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# The Equal Employment Opportunity Commission and Structural Reform of the American Workplace

Margo Schlanger\* & Pauline Kim\*\*

DRAFT: August 13, 2013

## Introduction

In one of its most-watched recent cases, the United States Supreme Court struck down a class action alleging that Wal-Mart stores discriminated against female employees in pay and promotion decisions.<sup>1</sup> The plaintiffs alleged that Wal-Mart’s corporate culture and highly discretionary decision-making practices led to sex discrimination on a company-wide basis, and they sought injunctive relief as well as backpay for individual employees. Reversing the Court of Appeals for the 9th Circuit, the Supreme Court held in *Wal-Mart v. Dukes* that the proposed class—which it estimated at one-and-a-half million plaintiffs—failed to meet the requirements for class action certification under Rule 23 of the Federal Rules of Civil Procedure.<sup>2</sup> Although the decision was widely understood as raising the bar for all types of class actions, it had particular significance for employment discrimination litigation. Observers wondered if it signaled the end of large-scale employment litigation aimed at structural reform of the

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This paper uses data collected as part of a larger project, the EEOC Litigation Project (Principal Investigators Pauline Kim, Margo Schlanger, and Andrew Martin), data available at <http://eeoclitigation.wustl.edu/>. Christina Boyd and Morgan Hazelton provided countless hours of critical assistance with the process of data collection, cleaning and shaping, as well as generous help on this paper. The larger data project received generous support from the Center for Empirical Research in the Law at Washington University School of Law and from the National Science Foundation, SES-0718831 (“The Litigation Process in Government Initiated Discrimination Suits”). In addition, University of Michigan Law School library staff was outstandingly helpful (and spent untold hours) in chasing down many unpublished sources. Our thanks as well to Grady Bridges, Alex Colbert-Taylor, and Jennifer Gitter for their data-management and research assistance; to Laura Beth Nielsen and Bob Nelson for sharing data with us; to participants at law faculty workshops at Stanford, UCLA, Duke, Washington University, and the University of Arizona, at the Labor Law Research Network, the Labor & Employment Law Colloquium, and the Jack Pemberton Legacy Event, University of San Francisco Law School, and to Sam Bagenstos, for comments on drafts.

<sup>1</sup> *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011).

<sup>2</sup> More specifically, a majority of the Court found that the plaintiffs had failed to satisfy the Rule 23(a)(2) requirement of showing that “there are questions of law or fact common to the class” because they had not identified a companywide discriminatory policy. *Id.* at 2556. The four dissenters would have upheld the district court’s determination that the proposed class met the commonality requirement, finding a common dispute as to whether Wal-Mart’s discretion pay and promotion policies produced discriminatory outcomes. *Id.* at 2566 (Ginsburg, J., dissenting). All nine justices unanimously agreed that because the plaintiffs sought individual monetary relief in addition to class-wide injunctive relief, the class should be not have been certified under Rule 23(b)(2); cases in which the monetary relief is not incidental to injunctive or declaratory relief should proceed as 23(b)(3) class actions, if at all.

workplace, or an implicit rejection of more expansive theories of employer liability under Title VII.<sup>3</sup>

While class litigation has continued in the wake of *Wal-Mart*, the opinion is clearly making it more difficult to obtain certification of private employment discrimination class actions.<sup>4</sup> As a result, the role of the Equal Employment Opportunity Commission (EEOC) in seeking structural reform of the workplace has gained in comparative importance. Unlike private litigants, the EEOC need not comply with the requirements of Rule 23 when it seeks relief on behalf of a group of aggrieved individuals.<sup>5</sup> Instead, the EEOC possesses express statutory authority to sue in its own name to vindicate the public interest in preventing employment discrimination and to seek relief for a group of employees.<sup>6</sup> Because the Commission need not meet the formal requirements for class certification, observers anticipate that the agency will play a larger role in bringing systemic cases in the future.<sup>7</sup> And the EEOC has recently recommitted to strengthening its focus on such cases.<sup>8</sup>

Given the EEOC's unique role in Title VII's remedial scheme, the agency's past experience with systemic cases and its efforts to seek structural reform of workplaces warrant close study. Even before the Supreme Court decided *Wal-Mart*, the role and effectiveness of large-scale litigation in combating discrimination in the workplace was highly contested. Two dominant theories offer different accounts of injunctive practices aimed at structural reform of the workplace, alternatively emphasizing dramatic struggles or intense collaborations to transform the culture and practices of the targeted organization. In this Article, we undertake a systematic analysis of the EEOC's injunctive practices over a ten-year period of time and measure them against the extant theories. We find a notable disconnect. We observe instead that the injunctive relief obtained by the EEOC in these cases appears primarily aimed at forcing

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<sup>3</sup> See, e.g., Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 395 (2011); Michael Selmi, *Theorizing Systemic Disparate Treatment Law After Wal-Mart v. Dukes*, 32 BERKELEY J. EMP. & LAB. L. 477 (2011); Suzette M. Malveaux, *How Goliath Won: The Future Implications of Dukes v. Wal-Mart*, 106 NW. U. L. REV. COLLOQUY 34 (2011); Sherry E. Clegg, *Employment Discrimination Class Actions: Why Plaintiffs Must Cover All Their Bases After the Supreme Court's Interpretation of Federal Rule of Civil Procedure 23(a)(2) in Wal-Mart v. Dukes*, 44 TEX. TECH L. REV. 1087 (2012); John M Husband & Bradford J. Williams, *Wal-Mart v. Dukes Redux: The Future of the Sprawling Class Action*, 40 COLO. LAW. 43 (2011).

<sup>4</sup> Although a number of proposed class actions have failed to be certified following *Wal-Mart*, see e.g., *Davis v. Cintas Corp.*, 717 F.3d 476 (6th Cir. 2013) (denying certification of proposed nationwide sex discrimination class action); *Stockwell v. City of San Francisco*, 2011 WL 4803505 (N.D. Cal. 2011) (denying class certification); *Bell v. Lockheed Martin Corp.*, 2011 WL 6256978 (D.N.J. 2011) (denying class certification), in other cases, courts have granted certification where the facts were distinguishable from *Wal-Mart*. See, e.g., *Ellis v. Costco*, 285 F.R.D. 492 (N.D. Cal. 2012) (certifying class action); *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012) (certifying class action race discrimination case); *Chen-Oster v. Goldman, Sachs & Co.*, 877 F. Supp.2d 113 (S.D.N.Y. 2012) (granting class certification).

<sup>5</sup> *General Tel. Co. v. EEOC*, 446 U.S. 318 (1980).

<sup>6</sup> *Id.* at 331.

<sup>7</sup> See, e.g., Lydell C. Bridgeford, *EEOC's Systemic Program Set to Fill Gap in Private Class Actions*, *Attorneys Predict*, DAILY LAB. REP. (BNA) No. 244, Dec. 19, 2012, at A-5.

<sup>8</sup> See EEOC, EEOC STRATEGIC PLAN FOR FISCAL YEARS 2012-2016, available at [http://www.eeoc.gov/eeoc/plan/upload/strategic\\_plan\\_12to16.pdf](http://www.eeoc.gov/eeoc/plan/upload/strategic_plan_12to16.pdf); Leslie E. Silverman et al., EEOC, SYSTEMIC TASK FORCE, REPORT TO THE CHAIR OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (March 2006), available at [http://www.eeoc.gov/eeoc/task\\_reports/upload/systemic.pdf](http://www.eeoc.gov/eeoc/task_reports/upload/systemic.pdf) [hereinafter EEOC, SYSTEMIC REPORT].

firms to implement what are commonly accepted as good and rational human resources practices. As we explore, these forms of injunctive relief are consonant with the sociological literature about how firms respond in non-litigation contexts to antidiscrimination law.

The phenomenon of “public law litigation” was first recognized and described in the period immediately following the passage of Title VII.<sup>9</sup> Employment discrimination litigation was viewed as one slice of the more general category of structural reform litigation, in which plaintiffs used injunctions to transform important American institutions, forcing them to align their practices with public norms. Although many of the examples cited involved suits against public entities such as hospitals, prisons, jails and schools, a number of scholars concurred that employment discrimination cases fit the public law litigation model.<sup>10</sup> Scholars like Owen Fiss and Abram Chayes, along with a crowd of other observers,<sup>11</sup> depicted mammoth cases that provide the occasion for heroic (or imperial<sup>12</sup>) judging or advocacy. The literature describes cases that last for years, even decades, and cost millions of dollars to litigate, that pose acute challenges to the managerial capacity of courts and offer occasions for power grabs by plaintiffs. Both those who praise and those who condemn structural reform litigation have concurred in this general description, which we call the gladiator theory of structural reform litigation.

While this depiction of structural reform litigation as protracted struggle persists in the literature, another vision has developed alongside it. Charles Sabel and William Simon wrote in 2004 that the litigation has moved away from remedial intervention modeled on command-and-control bureaucracy “toward a kind of intervention that can be called ‘experimentalist,’” which “emphasizes ongoing stakeholder negotiation, continuously revised performance measures, and transparency.”<sup>13</sup> Others have taken similar approaches focusing more particularly on employment discrimination litigation, arguing for what they term a “structural approach” to solving problems of “second generation discrimination” in employment.<sup>14</sup> In their view, the “easy” first generation cases of blatant discrimination are largely gone; discriminatory bias in

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<sup>9</sup> Owen Fiss, Foreword, *The Forms of Justice*, 93 HARV. L. REV. 1 (1979) [hereinafter Fiss, *Forms of Justice*]; see also OWEN FISS, *THE CIVIL RIGHTS INJUNCTION* (1978) [hereinafter FISS, *CIVIL RIGHTS INJUNCTION*]; Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) [hereinafter Chayes, *Public Law Litigation*].

<sup>10</sup> See, e.g., Chayes, *Public Law Litigation*, *supra* note 9, at 1284 (listing employment discrimination cases as one of the “avatars” of public law litigation); Robert Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905, 919 (1978) (asserting that Title VII class actions have the characteristics of public law litigation); Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L. J. 887, 893 (1984) [hereinafter Schwarzschild, *Public Law by Private Bargain*] (asserting that Title VII litigation is a “formidable example” of “public law”).

<sup>11</sup> For an extensive guide to the literature, see Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 569-570 n. 71 (2006); Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 1995-1997 & nn. 10-15 (1999).

<sup>12</sup> See Nathan Glazer, *Towards an Imperial Judiciary?*, 41 PUB. INT. 104 (1975).

<sup>13</sup> Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016 (2004) [hereinafter Sabel & Simon, *Destabilization Rights*].

<sup>14</sup> See, e.g., Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (2003).

employment today is more subtle and difficult to detect, yet the structure of the contemporary workplace renders it nonetheless extremely potent. Effective workplace reform efforts require not battles, but collaborations. They point to some high profile cases as embodying this approach—relying on flexible, context-specific remedies to create “processes of accountability” and encourage experimentation and information-sharing. We refer to this model of civil rights injunctive litigation as the collaboration theory.

Both the gladiator and collaboration depictions of employment discrimination litigation incorporate descriptive claims—that the proffered picture of employment discrimination litigation portrays some significant portion of the real world docket. However, these theories tend to rest on a handful of mega cases that are not necessarily representative.<sup>15</sup> In the 1970s, a prime example was the litigation against AT&T.<sup>16</sup> More recently, analysis has featured suits against Shoney’s,<sup>17</sup> Home Depot,<sup>18</sup> Wal-Mart,<sup>19</sup> Coca-Cola,<sup>20</sup> and Texaco.<sup>21</sup> Observers disagree on how to interpret these high-profile cases,<sup>22</sup> but perhaps the greater problem lies in taking them as representative of broader trends. These cases constitute just a sliver of a larger docket of cases aimed at providing relief to a group or class of employees—cases that have gone largely unexamined. In this Article, we begin to fill that gap by systematically examining one important category of those cases, rather than just a salient few. Specifically, we analyze the litigation activities and injunctive relief obtained by the EEOC in cases brought over a ten-year period

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<sup>15</sup> Similarly, in discussing prison and jail injunctive litigation, one of us has written that “our knowledge about a few cases is deep but highly unreliable more generally because those few are so aberrational.” Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 569 (2006).

<sup>16</sup> See, e.g., EEOC v. AT&T, 365 F.Supp. 1105 (E.D. Penn. 1973) (No. 73-149, filed Jan. 18, 1973); for documents and information, see <http://www.clearinghouse.net/detail.php?id=11146>; MARJORIE STOCKFORD, THE BELLWOMEN: THE STORY OF THE LANDMARK AT&T SEX DISCRIMINATION CASE (2004); HERBERT R. NORTHRUP & JOHN A. LARSON, THE IMPACT OF THE AT&T-EEO CONSENT DECREE (1979).

<sup>17</sup> Haynes v. Shoney’s, 1993 WL 19915 (N.D. Fla. 1993) (No. 3:89-cv-30093, filed Apr. 4, 1989); for documents and information, see <http://www.clearinghouse.net/detail.php?id=10711>; see Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. REV. 367 (2008) [hereinafter Levit, *Megacases*].

<sup>18</sup> Butler v. Home Depot, No. 3:94-cv-04335 (N.D. Cal., filed Dec. 19, 1994); for documents and information, see <http://www.clearinghouse.net/detail.php?id=9471>; see Sturm, *supra* note 14; Levit, *Megacases*, *supra* note 17; Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249 (2003).

<sup>19</sup> Wal-Mart v. Dukes, 131 S. Ct. 2541 (2011) (No. 3:01-cv-02252 N.D. Cal., filed June 8, 2001); for documents and information, see <http://www.clearinghouse.net/detail.php?id=10697>; LIZA FEATHERSTONE, SELLING WORKING WOMEN SHORT: THE LANDMARK BATTLE FOR WORKERS’ RIGHTS AT WAL-MART (2004).

<sup>20</sup> Ingram v. Coca-Cola, 200 F.R.D. 685 (N.D. Ga. 2001) (No. 1:98-cv-03679, filed Dec. 12, 1998); for documents and information, see <http://www.clearinghouse.net/detail.php?id=9473>; see also, e.g., Levit, *Megacases*, *supra* note 17; Henry Unger, *Discrimination Lawsuit-Coca-Cola Accused of “Company-wide Pattern,”* ATLANTA J.-CONST., Apr. 24, 1999, at H1.

<sup>21</sup> Roberts v. Texaco, 979 F.Supp. 185 (S.D.N.Y. 1997) (No. 7:94-cv-02015, filed Mar. 23, 1994); for documents and information, see <http://www.clearinghouse.net/detail.php?id=8162>; see Selmi, *supra* note 18; Cathy Cronin-Harris & David M. White, Negotiating Enduring Corporate Change: A Case Study on the Task Force on Equality and Fairness in *Roberts v. Texaco Inc.*, available at <http://www.dmwlawfirm.com/resources/Texaco%20Case%20Study.pdf>; Levit, *Megacases*, *supra* note 17.

<sup>22</sup> Selmi and Sturm disagree, for example, on nearly everything important about the Home Depot case. Compare Selmi, *supra* note 18; Sturm, *supra* note 14.

from fiscal years 1997-2006 inclusive,<sup>23</sup> focusing on the most “class-like” cases—those most likely aiming at structural reform of the workplace.

Our analysis necessarily leaves out of view the many class actions brought by private counsel.<sup>24</sup> While these cases are certainly important for a comprehensive understanding of structural reform litigation in the employment context, the EEOC is a particularly significant player—one with an increasingly important role following the Supreme Court’s *Wal-Mart* decision. The EEOC’s reports have stressed its “unique role and responsibility in combating systemic discrimination” and emphasized the importance of these cases to its mission.<sup>25</sup> Not only can it seek broad remedial provisions without certifying a class, the agency’s public funding allows it to pursue cases in which monetary damages are low or difficult to prove, and its history, regulatory role and nationwide reach give it resources unavailable to private counsel. Because of its special role in enforcement, the agency’s activities represent a crucial component of structural reform efforts in the workplace and warrant close study. During the period of our study, the EEOC brought many cases involving systemic discrimination and after systematically examining these, we find that neither the gladiator nor the collaboration theory of large-scale employment discrimination litigation comfortably fits the reality of the EEOC’s litigation practice.

Considering first the gladiator model, few of its predicted features are prevalent in the cases we examined. Even in the most class-like cases, the EEOC’s litigation is fairly modest; the cases are not bet-the-company battles and the awards are for thousands or occasionally millions of dollars, but not tens or hundreds of millions. The remedial phases last several years, not decades, and the dockets show few signs of post-decretal struggle. The cases are, it seems, only occasionally highly contentious; few epic battles appear. Most often no heated contestation of antidiscrimination norms takes place; the cases nearly always end with settlements rather than litigated judgments, and most of those settlements are negotiated without significant judicial intervention. Nor do the decrees require wholesale change to company practices, but rather more modest changes—in particular, the rationalization of hiring, promotion and complaint investigation processes. In short, these are ordinary, moderate-size litigations, not dramatic struggles.

At the same time, there is little sign of the type of flexible, contextualized, and decentralized problem-solving processes that the collaboration theorists envision. The EEOC’s decrees are not obviously individualized or contextual; most of their terms recur across cases. Moreover, only rarely do the decrees appear to require actions that are significantly integrated with an employer’s core operations. It is, of course, possible that the terms of these consent

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<sup>23</sup> For the EEOC, as for the federal government as a whole, a fiscal year begins on October 1 of the previous year and runs through September 30 of the year which it is numbered.

<sup>24</sup> Employment discrimination suits were and remain one of the largest components of federal court civil litigation, *see* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2006, 2006 TBL. C-2A (2006), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2006/appendices/c2a.pdf>; ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2012, 2012 TBL. C-2A (2012), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/C02ASep12.pdf>; the vast majority of employment discrimination suits are brought by private counsel.

<sup>25</sup> U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION’S SYSTEMIC TASK FORCE REPORT (2006), [http://www.eeoc.gov/eeoc/task\\_reports/systemic.cfm](http://www.eeoc.gov/eeoc/task_reports/systemic.cfm).

decrees do not capture the collaborative nature of the problem-solving they frame. By definition, a collaborative approach to structural reform will not entail clearly articulated rules or goals. Rather, one might look for evidence that a decree sets up a process that encourages and facilitates creative, accountable and effective problem-solving. Our data, however, contain little such evidence. The EEOC's consent decrees generally repeat the same handful of requirements regarding matters like notice-posting, training, and complaint-processing. While a significant minority of the decrees empower specified actors—human resources managers or consultants—to report to management and oversee implementation, very few decrees appear to put into place any mechanisms to create benchmarks by which employers might be held accountable or to encourage ongoing dialogue and norm creation with interested stakeholders. And virtually none of the consent decrees we examined appear to give ordinary employees any meaningful voice in the process of articulating and implementing anti-discrimination norms apart from the ability to file individual complaints.

If the gladiator and collaboration models do not accurately capture the reality of the EEOC's injunctive litigation, how best can it be understood? Even in those cases we identify as systemic, the remedies obtained by the EEOC are geared more towards rationalizing the firm's employment practices than transforming its culture and norms. They impose practices that would be entirely familiar to firms with well-functioning human resources departments that have adopted professionally endorsed "best practices" for compliance with the law. Thus we argue that the agency's structural reform efforts are best viewed not as intense battles seeking to transform the heart and soul of complex organizations, nor as equally intense and equally transformative partnerships, but as the quite routinized application of managerialist, bureaucratic responses to the legal prohibitions against discrimination.

In reaching this interpretation, we draw on scholarly work that focuses not on injunctive remedies in structural reform cases, but on organizations' responses to the general litigation threat posed by Title VII and other anti-discrimination statutes. Lauren Edelman, Frank Dobbin, and many others have argued that the requirements of anti-discrimination laws induce employers to respond in ways that signal compliance with the law while mediating tensions with the organization's managerial interests. Managers came to embrace the advice of personnel professionals who have long advocated a set of standardized bureaucratic responses, such as creating anti-discrimination policies, conducting EEO trainings, and establishing grievance procedures. These responses diffused through professional networks and were eventually validated by court decisions endorsing them as liability-defeating compliance. Our close examination of the EEOC's litigation efforts indicate that the injunctive remedies it obtained during the period of our study largely mirror these types of managerialist responses.

This Article is organized as follows: In Part I, we survey the literature on structural reform litigation and on the organizational responses to anti-discrimination law. In Part II, we describe the EEOC's role as a structural reform plaintiff. Part III presents three case studies as examples of the EEOC's systemic litigation, detailing the types of injunctive relief obtained. Part IV more systematically explores the injunctive relief obtained in the EEOC's systemic litigation over a ten-year period. It describes our methodology, sets out some basic information about the agency's systemic docket, and then examines how the docket as a whole lines up with the competing theories. It also offers our interpretation of the EEOC's injunctive practice as consistent with standard, bureaucratic personnel practices, suggesting that the agency has played a role in promoting and ratifying the managerialist responses adopted by many organizations.

Part V concludes by assessing the EEOC's efforts to address systemic discrimination. (All data and replication code are posted online<sup>26</sup>; the Civil Rights Litigation Clearinghouse<sup>27</sup> archives relevant case documents and other information.)

## I. Prior literature

Large-scale employment suits have often been cited as one example of what Owen Fiss named “structural reform” litigation—cases that try “to give meaning to [legal] values in the operation of large-scale organizations.”<sup>28</sup> As Fiss explained, “[s]tructural reform is premised on the notion that the quality of our social life is affected in important ways by the operation of large-scale organizations, not just by individuals acting either beyond or within these organizations.”<sup>29</sup> Abram Chayes labeled the same type of cases as “public law litigation.”<sup>30</sup> In the early 1970s when this literature began, the EEOC and Department of Justice brought numerous high profile class actions against public and private employers;<sup>31</sup> private litigants likewise filed many large and important employment cases.<sup>32</sup> The large-scale employment discrimination case was thus highly salient at the time, and viewed as an important species of structural reform litigation. Chayes, for example, declared that employment discrimination cases, along with school desegregation and prisoners’ rights cases “come readily to mind as avatars of this new form of litigation.”<sup>33</sup> And Maimon Schwarzchild labeled Title VII litigation a “formidable example” of ‘public law’ or ‘structural’ litigation.<sup>34</sup> Focusing on the employment context, we review in this section existing theories of structural reform and how the law and litigation shapes organizational responses to anti-discrimination mandates.

### A. The gladiator theory

Prior work has magnified the image of structural reform litigation, giving the impression that civil rights injunctive cases are nearly invariably the sites of long- and hard-fought struggles for justice. In *Against Settlement*, in 1984, Fiss wrote:

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<sup>26</sup> See <http://margoschlanger.net> and <http://eeoclitigation.wustl.edu/>. [these aren't posted yet]

<sup>27</sup> See <http://www.clearinghouse.net/results.php?searchSpecialCollection=1>.

<sup>28</sup> Fiss, *Forms of Justice*, *supra* note 9, *see also* FISS, CIVIL RIGHTS INJUNCTION, *supra* note 9.

<sup>29</sup> Fiss, *Forms of Justice*, *supra* note 9, at 2.

<sup>30</sup> Chayes, *Public Law Litigation*, *supra* note 9.

<sup>31</sup> See FRANK DOBBIN, INVENTING EQUAL OPPORTUNITY at 220 (2009) [hereinafter DOBBIN, INVENTING EO]. For a discussion of numerous suits brought by the EEOC and the Department of Justice in the 1970s, see Schwarzchild, *Public Law by Private Bargain*, *supra* note 10.

<sup>32</sup> See, e.g., *Luevano v. Campbell*, 93 F.R.D. 68 (D.D.C. 1981); *Lamphere v. Brown Univ.*, 491 F.Supp. 232 (D.R.I. 1980), *aff'd*, 685 F.2d 743 (1st Cir. 1982). In a study of the Northern District of California's cases that were closed between 1979 and 1984, employment discrimination cases comprised 21 of 46 certified class actions (and 24 of 73 putative class actions terminated without certification). Garth, Nagel, & Plager, *The Institution of the Private Attorney General*, 61 S. CAL. L. REV. 353, 355-56 & nn.5-6 (1988).

<sup>33</sup> Chayes, *Public Law Litigation*, *supra* note 9, at 1284.

<sup>34</sup> Schwarzchild, *Public Law by Private Bargain*, *supra* note 10, at 888.

The structural reform cases that play such a prominent role on the federal docket provide another occasion for continuing judicial involvement. In these cases, courts seek to safeguard public values by restructuring large-scale bureaucratic organizations. The task is enormous, and our knowledge of how to restructure on-going bureaucratic organizations is limited. As a consequence, courts must oversee and manage the remedial process for a long time—maybe forever.<sup>35</sup>

These are cases, Fiss says, in which ongoing disputes and judicial involvement are “inevitable,” even in cases that settle:

The parties may be ignorant of the difficulties ahead or optimistic about the future, or they may simply believe that they can get more favorable terms through a bargained-for agreement. Soon, however, the inevitable happens: One party returns to court and asks the judge to modify the decree, either to make it more effective or less stringent.<sup>36</sup>

From this perspective, a key feature of structural reform cases is their dramatic quality. These are, for Fiss, cases replete with “confrontations” and “threats,” and therefore particularly in need of stalwart judging:

The judge tries to give meaning to our constitutional values in the operation of these organizations. . . . The structural suit is one in which a judge, confronting a state bureaucracy over values of constitutional dimension, undertakes to restructure the organization to eliminate a threat to those values posed by the present institutional arrangements. The injunction is the means by which these reconstructive directives are transmitted.<sup>37</sup>

Likewise, Colin Diver explained in the context of custodial institution litigation that decree development and enforcement are complex and contentious processes:

The decree usually has followed an extended process that began with a court order to the defendants to submit a comprehensive plan for the eradication of violations and continued through lengthy negotiations and revisions. Promulgation of the decree has not terminated the litigation but instead simply has initiated a process of enforcement extending into the indefinite future. Ordinarily, the court has appointed an individual or a committee to monitor the defendants' compliance and to recommend corrective measures, but often it must reenter the dispute repeatedly to interpret or to modify the original order or to invoke its coercive powers to secure compliance.<sup>38</sup>

This observation of intense judicial involvement—whether as adjudicator, manager, or enforcer—is the dominant takeaway of much of the structural reform literature. Whatever their

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<sup>35</sup> Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1083 (1984).

<sup>36</sup> *Id.*

<sup>37</sup> Fiss, *Forms of Justice*, *supra* note 9.

<sup>38</sup> Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979).

precise role, judges' "time-consuming and cumbersome supervision" is said to be characteristic of structural reform litigation.<sup>39</sup>

Even observers less focused on the role of the judge agree that these cases are likely to be extremely drawn out and contentious, characterized by endless squabbles over implementation. John Jeffries and George Rutherglen, for example, highlight the importance of consent decrees rather than litigation in structural reform cases, but their description nonetheless emphasizes the conflict in the proceedings, which, they observe, "came to resemble a form of supervised political bargaining."<sup>40</sup> And Ross Sandler and David Schoenbrod criticize public law litigation for the authority it offers plaintiffs' lawyers in countless rounds of post-liability negotiations.<sup>41</sup>

Discussion of public law litigation sometimes focused on the public status of the defendants—but otherwise, employment discrimination cases were considered part and parcel of the phenomenon of structural reform litigation. Cases brought by employees against private employers were classified as "public" based on their broad impact. To quote Schwarzschild:

The outcome of a Title VII case may be to restructure an employer's entire process of selecting, hiring, training, assigning, promoting, and firing staff. Such a remedy affects not only the parties—the plaintiffs and the employer—but also the incumbent employees, future applicants, and the economic and moral interests of society as a whole.<sup>42</sup>

## B. The collaboration theory

Over the past decade, a number of scholars have articulated a new vision of institutional reform litigation, representing a distinct break from traditional models of public law litigation. For example, Charles Sabel and William Simon argue that "[t]he evolution of structural remedies in recent decades can be usefully stylized as a shift away from *command-and-control* injunctive regulation toward *experimentalist* intervention."<sup>43</sup> Building on a developing set of "democratic experimentalist" ideas about regulation<sup>44</sup> they explain:

[E]xperimentalist regulation combines more flexible and provisional norms with procedures for ongoing stakeholder participation and measured accountability. . . . [T]he governing norms are general standards that express the goals the parties are expected to achieve—that is, outputs rather than inputs. Typically, the regime leaves the parties with a substantial range of discretion as to how to achieve these

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<sup>39</sup> Adam M. Gershowitz, *Raise the Proof: A Default Rule for Indigent Defense*, 40 CONN. L. REV. 85 (2007).

<sup>40</sup> John C. Jeffries, Jr. & George Rutherglen, *Structural Reform Revisited*, 95 CAL. L. REV. 1387 (2007).

<sup>41</sup> For an example of a litigant-focused analysis that makes these points, see, e.g., ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* (2003); Ross Sandler & David Schoenbrod, *From Status to Contract and Back Again: Consent Decrees in Institutional Reform Litigation*, 27 REV. OF LITIGATION 115 (2007).

<sup>42</sup> Schwarzschild, *Public Law by Private Bargain*, *supra* note 10, at 893.

<sup>43</sup> Simon & Sabel, *Destabilization Rights*, *supra* note 13., at 1019.

<sup>44</sup> See generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Joanne Scott & David M. Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, 8 EUR. L.J. 1 (2002).

goals. At the same time, it specifies both standards and procedures for the measurement of the institution's performance.<sup>45</sup>

This vision of public law litigation is less conflict-suffused than the gladiator literature cited above. The law still plays a key role—the assertion of rights can destabilize the established practices of public institutions. However, rather than relying on top-down, fixed-rule solutions imposed by a court, that destabilization can “open up” an organization to an on-going process of deliberation among parties and stakeholders in order to resolve problems organically. Because experimentalist remedies “contemplate a permanent process of ramifying, participatory self-revision rather than a one-time readjustment to fixed criteria,”<sup>46</sup> significant post-decretal engagement by the parties, under the supervision of the court, is contemplated. On the other hand, courts are less involved in the shaping of specific remedies than under the traditional vision: “the norms that define compliance at any one moment are the work not of the judiciary, but of the actors who live by them.”<sup>47</sup>

Building on this vision, some employment law scholars have argued for a structural response to employment discrimination. They argue that the nature of discriminatory bias in the workplace has changed in form. Early litigation efforts focused on eliminating overt forms of race and gender subordination in the workplace. Today, although “whites only” employment listings and explicit race or gender classifications have largely disappeared, significant disparities in employment outcomes persist along race and gender lines, the result of more subtle forms of bias that block the progress of racial minorities and women in the workplace.

Sometimes called “second generation discrimination,” these more subtle and complex types of bias are the product of workplace structures, rather than “deliberate exclusion or subordination based on race or gender.”<sup>48</sup> Some scholars attribute second generation discrimination to psychological processes, such as unconscious racism or implicit cognitive bias.<sup>49</sup> Others emphasize the significance of informal interactions within a firm’s organizational structure. Susan Sturm, for example, argues that “[s]econd generation claims frequently involve patterns of interaction among groups within the workplace that, over time, exclude nondominant groups.”<sup>50</sup> These interactions may include a variety of behaviors such as undermining or “freezing out” by colleagues, or exclusion from important training and mentoring opportunities. Viewed in isolation, these interactions are not easily identified as discriminatory, but the broader pattern of interaction can result in excluding or blocking the progress of members of disfavored groups. Tristin Green similarly argues that the shift to more subtle forms of discriminatory bias is linked to the structure of the workplace. In particular, developments such as the breakdown of

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<sup>45</sup> Simon & Sabel, *Destabilization Rights*, *supra* note 13, at 1019.

<sup>46</sup> *Id.* at 1019.

<sup>47</sup> *Id.*

<sup>48</sup> Sturm, *supra* note 14, at 466-68.

<sup>49</sup> See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Ann C. McGinley, *!Viva La Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J. L. & PUB. POL’Y 415 (2000).

<sup>50</sup> Sturm, *supra* note 14, at 468.

internal labor markets, the replacement of fixed job ladders with “flattened hierarchies,” the emphasis on flexibility and the growth of peer assessments diffuse responsibility for decision-making, making it more difficult to identify discrete discriminatory acts.<sup>51</sup> Importantly, this form of discrimination results not from a discrete, individual action, but from “ongoing patterns of interaction shaped by organizational culture.”<sup>52</sup>

Citing these changes in the nature of discrimination and the organization of work, a number of scholars have argued that anti-discrimination law must change as well. Some have argued for amending Title VII’s liability standards.<sup>53</sup> Others have focused specifically on remedial issues—that is, what types of regulation can effectively combat second-generation forms of discrimination? To the extent that bias results from organizational structure, any effective remedy must be “structural” as well. Thus, Green argues for “a theory of structural disparate treatment” that “would generate the type of contextualized, multifaceted problem-solving process needed for change.”<sup>54</sup> Similarly, Sturm calls for a “de-centered, holistic, and dynamic approach to these more structural forms of bias,”<sup>55</sup> one that would encourage “the evolution of accountable and legitimate internal problem-solving processes.”<sup>56</sup> Like the experimentalist regulation literature of which it is a part, this approach encourages “the development of institutions and processes to enact general norms in particular contexts” and “experimentation with respect to information gathering, organizational design, incentive structures, measures of effectiveness, and methods of institutionalizing accountability.”<sup>57</sup>

Similarly observing a shift away from traditional command and control regulation, Cynthia Estlund sees the “potential to create new mechanisms for the enforcement of employee rights and labor standards.”<sup>58</sup> Although her focus is on basic labor standards, such as minimum wage and overtime requirements and health and safety regulations, Estlund’s analysis encompasses the trend toward self-regulation in the enforcement of anti-discrimination norms as well. In her view, effective self-regulation must be “‘tripartite’ in structure”—that is, “[i]t requires the participation of the government, the regulated firm, and the workers for whose benefits the relevant legal norms exist.” Establishing meaningful tripartism has been made more difficult, however, by the steep decline in unionization rates.<sup>59</sup> Thus, she argues that a crucial element of any effective regime of self-regulation is “[i]ndependent outside monitoring with

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<sup>51</sup> Green, *supra* note 14, at 99-104. See also Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519 (2001).

<sup>52</sup> Sturm, *supra* note 14, at 468.

<sup>53</sup> See, e.g., Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences*, 92 MICH. L. REV. 2370 (1994); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993).

<sup>54</sup> Green, *supra* note 14, at 156.

<sup>55</sup> Sturm, *supra* note 14, at 462.

<sup>56</sup> *Id.* at 491.

<sup>57</sup> *Id.* at 463.

<sup>58</sup> Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319 (2005).

<sup>59</sup> *Id.* at 323.

direct input from employees.”<sup>60</sup> Employee participation is essential to the success of self-regulation because employee representatives can not only help devise and implement flexible, relevant substantive changes in the workplace, they are also in the best position to monitor firm compliance.<sup>61</sup>

This recent work on experimentalist forms of regulation has both normative and descriptive components. It advocates that courts and parties pursue structural solutions, but also asserts that the elements of such an approach are emerging in actual practice. Thus, Green points to the terms of several recent settlement agreements and consent decrees as exemplars of efforts that address structural concerns.<sup>62</sup> Similarly, Sturm explores three cases studies as concrete examples of new types of collaborative efforts to identify and address manifestations of workplace bias.<sup>63</sup>

### C. The Managerialism Theory

A third strain of scholarship about anti-discrimination law is highly relevant here as well, although it does not highlight injunctive practice. In research spanning decades, sociologists Lauren Edelman, Frank Dobbin, and others have documented the ways in which the legal ideals of civil rights laws are constructed and reconstructed as those prescriptions move from the legal domain into organizations. Confronted with a legal mandate forbidding discrimination, firms have long sought to develop responses that signaled “a visible commitment to the law”<sup>64</sup> At the same time, firms have viewed antidiscrimination mandates as potentially in conflict with managerial interests in exercising broad discretion and operating efficiently. When a law like Title VII is “ambiguous, procedural in emphasis, and difficult to enforce,” it is “especially open to organizational mediation.”<sup>65</sup> In other words, ambiguity leaves firms greater leeway to “construct the law in a manner that is minimally disruptive to the status quo,”<sup>66</sup> and as they internalize the law, it becomes “infused with managerial values.”<sup>67</sup>

The process unfolded over time, with personnel professionals gaining influence in defining compliance and courts ratifying those responses. Dobbin writes that “it was civil rights activists who fought for equal opportunity in employment . . . [b]ut it was personnel managers who defined what job discrimination was and was not. . . . In the absence of clear government guidelines, personnel experts modeled compliance measures on classical personnel practices.”<sup>68</sup>

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<sup>60</sup> *Id.* at 356.

<sup>61</sup> *Id.* at 358.

<sup>62</sup> Green, *supra* note 14, at 155.

<sup>63</sup> Sturm, *supra* note 14, at 491.

<sup>64</sup> Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. OF SOCIOLOGY 1531, 1542 (1992) [hereinafter Edelman, *Legal Ambiguity*].

<sup>65</sup> *Id.* at 1542.

<sup>66</sup> *Id.* at 1535.

<sup>67</sup> Lauren B. Edelman, Sally Riggs Fuller, & Iona Mara-Drita. *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. OF SOCIOLOGY 1589, 1592 (2001) [hereinafter Edelman, *et al.*, *Diversity Rhetoric*].

<sup>68</sup> DOBBIN, INVENTING EO, *supra* note 31, at 220.

As these measures spread among firms, courts in turn begin to defer, taking these common organizational practices as evidence of good faith compliance and thereby ratifying the rationality of these responses. For example, the notion that firms should institute internal EEO grievance procedures to reduce their risks of liability is now widely accepted. Edelman, Uggen, and Erlanger recount, however, that this “accepted wisdom” emerged at a time when there was little empirical evidence that internal grievance procedures either reduced the incidence of external claims or would be accepted as a legal defense in court.<sup>69</sup> Nevertheless, accounts of the value of grievance procedures were “told and retold”<sup>70</sup> so that such procedures came to be equated with rational practices, and firms seeking to demonstrate compliance with the legal mandate adopted these procedures. Eventually the Supreme Court joined the chorus, authoritatively, when it held that employers that had grievance procedures could assert an affirmative defense against claims of hostile work environment sexual harassment under some circumstances.<sup>71</sup> By endorsing existing practices, the Court transformed grievance systems into a rational liability-reduction response.

In a similar manner, other organizational responses to the anti-discrimination mandate have become part of a standard bureaucratic set of responses to the legal prohibitions against employment discrimination. In addition to grievance procedures, firms typically adopt explicit anti-discrimination policies and often require “sensitivity training” of managers or employees; they also include equal employment opportunity affirmations in their job advertising, or adopt other kinds of diversity programs.<sup>72</sup> Many scholars are extremely skeptical about the efficacy of these measures, dismissing much of the modern diversity toolkit as mere window dressing that signals EEO compliance while doing little to promote equality or unbiased decision-making in the workplace. But whether they work or not, these sorts of managerialist responses are now prevalent.<sup>73</sup>

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<sup>69</sup> Lauren B. Edelman, Christopher Uggen, & Howard S. Erlanger, *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOCIOLOGY 406, 409 (1999)

<sup>70</sup> *Id.* at 408.

<sup>71</sup> See *Farragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries Inc. v. Ellerth*, 524 U.S. 742 (1998).

<sup>72</sup> See, e.g., Frank Dobbin & Erin L. Kelly, *How to Stop Harassment: Professional Construction of Legal Compliance in Organizations*, 112 AM. J. SOCIOLOGY 1203 (2007) [hereinafter Dobbin & Kelly, *How to Stop Harassment*]; Alexandra Kalev, Frank Dobbin, & Erin Kelly, *Best Practices or Best Guesses? Diversity Management and the Remediation of Inequality*, 71 AM. SOCIOLOGICAL REV. 589 (2006) [hereinafter Kalev, Dobbin, & Kelly, *Best Practices*].

<sup>73</sup> See, e.g., Kalev, Dobbin, & Kelly, *Best Practices*, *supra* note 72; Frank Dobbin, Soohan Kim & Alexandra Kalev, *You Can't Always Get What You Need: Why Diverse Firms Adopt Diversity Programs*, 76 AM. SOCIOLOGICAL REV. 386 (2011); Susan Bisom-Rapp, *An Ounce of Prevention is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law* 22 BERK. J. EMP. & LAB. L. 1, 4-6, 27-28 (2001) [hereinafter Bisom-Rapp, *Ounce of Prevention*]; Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: the Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 U. ARK. LITTLE ROCK L. REV. 147 (2001); Joanna L. Grossman, *The First Bite is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671 (2000); Anne Lawton, *Operating in an Empirical Vacuum: the Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197 (2004); Edelman, *Endogeneity*; Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 29 (2006) [hereinafter Bagenstos, *Structural Turn*].

The sociological literature on managerialist responses to antidiscrimination laws and norms focuses on how firms generally interpret and adapt to the law, however, not on their response to targeted litigation and specific types of injunctions. In contrast, the traditional literature on structural reform highlights the impact of litigated reform efforts, suggesting that injunctive orders provoke different responses than the mere liability-creating statute and the resulting litigation threat. Selmi's work bridges the gap between these two strands. He argues that while earlier public law litigation imposed meaningful remedies like redesigned employment tests or preferential hiring for discrimination victims,<sup>74</sup> in more recent class actions, private litigants have been content with remedies like EEO training and diversity initiatives—the types of responses documented in the managerialism literature.

Selmi is highly critical of the shift: “Not so long ago, class action employment discrimination suits were defined as a quintessential form of public law litigation where monetary relief was generally viewed as one component of necessary remedial relief, and a far less important component than the institutional reform the suit ultimately produced.”<sup>75</sup> By contrast, he argues that today “employment discrimination litigation has become a private affair that is largely about money and public relations, and rarely concerned with implementing broad institutional reform.”<sup>76</sup> Even when a prospective consent decree is entered, courts have little involvement in shaping the terms of those decrees; instead, they are negotiated between private parties who agree to actions—training programs or diversity initiatives, for example—that are predictably ineffective in combating discrimination and serve the corporation's interests, rather than fundamentally altering its crucial personnel practices.<sup>77</sup> Although he does not use the same terminology, Selmi is essentially complaining that the private EEO class action has embraced managerialist responses, rather than more reformist remedies, abandoning meaningful measures to benefit victims and prevent future discrimination.

Selmi's argument rests in part on the changed incentives for the private bar following passage of the Civil Rights Act of 1991, which increased the availability of money damages. His focus is therefore on the private class action, and he does not claim that his tort model describes the EEOC's litigation practice. Indeed, Selmi has acknowledged differences between private lawyers and the EEOC.<sup>78</sup> One might expect that the EEOC, as a publicly funded agency, is less likely to be driven by monetary concerns. In fact, the agency has self-consciously adopted a stance differentiating itself from private litigants, claiming to target systemic discrimination for

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<sup>74</sup> Selmi, *supra* note 18, at 1298-99.

<sup>75</sup> *Id.* at 1251-52.

<sup>76</sup> *Id.* at 1331.

<sup>77</sup> *Id.* at 1297.

<sup>78</sup> Selmi does not assess how the EEOC fits into his model, but he suggests that government-initiated litigation in the past looked different from today's large private class action. At the same time, he criticizes the agency's recent efforts in large class action suits as “almost comically inept.” *Id.* at 1331. Selmi also suggests that EEOC involvement in private class actions—for example, as a monitor of consent decrees—might help to restore the public interest focus of these cases. *Id.* at 1330. See also Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 2-3 (1996) [hereinafter Selmi, *Value of the EEOC*] (arguing that the EEOC “ought to provide some value that is different from what could be provided by private attorneys since there are obvious costs to having a public agency process claims”).

reform and to assist complainants based on the merits, not the monetary value, of their claims.<sup>79</sup> Nevertheless, Selmi's analysis raises questions about the EEOC's injunctive practices. If, as we find, the EEOC pursues the same kinds of limited injunctive remedies that he criticizes, that casts some doubt on his theory that prioritization of monetary relief over structural reform explains the predominance of such remedies.

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The literature thus offers three accounts of structural reform of the workplace in response to civil rights laws. The gladiator theory focuses on large-scale cases, depicting litigation as battle and the injunctions obtained as intrusively transformational of recalcitrant institutions. The collaboration theory emphasizes litigation-driven experimentation, information-sharing and accountability as the pathways to meaningfully reforming biased decision-making processes. And what we will call managerialism theory highlights organizations' voluntary responses to the legal prohibition against discrimination by adopting a standard set of bureaucratic responses, such as EEO policies, training programs, and grievance procedures. Our purpose here is not to resolve debates over which approach would be most effective in combating employment discrimination. Rather, our aim is to examine the activities of one particularly important player—the EEOC—to understand more about how it pursues structural reform through its litigation activities.

## II. The EEOC as a Structural Reform Plaintiff

The EEOC plays a unique role in the scheme established by Congress for enforcement of Title VII and other federal anti-discrimination statutes. Employees who believe they have been discriminated against must first file a charge against their employer with the EEOC.<sup>80</sup> The Commission processes tens of thousands of charges annually, investigating and making determinations whether or not there is cause to believe that discrimination occurred.<sup>81</sup> At any time after 180 days from the filing of the charge, complaining employees are entitled to a “right to sue” letter, which authorizes them to seek redress against the employer in federal district court.<sup>82</sup> Numerous charges exit the administrative process in this way, often before the EEOC has completed investigation, and in the period here examined private plaintiffs filed fourteen to

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<sup>79</sup> See, e.g., EEOC, SYSTEMIC REPORT, *supra* note 8, at 1.

<sup>80</sup> Litigants are required to first exhaust administrative remedies by filing a charge with the EEOC when alleging discrimination on the basis of race, color, national origin, religion, sex, or pregnancy, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17; Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k); age, the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634; and disability, the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213. In addition, the EEOC was recently given the responsibility of receiving claims of genetic discrimination under Title II of the Genetic Information Non-Discrimination Act of 2008. 42 U.S.C. §§ 2000ff to 2000ff-11. Alternatively, employees may file charges with state fair employment agencies where they exist. For simplicity, we refer here only to the EEOC's role.

<sup>81</sup> See, e.g., EEOC, Charge Statistics FY 1997 Through FY 2012, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

<sup>82</sup> Section 706 of Title VII of the Civil Rights Act of 1964, 29 U.S.C. § 2000e-5; 29 C.F.R. § 1601.28(a).

twenty-five thousand employment discrimination cases each year in federal district courts.<sup>83</sup> In cases in which the EEOC proceeds to a “cause” finding, the agency tries to “conciliate” or settle the charge with the employer. If no agreement is reached, the EEOC may choose to file a lawsuit on behalf of the charging party.<sup>84</sup> The charging party has the right to retain her own lawyer and intervene in the EEOC’s lawsuit.<sup>85</sup>

During the period of this study, the EEOC filed a few hundred cases each year in federal court.<sup>86</sup> Many of those cases sought modest compensation for just one or a handful of people. Although the resolution of those cases often included simple injunctive measures, such as banning discrimination and posting an antidiscrimination policy, they essentially addressed individual grievances. In other cases, the EEOC’s cases aimed to have a broader effect. In carrying out its mission of “promot[ing] equality of opportunity in the workplace,”<sup>87</sup> the Commission has—to varying degrees over time—emphasized its commitment to opposing “systemic discrimination.”<sup>88</sup> A 2006 Task Force Report highlighted the Commission’s “unique role and responsibility in combating systemic discrimination,” defining its “systemic” cases as: “pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location.”<sup>89</sup> For much of its history the EEOC has seemed to consider its systemic cases the most important component of the

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<sup>83</sup> See Administrative Office of the United States Courts, Federal Judicial Caseload Statistics, tbl. C-2A, annually, for years 1997-2006, available at <http://www.uscourts.gov/Statistics/JudicialBusiness/archive.aspx>.

<sup>84</sup> Section 706 of Title VII of the Civil Rights Act of 1964, 29 U.S.C. § 2000e-5. Although the agency was initially only empowered to seek conciliation when it found a claim to be meritorious, see Selmi, *Value of the EEOC*, *supra* note 78, at 5; Belton, *supra* note 10. Congress amended Title VII in 1972 to, among other things, give the EEOC the power to sue in federal court to vindicate the rights of complaining employees.

<sup>85</sup> On occasion, a charging party obtains a right to sue letter and file suit in federal court first. The EEOC may then intervene in the private lawsuit. This party configuration is far less common.

<sup>86</sup> That level of new litigation filings has decreased in recent years; in the first Obama administration, filings were in the 200-300 range, and in 2012, down to 122. See EEOC LITIGATION STATISTICS, FY 1997 THROUGH FY 2012, available at <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm>; U.S. EEOC, PERFORMANCE AND ACCOUNTABILITY REPORT, FY 2012 (2012), available at [http://www.eeoc.gov/eeoc/plan/2012par\\_discussion.cfm](http://www.eeoc.gov/eeoc/plan/2012par_discussion.cfm).

<sup>87</sup> See EEOC mission statement, available at <http://eeoc.gov/abouteeoc/plan/par/2008/index.html>.

<sup>88</sup> In the late 1970s, the EEOC had a set of criteria for systemic investigation “designed to focus on the worst discriminators first.” *Oversight Hearings on Equal Employment Opportunity and Affirmative Action, Part I: Hearings Before the Subcomm. on Employment Opportunities of the House of Rep. Comm. on Education and Labor, 97th Cong., 1st Sess. 321 (1981)* (statement of J. Clay Smith, Jr., Acting EEOC Chair). These criteria related to low employment rates of women or minorities in desirable jobs, or use of policies or practices with a disparate impact on women or minorities. See EEOC COMPL. MAN., ¶ 562; Richard I. Lehr, *EEOC Case-Handling Procedures*, 34 ALA. L. REV. 241, 255-56 (1983). However, the Commission drastically cut back its large-case litigation during the 1980s, opting instead for an approach that emphasized full investigations for each individual charge. See *Statement, Hearing before House Comm. on Appropriations, 102d Cong., 1st Session (1986)*, at 332, 338. See also Neal Devins, *Reagan Redux: Civil Rights Under Bush*, 68 NOTRE DAME L. REV. 955 (1993). By the mid-1990s, systemic litigation was again a priority. See EEOC, NATIONAL ENFORCEMENT PLAN (1995), available at <http://www.eeoc.gov/eeoc/plan/nep.cfm>. Unlike during the Reagan and Bush I administrations, the EEOC during the Bush II years never disavowed interest in systemic litigation; indeed, the 2006 Task Force review and resulting reforms took place during the Bush administration.

<sup>89</sup> EEOC, SYSTEMIC REPORT, *supra* note 8.

agency's litigation docket. These are the cases that receive attention in congressional oversight hearings, and that the EEOC features in its annual reports,<sup>90</sup> agency histories,<sup>91</sup> and the like.

The EEOC sees itself as not only bearing the responsibility to bring cases attacking systemic discrimination, but also having a particular ability to do so. As the Task Force argued:

For several reasons, EEOC is also uniquely positioned to litigate systemic cases. First, unlike private litigants, EEOC need not meet the stringent requirements of Rule 23 of the Federal Rules of Civil Procedure in order to maintain a class suit in federal court. Second, as a practical matter, EEOC may be able to bring certain systemic cases that the private bar is not likely to handle, for example, where the monetary relief might be limited, the focus is on injunctive relief, or the victims are in underserved communities. . . . Finally, the Task Force believes that EEOC's nationwide presence permits it to act as a large yet highly specialized law firm with a unique role in civil rights enforcement.<sup>92</sup>

But the Commission has not necessarily been successful in fully leveraging these advantages. The Task Force report itself criticized the agency's failure to bring more such cases, noting that while the "EEOC has successfully investigated, conciliated and litigated numerous systemic cases," the Commission "does not consistently and proactively identify systemic discrimination."<sup>93</sup> Observers agree both that the cases are important, and that the EEOC has not paid them sufficient attention. For example, Selmi has criticized the EEOC for "concentrate[ing] on individual rather than class action litigation"<sup>94</sup> that could help revive the public nature of the civil rights suits.

Regardless of whether the EEOC could have done more to pursue systemic discrimination, the agency is clearly an important subject of study for understanding litigation as a means to structural reform of the workplace. Although private litigants bring the bulk of federal lawsuits under Title VII and other federal anti-discrimination statutes, only a tiny proportion of these—between 0.6 and 1.1% during our period of study—are class actions.<sup>95</sup> Moreover, as Selmi has argued, class action cases are not necessarily about structural reform; private litigants may be primarily pursuing monetary relief, rather than reform of the

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<sup>90</sup> See, e.g., EEOC, PERFORMANCE AND ACCOUNTABILITY REPORT FY 2008 (2008), at 10, <http://www.eeoc.gov/eeoc/plan/archives/annualreports/par/2008/par2008.pdf>.

<sup>91</sup> See, e.g., EEOC 35 ANNIVERSARY: FOCUSING ENFORCEMENT EFFORTS ON SYSTEMIC DISCRIMINATION, <http://www.eeoc.gov/eeoc/history/35th/1970s/focusing.html> (last visited Aug. 8, 2013).

<sup>92</sup> EEOC, SYSTEMIC REPORT, *supra* note 8, at 1.

<sup>93</sup> *Id.*

<sup>94</sup> Selmi, *Value of the EEOC*, *supra* note 78, at 21.

<sup>95</sup> We derive the estimate in text from Nelson and Nielsen's data, which they generously shared with us; they assembled a random sample of 1788 employment discrimination cases filed between 1987 and 2003 in seven large districts, and found 15 class actions among them—.08%. For published papers using their data see Ellen Berrey, Steve G. Hoffman, Laura Beth Nielsen, *Situated Justice: A Contextual Analysis of Fairness and Inequality in Employment Discrimination Litigation*, 46 LAW & SOC'Y REV. 1 (2012); Laura Beth Nielsen, Robert L. Nelson, & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. OF EMPIRICAL LEGAL STUDIES 175.

workplace.<sup>96</sup> In contrast, the EEOC has expressly argued for the importance of structural reform cases and its public statements suggest that it views them as a particularly significant part of its work.<sup>97</sup> Systemic cases (using our criteria) amounted to 5-11% of its litigation docket during the period we here examine.

Because the Supreme Court's recent opinion in *Wal-Mart* appears to make it more difficult to certify employment discrimination class actions,<sup>98</sup> the EEOC's efforts in seeking relief for groups of workers will gain in significance. As discussed above, the EEOC is not required to satisfy the requirements of Rule 23 in order to pursue broad-based claims of discrimination and observers expect that it will play a larger role in pursuing systemic discrimination in the future.<sup>99</sup> Understanding its injunctive practices is thus crucial for assessing existing theories of structural reform and considering the prospects for such efforts in the future. We begin with close study of three of the EEOC's systemic cases, examining their litigation history and the terms on which they were resolved in order to gain insight into the EEOC's injunctive practices during the period of our study.

### III. The Case Studies

In order to get a textured sense of the EEOC's systemic cases, we undertook three case studies by interviewing the lawyers involved and closely examining the case documents. The first case, *EEOC v. Dial Corporation*,<sup>100</sup> alleged sexual harassment of women workers. In the second, *EEOC v. McKesson Water Products*,<sup>101</sup> the Commission joined with private counsel and a non-profit public interest organization to sue over discriminatory pay of African-American truck drivers. And in the third, the EEOC brought two separate lawsuits, each captioned *EEOC v. PJAX*,<sup>102</sup> on theories of sex and disability discrimination. *Dial* has some, though not all, of the attributes the gladiator theory might predict; *McKesson* might look somewhat familiar to a collaboration theorist; and the result obtained in *PJAX* largely fits the managerialism description. As part IV will confirm, however, *PJAX* is most typical of the EEOC's systemic docket.

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<sup>96</sup> Selmi, *supra* note 18, at 1297.

<sup>97</sup> See, e.g., *supra* note 90, at 10.

<sup>98</sup> See *supra* note 3.

<sup>99</sup> See *infra* Introduction.

<sup>100</sup> *EEOC v. Dial*, 156 F.Supp.2d 926 (N.D. Ill. 2001) (No. 1:99-cv-03356, filed May 20, 1999); documents and information available at <http://www.clearinghouse.net/detail.php?id=7947>.

<sup>101</sup> *EEOC v. McKesson Water Products*, No. 2:01-cv-09496-FMC-PJW (C.D. Cal., filed Nov. 5, 2001); documents and other information available at <http://www.clearinghouse.net/detail.php?id=9099>.

<sup>102</sup> *EEOC v. PJAX*, 2:03-cv-00759-TFM-IJS (W.D. Penn., filed May 27, 2003) was a sexual harassment case; documents and other information available at <http://www.clearinghouse.net/detail.php?id=8756>. *EEOC v. PJAX*, 1:03-cv-01535-JFM (D. Md., filed May 27, 2003), concerned hiring; documents and other information available at <http://www.clearinghouse.net/detail.php?id=8801>.

### A. *Dial*<sup>103</sup>: A gladiator case?

In 1996, Beverly Allen, an employee at the Dial Corporation's soap manufacturing plant, in Illinois, filed a charge with the EEOC, in which she claimed repeat and severe harassment from 1992 through 1995, and retaliation for complaints about that harassment. The EEOC took over two years to investigate; in March 1998, it made a "reasonable cause" finding in her favor. Statutorily required attempts at conciliation made little progress. The EEOC requested \$300,000 (the statutory cap) in damages for Allen; Dial offered \$5000. The positions on injunctive relief were similarly far apart. One of the EEOC's attorneys recalls that the EEOC insisted on a class-wide settlement but that Dial was equally resolute that it would deal only with the charging party's grievance.<sup>104</sup> Accordingly, the EEOC filed suit in May 1999, alleging a pattern and practice of sex discrimination by creation of a hostile work environment thick with sexual harassment and sex-based harassment,<sup>105</sup> and sought monetary relief for all those who had suffered harassment, as well as prospective injunctive relief.

This case might be thought to meet the "gladiator" description. Dial, a billion dollar company,<sup>106</sup> was a free-spending opponent, and the litigation was intense and extremely contentious. Dial hired Seyfarth Shaw, an employer-side employment litigation firm with a national reputation for aggressive defense tactics. Among other defenses, Dial attacked the sufficiency of the notice it received during the administrative process, the Commission's jurisdiction over the broad pattern-or-practice case, and the conciliation process.<sup>107</sup> It attacked, as well, the very idea of systemic litigation in a sexual harassment case, and the merits of the EEOC's case.

Judge Warren Urbom, a Nixon appointee to the District of Nebraska sitting by designation in the Northern District of Chicago, rejected these arguments in a thorough opinion in 2001. The EEOC's evidence suggested "that the work environment at [Dial] was sexually charged in a way that was offensive and demeaning to women." It detailed extensive sexual behavior targeting dozens of women, including male employees touching women's breasts and buttocks, exposing themselves to their female co-workers or touching their genitals while

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<sup>103</sup> This case study is based on review of the district court case docket, the Complaint, six district court opinions, the Consent Decree, several press releases, and three monitors' reports, and as well as on Schlanger's interviews of monitors Reginald Jones and Nancy Kreiter and EEOC lawyers Noelle Brennan, Jean Powers Kamp, and John Hendrickson. For the documents, see *supra* note 100; notes from the interviews are on file with the authors.

<sup>104</sup> Telephone Interview with Noelle Brennan, former EEOC attorney (Oct. 30, 2009) [hereinafter Brennan interview].

<sup>105</sup> Complaint at 2, EEOC v. Dial (N.D. Ill. 2001) (No. 1:99-cv-03356, May 20, 1999).

<sup>106</sup> See Press Release, EEOC, Judge in Dial Sexual Harassment Case Denies Soap Maker's 'Eve of Trial' Bid on Punitive Damages Issue, (Apr. 24, 2003), available at <http://www.eeoc.gov/press/4-24-03-b.html>, and at <http://www.clearinghouse.net/chDocs/public/EE-IL-0075-0008.pdf>. Dial was acquired by the German conglomerate Henkel Corporation in 2004 for \$2.85 billion. See Henkel Annual Report 2004, at 60, available at [http://www.henkel.com/com/content\\_data/2005.02.22\\_FY\\_2004\\_annualreport\\_en.pdf](http://www.henkel.com/com/content_data/2005.02.22_FY_2004_annualreport_en.pdf).

<sup>107</sup> See Docket, EEOC v. Dial (N.D. Ill. 2011) (No. 1:99-cv-03356, filed May 20, 1999), available at <http://www.clearinghouse.net/chDocs/public/EE-IL-0075-9000.pdf>.

making suggestive or threatening remarks, as well as open displays of sexually explicit materials.<sup>108</sup>

For two years, the case proceeded towards jury trial, which was eventually scheduled for April 28, 2003.<sup>109</sup> In the months prior to trial, Judge Urbom rejected a number of Dial's attempts to limit the introduction of various types of evidence against it and also held that if the jury hearing the liability case decided in favor of liability, that same jury could then assess punitive damages as well. The EEOC's attorneys explain that this was a crucial pro-plaintiff ruling, allowing the EEOC to present its case in the way most likely to convince the jury to make a large punitive damages award. Regional attorney John Hendrickson, the lead EEOC lawyer on the case (and described by one of the case's monitors as "probably the most successful EEOC lawyer in the country"<sup>110</sup>) gives much of the credit for the subsequent settlement to that ruling; it provided, he says, "powerful leverage,"<sup>111</sup> because it allowed the EEOC to "structure the case for trial in a way that was, we thought, equitable but very favorable."<sup>112</sup> The most crucial incentive to settle, however, was the prospect of the impending trial. Hendrickson recalls that at a technology run-through in the courtroom on the Friday before the Monday trial was scheduled to start, it was clear to the defendants—both the corporate people and the lawyers—that the EEOC was more than ready for trial. Even more important, he believes, was that the trial would likely have been a public relations disaster for Dial. Dial's status as a familiar household brand ("Aren't you glad you use Dial? Don't you wish everybody did?"), joined with the dramatic accusations of sexual misconduct on the plant floor, made the case very interesting to the press. The result was, he says, "the folks in the main corporate office wanted this case done; they didn't want to read about it" in the newspapers. And so, Hendrickson explains, they instructed their lawyers to "settle this god-damned case."<sup>113</sup>

But with the trial scheduled to begin in just a couple of days, there was not much time to negotiate. Judge Urbom was clear; he was holding a trial unless the parties gave him a signed settlement by Monday morning. The negotiators needed a template, a "go-by." They chose the decree from a prior high-profile EEOC case, against Mitsubishi, which had been negotiated in 1998 by essentially the same team of EEOC lawyers. The *Mitsubishi* case had settled for \$34 million.<sup>114</sup> In the *Dial* settlement, Dial agreed to pay \$10 million into a class fund to be disbursed to eligible class members, women who had experienced harassment at Dial's Illinois facility between 1988 and 2003. The amount was at the time the second highest sexual

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<sup>108</sup> *Id.* at 950.

<sup>109</sup> In the meantime the EEOC filed another, unrelated case against the Dial Corporation, involving allegations of discriminatory physical tests for factory jobs in a mean processing plant in Iowa. This matter went to trial in 2004, and Dial was assessed over \$3 million in back-pay, a judgment affirmed by the 7th Circuit in 2007. See <http://www.clearinghouse.net/detail.php?id=9306>. See *EEOC v. Dial Corp.*, No. 3:02-CV-10109, 2005 WL 2839977 (S.D. Iowa Sept. 29, 2005) *aff'd in part and remanded*, 469 F.3d 735 (8th Cir. 2006)

<sup>110</sup> Telephone Interview with George F. Galland, Dial Monitor (Oct. 28, 2009).

<sup>111</sup> Telephone Interview with John Hendrickson, EEOC Regional Attorney (Oct. 16, 2009).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *EEOC v. Mitsubishi Motor Mfg. of Am., Inc.*, 990 F.Supp. 1059 (C.D. Ill. 1998) (No. 1:96-cv-01192-JBM, filed Apr. 9, 1996); for documents and information, see <http://www.clearinghouse.net/detail.php?id=9787>.

harassment settlement in the Commission's history,<sup>115</sup> and the fourth highest award in any type of case in the time here studied. The EEOC and an appointed Special Master were assigned to allocate the funds among the various claimants, with no claimant to receive more than \$300,000. About 90 claimants received an average of \$110,000 each. The settlement also contained a great many injunctive provisions, some very ordinary but others quite unusual in EEOC litigation.

To begin with the ordinary: the *Dial* decree had a typical "thou shalt not" section, prohibiting sexual harassment and retaliation:

Dial and its officers, agents, management (including supervisory employees) . . . are enjoined, from: (i) discriminating against women on the basis of sex; (ii) engaging in or being a party to any action, policy or practice that is intended to or is known to them to have the effect of sexually harassing or intimidating any female employee on the basis of her gender; and/or (iii) creating, facilitating or tolerating the existence of a work environment that is sexually hostile to female employees.

Dial and its officers, agents, management (including supervisory employees) . . . are enjoined, from: engaging in, implementing or tolerating any action, policy or practice with the purpose of retaliating against any current or former employee of Dial because he or she opposed any practice of sexual harassment made unlawful under Title VII . . .<sup>116</sup>

These sorts of clauses are all-but-universal in the EEOC's decrees, systemic and non-systemic alike. As is obvious, they do not add anything substantive to the obligations imposed by Title VII and the other anti-discrimination statutes. Rather, their function is to abbreviate the remedial process in the event of a violation, rendering the employer subject to immediate court intervention without a new charging party, statutory conciliation process, and new district court complaint.

In another provision typical in EEOC systemic cases, Dial agreed to various revisions of its "No Harassment Policy" and its complaint procedure. For example, Dial agreed to revise its policies to "enable complaining parties to be interviewed by Dial about their complaints in such a manner that permits the complaining party, at such party's election, to provide information in a confidential manner."<sup>117</sup> As in nearly all the EEOC's decrees, Dial also agreed to train line staff and supervisors in their obligation to avoid sexual harassment, and anyone with responsibility for complaints in how to respond to complaints.<sup>118</sup> And Dial agreed to post notices throughout its

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<sup>115</sup> In 1998, the Commission reached a \$34 million settlement against Mitsubishi, and a \$9.85 million settlement against the pharmaceutical company Astra. *See* EEOC v. Astra USA, Inc., 1999 WL 342043 (D. Mass 1999) (No. 4:98-cv-40014-NMG, filed Jan. 5, 1998); for documents and information, see <http://www.clearinghouse.net/detail.php?id=8308>; Mitsubishi Motor Mfg. of Am., Inc., *supra* note 114.

<sup>116</sup> Consent Decree at 4-5, EEOC v. Dial (N.D. Ill. 2001) (No. 1:99-cv-03356, May 9, 2003).

<sup>117</sup> *Id.* at 11.

<sup>118</sup> *Id.* at 12.

plant explaining the decree and the anti-harassment policy<sup>119</sup>—yet another all-but-universal provision of the EEOC’s decrees.

The *Dial* decree looked much less typical in other ways, however. First, Dial agreed to incorporate EEO principles into its employee performance management; the decree included a number of “policies designed to promote supervisor accountability,” promising to discipline any supervisor who engaged in or tolerated sexual harassment,<sup>120</sup> and to “link” “evaluation of [each] supervisor’s handling of equal employment opportunity issues . . . directly to supervisor salary/bonus structure.”<sup>121</sup> In addition, the Decree gave specified outsiders extensive workplace authority and access; Dial agreed to give monitoring authority to three “consent decree monitors”—one picked by Dial, one by the EEOC, and the Chair by both parties.

The EEOC’s Hendrickson explains that the ideal monitor combines “fundamental dedication to equity and civil rights in the workplace” with “steel in their spine” and a pro-business attitude.<sup>122</sup> “To be effective,” he says, a monitor “needs to see that business can do *better* without discriminating, and to want to show the business how,” and “needs to have a tough side but also to be diplomatic.”<sup>123</sup> The parties picked three monitors with substantial backgrounds in employment anti-discrimination. Nancy Kreiter, chosen by the EEOC, had previously been a monitor in the *Mitsubishi* case and the research director of the nonprofit organization Women Employed. Reginald Jones was Dial’s pick; just finished with his service as one of President Clinton’s Republican appointees to the EEOC itself, he had before that been a partner at Seyfarth Shaw, Dial’s law firm. The EEOC and Dial together picked George Galland as the monitors’ chair; Galland, like Kreiter, had played the same role in the *Mitsubishi* case.

The three decree monitors were assigned to evaluate and recommend changes to “all existing employment policies, procedures and practices” relating to the subject matter of the case. Dial agreed in advance to implement all recommended changes, unless the Court permitted otherwise after hearing Dial’s objections. The monitors also had reporting obligations; they were to assess Dial’s compliance with the decree and the effectiveness of its policies in achieving non-harassment. The Chair of the decree monitoring panel was also given investigation and appeal authority over harassment complaints.<sup>124</sup>

Appointing outside monitors is a fairly standard remedy in much civil rights injunctive litigation, but relatively uncommon in EEOC cases. Although outsiders were brought in as consultants in about 12% of the EEOC’s systemic cases in our sample, in less than 4%—just 9 cases over the entire decade—were they named as “monitors” and given concomitant stature. Perhaps the outsider received greater access in the *Dial* case because of the scope of the

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<sup>119</sup> Consent Decree, EEOC v. Dial, *supra* note 116, at 11.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 12.

<sup>122</sup> Hendrickson interview, *supra* note 111.

<sup>123</sup> *Id.*

<sup>124</sup> Consent Decree at 15, EEOC v. Dial, *supra* note 116.

violations, or because the EEOC's own relationship with Dial was insufficiently cordial<sup>125</sup> to make monitoring by the EEOC palatable or productive. Or perhaps the EEOC thought that it needed more thoroughgoing change and that an HR person who answered to Dial managers would lack the independence or authority to implement it. EEOC Regional Attorney John Hendrickson explains that the EEOC seeks imposition of a monitor or monitors only where "the situation is pretty egregious."<sup>126</sup> And the EEOC's lawyers we interviewed agreed that when a settlement seems to need a great deal of followup, they try to get a monitor or consultant appointed rather than seeking themselves to get inside and change the corporate culture. Lawyers, they say, typically move on to the next case; corporate culture change is what monitors are for. In this case, the monitors were quite active. They surveyed and interviewed dozens, even hundreds of employees, developed policy, reviewed online training, and generally supervised anti-harassment activities for a period of two-and-a-half years.

The settlement terms just described might appear to support a collaborationist account. But that's not the approach the parties describe. Monitor Nancy Kreiter says, for example, that where some firms facing monitorships "want to take advantage of the consent decree, and become a model," Dial was more interested in a more limited version of compliance.<sup>127</sup> The reason, it seems, was the continuation of the conflictual mindset after the settlement. Dial's lawyers and officers did not agree to our interview requests, but the EEOC's lawyers believe that the settlement was forced on Dial's lawyers by its business people for business reasons. It was the impending public relations fiasco, not a sudden conviction that Dial had done anything wrong, that drove the settlement—and defense counsel's unhappiness was palpable to the participants even at the press conference announcing the purportedly amicable resolution. Over the next several years, lawyers continued to run the compliance process (Dial apparently had a very small and quite uninvolved HR department), and continued to believe that their company had been unfairly accused. The litigation mindset was marked enough that Dial's own chosen monitor, Reginald Jones, hinted several years later at the problems caused. Jones wrote an article entitled "Ten Tips for Class Action Consent Decree Settlement Survival,"<sup>128</sup> and listed as Item 1:

Settle if you want to or litigate if you must. Don't try to do both in the consent decree. . . . Parties . . . first need to let go of the allegations, facts and issues that prompted the litigation in the first place. . . . If any party insists on continuing to try to vindicate their litigation posture they will subvert the healing and normalization that the settlement contemplates.

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<sup>125</sup> In addition to the case profiled here and the 2002 Iowa case mentioned above, the EEOC litigated a third major case against Dial, dealing with sexual harassment, in the early 1990s. *EEOC v. Dial Corp.*, No. 4:95-cv-01726 (E.D. Mo. Sept. 13, 1995) [CK]. This kind of litigation history against the same employer by the Commission is quite uncommon, even for a company as large as Dial—after all, the EEOC brings only a few hundred cases each year, nationwide.

<sup>126</sup> By contrast, he describes "serious money" as "the lingua franca of business" and therefore more universally sought. Hendrickson interview, *supra* note 111.

<sup>127</sup> Telephone Interview with Nancy Kreiter, Dial Monitor (Nov. 18, 2009).

<sup>128</sup> Reginald E. Jones, *Ten Tips for Class Action Consent Decree Settlement Survival*, THE PRACTICAL LITIGATOR, Sept. 2006, available at <http://www.bna.com/bnabooks/ababna/annual/2005/022.pdf>.

Even so, the required monitoring reports suggest that the environment at the Dial plant improved substantially over the life of the decree; surveyed employees reported that the sexual harassment they had seen in the past was no longer tolerated or present.<sup>129</sup>

It is worth noting, too, that while there was ongoing conflict, no post-decree disputes developed into litigated enforcement of any type; the docket is devoid of post-decree interventions.<sup>130</sup> As one of the monitors describes it, “There was resistance, at various points, to things we suggested, but not resistance that ever stopped anything from happening that we thought should happen.” Management “moaned and groaned and hollered and screamed behind the scenes,” but never actually got to the point of contesting anything the monitors did.<sup>131</sup>

This case was an outlier in several ways. Its use of a monitoring team—shared with just 4% of the systemic docket—has already been noted. It also had more motions than usual—23, which puts it at the 98th percentile in the sample. And it took longer than usual to come to closure—nearly 4 years (97th percentile). Its decree is relatively long—19 pages (76th percentile). But even as an outlier, while the case clearly generated considerable heat, the conflict was, *contra* the gladiator theory, insufficient to drive anyone back into court after the settlement.

### **B. McKesson Water Products<sup>132</sup>: Collaborationist?**

In 1998 Steven Crutchfield and eight other African-American employees filed charges with the EEOC accusing their employer of race discrimination in pay and work assignments. The charging parties worked for Sparkletts, a water delivery company owned by McKesson Water Products, a billion dollar processor, marketer, and distributor of bottled water. The complainants alleged that African-American drivers were assigned routes in low-income neighborhoods, which were often less profitable than routes in more affluent areas, and then paid them on the basis of their routes’ profitability. Crutchfield’s cousin’s husband was Antonio Lawson, an experienced class action employment lawyer in private practice, and Lawson represented the complaining employees from the start. He was able to devote substantial resources to it because of a grant he received from the Impact Fund,<sup>133</sup> an organization that provides support to small firms litigating big civil rights cases.<sup>134</sup> As Lawson described the allegations later, “Black drivers understood that they would work the so-called ‘ghetto routes’ while Beverly Hills would be handled by white drivers.”<sup>135</sup> The EEOC’s investigation supported

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<sup>129</sup> See, e.g., Second Year Report of the Consent Decree Monitors, EEOC v. Dial (N.D. Ill. 2011) (No. 1:99-cv-03356, May 24, 2005); Final Report of the Consent Decree Monitors to the Parties and the Court, EEOC v. Dial (N.D. Ill. 2011) (No. 1:99-cv-03356, Oct. 26, 2005).

<sup>130</sup> See *supra* note 107.

<sup>131</sup> Interview, Reginald Jones, Dial Monitor (Nov. 11, 2009).

<sup>132</sup> This case study is based on court papers and interviews with EEOC lawyers Anna Park and Dana Johnson, Consultant Heidi Olguin, and class counsel Antonio Lawson, Kendra Tanacea, and Jocelyn Larkin. We were unable to obtain interviews of lawyers or management for the defendant.

<sup>133</sup> Telephone Interview with Attorney Antonio Lawson (Nov. 4, 2009).

<sup>134</sup> See [http://www.impactfund.org/index.php?cat\\_id=4](http://www.impactfund.org/index.php?cat_id=4).

<sup>135</sup> Court Approves \$1.2 Million Settlement Between EEOC and McKesson for Race Discrimination, March 6, 2002, available at <http://www.eeoc.gov/press/3-6-02.html> and at <http://www.clearinghouse.net/chDocs/public/EE-CA-0138-0003.pdf>.

the charging parties' claims. At that point, the Commission and the parties entered into settlement negotiations. At first those negotiations went nowhere—Lawson describes McKesson as “adamant that they weren’t going to settle.”<sup>136</sup> McKesson brought in outside counsel and began a competing analysis of the racial impact of Sparkletts route assignments. But then McKesson sold Sparkletts to Danone, the much larger French company best known in the U.S. for its Dannon yogurt.<sup>137</sup> Danone’s French management had a completely different view about the matter; Danone didn’t want the U.S. government as an opponent, and also felt much less loyalty to local management. Indeed, French management got very much involved, even flying over to negotiate settlement terms. In addition, Danone’s American general counsel, who was African American, was very interested in cleaning shop in its new acquisition.<sup>138</sup>

On November 5, 2001, the parties filed, simultaneously, the EEOC’s complaint, a private intervenors’ complaint, class certification papers, and a proposed consent decree. Judge Florence-Marie Cooper, a district judge appointed by President Clinton to the Central District of California, in Los Angeles, held a preliminary hearing on class certification later that month, and a fairness hearing in February 2002, at which she approved the settlement. Under the agreement, 85 current and former employees, and their lawyers, received \$1.7 million from Danone. Danone also agreed to injunctive relief and monitoring of that relief’s implementation.

As one would expect in an EEOC case, the decree prohibited discrimination, mandated development of an anti-discrimination policy, and required EEO training for employees. It also included substantial document retention and reporting requirements, to enable the plaintiffs’ counsel and the EEOC to monitor compliance and progress. Like the *Dial* decree, the *McKesson* decree had several provisions for bringing in outsiders—here, an “EEO consultant”—to assist and sometimes to decide various issues.

But even more than the *Dial* decree just described, and unlike the *PJAX* decree described next, the *McKesson* decree departed considerably from most of the EEOC’s decrees, in a variety of ways. First, the role of plaintiffs’ counsel was much more pronounced; responsibility for policy development was shared in the first instance not only by the EEO consultant and the defendant, but also by private class counsel and the EEOC. Second, the decree intervened much more deeply than the typical case in the basic employment terms for the drivers. Pay went from commission to an hourly wage,<sup>139</sup> and—guided, class counsel Tony Lawson says, by workers’ preferences—route assignments went from discretionary to seniority-based.<sup>140</sup> This involvement of the workers in deciding the foundational issue of how pay and route assignments would be structured is the closest thing we found in all our research to a collaborationist dynamic.

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<sup>136</sup> Lawson interview, *supra* note 133.

<sup>137</sup> Indraneel Sur, *McKesson to Sell Sparkletts Unit to French Food Firm*, L.A. TIMES (Jan. 12, 2000).

<sup>138</sup> Lawson interview, *supra* note 133; Telephone Interview with Impact Fund attorney Jocelyn Larkin (Oct. 19, 2009).

<sup>139</sup> Lawson interview, *supra* note 133; Amended Consent Decree at 15, *EEOC v. McKesson Water Products*, No. 2:01-cv-09496-FMC-PJW (C.D. Cal., May 10, 2002), available at [http://chadmin.clearinghouse.net/chDocs/not\\_public/EE-CA-0138-0002.pdf](http://chadmin.clearinghouse.net/chDocs/not_public/EE-CA-0138-0002.pdf).

<sup>140</sup> Lawson interview, *supra* note 133; Larkin interview, *supra* note 138; Amended Consent Decree, *supra* note 139, at 15.

Even so, the decree was also notably managerialist—implementing management practices widely accepted quite apart from any civil rights impact. Indeed, a third unusual feature of the decree was its very high level of detail aimed at bureaucratizing and standardizing the hiring, assignment, and promotion processes. For example, the Decree provides:

[The defendant] shall conspicuously post all openings in Class Positions as well as any open positions for Managers using an Open Position Notice. An opening is defined as any position, including route assignments and special assignment in the Los Angeles Metro Region other than a temporary vacancy of less than thirty days. For each opening, the Open Position Notice shall list the minimum qualifications for the position, the expected starting date, the procedure for submitting a bid, the deadline for submitting a bid, and the location/availability of the Job Description for the position, and the salary and, if bonus and commissions are part of the compensation for the position, average earnings potential for the route or position. The Open Position Notice shall be posted for a minimum of ten (10) business days in all facilities within the Los Angeles Metro Region, in a location that is readily accessible to all employees. The Successor shall also post all job openings covered by this Decree on an online system accessible to all employees.<sup>141</sup>

The decree sets out similarly detailed provisions governing job bidding, route-assignment criteria, and route compensation.

Asked how the decree got so detailed, the participants report several causes. Private plaintiffs' counsel emphasize their overall approach. They had a good deal of experience negotiating non-EEOC consent decrees, and tended, they themselves say, to take what some might consider an “overinclusive” approach to decree terms. And because they had negotiated many prior decrees, including in some large cases<sup>142</sup> they had many models to choose from. In addition, both the plaintiffs' lawyers and EEOC's counsel reports that the impetus towards detail came equally from defendants' in-house lawyers, who wanted specificity so they could ensure their company's compliance.<sup>143</sup> Perhaps because of the recent corporate acquisition of Sparkletts, in-house counsel “just didn't have faith in the local managers, and wanted to take away as much as possible their ability to get out from underneath” the decree.<sup>144</sup>

A fourth important difference between the *McKesson* decree and most EEOC decrees is its five-year term—exceptionally long for an EEOC settlement. (For more on decree length, see Table 5, row 3). Additionally, the settlement did not entirely quantify attorneys' fees. The decree awarded plaintiffs' private counsel \$412,000 for their prior work, but Danone agreed to

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<sup>141</sup> Amended Consent Decree, *supra* note 139, at 14.

<sup>142</sup> Tony Lawson had worked for a number of years with long-time civil rights plaintiffs' counsel Guy Saperstein, and he and his colleague Kendra Tanacea were able to review many large-scale decrees, picking provisions to use as models. Lawson Interview, *supra* note 133; Telephone Interview with Attorney Kendra Tanacea (Nov. 5, 2009).

<sup>143</sup> Telephone Interview with Dana Johnson, EEOC attorney (Nov. 2009).

<sup>144</sup> Larkin interview, *supra* note 138.

pay unspecified future fees for securing approval of the decree and implementing it over that five-year term.

Finally, the resulting implementation process was unusually comprehensive. Heidi-Jane Olguin, president of a civil rights consulting company called Progressive Management Resources (and married to a federal district judge who had previously been a civil rights lawyer<sup>145</sup>), was hired as a consultant; she and her partner worked extremely closely with both class counsel and management. The consultants provided training and were responsible for meeting the reporting requirements. It was even their phone number that was posted for reporting any subsequent complaints by employees.<sup>146</sup> They coordinated and led the drafting of new policy, at meetings involving Danone management and class counsel (but not the EEOC).<sup>147</sup> And class counsel, their time paid for by Danone under the decree, worked many many hours. One of the lawyers, Kendra Tanacea, remembers the effort in detail: “Our aim was to go into the company; we’d have 6:30 am meetings and explain the consent decree. . . . We went to every drivers’ room. Oxnard, Covina—Lancaster was the furthest out, a couple in downtown L.A. Maybe 12 branches. And we did it several times over the years. And then they would have a couple of Saturday half-day trainings on new policies and discrimination and ‘train the trainer’ exercises. We were part of all that.”<sup>148</sup>

As in the *Dial* litigation, where interview subjects emphasized that cases that required monitoring required outsiders, our interview subjects agree that the EEOC simply does not do this kind of monitoring. Class counsel Tony Lawson counted this as a failing: the EEOC has “all these lawyers all over the country,” he said. “They should hire some to monitor decrees. . . . Too often they just sign off and there’s an agreement to make changes, but they don’t follow up.”<sup>149</sup> The EEOC’s own lawyers confirmed that time-consuming monitoring is not their priority, although they obviously offered a somewhat different spin, explaining why private lawyers might be more interested in a collaborative approach than the EEOC is. Anna Park explained that when the EEOC is doing the monitoring, its lawyers think of compliance as pretty cut and dried: “For us, you comply [or] you don’t comply. On the key terms, we’re not really willing to budge.” Private monitoring “might create a different dynamic,” she said, in part because those monitors are “paid by the company to monitor”; in those circumstances, the business model encourages getting along, and working things through. “There’s nothing wrong with collaboration,” she emphasized: “if the company says, well, what do you think is a better way to do it, and they listen to the answer, that’s fine.” But there’s always the danger that what collaboration actually means is undue flexibility: “it’s a strange dynamic, if the company is paying the lawyers. It’s a business.”<sup>150</sup>

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<sup>145</sup> On Ms. Olguin’s husband, District Judge Fernando Olguin, see <http://www.fjc.gov/servlet/nGetInfo?jid=3454>; <http://www.whitehouse.gov/the-press-office/2012/05/14/president-obama-nominates-two-serve-us-district-court>.

<sup>146</sup> Telephone Interview with Heidi-Jane Olguin, President, Progressive Management Resources (Nov. 5, 2009).

<sup>147</sup> Olguin interview, *supra* note 146; Tanacea interview, *supra* note 142. [confirm EEOC absence]

<sup>148</sup> Tanacea interview, *supra* note 142.

<sup>149</sup> Lawson interview, *supra* note 133.

<sup>150</sup> Telephone Interview with Anna Park, EEOC Regional Attorney (Nov. 20, 2009).

There is clearly money to be made in monitoring systemic decrees, both for plaintiffs' lawyers and monitors or consultants. But Lawson emphasizes that only a very few firms are willing to put in the work, which is far from glamorous, attracts no headlines, and receives only hourly compensation with no possibility of a large payoff: "Very few private lawyers write into settlements the degree of monitoring that we did in *McKesson*. For the first year after the decree, we *lived* in L.A.; we were there every week. [Danone] knew we'd be there, staying involved. That meant they sent enough people to the meetings and kept things moving. That was how you assure that there's more than changes in HR policy. Private lawyers often don't do that. . . . It's rare to have firms stay involved and do monitoring."

So if *McKesson* is a collaborative case, the features that put it in that category seem, interestingly, to stem from the involvement of a class counsel with unusually pronounced public interest orientation and experience, and an unusually high level of interest in implementation, whether because of its results or the regular compensation that accompanied the requisite hours upon hours of effort. And it seems likely that the other unusual features of the case—the high level of detail and the concern for class counsel's compensation—all stem from the same causes.

### C. *PJAX*<sup>151</sup>: Managerialism

Our third case, *PJAX*, is more typical of the EEOC's systemic litigation than either *Dial* or *McKesson*. In 1999 and 2000 a number of employees filed discrimination charges with the EEOC against *PJAX*, a large Pennsylvania-based shipping company. The first complaint alleged gender-based harassment and disparagement; women told the EEOC stories of being screamed at by managers and owners using sexually derogatory terms, and of gender-specific requirements that they perform personal chores for the owners such as picking up laundry and having the owners' personal cars cleaned. One complainant said she was asked by a *PJAX* manager to perform sexual favors for his bookie, in order to reduce his gambling debt. In addition, other employees alleged that *PJAX* refused to hire older applicants, women, and people with disabilities for positions as drivers or dockworkers, and that it retaliated against those who protested against discrimination.

The charges were filed in two EEOC offices, in Pittsburgh and in Baltimore. The resulting investigations were apparently only loosely coordinated,<sup>152</sup> but it seems the unsuccessful conciliation negotiations occurred jointly. *PJAX*'s counsel complains that the EEOC did not try in good faith to conciliate the case<sup>153</sup>; the EEOC's Maryland lawyer reports of *PJAX* that "they didn't seem to take conciliation very seriously."<sup>154</sup> In May 2003, the EEOC simultaneously brought two suits in two different U.S. district courts; a case in the Western

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<sup>151</sup> This case study is based on review of two cases, both captioned EEOC v. *PJAX*, one in the Western District of Pennsylvania, the other in the District of Maryland. The available documents in each include the district court case docket, the Complaint, the EEOC's filed Complaint, and the Consent Decree. In addition, Schlanger conducted telephone interviews of *PJAX*'s lawyer, Scott Hardy, and EEOC lawyers Jean Clickner, and Debra Lawrence. Notes from the interviews are on file with the authors.

<sup>152</sup> Telephone Interview with M. Jean Clickner, EEOC attorney (Oct. 20, 2009); Telephone Interview with Debra M. Lawrence, EEOC attorney (November 4, 2009).

<sup>153</sup> Telephone Interview with W. Scott Hardy, partner, Cohen & Grisby (Oct. 30, 2009).

<sup>154</sup> Lawrence interview, *supra* note 152.

District of Pennsylvania focused on the sexual harassment charges while one in the District of Maryland alleged discriminatory failures to hire.

Like the investigation, the litigation process proceeded without much coordination between the two suits on the EEOC's part, although the two cases were inextricably linked in the minds of the defendants. PJAX's lawyer, Scott Hardy, felt that the sexual harassment case, in Pittsburgh, "interjected a lot more emotion." It was the sexual harassment case that interested the press, which (following the EEOC's standard procedure) was notified by press release when the litigation commenced. PJAX at the time described the sexual harassment allegations as "unfounded and salacious."<sup>155</sup> Even six years later, in an interview, Hardy continued to describe the sexual harassment case as "vicious."<sup>156</sup> Far from encouraging settlement, in his view those accusations "caused people to be entrenched and to want to defend themselves even more, and held up the resolution of the Baltimore [hiring] case." The EEOC's lawyers, of course, saw things differently. Jean Clickner, the EEOC's lawyer in the Pittsburgh case, describes the sexual harassment that was the subject of that case as "over the top outrageous" and "really just endemic."<sup>157</sup> And the EEOC's lawyers thought the resulting litigation provided pressure that was useful in resolving both cases. Debra Lawrence, who worked on the Baltimore case, explained, "I guess information sharing and coordinating our efforts makes us stronger; they throw a right punch out of Pittsburgh and we throw a left punch here."<sup>158</sup>

Notwithstanding the heat engendered by the case, there was no gladiator-style litigation. The cases were settled, together, by the defendants and the EEOC's general counsel's office about six months after they were filed, without significant litigation. (The length of litigation puts PJAX at the 15 percentile on this measure; see Table 5.) Under the sexual harassment consent decree, PJAX agreed to pay \$500,000; \$300,000 in compensatory damages to the charging party and another \$200,000 to be shared by four other claimants. In addition, the court order enjoined PJAX from subjecting female employees to an unlawful hostile work environment and required the company to revise its anti-discrimination policy to include a grievance process, confidential investigation procedures, and anti-retaliation provisions, and to provide anti-harassment equal employment training by an outside source to its employees.

The failure-to-hire decree involved more money and more injunctive relief. Under it, PJAX paid \$2 million: \$200,500 to one of the charging parties, a manager who complained he'd been fired in retaliation for protesting against discriminatory hiring practices; \$25,000 to a charging party who complained she was refused employment because of her sex and age; and a total of \$1.775 million to about 100 unnamed employees—qualified females who applied for driver and/or dockworker positions over the three prior years but were rejected because of their sex; and qualified applicants for driver and dockworker positions in the same period who were rejected because of their disabilities. In addition, PJAX agreed to give all class members priority hiring consideration.

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<sup>155</sup> Lou Ransom, *U.S. Files Sex-Harassment Lawsuits Against Trucking Company*, PITTSBURGH TRIB. REV., May 28, 2003.

<sup>156</sup> Hardy interview, *supra* note 154.

<sup>157</sup> Clickner interview, *supra* note 152.

<sup>158</sup> Lawrence interview, *supra* note 152.

The more general injunctive provisions of the decree were imposed for two years (just below the median, in the systemic docket), and required PJAX to reform its HR practices. First were the standard “thou shalt not” clauses:

PJAX, its officers, agents, servants, employees and all persons acting or claiming to act in its behalf and interest hereby agree to comply with the provisions of Title VII and the ADEA and agree in this Decree to be enjoined, and are enjoined, from refusing to hire female applicants for employment because of their sex and/or age and from utilizing disparate qualifications for male and female applicants.<sup>159</sup>

In addition, as per usual, the PJAX decree required antidiscrimination training for all employees who dealt with hiring, and the posting of antidiscrimination policies at all its facilities and terminals nationwide.

The decree also required moderately detailed quarterly reporting to the EEOC on hiring activity. This too is extremely prevalent in EEOC decrees. The idea is presumably to (a) allow the EEOC to monitor whether the defendant is actually reforming, and (b) induce such reform by the *in terrorem* effect of the defendant’s awareness that it is being closely watched. For whatever reason, there was no post-decretal activity on either cases’ docket sheet. As discussed above, however, it would be difficult for the EEOC’s lawyers to devote enough time to this kind of followup to make it a strong tool. About 18% of the EEOC’s systemic cases are like *Dial* and *McKesson*, designating an outsider to serve as consultant or monitor. But in another 12% of its decrees, the EEOC seeks to deputize someone within a defendant organization who is likely to have both expertise and a commitment to the value the EEOC is trying to protect. Such deputation was a very important part of the PJAX case, both sides agree. Rather than itself engage in a collaboration with PJAX, and rather than designating a consultant, monitor, or workers to do so, the EEOC obtained agreement, by decree, that PJAX would create a “Human Resources Specialist” position and fill that role with someone who had “a professional background in the field of human resources.” As a mild check on its choice, PJAX was required to report to the EEOC the designated employee’s name and experience. It was then the HR specialist’s task to ensure compliance with equal opportunity laws at all facilities and terminals nationwide, to “promot[e] employment opportunities for females in the traditionally male jobs of driver and dockworker,” and to investigate complaints.<sup>160</sup>

More particularly, the HR specialist was to be assigned a variety of tasks that would solidify and standardize recruitment and hiring process, including “development of defined, uniform, objective, job-related qualifications for the positions of driver and dockworker,” and “objective, defined, uniform, and published procedures for hiring.”<sup>161</sup> In addition, the HR specialist would “implement[] defined and consistent job application, record-keeping, and records retention procedures, including the development and retention of applicant flow data.”<sup>162</sup> These types of bureaucratization are prevalent remedies in the EEOC’s decrees; designed of

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<sup>159</sup> Consent Decree at 9, *EEOC v. PJAX*, 1:03-cv-01535-JFM (D. Md., Nov. 24, 2003), available at <http://www.clearinghouse.net/chDocs/public/EE-MD-0093-0002.pdf>.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 10.

<sup>162</sup> *Id.*

course, to minimize the opportunity for bias to operate and to facilitate both internal and external monitoring. About half of the Commission's decrees in systemic decrees relating to hiring or promotion include like provisions.

It should be apparent, then, that the PJAX decree fails to conform to either the gladiator or collaboration theories. It demonstrates neither long-term high stakes conflict nor much by way of ongoing and creative collaboration between either the EEOC or workers on the one hand and PJAX on the other. Instead, what seems to be going on is, even more than in the *McKesson* case, is managerialism—and here, the priority given to standard (often non-civil-rights-related) management techniques is coupled with designation of a particular manager, a human resources specialist, to carry out those techniques. The EEOC's role is as back-stop; compliance reporting enabled EEOC intervention, but entirely at the EEOC's discretion. No such intervention is evident in the record.

We move, next, to more systematic analysis of the EEOC's systemic docket.

#### IV. A Systematic Look at the Systemic Cases—Testing the Theories

The three case studies discussed above illustrate the variety of types of injunctive relief obtained by the EEOC during our study period. One could find some support for aspects of both the gladiator and collaboration theories in the *Dial* and *McKesson* cases, while *PJAX* seemed largely consonant with managerialist theories. But what does the EEOC's systemic docket as a whole reveal about the agency's injunctive practices? In this section we undertake systematic analysis of a large sample of the EEOC's systemic cases.

The first step in a systematic analysis is identifying which of the EEOC's cases are “systemic” cases. Unfortunately, during the period of our study—cases filed from October 1997 through September 2006—the EEOC did not itself clearly identify which of its cases it viewed as systemic.<sup>163</sup>

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<sup>163</sup> The EEOC's information management system did have a variable on “case type”—“I” for individual or “C” for class—that initially seemed promising. However, during the years of this study, the category C meant only that when a suit was filed, the EEOC's lawyer thought it likely to benefit *more than one* charging party. This is clearly not a variable that captures the concept of “systemic” litigation. (We did, however, include every case labeled C in our sample.)

In subsequent years, as the EEOC has tried to ramp up its systemic docket, its categorization methodology has shifted. In 2007, the EEOC operationalized the category of “systemic” using multiple “indicia”: among them were “Commissioner charges,” “suit filing with 20+ victims,” and “suit resolution with 20+ victims.” See U.S. EEOC, PERFORMANCE AND ACCOUNTABILITY HIGHLIGHTS, FY 2007, at 12, available at <http://www.eeoc.gov/eeoc/plan/archives/annualreports/par/2007/highlights.pdf>. Beginning in 2009 (under the new, Democratic administration), the EEOC began to report the number of systemic cases brought, evidencing firmer boundaries for categorization. See U.S. EEOC, FY 2009 PERFORMANCE AND ACCOUNTABILITY REPORT HIGHLIGHTS, available at [http://www.eeoc.gov/eeoc/plan/2009parhigh\\_discussion.cfm](http://www.eeoc.gov/eeoc/plan/2009parhigh_discussion.cfm) (reporting 19 new systemic cases filed). By 2011, the Commission was counting a case as systemic more simply, if it has at least 20 known or expected class members. See U.S. EEOC, FY 2011 PERFORMANCE AND ACCOUNTABILITY REPORT HIGHLIGHTS, available at [http://www.eeoc.gov/eeoc/plan/2011parhigh\\_discussion.cfm](http://www.eeoc.gov/eeoc/plan/2011parhigh_discussion.cfm) (The report describes 261 lawsuits filed that year: “These included 177 individual suits, 61 multiple-victim suits (with fewer than 20 victims) and 23 systemic suits.” And it uses the same categories for the 443 cases remaining on the active docket: “116 (26 percent)

In order to capture the cases most likely aimed at structural reform, we used seven criteria. The first two are legal theories that suggest a collective element—allegations of a pattern or practice of discrimination,<sup>164</sup> or a disparate impact claim.<sup>165</sup> The next two criteria focus on the number of individuals potentially affected by the suit. Using both the EEOC’s internal estimates of the number of benefitted persons and our count of the number of complainants listed in the case documents, we included any cases involving 20 or more individuals in either variable. The remaining three criteria focus on the breadth of the remedy obtained: we include as “systemic” any case in which case documents or the EEOC’s data indicate that 20 or more complainants received monetary relief, any case in which the EEOC obtained relief totaling \$1 million or more in real (2007) dollars, and any case with an affirmative action remedy. The first two show that broad relief for a workforce was likely obtained, while the presence of an affirmative action remedy again indicates a collective element to the suit. (In addition, we limited our sample to cases against private employers, excluding the EEOC’s age discrimination cases against governmental employers even if they would otherwise have fit our criteria.)

Using these criteria, we identified a set of 281 cases which we refer to as the EEOC’s “systemic cases.”<sup>166</sup> Table 1 lists the number of systemic cases in our sample by year, the percentage satisfying each of our inclusion criteria, and the estimated total number of systemic cases filed by the EEOC.<sup>167</sup> Our criteria cannot precisely identify those cases and only those

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involved multiple aggrieved parties (but fewer than 20) and 63 (14 percent) involved challenges to systemic discrimination.”).

<sup>164</sup> See 42 U.S.C. § 2000ee-6.

<sup>165</sup> Title VII doctrine distinguishes between disparate treatment and disparate impact theories of discrimination. In a disparate treatment case, the plaintiff alleges that she suffered adverse treatment on the job and that that treatment was motivated by her race, sex or other protected characteristic. Disparate impact cases, by contrast, do not assume that discriminatory treatment was intentional. Rather, under a disparate impact theory, the plaintiff can show that the employer has adopted a facially neutral employment practice—for example, requiring a certain score on a standardized test—but that practice has a disproportionate impact on members of a protected group and is not justified by business necessity. Disparate impact cases are necessarily class-based rather than individual claims and are therefore systemic in nature.

<sup>166</sup> These data are a subset of those collected in the EEOC Litigation Project. How we selected and coded data for that project is documented in Pauline T. Kim, Andrew D. Martin & Margo Schlanger, *EEOC LITIGATION DATABASE CODE BOOK* (2013) available at <http://eeoclitigation.wustl.edu/>. All of the data collected in the EEOC Litigation Project are also available for download at that site. In brief, we began with a list of every case brought by the EEOC between October 1997 and September 2006. From this list, we selected a stratified random sample of cases for coding, excluding non-merits cases such as suits enforcing administrative subpoenas or administrative conciliations. We also excluded a handful of cases that for a variety of reasons, such as unavailability of case documents or characteristics that did not fit our target population of EEOC suits against private defendants. In total, the Project coded information about 2316 of the EEOC’s cases filed over a 10-year period of time. Of those, 281 met one or more of our criteria for inclusion in the set of “systemic” cases analyzed here.

<sup>167</sup> The EEOC Litigation Project includes a stratified random sample of cases. Cases classified by the EEOC as intended to benefit more than one employee, all cases concluded by a court order, and all cases listing a trial date were included with probability 1. The remaining cases were randomly sampled with probability of .45 of being selected. See Kim et al, *EEOC Litigation Database Code Book*. Nearly all of the systemic cases—261 of 281—came into our study with a probability of 1 based on the criteria we used for inclusion. The 20 other systemic cases represent only 2.3% of the part of the sample randomly selected for inclusion (with probability .45). The estimated number of *non*-selected cases in our target population is 1109, and so an additional 26±10 (95% confidence interval)

cases targeting systemic discrimination; nevertheless, we believe the criteria sufficiently capture the cases we are interested in—those aimed at structural reform of a targeted workplace. To the extent that the EEOC pursued structural reform in its cases, we are most likely to see evidence of it in this subset of cases.

**Table 1: EEOC Systemic Cases Filed 1997-2006**

Filing year	EEOC cases filed	Systemic		Pattern or Practice	Disparate Impact	20+ class size			EEOC: \$1 million damages	Affirmative Action
		Sample	Est. population			EEOC benefitted parties	Complainants listed in court docs	Claimants awarded damages		
1997	298	19	22±2	37%	11%	53%	0%	26%	42%	5%
1998	373	18	21±2	28%	11%	56%	0%	33%	61%	11%
1999	437	23	27±3	48%	13%	17%	9%	4%	35%	9%
2000	288	32	36±3	47%	13%	41%	9%	13%	22%	13%
2001	382	34	37±2	38%	18%	38%	3%	21%	26%	6%
2002	327	31	35±3	42%	13%	32%	6%	16%	39%	6%
2003	363	39	43±3	56%	10%	36%	5%	18%	33%	8%
2004	375	32	37±4	63%	13%	31%	3%	0%	22%	3%
2005	380	28	34±5	61%	18%	21%	0%	7%	21%	7%
2006	373	25	30±4	64%	12%	16%	4%	4%	4%	4%
<b>Total</b>	<b>3596</b>	<b>281</b>	<b>307±10</b>	<b>49%</b>	<b>13%</b>	<b>33%</b>	<b>4%</b>	<b>14%</b>	<b>29%</b>	<b>7%</b>

What are these systemic cases about? Figure A reports the proportion alleging different types of discrimination. As it illustrates, the most frequent basis of suit is sex (including pregnancy) discrimination, asserted in over half the cases; about the same proportion of cases allege retaliation. Race, national origin, or color discrimination claims are included in over a third of the systemic docket. Age discrimination is less commonly alleged. And as might be expected, disability and religious discrimination—claims that are more often individual, rather than collective in nature—appear more rarely (and notably less frequently in the systemic docket than the non-systemic).<sup>168</sup>

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cases from the full list would have met our criteria for inclusion in the subset of systemic cases, if we had coded them all. Our sample of 281 thus represents the vast majority of the universe of systemic cases.

<sup>168</sup> In our non-systemic sample, 13.1% and 6% of the cases involve claims for disability or religious discrimination, respectively.

**Figure A: Basis of Suit: EEOC Systemic Cases Filed 1997-2006**

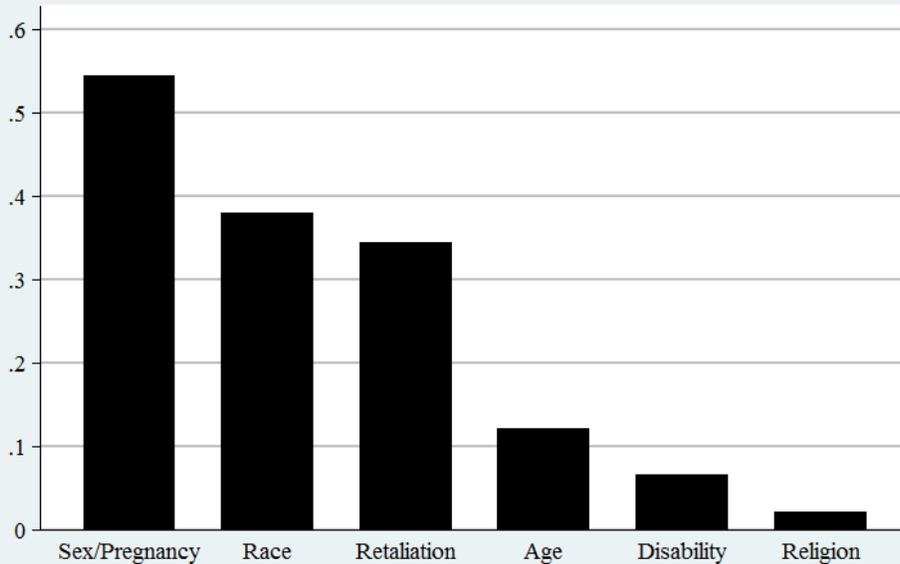
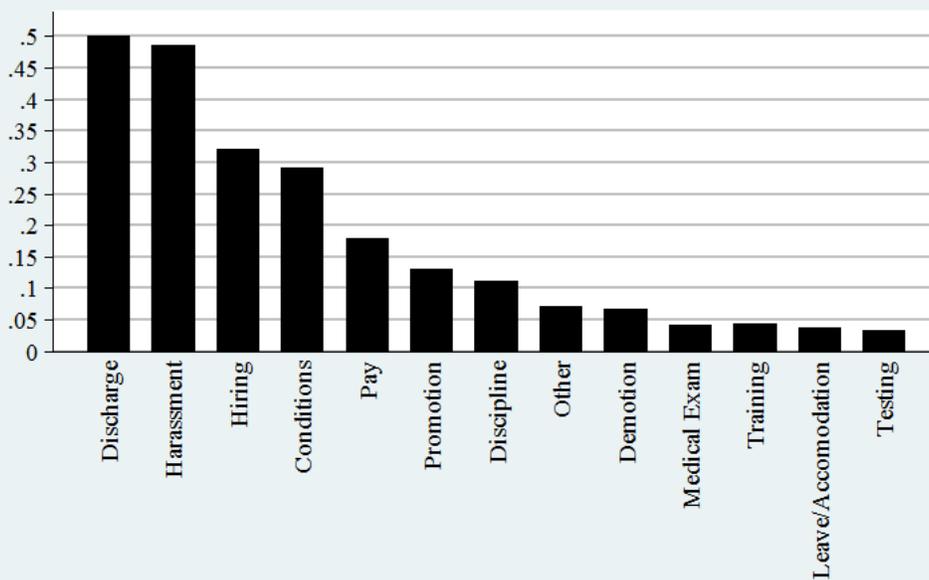


Figure B reports the proportion of systemic cases raising different types of employment issues. As it illustrates, the cases (as in the non-systemic docket) deal most often with harassment and discharge. Next most frequent, but far less common, are claims alleging failure to hire or discriminatory working conditions, pay or promotion.

**Figure B: Issues: EEOC Systemic Cases Filed 1997-2006**



With this brief summary as context, we turn now to a systematic analysis of these cases. By considering the frequency with which particular injunctive terms were obtained, we examine how various theories of structural reform measure up to the EEOC's actual practices.

### A. Low Intensity Litigation: Undermining the gladiator theory

As discussed above, the gladiator theory imagines structural reform litigation as high-stakes battle, involving hard-fought contests over liability, intense judicial involvement and a need for ongoing monitoring of compliance with remedial terms of a decree. Examining the EEOC's systemic cases, we see little evidence to support these expectations. Tables 2 and 3 profile the EEOC's systemic docket, by year, in terms of the number of persons compensated and the monetary awards obtained.

**Table 2: Persons Compensated,\*  
EEOC Systemic Cases Filed FY 1997- 2006**

<b>Filing year</b>	<b>N</b>	<b>Mean</b>	<b>Median</b>	<b>90 %ile</b>	<b>Max</b>	<b>Total</b>
1997	15	41	21	127	163	410
1998	12	47	56	96	96	233
1999	14	9	7	23	23	71
2000	26	34	5	56	330	475
2001	24	13	8	30	33	226
2002	26	24	9	52	224	440
2003	34	26	6	67	216	645
2004	31	7	4	17	18	115
2005	22	219	3	29	3413	3502
2006	16	18	2	138	138	163
<b>All years</b>	<b>220</b>	<b>45</b>	<b>7</b>	<b>56</b>	<b>3413</b>	<b>6280</b>

\* Among cases with any persons compensated

**Table 3: Monetary award,\* EEOC Systemic Cases Filed FY 1997- 2006.  
Real (2007) dollars, in thousands**

<b>Filing year</b>	<b>N</b>	<b>Mean</b>	<b>Median</b>	<b>90 %ile</b>	<b>Max</b>	<b>Total, by year</b>	<b>Average recovery/ person</b>
1997	12	\$1,425	\$870	\$3,235	\$7,631	\$21,370	\$52
1998	11	\$1,816	\$728	\$2,996	\$11,525	\$21,787	\$94
1999	12	\$1,959	\$280	\$7,960	\$11,266	\$27,420	\$386
2000	22	\$2,519	\$285	\$2,103	\$54,158	\$65,487	\$138
2001	24	\$3,855	\$622	\$6,112	\$59,260	\$92,515	\$409
2002	26	\$1,092	\$366	\$3,549	\$4,113	\$28,401	\$65
2003	33	\$815	\$425	\$2,254	\$2,800	\$27,699	\$43
2004	31	\$789	\$521	\$1,500	\$6,178	\$24,449	\$213
2005	22	\$4,463	\$219	\$10,845	\$50,153	\$98,186	\$28
2006	16	\$275	\$113	\$800	\$1,800	\$4,406	\$27
<b>All years</b>	<b>209</b>	<b>\$1,871</b>	<b>\$386</b>	<b>\$2,808</b>	<b>\$59,260</b>	<b>\$411,720</b>	<b>\$66</b>

\* Among cases with any damages awarded

Whether viewed in terms of the number of people benefitted or by the amount of money changing hands, the EEOC’s systemic cases are moderate in size. Total damages are not tiny, but neither are these bet-the-company cases. And while these cases are clearly about more than individual grievances, they do not generally appear to entail thorough-going reform of large-scale institutions—at least as measured by the number of employees benefitted.

Nor do the EEOC’s systemic cases appear to routinely involve hard-fought contests over liability. Rather, the vast majority of its systemic cases—88% of the resolved cases—ended by settlement.<sup>169</sup> A mere handful—8% of resolved cases—ended through some sort of litigated judgment.<sup>170</sup> More details about the types of case resolutions are in Table 4:

**Table 4: Type of Resolution, Systemic EEOC cases filed FY 1997 to 2006\***

	N	%
1. Settlement	229	87%
2. Withdrawal by EEOC	3	1%
3. Default judgment	9	3%
4. Litigated Judgment for Def’t	8	3%
5. Litigated Judgment for EEOC	13	5%
Total	262	

\* Among cases resolved by April 22, 2008, the date on which the data-gathering for this project ended. Nineteen of the 281 cases in the sample were ongoing as of that date.

Of course a case can be the site of very intensive litigation and nonetheless end by settlement. That is hardly ever the case in this docket, however. Most of the EEOC’s systemic cases show little evidence of any rigorous contestation of liability. One hundred and sixty-one, or 70.3% of the systemic cases that settled, were resolved without a single substantive motion being filed,<sup>171</sup> and forty-three, or 19% of settled cases, were resolved before the defendant even filed an answer. Discovery motions<sup>172</sup> were somewhat more common than substantive motions, as seen in Table 5. Even so, more than half the cases resolved without a discovery motion being filed. Judicial involvement in the typical cases did not appear to be particularly intense either. As seen in Table 5, the number of discovery and substantive motions actually ruled on by a judge

<sup>169</sup> We coded as the resolution in each case the event by which the EEOC’s complaint was completely resolved, at least initially, at the district court level. That is, if a judgment was entered, we considered that a resolution, regardless of subsequent appeal, settlement, or failure to comply. In some cases, as when a district court’s judgment was overturned on appeal, this event turned out not to be the end of the litigation in the district court.

<sup>170</sup> Note, however, that for cases that do NOT settle, appeals are common: the EEOC filed notices of appeal in 4 of the 6 cases in the sample in which it lost; defendants filed a notice of appeal in 8 of the 13 cases in which they lost.

<sup>171</sup> By “substantive motions” we mean any motions to dismiss for failure to state a claim under FRCP 12(b)(6), motions for judgment on the pleadings, motions for summary judgment and motions for judgment as a matter of law.

<sup>172</sup> By “discovery motions” we mean motions about what information was subject to or protected from disclosure, such as motions to compel and motions for a protective order. We did not count motions relating solely to such matters as the timing of discovery.

before the settlement was quite modest across most of the cases. Only a very small handful of the settled cases appeared to entail the kind of intense, prolonged litigation battle predicted by the gladiator model. In the vast run of cases, resolution might have been preceded by a scheduling conference or two, and less commonly, a judicial ruling on a discovery motion or two.

**Table 5: Significant Motions and Events in EEOC Systemic Cases Resolved by Agreement (filed FY 1997 to 2005) (N = 229)**

	Mean	Median	75 %ile	90 %ile	Max
1. Discovery Motions Filed	2.28	0	2	6	129
2. Discovery Motions Resolved	1.81	0	1	5	110
3. Substantive Motions Filed	0.86	0	1	2	26
4. Substantive Motions Resolved	0.42	0	0	1	21
5. Scheduling/Status Conference Held	1.90	1	2	5	30

Other measures of litigation intensity, reported in Table 6, similarly suggest that the bulk of the systemic cases entailed low-intensity litigation:

**Table 6: Features of EEOC Systemic Cases, FY 1997-2005**

	N	Mean	25th %ile	Median	75th %ile	90 %ile	Max
1. Days to first resolution	262	562	300	507	806	1051	2378
2. Decree pages	215	16	9	13	19	30	75
3. Length of decree (months)	215	30	24	30	36	48	72

The first row of Table 6 sets out the length of the pre-resolution litigation, which is often very modest. In fact, in about 6% of the systemic cases, resolution is reached in the first month after filing, often with joint resolutions proposed for court approval simultaneously with the court complaint. In such a situation, the court serves as a recorder and potential enforcer of the settlement, rather than a forum for dispute resolution. More typically, the litigation lasted between 1 and 3 years. The dockets do not show particularly intense conflict during that time, however, as Table 6 shows—an average of three motions (two discovery and one substantive).

In any event, resolution having been reached, the decrees that result are not the behemoths predicted by the gladiator theory. Rather, as Table 6's row 3 sets out, they tend to be fairly short—16 pages is the mean, and 75% have fewer than 20 pages. And their length of time is also quite short. The vast majority of them impose remedial terms for a defined period of time—a term of months specified at the outset of the decree stage. And as row 3 shows, that term averages 30 months, and is only rarely as much as 48 months.

What about Owen Fiss's suggestion (made, admittedly, in an earlier era of litigation) that the cases do not end with entry of a judgment? In all sorts of institutional reform litigation, experience teaches that the most crucial work may take place *after* the decree is entered.<sup>173</sup> As

<sup>173</sup> See, e.g., M. KAY HARRIS & DUDLEY P. SPILLER, AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS (1976); PHILLIP J. COOPER, HARD JUDICIAL CHOICES: FEDERAL DISTRICT COURT

Lloyd Anderson wrote in a study of the implementation phase in structural reform cases, “Approval of the consent decree, then, is just the beginning of a new and crucial phase of the case, that of implementing the promises in the decree.”<sup>174</sup> Even when a time limit is specified in a civil rights injunctive case, such a limit might be extended if the defendant has not complied prior to the scheduled end date.<sup>175</sup> Among the EEOC’s resolved systemic cases, however, only a handful define the decree’s duration in substantive terms—and often these provide for *early* termination if particular events occur (e.g., if ownership of the company is transferred,<sup>176</sup> or a facility is closed<sup>177</sup>). In just *two* of the decrees does termination depend on the defendant achieving some measure of reform.<sup>178</sup> Nor do the docket sheets show evidence of massive implementation struggles. Only in three or four of the cases do the docket sheets show any sign of post-decretal injunction-related activity.<sup>179</sup> Thus signs of post-decree implementation struggle are nearly non-existent. Of course much implementation work may be done without any record

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JUDGES AND STATE AND LOCAL OFFICIALS (1988); Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725 (1986).

<sup>174</sup> *Id.* at 727. See also Selmi, *supra* note 18, at 1330 (“when employment discrimination cases were treated as involving public rather than purely private interests . . . the filing of the settlement agreement often marked the beginning of the proceedings rather than the end, as these attorneys carefully reviewed the defendants’ progress to ensure that the terms of the agreement were being fulfilled”).

<sup>175</sup> The EEOC’s decrees very often include a term that allows for extension on the defendant’s demonstrated noncompliance. See, e.g., Consent Decree, EEOC v. Pinnacle Nissan (CIV 00-1872-PHX-MHM, Feb. 20, 2003), available at [http://chadmin.clearinghouse.net/chDocs/not\\_public/EE-AZ-0085-0004.pdf](http://chadmin.clearinghouse.net/chDocs/not_public/EE-AZ-0085-0004.pdf). But even in the absence of such a term a defendant’s substantial noncompliance can be grounds for alteration of the decree’s termination date. See, e.g., EEOC v. Milgard Mfg. Inc., No. 01-MK-1731 (OES) (D. Colo., filed August 31, 2001); for documents and information, see <http://www.clearinghouse.net/detail.php?id=8450> (documenting several extensions to the decree).

<sup>176</sup> EEOC v. Sbarros Italian Eatery, 2:00-cv-00774-DB (D. Utah, filed Sept. 29, 2000); for documents and information, see <http://www.clearinghouse.net/detail.php?id=9187>.

<sup>177</sup> See, e.g., EEOC v. Hamilton Sundstrand Corp., No. 1:03-cv-01663-ZLW-PAC (D. Colo., filed Aug. 29, 2003); for documents and information, see <http://www.clearinghouse.net/detail.php?id=8387>.

<sup>178</sup> See Consent Decree at 8-9, EEOC v. Abercrombie & Fitch Stores, Inc., No. 3:04-cv-04731-SI (N.D. Cal., Apr. 15, 2005), available at <http://www.clearinghouse.net/chDocs/public/EE-CA-0006-0023.pdf>; for additional documents and information, see <http://www.clearinghouse.net/detail.php?id=7903>; Consent Decree at 11, EEOC v. Eagle Financial, Inc., No. 8:97-cv-03274-AW (D. Md., Apr. 14, 2000), available at <http://www.clearinghouse.net/chDocs/public/EE-MD-0030-0001.pdf>; (“This Consent Decree shall continue in effect . . . until the earlier of A. Two years from the entry of this Decree; or B. Until the number of African-American individuals employed by Eagle at any given moment is within one standard deviation, at a confidence level of 95%, of the number of African-American individuals expected to be employed based on the most recent decennial census data available for the job category of Teller, plus an additional twelve months; so long as that at the expiration of the additional 12 months the number of African-American individuals employed by Eagle remains within two standard deviations.”). For additional documents and information, see <http://www.clearinghouse.net/detail.php?id=7903>.

<sup>179</sup> In Milford Mfg. Inc., *supra* note 175, there were four decree extensions, from three to five years, because of compliance issues. In EEOC v. Ingersoll Int’l, Inc., No. 3:99-CV-50362 (N.D. Ill, filed Nov. 3, 1999) (for documents and information, see <http://www.clearinghouse.net/detail.php?id=8978>), apparent enforcement struggles were ended by the defendants’ bankruptcy. In EEOC v. Enterprise Rent-A-Car Co. of Tex., No. 5:99-CV-01088-ECP (W.D. Tex. filed Sept. 30, 1999) (for documents and information, see <http://www.clearinghouse.net/detail.php?id=9390>) and EEOC v. STI Holdings, Inc., No. 03-C-0543-S (W.D. Wis., filed Sept. 30, 2003) (for documents and information, see <http://www.clearinghouse.net/detail.php?id=8764>) there were efforts to enforce or extend the decree. Other cases do exhibit non-substantive post-decretal activity, such as notification to the court about distribution of monetary awards, attorneys’ fees motions, etc.

making it into a court file, but one would expect major disputes to leave their mark on docket sheets.

In sum, we find little evidence that the gladiator theory accurately captures the nature of the EEOC's systemic litigation during the period of our study. On virtually every relevant dimension we measured—e.g., type of resolution, intensity of litigation, post-decree activity—the EEOC's systemic docket appears to be made up of modest-sized, mostly ordinary cases, not epic struggles.

## B. Limited Problem-Solving: Undermining the Collaboration Theory

Measuring the EEOC's injunctive practices against the collaboration theory is difficult because of the theory's lack of concrete or objective criteria for identifying its core practices. By definition, the collaborative approach eschews the exemplary case, emphasizing instead flexibility, experimentalism and context-specific problem-solving. It offers no list of essential components or key factors to be included in an effective remedy. As Sturm puts it, "the goal is most decidedly not to develop a one-size-fits all model or a predetermined set of criteria."<sup>180</sup> Nevertheless, several key characteristics would seem to be essential to a collaborative approach to addressing structural discrimination.

First, a true problem-solving regime will be customized to the particular workplace,<sup>181</sup> resulting in a wide variety of injunctive relief provisions across cases, with the specifics in each case tailored to the unique circumstances of that particular employer. Second, effective remedies will be "functionally integrated"<sup>182</sup>—that is, they will link the processes for pursuing anti-discrimination goals with the employer's core productive and personnel activities. The third and fourth characteristics important to a second-generation structural response are data-driven decision-making and accountability.<sup>183</sup> These two characteristics are closely related, because often it is the generation of data that makes it possible to measure effectiveness and hold decision-makers accountable. We compare our observations of the EEOC's injunctive practices to each of these characteristics in turn. In order to do so, we examine the actual terms of the injunctive remedies obtained by the EEOC, whether through settlement or contested court order. Full documentation of the injunctive relief was not available in all cases, and default cases tend to involve defunct defendants, and are therefore omitted, so the discussion here rests on an analysis of 215 systemic cases.

*Contextual remedies.* The experimentalist regulation literature, of which the collaboration theory is an example, is skeptical of rigid, rule-based remedies, arguing instead for a more flexible, contextual approach that accounts for the "complexity and diversity of organizational forms."<sup>184</sup> Traditional rule-enforcement remedies narrowly define compliance "as the absence of identifiable conduct violating those rules" and fail to recognize how "intra-

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<sup>180</sup> Sturm, *supra* note 14, at 492.

<sup>181</sup> *Id.* at 519.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 519-20.

<sup>184</sup> *Id.* at 492.

organizational culture and decision processes” can “entrench bias, stereotyping, and unequal access.”<sup>185</sup> The collaboration theory sees the solution to second-generation discrimination in contextually-based remedies in which firms are incentivized to “problem-solve” by “address[ing] their particular culture, power dynamics, and patterns of daily interaction.”<sup>186</sup>

Examining the injunctive remedies obtained by the EEOC in its systemic cases suggests a continuing reliance on traditional rule-enforcement remedies. As Table 7 indicates, the most commonly obtained injunctive provision is the simple “thou shalt not” command—an order prohibiting the defendant from engaging in unlawful discrimination (row 1a, 88%). Only slightly less common is an order prohibiting retaliation against employees who complain about unlawful discrimination (row 1b, 80%). These orders take the classic form of the rule-enforcement remedy as a rigid and externally defined prohibition.

**Table 7: Types of Remedies in EEOC Systemic Cases  
(N=215)**

Type of remedy	N	%
<b>1. Rule Enforcement Remedies</b>		
a. D prohibited from discriminating	189	88%
b. D prohibited from retaliating	174	81%
c. Other requirements	30	14%
<b>2. Peripheral Remedies</b>		
a. Require EEO training	188	87%
b. Post notice of equal employment rights	184	86%
c. Distribute notice of equal employment rights	105	49%
d. Develop/modify anti-discrimination policy	72	33%
e. Implement complaint/dispute resolution process	68	32%
<b>3. Functionally Integrated Remedies</b>		
a. Advertising/recruitment requirements	34	16%
b. Require objective hiring/promotion criteria	30	14%
c. Require recruitment, hiring or promotion protocols	30	14%
d. Quantitative goals specified	20	9%
e. Require objective job descriptions	12	6%

A significant minority of the cases imposed other types of rule-enforcement requirements on employers (row 1c, 14%). However, although some were context-specific, they generally

<sup>185</sup> *Id.* at 475, 467-68. See also Green, *supra* note 14, at 145 (seeking to hold employers responsible for “organizational choices, institutional practices, and workplace dynamics that enable the operation of discriminatory bias”).

<sup>186</sup> Sturm, *supra* note 14, at 519. See also Green, *supra* note 14, at 144 (arguing that the “complex, contextual nature” of structural employment discrimination requires an “innovative, problem-based, collaborative solution” that does not fit with traditional remedies).

were *not* the type of flexible, problem-solving remedy called for by the collaboration theory. In many cases, the orders are merely specific applications of general anti-discrimination principles—for example, an order that forbids harassment of African-American employees.<sup>187</sup> Others respond to the unique facts of a case, such as orders requiring that certain named individuals be fired, or not be re-hired,<sup>188</sup> or, in one case, an order prohibiting a firm from sponsoring company events at “adult entertainment establishments.”<sup>189</sup> In another case, the injunctive remedy required the defendant employer, a private school, to offer tuition waivers for the complainants’ enrolled children.<sup>190</sup> Such a remedy, while certainly creative and context-specific, does not seek to address structural sources of second-generation discrimination.

*Functionally Integrated Remedies.* If a collaborative approach is taken to addressing second-generation discrimination, one would expect to see injunctive terms that affect the core decision-processes of the firm. Thus, rather than seeking to eliminate a discrete, identifiable discriminatory practice, such an approach will link these normative concerns to the firm’s core business or personnel practices in order to reform those structures and processes which allow bias to operate.<sup>191</sup> An example of a functionally integrated remedy is a requirement that the employer change its methods of evaluating and selecting employees for promotion to avoid processes that systematically disadvantage women or underrepresented minorities.<sup>192</sup> By contrast, “peripheral remedies” do not require any changes in how the employer carries on its usual business operations—for example, requiring its employees to undergo EEO training.

As seen in Table 7, functionally integrated remedies were far less commonly deployed in the EEOC’s systemic cases than were peripheral remedies. Aside from the traditional “thou shalt not” injunctions discussed above, the most common remedies ordered were a requirement that the employer provide EEO training to its employees (row 2a, 87%) and that it post a notice informing employees of their rights under equal employment laws (row 2b, 85%). Far less common—though important, as we argue below—were remedies trenching on a firm’s existing personnel practices, such as a requirement that objective criteria be used for hiring and promotion (row 3.b, 13%), or that job openings be publicized in ways designed to reach all potentially qualified applicants (row 3.a, 15%).

One might argue that a simple count is misleading, however, because not all of the functionally integrated remedies are appropriate in all cases. For example, requiring objective promotion criteria might be warranted in a case alleging a discriminatory failure to promote, but

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<sup>187</sup> EEOC v. Pemco Aeroplex, Inc., 383 F.3d 1280 (11th Cir. 2004) (No. 2:00-cv-02762-WMA, N.D. Ala., filed Sept. 28, 2000); for documents and information, see <http://www.clearinghouse.net/detail.php?id=9454>

<sup>188</sup> See, e.g., EEOC v. Lockheed Martin, 2007 WL 4468658 (D. Haw. 2007) (No. 1:05-cv-00479-SPK-LEK, filed Aug. 1, 2005); for documents and information, see <http://www.clearinghouse.net/detail.php?id=6096>; EEOC v. Midamerica Hotels Corp., 2004 WL 758054 (E.D. Mo. 2004) (No. 4:03-CV-00107 HEA, filed Jan. 30, 2003); for documents and information, see <http://www.clearinghouse.net/detail.php?id=8411>.

<sup>189</sup> EEOC v. Custom Companies, Inc., 2007 WL 1810495 (N.D. Ill. 2007) (No. 1:02-cv-03768, filed May 28, 2002); for documents and information, see <http://www.clearinghouse.net/detail.php?id=7999>.

<sup>190</sup> EEOC v. Univ. of the Incarnate World, No. 5:99-cv-01090-OLG (W.D. Tex., filed Sept. 30, 1999); for documents and information, see <http://www.clearinghouse.net/detail.php?id=8413>.

<sup>191</sup> Green, *supra* note 14, at 148.

<sup>192</sup> *Id.* at 148, 155.

not in a case involving only charges of sexual harassment. However, the very idea of structural reform is premised on the theory that discriminatory outcomes are not isolated, one-off incidents, but occur because the overarching structure of work permits bias to operate in an organization.<sup>193</sup> Thus, sexual harassment should not be viewed as the result of one bad actor, but a system in which women workers are isolated tokens, or alternatively, lack power within the organization.<sup>194</sup> To the extent that the remedies obtained by the EEOC are narrowly tailored to address only the specific legal issues alleged, they are inconsistent with a structural approach to addressing second generation forms of discrimination.<sup>195</sup>

In addition to coding for the most commonly occurring forms of injunctive relief obtained by the EEOC, we also captured information about other “miscellaneous” types of relief. Review of these additional provisions revealed little in the way of functionally integrated remedies. Most simply entailed more detailed instructions regarding how the standard set of remedies should be carried out. For example, one decree required that the posted notice of employees’ rights should state where the closest EEOC office is located and explain that complaints could be filed there.<sup>196</sup> Another required the employer to provide the EEO notices on employees’ paychecks, along with contact information for reporting violations.<sup>197</sup>

The one notable exception is a group of cases—fewer than 20—that included provisions requiring the employer to integrate consideration of managers’ compliance efforts in their performance evaluations. Typical of these provisions were requirements that a defendant “revise its performance evaluation forms for managers and supervisors in order to include measures for performance compliance with [its] discrimination, harassment and retaliation policies and procedures,”<sup>198</sup> or impose substantial discipline “upon any supervisor or manager who engages in sex discrimination or permits any such conduct to occur.”<sup>199</sup> In cases in which quantitative goals were specified, however, achievement of or progress towards those quantitative goals was not required to be part of managers’ performance evaluations. Thus, even when injunctive terms attempted to incorporate anti-discrimination goals into the job responsibilities of critical decision-makers in the workplace, those goals were usually broadly and negatively defined. We see little evidence in our sample of any affirmative obligations imposed on key decision-makers to engage in the sort of accountable problem-solving called for by the collaboration theories.

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<sup>193</sup> *Id.* at 149.

<sup>194</sup> See Sturm, *supra* note 14, at 477.

<sup>195</sup> This point is emphasized by ARIANE HEGEWISCH, CYNTHIA DEITCH, & EVELYN MURPHY, ENDING SEX AND RACE DISCRIMINATION IN THE WORKPLACE: LEGAL INTERVENTIONS THAT PUSH THE ENVELOPE (March 2011), available at <http://www.iwpr.org/publications/pubs/ending-sex-and-race-discrimination-in-the-workplace-legal-interventions-that-push-the-envelope-1>.

<sup>196</sup> EEOC v. Arrowhead Bagel Company, 2:00-cv-01860-SMM (D. Ariz., filed Sept. 28, 2000) ; for documents and information, see <http://www.clearinghouse.net/detail.php?id=9000>.

<sup>197</sup> Midamerica Hotels Corp., *supra* note 188.

<sup>198</sup> Consent Decree at 8, EEOC v. Valentino Las Vegas, LLC, No. 2:04-cv-01357-JCM-LRL (D. Nev., Oct. 12, 2005), available at [http://www.clearinghouse.net/chDocs/not\\_public/EE-NV-0042-0002.pdf](http://www.clearinghouse.net/chDocs/not_public/EE-NV-0042-0002.pdf); for additional documents and information, see <http://www.clearinghouse.net/detail.php?id=8747>.

<sup>199</sup> Consent Decree at 8-9, EEOC v. Trendwest Resorts, Inc., No. 2:04-cv-00503-RSL (W.D. Wash., June 1, 2004), available at [http://chadmin.clearinghouse.net/chDocs/not\\_public/EE-WA-0098-0002.pdf](http://chadmin.clearinghouse.net/chDocs/not_public/EE-WA-0098-0002.pdf); for additional documents and information, see <http://www.clearinghouse.net/detail.php?id=8962>.

*Generate relevant data.* Under a second-generation structural approach, one would expect to see employers required to generate and share relevant data about such matters as the gender and racial composition of hiring pools and different job classifications, the effects of different personnel practices, and the incidence of complaints by employees.<sup>200</sup> Such data is necessary not only to identify problems and encourage problem-solving; they also make it possible to hold firms accountable for the organizational structures and decision-making processes they put into place.

In a substantial proportion of the cases in our sample, the injunctive remedies included provisions generating data about the firm's operations. As seen in Table 8, most commonly included was a provision the required a defendant to report on its compliance with the injunctive terms. Because many of the provisions involved peripheral remedies like posting a notice of rights or conducting training, some of this compliance reporting had little to do with a firm's core operations. However, in a majority of cases (row 2, 55%), some sort of record-keeping, often more directly tied to business operations or personnel practices, was required—for example, maintaining records of complaints, the race of applicants, or the outcomes of promotion decisions. Also included in a majority of cases (row 3, 55%) was a requirement that employers report complaints received about discrimination or harassment. Less common were provisions of specific forms of audit or regular reports on whether quantitative goals were achieved.

**Table 8: Remedies Involving Data Generation in EEOC Systemic Cases (N=215)**

Type of remedy	N	%
1. Compliance reporting	180	84%
2. Record-keeping	121	56%
3. Reports on complaints/incidents	118	55%
4. Auditing	15	7%
5. Subset: Quantitative Goals Specified	20	9%
a. Outcomes required to be reported	10	50%
b. Outcomes assessed against goals	5	25%

In a significant proportion of cases, then, the injunctive relief included requirements that a firm generate data about its practices, although the type of data most often produced was information about complaints and reported incidents of discrimination or harassment. To that extent, the data generated lends itself more readily to detecting and addressing potential rule violations rather than to diagnosing structural conditions that enable bias to or to engaging in proactive problem-solving.

*Accountability.* As mentioned above, generating data is closely linked to accountability. According to the collaborative theory, accountability is necessary to assure that a firm deals with the problems identified through the information generating process.

Focusing on accountability also raises the question of accountability to whom? Sturm is reluctant to hold firms accountable to courts, for fear of “reproducing the limitations of a rule-

<sup>200</sup> Sturm, *supra* note 14, at 519-20; Green, *supra* note 14, at 155.

enforcing dynamic.”<sup>201</sup> On the other hand, leaving employers accountable only to themselves “risks abdicating accommodation to public norms.”<sup>202</sup> As a solution, she suggests that effective structural reform efforts must include a crucial role for intermediaries—individuals and nongovernmental organizations who can “translat[e] and mediat[e] between formal law and workplace practice.”<sup>203</sup> These intermediaries are involved in evaluating and revising a firm’s practices on an ongoing basis, at the same time that they are connected to a “broader community of practice,” which enables them to identify problems and promote best practices. Similarly, in assessing the efficacy of labor standards, Estlund also emphasizes the role of intermediaries. She argues that the critical elements of an effective system of workplace self-regulation are “independent outside monitoring and some form of effective employee participation.”<sup>204</sup> Although her concern is primarily with enforcement of labor standards, Estlund similarly argues that any successful project of self-regulation requires the involvement of employees.

Finding evidence of “systems of accountability” imposed by the injunctive terms in our sample is difficult. The characteristics most closely capturing accountability are whether quantitative goals are specified and whether the duration of a consent decree is measured not in months, but in terms of the achievement of substantive goals. As seen in Table 9, relatively few cases incorporated terms of these sorts (9% and 4% respectively, in rows 2 and 1). The other types of compliance measures identified (11%, row 3) mostly involved setting time deadlines for performing acts required under the decree, such as making payment to individual complainants, giving notice of the action, posting a notice of rights or conducting training sessions. Thus, they set out measures of accountability for performing specific acts required by the injunction, rather than accountability for the ways in which the firms’ structures or processes might enable discriminatory bias to operate.

**Table 9: Remedies Involving Accountability Measures in EEOC Systemic Cases (N=215)**

Type of remedy	N	%
1. Duration of decree specified in non-time terms	10	5%
2. Quantitative goals and timetables specified	20	9%
3. Other measures of compliance specified	22	10%

<sup>201</sup> Sturm, *supra* note 14, at 521

<sup>202</sup> *Id.* at 523.

<sup>203</sup> *Id.*

<sup>204</sup> Estlund, *supra* note 58, at 325.

**Table 10: Remedies Involving Accountability to Stakeholders and Intermediaries in EEOC Systemic Cases (N=222)**

	Any Role	Complaint / Incident Reports	Compliance Reports	Monitoring	Other
<b>1. Any stakeholder access</b>	205	115	178	123	53
<b>2. Internal Reporting</b>					
a. Internal Manager	33	1	2	3	27
b. Peer Worker Group	1	0	0	0	1
c. Union	0	0	0	0	0
<b>3. External Reporting</b>					
a. EEOC	201	113	178	108	3
b. Private Plaintiff or Counsel	7	3	6	1	0
c. Consultant	26	2	4	12	18
d. Monitor/Special Master	9	2	1	3	8
e. Advocacy Group	1	0	1	0	0

Any successful system of accountability not only requires the production of information, but must empower individuals or entities to receive and respond to that information. Examining the decrees in our sample reveals modest efforts to empower external intermediaries. In roughly 18% of the cases, appointed monitors or outside consultants who specialize in EEO matters are given some role in implementing the remedial terms. In a similar proportion of the cases, an internal manager at the firm was given some responsibility or authority regarding decree implementation.

What is notably *absent*, however, is any attempt to empower workers, either through a union or a more informally created group. In only one case out of 224 did we see any effort to involve workers in the problem-solving<sup>205</sup> and in none was any role created for a union in monitoring the terms of a consent decree or participating in restructuring processes within the firm. Unfortunately, we lack information about base rates—we do not know how many cases a union was present at the workplace that might have been called on to ensure accountability. And the labor laws' hostility to employer-created worker organizations<sup>206</sup> might well have discouraged other efforts to involve employees in problem-solving. Still, the nearly complete

<sup>205</sup> EEOC v. Rainbow Rest. Props., Inc., 0:06-cv-00988-PJS-JJG (D. Minn., filed Mar. 7, 2006); for documents and information, see <http://www.clearinghouse.net/detail.php?id=8368>; the case involved allegations of discriminatory harassment against Hispanic and Latino workers by the employer, a restaurant. Among other things, the consent decree called for the creation of an employee advisory committee, composed of at least one-half Hispanic or Latino employees “to review and present feedback to Chino Latino regarding its marketing and advertising efforts.” The consent decree does not make clear whether the “marketing and advertising efforts” referred to are in regards to hiring and promotion or the restaurant’s services, nor does it provide any other details regarding the role or composition of the employee advisory committee.

<sup>206</sup> Estlund, *supra* note 58, at 362-63. See also sources cited *id.* at n.199.

lack of any provisions calling for accountability to line-employees, the ultimate stakeholders in cases involving discrimination and harassment, seems inconsistent with collaborative theories.<sup>207</sup>

Although neither outsiders nor stakeholders within the defendant firms are consistently given monitoring or enforcement powers, the decrees do—overwhelmingly—create some on-going role for the EEOC. In nearly all—201 out of 215—the defendant is obligated to report to the EEOC or submit to monitoring by it. Thus, of all the potential monitors and stakeholders, the EEOC is the principal entity empowered with information and rights of access that might be leveraged to hold firms accountable for engaging in meaningful problem-solving.

The decrees alone do not tell us if or how the EEOC exercise the powers it thus acquires through its consent decrees, but the agency appears to have the capacity to engage in meaningful monitoring. Our data suggest that there are about 70 systemic decrees open at any given time; that amounts to fewer than two dozen reports per month, spread out among all the EEOC's attorneys. However, neither our case studies nor the systemic docket as a whole shows evidence of vigorous monitoring activity by the EEOC. Recall that in *Dial* and *McKesson*, where the EEOC's attorneys felt there was a need for close monitoring, they negotiated the hiring of outside consultants to oversee implementation. In the more typical cases like *PJAX*, reports to the EEOC are required, but the case documents and dockets do not indicate any post-decretal activity. While it is possible EEOC lawyers spent time analyzing and following up on these reports, our interviews suggest that post-decree monitoring was not a priority for the agency.<sup>208</sup> In addition, perhaps we see little evidence of on-going monitoring because the most common remedies—such as posting notices and conducting training—are easy for firms to comply with and compliance is readily verifiable.

As in the case of the gladiator theory, then, we find little evidence in our study period of a new collaborative model for addressing structural reform. In the EEOC's systemic cases, the injunctive relief primarily emphasized traditional rule-based prohibitions or peripheral remedies such as EEO training, rather than empowering stakeholders to engage in collaborative problem-solving.

### C. Enforced Managerialism

If neither the gladiator nor the collaboration theory accurately describes the EEOC's systemic cases, how are they best understood? Our study suggests that the EEOC's injunctive practices in these cases are part of a larger phenomenon, namely, the widespread adoption of routinized bureaucratic responses to the legal prohibition on employment discrimination. As discussed in Part I.C., *supra*, a rich sociological literature has explored how firms have constructed civil rights law, infusing it with managerial values as they internalized its commands. The result has been the development and diffusion of a number of standard responses, adopted by firms to signal compliance and reduce liability risks.<sup>209</sup> Although the sociological literature focuses on firms' voluntary responses to general legal mandates, rather

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<sup>207</sup> Cf. Estlund, *supra* note 58, at 333 (arguing that the regulatory model renders employees the passive beneficiaries of the government's protection).

<sup>208</sup> See, e.g., text accompanying note 150, *supra*; text accompanying notes 122 to 127.

<sup>209</sup> See, e.g., Edelman, *Legal Ambiguity*, *supra* note 64; DOBBIN, *INVENTING EO*, *supra* note 31.

than particularized litigation, our study suggests that the EEOC has played a role through its systemic injunctive litigation in ratifying those responses and promoting their adoption.

In our analysis, the injunctive terms obtained in the EEOC's systemic cases largely mirror the bureaucratic practices recommended by human resources professionals to comply with anti-discrimination law in non-injunctive contexts. Several of the most common decree terms we observed—the prohibition on discrimination and retaliation and the posting requirements—simply reassert the anti-discrimination mandate and provide notice of those rules to workers (although they also substantially ease the path of further enforcement, if further enforcement is needed). However, the other common terms, such as requiring EEO training, developing an anti-discrimination policy and implementing a complaint or grievance process, are precisely the types of responses developed and spread by human resources professionals.<sup>210</sup> Even the less commonly imposed remedies in our study, such as requiring the posting of available positions or the development of objective hiring or promotion criteria, are bureaucratic measures widely accepted as constituting human resources “best practices.”<sup>211</sup>

The terms of the EEOC's systemic cases are thus similar to those criticized by Selmi as demonstrating limited ambition to change employer practices or remedy past discrimination. Selmi's theory is that more meaningful structural reform has fallen by the wayside as profit-motivated private attorneys, focusing on monetary damages, have been willing to settle for anemic forms of injunctive relief.<sup>212</sup> EEOC lawyers, however, are unlikely to be driven to the same extent by pocketbook incentives, given that their pay and other work benefits are not contingent on the amount of money damages recovered.<sup>213</sup> (Other incentives may, of course, encourage EEOC employees to seek high damages,<sup>214</sup> but they are likely softer than in the private sector.) Moreover, as discussed in Part II, *supra*, the EEOC professes to prioritize systemic cases, seeing itself as “uniquely positioned” to focus on injunctive, rather than monetary, relief.<sup>215</sup> If the EEOC is less likely distracted by financial incentives, what then explains its embrace of managerialist remedies?

It is worth noting that in some ways, what we observe is nothing new. In the 1970s when it was first authorized to sue employers, the EEOC pursued consent agreements with a number of large employers that required them to adopt “best practices” recommended by personnel experts

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<sup>210</sup> See, e.g. Dobbin & Kelly, *How to Stop Harassment*, *supra* note 72; Lauren B. Edelman, Christopher Uggen, & Howard S. Erlanger, *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOCIOLOGY 406 (1999); Frank Dobbin and Alexandra Kalev, *The Origins and Effects of Corporate Diversity Programs*, OXFORD HANDBOOK OF DIVERSITY AND WORK, 253-281 (2013) [hereinafter Dobbin & Kalev, *Origins*].

<sup>211</sup> DOBBIN, INVENTING EO, *supra* note 31.

<sup>212</sup> Selmi, *supra* note 18, at 1299. The EEOC's lawyers confirm this account in large part—they report that intervenors' counsel are generally pretty uninterested in injunctive relief. See, e.g., Park interview, *supra* note 150, (“If [intervenors' counsel] have ongoing monitoring, and [the defendants] are paying them, they're more interested, but for the most part, intervenors are not so interested in injunctive cases.”); Johnson interview, *supra* note 143 (“My perception is that the EEOC is much more interested in getting ongoing injunctive relief than the private bar, for obvious market-driven reasons”).

<sup>213</sup> See, e.g., Johnson interview, *supra* note 143.

<sup>214</sup> See, e.g., Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement: Innovation and Optimal Punishment, with Antitrust Applications*, 127 HARV. L. REV. [] (2014).

<sup>215</sup> EEOC, SYSTEMIC REPORT, *supra* note 8, at 2.

at the time.<sup>216</sup> For example, a consent decree with AT&T required revised salary classifications and the use of validated job tests, while other companies agreed to change their seniority systems and to actively recruit women and minorities—all practices endorsed by personnel experts at the time.<sup>217</sup> Thus, the EEOC’s emphasis on widely accepted human resources practices, which we observe in a more recent period, is continuous in some ways with its past injunctive efforts.

Yet if the turn to human resources practices is nothing new, the particulars of the injunctive remedies obtained by the EEOC during our study period differ from those it sought in the 1970s; remedies during the more recent period are far more limited. The reasons, we suspect, are to be found both in and out of the courts. The more aggressive remedies of an earlier era—requiring job tests to be validated, restructuring job ladders, and the like—followed Supreme Court decisions such as *Griggs v. Duke Power Company*<sup>218</sup> and *Albemarle Paper*<sup>219</sup> that defined discrimination expansively. These decisions suggested that anti-discrimination statutes barred more than animus, and that many previously accepted employer practices could constitute actionable discrimination. The Court has, in more recent years, been far more skeptical of this kind of reasoning, necessarily reducing the ability of plaintiffs’ lawyers to obtain expansive remedies through litigation, including by negotiation. Moreover, especially after the Supreme Court in *Faragher* and *Ellerth* ratified anti-harassment policies and grievance procedures as harassment prevention tools, it makes sense that both personnel experts and legal actors increasingly promoted these less intrusive procedures as a means of legal compliance. Outside the courts, as Dobbin, Edelman, and others have documented, organizational responses to Title VII and other anti-discrimination laws likewise shifted, as professionals promoted new practices and in turn influenced doctrinal developments<sup>220</sup>

As times and the law have changed, it is unsurprising that the EEOC has continued to look to human resources “best practices” when shaping its decrees, because both the agency and personnel professionals were responding to the same challenges. The mandate of the law is clear—do not discriminate—but Title VII and other anti-discrimination statutes offer no concrete guidance as to what constitutes compliance.<sup>221</sup> In the face of legal ambiguity, firms are motivated to adopt structures or practices that visibly signal compliance with the law.<sup>222</sup> As Dobbin and Kalev explain about the widespread acceptance of anti-harassment training programs, the personnel profession “had a plausible compliance remedy that offered executives a formalized solution, and judges a bright-line standard by which they could assess employers.”<sup>223</sup>

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<sup>216</sup> DOBBIN, INVENTING EO, *supra* note 31, at 103.

<sup>217</sup> *Id.*

<sup>218</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding that Title VII prohibited intelligence testing or high school completion requirement when they had the effect of disqualifying blacks at disproportionately high rate without demonstrable connection to job performance).

<sup>219</sup> *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (finding discrimination in preemployment screening with disparate impact on black applicants that was not substantially related to job performance).

<sup>220</sup> DOBBIN, INVENTING EO, *supra* note 31, at 132; *see also, e.g.*, Edelman, et al., *Diversity Rhetoric*, *supra* note 67.

<sup>221</sup> Edelman, *Legal Ambiguity*, *supra* note 64.

<sup>222</sup> *Id.* at 1542.

<sup>223</sup> Dobbin & Kelly, *How to Stop Harassment*, *supra* note 72.

And once the Court signaled its acceptance of these structures as a sign of compliance,<sup>224</sup> companies had all the more reason to adopt them. As one employer-side lawyer explained, “The beauty of these rulings is that companies now know what they have to do: They have to advertise a no-harassment policy, run training programs and have a discipline-response mechanism. If the company does those things, they can defend against these cases.”<sup>225</sup> Similarly, when pursuing systemic cases, the EEOC needed concrete remedies it could impose that would manifest firms’ compliance with the law. The “best practices” adopted by leading organizations and promoted by personnel professionals offered a solution—plausible forms of compliance that are visible and readily verifiable.

An additional plausible reason the EEOC has repeatedly drawn on bureaucratic solutions to enforcement problems is that the Commission is itself a large bureaucratic organization. Managerialist remedies may appear familiar to its lawyers from the EEOC’s own employment practices, and in any event such remedies meet the agency’s need to rationalize and standardize its core function of enforcing anti-discrimination norms in the workplace. The EEOC must coordinate the work of scores of attorneys across the country to advance a common goal, and it utilizes several levers to direct their activities. For example, it distributes a Compliance Manual with sample decrees, and draft decrees are reviewed at the regional level and, for decrees with over 20 benefitted parties, at the national level as well. As a result, as EEOC regional attorney John Hendrickson says, “The consent decrees look awfully cookie cutter, and they are.”<sup>226</sup>

## V. Conclusion: Assessing the EEOC’s Systemic Efforts

This Article’s project is positive, not normative. Nevertheless, we briefly consider in conclusion how our examination of the nature of the EEOC’s injunctive practice bears on various normative claims in the literature:

Our study of the EEOC’s systemic cases suggests that the consent decrees it obtains primarily implement managerialist remedies—the policies and structures considered “best practices” by many firms and human resources professionals. If this depiction is accurate, is it a problem? A number of scholars have been highly critical of the legal profession’s embrace of managerialist responses, and their criticism would likely extend to the EEOC practices we document as well. Bagenstos, for example, concludes that “there is scant evidence that the responses urged [by lawyers and consultants] actually result in equal treatment or unbiased decisionmaking.”<sup>227</sup> Similarly, Selmi describes these types of remedies as “cosmetic in nature”

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<sup>224</sup> See, e.g., *Farragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries Inc. v. Ellerth*, 524 U.S. 742 (1998).

<sup>225</sup> Walter Connally, Jr., the attorney who represented Mitsubishi in the class action suit against it, made this comment in an interview following the Supreme Court’s decision in *Farragher* and *Ellerth*. See DOBBIN, INVENTING EO, *supra* note 31, at 214, citing Jane Daugherty, *Racial Discrimination Charges Rise in Michigan*, DETROIT NEWS, July 15, 1998.

<sup>226</sup> Hendrickson interview, *supra* note 111.

<sup>227</sup> Bagenstos, *Structural Turn*, *supra* note 73, at 29.

and “primarily designed to address public relations problems,”<sup>228</sup> while Bisom-Rapp dismisses training programs as “symbolic gestures” whose efficacy has little empirical support.<sup>229</sup>

Scholars are correct to point out that, for many standard managerialist remedies, there is a disturbing lack of empirical evidence of their effectiveness in redressing or preventing discrimination.<sup>230</sup> In particular, the heavy emphasis on EEO and sexual harassment training in the courts and by the legal profession is troubling. Studies do not support the claim that these programs can change employee attitudes; indeed, evidence suggests that if poorly conducted, they can produce backlash harmful to women and minority employees.<sup>231</sup> In light of these concerns, the frequency with which the EEOC negotiates training as a court-enforceable remedy raises questions about the effectiveness of its efforts to secure relief for victims of discrimination.

We agree wholeheartedly that more empirical evidence is needed, rather than assuming that a practice is effective just because it is widely accepted. But it seems likely that some managerialist responses are, indeed, useful.<sup>232</sup> In particular, bureaucratic controls may help constrain decisionmaking in ways that reduce the influence of stereotypes and implicit biases. For example, sociologists have concluded that “[f]ormalized practices or formal structures such as a personnel or human resources department reduce the use of sex and race as hiring criteria by limiting decision makers’ discretion,” whereas “[s]ubjective hiring procedures and vague criteria free decision makers to favor persons of their own race or sex.”<sup>233</sup> Similarly, Kalev et al. found evidence that practices that assign organizational responsibility for change—e.g. affirmative action plans, diversity committees, diversity managers—are effective in increasing the proportion of women and minorities in management.<sup>234</sup> Thus, any assessment of the EEOC’s injunctive practices ought to focus on whether a particular managerialist response is actually helpful or not. The fact that some of the remedies pursued by the EEOC are likely ineffective does not mean that all bureaucratic responses are problematic.

In addition, even if other settlement terms might be more effective in any given case, evaluating the EEOC’s approach needs to consider the Commission’s docket as a whole, not case by case. Perhaps the EEOC would have been more effective at promoting equal employment opportunity in a particular case if it pursued a more muscular kind of litigation—with more aggressive claims for higher damages, more intrusive remedies, longer enforcement periods, and more onerous decree termination provisions. But it is important to remember that the EEOC operates under constraints. Gladiator litigation requires lots of time and effort, and true

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<sup>228</sup> Selmi, *supra* note 18, at 1250

<sup>229</sup> Bisom-Rapp, *Ounce of Prevention*, *supra* note 73, at 6, 29.

<sup>230</sup> DOBBIN, INVENTING EO *supra* note 31, at 21.

<sup>231</sup> Kalev, Dobbin, & Kelly, *Best Practices*, *supra* note 72 (diversity training has negative effect); Dobbin & Kalev, *Origins*, *supra* note 210 (summarizing literature); Bisom-Rapp, *Ounce of Prevention*, *supra* note 73 (summarizing studies)

<sup>232</sup> Dobbin & Kalev, *Origins*, *supra* note 210 (reviewing the literature); Kalev, Dobbin, & Kelly, *Best Practices*, *supra* note 72 (finding mixed effects).

<sup>233</sup> Barbara F. Reskin, Debra B. McBrier, & Julie A. Kmec, *The Determinants and Consequences of Workplace Sex and Race Composition*, 23 ANN. REV. SOCIOLOGY. 335, 343 (1999).

<sup>234</sup> Kalev, Dobbin, & Kelly, *Best Practices*, *supra* note 72.

collaboration is also highly resource intensive. A relatively easy-to-apply, bureaucratic approach to injunctive remedies allows the agency to bring—and resolve—more lawsuits.

Sociologists have noted that the process of “managerialization of law” is an ambiguous one. On the one hand, it “has the potential to undermine legal ideals.”<sup>235</sup> Grievance processes, for example, “tend to recast grievances in ways that downplay legal issues and that focus instead on more typically managerial concerns . . . ; disputes that originate as rights violations . . . are likely to be handled as interpersonal difficulties, administrative problems, or psychological pathologies.”<sup>236</sup> On the other hand, as the law is reframed “in ways that make it appear more consistent with traditional managerial prerogatives,” they are more easily internalized by organizations.<sup>237</sup> When the personnel profession recasts civil rights imperatives as initiatives that are good for business, that promotes the internalization of these legal norms, albeit in an altered form. Similarly, it may be rational for the EEOC to pursue familiar bureaucratic practices in the Commission’s consent decrees. The EEOC’s systemic cases we examined were overwhelmingly settlements, and the agency needed some level of employer buy-in to resolve them short of full-blown litigation. The EEOC’s ability to resolve cases may be enhanced when it pursues remedies that have the aura of being good for business. For the employer faced with ongoing litigation, it must be easier to accept a settlement that entails the adoption of practices already followed in many leading organizations.

Moreover, the EEOC’s practices can have impact even beyond its docket, by influencing employer practice. If the remedies the EEOC pursues suggest “best practices,” employers seeking to avoid lawsuits can emulate those practices long before they face any concrete threat of suit. In this way, bureaucratic solutions to civil rights problems may magnify the EEOC’s influence by providing employers with a road map for compliance. If more onerous terms were demanded, employers might opt not to comply until forced through litigation. On net, whether the agency would be more effective by forcing more radical change on fewer employers than by litigating—and settling—more cases on standardized terms depends on the effectiveness of the standard remedies.

Finally, the EEOC operates under political and legal constraints. Congress establishes the Commission’s budget and exercises oversight authority. If the agency pursues a reform agenda more aggressive than that preferred by key political leaders, it risks being reined in by Congress. According to former EEOC Commissioner Paul Steven Miller, “Congress . . . sees us as an agency which is there to manage employment discrimination disputes,”<sup>238</sup> rather than to prevent or remedy discrimination. If, in fact, Congress has such a limited view of the Commission’s role, a strategy of settling many cases on standardized terms rather than vigorously pursuing a handful of transformative cases may make sense. Legal doctrine also cabins the EEOC’s ability to pursue structural reform. If the injunctive relief it pursues is less robust than it could be, the problem may stem as much, or more, from the courts’ evolving doctrine as from a lack of commitment on the part of the EEOC. As Bagenstos has pointed out,

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<sup>235</sup> Edelman, et al., *Diversity Rhetoric*, *supra* note 67.

<sup>236</sup> Lauren B. Edelman & Mark C. Suchman, *When the “Haves” Hold Court: Speculations on the Organizational Internalization of Law*, 33 *LAW & SOC’Y REV.* 941, 967 (1999).

<sup>237</sup> Edelman, et al., *Diversity Rhetoric*, *supra* note 67.

<sup>238</sup> Sturm, *supra* note 14, at 551.

claims about what types of employer conduct are wrongful and should be prevented are deeply controversial.<sup>239</sup> Judges have been increasingly reluctant to embrace a more expansive definition of discrimination—one that holds employers accountable for structural disadvantage and not merely intentional forms of invidious discrimination.<sup>240</sup> And as the courts' conception of what constitutes discrimination has contracted, so, too, has the remedial ambition of structural reform cases. Consent decrees, after all, are negotiated settlements reached in the shadow of the law. As a result, the EEOC's ability to pursue more aggressive structural remedies has diminished. Whether or not the EEOC's injunctive practices we observed in our study period were optimal in the sense of being maximally effective in combating workplace discrimination, they were an understandable response to the various constraints under which the agency operated.<sup>241</sup> Indeed, under a more individualized, fault-based understanding of discrimination, the EEOC might find it difficult to pursue even rather routine managerialist remedies.<sup>242</sup>

In any event, to repeat, our project is positive not normative. This paper has looked at the EEOC's litigation but not at what happens at the regulated workplaces. We do not here assess either the problems the EEOC sought to solve or the Commission's success or failure in that endeavor. And the positive point is this: Existing visions of structural reform litigation are altogether too romantic. The EEOC's injunctive cases demonstrate neither contests to the death, nor collaborative love-fests; instead, they provide evidence that the managerialism so evident in *non-litigation* responses to EEO imperatives is evident, as well, in the EEOC's large and influential component of the civil rights docket.

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<sup>239</sup> Bagenstos, *Structural Turn*, *supra* note 73, at 36-40.

<sup>240</sup> *Id.* at 13-14.

<sup>241</sup> Scholars have proposed a number of reforms intended to boost the agency's effectiveness in combating workplace discrimination. *See, e.g.*, Sturm, *supra* note 14, at 566 (calling for the EEOC to play a larger role in pooling information and building networks for effective problem-solving); Green, *supra* note 3 (arguing for enhanced role for EEOC); Selmi, *supra* note 18 (suggesting that the EEOC play a more active role in overseeing implementation of consent decrees in private class actions); David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. [] (forthcoming 2014) (proposing that the EEOC be granted sweeping gatekeeping powers over all class actions and systemic job discrimination suits). Evaluating these proposals is beyond the scope of this Article; however, our study suggests caution. Giving the Commission an expanded role in private class actions is unlikely to prove transformative of its practices, unless the political, legal and resource realities that shape the EEOC's activities are also significantly changed.

<sup>242</sup> The Supreme Court's recent decision in *Wal-Mart v. Dukes* implicitly rejected the plaintiffs' attempt to impose more rational personnel practices on the company. Although the decision concerned the technical requirements of Rule 23, the tone of the majority opinion suggests deep skepticism about any claim of discrimination not founded in demonstrable animus. In denying class certification, the Court in effect rejected the plaintiff's theory that Wal-Mart's organizational structures systematically disadvantaged women because of its failure to establish any criteria for pay and promotion decision, or to post available management jobs. If the Court were to move substantive doctrine toward requiring proof of specific discriminatory intent by a culpable actor, that would weaken the ability of the EEOC to push even the standardizing bureaucratic responses we document.