



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

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Executive Summary

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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 response 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.