior buyers, who, after she had trained them, were then paid more than her despite her considerably longer tenure and experience. She finally filed an EEOC complaint in 2005, after years of frustration and injustice.

Another example is *EEOC v. Emergency Medicine Associates*. The sole female doctor working in an emergency services department of a hospital was persistently harassed and derided, including in front of patients, and was terminated when her employer discovered she was pregnant (after the results of her confidential pregnancy test had been publicized to her colleagues). The adverse working environment created by her colleagues and superiors included comments such as “not needing more shifts because her husband was a doctor.” Pay discrimination is not included in the formal charges in this decree, but it illustrates, as does the case above, that women still are confronted by notions that they are secondary earners and that their earnings are less important to the welfare of their families than those of men. It also shows the lengths some men are willing to go to in order to exclude women.

Or take for instance *Hnot v. Willis Group*, a class action case from the insurance industry addressing discrimination in compensation and promotions. On its face, female employees had made impressive gains into managerial and officer positions. In practice, however, even though their job titles and job descriptions suggested similar levels of responsibility, women managers and officers were paid significantly less than male employees at similar corporate officer levels. The spate of employment discrimination law cases in the financial services highlight other discriminatory compensation practices that keep the earnings of women professionals below those of men; they include bias in the allocation of promising business leads, reduced access to training required for promotion, and lower allocation of funds for business development and are discussed in greater detail in Chapter 6.

The case of *EEOC v. Woodward Governor*, a multinational manufacturing company, illustrates how race and sex discrimination combine to disadvantage women of color.⁵³ Kimberly Buchanan, an African-American woman, was hired as a communications specialist, and was classified at the lowest pay, Level I; she was the only African American in the company's corporate division worldwide. The company hired another employee, who was not African American, and classified him as Level II even though their levels of experience, skill, and job responsibilities were commensurate. When she complained about having to perform work above her job classification without receiving a promotion or pay increase, her employer retaliated against her, culminating in selecting her for termination even though other non-African-American employees, with less tenure, skills, or experience, were not. Likewise, Brenda Riley, an African-American woman who worked in assembly, was paid less than white colleagues with less or similar levels of skills, experience, and tenure, and, unlike her white colleagues, had to perform work above her job classification without compensation.

These, and other cases in the Database, show that the discriminatory patterns addressed

Even though their job titles and job descriptions suggested similar levels of responsibility, women managers and officers were paid significantly less than male employees at similar corporate officer levels.

⁵³ *EEOC v. Woodward Governor* was started as a private race discrimination class action case and was then joined with a sex and race discrimination charge made by the EEOC.

in *Beck v. Boeing* are not unique. The *Beck v. Boeing* consent decree illustrates what may be done to eliminate such discriminatory patterns. The analysis of *Beck v. Boeing* is based on both primary and secondary sources, including a review of legal documents, newspaper and scholarly articles, and interviews with plaintiff and defendant lawyers.⁵⁴

Beck v. Boeing

The *Beck v. Boeing* class action lawsuit was preceded by a compliance review of Boeing by the Office of Federal Contract Compliance Programs (OFCCP). Companies that sell goods and services to the federal government are held to slightly higher standards in terms of nondiscriminatory employment practices than are other companies. Like all companies, federal contractors are prohibited from discriminating on the basis of race, color, religion, sex, or national origin; additionally, if they employ 50 or more employees and have sales worth \$50,000 or more to the government per year, they have to comply with Executive Order 11246 and prepare written affirmative action programs to “identify and analyze potential problems in the participation and utilization of women and minorities in the contractor’s workforce” for each of their establishments (U.S. Department of Labor 2010).

The OFCCP compliance review, which includes an examination of payroll data, began at Boeing’s Philadelphia plant in 1995 and found *prima facie* evidence of “systemic discrimination concerning the compensation of females and minorities”; the investigation was then extended to other Boeing plants, including those in the Puget Sound Area of Washington, which later became the subject of the class action suit (Holmes and France 2004). Boeing strongly contested these charges, and particularly contested the methodology for measuring wage differentials, which involved a detailed regression analysis of salary data to establish statistically significant pay differences between men and women in different groups, but finally in 1997 settled with the OFCCP for \$4.5 million and an agreement from the OFCCP that no further site visits would be made for at least four years. The agreement put Boeing under the obligation to conduct an annual analysis of its wage and salary dispersion based on the methodology negotiated in the settlement.

As a result of the OFCCP investigation, Boeing initiated some adjustments to its salary structure. Yet these adjustments were far less than the actual gender earnings gap, according to Boeing’s own analysis. While the OFCCP investigation was going on, the company had conducted an internal “Salary Diversity Analysis,” which in 1997 concluded that “females and minorities are paid less” than white men. According to internal Boeing documents from October 1999 (which came to light during the discovery process for the class action suit), the company estimated that it would have to spend \$30 million per year to partially address gender-pay disparities. “The company allocated only \$10 million, and, thus, the disparities continued” (Cascio 2007:149).

The class action case was built on the fact that as part of the OFCCP settlement, Boeing had agreed (albeit as a compromise) to a method for analyzing wage disparities; this agreement included how to group jobs and workers for wage comparisons, and which factors to use to account for differences in salaries. Even though class counsel might not have used exactly this method had they started their investigation from scratch, this officially agreed regression analysis was very helpful in demonstrating gender disparities:

The OFCCP compliance review, which includes an examination of payroll data, found prima facie evidence of “systemic discrimination concerning the compensation of females and minorities.”

⁵⁴ We were unsuccessful in our efforts to interview the union representing hourly workers involved in the suit.

Our [the plaintiffs'] statisticians looked at it [the method for analyzing wages negotiated with the OFCCP] and said that's good, it's a good analysis. And lo and behold, it shows these massive disparities, over and over again. (Plaintiff attorney)

The case was fought acrimoniously, not least because the company refused to release the internal salary analysis it had conducted during the OFCCP negotiations. The company argued that the data were collected to inform the company's legal strategy, and thus were protected as part of client-attorney privilege. This argument was finally dismissed by the judge as it became clear that the data were used not simply to inform legal decisions but were used directly to inform business decisions and strategies. The court's decision to enforce releasing the data was important less for showing the disparities, and more for showing that the company had known about them and chosen to ignore them—affecting the financial size of the settlement more than the programmatic relief. The case finally settled a month after the appeal against the class certification had failed, and less than 48 hours before jury trial was to commence.

The settlement agreement included only the monetary relief; the injunctive relief part was set out only as an Agreement in Principle. It took another three months of intense negotiations to shape this into the actual detailed programmatic relief in the consent decree. The consent decree was effective for three years, until May 2007.

Although the negotiation process had been highly intense and at times acrimonious, once the consent decree was accepted, the implementation and monitoring proceeded in a cooperative manner without major friction. In the view of a plaintiff attorney who was part of the team negotiating the injunctive relief and was responsible for monitoring the implementation, this was not least due to the attitude of Boeing's lawyers:

My impression of [the law firm representing Boeing] is, you know, they like having clients who are model employers. They'll fight very hard, when there's a loophole, like getting a Class decertified that might allow them to escape being held accountable. But, once that doesn't work, ...they will figure out a way to make the changes needed so that they will be workable for the employer...and will satisfy the Plaintiffs...really, that was one thing that I think helped. And this is not always the case with opposing counsel...I really respect the lawyers at [the law firm] that they know what they're doing. And that they do spend chunks of their lives, actually, trying to advise employers on how to set up good systems, and not just on how to get away with having a bad system. (Plaintiff attorney)

Discriminatory Pay Practices at Boeing

The class action suit alleged patterns and practices that systematically discriminated against women in compensation and promotions. Together these provide almost a textbook case of how wage, salary, and promotion practices can lead to a substantial gender wage gap. The lawsuit addressed pay discrimination for two sub-classes of employees: nonexecutive female salaried employees (excluding engineers who had concluded a separate agreement with Boeing through their union, the Society of Professional Engineering Employees in Aerospace, SPEEA), and hourly paid female employees covered by collective bargaining agreements with the International Association of Machinists (IAM) and the United Auto Workers (UAW) unions. The female salaried employees claimed disparities with respect to

The complaint addressed both formal policies, which indirectly tended to disadvantage women, and the lack of formal policies, which gave too much leeway to individual male managers.

By focusing on percentage raises rather than salary relativities in relation to the tasks performed, absolute wage differentials between men and women grew over time.

compensation and promotion. The claim of the hourly paid female production workers concerned disparities in the allocation of overtime and weekend work, as well as disparities in promotions.⁵⁵ The complaint addressed both formal policies, which indirectly tended to disadvantage women, and the lack of formal policies, which gave too much leeway to individual male managers.

The discriminatory effect of Boeing's formal salary practices was summarized in a deposition by Boeing's then director of employee relations (Cascio 2007):

- *Entry salaries:* New employees were hired at their pre-existing salary plus a hiring bonus; the hiring bonus was given as a percentage, not as an absolute increase. This method tended to both import pre-existing gender differentials from the general labor market into the company, and, by authorizing a hiring bonus as a percentage of the pre-Boeing salary, rather than as an absolute cash bonus, further exacerbated such differences in earnings. In 1997 the salary difference between entry level male and female managers was \$3,741.
- *No dedicated fund for promotion-related salary increases:* Managers had to draw on the same fixed fund to give a salary increase for an internal promotion and to pay for merit increases; merit increases additionally were capped in percentage terms. This arrangement created a disincentive for managers to bring lower paid female managers up to higher male wage levels after promotions.⁵⁶
- *Capped salary increases:* One-off salary increases were capped at 15 percent, making it impossible to rectify major disparities between lower paid women and higher paid men.
- *Salary increases as percent of current salary:* Allocations for salary increases were given in percentage terms, with the same cap across all "salary review groups"; thus if a group mainly consisted of higher paid males, the same percentage increase translated into a higher allocation than it would for a group consisting mainly of lower paid female staff, further exacerbating the absolute pay gap.
- *Red-circling:* When someone was downgraded because of company restructuring, the salary was protected; if a man was moved into a predominantly female, lower paid area, this would increase male-female salary differences.
- *Protecting salaries based on previous work history without regard to pay relativities:* Boeing had a policy to protect the wage levels of workers transferring between jobs. Hourly paid jobs (typically done by men) often were higher paying than administrative salaried jobs (typically done by women). Transferring a male hourly paid worker into a salaried administrative position could thus potentially increase pay disparities.

In summary, by focusing on percentage raises rather than salary relativities in relation to the tasks performed, absolute wage differentials between men and women grew over time. Although the salary system might have been coherent within broad groups, it was not so across different groups, so that people doing substantially the same jobs at supervisory or managerial levels would receive significantly different compensation. According to class counsel:

⁵⁵ On October 19, 2001, class certification was granted on a more narrow basis than the plaintiffs had argued for, limited to past and present (1997 onwards) female employees in Boeing facilities in the Puget Sound region of Washington State; the original claim also covered employees at plants in other locations (*Beck v. Boeing* Consent Decree, Section II).

⁵⁶ Some employers now have dedicated funds for "equity adjustments," in addition to merit and promotion funds.

Boeing had this argument that, if you are a first level manager and you supervise a group of hourly union employees you can't have people doing that job who are paid less than the hourly union employees, and so you have first-line managers at a certain level. And if you are a first line manager...and supervise salaried non-exempt workers who are doing accounts payable, and they are a much lower paid segment of the workforce, ...you would have to be paid more than they are, but less than other first-level managers. (Plaintiff attorney)

Given that most hourly staff were male, and most salaried non-exempt staff were female, female first-line managers who typically supervised females were paid significantly less than male first-line managers who typically supervised males, even though their tasks, skills and responsibilities arguably were substantially the same.

In addition to these systematic policies and procedures that guided company-wide salary decisions, the expert witnesses acting for the plaintiffs also suggested that Boeing's corporate practices permitted managers and supervisors "excess subjectivity" in job decisions without adequate corporate oversight.⁵⁷ Boeing strongly contested the claims that promotion decisions may have reflected gender bias and were based on anything but objective performance, yet the statistical evidence demonstrated that women, both hourly paid and salaried, were significantly less likely to be promoted than men.

Discrimination in Access to Overtime

Of particular importance to the hourly women workers was lack of access to overtime. Gender bias in overtime allocation is often based on implicit assumptions about gender roles: that women, particularly once they have become mothers, as primary family care givers, will not be available to work additional hours, whereas men, particularly once they have become fathers, are assumed to want additional earning opportunities no matter what, irrespective of their actual preferences (Biernat, Crosby, and Williams 2004). Women claimed that they were routinely excluded from overtime opportunities, both from overtime opportunities on a daily basis (which, given the short notice periods, might have been harder to accept for women with childcare responsibilities) and for additional weekend work (which often was requested with more notice, and thus provided more opportunities for organizing cover at home if needed). The allocation of overtime was an issue covered in the collective bargaining agreement; additionally, job specifications for many hourly jobs would also include rules related to mandatory overtime. Yet the collective bargaining rules also provided for some leeway to managers in terms of how overtime was allocated, given that the required additional work might rely on the specific skills and expertise of a specific person. Although the company was certain that the differential allocation of overtime was a reflection of preferences and availability rather than discrimination, they realized that they had no data to prove this assertion either way; there were no records of who was offered overtime, or whether anyone had actually refused such an offer, and hence no basis for judging whether such allocation was biased or fair.

Gender bias in overtime allocation is often based on implicit assumptions about gender roles.

⁵⁷ *Beck v. Boeing*, Order on Motion for Class Certification (Oct. 19, 2001), ¶¶17–20; this charge was strongly contested by Boeing.

When some women had made complaints about harassment to their supervisors or to human resource managers, they had been ignored; in their perception this was because management did not want to rock the boat and discipline “valuable” male employees.

Sexual Harassment

Interviews with female plaintiffs in preparation for the class action lawsuit also found incidents of sexual harassment—unwanted touching or offensive comments—that were not systematically addressed by the company. As in other decrees in the Database, Boeing had established sexual harassment policies and grievance procedures, yet when some women had made complaints about harassment to their supervisors or to human resource managers, they had been ignored; in their perception this was because management did not want to rock the boat and discipline “valuable” male employees.

Yet sexual harassment was not part of the official class action suit. As discussed in Chapter 2, getting a class certified relating to sexual harassment is very difficult. For that reason, the plaintiffs’ legal team decided not to include sexual harassment in the case for class certification. Nevertheless, damages paid to named plaintiffs included compensatory damages for those who had sexual harassment complaints (although these compensatory damages claims were not released leaving open the option for those women to lodge a formal sexual harassment suit in the future). Sexual harassment policies were also addressed in the injunctive relief of the consent decrees.

Injunctive Relief in the *Beck v. Boeing* Consent Decree

The consent decree addressed a broad range of issues designed to make salary decisions more coherent, visible, accountable, and measurable:

- *A comprehensive review of job descriptions:* “Clearly aligning these with the critical knowledge, skills, abilities and other characteristics” for each job family, and each level within a job family (Section 5.A., 1–3).
- *Performance evaluations:* For all employees, identifying concrete examples of high or low performance; supervisors will receive training from Boeing for these tasks. A manager’s failure to complete performance evaluations for all of his/her employees shall be a factor in the manager’s performance assessment (Section 5.B).
- *Mechanism for converting performance ratings into salary increases:* Evaluation of the assessment (method for converting performance evaluations into an alpha-numerical grade for purposes of salary determination). Boeing will provide descriptions for each of the alpha-numerical assessments (Section 5.C.1–2).
- *Annual disparate impact analysis:* Of assessment ratings within appropriate analysis groups; where statistically significant differences are found, Boeing will investigate how far there is “legitimate business-related justification”; if no legitimate business justification can be established, Boeing will counsel relevant managers, and, if warranted, will adjust salaries (Section 5.C.3.); the final result of the assessment will be fed into a “salary tool” to determine each employee’s salary.
- *New tool for determining starting salaries:* For new employees and for setting postpromotion salaries (Section 5.D.).
- *Annual salary monitoring:* During the life of the decree, using the OFCCP methodology, modified by “job family” and “time in level,” including monitoring salaries of the SPEEA engineers who were not formally members of the class (Section 5.E.).⁵⁸

⁵⁸ The decree states that Boeing “does not concede that said methodology is the optimal regression model for monitoring salary equity” (Section 5.E.6).

- *New system for offering and monitoring overtime allocation:* Regarding discretionary weekend overtime, for which “there is both greater prior notice of the need for overtime work and a greater ability to schedule that overtime in advance,” a formal rotation system will be set up; for other discretionary overtime, where the need is too short notice or otherwise makes a formal rotation system impracticable, overtime allocations will be recorded and monitored on a quarterly basis for potential gender bias (Section 5.E.).
- *More formalized promotion process:* With structured interviews (based on job description for the positions) and a target for conducting 75 percent of all promotion related interviews by a team by the third year of the decree (Section 5.G.).
- *Tests and training regarding stereotypical thinking and gender bias:* Boeing agreed to investigate the feasibility of including in its management assessment process a test to see whether “a candidate is predisposed to stereotypical thinking adverse to females/minorities” and will provide training for newly selected first-level managers on the importance of avoiding such stereotypical thinking (Section 5.G.7.).
- *New reporting structures for EEO:* Boeing had already substantially revised many of its EEO policies and procedures in the run-up to the settlement; a process acknowledged by class counsel. The decree introduces a new reporting structure where all EEO investigations will be reported directly to Boeing’s global diversity organization (Section 5.H.).
- *New sexual harassment procedures:* Boeing committed to strengthen its message to prohibit sexual harassment; specified that line managers will no longer be able to countermand recommendations for disciplinary action as a result of a sexual harassment investigation without the concurrence of the global diversity organization; and specified that the standard corrective action in response to physical sexual harassment will be suspension or termination, unless there are extenuating circumstances. (Section 5.H.).
- *New procedures to prevent retaliation against employees complaining of sexual or gender harassment:* One year, and again three years, after completing an investigation, Boeing will interview the complainant to establish that he/she has not been the subject of retaliation; the investigation might include a comparison of pre-/post-complaint salary increases, overtime allocation, and performance assessments, for example (Section 5.H.3-5).

Additionally the decree included the resources for detailed monitoring by the class counsel of the implementation of the decree.

A Focus on Measuring Results

Okay, we are going to monitor the outputs. (Plaintiff attorney)

The decree specifies action in considerable detail for each policy area, yet in the view of the class counsel who monitored the implementation of the decree, key to the decree’s effectiveness was agreement on how to monitor the effect of changed policies on wage disparities, more so than the detail in the policies themselves. As class counsel described it, there might be any number of ways to draw up a fair performance evaluation or assessment process, yet without clear accountability even the best process may be subject to manipulation. Thus rather than insisting on specific policies and approaches, the plaintiff team insisted that the results of any policy should be measured in terms of its gender outcomes and focused on getting agreement on how to measure outcomes.

The challenge for Boeing was to develop a model that, given the need for quick and decentralized decision making, could flag areas of concern to human resource managers.

One of the most contested components of the injunctive relief package was the methodology for monitoring and measuring pay disparities. The negotiations involved two key issues: how to define the groups that would be the basis for the comparison, and which factors should be used to analyze any disparities. Statistics have become an important feature in employment discrimination cases, particularly during the class certification stage. As Bielby and Coukos (2007) describe, statistical analysis has become a key battling ground in employment discrimination litigation. The smaller the unit of analysis, the more unlikely that gender differences in pay will be statistically significant; conversely, larger groups are more likely to show statistically significant pay differences. Hence, it is likely that management side experts will focus on the characteristics of jobs that differentiate them and make them unique, whereas plaintiff side experts will be more likely to focus on factors that are similar and make jobs comparable across different units and specific work contexts. As a management side attorney noted: “If you’ve ever done any computer modeling of compensation, you know that the larger the employee group, the easier it is for small differences to constitute statistically significant differences.” Another management attorney described this process as follows:

You can’t just analyze the big old workforce. You’ve got to kind of analyze it by group relative so it makes sense and then, you know, you’ve got compare apples to apples. And so that, kind of agreeing on how you cut things up and analyze them, and then what factors you use. And all that, again, was intensely negotiated. (Management side attorney)

In the negotiations over the Boeing decree these different approaches emerged in relation to the definition of Job Aggregation Groups (JAGs), that is, job families, which were the basis for the evaluation of potential wage disparities.

A second contention was over the interpretation of any salary differences that were found, particularly in relation to prior experience and setting entry level wages. As we described above, a major cause of the gender wage gap was that Boeing used a “current salary plus” system when it recruited new employees. In Boeing’s view, pre-Boeing entry-level wage differences were the result of actual differences in experience (on the assumption that women were more likely to have had time out of the labor market for family reasons), and therefore it was fair for such differences to continue once people became Boeing employees. The plaintiff side instead insisted that what should count was the actual work expected and performed by job holders, and that work experience should only count in as far as it was proven and actually relevant to the job. After considerable negotiations, Boeing in principle agreed to use the amended OFCCP methodology for analyzing wage data, but the decree includes a provision that explicitly allowed Boeing to renegotiate the precise specification of the statistical analysis, should they see the need (Section 5.E.3.). The decree states:

In the event that Boeing gathers reliable pre-Boeing experience data for...employees covered by this decree, then Boeing may for such employee group(s) conduct the salary monitoring through a further modification of the Modified OFCCP Methodology that incorporates such data, provided that the monitoring methodology credits only such pre-Boeing experience as is demonstrably job related for both men and women (Section 5.E.6.).

Although the options were in the decree, Boeing did not make use of them during the time the decree was in effect.

The company developed a new tool for a more coherent approach to setting entry-level wages. As management side lawyers described, recruitment and hiring activities in Boeing are highly cyclical, with periods when the company has to ramp up its staffing resources very rapidly and compete in a tight labor market for skilled employees. Under those circumstances managers were given considerable leeway to recruit. The challenge for Boeing was to develop a model that, given the need for quick and decentralized decision making, could flag areas of concern to human resource managers, who then could follow up in greater detail to ensure that salary decisions made were supportable. The new Starting Salary Tool gave managers a salary range within which they could make appointments, based on analyzing the going rate for a job in the external market, as well as drawing on internal comparisons. This external/internal peer comparison model was based on market factors. As a management side attorney explained:

We put in a starting salary tool that compares the applicant to internal peers and to external peers and it spits out a salary range for the managers to hire the new person within....Before there was a market for women and a market for men. I mean, you'd get women traditionally at lower salaries. And so by expanding the comparison now we look at the overall market, men, women all sorts of protected groups, everybody, you know, everybody's in that. (Management attorney)

For Boeing, the key issue was the need for salary decisions to balance performance with experience, and a need to be seen as fair but also competitive in its salary package.

You have Bob and you have Sue sitting next to each other each day. Each of them makes a locket and the locket is identical and it's perfect. Bob has 20 years experience and Sue has 5....We increasingly said that we paid for performance. We said those words but when you looked at salary differences, a lot of our salary structure was based on entry salary and prior experience. And so we really had to evaluate that. (Management attorney)

The decree also resulted in developing a new performance appraisal process; although the company used performance appraisals previously, several different forms had been used, and there was some variation across the company in terms of how many managers actually completed the forms for their employees each year. Boeing developed a new uniform performance appraisal, in response to what it perceived as concerns by the plaintiff side but also to fulfill its internal management needs. The new appraisal form was implemented across the organization with a goal of 100 percent completion; managers' own performance evaluations were tied to having completed appraisals for all their staff, and funds for salary increases were conditional on handing in appraisals.

Key in the approach to implementing the decree was monitoring and analyzing salary decisions. Under the decree, the provisional salary decisions of managers would be analyzed using the revised OFCCP methodology. The methodology set agreed tolerance levels within which salary distributions might vary; if the salary analysis in a particular job group was outside those tolerance levels, this would provide a flag for the manager and for the com-

Key in the approach to implementing the decree was monitoring and analyzing salary decisions.

pensation experts in human resources, to have a closer look to decide whether the differences were legitimate or needed to be adjusted.

New Promotion and Recruitment Procedures

In other areas consensus was more easily achieved. This was the case with the new promotion and recruitment procedures. In 1997 Boeing had merged with McDonnell Douglas; facilities, policies, and practices had differed between the two companies and many of the differences continued during the time of the negotiations. The analysis of salary data found similar gender differences across the new company, irrespective of whether a site had been McDonnell Douglas or Boeing. Yet the data showed marked differences when promotion rates were evaluated. In the ex-McDouglas facilities, there was no statistically significant difference in promotion rates for men and women, unlike in Boeing's Puget Sound facilities. McDonnell Douglas used interview panels and structured interviews, Boeing's Puget Sound facilities did not. Likewise, in the words of one class counsel, "zipper disparities" were found among promotion rates of employees selected after undergoing Boeing's assessment center First Line Management Selection Process (FLMSP); FLMSP had been introduced in response to a race discrimination claim that was settled in 1998. As a consequence, it was easy to agree in principle on introducing a methodology based on structured interviews for hiring and promotions, although according to management side attorneys, it took a long time to negotiate a detailed method that both sides thought could work.

Sexual Harassment

The decree also specified new procedures for handling sexual harassment, even though sexual harassment had not formally been part of the class action. The new complaint procedure made it possible for women and men to complain to someone outside their own division, and all complaints were considered by the global diversity organization; this applied to all EEO related complaints. Importantly, decisions about the level of discipline against a harasser were no longer up to their line manager; HR had the power to override line managers' decisions; line managers could appeal to higher levels within the organization but were no longer able to override HR's recommendations. The new sexual harassment policy is also noteworthy for introducing a procedure to limit the danger of retaliation against someone complaining of harassment. A human resource manager will interview a person who complained one year and three years after the complaint was lodged to check whether in the view of the complainant there were any adverse consequences.

In the view of the plaintiff counsel, during the first year of the decree there were some conflicts over the type of information counsel should receive as part of the monitoring process, and some "push back" was required to receive information about the numbers of complaints and the follow up action that had been taken. But altogether, both nationally and locally, plaintiff attorneys thought the company made a serious commitment to preventing sexual harassment and strictly enforced its new Zero Tolerance sexual harassment policies. In the view of the local class counsel:

Largely through the monitoring process of the consent decree, [the sexual harassment policy] became a policy with teeth so that—now they were starting to fire even productive males when they engaged in that sort of stuff, which did not hap-

pen before. And so the sexual harassment actually was pretty effectively handled through just the monitoring aspects of the consent decree. (Plaintiff attorney)

The Effect of the *Boeing* Decree

According to management side attorneys, Boeing used the process to develop new corporate-wide policy; the decision was made to implement the policies and procedures that were negotiated as a result of the decree (with the exception of those related to overtime procedures as these were closely linked with their collective bargaining agreement) throughout the company rather than only in the facilities directly covered by the class action. Although this increased the potential effect of the decree, it made it even more important for Boeing to find solutions that appeared workable in the long run (a fact that might have intensified the negotiation process). In view of a management side lawyer:

To me, that is the beauty of all this, that the company found a way to negotiate in the agreement practices that it had had time to figure out what worked for them in the workplace....Lots of times these sorts of cases are settled, and then lawyers dream up things that will work at the negotiating table, but then, you know, people bang their heads against them for years trying to comply. And this we did the other way around because we really worked ideas hard inside first before we agreed [to] them at the negotiating table. (Management side attorney)

Management side counsel acknowledged that the process of negotiating over new policies and procedures provided access, through class counsel and class experts, to knowledge of policies and practices used in other large companies:

[A] lot of what they (class counsel) brought to us is “Really? Can you do it this way? Is that the way that a court or jury’s going to think makes sense?”...As a national firm, they had great ideas about what makes sense and what other companies do, and they brought that to the table. And the local (law) firm, they were the ones more in contact with the plaintiffs. They brought forward more what the plaintiffs themselves had to say as far as there were problems. (Management side attorney)

As in other consent decrees, data that would allow an independent assessment of change in gender, and other, disparities in Boeing as a result of the decree are not publicly available. In their absence, we rely on the view of class counsel, whose responsibility it was to review the detailed monitoring reports. Class counsel concluded both that Boeing made the changes required in the decree and that the policies had the effect of reducing disparities in earnings and promotion rates (and led to a more effective response to sexual harassment). Although the measures in the decree were subject to intense and heated negotiations, implementing the decree proceeded in a spirit of cooperation.

The Role of Boeing’s Unions

Boeing is a unionized company. The hourly paid women in the class action were union members and their employment conditions were governed by a union contract. The actual union contract contained a provision requiring the union to be involved in claims of em-

The decision was made to implement the policies and procedures throughout the company rather than only in the facilities directly covered by the class action.

ployment discrimination. Yet none of the people we interviewed reported any active involvement of the union on behalf of the women during the litigation.

Lessons from the *Boeing* Decree

The *Boeing* decree demonstrates the potential of injunctive relief to systematically address gender disparities in pay. It is focused on objective measures, both in the way compensation and promotion decisions are designed, and the way that the effects of those decisions are measured. Emphasizing objective job requirements, rather than broader notions of experience, is particularly important to challenge the cumulative disadvantages in earnings many women face in the labor market. The emphasis on monitoring and record keeping in allocating overtime and weekend shift work provides detailed tools to move from broad generalizations about work preferences (women won't be able to work additional hours because of childcare) to decisions made based on objective rules and real information.

The consent decree is also noteworthy for the comprehensive manner in which it addresses gender disparities, from recruitment and hiring processes to promotion procedures, from performance appraisals to supervisory accountability. Given the emphasis on accountability and measurement of equality outcomes, key to successfully implementing the decree was allocating sufficient funds for the class counsel to monitor compliance and progress.

Although the decree was not primarily about sexual harassment, it resulted in new reporting procedures and greater attention to creating a harassment-free environment. Particularly noteworthy is the introduction of a long-term review of sexual harassment complaints to provide a guard against potential retaliation.⁵⁹

Finally, the decree demonstrates the important role of scrutinizing employment practices of federal contractors through the OFCCP. The OFCCP audit flagged the basic pay discrepancies. Even though much of the negotiations in the decree involved sophisticated statistical analysis, the initial examination of data leading to greater scrutiny was much more basic and easily replicated. The focus on transparency, objective criteria, and accountability has resulted in a more level playing field for all at Boeing.

***The decree demonstrates
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⁵⁹ It should be noted that the EEOC in 2010 settled two sexual harassment and retaliation lawsuits with Boeing that involved women working in other parts of the company; one of these suits was filed in 2002, before the consent decree was settled, the other one in 2005, in the first year of the decree (EEOC 2010b). We do not know whether this occurred after the roll-out of the new sexual harassment policy.



Chapter 6

Lessons from Consent Decrees to Address Sex and Race Discrimination in the U.S. Financial Services Industry, 1995–2010*

Introduction

On October 4, 1999, four female former brokers⁶¹ at American Express Financial Advisors (AEFA)—Lois Wisocky, Shelly Kosen, Susan Seltzer, and Mary Roy—each filed a charge with the Minneapolis, Minnesota, office of the EEOC against their former employer claiming widespread sex and age discrimination. Over the next year and a half, 13 more women joined them in filing similar charges.

On January 17, 2002, the class of Shelly Kosen and 16 women filed a 33-page complaint in the United States District Court for the District of Columbia against American Express Financial Advisors, Inc., IDS Financial Services, Inc., IDS Life Insurance, Inc., American Express Financial Corporation, and American Express Company. Fifteen plaintiffs were financial advisors and two were applicants who were denied positions as financial advisors. The plaintiffs were employees or former employees in American Express offices in New Jersey, Minnesota, Michigan, Western Pennsylvania, North Carolina, Eastern Georgia, and Western Florida. The class of financial advisors numbered 4,000; the class of job applicants, 1,000.⁶²

The next day, January 18, 2002, after two years of negotiation among the parties before filing the complaint in federal court, the parties filed an extensive consent decree and a motion for preliminary approval of the settlement. In June 2002, the District Court officially approved the consent decree and certified the classes. AEFA agreed to pay \$31 million in settlement. In addition to monetary relief, the consent decree mandated extensive injunctive relief, including path-breaking new methods of allocating leads for new accounts to financial advisors, and rigorous efforts to hire and promote female financial advisors.

The *AEFA* consent decree followed several high-profile discrimination cases that had brought to public attention the extent of discrimination and harassment faced by female

In addition to monetary relief, the consent decree mandated extensive injunctive relief, including path-breaking new methods of allocating leads for new accounts to financial advisors.

* This chapter was prepared by Evelyn V. Murphy, The WAGE Project.

⁶¹ In the 1990s, women and men who managed client's financial portfolios were called "brokers." Later, performing similar functions, they became known as "financial advisors," the term that will be commonly used throughout this report.

⁶² Profiles of plaintiffs and the discrimination to which they were subjected can be found in Kosen et al. v. American Express Financial Advisors et al., Complaint 3-1.

professionals in financial services. Business news bureaus had reported when women filed charges against their employers and when settlements were approved between female employees and their employers. Women aired their complaints about discrimination on radio, television, and in print media. Headlines trumpeted multimillion dollar settlements. Company reputations appeared to suffer from bad publicity time and again. Many predicted that such consequences would compel the entire financial services industry to adopt fundamental reforms to eliminate gender discrimination.

Although the AEFA case was neither the first nor the last high-profile lawsuit detailing extensive sex discrimination in financial services, it set important precedents both in the way it detailed charges, and in the injunctive relief it mandated, that is, the changes in employment policies and practices to be made by the employer, and accountability measures in the consent decree.

This chapter will begin with a brief history and discussion of class action sex discrimination litigation in the financial services industry leading up to *Kosen v. AEFA*, and then turns to an in-depth discussion of the *AEFA* consent decree and the lessons learned from its design and implementation. The chapter then reviews class action sex and race discrimination litigation initiated largely by financial advisors since the *AEFA* case, and concludes with the lessons from all these consent decrees.

Precursors to the AEFA Consent Decree in *Kosen v. AEFA*

In the second half of the 1990s, two financial services employers were the subjects of high-profile class action sex discrimination lawsuits. Prior to that time, a few female brokers, on their own, sued their employers for sex discrimination. In 1990, Teresa Contardo, a former stockbroker in the Boston office of Merrill Lynch, won a \$250,000 settlement, the largest such award on record at that time. In response to individual lawsuits, employers in the early 1990s adopted policies that closed women's access to courts to adjudicate their claims of sex discrimination. In 1993, the National Association of Securities Dealers (NASD) gained an agreement from the Securities and Exchange Commission (SEC) to amend the U-4 form that every broker must execute for a license on the New York Stock Exchange (NYSE) and the NASDAQ. The modification mandated that signers settle any business dispute with their employer through arbitration. Some firms even added the same requirement that employment disputes be settled through arbitration in contracts women were forced to sign as a condition of being hired. Employers forced female brokers to resolve their claims of discrimination behind closed doors through panels dominated by men from the industry who were mostly unsympathetic to their grievances. So, for much of 1990s, the extent to which female brokers experienced sex discrimination was hidden from public view.

One means by which female brokers could gain access to the courts was in a class action lawsuit. Although class action certification for sex discrimination was unprecedented in financial services, the sex harassment lawsuit by the women working at Eveleth Mines in Minnesota established a precedent for women financial advisors. In the late 1990s, two class action lawsuits—*Martens v. Smith Barney* and *Cremin v. Merrill Lynch*—opened a window on the extent of sex discrimination in financial services industry.

Pamela Martens v. Smith Barney

Although the public usually becomes aware of a case only when it is filed in court, for years prior to filing plaintiffs typically endure discrimination and battle to get into federal courts.

Employers forced female brokers to resolve their claims of discrimination behind closed doors through panels dominated by men from the industry who were mostly unsympathetic to their grievances.

Pamela Martens, a broker in the Garden City, New York, office of Smith Barney, reported incidents of discrimination in her complaint spanning almost 10 years. She began to make complaints to management after eight years; during the following two years she had heard nothing. The final straw was an order by the branch manager for all female sales assistants to work at his charity golf tournament wearing short skirts and serving coffee to male brokers. If they refused, they would lose raises, bonuses, or time off with pay. She saw no change in how she was treated. Her manager's order pushed her to seek help from the federal government.

On May 20, 1996, Martens and two other women filed a complaint in the United States District Court Southern District of New York against employer Smith Barney, James Dimon, Nicholas Cuneo, the NYSE, and the NASD. Pointing out that women held fewer than 5 percent of 11,000 brokerage jobs, these women charged Smith Barney with a pattern of discriminatory behavior that included excluding qualified women from the company's training program; failing to laterally recruit women; failing to promote women; discriminatory hiring practices that segregated women as sales assistants and in clerical positions; quid pro quo sexual harassment; discrimination in wages; denying women opportunities to increase their earnings through commissions; retaliation when women rejected or were unwilling to tolerate unwelcome sexual conduct and for complaining about discrimination; penalizing women for maternity leaves of absence; and discrimination in account generation and in assigning the accounts of departing brokers. The 94-page complaint detailed allegations of discrimination and harassment at branch offices in 11 states (*Martens v. Smith Barney*, Complaint). Other women added their names as plaintiffs in the ensuing months. In October 1996, Jennifer Alvarez and five other women filed a similar complaint in the United States District Court for Northern California (*Martens v. Smith Barney*, Consolidated Statement of Settlement, 3). By then plaintiffs' counsel was exploring certification of a nationwide class action lawsuit against Smith Barney.

In November 1997, the court granted preliminary approval of a class action settlement. Nine months later, using a mediator, a final settlement was achieved in which Smith Barney agreed to a settlement covering 22,000 women who worked at Smith Barney between May 1993 and November 1997. More than 1,900 women filed claims under this settlement. The amount each woman received was never made public.

The case became known for the stories of sexual harassment women endured, and for a room constructed in the basement of the Garden City Branch Office called the "Boom Boom Room." This room, decorated in vulgar fraternity house style, was where male brokers gathered after work to drink and disparage women brokers who were not allowed to enter the room. The Boom Boom Room culture of crass, graphic, everyday sexual harassment of women financial advisors was extensively documented in the complaint plaintiffs filed with the court (Antilla 2002).

The process of settling all claims spanned more than five years. In December 2002, the settlement of one claim did become public. In this case, after seven years of litigation, Hydie Sumner was awarded \$3.2 million (Smith 2002). Published estimates of Smith Barney's total payout, known only to Smith Barney and plaintiff's law firm, Friedman & Stowell, ranged from \$100 million to \$250 million, an attention-grabbing penalty. In 2000, Attorney Friedman acknowledged that when all claims were settled, the total cost to the firm would be in "the hundreds of millions" (Weiss 2000). In addition to paying individual claims, Smith Barney also committed \$15 million to diversity initiatives, which are discussed below.

This settlement was heralded at the time for its sweeping change in business practices at

The final straw was an order by the branch manager for all female sales assistants to work at his charity golf tournament wearing short skirts and serving coffee.

These women claimed that they were systematically deprived of training, support staff, promotions, account distribution, and fair wages because of their sex—complaints almost identical to those filed against Smith Barney.

Smith Barney. Because of the publicity of this litigation, the prescribed changes for Smith Barney were expected to change the corporate cultures of other Wall Street financial services companies. Smith Barney's Co-CEO's James Dimon (one of the named defendants) and Deryck Maughan sent a memo setting expectations for all employees by describing the significance of the settlement saying that it "focuses on effecting real change and progress rather than simply delivering monetary rewards" (Truell 1998a).

Marybeth Cremin v. Merrill Lynch

In June 1996, only one month after women at Smith Barney filed their complaint in federal district court in New York, Marybeth Cremin filed a complaint in the United States District Court Northern District of Illinois, charging Merrill Lynch, Joseph Gannotti, the NYSE, and the NASD with sex discrimination. The following month, Merrill Lynch, the NYSE and NASD filed motions asking the court to dismiss her claim and force Cremin into arbitration. In February 1997, the court dismissed the NYSE and NASD as defendants, and Cremin was joined by seven more women who jointly filed an amended complaint on behalf of a class of current and former employees claiming sex discrimination and retaliation.

These women claimed that they were systematically deprived of training, support staff, promotions, account distribution, and fair wages because of their sex—complaints almost identical to those filed against Smith Barney, albeit without the salacious sexual harassment stories of the Boom Boom Room.⁶³ The women also charged that Merrill Lynch retaliated against them when they complained of sexual discrimination or harassment. Mary Stowell, one of the plaintiffs' lawyers, summed up their grievances: "Women were not given the same leads, walk-ins, and help from management [as their male counterparts]" (Jacoby 1999).

A settlement in this lawsuit was reached in May 1998, when the parties, after using two mediators in succession, entered into a private settlement. Estimates varied widely about the amount of money Merrill Lynch paid to settle claims. One news article reported that Merrill Lynch paid out \$200 million (Anderson 2007). The settlement involved a class of 2,700 women eligible to file claims. More than 900 women actually filed claims.

Characteristics of Class Action Sex Discrimination Consent Decrees Involving Financial Services Employers Preceding the *Kosen v. AEFA* Consent Decree

The consent decrees for both *Martens v. Smith Barney* and for *Cremin v. Merrill Lynch* included individual monetary relief as well as injunctive relief. Yet both concentrated predominantly on the monetary claims of class members and only sketched aspects of injunctive relief.⁶⁴ Although page count in a consent decree may seem an immaterial measure of the relative significance of matters being settled, it is instructive in these particular consent decrees. In *Martens v. Smith Barney*, approximately 38 pages of the consent decree addressed monetary relief (Dispute Resolution Process), and 11 pages addressed injunctive relief (Di-

⁶³ For an account of the discrimination these plaintiffs faced, see Reed (2002).

⁶⁴ The term "injunctive relief," also referred to as "programmatic relief," is used throughout this chapter to include measures in consent decrees that involve changes in an employer's policies, practices, and programs to alleviate unequal opportunity or treatment of class members. Examples of such relief include initiatives to recruit and hire women as financial advisors, methods to eliminate biases in distributing accounts and leads, and procedures to eliminate biases in promotions.

iversity Programs and Initiatives); in *Cremin v. Merrill Lynch*, 37 pages addressed matters concerning monetary relief (Claims Resolution Process), whereas two pages concerned injunctive changes (Diversity Programs and Other Programs and Initiatives) along with a reference to an attachment for more information about Diversity Programs.

Injunctive relief in the *Smith Barney* consent decree mandated numerous reforms. An Office of Diversity was established with the director reporting directly to the CEO and executive committee of the firm. An independent diversity advisor was retained to advise on implementing the agreement. Smith Barney committed, on a “reasonable efforts” basis, to increasing the numbers of women recruited into its training programs, hired from its training programs and promoted and retained as financial advisors. The parties stipulated percentage changes to advance the presence and status of women as financial advisors, and financial penalties to Smith Barney in the event the stated goals were not met. The employer was directed to develop and distribute nondiscriminatory standards for distributing lists of potential customers and the accounts of departing financial advisors among all financial advisors in the branch office and to make these standards available in all branches. Job openings were to be posted in the retail branch; decisions not to train, hire, or promote class members could be reviewed; and a centralized database of complaints of sexual harassment, discrimination, and retaliation was to be established. An annual report on the firm’s expenditures in fulfillment of these changes was to be presented to the co-CEOs, class counsel, and the District Court.

Although some details of injunctive relief in the *Merrill Lynch* consent decree—namely the firm’s Diversity Program—were referenced as an attachment, in the body of the agreement, the firm was mandated to provide class counsel with an annual report on the diversity program for three years. In addition, Merrill Lynch agreed to increase its recruitment of women and minorities, and it was ordered to establish standards for nondiscriminatory practices of account and lead distribution and then allow each branch to adopt its own practices on these matters consistent with the overall standards for the firm. Merrill Lynch committed \$15 million to diversity initiatives (*New York Times* 1998).

Because both cases were settled within months of each other and involved thousands of women in the financial services industry sharing in hundreds of millions of dollars, taken together, these consent decrees were widely regarded as catalysts for eliminating sexist behavior of employers throughout the financial services industry.

In both cases, new processes for settling claims were adopted. Both employers agreed to settle claims individually, first through mediation, and if mediation failed, through voluntary arbitration. Smith Barney settled and agreed to this claims settlement process first, followed by Merrill Lynch. However, Merrill Lynch went a step further and, apart from the consent decree, agreed to end the company’s policy of mandatory arbitration for sex discrimination claims, a breakthrough hailed by female brokers as the most significant policy change. One plaintiff said, “The most important thing for me was to see a change in mandatory arbitration. When I came out of Merrill Lynch, I sought some remedy for something that I saw as a violation of my civil rights” (Truell 1998).

Michael Rubin, a lawyer for the plaintiffs, predicted: “Now that Merrill Lynch, the industry leader, has abandoned mandatory arbitration, the rest of the industry will follow” (*San Francisco Chronicle* 1998).

With the class action precedents of these two cases and Merrill Lynch’s abandonment of mandatory arbitration, the doorway was open for women financial advisors to turn to class

Because both cases were settled within months of each other these decrees were widely regarded as catalysts for eliminating sexist behavior of employers throughout the financial services industry.

action in federal district courts to receive redress for their claims of sex discrimination. During the next decade, thousands of women joined such lawsuits.

EEOC and Schieffelin v. Morgan Stanley

Another high-profile class action case in the financial services industry in the late 1990s was litigated by the EEOC on behalf of Allison Schieffelin. Plaintiffs in this case were not financial advisors. This case was filed on behalf of top-level employees, including the multimillion dollar earner, Schieffelin, and others with job titles including associate, vice-president, principal, and managing director. Like the cases filed by financial advisors, this lawsuit put industry employers on notice that sex discrimination practices extended beyond a single group of their female employees. Moreover, because these women had not executed U-4 Forms for brokers' licenses, they were able to file notice with the EEOC.

In 1996, Schieffelin, an institutional bond saleswoman at Morgan Stanley Dean Witter (MSDW) met with Vikram Pandit, the head of the institutional stock division to complain about sex discrimination she was encountering. After experiencing no relief in the intervening years, in November 1998 Schieffelin filed a complaint with the EEOC claiming she was denied a promotion based on her sex and that the company paid women less than men.

The EEOC began investigating MSDW for sex discrimination in compensation. In June 2000, the EEOC issued its finding that there was significant evidence of a pattern and practice of discrimination against women. In September 2001, after Schieffelin had been fired in late 2000, the EEOC filed a lawsuit against Morgan Stanley charging intentional discrimination in promotion and compensation and retaliation against Schieffelin in terminating her employment.

At the time the EEOC filed its lawsuit, Schieffelin issued a public statement about the firm's tactics of intimidation:

The campaign of retaliation that Morgan Stanley launched against me was designed not only to punish me but also to scare other women who might dare to complain of discrimination. From the time that I filed my charge with the EEOC, senior managers at the firm sought to denigrate my work, ostracize me and humiliate me. They took away projects that I had worked on for years. They diminished my daily responsibilities....And so when that day-to-day mistreatment didn't force me to quit, Morgan Stanley fired me. They actually fired me without any warning last October, after almost 15 years of service. (Schieffelin 2001)

Negotiations among the parties stretched out across three years. The consent decree resulting from this litigation, therefore, had no affect on the *Kosen v. AEEA* consent decree. Nonetheless, this consent decree was regarded as another advance for women working in financial services. In July 2004, on the day opening statements were scheduled to begin the trial, Morgan Stanley and the EEOC announced that the parties had agreed to a three-year consent decree that included "far-reaching" measures to enhance the compensation and promotional opportunities for women employees in the firm's Institutional Equity Division as well as \$54 million for settling claims of a class of 340 women working or formerly working in that division. U.S. District Judge Richard Berman, in approving the settlement, hailed it saying "this consent decree is a watershed in safeguarding and protecting the rights of women on Wall Street". (McGeehan 2004).

Like the cases filed by financial advisors, this lawsuit put industry employers on notice that sex discrimination practices extended beyond a single group of their female employees.

Lessons of the AEFA Consent Decree

The Process of Arriving at a Consent Decree: “Quick and Quiet”

In summer 1999, after Shelley Kosen and Lois Wisocky quit their jobs as financial advisors at AEFA office in Edina, Minnesota, they, along with Meg Roy, who was still employed as an advisor, contacted the Minneapolis law firm Miller O’Brien. Partner Bill O’Brien was sympathetic to their stories. His firm invited another Minneapolis law firm, Sprenger + Lang, nationally known for its expertise in workplace discrimination, to join the plaintiffs’ team.

AEFA management took note of the Smith Barney and Merrill Lynch precedents. According to a lead plaintiffs’ attorney, Larry Schaeffer, the negative publicity experienced by those companies created an environment in which AEFA wanted to negotiate quickly and avoid publicity:

People knew about Merrill Lynch and Smith Barney litigation involving among other groups female financial advisors and the degree to which in the financial industry women in those positions were abused and treated as sexual objects and not provided the same opportunities as men and I think the tea leaves in the industry at that time were that this has got to change, it’s got to change fast, and that we haven’t been attentive to this as an industry. So I think American Express felt that. I think they felt as though we had assembled—and by we I mean Sprenger + Lang and the plaintiff’s group—had assembled a representative group that was really going to put them to the test of needing to defend what was a systemic problem. And I think they took responsibility because of largely economic interests and decided that they needed to act and act quickly rather than fight it out for ten years and spend ten million bucks on lawyers. (Schaeffer 2003)

A Plaintiff attorney noted other factors that contributed to AEFA’s strategy to pursue a quick negotiation, factors involving top priorities of the corporate headquarters at the time:

I think there were two things going on behind the scenes. One was the other lawsuit at American Express Financial Services for unpaid taxes. There was an independent contractor issue with respect to financial advisors, and there was somebody named Lawton who was putting on a class case to have them re-characterized as employees, because none of their taxes were being paid, and none of their FICA contributions, things like that. That settled shortly before ours settled.⁶⁵ It was also learned, in the background, and now you see it for sure, Amex spun off American Express Financial Services.⁶⁶ I think that was in the works while we were negotiating. Now it took two years. They also restructured their entire system, and have platforms now for financial advisors, partially based on the other case I think, where platform one is solely employee, not even commission based. Platform two is commission based. Platform three is really a franchisee, independent contractor. They

...and I think the tea leaves in the industry at that time were that this has got to change, it’s got to change fast.

⁶⁵ This case involved the improper classification of American Express financial advisors as independent contractors rather than employees. *Lambert, Foeckler, Bonfield, Homolka et al. v. American Express Financial Corporation; American Express Financial Advisors, et al.* was filed in the United States District Court in the District of Minnesota. The litigation lasted over three years and resulted in a \$15 million award to the class.

⁶⁶ In 2005, American Express spun off AEFA into the publicly traded corporation Ameriprise Financial, Inc.

Money is transitory. To really get at the underlying problems and to try to systemically change these operations, you have to get them to commit to operational changes that are fundamental.

enter into agreements like that. So there was a whole restructuring going on in the background, and I think they didn't want this kind of litigation interfering with anything, the spin-off, the restructuring, all of that. They wanted to get it done fast, and we had some really good evidence. (Plaintiff attorney)

Plaintiffs' attorneys, too, adapted their strategy based on Smith Barney, Merrill Lynch, and other sex discrimination litigation. Sprenger + Lang had first-hand experience in sex discrimination cases. In the early 1980s, the firm began representing a class of 1,500 women and African Americans against Cargill, Inc., a large, 100-year old agricultural products wholesaler. In 1985, Cargill signed a consent decree involving \$20 million and agreed to create opportunities for class members to be hired and to advance into the ranks of managers. In 1988, the firm began representing women in the first class action sexual harassment case in the *United States, Jensen v. Eveleth Mines*, depicted in the movie *North Country* in 2005.

Sprenger + Lang believed strongly in obtaining injunctive relief as part of its settlements:

...because, in our view, money is transitory. The effect of compensation, while it's important and it's good for the victims and it helps allow them to put it behind them, to really get at the underlying problems and to try to systemically change these operations, you have to get them to commit to operational changes that are fundamental. (Schaeffer 2003)

Another attorney at the firm elaborated:

[In] a class case you have to try to get institutional change. An individual case, you can take money as [to] say, "well, I guess it's not my problem anymore." But in a class case, where you have hundreds and thousands of people working there, it's hard to walk away for a couple bucks and say "well, I guess you'll just have to sue them again in five years when you've accrued more damages." (Plaintiff attorney)

For more than a year, counsel for plaintiffs and defendants engaged in an extensive exchange of information similar to what would have occurred in a discovery period preceding a comprehensive class certification motion and trial. Statistical experts analyzed company-wide data concerning pay, promotion, retention, and termination rates by sex. The data were compelling said one plaintiffs' attorney:

[A] unique aspect of this case is that before there was ever a shot fired in litigation, or a complaint was even filed, we had a detailed production of data on all aspects of the employment relationship and we had our experts analyze it—the precise findings are confidential, but I can guarantee you that the settlement wouldn't have been achieved if both sides didn't have a basic mutual understanding that statistically the case had a backbone. I mean, that there were serious discrepancies, not only in compensation, but in promotion and termination rates. That was present and it has to be present. Systemic discrimination—if you can't demonstrate it statistically, these cases don't go anywhere. (Schaeffer 2003)

Armed with the analyses of patterns of discriminatory practices, counsel for both sides engaged in intense, arms-length negotiation sessions facilitated by mediator Linda Singer.⁶⁷ In January 2002, the parties executed and filed both a complaint and a consent decree.

The charges filed in the complaint came from what women told their lawyers had happened to them:

The way that's phrased in the complaint is because of what the plaintiffs and the witnesses told us. They contacted HR, their various regional offices, told them this is happening: Accounts aren't distributed fairly. Promotions aren't fair. Things like that. They got either the brush off or phone calls weren't returned, or HR never did anything for them. That's why that's in the complaint. (Schaeffer 2003)

Plaintiffs charged AEFA with:

- failing and refusing to hire female applicants for financial advisors positions, including denying them the same opportunities to qualify for advisor positions as provided to similarly situated men;
- failing and refusing to promote female trainees to financial advisor positions;
- assigning female advisors fewer accounts, and accounts of lesser value and production potential, than were assigned to male advisors;
- denying female advisors the type of job assignments (such as participation in marketing activities), which can lead to lucrative accounts and clients;
- denying female advisors client leads or providing them with leads that have far less potential to generate business than the leads provided to male advisors;
- assigning fewer and much less valuable accounts to female advisors than are assigned to male advisors even when the client holding the account specifically requests a female advisor;
- denying female advisors promotional opportunities to management positions;
- maintaining a segregated work environment in which female advisors are kept in low-paying, slow-track positions through arbitrary and subjective practices;
- paying female advisors compensation that is far lower than that paid to similarly situated male advisors, failing to pay them compensation that they have earned, and denying them opportunities to increase their earnings;
- channeling female advisors into depressed markets with far less potential than the markets to which male advisors are assigned;
- denying female advisors training and mentoring, including denying specialized training (such as one-on-one meetings with district managers and “go-to” managers) given to male advisors; and
- denying female advisors other benefits and conditions of employment on the same terms applied to male advisors (*Kosen v. AEFA*, Complaint, 18–19).

For the remainder of the decade, these charges were the template used by women, African American, and Latino financial advisors for many subsequent complaints filed against their employers.⁶⁸

I can guarantee you that the settlement wouldn't have been achieved if both sides didn't have a basic mutual understanding that statistically the case had a backbone.

⁶⁷ Attorney Singer did not respond to several requests for interviews for this study.

⁶⁸ For example, see *Augst-Johnson et al. v. Morgan Stanley & Co. Inc.* or *Jaffe et al. v. Morgan Stanley & Co. Inc.*,

Injunctive Relief in the *Kosen v. AEFA* Consent Decree

Shortly after the consent decree took effect, one plaintiffs' attorney characterized the consent decree in the following way:

The remarkable thing about the whole American Express case really is the timing of how the company addressed it when the problem was brought to their attention, and the scope of the solution they committed to—it really—that sort of settlement being achieved in the case, at that stage, pre-suit—it really is, it's unprecedented in our field. (Schaeffer 2003).

In contrast with the consent decrees in *Martens v. Smith Barney* and *Cremin v. Merrill Lynch*, the *AEFA* consent decree dealt in detail with each aspect of injunctive relief—hiring, promotion, lead distribution, account distribution, acquisition allowances, company sponsored events, and mentoring. Instead of general language about distributing leads and accounts using “non-discriminatory standards” as Smith Barney accepted, *AEFA* committed to the more precise process of randomized account distribution. With every aspect of relief, the consent decree specified the data to be generated to measure progress, and reports to be made twice a year on each injunctive element.

The structural reform designed to oversee an effective implementation of changes in practices and procedures was lodged in a newly established Field Diversity Office. *AEFA* agreed to appoint a Field Diversity Officer reporting to an Executive Vice President of the corporation. The Field Diversity Officer was responsible for overseeing the implementation of the consent decree, overseeing resolution of gender discrimination or harassment complaints, and reviewing and approving all promotions to Assistant Vice Presidents and above. Two people, Catherine Sweet and Paul Connolly, were designated to both fill this position at the outset.

Similar to the two precedential consent decrees, the goal of increasing the presence of women financial advisors was manifested in specific numeric requirements. The consent decree set out “good faith hiring goals,” spelling out yearly percentages of new hires of financial advisors who would be women as 26 percent in 2002; 28 percent in 2003; 30 percent in 2004; and 32 percent in 2005.

In response to charges of failure to promote, the consent decree established a detailed process for promotions that included: (a) a procedure for electronically posting openings for all Employee Leader positions for a minimum of seven days along with selection criteria, minimum qualifications, and essential job functions; (b) a requirement to interview at least two applicants of each sex, if available, who met the minimum requirements for the position; (c) approval and review of promotions for Employee Leader positions and above through normal channels of human resource department and responsible senior vice president and, in addition, the Field Diversity Office was authorized to review and approve all such promotions; (d) written reasons for the promotion decision in the event a male applicant was selected over a minimally qualified female applicant; (e) diversity training in promotion settings to include interviewing techniques and gender sensitivities; (f) a promotions database; and (g) a review of promotion activities by class counsel twice a year.

A number of mandates were directed at enabling women financial advisors to gain their fair share of marketing opportunities and accounts left with *AEFA* when other financial advisors moved on. Specifically, *AEFA* agreed to provide each Financial Advisor with a

AEFA committed to the more precise process of randomized account distribution. With every aspect of relief, the consent decree specified the data to be generated to measure progress.

client acquisition allowance, with the size of the allowance based on length of service. All client leads were to be purchased through a distribution center established at the AEFA corporate headquarters. The firm was to distribute leads on a randomized basis without regard to sex. A database was established for lead distribution both to ensure objectivity and compliance.

When AEFA assigned client accounts, assignments were to be done by designated client account assignment coordinators in their respective market groups on a randomized basis, according to central objective criteria that included geography, productivity of the Financial Advisor, specialty expertise, and account value index. A database of account assignments was established and AEFA was to provide a report about account assignments to class counsel twice a year.

To redress the effects of past inequities in account and lead distribution, AEFA established a \$4 million Business Development Portion separate and distinct from the client acquisition allowance. These funds were allocated to members of the class who had filed claims for damages, were still working as financial advisors at AEFA, and who had held this position for no longer than seven years. The funds were in addition to the client acquisition funds for which these financial advisors were eligible.

To further the more general performance and advance of female financial advisors, AEFA was required to create a mentoring program available to these women on a voluntary basis. The company's efforts in this regard were to be reported to class counsel twice each year.

To improve the work environment for women, AEFA agreed to provide mandatory web-based diversity training to all current and future financial advisors and one follow-up web-based training to all financial advisors. All Employee Leaders were required to attend an in-person diversity training session followed by an annual in-person or web-based diversity training session. Subject matter for the in-person mandatory training was specified in the consent decree. Class counsel had to approve the provider of training and the proposed curriculum.

To keep track of the reasons why female financial advisors left AEFA, which might relate to discriminatory practices, the consent decree mandated certain actions regarding termination and complaints. First, the company agreed to prepare and post an electronic exit interview form and encourage departing financial advisors to fill out and submit the form. Excerpts of exit interviews with female financial advisors that related to any subject in the consent decree were to be sent to class counsel twice a year. Second, a new complaint procedure was attached to the consent decree to take effect within two months of the effective date of the decree.

Although the *AEFA* consent decree devoted as many pages to injunctive relief as the *Smith Barney* consent decree, the emphasis in each document was entirely different. In *Smith Barney*, injunctive relief consisted of specifying percentage changes in the representation of women in training programs and working as financial advisors along with the financial consequences to the employer of not meeting these goals. The primary, although not exclusive, emphasis was monitoring numbers of women. In contrast, injunctive relief in *AEFA* consisted of specifying changes in each of 10 essential aspects of relief along with the data set, the report formats, and time intervals for reporting on each new procedure. The *AEFA* agreement established an extensive, detailed format for monitoring changes in basic daily operations of a branch that could enable women to be treated fairly in their jobs and career advancement.

...a procedure for electronically posting openings for all Employee Leader positions for a minimum of seven days along with selection criteria, minimum qualifications, and essential job functions.

The fact that \$10.8 million, that is, more than one-third of the overall settlement, was set aside for monitoring, was an indication of the importance plaintiffs and their attorneys placed on changing practices.

All materials and information related to generating the consent decree and its implementation were wrapped in a confidentiality agreement.

Monetary Settlement

AEFA agreed to establish a settlement fund of \$31 million. These monies were designated to settle claims of named plaintiffs and eligible class members, attorneys' fees and expenses of the plaintiffs and class members, all costs of notice and settlement administration, and all taxes related to the settlement. Of the total, \$17.5 million was earmarked for claims and \$2.6 million for business development. The fact that \$10.8 million, that is, more than one-third of the overall settlement, was set aside for monitoring, was an indication of the importance plaintiffs and their attorneys placed on changing practices in AEFA and the complexity of the system of monitoring to which all parties agreed.

Eligibility requirements for receiving funds were enumerated for both claims and business development. A court-approved point system determined the share of the settlement fund each eligible class member would receive. The point system took into account tenure; denial of leads; denial of promotions; denial of accounts; denial of training, mentoring, and marketing opportunities; hostile work environment; unequal compensation; termination or constructive discharge; age; contributions to the prosecution of the litigation; and economic losses and/or evidence warranting entitlement to compensatory damages (*Kosen v. AEFA* Consent Decree, 27–28).

All members of the class receiving funds were bound to keep the amount of their award confidential from everyone except Class Counsel.

Internal and External Accountability

The consent decree assigned internal monitoring responsibility to the Field Diversity Officer while class counsel monitored compliance with the targets established in the consent decree on behalf of plaintiffs and class members.

For the four years of the consent decree, the Field Diversity Officers, class counsel, and counsel for AEFA were required to “meet in person or by telephone conference call twice per year following production of required reports to Class Counsel.” The purpose of these meetings was to “discuss implementation of and compliance with the terms of this Decree and shall make good faith efforts to resolve potential issues short of resort to enforcement mechanism” (*Kosen v. AEFA*, 38).

Class counsel was required to treat information obtained during these meetings as confidential and not to be used for any reason except for enforcement of this consent decree.

All materials and information related to generating the consent decree and its implementation were wrapped in a confidentiality agreement. The language in the consent decree agreed to by all parties barred external disclosure during and after the period of court oversight:

The documents and the information exchanged pursuant to the Stipulation of confidentiality executed by defense counsel and Class Counsel and forward by Class Counsel to defense counsel on or about December 18, 2000 shall retain their confidential status, exempt to the extent that disclosure is necessary to obtain Court approval of this Decree....

The documents and information which are produced by AEFA to Class Counsel pursuant to any provision of this Decree shall be treated as, and thereafter remain, confidential. Said documents and information shall not be disclosed to anyone

other than the Court in connection with any proceeding to enforce any provision of this Decree....

Within thirty (30) days after the expiration of the Decree, the parties and their attorneys shall return, or at the producing party's option, destroy all documents, including all copies, in their possession that have been produced by the other parties and designated 'Confidential for Settlement Purposes Only' or similar designation pursuant to the Confidentiality Agreement or that have been produced to any provision of this Decree. (*Kosen v. AEEA* Consent Decree, 41–42)

With this language, the opportunity to analyze the enduring effects of this landmark consent decree was forfeited. It is understandable that, at the time, private counsel, representing the interests of the plaintiffs and class members, achieved an agreement of significant injunctive and financial relief for the class. No counsel represented a public interest in understanding the enduring effects of these reforms and potential for adaptation in other workplaces.

Key Aspects in Implementation

Processes for Clear Procedures for Reporting and Monitoring and Clear Penalties for Violations

According to plaintiff's attorneys, clear reporting and monitoring procedures were the most important factors to the effectiveness of the consent decree.⁶⁹ As plaintiff's counsel, Larry Schaeffer, explained:

We insist on data analysis throughout the term of the decree periodically to be sure again as much as you can be sure that the measures that have been undertaken are having some effect. (Plaintiff attorney).

If clear procedures were established, monitoring each party's adherence to the procedures would be easier. Class counsel regarded clarity in reporting and monitoring as critical to making their role in implementation constructive and realistic:

[T]he mistake you can often make at the outset is thinking you can be the super police over this, and get too involved in the workings of a company, and it just is—it does not work...you've got to strike the balance between setting up a system that is designed to effect the kind of change that you hope will eliminate the systemic problem but on the other hand not get too enmeshed in the day-to-day business operations of the organization. (Plaintiff attorney)

The consent decree was purposefully designed to produce intelligence that, when dutifully monitored by class counsel as specified in the agreement, would allow constant correction:

The consent decree was purposefully designed to produce intelligence that would allow constant correction.

⁶⁹ In the AEEA decree, the monitoring of compliance with the decree was the responsibility of plaintiff counsel; in subsequent decrees involving financial advisors the responsibility for monitoring behavior and recommending changes transferred to external industrial psychologists.

**Plaintiffs' counsel linked
the salary and bonus of
the Field Diversity
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implementation of the
consent decree.**

[W]hat we tried to do in American Express is set up periodic reports and analyses that are produced from the database that show distribution of leads and accounts. And if there are discrepancies, those are red flagged, and we follow up on them aggressively. (Schaeffer 2003)

Class counsel's strategy for eliminating systemic discrimination was, in effect, to achieve incremental change throughout the life of the consent decree particularly in key elements of inequity, such as distribution of accounts and leads.

One attorney involved in drafting the consent decree also noted that clear penalties for any violation of the consent decree would protect women from subtle retaliation (WAGE 2006). The enforcement section of the consent decree made clear consequences to AEFA for noncompliance. Women advisors could report their complaints related to noncompliance as well as harassment and retaliation for complaining. A process for reviewing these complaints was specified, as well as a process for considering remedies. If class counsel found AEFA's remedial action insufficient, enforcement proceedings were to be conducted before a Special Master. The findings and recommendations of the Special Master were binding on all parties and enforceable orders of the court.

Internal Accountability: The Criticality of the Field Diversity Office

For plaintiffs' lawyers, the Field Diversity Office was critical because this office reported directly to a company executive. Acting on their experience that "when there really is perceived to be a commitment at top level (the CEO), and it's imposed and followed through, and there are consequences when there are violations of either internal policies or discrimination is found to occur, and there are swift consequences, that changes places" (Schaeffer 2003), plaintiffs' counsel fashioned this office to be both the symbol and substance of the chief executive's commitment to change.

To strengthen this model for effecting internal change, plaintiffs' counsel linked the salary and bonus of the Field Diversity Officer(s) to their implementation of the consent decree: "Fulfillment of the responsibilities of the Field Diversity Officer shall be an express written criterion in the Field Diversity Officer's performance review, which shall specifically include an annual rating as to this criterion, and as a result shall be a factor in the Field Diversity Officer's compensation" (*Kosen v. AEFA Consent Decree*, 14).

This office—with its responsibility for generating highly specific data and its biannual reporting requirements—was the focal point in the model for effecting institutional change:

We wanted the field diversity officer to be a direct report to an officer of the company, and that was accomplished. And we wanted some objective measures in their performance appraisal to be directly related to how well they were doing that job. Because we viewed that position as critical. (Schaeffer 2003)

Outcomes: Account Assignments, Hiring Goals, Diversity Training

While the consent decree was in effect, one injunctive change in particular—the assignment of accounts—was seen to be effective. This was significant because class counsel believed in their negotiations leading up to the settlement agreement that many problems expressed by their clients had to do with the assignment of the accounts that remained at AEFA when a financial advisor left or retired. The relief specified in the consent decree was

to make sure that these accounts were distributed fairly so that female financial advisors would have the same opportunity to earn commissions by securing their fair share of these accounts (WAGE 2006). A plaintiff attorney involved in the case concluded:

I think overall it was effective. There were some people made complaints to us about it, but under the resolution mechanism, Amex gave us data about where accounts in that marketplace went, and there was no apparent deviation that we saw during the terms of the consent decree. (Plaintiff attorney)

Regarding hiring goals, however, according to Plaintiffs counsel, AEFA had difficulty from the outset:

The hiring goals turned out to be a problem. They couldn't ever meet hiring goals, and they really tried. I had meetings twice a year with their people during the term of that consent decree. They were doing everything they could to try to hire more women. There were certain markets where they could not hire women, no matter what they did. People in those markets just didn't respond to the effort. They reached out at colleges, universities, all sorts of places and couldn't meet those hiring goals. (Plaintiff attorney)

External forces also hindered the company's efforts to reach their hiring goals. In 2003, shortly after the consent decree was signed, the United States economy was still suffering from the 2001 recession and the financial services industry was unattractive to job seekers. Also, the growing reputation of the industry as unfriendly to women dampened women's willingness to pursue jobs with these firms (Plaintiff attorney).

Unmet hiring goals reduced the pool from which to promote women brokers. Yet an inadequate pipeline of women from which to promote was only part of the problem:

Some women...wanted to try to get into these regional vice president, or regional director, whatever title they were giving people at the time, and they couldn't get some of the women they wanted to apply, because you lose your book of business sometimes. The women didn't want to stop practicing to manage others. (Plaintiff attorney)

Plaintiffs lawyers were skeptical from the outset about what diversity training would accomplish.

We did take part in it (diversity training)...they gave us the responses to surveys about: did you think it was worthwhile? Did you think it was great? Did you think it was horrible? Did you learn anything? Things like that and you didn't have to fill out the survey. So what we got were a very few people were ecstatic about it and thought it was great and a bunch of people who thought it was a waste of time, but those are just the types of people who fill out the survey. So in general, based on lots of cases, I don't know that diversity training is worth the money. I don't know

Plaintiffs lawyers were skeptical from the outset about what diversity training would accomplish.

that it changes anybody's ideas, feelings, the atmosphere of the workplace. It might make people learn to be quiet and not say stupid things. (Plaintiff attorney)

Consent Decrees in Similar Cases after AEFA

Although the AEFA consent decree contributed important precedents in terms of framing charges of sex discrimination and developing concrete mechanisms and metrics for instituting organizational change, it was not the last class action discrimination lawsuit involving financial advisors/brokers and trainees. We identified eight subsequent class cases, seven brought by private law firms and one case brought by the EEOC on behalf of women working in different positions in financial services. Three of these cases involved charges of race discrimination brought by African-American and Latino financial advisors and other money managers with almost the same set of detailed charges of unfair hiring, promotion, account assignments, and the like, as women brokers charged. The similarities of discriminatory conditions faced by women, African-American, and Latino financial advisors resulted in consent decrees with similar injunctive relief. These cases involved classes ranging in size from 515 to 2,700 people and in awards from \$7 million to \$46 million. Three employers—Smith Barney, Merrill Lynch, and Morgan Stanley—were the subject of class action discrimination suits multiple times.

This section describes the characteristics of the class and their charges, remarkably similar nationwide, and across race and gender lines as well. These cases are presented in the order in which they filed in federal district court so that the reader can see how, year after year, similar charges persisted in the financial services industry. The injunctive relief in the cases is discussed in the following section within the context of discussing the evolution of consent decrees through this 15-year period.

Amochaev v. Smith Barney

On March 21, 2005, Renee Fassbender Amochaev and three other women filed a class action complaint in the United States District Court for the Northern District of California against Citigroup Global Markets, Inc. d/b/a Smith Barney. These women were employed as financial advisors in California branches of Smith Barney's retail brokerage operation from June 2003 to March 2005. Their claims, while similar to those filed against Smith Barney in the late 1990s, were expanded to reflect the more extensive enumeration of claims in *Kosen v. AEFA*, including discrimination in account distribution, sales support, promotions, pay, and other terms and conditions of employment.

In November 2006, plaintiffs added a new dimension to their charges: the accumulation of disadvantage over time. They amended their complaints to accuse Smith Barney of using past performance, which they called "the results of historical discrimination" as a criterion for awarding business and pay. The women contended that even small advantages that the bank gave to men accumulated over time, thereby keeping male brokers at the top of the compensation scale and female brokers at the bottom.

After almost three years of extensive fact finding through discovery and depositions related to class certification, a four-year settlement was reached under supervision of a mediator; the settlement affected all women employed as financial advisors throughout the U.S. branches of Smith Barney's retail brokerage and established a settlement fund of \$33 million to settle claims from a class of approximately 2,500 women.

Once again, the settlement was hailed as a force for sweeping change in the industry.

McReynolds v. Merrill Lynch

In November 2005, George McReynolds, a financial advisor in the Nashville, Tennessee, branch of Merrill Lynch, filed a complaint in the United States District Court Northern District of Illinois against his employer on behalf of himself and more than 60 other African-American financial advisors at the firm.

His complaint charged Merrill Lynch with a pattern of race discrimination, including failing to hire African-Americans, failing to promote African-Americans, including to management; segregating African-Americans in lesser positions, such as clerical positions and nonproducing roles, such as investment advisors; retaliation; racial bias in account assignments, training, and partnership opportunities; and continuing the effects of past discrimination regarding account distributions and partnerships; and other charges as well. These charges closely resembled the charges in *Kosen* as applied to race rather than gender discrimination.

Although class action certification was denied, this decision was not related to the substantive discrimination case made in the complaint. This case is ongoing.

Augst-Johnson v. Morgan Stanley

In early 2005, approximately the same time that *Amochaev v. Smith Barney* was filed in court, Joanne Augst-Johnson and seven other women each filed a charge of discrimination with the EEOC charging Morgan Stanley with sex discrimination against themselves and a class of women employed as financial advisors or registered financial advisor trainees throughout the United States. In June 2006, these women filed a complaint in the United States District Court of the District of Columbia against Morgan Stanley.

These women's charges were similar to those in *Kosen*, namely, that they had been afforded fewer business opportunities than male counterparts and that they experienced sex discrimination in "career advancement, distribution of accounts, work assignments, compensation, and/or other terms and conditions of employment and/or termination (*Augst-Johnson v. Morgan Stanley*). As in *Kosen*, some plaintiffs also claimed age discrimination.

Negotiations among the parties using the services of a mediator ultimately led to a court-approved settlement agreement on behalf of approximately 2,700 women financial advisors and registered financial advisors. The five-year agreement included a \$46 million fund. Once again, the settlement was hailed as a force for sweeping change in the industry: "[It] is a tremendous first step in terms of changing the practice on Wall Street with regard to how female financial brokers are treated" (Anderson 2007).

Jaffe v. Morgan Stanley DW (MSDW)

After filing an administrative complaint with the EEOC, in June 2006, Daisy Jaffe, a former financial advisor of Morgan Stanley in the company's San Mateo, California, office, and three other women filed a class action lawsuit in the United States District Court for the Northern District of California. They claimed a pattern of sex discrimination with regard to compensation, account distribution, leads, referrals, partnership opportunities, walk-ins, call-ins, and other business opportunities. They said that Morgan Stanley had created "an unlawful adverse impact on women and minorities" when those leads were distributed disproportionately among white male financial advisors. Jaffe also claimed age discrimination.

The California case was originally filed as a sex discrimination case on behalf of a white woman financial advisor, Jaffe, who claimed she was wrongfully terminated. Her sex discrimination charges were eventually incorporated into the Augst-Johnson settlement. After

His complaint charged Merrill Lynch with a pattern of race discrimination, including failing to hire African-Americans, failing to promote African-Americans, including to management; segregating African-Americans in lesser positions.

Plaintiffs charged that they were steered to sales territories and neighborhoods where minorities and low-net-worth clients lived.

Jaffe's complaint was filed in June 2006, an African-American broker, Denise Williams, claimed the firm discriminated against her based on her race. Then, Curtis Bauer, an African-American former broker, was added as a lead plaintiff in August 2007.

In February 2008, the court certified class status for approximately 1,300 employees—African-American and Latino financial advisors and trainees.

A five-year settlement was approved by the court in October 2008. Morgan Stanley paid \$16 million into a settlement fund to be distributed to class members, with the average class member receiving about \$12,000.

Once again, the settlement was heralded as changing the industry:

This is a bell-weather settlement that not only will bring about genuine change at Morgan Stanley, but will also influence the entire industry (plaintiff attorney quoted in Basar 2007).

Turnley v. Banc of America Investment Services

In May 2007, Richard Turnley III and four other current and former financial advisors filed a complaint in the United States District Court for the District of Massachusetts against Banc of America Investment Services (BAI), a subsidiary of Bank of America (BOA), and the parent company BOA. The plaintiffs sought nationwide class action status charging their employer with racial discrimination in compensation, promotion, mentoring, training, resources, business opportunities, and other terms and conditions of employment. They claimed they were denied promotions in favor of less qualified Caucasian employees, provided less training, received fewer accounts of departing advisors, and had access to less administrative support services based on their race.

With racial discrimination central to this case, these financial advisors introduced a set of charges of discrimination that adds to those that women brought in *Kosen v. AEFA* and subsequent cases. These plaintiffs charged that they were steered to sales territories and neighborhoods where minorities and low-net-worth clients lived, and also, that BAI and BOA favored partnerships of Caucasian financial advisors with Caucasian premier bankers, assigning these Caucasian partnerships to geographic territories composed of Caucasians with relatively higher net worth than minority territories (*Turnley v. Banc of America*, Class Action Complaint, 5–12).

Lead plaintiff, Richard Turnley III, an African American, was employed as a financial advisor in the Atlanta, Georgia, office of BAI from October 2003 until November 2006. Four other African Americans, three men and one woman, employed in the Atlanta, St. Louis, Missouri, and West Palm Beach, Florida, offices were also named plaintiffs. Three of the four were financial advisors, the other was a premier banker with BOA's Premier Banking & Investments Division in the Atlanta office.

Turnley described a continuing process over several years in which he was consistently "steered" into minority partnerships, denied access to high-net-worth areas, and reassigned to low-net-worth areas. After three years, he resigned. In the interim, he was denied a position as sales manager because he was not doing enough "fee-based business," only to watch BAI hire someone as a sales manager who had no such experience (*Turnley v. Banc of America*, Class Action Complaint, 16–17).

Another plaintiff claimed that, in four years, he was subjected to six different territorial reassignments and seven different premier banker relationships. Each time, he was part-

nered with an African-American premier banker and assigned to predominately African-American, low-net-worth areas. Another plaintiff charged that his pay-out share was reduced from 36 percent to 24 percent, although no such reduction was made to the pay-out of Caucasian financial advisors. The specific charges by plaintiffs in this case are lengthy, highly detailed accounts of practices that denied African-American financial advisors and premier bankers opportunities to access the entire marketplace (*Turnley v. Banc of America*, Class Action Complaint, 13–25).

After an extensive discovery period with defendants producing two million pages of documents and more than two million records of employment-related data, using the services of a mediator, the parties came to a settlement agreement that was submitted to the court in July 2009 (*Turnley v. Banc of America*, Settlement Agreement, 2). Final approval of a settlement to be in effect for two years was issued in November 2009. The settlement covered a class of all African Americans employed as financial advisors or premier client managers in the Premier Banking & Investment division of Bank of America between April 2003 and March 2009, estimated to be 515 people. A settlement fund of \$7.2 million was established to pay claims.

Goodman v. Merrill Lynch

In June 2009, Jamie Goodman, a top earning financial advisor who had worked at Merrill Lynch since 1992, filed a complaint in the United States District Court for the Southern District of New York (Manhattan) on behalf of herself and all others similarly situated, charging Merrill Lynch and its parent company, Bank of America, with sex discrimination in offering female advisors lower retention bonuses than their male counterparts. The complaint argued that because wealthier clients had been steered to male advisors, female financial advisors were typically eligible for only lower production-based bonuses.

When Bank of America acquired Merrill Lynch in September 2008, the bank announced that it would pay retention bonuses to Merrill's financial advisors based on commissions. The problem was, according to Goodman, that women were discriminated against in being excluded from significant earning opportunities, thereby keeping their commissions artificially low. Moreover, the few women like herself who made it into the high earning brackets were disproportionately denied retention bonuses or received lower bonuses than their male counterparts.

The complaint was rooted in the *Cremin v. Merrill Lynch* consent decree in which Merrill Lynch agreed to create a nondiscriminatory process for account distribution. In the intervening years, the complaint charged that:

Merrill Lynch managers have also devised and employed a number of means designed to evade or manipulate the account distribution policy to the benefit of male brokers and to the detriment of female brokers. One such method is the use of partnerships, or teams, of brokers. (*Goodman v. Merrill Lynch & Co.* Complaint:6.)

Goodman's complaint laid out the way her own partnership, when it dissolved, discriminated against her. Accounts previously under her management were distributed throughout the office despite assurances from the company's director of the Office of Diversity Analytics and Assessment that she was entitled to these accounts. Her experience illustrated the way in which partnerships formed and directed by male managers often worked to dis-

The complaint argued that because wealthier clients had been steered to male advisors, female financial advisors were typically eligible for only lower production-based bonuses.

Her male supervisors began taunting her, calling her “preggers” and “large and in charge.” The taunting escalated even while her sales soared.

criminate in the distribution of accounts, routing accounts, assets, and resources to male brokers.

In acquiring Merrill Lynch, Bank of America knew the firm’s record of sex discrimination settlements and that women financial advisors still held a disproportionate number of the lowest producing positions. Yet, the complaint charged that Bank of America “Defendants intended to retain and more generously compensate white men rather than female FAs” (*Goodman v. Merrill Lynch*, Complaint, 8). “Bank of America acquired a company that had a history of mistreatment,” said one plaintiff’s attorney. “Rather than acknowledge that, and be part of the solution to level the playing field, Bank of America picked up where Merrill Lynch left off” (Ali 2009).

This case was settled in November 2010; the details of the settlement are not public.

EEOC and Doneyhue v. JP Morgan Chase Bank

After an unsuccessful effort at reaching a voluntary settlement, in September 2009, the EEOC filed a complaint in the U.S. District Court for the Southern District of Ohio on behalf of Aimee Doneyhue, formerly a home mortgage consultant and other female employees at the Polaris Park facility of JP Morgan Chase Bank in Columbus, Ohio. The complaint charged JP Morgan Chase Bank, NA, with sex discrimination, a sexually hostile environment and retaliation that affected women’s compensation, including their ability to earn commissions and bonuses.

Doneyhue began working at Chase in April 2007. She was pregnant at the time she was hired. Her male supervisors began taunting her, calling her “preggers” and “large and in charge.” The taunting escalated even while her sales soared. “It was my first full month working there so I was already No. 1.” Doneyhue claimed that name calling turned worse and that she was penalized financially. When she contacted the human relations department, she was fired. Doneyhue is seeking class action status for other women who were treated in ways that affected their ability to earn commissions and bonuses, as well as subjected to verbal sexual harassment (10TV.com 2009).

This case is on-going. Class certification has not been determined.

Carter v. Wells Fargo Advisors

In March 2005, approximately the same time that Augst-Johnson filed her complaint with the EEOC and Amochaev filed her complaint in federal court, Evelyn Carter, a financial advisor at Wachovia Securities in the Private Client Group in its Albuquerque, New Mexico, branch, filed a complaint of sex discrimination and retaliation with the EEOC and the New Mexico Human Rights Division.⁷⁰ After exhausting all administrative remedies in the ensuing four and a half years, in September 2009, she joined with two other women to file a class action complaint in the United States District Court for the District of Columbia.

These women charged Wachovia Securities with engaging in a pattern and practice of sex discrimination in compensation; in promotions of women from financial advisor to branch managers and other more prestigious positions; in training, mentoring, and in assigning of-

⁷⁰ Wachovia Securities was renamed Wells Fargo Advisors in May 2009 as a result of Wells Fargo & Co.’s acquisition of Wachovia Corporation in December 2008.

fice space; and in sales support. As in earlier cases, plaintiffs claimed gender biases in the distribution of accounts, including assignment of new accounts, account leads, referrals, partnership agreements, and transfers. Regarding compensation, they claimed discrimination in signing bonuses, forgivable loans, and transitional compensation packages offered to lateral recruits. One plaintiff, Eileen Wasserman, age 66 at the time of the filing, also claimed Wachovia Securities discriminated against her based on her age (*Carter v. Wells Fargo Advisors*, 10–13).

The allegations of each of the three named plaintiffs illuminate the persistence of discriminatory treatment of female financial advisors. Carter claimed that she was paid less than male financial advisors with the same or less experience and performance; that she was denied promotional opportunities given to less qualified male financial advisors; and that she was denied her fair share of the partnership earnings. Phillips and Wasserman made similar claims. All charged that they were subjected to sexual stereotyping, derogatory treatment, and retaliation for their complaints. The latter two plaintiffs were forced to resign.

This case is open. A final settlement has not been reached. In January 2011, a preliminary approval was granted by the court to a \$32 million class settlement.⁷¹

The Lessons of Consent Decrees of AEFA and Similar Cases

Taken together, the cases in the preceding sections represent the record of class action workplace discrimination litigation in the financial service sector from 1995–2010. It is predominantly a record of action by one particular group of employees, financial advisors. During this time, the following patterns emerged.

Monetary Recovery by Individual Class Members Was Modest

Although much public attention was given to the multimillion dollar settlements that employers set aside for class claims, in fact, the individual awards for most of the class were modest. Some named plaintiffs received roughly six-figure awards. Yet overall, the average claimant received \$11,000; in recent settlements, however, the average payment was \$14,600.⁵²

In one plaintiffs' attorney's assessment, no individual in a class action recovers her (or his) full financial losses from discrimination.

I think if a woman...really wants to get full relief, that has to be done through individual litigation, and somebody really devoting the attention necessary to work up her economic loss, damages through the course of a career. That doesn't get unfortunately compensated adequately in the class mechanism. (Schaeffer 2003)

Independent Mediators Were Critical in Reaching Agreements

Of the eight settled cases, seven were settled with the help of mediators. The exception

⁷¹ See <http://www.sprengerlang.com/wp-content/uploads/2011/01/2011-01-25-wachovia-securities-preliminary-approval-order.pdf>.

⁷² This calculation is an approximation based on total settlement divided by class size. Although the total settlement includes attorneys' fees, and thus might overstate awards to class members, on the other hand, class size is an estimate that may overstate the actual number of class members who file claims. Overall these averages give the reader an approximate measure of the financial remuneration of class members. The calculation is skewed by the large class in *Kosen v. AEFA*, who each received an average \$5,400 payment. In recent settlements, the average payment to a financial advisor ranged between \$12,000–\$17,000, with an average claim payment of \$14,600.

Companies, especially large corporations, need oversight for five years for changes in procedures and behavior to become established and have any likelihood of remaining intact after a consent decree expires.

was the EEOC case involving Schieffelin. Three recently settled cases—*Augst-Johnson*, *Amochaev*, and *Jaffe*—used the same mediator, Hunter Hughes.

Mediators serve a crucial role because they are not invested in either side. One attorney, after saying “I can’t imagine settling a case without a mediator” went on to explain:

[S]ometimes you get a new representative in the room who usually is either the employment lawyer for the company, or head of HR of the company. And they get various titles, you know, head of human capital, whatever. They take things very personally. “It’s my job to make sure this doesn’t happen and you’re saying it does, and I don’t want to change anything I’m doing, because I’m doing a good job.... And so there’s a lot of psychological push back to getting to injunctive relief. Frequently, having a mediator, a neutral person there who isn’t accusing anybody of anything can help get you through that psychological block. Because you have to get buy-in from the company, particularly from that person who’s head of human capital or head of HR or whatever their title is. You have to get them to buy into the process, or they’re never going to implement injunctive relief. (Plaintiff attorney)

Years of Oversight Are Necessary for Injunctive Relief to Take Hold

In response to our inquiries about an effective duration of court oversight, plaintiffs’ attorneys said that companies, especially large corporations, need oversight for five years for changes in procedures and behavior to become established and have any likelihood of remaining intact after a consent decree expires. One attorney explained:

You don’t see any changes in the data for a minimum of two years. It takes that long for the data to start showing... And then it takes another three probably for it to actually become rote procedure at the company, so I’d say five (years) for the really big companies. Now if it’s a smaller company, it would probably take a lot less time.” (Plaintiff attorney)

Another plaintiffs’ attorney had similar reasoning:

Well, defendants want it—typically want it to be, like, one or two years and we typically want it to be five years and so sometimes we get five years. Sometimes we get three years with the right to extend it for two years if there’s a basis for doing it. Sometimes we get four years but it’s usually—for me anyway it’s in the three to five year frame... if you get less than that it’s crazy because it takes a year or two to just get these policies up and running, then you got to see the impact that they have. You can’t change these companies. They took 100 years to get themselves in their bad state. You can’t turn them around in one or two years. You need three to five years, you really do. (Plaintiff attorney)

Yet, it is difficult to get companies to accept five years of oversight. Attorneys reported intense negotiation about the duration of the agreement.

We always start off with, “We want seven years.” And they always start off with, “Well, six months sounds good.” (Plaintiff attorney)

For the companies in this study, the length of time in which the settlement or consent decree was in effect varied within a range of three to five years, yet overall, crept to slightly longer durations during the 15-year period. The first three consent decrees specified three- or four-year terms (*Martens v. Smith Barney*—four years; *Cremin v. Merrill Lynch*—three years, *EEOC/Schieffelin v. Morgan Stanley*—three years). For the next seven years, 2002–2008, parties agreed to oversight lasting four or five years (*Kosen v. AEFA* and *Amochaev v. Smith Barney*, four years; *Augst-Johnson v. Morgan Stanley* and *Jaffe v. Morgan Stanley*, five years). Of the seven employers involved in the cases in this study, only one employer, Morgan Stanley, ever agreed to a five-year term.

The 2009 settlement of *Turnley v. BoA* was the exception to the three- to five-year pattern; its duration was only two years. Given the assessment by one attorney engaged in supervising the AEFA consent decree that meaningful data about changes in practices does not appear for “a minimum of two years,” any positive and lasting effects from this settlement appear questionable.

A Small Number of Firms Represent Plaintiffs, Large Firms Represent Employers

From 1995–2010, eight private law firms consistently played central roles for plaintiffs individually and as their class counsel. Attorneys in these firms carried their approaches to discovery and charges of systemic discrimination from one case to the next, which is reflected in the similarities in charges in complaints they filed on behalf of their clients. These attorneys also carried with them the lessons they learned from one case to another, which is reflected in the evolution of some measures they successfully negotiated in injunctive relief.

Figure 3 shows principle plaintiffs’ firms involved with each case. Arrows indicate the migration of each law firm to subsequent cases.

There is considerable overlap among the firms representing plaintiffs in the three cases settled between 2007 and 2008—*Augst-Johnson*, *Amochaev*, and *Jaffe*. Although plaintiff’s attorneys tended to negotiate similar prescriptions from one case to the next, they treated each case as representing the next opportunity to effect significant changes in the employer’s practices of discrimination. One seasoned plaintiff’s attorney explained:

I think one of the reasons we continue to get sweeping programmatic [injunctive] relief is because we’ve got sweeping programmatic relief before...you just keep building on it. (Plaintiff attorney)

From their experience with previous similar discrimination cases, these firms learned the information employers generated about wage and job categories and, therefore, the data they could request from an employer in the discovery phase of the next case. Because class action cases involved extensive data gathering—as noted earlier one employer provided two million pages—plaintiff’s firms relied on a limited number of companies that had the capacity to process and analyze volumes of data. Plaintiffs’ firms also depended on a cadre of expert witnesses whom they used in gaining settlements on many of their cases.⁷³ One drew an important distinction: “it’s only recently that they’ve started to embrace the social science

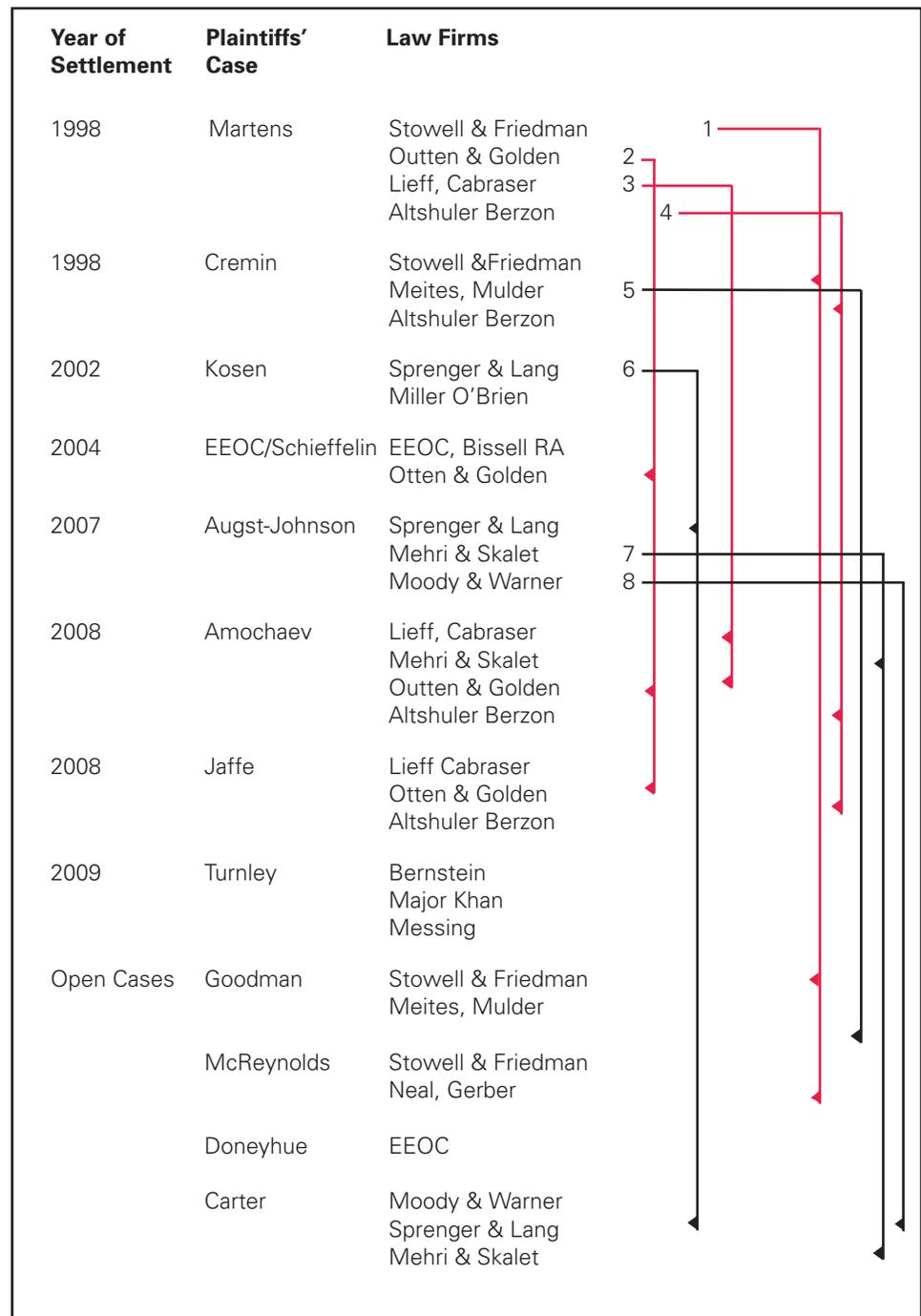
These attorneys also carried with them the lessons they learned from one case to another.

⁷³ For example, expert witness Professor William Bielby was engaged by plaintiffs’ firms in many of these cases, specifically *Cremin v. Merrill Lynch*, *Martens v. Smith Barney*, *EEOC/Schieffelin v. Morgan Stanley*, *McReynolds v. Merrill Lynch*.

expertise that informs remedies, as opposed to diagnosing the causes of discrimination” (expert witness).

In contrast, the chart shows that the three firms that represented plaintiffs in *Turnley v. BaA*—the settlement with the shortest duration and the most limited injunctive relief coming from a discovery phase that produced over two million documents—had not participated in any of the previous settlements.

Figure 3: Chronology of Financial Services Class Action Litigation and Links between Plaintiff Law Firms



Employers relied on outside counsel at some of the largest law firms in the nation. In most cases, employers that were sued more than once typically used the same firms to defend them time and again. Like plaintiffs' firms, defense counsel learned from each case and carried that experience to the next negotiation. In *Martens*, Smith Barney retained the large, prestigious law firm Paul Weiss Rifkind, Wharton & Garrison. Paul Weiss represented Smith Barney against *Amochaev*; Morgan Lewis first represented Merrill Lynch against *Martens*, and has defended the firm in *Goodman v. Merrill Lynch & Co.*; in addition, Morgan Lewis represented Morgan Stanley in *Augst-Johnson* and *Jaffe*. The exception to this pattern was Bank of America. Just as plaintiffs' counsel in *Turnley v. BoA* had not been involved in any previous settlements, neither had the Bank's outside counsel had the benefit of experience in any of these previous class action lawsuits.

Prescriptions for Injunctive Relief Came from Multiple Sources

In addition to building on their own previous experience, attorneys turn to many sources for recommendations regarding injunctive relief, especially the plaintiffs themselves, expert witnesses and other consent decrees, some involving other financial service employers, some involving highly regarded settlements in other industries, such as *Butler v. Homes Depot*.

One attorney outlined the array of people and resources commonly consulted for input:

Our clients are a big resource and we continuously go back to our clients to see what they experienced on the ground...the second big one I would say (are) our own experiences...we have this laboratory of justice and we've got all these binders of settlements, so sometimes we just flip through them and look for ideas of what we worked on in the past. And brokerage houses are really like sales cases and we've done a number of confidential settlements in sales, so we've looked at the issue of distribution of accounts and territories and things like that which are very much on point. A third resource, like for example Mara was on the Morgan Stanley case, so she had *Kosen*, which was probably...as close to on point as there is a case out there. And then we have social scientists, like [Professor Frank] Dobbin. Then we have our own experts. We consulted with...Professor Bielby. We also worked with statisticians and reached conclusions regarding what factors should go into account distributions... (Plaintiff attorney)

Because the institutional change sought in consent decrees is complex, each source provides important input to crafting potentially effective prescriptions.

Lessons in the Evolution of Injunctive Relief

Consent Decrees Developed Highly Detailed Injunctive Relief

Throughout 1995 to 2010, while the complaints of plaintiffs consistently focused on the same issues—discrimination in compensation, bonuses, account distribution, leads, partnerships, promotions, resources for business development—the form and substance of injunctive relief evolved.

As noted earlier, the first two cases to reach settlements, *Martens v. Smith Barney* and *Cremin v. Merrill Lynch*, were largely devoted to monetary relief for class members. In *Martens*, monetary relief consisted of a three-tier structure of dispute resolution: first, those claimants who accepted the firm's offer would be paid immediately; if the firm's offer was

A psychologist was charged with reviewing the bank's account distribution, lead distribution, partnerships, handling of accounts, and geographic assignments of financial advisors and premier client managers.

not accepted, a mediation process was initiated; if mediation failed to resolve a claim, then alternative dispute resolution was the final forum. In *Cremin*, a Claims Resolution Process required an investigation by the company and then mediation. If no settlement was reached, then the claim would be subjected to binding arbitration (Hughes n.d., Appendix A). In both settlements, the injunctive relief was stipulated after monetary relief.

Several years later, the consent decree of *Kosen v. AEFA* shifted the emphasis: injunctive relief became the first matter addressed in the consent decree; monetary awards, second. All subsequent settlements except for the *EEOC/Schieffelin* case, addressed injunctive relief first and gave roughly proportionate attention to details as given to monetary relief.

The injunctive relief in the *Kosen v. AEFA* consent decree dealt with core issues that were consistently addressed in subsequent consent decrees: account distributions, lead distribution, procedures for promotions, job postings, development opportunities, terminations, mentoring, complaints, and diversity training. In later settlements, some additional matters were added, which reflected emerging new practices of an employer. For example, in the early 2000s, some financial advisors in brokerage houses began forming teams, commonly called partnerships, to attract and manage accounts. Women were less likely to be included in teams. So, in 2008, in the second class action suit against this employer, *Amochaev v. Smith Barney*, and in *Jaffe v. Morgan Stanley*, injunctive relief specifically dealt with enabling women to participate more equitably in and benefit from partnerships.

Although injunctive relief in *Kosen v. AEFA* included matters covered in the previous cases, for example, account distribution, lead distribution, promotions, etc., the *Kosen v. AEFA* consent decree specified changes in procedures for each matter in detail. Except for *Turnley v. BoA*, all subsequent consent decrees also specified changes for each element of injunctive relief.

The *Turnley v. BOA* consent decree stands in sharp contrast to the detailed, increasingly employer-specific prescriptions for change that evolved over this 15-year period. The complaints of African-American financial advisors and premier bankers in *Turnley* were similar to those of *Kosen v. AEFA*. The three pages addressing injunctive relief in this case, however, required changes to account distribution and lead distribution to be designed and approved through a drawn out process practically insuring that the consent decree would expire before changes went into effect. First, BoA agreed to appoint an industrial psychologist (IP) within a year of a two year consent decree. This psychologist was charged with reviewing the bank's policies and practices with regard to diversity and inclusion in its account distribution, lead distribution, partnerships, handling of accounts, and geographic assignments of financial advisors and premier client managers. The IP was then to report findings and make preliminary recommendations for improvements in these policies and procedures, which the bank would consider and discuss with the IP. No deadlines were placed on the IP for completing these tasks. Once policies and practices had been analyzed, the IP would make final recommendations to BoA and provide class counsel with a confidential copy. The bank had 45 days to determine "whether and how to implement the Recommendations" and another 10 days before informing class counsel in a confidential memo which recommendations BoA would implement and which it would not. The sketchy injunctive relief in this case had little prospect of resulting in any lasting effect on the complaints of Turnley and his class.

Increasingly Sophisticated Algorithms Evolved to Ensure Fair Distributions of Accounts and Leads

The most painstaking advance in injunctive relief came in distributing prospects for new accounts and accounts left behind when a financial advisor left the brokerage firm. In the first two consent decrees, opportunities for women to build up the assets under their management through leads and account distributions were to be allocated in a new, “non-discriminatory” fashion. To do so, the employer was charged with developing and distributing “non-discriminatory standards” to its branch offices.

In 2002, the *Kosen v. AEFA* consent decree took the responsibility of establishing “non-discriminatory standards” out of the hands of the employer and instead specified distribution of leads and accounts on a randomized basis. The details of the randomized process were carefully spelled out for both leads and accounts. For example, when client accounts left by a departing financial advisor were distributed, these were required to be assigned “without regard to gender by designated client account assignment coordinators in their respective market groups on a randomized basis, according to the central objective criteria, which shall include geography, Financial Advisor productivity, specialty expertise, and account value index” (*Kosen v. AEFA*, Consent Decree, Section IV.F).

This randomized statistical approach was replaced in the *Augst-Johnson v. Morgan Stanley* settlement with “Power Ranking”—a “system to rank Financial Advisors on performance factors to determine the distribution of accounts, a means of reducing reliance on historical factors and more heavily weighting criteria which reflect recent performance” (*Augst-Johnson v. Morgan Stanley*, 20.) Power rankings were to guide the distribution of accounts of retiring brokers, departing brokers, partnerships, and leads, walk-ins, and call-ins. The rationale for abandoning random assignments for this new methodology was explained:

...Morgan Stanley already had factors that went into how accounts are being distributed and the problem with them was they were using factors that look on their face like they were neutral but actually weren't. So we had to expunge those out of the system and replace them with what I would call more merit based system factors. Which is probably the best way to go, probably better than randomly. Better than random are gender/racial-neutral, merit based factors. (Plaintiff attorney)

This Power Ranking system was subsequently also incorporated in the *Jaffe v. Morgan Stanley* and *Amochaev v. Smith Barney* consent decrees.

Development of Women and Minority Professionals Replaced Numerical Goals for Hiring and Promotion

The *Kosen v. AEFA* consent decree carried over from *Martens v. Smith Barney* a commitment to numerical hiring goals to increase the representation of female financial advisors in their ranks. Of the subsequent decrees, only one, *Jaffe v. Morgan Stanley*, expressed a commitment to increase the numbers of financial advisors of the class, in this case, African Americans and Latinos. To this end, Morgan Stanley committed to employing one person whose primary function was to recruit qualified minorities.

In place of numerical goals, subsequent decrees substituted initiatives to develop careers and performance of female and minority financial advisors. In *Kosen v. AEFA*, professional development was limited to a requirement that the employer establish a voluntary mentor-

The details of the randomized process were carefully spelled out for both leads and accounts.

ing program for women. In three subsequent consent decrees—*Jaffe v. Morgan Stanley*, *Augst-Johnson v. Morgan Stanley*, and *Amochaev v. Smith Barney*, industrial psychologists were mandated to assist in the professional development of female and minority financial advisors. The two industrial psychologists designated in the Morgan Stanley cases brought extensive experience as court appointed monitors in the settlement agreement of *Ingram v. The Coca Cola Company*. They were charged with developing initiatives to attract, retain, and promote women and minority brokers primarily through targeting training programs to build marketing skills and mentoring programs. They were also charged with improving the participation of women and minorities in partnerships.

The promotions process also shifted over time from prescription to process. AEFA established a detailed process for promotions that not only prescribed the posting of all available positions but also mandated that at least two applicants of each sex who met the minimum qualifications for the position were interviewed for the open position. Promotions at the level of assistant vice president and above required written approval by the Human Resources Department, and the responsible senior vice president and the Field Diversity Officer, and a written justification if a qualified woman was bypassed for a less qualified man. The interview requirements and written justifications for bypassing a qualified woman were reminiscent of the promotion process ordered in the Boston police department consent decree several decades earlier.⁷⁴

Consent decrees following *Kosen v. AEFA* treated promotions much less rigorously. All included requirements for posting openings for management positions. None required including two qualified women candidates in the interviewing process or a written justification when a qualified woman was bypassed for a less qualified man.

Summary

Injunctive relief in the consent decrees involving this group of financial institutions evolved in fundamental ways over the 15-year period. First, injunctive relief became a more substantial part of consent decrees from 2000–2010. Decrees shifted from focusing first and foremost on monetary relief for plaintiffs to addressing injunctive relief first and with roughly the same attention given to both forms of relief. Second, although the *Kosen v. AEFA* consent decree established the core elements that were subsequently included in injunctive relief for women and minorities employed as financial advisors in large brokerage firms throughout the last decade, the relief associated with these core elements adapted as the practices of financial advisors evolved in their institutional setting. One particularly timely adaptation was including allocations involving partnerships as employers increasingly sanctioned partnership arrangements among financial advisors. Third, later consent decrees placed increasing requirements on the professional development of women and minority brokers while abandoning numerical goals representing these employees. Finally, the most important evolution was the fine-tuning of methodology for allocating leads and accounts so that ingrained historic bias did not further disadvantage female financial advisors.

A written justification was required if a qualified woman was bypassed for a less qualified man.

⁷⁴ *Castro v. Beecher* addresses the complaints of African-American and Hispanic applicants to the Boston police force regarding race discrimination in recruitment and selection; the consent decrees were lifted only in 2004, after they had been in force for more than two decades (Murphy and Northeastern University School of Law unpublished).

The Evolution of Accountability

Accountability for implementing injunctive relief in any consent decree depends on two elements: (1) data; and (2) people assigned to use the data.⁷⁵ With regard to data, the *Kosen v. AEFA* consent decree specified detailed data to track and report progress for each element of change in the employer's practices. No subsequent decree was as specific in data and reporting requirements.

To gain insight into the data specifications in *AEFA* and later, consider the following comparison. The database pertaining to lead distribution in the *AEFA* consent decree was spelled out as follows:

AEFA will create and maintain a centralized database for lead distribution, both for the purpose of improving the objectivity of its lead distribution and for the compliance with this Decree. The database will be configured to allow tracking both by lead and by Financial Advisor. Each lead will be tracked for the life of the lead (e.g., by client name). The database will include Financial Advisor name, Financial Advisor number, Financial Advisor status, gender, office location, market group and hire date. For each Financial Advisor, the number of leads requested, the type of lead requested, the number of leads assigned, the type of leads assigned, whether each lead assigned is a refreshed lead, and the amount the Financial Advisor is personally charged for the lead will be preserved in the database. When a Financial Advisor obtains a lead, she will be informed if it is a refreshed lead. The Field Diversity Office shall receive no less than twice annually printouts of the lead distribution, broken down by market group, and review said printouts for equitable distribution. (*Kosen v. AEFA*, 17-18)

In contrast, the lead distribution database in *Augst-Johnson v. Morgan Stanley* settlement consisted of the following:

Each Financial Advisor of the Day shall complete a "Financial Advisor of the Day Activity Log" that will detail all telephone calls and walk-in prospects fielded by the Financial Advisor and the disposition of each. The logs shall be maintained in a Branch Financial Advisor of the Day File for a three-year period. (*Augst-Johnson v. Morgan Stanley*, 25)

This example illustrates the fact that after the *Kosen v. AEFA* consent decrees, none of the agreements was as thorough in establishing databases and in reporting requirements for each and every aspect of injunctive relief.

In terms of the people responsible for implementing and reporting on progress on consent decrees, in *Martens v. Smith Barney*, internal responsibility for ensuring the implementation of injunctive changes was assigned to the company's newly created Office of Diversity. The head of the office reported directly to the chief executive, sending a clear message throughout the firm that this office had strong support at the top. In none of the

One particularly timely adaptation was including allocations involving partnerships as employers increasingly sanctioned partnership arrangements among financial advisors.

⁷⁵ For purposes of this analysis, accountability means accountability internal to the agreement, that is, to the employer, plaintiffs, and class counsel, because plaintiffs used private counsel in all but one case, no public reporting was ever made available.

subsequent consent decrees did the internal person responsible for monitoring and implementing the decree report directly to the CEO.

Kosen v. AEFA established the Field Diversity Officer (FDO) as the responsible party for monitoring and implementing the terms of the consent decree. The FDO reported to an executive vice president. The FDO's compensation was tied to his/her performance on the consent decree, a strong incentive for implementing the prescribed changes. No subsequent settlement linked the compensation of internal person responsible for implementing the consent decree to his or her performance on this matter.

In the consent decree of *EEOC/Schieffelin v. Morgan Stanley*, an internal ombudsperson was assigned to monitor implementation. No clear line of reporting to a senior executive was spelled out in the document. Rather, the ombudsperson was to have "the full support of Morgan Stanley's senior management" (*EEOC/Schieffelin v. Morgan Stanley* Consent Decree, 7). An outside monitor, Paul Shechtman, was designated, as neither an agent of the employer nor the EEOC, to report once a year to Morgan Stanley and the EEOC on progress in implementing the consent decree.

Three recent consent decrees—*Amochaev. v. Smith Barney*, *Jaffe v. Morgan Stanley*, and *Augst-Johnson v. Morgan Stanley*—established a diversity monitor external to the firm to monitor and report on implementation to class counsel and senior management. The industrial psychologists were to provide input to the diversity monitors' report on compliance. The role and responsibilities of the diversity monitors in the two consent decrees involving Morgan Stanley were essentially the same. Both reported to the corporate operating officer and president of Morgan Stanley Global Wealth Management Group. In recent consent decrees, class counsel has been partially relieved of the responsibility of monitoring the company's performance through engaging external monitors.

The *Turnley v. BoA* consent decree was vague about the reporting relationship and status of the internal person charged with implementing the decree. An internal diversity monitor was charged with the responsibility to oversee the consent decree with no reference to where this person or office was situated in the bank.

The cycle for accountability, that is, in review and reporting on implementation, shortened over time. Early consent decrees called for a yearly review. The AEFA consent decree established a review and reporting cycle of six months. This cycle was commonly adopted in later settlements except for the yearly cycle in *EEOC/Schieffelin v. Morgan Stanley*. Even quarterly reports were required from branches to the diversity monitors in the recent Morgan Stanley settlements. These reports were to identify any deviations from the power ranking account distribution process. If the diversity monitor determined there was noncompliance, she/he was empowered to act without waiting for the six-month report and its review.

Confidentiality: Limits to Learning and Best Practice Development

Kosen v. AEFA specified requirements for confidentiality that shielded AEFA from any external assessment of implementation efforts. Every settlement after *Kosen v. AEFA*, except for the *EEOC/Schieffelin v. Morgan Stanley*, imposed similar confidentiality requirements and ordered any relevant documents destroyed or returned to the employer.

The confidentiality requirement in *Kosen v. AEFA* was thorough in its details. Information obtained by class counsel during the six months' meetings was required to be treated as confidential and could not be used for any purpose except to enforce the decree. All docu-

Every settlement after Kosen v. AEFA, except EEOC/Schieffelin v. Morgan Stanley, imposed similar confidentiality requirements and ordered any relevant documents destroyed or returned to the employer.

ments and information exchanged in the phase of negotiation that resulted in the consent decree were classified as confidential except to the extent disclosure was necessary to obtain court approval of the decree. All documents created to implement the consent decree were confidential. By April 2005, that is, 30 days after the consent decree expired, all documents were to be returned to AEFA or destroyed if AEFA preferred. That meant that the six-month progress reports—which constituted the record of details essential to understanding what injunctive relief was working and what was not—were gone.

The *EEOC/Schieffelin v. Morgan Stanley* consent decree differed in its confidentiality requirements. The names of the women participating in the claims process and awards by the Special Master were expressly designated as confidential. All reports designated as confidential in implementing this consent decree were available to the EEOC, special master, monitor, Morgan Stanley, the court under seal, and in some instances claimants when related to the claims process. Nonetheless, all documents in this case were to be destroyed or returned to the employer within 30 days of the expiration of the consent decree (*EEOC/Schieffelin v. Morgan Stanley* Consent Decree, 17).

The Influence of Consent Decrees on Industry Behavior

As seen through these cases, during the last 15 years, female financial advisors in some of the largest brokerage companies in the country filed similar charges in federal district courts throughout the United States. They claimed that their employers sanctioned patterns and practices of sex discrimination that adversely affected their compensation, bonuses, commissions, account distribution, mentoring, sales support, and partnership opportunities, and often condoned a hostile work environment.

The publicity attendant to every filing called attention to the accused employer. Because women filed not only for themselves but also as representatives of a class of other women, the entire financial services industry was aware of their charges. Practically every time a settlement was announced, plaintiffs and their attorneys predicted that this settlement would trigger similar changes throughout the industry. “This has brought the industry to its knees” declared Steven Platt, president of the National Employment Lawyers Association in describing the effect of the first class action settlement against Smith Barney (Smolowe 1999). Several years later, Judge Richard Berman, called the settlement by the EEOC and Schieffelin with Morgan Stanley a “watershed in safeguarding and promoting the rights of women on Wall Street” (McGeehan 2004). In 2007, Cyrus Mehri predicted the settlement of *Jaffe v. Morgan Stanley* would affect the entire industry (Labor & Employment Law 2007).

Yet, some firms in this study did not change sufficiently to avoid more workplace discrimination charges by financial advisors. Merrill Lynch was sued twice again after settling most of the claims by Cremin and other members of that class action lawsuit. The consent decree Morgan Stanley signed with the EEOC and Schieffelin did not stem subsequent litigation by female and African-American financial advisors in that company.

Smith Barney also faced class action litigation by female financial advisors after signing its consent decree in 1999. One plaintiffs’ attorney suggested that the reason Smith Barney did not learn from its own experience was also a result of the weakness of injunctive reforms in the Martens settlement agreement.

Well, one of the things you’ll see when you look at the *Martens* case is the day after that decree was over they completely lapsed back, so there had to be a second

Practically every time a settlement was announced, plaintiffs and their attorneys predicted that this settlement would trigger similar changes throughout the industry.

case...they didn't really create a sustainable—you have very weak programmatic relief. So, when it ends they say “Thank God it's over. Let's go back to our ‘boys will boys’ way of doing things,” so that's what they did. (Plaintiff attorney)

**Some firms in this study
did not change
sufficiently to avoid
more workplace
discrimination charges.**

One indication that the industry ignored or downplayed the relevancy of claims against their competitors to their own operations occurred recently. Despite all the attention to female financial advisors litigating against Smith Barney, Merrill Lynch, and Morgan Stanley, in 2009, three current and former female financial advisors of Wachovia Securities, now Wells Fargo Securities, filed a suit in federal court seeking class action status. Their charges were akin to those of previous litigants: discrimination in compensation, promotion, account assignments, partnership arrangements, training, and mentoring.

Although lessons from high profile sex discrimination cases in other industries may have been brushed aside by employers in the financial services industry, plaintiffs' counsel certainly took note. For example, throughout the last decade, developments in *Ledbetter v. Goodyear Tire* were followed by plaintiffs' lawyers. Lily Ledbetter claimed that her paycheck had been clipped by discrimination that occurred over an extended period. Her case asserted cumulative effects of discriminatory treatment. Ledbetter won her claim in the trial court. Then in 2005, just as the Court of Appeals for the 11th Circuit ruled in this case, plaintiffs' counsel in *Amochaev v. Smith Barney* introduced the matter of historic effects of patterns of discrimination on female financial advisors. In the complaint the concept of “cumulative advantage” was explained as “...implementing policies and practices that cause a ‘cumulative advantage’ for men by which even small advantages that men have received are exponentially magnified over time, causing the ‘rich (men) to get richer” (*Amochaev v. Smith Barney*, Complaint, 2–6). Among the small advantages enumerated in the complaint were the account distribution system, lead distribution system, partnership arrangements, and consequently, in compensation. Cumulative discrimination was cited also in the case brought by Jamie Goodman against Merrill Lynch.

Larger dynamics in the financial services industry throughout this time must also be taken into account. The industry went through extensive corporate consolidation. Many institutions were bought and/or bought other businesses themselves. Smith Barney experienced several iterations of corporation change. Merrill Lynch became part of Bank of America. Morgan Stanley took over Dean Witter. With this upheaval, executive management had other pressing corporate matters to attend to in addition to litigation.

An additional factor reducing the possible effect of employment discrimination litigation is that, even if class action settlements might appear large to outsiders, they typically carry smaller financial risks than other litigation and investigations related to regulatory enforcement proceedings concerning securities fraud, disclosure violations, improper trading, and inaccurate investment research. Several of the large brokerage firms were subject to such investigations at the same time as the employment discrimination class suits discussed here. For example, in 1998, when Merrill Lynch settled with Cremin, the firm also agreed to pay Orange County, California, \$400 million to settle a claim that the company had helped push the county into bankruptcy four years earlier. In 2007 Morgan Stanley agreed to a \$46 million settlement in *Augst-Johnson*. Two years earlier, the firm had paid almost 10 times that amount, \$450 million, to settle a class action suit concerning overtime payments to its employees. So, while multimillion dollar sex discrimination settlements sounded large in media accounts, these employers had much to gain in avoiding future financial risk by revising other business practices in addition to tending to discriminatory behavior.

Sex discrimination charges in the financial services industry continue to this day. In September 2010, three women formerly employed by Goldman Sachs, filed a complaint seeking class action status in federal district court accusing the firm of “systematic and pervasive discrimination” similar to the cases in this study—in assignment of accounts, pay, and advancement opportunities. These women also cited stories of lewd parties and sexist behavior rekindling recollections of the Boom Boom Room at Smith Barney more than a decade ago (Lattman 2010).

The reoccurrence of gender and race discrimination lawsuits against large employers of financial advisors and within the financial services industry during the last 15 years bears out the following conclusion:

...This finding also suggests that no significant penalty results from either engaging in or being accused of discrimination, and that if we want to provide a stronger form of deterrence, it will be necessary to make higher damage awards available for employment discrimination suits.... In many cases, it appears that employment discrimination litigation has become a private affair that is largely about money and public relations and rarely concerned with implementing broad institutional reform...All of this suggests that neither the harm nor the benefit of the private class action litigation is substantial...Most importantly, we should not rely on litigation to eliminate or deter discrimination... litigation has become just another form of tort, which reflects our declining national commitment to eradicate discrimination... (Selmi 2003: 29).

***Between 2000 and 2009
the gender wage ratio for
'personal financial
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one percentage point
from 41 to 40.***

After Effects

As a consequence of hundreds of millions of dollars paid by Smith Barney, Merrill Lynch, Morgan Stanley, Bank of America, and AEFAs, and all the injunctive relief these employers undertook as conditions of consent decrees, did these employers and others in their industry undertake and sustain significant changes to eliminate gender discrimination in their workplaces?

One measure of effect of these consent decrees in eliminating discriminatory treatment of female financial advisors in their industry is their gender wage gap. The category “personal financial advisors” includes more than the brokers/financial advisors in the investment banks and financial service companies in this study. Nonetheless, this seems a reasonable index of the disparity of earnings for the women in these class action cases. Between 2000 and 2009 the gender wage ratio for ‘personal financial advisors’ changed from 59 to 60 percent, that is, the gender wage gap narrowed by one percentage point from 41 to 40.⁷⁶

Methodological Note on the Cases Considered in the Chapter

WAGE conducted a survey of charges of sex and race discrimination and sexual harassment in this industry between 1995–2010. News stories, academic articles, books, and state and federal government documents were reviewed to identify cases in addition to the cases in the Washington University Clearinghouse. Thirty-three cases were identified:

⁷⁶ IWPR calculation based on median annual earnings for full-time/year-round workers; data from Ruggles et al 2008.

Amochaev v. Smith Barney; Augst-Johnson v. Morgan Stanley; Berenyi v. Wells Fargo; Carter v. Wells Fargo; Cremin v. Merrill Lynch; Dodson v. Morgan Stanley; EEOC and Aimee Doneyhue v. JP Morgan Chase Bank; EEOC and Allison Schieffelin v. Morgan Stanley; EEOC v. Fifth Third Bank; EEOC v. Gruntal & Co.; EEOC v. Integrity Financial Services; EEOC v. Johnson International, Inc.; EEOC v. Josephthal & Company; EEOC v. Lew Lieberman; EEOC v. Nasdaq Stock Market; EEOC v. Northwest Savings Bank; EEOC v. Simran Investments, Inc.; EEOC v. Wells Fargo Financial Louisiana, Inc.; Gambale v. Deutsche Bank; Goodman v. Merrill Lynch/Bank of America; Gould v. Merrill Lynch; Graff v. Olde Discount Corporation; Goshv v. U.S. Bancorp Piper Jaffray; Hackett v. ING Barings; Jaffe v. Morgan Stanley DW; Kosen v. American Express Financial Advisors; Lane v. Piper Jaffray Companies; LaPrade v. Kidder Peabody; Martens v. Smith Barney; McReynolds v. Merrill Lynch; Rosenberg v. Merrill Lynch; Turnley v. Bank of America; Zubulake v. UBS.

A subset of these cases was selected for analysis as a complement to AEFA. The criteria for inclusion in the subset were those cases sharing most of the following AEFA characteristics: (a) financial advisors/brokers as plaintiffs; (b) a large number of employees and former employees acting as a class; (c) a consent decree as part of the resolution of the case; and (d) charges of discrimination involving losses in compensation and career opportunities. Some cases were excluded from the subgroup because financial advisors were not involved.

The subset that met the criteria consisted of 12 cases:

Amochaev v. Smith Barney; Augst-Johnson v. Morgan Stanley; Carter v. Wells Fargo; Cremin v. Merrill Lynch; EEOC and Aimee Doneyhue v. JP Morgan Chase Bank; EEOC and Allison Schieffelin v. Morgan Stanley; Goodman v. Merrill Lynch/Bank of America; Jaffe v. Morgan Stanley DW; Kosen v. American Express Financial Advisors; Martens v. Smith Barney; McReynolds v. Merrill Lynch; Turnley v. Bank of America.

Because all documentation regarding the effects of each consent decree has been destroyed or is protected by employers, data from the U.S. Census Bureau and the Bureau of Labor Statistics become the best data sources to assess the effect, if any, of discrimination lawsuits on gender biased practices in the financial services industry during the last 15 years. Also, EEO-1 data for financial service sector employers could provide data about changes in employment by sex and race within this sector. These are available at an aggregated level, which makes meaningful statistical observations less likely.

Consideration should be given to data requirements in consent decrees, particularly class action gender and race wage discrimination class action lawsuits, that enable ex post assessments of effect on wage differentials and the representation of class members within that employer's establishment.



Chapter 7

Summary and Recommendations

This report is based on a review of more than 500 consent decrees; interviews with people involved with dozens of consent decrees; in depth case studies; and the input from three expert panels composed of attorneys, social scientists, organizational development specialists, and other experts, convened to solicit their guidance and wisdom.

The broad reach of this study leads us to recommendations that also extend broadly to change and challenge the spectrum of participants involved in consent decrees. We offer recommendations to guide public and private attorneys engaged in negotiating and implementing consent decrees. We offer recommendations that may guide employers to alleviate discriminatory practices before these ripen into enforcement actions and lawsuits. We offer recommendations to better inform employees of their options for changing working conditions as well as to enhance the effectiveness of public entities responsible for enforcing antidiscrimination statutes in the executive, legislative, and judiciary branches.

Some recommendations flow directly from case study lessons and the analysis of our Database of consent decrees. These aim to enhance the effectiveness of consent decrees in the future. Yet when we reflected on the overall effect of a consent decree as an essential mechanism in today's society for lessening and eliminating workplace discrimination, we concluded that systemic change could significantly enhance effectiveness of all consent decrees. In this regard, we close with some recommendations that we hope will challenge all involved with consent decrees to consider more sweeping reforms.

Although we recognize that consent decrees are negotiated by opposing parties, we believe that the recommendations we set forth in this chapter have merit for both workers and employers. For example, when we recommend that a consent decree establish objective criteria for hiring into a certain position, that clarity enables a job applicant to assess whether she/he has a fair and equal opportunity to get hired on the one hand; and on the other, objective criteria protect the hiring decisionmaker from accusations of discrimination if the person hired has met these criteria regardless of sex or race. For each and every recommendation we make based on our case studies and database analysis, a similar argument can be made that our recommendation has common interest to opposing parties.

Although we did not study the role of judges in the negotiation process for consent decrees in detail, some of the anecdotal evidence we collected suggests that, at least in some cases, judges have actively limited the length and scope of consent decrees, under the assumption, in view of the attorneys we interviewed, that financial penalties and shorter consent decrees were sufficient to change employers' behavior. In contrast, in one case the judge encouraged expansive injunctive relief. The role and understanding of judges of injunctive

relief, and their knowledge and perceptions of how organizations change in employment discrimination charges, might be a subject of future study.

Recommendations for Developing More Comprehensive Injunctive/Injunctive Relief

Consent decrees most often are negotiated as part of the EEOC's mandate to enforce and advance the broad commitment to nondiscriminatory employment practices in Title VII. Our case studies and analysis of the Database, as well as other social science research, demonstrate that frequently several employment practices interact to create a discriminatory environment. Sexual harassment may be linked to hiring discrimination (being a factor in reducing the number of women in an occupation, and increasing women's exposure to harassment); wage differentials may be linked to opaque promotion processes; differential promotion rates may be linked to differential access to training and development, and so on. Although some consent decrees address several aspects of employment, many are solely focused on one main issue. A more comprehensive approach to potentially discriminatory employment practices through a more expansive investigation of workplace discrimination and more comprehensive development of injunctive relief would best serve the statutory mandate of the EEOC.

EEOC attorneys report that the narrow definition of charges in investigation reports consequently narrows their ability to negotiate comprehensive injunctive relief packages. This suggests that more attention should be paid to the initial charging and investigation process of complaints made to the EEOC. We recommend better training and more resources for EEOC investigators so that their investigations comprehensively rather than narrowly investigate employment patterns of employers charged with discrimination.

Measures to Create Transparency and Accountability in Employment Decisions

All consent decrees mandate accountability; the key issue is how such accountability is established. Our research suggests that only a minority of consent decrees establish objective criteria for decisions (jobs, compensation, recruitment), then measure the effect of policies and decisions against these criteria, and feed the results back to the decisionmakers so that they are held accountable and/or can check whether their decisions had the intended or adverse effects. Accountability has other aspects as well, namely monitoring and reporting. We recommend that consent decrees encompass all three aspects of accountability in an interconnected, complementary, and explicit fashion.

With regard to establishing objective criteria for decisions, the first step requires some formalization, for example, making sure that job openings and promotional opportunities are posted; that the criteria for openings and promotions are clear; and that the decision to hire or promote is not made by a single, nonaccountable person. Medium and large employers often decentralize these decisions, thereby allowing managers to be responsive in their particular markets. In this context, employers need to establish basic metrics to evaluate the effect of managers' decisions, so that they can identify the outliers and give feedback to managers.

The need for objective criteria is essential not only for decisions that affect fairness and equitable treatment in workplaces but also for policies that companies espouse proclaiming their commitment to nondiscriminatory workplaces. Many employers already had formally sophisticated policies and procedures, including policies aimed at preventing sexual harass-

All consent decrees mandate accountability; the key issue is how such accountability is established.

ment, in place when they were charged with employment discrimination. The cause of the employment discrimination charges was not a lack of policies, but a lack of a commitment to ensure that policies informed actual employment practice. Measurement and feedback mechanisms are key for knowing whether policies perform in practice.

Only a minority of consent decrees in the Database include such detailed requirements for creating transparent employment decisions based on objective criteria. Such measures are standard components of good practice recommendations for human resource management; they have also been shown to be most likely to lead to sustained change in diversity and equal opportunity in organizations. We recommend that injunctive relief in consent decrees be more closely guided by standard good practice in human resource management and equal opportunity.

Methodologies to Assess and Resolve Discriminatory Practices

The case studies provide a glimpse at certain methodologies for assessing discrimination at a particular time in a particular workplace. In the Boeing case, the company adopted an entry-level salary setting method that addressed its hiring prerogatives as well as equity concerns; it negotiated a variation of the OFCCP wage disparity methodology to fit its performance and reward criteria. In *Augst-Johnson v. Morgan Stanley*, the consent decree specified a power ranking methodology to account for historic discriminatory practices in account and lead distributions.

Although these methodologies served their purposes in these consent decrees, we also recognize that business practices are constantly evolving, and methodologies take on different dimensions over time. For example, the methodology that gave women and minorities more equitable opportunities for business leads in financial services was an adaptation over time to the growing practice of partnerships in this sector and an increasing awareness of the historic accumulation of disadvantage. Clearly, one methodological prescription cannot fit all or even most employers, and certainly not over time, but we would expect that typically consent decrees in financial services will need to include methodologies to check that the distribution of leads does not lead to biased opportunities for generating business. For any charge of workplace discrimination, as parties to consent decrees learn from each experience in implementation, they become more astute in understanding discriminatory practices and behavior, and therefore, more capable of refining relief measures to achieve a lessening, even elimination, of discrimination.

For purposes of this study, we therefore do not recommend any particular methodology for application in consent decrees addressing injunctive relief in pay discrimination, promotion, hiring, recruitment, and business development opportunities. Rather, we recommend that public and private attorneys have the resources to develop updated, detailed and tailor-made solutions to historically engrained discriminatory patterns, particularly that those negotiating decrees have sufficient resources to draw on the experience and expertise of social scientists, organizational development experts, industrial psychologists, and other experts on related matters. Although private attorneys may have the resources to tap these experts, public attorneys typically do not; as a result the quality of injunctive relief developed in publicly negotiated decrees is likely suboptimal. Public agencies need to have and allocate more resources to engage experts to develop injunctive relief.

Our research also suggests that the detailed and organization-specific development of human resource management tools and methodologies for addressing discrimination are

Public and private attorneys need the resources to develop updated, detailed and tailor-made solutions to historically engrained discriminatory patterns.

We recommend the EEOC investigate how the development of tailor-made solutions may become part of consent decrees negotiations with smaller employers.

typically confined to certified class actions and the largest multi-plaintiff consent decrees; such decrees typically involve large employers with pre-existing HR resources. Consent decrees in such cases typically involve thoroughly investigating existing employment practices and may be the source of considerable best practice innovation. This is less likely for small- and medium-sized employers negotiating injunctive relief with the EEOC, partly because of the EEOC's reluctance to be the source of best practice advice out of concern that such advice might be misconstrued as an employer's defense against future investigations. We recommend the EEOC investigate how such increased systematic reassessment of employment practices and development of tailor-made solutions may become part of consent decrees negotiations with smaller employers; independent monitors might be one avenue for providing such input.

Monitoring and Implementation of the Consent Decree

Sound accountability depends in large measure on the data gathered and used to report progress. That is to say, reporting is only credible and acceptable to all parties when the data used in reports have been specified and agreed to in the consent decree. We recommend that consent decrees specify the data set associated with each measure of accountability that the employer will generate, keep, and provide in timely reports. Every consent decree is different. Every data set is different. Yet specifying these details in consent decrees is an essential complement to our recommendation for the establishment of objective criteria in accountability.

Our research, and the research of others, suggests that it is particularly difficult to establish objective measures in sexual harassment cases. The number of complaints is not necessarily a good measure of progress. Monitoring the time it takes to respond to complaints, and how complaints were addressed, is important but not an assessment of the underlying confidence of employees in using grievance procedures. Anonymous employee surveys have shown some promise and are one avenue to explore. We recommend the EEOC support developing specific measures of change in sexual harassment cases—measures that address employers' fear of litigation yet provide a tool for assessing real change in the underlying sexual harassment climate.

For accountability to be effective, adequate resources must be set aside for monitoring and reporting. In all privately litigated class action cases we reviewed, two issues were common: 1) the specification of detailed metrics to gauge performance, and 2) resources, adequate both for acquiring the latest know-how in organizational behavior during the negotiation stage of the decree and for monitoring the implementation of the decree afterward. All parties must be satisfied that sufficient resources have been allocated for monitoring and reporting during the implementation of the consent decree.

Designated Internal and External Monitors

Accountability also depends on those designated to monitor and report on the objective measures during the implementation of consent decrees. In terms of accountable authorities, we recommend that those negotiating consent decrees designate both an internal person, that is, an employee, specifically charged with implementing the consent decree, and one or more external agents, that is, nonemployees. The internal person should report directly to the chief executive, with some portion of her/his performance evaluation directly linked to the employer's achievement of the consent decree's measurable objectives.

An external monitor, someone independent of the employer, reporting to the employer, plaintiffs' counsel, government lawyers, and the court is critical, particularly in cases involving smaller employers. We see that government lawyers face daunting caseloads and have neither the time nor resources to conduct rigorous monitoring on employers' compliance. An external monitor, funded by the employer, can build strength into compliance. Our research suggests that monitors may play an important role in facilitating successfully implemented decrees. Their role typically goes beyond mere "policing" of compliance; instead they may be a source of best practice advice and guidance on developing workable and equitable human resource management solutions. Our research suggests that such a position is particularly important in cases addressing systemic sexual harassment.

The experience, qualifications, credibility, and commitment of the person(s) appointed as monitors, however, are key in terms of their effectiveness. Our research suggests that teams of monitors can enhance the effect of this role, but, where teams are not well matched, may neutralize the effect. Long-term monitoring especially benefits from involving employees with long-term memories who can alert external lawyers if bad practices recommence. For a consent decree to be effective, qualifications for filling key assignments cannot be left unspecified. Properly structured in the consent decree, external monitors have the incentives and capacity to monitor accomplishment while government and private counsel turn to their other pressing matters.

The Duration of Consent Decrees

Consent decrees need to be in effect for a sufficient time to enable injunctive relief measures to be adopted, accepted, assessed, and become routine practices. For all this to happen, we strongly suggest that consent decrees have a minimum expected length of three to five years, with the possibility of ending earlier if all parties agree that all provisions have been met satisfactorily. Currently, the average length is 24 months, but we found that it may take a year or more to actually initiate the prescribed policies and procedures, not leaving enough time for assessment or change in accepted practice.

Currently, there is usually an option for parties to go to the court to request an extension if more time is needed because of noncompliance or failure to meet deadlines. Rather than making the realistic need for more time a mark against the employer, we suggest an incentive for compliance be an opportunity for time reduced for early success, while making a slightly longer time frame the norm.

For public sector organizations specifically, we recommend exploring legislative resolutions or executive orders to more permanently extend the reporting requirements in consent decrees on issues such as the extent of sexual harassment in the workplace and the time taken to process sexual harassment complaints or hiring and retention of women in nontraditional occupations, such as firefighting; such resolutions or orders could also make monitoring compliance part of the existing oversight of publicly funded organizations.

Information Exchange and Capacity Building

There are numerous forums for employment lawyers to exchange experiences and expertise. Yet noticeable for us was the lack of exchanges between private and public lawyers. We believe that more concerted efforts in encouraging such exchanges might be beneficial, particularly in developing injunctive relief. The IWPR/WAGE Database shows that private counsel have more experience negotiating pay and promotion consent decrees, whereas

For public sector organizations specifically, we recommend exploring legislative resolutions or executive orders to more permanently extend the reporting requirements in consent decrees on issues such as sexual harassment.

We recommend the EEOC set up a systemic Injunctive Relief Task Force as one means for building capacity and increasing the potential reach of consent decrees.

EEOC lawyers have substantially more experience negotiating sexual harassment decrees. The injunctive relief relevant to these claims is substantially different. Thus a conference or other—even electronic—forum to facilitate an exchange of their different perspectives could provide valuable professional development for all lawyers, most especially perhaps, for the overloaded, underfunded public lawyers.

The EEOC has begun to address the need for a more systematic approach in the cases it selects for litigation, through the Systemic Task Force and the E-Race Initiative; the negotiation and evaluation of injunctive relief has not received similar attention. We recommend the EEOC complement its Systemic Litigation Task Force with a Systemic Injunctive Relief Task Force as one means for building capacity and increasing the potential reach of decrees; such a Task Force would require dedicated funding and sufficient resources to provide access to up-to-date research on effective EEO organizational interventions.

Our research also suggests that, although some lawyers have developed substantial insights in the type of injunctive relief most likely to generate sustained organizational changes, this is not the norm. We recommend that instruction on injunctive relief in employment discrimination litigation become a standard component of basic legal education and be available through continued legal education (CLE), for both lawyers and judges. Such instruction should reflect social science and human resource management research on the measures most likely to create improvements in EEO outcomes.

Access to Data and Confidentiality

EEOC and DOJ consent decrees—by definition public documents—are entered in the public court docket. Only a few privately settled employment discrimination cases are made public. There now are several initiatives targeted at making Title VII litigation decrees more easily accessible to legal practitioners and social scientists. The IWPR/WAGE Database is one of these initiatives, in conjunction with the broader database established by the Civil Rights Litigation Clearing House at Michigan University School of Law (the host of the consent decrees collected for this project).⁷⁷ Another such initiative is the Consent Decree Database at Cornell University,⁷⁸ focused on large class action cases with the express intent of making it easier for lawyers drafting decrees to identify potential precedents.

However, data about the effectiveness of these decrees are much harder to obtain. Decrees, including decrees negotiated by the EEOC, frequently include clauses that ensure that any data and information exchanged as part of the monitoring process are treated as confidential. Indeed, the original intent for this study, the evaluation of the effect of injunctive relief on employment outcomes in organizations, proved to be impossible because of confidentiality requirements and organizations' unwillingness to provide access to internal HR information because of concerns over the possibility of future litigation.

A compromise might be a mandate to provide any monitoring data to a central database, while maintaining the anonymity of the sources. Such anonymity is already guaranteed by the EEOC for the data presently gathered through the EEO-1 forms. The EEOC could establish a national repository for monitoring data resulting in the implementation of decrees under the same stringent confidentiality arrangements that rule access to EEO-1 data.

⁷⁷ The Civil Rights Litigation Clearinghouse can be found at <http://www.clearinghouse.net/>.

⁷⁸ The Cornell Consent Decree Database can be found at <http://digitalcommons.ilr.cornell.edu/condec/>.

This would provide an avenue for social scientists to use such data in evaluating the effect of injunctive relief and to feed back the results to those negotiating injunctive relief to strengthen its effect.

Recommendations for Unions

Our research, with few exceptions, has found little evidence of an active involvement in negotiating or implementing injunctive relief by unions in workplaces subject to Title VII employment discrimination claims. Although union involvement in consent decrees may be legally complicated by “duty of fair representation”⁷⁹ or other issues under labor relations law (Crain and Matheny 1999), unions can, and frequently do, have contract clauses protecting workers against sexual harassment and other discrimination. Along with other actions aimed at sexual harassment, discussed in Chapter 3, unions could take an active role in more workplaces in helping to hold employers accountable for implementing consent decree provisions promoting fair pay, promotion, and training opportunities, and better protections against retaliation. Unions could provide training and support for their members and shop stewards to enable them to monitor decrees and flag potential problems.

Unions could take an active role in more workplaces in helping to hold employers accountable for implementing consent decree provisions.

More Systematic Research on the Extent of Discriminatory Practices in Organizations

The consent decrees reviewed for this study provide examples of systematic and ingrained discrimination against women and minorities. Many of the practices highlighted in decrees seem familiar to researchers of the barriers that women and minorities continue to face in many workplaces. Yet consent decrees are not a good source for establishing the overall extent of discrimination in employment. A more systematic source of information on the level, extent, and type of discriminatory work practices experienced by workers, through a regular national survey or other tools to assess discrimination—may help us to establish better metrics for policy making and enforcement.

⁷⁹ Duty of fair representations (DFR) refers to the legal obligation of the union, as collective bargaining agent, to represent all employees in the bargaining unit, not some interests over others in conflicts, or potential conflicts, among bargaining unit members.

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Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003)

Appendix A

IWPR/WAGE Consent Decree Database: Descriptive Statistics

The codings for each consent decree in the Database are available as an excel document on the Institute for Women's Policy Research's website (www.iwpr.org). The legal documents for each consent decree are available in the IWPR/WAGE Collection at the Civil Rights Litigation Clearinghouse (www.clearinghouse.net). To search for a consent decree in the Clearinghouse, either use the case name or Clearinghouse Code included for each case in the IWPR/WAGE Database (column D of the Excel database).

Table A1.
Charges and Bases for Complaints, by Plaintiff Representative

	Total N=502		EEOC N=423		DOJ N=45		Private N=34	
	Count	% ^a	Count	% ^a	Count	% ^a	Count	% ^a
Type of Charge	502	100	423	100	45	100	34	100
Sex discrimination	308	61.4	262	61.9	30	66.7	16	47.1
National origin	25	5.0	22	5.2	1	2.2	2	5.9
Age	9	1.8	7	1.7	0	0	2	5.9
Sex alone	249	49.6	211	49.9	26	57.8	12	35.3
Race discrimination	218	43.4	182	43.0	17	37.8	19	55.9
National origin	39	7.8	32	7.6	3	6.7	5	14.7
Age	8	1.6	7	1.7	1	2.2	0	0
Race alone	146	29.1	121	28.6	11	24.4	14	41.2
Sex & Race	45	9.0	39	9.2	5	11.1	1	2.9
Base for Complaint								
Harassment	259	51.6	225	53.2	19	42.2	15	44.1
Sexual harassment (SH)	171	34.1	150	35.5	15	33.3	6	17.6
SH only (not pay/ promotion/hiring)	155	30.9	139	32.9	14	31.1	2	5.9
Retaliation	200	39.8	177	41.8	13	28.9	10	29.4
Pay	57	11.4	37	8.7	1	2.2	19	55.9
Promotion	86	17.1	47	11.1	9	20.0	30	88.2
Termination/discharge	151	30.1	136	32.2	6	13.3	9	26.5
Hiring	87	17.3	63	14.9	13	28.9	11	32.4
Constructive discharge	69	13.7	64	15.1	4	8.9	1	2.9
Pregnancy	40	8.0	35	8.3	4	8.9	1	2.9
Type of Lawsuit								
Class action/ similarly situated	175	34.9	129	30.5	12	26.7	34	100
Single plaintiff only and not class action	210	41.8	190	44.9	20	44.4	0	0
Other not similarly situated	117	23.3	104	24.6	13	28.9	0	0

Note: ^a Percentages do not total to 100 percent because categories shown are not mutually exclusive and not all categories are shown

Source: IWPR/Wage Consent Decree Database 2010.

Table A2.
Charges and Bases for Complaints, by Type of Discrimination Charge

	Sex Discrimination		Race Discrimination		Sex & Race Discrimination	
	Count	% ^a	Count	% ^a	Count	% ^a
Base for Complaint	308	100	218	100	44	100
Harassment	172	55.8	101	46.3	23	52.3
Sexual harassment (SH)	171	55.5	22	10.1	22	50.0
SH only (not pay/ promotion/hiring)	153	49.7	18	8.3	18	40.9
Retaliation	129	41.9	80	36.7	17	38.6
Pay	38	12.7	22	10.1	6	13.6
Promotion	42	13.6	53	24.3	11	25.0
Termination/discharge	79	25.6	74	33.9	11	25.0
Hiring	53	17.2	45	20.6	12	27.3
Constructive discharge	59	19.2	18	8.3	8	18.2
Pregnancy	40	13.0	2	0.9	2	4.5
Type of Lawsuit						
Class action/similarly situated	130	42.3	65	29.8	27	67.3
Single plaintiff only and not class action	117	38.0	103	47.2	14	31.8
Other not similarly situated	61	19.8	50	22.9	3	6.8

Note: ^aPercentages do not total to 100 percent because categories shown are not mutually exclusive and not all categories are shown

Source: IWPR/Wage Consent Decree Database 2010.

Table A3.
Plaintiff Characteristics: Sex and Race/Ethnic Background, by Plaintiff Representative

	Total N=502		EEOC N=423		DOJ N=45		Private N=34	
	Count	%	Count	%	Count	%	Count	%
Female	307	61.2	263	62.2	29	64.4	15	44.1
Male	116	23.1	106	25.1	9	20.0	1	2.9
Mixed group	54	10.8	33	7.8	4	8.9	17	50.0
Sex unknown	25	5.0	21	5	3	6.7	1	2.9
African American	126	25.1	106	25.1	7	15.6	13	38.2
Hispanic	26	5.2	23	5.4	2	4.4	1	2.9
White	5	1.0	3	0.7	2	4.4	0	0
Asian	1	0.2	1	0.2	1	2.2	0	0
Native American	1	0.2	0	-	1	2.2	0	0
Mixed group	36	7.2	25	5.9	3	6.7	8	23.5
Race/ethnic background unknown	307	61.2	265	62.6	30	66.7	12	35.3

Source: IWPR/Wage Consent Decree Database 2010.

Table A4.
Plaintiff Characteristics: Sex and Race/Ethnic Background, by Type of Discrimination Charge

	Sex Discrimination N=308		Race Discrimination N=218		Sex & Race Discrimination N=44	
	Count	%	Count	%	Count	%
Female	261	84.7	62	28.1	23	52.3
Male	15	4.9	98	45	4	9.1
Mixed group	31	10.1	39	17.9	17	38.6
Sex unknown	1	0.3	19	8.7	0	0
African American	14	4.5	125	57.3	13	29.5
Hispanic	14	4.5	2	0.9	1	2.3
White	2	0.6	4	1.8	2	4.5
Asian	1	0.3	1	0.5	1	2.3
Native American	0	0	1	0.5	0	0
Mixed group	22	7.1	32	14.7	19	43.2
Race/ethnic background unknown	255	82.8	53	24.3	8	18.2

Source: IWPR/Wage Consent Decree Database 2010.

Table A5.
Plaintiff Characteristics: Occupation, by Plaintiff Representative

	Total N=502		EEOC N=423		DOJ N=45		Private N=34	
	Count	%	Count	%	Count	%	Count	%
Officials and managers	37	7.4	26	6.1	2	4.4	9	26.5
Professionals	47	9.4	27	6.4	4	8.9	16	47.1
Technicians	26	5.2	16	3.8	4	8.9	6	17.6
Sales workers	35	7	29	6.9	1	2.2	5	14.7
Administrative support workers	29	5.8	20	4.7	4	8.9	5	14.7
Craft workers	13	2.6	8	1.9	1	2.2	4	11.8
Operatives	18	3.6	14	3.3	1	2.2	3	8.8
Laborers and helpers	64	12.7	53	12.5	6	13.3	5	14.7
Service workers	121	24.1	115	27.2	1	2.2	5	14.7
Uniformed services	27	5.4	4	0.9	22	48.9	1	2.9
Unknown/missing	109	21.7	101	23.9	1	2.2	7	20.6

Note: Multiple answers possible.

Source: IWPR/Wage Consent Decree Database 2010.

Table A6.
Plaintiff Characteristics: Occupation, by Type of Discrimination Charge

	Sex Discrimination N=308		Race Discrimination N=218		Sex & Race Discrimination N=44	
	Count	%	Count	%	Count	%
Officials and managers	21	6.8	19	8.7	3	6.8
Professionals	36	11.7	18	8.3	7	15.9
Technicians	18	5.8	10	4.6	3	6.8
Sales workers	24	7.8	14	6.4	3	6.8
Administrative support workers	24	7.8	6	2.8	2	4.5
Craft workers	7	2.3	6	2.8	1	2.3
Operatives	15	4.9	5	2.3	2	4.5
Laborers and helpers	37	12.0	29	13.3	7	15.9
Service workers	79	25.6	53	24.3	16	36.4
Uniformed services	16	5.2	10	4.6	44	100.0
Unknown/missing	50	16.2	54	24.8	3	6.8

Note: Multiple answers possible.

Source: IWPR/Wage Consent Decree Database 2010.

Table A7.
Defendant Characteristics: Number of Employees, by Plaintiff Representative

Size of Defendant Firm (numbers of employees)	Total N=502		EEOC N=423		DOJ N=45		Private N=34	
	Count	%	Count	%	Count	%	Count	%
15-99 ^a	71	21.4	63	21.5	7	58.3	0	0
100-999 ^a	112	33.7	104	35.5	3	25	5	19.2
1,000-9,999 ^a	65	19.6	61	20.8	1	8.3	3	11.5
10,000 plus ^a	84	25.3	65	22.2	1	8.3	18	69.2
Unknown/missing	170	33.9	130	30.7	33	73.3	7	20.6

Note: ^a Valid Percent

Source: IWPR/Wage Consent Decree Database 2010.

Table A8.
Defendant Characteristics: Number of Employees, by Type of Discrimination Charge

Size of Defendant Firm (numbers of employees)	Sex Discrimination N=308		Race Discrimination N=218		Sex & Race Discrimination N=44	
	Count	%	Count	%	Count	%
15–99 ^a	42	21.1	30	19.6	6	17.1
100–999 ^a	63	31.7	57	37.3	11	31.4
1,000–9,999 ^a	42	21.1	28	18.3	8	22.9
10,000 plus ^a	52	26.1	38	24.8	10	28.6
Unknown/missing	109	35.4	65	29.8	9	20.5

Note: ^a Valid Percent

Source: IWPR/Wage Consent Decree Database 2010.

Table A9.
Defendant Characteristics: Industrial Sector, by Plaintiff Representative

Industry of Defendant Firm	Total N=502		EEOC N=423		DOJ N=45		Private N=34	
	Count	%	Count	%	Count	%	Count	%
Agriculture ^a	12	2.5	12	3	0	0	0	0
Forestry/fishing ^a	0	0	0	0	0	0	0	0
Mining ^a	2	0.4	1	0.2	0	0	1	2.9
Construction ^a	25	5.2	25	6.2	0	0	0	0
Manufacturing ^a	74	15.4	69	17.2	0	0	5	14.7
Transportation ^a	41	8.5	37	9.2	0	0	4	11.8
Communications ^a	20	4.2	19	4.7	0	0	1	2.9
Electric/gas ^a	12	2.5	8	2.0	1	2.2	3	8.8
Sanitary services ^a	3	0.6	2	0.5	1	2.2	0	0
Retail trade ^a	75	15.6	70	17.4	0	0	5	14.7
Finance ^a	16	3.3	11	2.7	0	0	5	14.7
Insurance ^a	4	0.8	2	0.5	0	0	2	5.9
Real Estate ^a	9	1.9	9	2.2	0	0	0	0
Services ^a	143	29.7	133	33.1	6	13.3	4	11.8
Public administration ^a	45	9.4	4	1.0	37	82.2	4	11.8
Unknown/missing	21	4.2	21	5.0	0	0	0	0

Note: ^a Valid Percent

Source: IWPR/Wage Consent Decree Database 2010.

Table A10.
Defendant Characteristics: Industrial Sector, by Type of Discrimination

Industry of Defendant Firm	Charge					
	Sex Discrimination N=308		Race Discrimination N=218		Sex & Race Discrimination N=44	
	Count	%	Count	%	Count	%
Agriculture ^a	6	2.1	4	1.9	0	0
Forestry/fishing ^a	0	0	0	0	0	0
Mining ^a	1	0.3	0	0	0	0
Construction ^a	14	4.8	12	5.6	1	2.3
Manufacturing ^a	40	13.8	41	19.0	8	18.2
Transportation ^a	22	7.6	23	10.6	5	11.4
Communications ^a	12	4.2	13	6.0	5	11.4
Electric/gas ^a	6	2.1	7	3.2	1	2.3
Sanitary services ^a	3	1.0	1	0.5	1	2.3
Retail trade ^a	47	16.3	32	14.8	6	13.6
Finance ^a	14	4.8	5	2.3	3	6.8
Insurance ^a	2	0.7	2	0.9	0	0
Real estate ^a	6	2.1	3	1.4	1	2.3
Services ^a	87	30.1	55	25.2	9	20.5
Public administration ^a	29	10.0	18	8.3	4	9.1
Unknown/missing	19	6.2	2	0.9	0	0

Note: ^a Valid Percent

Source: IWPR/Wage Consent Decree Database 2010.

Table A11.
Defendant Characteristics: Annual Revenue, by Plaintiff Representative

Annual Revenue of Defendant Firm	Total N=502		EEOC N=423		DOJ N=45		Private N=34	
	Count	%	Count	%	Count	%	Count	%
Less than \$5m ^a	73	21.1	72	22.9	N/A	N/A	1	3.2
\$5m to less than \$25m ^a	62	17.9	57	18.1	N/A	N/A	5	16.1
\$25m to less than \$200m ^a	71	20.5	69	21.9	N/A	N/A	2	6.5
\$200m to less than \$2000m ^a	62	17.9	61	19.4	N/A	N/A	1	3.2
\$2000m and more ^a	78	22.5	56	17.8	N/A	N/A	22	71
Unknown/missing	156	31.1	108	25.5	N/A	N/A	3	8.8

Note: ^a Valid Percent

Source: IWPR/Wage Consent Decree Database 2010.

Table A12.
Defendant Characteristics: Annual Revenue, by Type of Discrimination Charge

Annual Revenue by Defendant Firm	Sex Discrimination N=308		Race Discrimination N=218		Sex & Race Discrimination N=44	
	Count	%	Count	%	Count	%
Less than \$5m ^a	38	18.8	35	21.2	4	11.4
\$5m to less than \$25m ^a	32	15.8	33	20.0	6	17.1
\$25m to than \$200m ^a	45	22.3	30	18.2	5	14.3
\$200m to less than \$2000m ^a	40	19.8	29	17.6	10	28.6
\$2000m and more ^a	47	23.3	38	23.0	10	28.6
Unknown/missing	106	34.4	53	24.3	9	20.5

Note:^a Valid Percent

Source: IWPR/Wage Consent Decree Database 2010.

Table A13.
Distribution of CDs among U.S. District Courts, by Plaintiff Representative

	Total N=502		EEOC N=423		DOJ N=45		Private N=34	
	Count	%	Count	%	Count	%	Count	%
District 1 (MA, ME, NH, RI)	5	1	4	0.9	1	2.2	0	0
District 2 (CT, NY, VT)	34	6.8	25	5.9	2	4.4	7	20.6
District 3 (DE, NJ, PA)	29	5.8	24	5.7	4	8.9	1	2.9
District 4 (NC, SC, VA, WV)	62	12.4	48	11.3	8	17.8	6	17.6
District 5 (LA, MS, TX)	67	13.3	58	13.7	8	17.8	1	2.9
District 6 (KY, OH, MI, TN)	35	7	29	6.9	4	8.9	2	5.9
District 7 (IL, IN, WI)	57	11.4	50	11.8	3	6.7	4	11.8
District 8 (AR, IA, MN, MO, ND, NE, SD)	38	7.6	30	7.1	4	8.9	4	11.8
District 9 (AK, AZ, CA, HI, ID, MT, NV, OR, WA, Guam)	100	19.9	93	22	1	2.2	6	17.6
District 10 (CO, KS, OK, NM, UT, WY)	29	5.8	22	5.2	7	15.6	0	0
District 11 (AL, GA, FL)	46	9.2	40	9.5	3	6.7	3	8.8

Source: IWPR/Wage Consent Decree Database 2010.

Table A14.
Distribution of Consent Decrees among U.S. District Courts, by Type of Discrimination Charge

	Sex Discrimination N=308		Race Discrimination N=218		Sex & Race Discrimination N=44	
	Count	%	Count	%	Count	%
District 1 (MA, ME, NH, RI)	3	1	2	0.9	0	0
District 2 (CT, NY, VT)	26	8.4	15	6.9	7	15.9
District 3 (DE, NJ, PA)	15	4.9	15	6.9	3	6.8
District 4 (NC, SC, VA, WV)	32	10.4	31	14.2	4	9.1
District 5 (LA, MS, TX)	38	12.3	35	16.1	8	18.2
District 6 (KY, OH, MI, TN)	17	5.5	19	8.7	2	4.5
District 7 (IL, IN, WI)	35	11.4	27	12.4	8	18.2
District 8 (AR, IA, MN, MO, ND, NE, SD)	21	6.8	19	8.7	2	4.5
District 9 (AK, AZ, CA, HI, ID, MT, NV, OR, WA, Guam)	81	26.3	21	9.6	7	15.9
District 10 (CO, KS, OK, NM, UT, WY)	22	7.1	8	3.7	2	4.5
District 11 (AL, GA, FL)	18	5.8	26	11.9	1	2.3

Source: IWPR/Wage Consent Decree Database 2010.

Table A15.
General Remedies, by Plaintiff Representative

Remedy	Total N=502		EEOC N=423		DOJ N=45		Private N=34	
	Count	%	Count	%	Count	%	Count	%
Post notice of policy	448	89.2	389	92.0	33	73.3	26	76.5
Diversity/harassment training	445	88.6	386	91.3	32	71.1	27	79.4
Create/revise policy	313	62.4	250	59.1	35	77.8	28	82.4
Record keeping	267	53.2	202	47.8	38	84.4	27	79.4
New investigation and complaints procedure	189	37.6	143	33.8	20	44.4	26	76.5
Supervisor accountability	95	18.9	73	17.3	5	11.1	17	50.0
Allow interviews with staff	52	10.4	42	9.9	5	11.1	5	14.7
Establish objective criteria for assignments and promotion	46	9.2	17	4.0	4	8.9	25	73.5
Establish objective criteria for hiring and firing	43	8.6	23	5.4	8	17.8	12	35.3
Positive action in recruitment	43	8.6	23	5.4	5	11.1	15	44.1
Post-job vacancies	53	10.6	24	5.7	6	13.3	23	67.6
Analysis of promotion and compensation	32	6.4	8	1.9	3	6.7	21	61.8
Revise job descriptions/categories	28	5.6	14	3.3	1	2.2	13	38.2
New training/mentoring opportunities	26	5.2	10	2.4	0	0	16	47.1
CD includes zero-tolerance clause	15	3.0	13	3.1	1	2.2	1	2.9
Conduct exit interviews	3	0.6	1	0.2	1	2.2	1	2.9
Other general relief/remedies	67	13.3	35	8.3	10	22.2	22	64.7

Source: IWPR/Wage Consent Decree Database 2010

Table A16.
General Remedies, by Type of Discrimination Charge

Remedy	Sex Discrimination N=308		Race Discrimination N=218		Sex & Race Discrimination N=44	
	Count	%	Count	%	Count	%
Post notice of policy	276	89.6	197	90.4	41	93.2
Diversity/harassment training	275	89.3	189	86.7	38	86.4
Create/revise policy	214	69.5	121	55.5	36	81.8
Record keeping	172	55.8	110	50.5	28	63.6
New investigation and complaints procedure	140	45.5	73	33.5	28	63.6
Supervisor accountability	64	20.8	36	16.5	10	22.7
Allow interviews with staff	42	13.6	13	6.0	4	9.1
Establish objective criteria for assignments and promotion	28	9.1	24	11.0	6	13.6
Establish objective criteria for hiring and firing	34	11.0	18	8.3	9	20.5
Positive action in recruitment	26	8.4	24	11.0	7	15.9
Post-job vacancies	31	10.1	30	13.8	8	18.2
Analysis of promotion and compensation	17	5.5	18	8.3	3	6.8
Revise job descriptions/categories	19	6.2	15	6.9	6	13.6
New training/mentoring opportunities	15	4.9	14	6.4	3	6.8
CD includes zero-tolerance clause	15	4.9	4	1.8	4	9.1
Conduct exit interviews	3	1.0	0	0	0	0
Other general relief/remedies	37	12.0	35	16.1	6	13.6

Source: IWPR/Wage Consent Decree Database 2010.

Table A17.
Appointment of Monitor, by Plaintiff Representative

Type of Monitor	Total N=502		EEOC N=423		DOJ N=45		Private N=34	
	Count	%	Count	%	Count	%	Count	%
Independent monitor	48	9.6	31	7.3	3	6.7	14	41.2
Internal monitor	36	7.2	20	4.7	7	15.6	9	26.5
Other monitoring arrangements	4	0.8	1	0.2	0	0	3	8.8
No monitoring requirements	413	82.3	371	87.7	35	77.8	7	20.6

Source: IWPR/Wage Consent Decree Database 2010.

Table A18.
Appointment of Monitor, by Type of Discrimination Charge

Type of Monitor	Sex Discrimination N=308		Race Discrimination N=218		Sex & Race Discrimination N=44	
	Count	%	Count	%	Count	%
Independent monitor	36	11.7	18	8.3	7	15.9
Internal monitor	27	8.8	14	6.4	5	11.4
Other monitoring arrangements	1	0.3	3	1.4	0	0
No monitoring requirements	244	79.2	182	83.5	32	72.7

Source: IWPR/Wage Consent Decree Database 2010.

Table A19.
Consent Decree Duration (in Months), by Plaintiff Representative

Consent Decree Duration	Total N=498		EEOC N=420		DOJ N=45		Private N=33	
	Count	%	Count	%	Count	%	Count	%
Up to 12 months ^a	65	13.1	56	13.3	9	20	0	0
13 to 24 months ^a	194	39.0	168	40.0	20	44.4	6	18.2
25 to 36 months ^a	173	34.7	149	35.5	10	22.2	14	42.4
More than 36 months ^a	66	13.3	47	11.2	6	13.3	13	39.4

Note: ^a Valid Percent

Source: IWPR/Wage Consent Decree Database 2010.

Table A20.
Consent Decree Duration (in Months), by Discrimination Charge

Duration of Consent Decree (Months)	Sex Discrimination N=308		Race Discrimination N=218		Sex & Race Discrimination N=44	
	Count	%	Count	%	Count	%
Up to 12 months ^a	33	10.7	36	16.6	7	15.9
13 to 24 months ^a	116	37.7	78	35.9	8	18.2
25 to 36 months ^a	110	35.7	74	34.1	18	40.9
More than 36 months ^a	46	14.9	29	13.4	11	25.0

Note: ^a Valid Percent

Source: IWPR/Wage Consent Decree Database 2010.

Table A21.
Individual Remedies, by Type of Plaintiff Representative

Remedies for Individuals	Total N=502		EEOC N=423		DOJ N=45		Private N=34	
	Count	%	Count	%	Count	%	Count	%
Monetary relief	489	97.4	415	98.1	40	88.9	34	100
Alter contents of personnel file	118	23.5	109	25.8	6	13.3	3	8.8
Letter of reference	109	21.7	102	24.1	7	15.6	0	0
Reinstatement	21	4.2	13	3.1	6	13.3	2	5.9
Written apology	5	1.0	4	0.9	1	2.2	0	0
Other individual relief	38	7.6	24	5.7	11	24.4	3	8.8

Source: IWPR/Wage Consent Decree Database 2010

Table A22.
Individual Remedies, by Type of Discrimination Charge

Remedies for Individuals	Sex Discrimination N=308		Race Discrimination N=218		Sex & Race Discrimination N=44	
	Count	%	Count	%	Count	%
Monetary relief	295	95.8	214	98.2	40	90.9
Alter contents of personnel file	72	23.4	50	22.9	6	13.6
Letter of reference	60	19.5	54	24.8	7	15.9
Reinstatement	18	5.8	3	1.4	1	2.3
Written apology	4	1.3	1	0.5	44	100
Other individual relief	25	8.1	17	7.8	4	9.1

Source: IWPR/Wage Consent Decree Database 2010

Table A23.
Financial Relief: Maximum Monetary Award,^a by Plaintiff Representative

Value of Financial Relief	Total N=492		EEOC N=415		DOJ N=45		Private N=34	
	Count	%	Count	%	Count	%	Count	%
Up to \$25,000 ^b	92	18.7	82	19.8	10	23.3	0	0
\$25,001–\$60,000 ^b	102	20.7	93	22.4	9	20.9	0	0
\$60,001–\$125,000 ^b	99	20.1	85	20.5	14	32.6	0	0
\$125,001–\$400,000 ^b	104	21.1	95	22.9	8	18.6	1	2.9
\$400,001–\$800,000 ^b	95	19.3	60	14.5	2	4.7	33	97.1

Notes: ^a Maximum damages plus legal costs. ^b Valid Percent

Source: IWPR/Wage Consent Decree Database 2010.

Table A24.Financial Relief: Maximum Monetary Award,^a by Type of Discrimination Charge

Value of Financial Relief	Sex Discrimination N=308		Race Discrimination N=218		Sex & Race Discrimination N=44	
	Count	%	Count	%	Count	%
Up to \$25,000 ^b	51	16.9	41	19.2	7	16.7
\$25,001–\$60,000 ^b	53	17.6	49	23.0	5	11.9
\$60,001–\$125,000 ^b	60	19.9	43	20.2	6	14.3
\$125,001–\$400,000 ^b	80	26.6	30	14.1	12	28.6
\$400,001–\$800,000 ^b	57	18.9	50	23.5	12	28.6

Notes: ^a Maximum damages plus legal costs. ^b Valid Percent

Source: IWPR/Wage Consent Decree Database 2010.

Table A25.

Number of Awardees, by Plaintiff Representative

Number of Awardees	Total N=502		EEOC N=423		DOJ N=45		Private N=34	
	Count	%	Count	%	Count	%	Count	%
Zero or one	222	44.2	196	46.3	26	57.8	0	0
Two to four	113	22.5	100	23.6	13	28.9	0	0
Five to ten	47	9.4	47	11.1	0	0	0	0
More than ten	45	9.0	28	6.6	0	0	17	50
Not specified	75	14.9	52	12.3	6	13.3	17	50

Source: IWPR/Wage Consent Decree Database 2010.

Table A26.

Number of Awardees, by Type of Discrimination Charge

Number of Awardees	Sex Discrimination N=308		Race Discrimination N=218		Sex & Race Discrimination N=44	
	Count	%	Count	%	Count	%
Zero or one	126	40.9	104	47.7	15	34.1
Two to four	78	25.3	40	18.3	8	18.2
Five to ten	34	11.0	13	6.0	4	9.1
More than ten	25	8.1	21	9.6	3	6.8
Not specified	45	14.6	40	18.3	14	31.8

Source: IWPR/Wage Consent Decree Database 2010.

Appendix B

IWPR/WAGE Consent Decree Project: Coding Notes

1. Title of Case: (Last name of first plaintiff) v. (first company name)

a) Plaintiff (last name only- or EEOC etc) _____

b) Defendant (first company only) _____

c) Intervenor (if any) (1)

d) Sex of plaintiff/benefitting party:

(1) Female (2) Male
 (3) Mixed group (99) Unknown

e) Race of plaintiff/benefitting party:

(1) Afro American (2) Hispanic (3) White (4) Asian
 (5) Native American (6) Mixed group (99) Unknown

2. Docket number _____

Michigan University Clearinghouse ID: _____

3. Court (where filed): (1) Federal District Court (2) State Court

4. State (*where filed*):

1= Alabama	9= Florida	17= Kentucky	25= Missouri	33= North Carolina	41= South Dakota	49= Wisconsin
2= Alaska	10= Georgia	18= Louisiana	26= Montana	34= North Dakota	42= Tennessee	50= Wyoming
3= Arizona	11= Hawaii	19= Maine	27= Nebraska	35= Ohio	43= Texas	51= District of Columbia
4= Arkansas	12= Idaho	20= Maryland	28= Nevada	36= Oklahoma	44= Utah	52= Puerto Rico
5= California	13= Illinois	21= Massachusetts	29= New Hampshire	37= Oregon	45= Vermont	
6= Colorado	14= Indiana	22= Michigan	30= New Jersey	38= Pennsylvania	46= Virginia	
7= Connecticut	15= Iowa	23= Minnesota	31= New Mexico	39= Rhode Island	47= Washington	
8= Delaware	16= Kansas	24= Mississippi	32= New York	40= South Carolina	48= West Virginia	

5. a Case Brought by (*i.e. Plaintiff is*) (1) EEOC (2) DOJ (Plaintiff = "U.S.")
 (3) DOL (Dept. of Labor) (4) Private (Plaintiff is private person(s))

5. b IF defendant/employer is a public agency (true for all cases where plaintiff is U.S. (= DOJ), for cases brought by private person, please check), please indicate whether the employer/defendant is :

(1) Federal agency (2) State agency (3) City/district/municipality/county

6. Date case filed (mm/dd/yyyy): _____

7. a) Date CD entered (mm/dd/yyyy): _____ If date unknown, code 99/99/9999.

7. b) Date CD expired (mm/dd/yyyy): _____ If date unknown, code 99/99/9999.

7. c) Number of months CD in effect: _____ 7. d) CD expiry date extended by court? (1)

8. Type of discrimination alleged: (tick as many others as applicable):

- a) (1) Sex b) (1) Race c) (1) National Origin d) (1) Age
 e) (1) Religion f) (1) Disability

8 c. IF the decree includes complaints of both sex AND race discrimination, please indicate

- (1) Combined sex & race (2) Separate complaints (0) Not relevant

9. Type(s) of Complaints (tick as many as applicable)

- a) (1) Harassment (any) b) (1) Equal Pay
 a-a) (1) Sexual harassment c) (1) Promotion
 d) (1) Hiring e) (1) Retaliation
 f) (1) Pregnancy g) (1) Wrongful termination/discharge
 h) (1) Constructive Discharge
 i) (1) Other Terms & Conditions (e.g. allocation of overtime or of shifts)
 (tick and write-in): _____

10a. Class action (tick one only)

- (1) No (2) Yes, "certified" class
 (3) Yes, "on behalf of other similarly situated..."

→ "On behalf of other similarly situated" means that a class has been asserted although it may not have been officially certified, or that EEOC is bringing a case as a class (the EEOC has powers to treat a case as 'class action' even without formal process).

10.b If class, how many people are in the class? _____ (Code as -1 if of undetermined size)

10.c (1) Class of undetermined size

11. General Relief or Remedies imposed (tick as many as applicable)

- a. (1) Revise or Create New Policy b. (1) Revise Job Descriptions/Categories
 c. (1) Post Job Opportunities d. (1) Positive action in recruitment/hiring of (women/African Americans etc)
 e. (1) New training/mentoring opportunities g. (1) Establish objective criteria for assignments
 f. (1) Supervisor accountability h. (1) Establish objective criteria for hiring and promotion & firing
 i. (1) New investigation and complaints procedures
 j. (1) Post notice of policy k. (1) Record keeping
 l. (1) Analysis of promotion & compensation
 m. (1) Allow interviews with staff
 n. (1) Conduct exit interviews
 o. (1) Other (tick and write-in): _____
 p. (1) CD includes a sexual harassment "zero tolerance" clause

12. Mandatory Diversity/Harassment/EEO Training? (1) Yes

13. Reporting arrangements

- (1) Report to EEOC (2) Report to Department of Justice
 (3) Report to Department of Labor (4) Report to Class Counsel
 (5) Other reporting requirements (tick and write-in): _____
 (6) No reporting requirements specified

14. Appointment of Monitor?

- (0) No monitoring arrangement specified
 (1) Appoint Independent /External Monitor
 (2) Appoint Internal Monitor
 (3) Other monitoring arrangement (tick and write-in) _____

15. Individual relief/remedies (tick all applicable):

- a. (1) Monetary payment b. (1) Require reinstatement
 c. (1) Written apology d. (1) Letter of reference
 e. (1) Alter contents of personnel file
 f. (1) Other (tick and write-in): _____

16.a. Size of maximum total monetary award: \$ _____

Maximum damages are equal to monetary damages plus legal fees. Mandatory salary increases are not considered monetary damages.

16.b. Number of awardees (for distribution of award): _____

- (1) Award group of undetermined size

17. Is employer/defendant unionized? (1)Yes

This information may be in body of some CD, in section where complaint is described. The mention of a collective bargaining agreement is one way to identify that the business is unionized. [Where possible, information was also added through external searches].

18. Job/Occupation of plaintiff workers (tick all applicable)

Information might not be directly in the decree – it might be in the complaint, the EEOC/DOJ summary of the case or other related documents.

- | | |
|---|---|
| a. <input type="checkbox"/> (1) Officials and Managers | b. <input type="checkbox"/> (1) Professionals |
| c. <input type="checkbox"/> (1) Technicians | d. <input type="checkbox"/> (1) Sales Workers |
| e. <input type="checkbox"/> (1) Administrative Support Worker | f. <input type="checkbox"/> (1) Craft Workers |
| g. <input type="checkbox"/> (1) Operatives | h. <input type="checkbox"/> (1) Laborers and Helpers |
| i. <input type="checkbox"/> (1) Service Workers | j. <input type="checkbox"/> (1) Uniformed services (i.e., police, fire) |
| k. <input type="checkbox"/> (1) Unknown | |

If you find it hard to classify, write in: _____

19. Sector [Tick one only]

Information might not directly be in the decree – it might be in the EEOC/DOJ summary for the case. Additional note: Uniformed services are considered part of Public Administration.

- | | |
|--|--|
| <input type="checkbox"/> (1) Agriculture | <input type="checkbox"/> (2) Forestry/Fishing |
| <input type="checkbox"/> (3) Mining | <input type="checkbox"/> (4) Construction |
| <input type="checkbox"/> (5) Manufacturing | <input type="checkbox"/> (6) Transportation |
| <input type="checkbox"/> (7) Communications | <input type="checkbox"/> (8) Electric/Gas |
| <input type="checkbox"/> (9) Sanitary Services | <input type="checkbox"/> (10) Retail Trade |
| <input type="checkbox"/> (11) Finance | <input type="checkbox"/> (12) Insurance |
| <input type="checkbox"/> (13) Real Estate | <input type="checkbox"/> (14) Services |
| <input type="checkbox"/> (15) Public Admin | <input type="checkbox"/> (99) Can't find information |

20. Size of employer

The information will not be in the decree. Information can be found in business databases. Where ever possible find information within two years of the effective date of the decree. Check WARD or MERCHANT business databases.

Number of employees _____ Information applies to year: _____
 (9999) Can't find information

21. Total revenue

Information will not be in the decree. Information can be found in business databases. Where ever possible find information within two years of the effective date of the decree. Check WARD or MERCHANT business databases.

Annual revenue \$\$ _____ Information applies to year: _____
 (9999) Can't find information

22. Is this business now closed or bankrupt?

(1)Yes (0)No/n.a.

23. Is this company a subsidiary of a larger corporation?

Information might not be directly in the decree – it might be in EEOC/DOJ summary of the case or other related documents.

(1)Yes (0)No/n.a.

24. Source of Information

(1) Consent decree (2) EEOC notices
 (3) DoJ notices/website (4) Other (please write in) _____

Appendix C

Overview of EEOC Charges and Resolutions, FY 2000–2008

	FY 2000		FY 2001		FY 2002		FY 2003		FY 2004		FY 2005		FY 2006		FY 2007		FY 2008	
	Count	%	Count	%	Count	%	Count	%	Count	%	Count	%	Count	%	Count	%	Count	%
Total Charges	79,896	0.5%	80,840	0.4%	84,442	0.4%	81,293	0.4%	79,432	0.4%	75,428	0.4%	75,768	0.5%	82,792	0.4%	95,402	0.3%
Total Merit Suits Resolved	407		321		351		351		346		338		383		364		339	
Types of Resolutions		% ^a		% ^a		% ^a		% ^a		% ^a		% ^a		% ^a		% ^a		% ^a
Consent Decree	N/A	N/A	N/A	N/A	239	69.3%	260	74.9%	266	76.7%	269	79.8%	307	80.2%	281	77.0%	277	82.4%
Settlement Agreement	N/A	N/A	N/A	N/A	58	16.8%	46	13.3%	44	12.7%	27	7.7%	32	8.4%	13	3.6%	17	5.1%
Favorable Court Order	N/A	N/A	N/A	N/A	19	5.5%	19	5.5%	19	5.5%	17	5.0%	9	2.3%	23	6.3%	14	4.2%
Unfavorable Court Order	N/A	N/A	N/A	N/A	19	5.5%	13	3.7%	11	3.2%	19	5.6%	24	6.3%	27	7.4%	17	5.1%
Resolutions by Statute (as % of all Merit Suits Resolved each year)																		
Resolved by Title VII	315	77.4%	232	72.3%	266	75.8%	275	78.3%	277	80.0%	259	76.6%	295	77.0%	297	81.6%	265	78.2%
Resolved by EPA	6	1.4%	15	4.6%	9	2.6%	13	3.7%	9	2.6%	12	3.6%	8	2.1%	14	3.8%	3	0.9%
Resolutions by Issues Alleged																		
All Harassment	N/A	N/A	N/A	N/A	140	40.6%	149	42.9%	157	45.5%	160	47.5%	174	45.4%	170	46.6%	147	43.8%
Sex Harassment	N/A	N/A	N/A	N/A	86	24.9%	111	32.0%	115	33.1%	98	29.1%	113	29.5%	N/A	N/A	N/A	N/A
Hiring	N/A	N/A	N/A	N/A	51	14.8%	43	12.4%	49	14.1%	41	12.2%	51	13.3%	43	11.8%	41	12.2%
Promotion	N/A	N/A	N/A	N/A	26	7.5%	18	5.2%	26	7.5%	20	5.9%	30	7.8%	24	6.6%	25	7.4%
Wages	N/A	N/A	N/A	N/A	20	5.8%	21	6.1%	21	6.1%	22	6.5%	14	3.7%	23	6.3%	7	2.1%
Terms/Conditions	N/A	N/A	N/A	N/A	0	0.0%	0	0.0%	40	11.5%	40	11.9%	46	12.0%	42	11.5%	35	10.4%
Discharge	N/A	N/A	N/A	N/A	118	34.2%	211	60.8%	207	59.7%	206	61.1%	245	64.0%	251	68.8%	221	65.8%
Disability Accommodation	N/A	N/A	N/A	N/A	27	7.8%	21	6.1%	16	4.6%	16	4.7%	18	4.7%	19	5.2%	17	5.2%
Religious Accommodation	N/A	N/A	N/A	N/A	16	4.6%	14	4.0%	7	2.0%	9	2.7%	7	1.8%	11	3.0%	8	2.4%
Resolutions by Bases Alleged																		
Sex	N/A	N/A	N/A	N/A	140	40.6%	163	47.0%	174	50.1%	155	46.0%	186	48.6%	172	47.1%	115	33.9%
Race	N/A	N/A	N/A	N/A	78	22.6%	59	17.0%	61	17.6%	60	17.8%	67	17.5%	76	20.8%	88	26.0%
Equal Pay	N/A	N/A	N/A	N/A	7	2.0%	10	2.9%	5	1.4%	11	3.3%	6	1.6%	10	2.7%	3	0.9%
Retaliation	N/A	N/A	N/A	N/A	112	32.5%	114	32.9%	132	38.0%	119	35.3%	140	36.6%	140	38.4%	123	36.6%
Disability	N/A	N/A	N/A	N/A	61	17.7%	47	13.5%	47	13.5%	41	12.2%	59	15.4%	42	11.5%	44	13.1%
National Origin	N/A	N/A	N/A	N/A	27	7.8%	33	9.5%	34	9.8%	31	9.2%	30	7.8%	39	10.7%	40	11.9%
Age	N/A	N/A	N/A	N/A	24	7.0%	31	8.9%	34	9.8%	44	13.1%	46	12.0%	30	8.2%	37	11.0%
Religion	N/A	N/A	N/A	N/A	17	4.9%	17	4.9%	15	4.3%	19	5.6%	15	3.9%	20	5.5%	14	4.2%
Suits filed																		
Class Action Suits	N/A	N/A	N/A	N/A	113	32.8%	126 ^b	35%	146 ^b	38.5%	139 ^c	36.3%	137 ^d	37%	115 ^e	34.2%	112	38.6%
Individual Suits	N/A	N/A	N/A	N/A	232	67.2%	235 ^b	65%	233 ^b	61.5%	244 ^c	63.7%	234 ^d	63%	221 ^e	65.7%	178	61.4%

Notes: ^a Percentages are calculated with reference to total number of merit suits for each year.

Source: IWPR Compilation of data from EEOC Office of General Counsel Annual Reports, various years; EEOC, 2011 EEOC Litigation Statistics, FY 1997-FY2010.

Author Biographies



Lenora Cole, Ph.D., is the Chair of the Board of the Institute for Women's Policy Research. She is an expert on higher education, organizational development, and the issues of working women, and regularly works as a consultant to government agencies. From 1981 to 1986, Dr. Cole served as the Director of the Women's Bureau of the U.S. Department of Labor. She has also been involved in many community activities, including serving as a member of the Commission on Higher Education of the National Council of Negro Women; member of the board of directors, Wider

Opportunities for Women; President of the Foundation for Exceptional Children; and, Commissioner, District of Columbia Board of Elections and Development. She is the recipient of distinguished alumni awards from both Buffalo State College and the State University of New York at Buffalo, where she received a Ph.D. in educational administration, organizational development, and policy.



Cynthia Deitch, Ph.D., is an Associate Professor of Women's Studies, Sociology, and Public Policy at George Washington University and the Associate Director of the university's Women's Studies Program. Dr. Deitch is also an Affiliated Researcher with the Institute for Women's Policy Research and is a member of IWPR's Program Advisory Committee. Her research and publications have often focused on the intersection of gender, race, and class in the labor market, including studies of economic restructuring and displaced workers, work-family conflicts and employment

benefits, the evolution of Title VII, and occupation segregation among physicians. She has also published research on public opinion on abortion and on social welfare policies. Her current research is on the myths and realities of gender disparities in the recent recession. She received a Ph.D. in sociology from the University of Massachusetts at Amherst.



Ariane Hegewisch, M.Phil., is a Study Director at the Institute for Women's Policy Research (IWPR) focusing on workplace discrimination, work-family policies, and job quality. Prior to joining IWPR, she was a Senior Researcher and Lecturer in comparative human resource management at Cranfield School of Management, one of the premier university business schools in the United Kingdom. She began her career as a policy advisor in local government, developing strategies for greater gender equality in employment and training. She has published many papers and

articles and co-edited several books, including *Women, Work and Inequality: The Challenge of Equal Pay in a Deregulated Labor Market* (1999). She received a B.Sc. in economics from the London School of Economics and an M.Phil. from the Institute of Development Studies, University of Sussex.



Evelyn Murphy, Ph.D., is an economist, Founder and President of The WAGE Project, Inc., and a Resident Scholar (on leave 2010–11) in the Women's Studies Research Center at Brandeis University, where she researched and authored a book with E.J. Graff on the gender wage gap entitled *Getting Even: Why Women Don't Get Paid Like Men and What To Do About It* (2005). The WAGE Project is a nationwide, grassroots activist organization dedicated to eliminating the gender wage gap. Dr. Murphy was elected Lieutenant Governor of Massachusetts in 1986, after serving as

Massachusetts Secretary of Environmental Affairs and Secretary of Economic Affairs, and became the first woman in the state's history to hold constitutional office. She received a B.A. from Duke University in mathematics, a M.A. in economics from Columbia University, and a Ph.D. in economics from Duke University.

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