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THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND STRUCTURAL REFORM OF THE AMERICAN WORKPLACE

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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.[1] 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 Ninth Circuit, the Supreme Court held in *Wal-Mart v. Dukes* that the proposed class failed to meet the requirements for class action certification under Rule 23 of the Federal Rules of Civil Procedure.[2] Although the decision

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1. Wal-Mart v. Dukes, 131 S. Ct. 2541 (2011).

2. 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 discretionary 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 not have been certified under Rule 23(b)(2); cases in which the

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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 workplace, or an implicit rejection of more expansive theories of employer liability under Title VII.[3]

While class litigation has continued in the wake of *Wal-Mart*, the opinion clearly has made it more difficult to obtain certification of private employment discrimination class actions.[4] As a result, the role of the Equal Employment Opportunity Commission (EEOC) in seeking structural reform of the workplace has gained comparative importance. Unlike private litigants, the EEOC need not comply with the requirements of Rule 23 when it brings suit on behalf of a group of aggrieved individuals.[5] 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.[6] The EEOC's reports have stressed its "unique role and responsibility in combating systemic discrimination" and emphasized the importance of

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monetary relief is not incidental to injunctive or declaratory relief should proceed as 23(b)(3) class actions, if at all. *Id.* at 2561; *id.* at 2558 (majority opinion).

3. *See, e.g.*, Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 395 (2011) [hereinafter Green, *Future of Systemic Disparate Treatment Law*]; Melissa Hart, *Civil Rights and Systemic Wrongs*, 32 BERKELEY J. EMP. & LAB. L. 455 (2011) [hereinafter Hart, *Civil Rights*]; John M. Husband & Bradford J. Williams, Wal-Mart v. Dukes *Redux: The Future of the Sprawling Class Action*, 40 COLO. LAW. 53 (2011); Suzette M. Malveaux, *How Goliath Won: The Future Implications of* Dukes v. Wal-Mart, 106 NW. U. L. REV. COLLOQUY 34 (2011); Michael Selmi, *Theorizing Systemic Disparate Treatment Law: After* Wal-Mart v. Dukes, 32 BERKELEY J. EMP. & LAB. L. 477 (2011); Noah D. Zatz, *Introduction: Working Group on the Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 387 (2011) [hereinafter Zatz, *Future of Systemic Disparate Treatment*]; Sherry E. Clegg, Note, *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).

4. 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); Bell v. Lockheed Martin Corp., No. 08-6292 (RBK/AMD), 2011 WL 6256978 (D.N.J. Dec. 14, 2011); (denying class certification); Stockwell v. City and Cnty. of San Francisco, No. C 08-5180 PJH, 2011 WL 4803505 (N.D. Cal. Oct. 11, 2011) (same), in other cases, courts have granted certification where the facts were distinguishable from *Wal-Mart*. *See, e.g.*, McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482 (7th Cir. 2012) (certifying class action in race discrimination case); Chen-Oster v. Goldman, Sachs & Co, 877 F. Supp.2d 113 (S.D.N.Y. 2012) (granting class certification); Ellis v. Costco Wholesale Corp., 285 F.R.D. 492 (N.D. Cal. 2012) (certifying class action).

5. Gen. Tel. Co. v. EEOC, 446 U.S. 318, 323 (1980).

6. *See id.* at 331.

these cases to its mission.[7] The agency has other advantages in pursuing multi-employee cases: its 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. In the wake of *Wal-Mart*, observers anticipate that the agency will or should play a larger role in bringing systemic cases in the future.[8] And the EEOC has recently recommitted to strengthening its focus on such cases.[9] Given the obstacles to private class actions created by *Wal-Mart* and the EEOC's unique powers to enforce Title VII, the agency's efforts to seek structural reform of workplaces warrant close study. Yet, the recent literature has largely overlooked the role of the EEOC in pursuing structural reform in the workplace.

Early theories of "structural reform" or "public law litigation"—cases that try "to give meaning to [legal] values in the operation of large-scale organizations"[10]—developed in the years after Title VII was passed, and emphasized dramatic legal struggles to transform recalcitrant institutions.[11] Although many of the examples cited involved suits against public entities such as hospitals, prisons, jails, and schools, a number of scholars concurred that large-scale employment discrimination cases fit the public law litigation model.[12] Scholars like Owen Fiss and Abram Chayes, along

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7. EEOC, SYSTEMIC TASK FORCE REPORT 2 (2006), *available at* http://www.eeoc.gov/eeoc/task_reports/upload/systemic.pdf [hereinafter EEOC, SYSTEMIC REPORT].

8. *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; Zatz, *Future of Systemic Disparate Treatment*, *supra* note 3, at 394 (anticipating the EEOC and Department of Justice might bring next wave of systemic disparate treatment cases). *See also* Hart, *Civil Rights*, *supra* note 3, at 475 (suggesting a greater reliance on EEOC enforcement efforts to address systemic discrimination after *Wal-Mart*); Angela D. Morrison, Duke-*ing Out Pattern or Practice after* Wal-Mart*: The EEOC as Fist*, 63 AM. U. L. REV. 87 (2013) (arguing for the EEOC to take on a greater role in pursuing pattern or practice cases after *Dukes*).

9. *See* EEOC, STRATEGIC PLAN FOR FISCAL YEARS 2012–2016, *available at* http://www.eeoc.gov/eeoc/plan/upload/strategic_plan_12to16.pdf; EEOC, SYSTEMIC REPORT, *supra* note 7.

10. Owen Fiss, Foreword, *The Forms of Justice*, 93 HARV. L. REV. 1, 6 (1979) [hereinafter Fiss, *Forms of Justice*]; *see also* OWEN FISS, THE CIVIL RIGHTS INJUNCTION 86–95 (1978) [hereinafter FISS, CIVIL RIGHTS INJUNCTION]. 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." Fiss, *Forms of Justice*, *supra*, at 2.

11. *See generally, e.g.*, Fiss, *Forms of Justice*, *supra* note 10, at 27–28; Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1298–1302 (1976) [hereinafter Chayes, *Public Law Litigation*].

12. *See, e.g.*, 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); Chayes, *Public Law Litigation*, *supra* note 11, at 1284 (listing employment discrimination cases as one of the "avatars" of public law litigation);

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with a crowd of other observers,[13] depicted mammoth cases that provide the occasion for heroic (or imperial[14]) judging or advocacy. Of central importance to these cases was the remedial phase, "a long continuous relationship between the judge and the institution."[15] As Chayes argued, the decree in public law cases typically "provid[ed] for a complex, on-going regime of performance [that] prolongs and deepens, rather than terminates, the court's involvement with the dispute."[16] Thus, the literature described cases that lasted for years, even decades, and cost millions of dollars to litigate, that posed acute challenges to the managerial capacity of courts and offer occasions for power grabs by plaintiffs. Both those who have praised and those who have condemned structural reform litigation have concurred in this general description, which we call the "gladiator theory" of structural reform litigation.

In subsequent years, theorists of structural reform litigation began to explore more collaborative models of reform. 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."[17] Other scholars have seen a similar approach in the workplace context, describing what they term a "structural approach" to solving problems of discriminatory bias.[18] They

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Maimon Schwarzchild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 893 [hereinafter Schwarzchild, *Public Law by Private Bargain*] (asserting that "Title VII litigation [is] a formidable example of 'public law'").

13. 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 n.71 (2006) [hereinafter Schlanger, *Civil Rights Injunctions Over Time*]; Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 1995–97 & nn.10–15 (1999).

14. *See, e.g.*, Nathan Glazer, *Towards an Imperial Judiciary?*, 41 PUB. INT. 104 (1975).

15. Fiss, *Forms of Justice*, *supra* note 10, at 27.

16. Chayes, *Public Law Litigation*, *supra* note 11, at 1298.

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

18. *See generally* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) [hereinafter Sturm, *Second Generation*]; 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) [hereinafter Green, *Discrimination in Workplace Dynamics*]. In their view, the "easy" first generation cases of blatant discrimination are largely gone; discriminatory bias in employment today is more subtle and difficult to detect, yet the structure of the contemporary workplace renders it nonetheless extremely potent. Sturm, *Second Generation*, at 468–74; Green, *Discrimination in Workplace Dynamics*, at 95–108. Effective workplace reform efforts therefore

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.[19] We refer to this vision of civil rights injunctive litigation as the "collaboration theory."

The collaboration theory has in turn come under criticism, as unduly empowering employers and human resources professionals to devise compliance strategies.[20] Because the requirements of the anti-discrimination norm are ambiguous, employers can influence how those norms are operationalized, and their practices in turn shape the meaning of those norms. Law, in other words, is endogenous to its own implementation.[21] Organizational sociologists like Lauren Edelman, Frank Dobbin, and others have found that employers frequently respond to the requirements of anti-discrimination laws in ways that signal compliance with the law while accommodating the organization's managerial interests.[22] Managers have come 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.

The literature just summarized describing structural reform of the workplace suffers from several limitations. First, to the extent that it describes systemic litigation, it has relied on a handful of mega cases that are not necessarily representative.[23] In the 1970s, a prime example was the

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require not battles, but collaborations. Sturm, *Second Generation*, at 475–78; Green, *Discrimination in Workplace Dynamics*, at 144.

19. Susan Sturm, *Equality and the Forms of Justice*, 58 U. MIAMI L. REV. 51, 80 (2003); Sturm, *Second Generation*, *supra* note 18, at 542.

20. *See, e.g.*, Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 25–34 (2006) [hereinafter Bagenstos, *Structural Turn*]; Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659 705–06 (2003) [hereinafter Green, *Targeting Workplace Context*].

21. *See, e.g.*, 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) [hereinafter Edelman et al., *Endogeneity of Legal Regulation*].

22. *See, e.g.*, FRANK DOBBIN, INVENTING EQUAL OPPORTUNITY 220–33 (2009); 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*]; 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*].

23. 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." Schlanger, *Civil Rights Injunctions Over* Time, *supra* note 13, at 571.

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litigation against AT&T.[24] More recently, analysis has featured suits against Shoney's,[25] Home Depot,[26] Wal-Mart,[27] Coca-Cola,[28] and Texaco.[29] Observers disagree on how to interpret these high-profile cases,[30] 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[31]—cases that have gone largely unexamined. Second, the

24. EEOC v. AT&T, 365 F. Supp. 1105 (E.D. Pa. 1973) (documents and information available at UNIV. OF MICH. LAW SCH., THE CIVIL RIGHTS LITIGATION CLEARINGHOUSE [hereinafter CIVIL RIGHTS LITIGATION CLEARINGHOUSE], http://www.clearinghouse.net/detail.php?id=11146). *See, e.g.*, HERBERT R. NORTHRUP & JOHN A. LARSON, THE IMPACT OF THE AT&T-EEO CONSENT DECREE (1979); MARJORIE A. STOCKFORD, THE BELLWOMEN: THE STORY OF THE LANDMARK AT&T SEX DISCRIMINATION CASE (2004).

25. Haynes v. Shoney's, No. 3:89-cv-30093, 1993 WL 19915 (N.D. Fla. Jan. 25, 1993) (documents and information available at CIVIL RIGHTS LITIGATION CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=10711). *See, e.g.*, Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. REV. 367 (2008) [hereinafter Levit, *Megacases*].

26. Butler v. Home Depot, No. 3:94-cv-04335 (N.D. Cal., filed Dec. 19, 1994) (documents and information available at CIVIL RIGHTS LITIGATION CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=9471). *See, e.g.*, Sturm, *Second Generation*, *supra* note 18; Levit, *Megacases*, *supra* note 25; Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249 (2003) [hereinafter Selmi, *Price of Discrimination*]; Lynn Perry Wooten & Erika Hayes James, *When Firms Fail to Learn: The Perpetuation of Discrimination in the Workplace*, 13 MGMT. INQUIRY 23 (2004).

27. Wal-Mart v. Dukes, 131 S. Ct. 2541 (2011) (documents and information available at CIVIL RIGHTS LITIGATION CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=10697). *See, e.g.*, LIZA FEATHERSTONE, SELLING WOMEN SHORT: THE LANDMARK BATTLE FOR WORKERS' RIGHTS AT WAL-MART (2004).

28. Ingram v. Coca-Cola Co., 200 F.R.D. 685 (N.D. Ga. 2001) (documents and information available at CIVIL RIGHTS LITIGATION CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=9473). *See, e.g.*, Levit, *Megacases*, *supra* note 25; Henry Unger, *Discrimination Lawsuit Coca-Cola Accused of "Company-wide Pattern,"* ATLANTA J.-CONST., Apr. 24, 1999, at H1.

29. Roberts v. Texaco, Inc., 979 F.Supp. 185 (S.D.N.Y. 1997) (for documents and information, see CIVIL RIGHTS LITIGATION CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id= 8162). *See, e.g.*, 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. (2005), *available at* http://www.dmwlawfirm.com/resources/Texaco%20Case% 20Study.pdf; Levit, *Megacases*, *supra* note 25; Selmi, *Price of Discriminaton*, *supra* note 26.

30. Selmi and Sturm disagree, for example, on nearly everything important about the Home Depot case. *Compare* Selmi, *Price of Discrimination*, *supra* note 26, at 1281–89 (characterizing Home Depot's response to class litigation as an example of recalcitrance), *with* Sturm, *Second Generation*, *supra* note 18, at 509–19 (describing consent decree reached in Home Depot litigation as an innovative solution).

31. Employment discrimination suits were and remain one of the largest components of federal court civil litigation. *See* ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2006, 2006 tbl. C-2A (2006), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2006/appendices/c2a.pdf; ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2012, 2012 TBL. C-2A (2012), *available at* http://www.

almost exclusive focus of the recent literature has been on cases brought by private counsel, with little or no attention paid to the enforcement efforts of the EEOC or the role that might be played by the agency in seeking structural reforms.[32] Finally, the sociological literature, while attentive to firms' responses to the general legal environment, has largely neglected the role of the EEOC in that process in recent years.

In this Article, we begin to fill these gaps by systematically analyzing the EEOC's litigation activities and the injunctive relief it obtained in cases brought over a ten-year period, from fiscal years 1997 to 2006.[33] Our focus is on the most "class-like" of the EEOC's cases—those most likely aiming at structural reform of the workplace—which we examine in light of the existing literature. We find that neither the early description of public law litigation, the gladiator theory, nor more recent, experimentalist accounts of institutional reform, the collaboration theory, depicts the reality of the EEOC's practices in systemic cases. Unlike the depiction of structural reform litigation in the gladiator theory, 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 anti-discrimination 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.

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uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/C02ASep12.pdf. The vast majority of employment discrimination suits are brought by private counsel.

32. For example, Susan Sturm and Michael Selmi make only brief mention of the EEOC in their studies of large-scale employment discrimination cases. *See, e.g.*, Selmi, *Price of Discrimination*, *supra* note 26, at 1330–31; Sturm, *Second Generation*, *supra* note 18, at 550–53.

33. 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.

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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 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 theories do not accurately describe 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. The adoption of these forms of injunctive relief is consonant with the sociological literature on how firms respond in non-litigation contexts to anti-discrimination law. Thus, we argue that the EEOC'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.

Our argument unfolds as follows: We begin in Part I by surveying 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

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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 this evidence in light of the theoretical literature.[34] We conclude that the EEOC's injunctive practices are best understood as pursuing standard, bureaucratic personnel practices that have helped to promote and ratify the managerialist responses adopted by many organizations. We finish by briefly assessing the EEOC's efforts to address systemic discrimination in the Conclusion.

I. THE PRIOR LITERATURE

In this Part, we review the literatures regarding structural reform litigation and the impact of anti-discrimination norms in the workplace.

A. The Gladiator Theory

The early scholarship on the topic magnified the image of structural reform litigation, giving the impression that civil rights injunctive cases are almost invariably the sites of long- and hard-fought struggles for justice. In *Against Settlement*, in 1984, Owen Fiss described cases in which courts "seek to safeguard public values by restructuring large-scale bureaucratic organizations" in dramatic terms: "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."[35] In his view, ongoing disputes and judicial involvement were "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

34. All data and replication code are posted online. *See* http://margoschlanger.net; & http://eeoc litigation.wustl.edu/. The Civil Rights Litigation Clearinghouse archives relevant case documents and other information. *See* CIVIL RIGHTS LITIGATION CLEARINGHOUSE, *available at* http://www.clearing house.net/results.php?searchSpecial Collection=1.

35. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1083 (1984).

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> to modify the decree, either to make it more effective or less stringent.[36]

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.[37]

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.[38]

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 precise role, judges' "time-consuming and cumbersome supervision" is said to be characteristic of structural reform litigation.[39]

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36. *Id.*

37. Fiss, *Forms of Justice*, *supra* note 10, at 2.

38. Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 52 (1979) (footnote call numbers omitted).

39. Adam M. Gershowitz, *Raise the Proof: A Default Rule for Indigent Defense*, 40 CONN. L. REV. 85, 123 (2007).

http://openscholarship.wustl.edu/law_lawreview/vol91/iss6/7

Even some 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. In a 2007 article, John Jeffries and George Rutherglen, for example, highlighted 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."[40] And Ross Sandler and David Schoenbrod have criticized public law litigation for the authority it offers plaintiffs' lawyers in countless rounds of post-liability negotiations.[41]

Discussion of public law litigation sometimes focused on the public status of the defendants. But usually, employment discrimination cases were considered part and parcel of the phenomenon of structural reform litigation. Abram Chayes, for example, described employment discrimination cases as one of the "avatars of this new form of litigation."[42] Similarly, Maimon Schwarzchild labeled Title VII litigation a "formidable example" of public law or structural litigation.[43] Discrimination cases brought against private employers were classified as "public" based on their broad impact. As Schwarzchild explained:

> 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.[44]

Thus, the employment class action, which aimed at reforming an employer's personnel practices to eradicate systemic bias, was viewed as a prototypical example of public law litigation in the scholarly literature. Because of its emphasis on the dramatic quality of this litigation, characterized by intense litigation battles, on-going judicial involvement

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40. John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CAL. L. REV. 1387, 1409 (2007).

41. For examples of a litigant-focused analysis that makes these points, see generally 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. LITIG. 115 (2007).

42. Chayes, *Public Law Litigation*, *supra* note 11, at 1284.

43. Schwarzchild, *Public Law by Private Bargain*, *supra* note 12, at 893.

44. *Id.*

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and persistent disputing over implementation, we refer to this depiction of structural reform litigation in employment as the gladiator theory.

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 interpretations 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."[45] Building on "democratic experimentalist" ideas about regulation[46] 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 goals. At the same time, it specifies both standards and procedures for the measurement of the institution's performance.[47]

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. "[B]ecause experimentalist remedies contemplate a permanent process of ramifying, participatory self-revision rather than a one-time readjustment to fixed criteria,"[48] significant post-decretal engagement by the parties, under the supervision of the court, is contemplated. On the other hand, courts are

45. Sabel & Simon, *Destabilization Rights*, *supra* note 17, at 1019.

46. *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).

47. Sabel & Simon, *Destabilization Rights*, *supra* note 17, at 1019.

48. *Id.* at 1020.

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."[49]

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. These forms of "second generation discrimination" are the product of workplace structures, rather than "deliberate exclusion or subordination based on race or gender."[50] Scholars attribute second-generation discrimination to psychological processes, such as unconscious racism or implicit cognitive bias,[51] as well as a firm's culture and organizational structure. Susan Sturm, for example, argues that patterns of interaction such as undermining or "freezing out" by colleagues, or exclusion from important training and mentoring opportunities can block the progress of members of disfavored groups.[52] Tristin Green similarly argues that developments such as the breakdown of internal labor markets, the replacement of fixed job ladders with "flattened hierarchies," the emphasis on flexibility and the growth of peer assessments, which diffuse responsibility for decision making, make it more difficult to identify discrete discriminatory acts.[53] Importantly, this form of discrimination results not from a discrete, individual action, but from "ongoing patterns of interaction shaped by organizational culture."[54]

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49. *Id.*

50. Sturm, *Second Generation*, *supra* note 18, at 466–68.

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

52. *See* Sturm, *Second Generation*, *supra* note 18, at 468–69.

53. Green, *Discrimination in Workplace Dynamics*, *supra* note 18, at 99–104. *See generally* Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519 (2001).

54. Sturm, *Second Generation*, *supra* note 18, at 470.

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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.[55] Others, more relevant to this project, have argued that because bias results from organizational structure, any effective remedy must be "structural" as well. Thus, Green argues that a "contextualized, multifaceted problem-solving process [is] needed for change."[56] Similarly, Sturm calls for a "de-centered, holistic, and dynamic approach" to litigation[57] that 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 . . . ."[58]

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."[59] 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 benefit the relevant legal norms exist."[60] Establishing meaningful tripartism has been made more difficult, however, by the steep decline in unionization rates. Thus, she argues that a crucial element of any effective regime of self-regulation is "[i]ndependent outside monitoring with direct input from employees."[61] Employee participation is essential to the success of self-regulation because employee representatives can not only help devise and

55. *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); Green, *Discrimination in Workplace Dynamics*, *supra* note 18.

56. Green, *Discrimination in Workplace Dynamics*, *supra* note 18, at 156.

57. Sturm, *Second Generation*, *supra* note 18, at 462.

58. *Id.* at 463.

59. Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 321 (2005) [hereinafter Estlund, *Rebuilding the Law*].

60. *Id.* at 323.

61. *Id.* at 356.

implement flexible, relevant substantive changes in the workplace, they are also in the best position to monitor firm compliance.[62]

This recent work on experimentalist forms of litigated remedies has both descriptive and normative components. As a descriptive matter, it 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.[63] Similarly, Sturm explores three cases studies as concrete examples of new types of collaborative efforts to identify and address manifestations of workplace bias.[64]

The normative implications of this work are more ambiguous. Although some scholars, particularly Sturm, appear to strongly endorse a collaborative problem-solving approach within anti-discrimination litigation, others are more ambivalent. Green observes that the complexity of structural discrimination and the need for collaborative, flexible problem-solving raises the risk that attempts at structural change will "trigger symbolic rather than meaningful organizational reform."[65] Estlund similarly worries that an emphasis on self-regulation has "the potential to divert crucial public resources from the task of securing compliance with public norms."[66] Some scholars are outright critical of the collaborative approach. Samuel Bagenstos, for example, expresses skepticism that it will be successful, in part because it entails deference to "professional communities—such as those of human relations professionals and lawyers—that are as likely to subvert as to promote norms of workplace equality."[67] Much of the uncertainty and skepticism about the collaborative approach stem from the findings of organizational sociologists, whose work we explore in the next Part.

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62. *Id.* at 358.

63. *See* Green, *Discrimination in Workplace Dynamics*, *supra* note 18, at 155.

64. *See* Sturm, *Second Generation*, *supra* note 18, at 491.

65. Green, *Targeting Workplace Context*, *supra* note 20, at 709. *See also* Green, *Future of Systemic Disparate Treatment Law*, *supra* note 3, at 449 ("The risk remains . . . that courts and other players—including class action lawyers—will defer to employer-initiated compliance efforts or will rubber stamp symbolic measures over effective ones.")

66. Estlund, *Rebuilding the Law*, *supra* note 59, at 321.

67. Bagenstos, *Structural Turn*, *supra* note 20, at 3.

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C. The Managerialism Theory

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. Their work does not focus on injunctive remedies per se, but instead on how firms respond to the general litigation threat posed by Title VII and other anti-discrimination statutes. They explain that when confronted with the legal mandate forbidding discrimination, firms sought to develop responses that signaled "a visible commitment to the law."[68] At the same time, firms viewed anti-discrimination 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."[69] In other words, ambiguity leaves firms greater leeway to "construct the law in a manner that is minimally disruptive to the status quo,"[70] and as they internalize the law, it becomes "infused with managerial values."[71]

The process unfolded over time, with personnel professionals gaining influence in defining compliance and courts ratifying those responses. Dobbin writes that "[i]t 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."[72] 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

68. Edelman, *Legal Ambiguity*, *supra* note 22, at 1542.
69. *Id.* at 1536, 1542.
70. *Id.* at 1535.
71. Lauren B. Edelman et al., *Diversity Rhetoric*, *supra* note 22, at 1592.
72. DOBBIN, INVENTING EQUAL OPPORTUNITY, *supra* note 22, at 220.

legal defense in court.[73] Nevertheless, accounts of the value of grievance procedures were "told and retold"[74] 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.[75] 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.[76] 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.[77] But

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73. *See* Edelman et al., *Endogeneity of Legal Regulation*, *supra* note 21, at 409.

74. *Id.* at 408.

75. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 807–08 (1998); Burlington Indus. Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

76. *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? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOCIOLOGICAL REV. 589 (2006) [hereinafter Kalev, Dobbin, & Kelly, *Best Practices*].

77. *See, e.g.*, Bagenstos, *Structural Turn*, *supra* note 20, at 29 (expressing skepticism that responses like dispute resolution procedures and training programs actually result in equal treatment and non-discrimination); 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 BERKELEY J. EMP. & LAB. L. 1, 4–6 (2001) [hereinafter Bisom-Rapp, *Ounce of Prevention*] (arguing that anti-discrimination training may actually increase bias and undermine enforcement of employment discrimination law); Edelman et al., *Endogeneity of Legal Regulation*, *supra* note 21 (finding that EEO grievance procedures represented strategic attempts at rational compliance given lack of evidence of their value when initially adopted); Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 4–5 (2003) (contending that sexual harassment grievance procedures and training programs represent a triumph of form over substance); Kalev, Dobbin, & Kelly, *Best Practices*, *supra* note 76, at 610–11 (evaluating efficacy of corporate EEO policies and finding that some have little or no effect on increasing diversity in management); Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003) (arguing that

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whether they work or not, these sorts of managerialist responses are now prevalent.

The sociological literature on managerialist responses to anti-discrimination 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.[78] 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,[79] in more recent class actions, private litigants have been content with remedies like EEO training and diversity initiatives—the types of responses documented—and frequently criticized—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."[80] 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

internal compliance structures like those promoted by employment discrimination doctrine are costly and largely ineffective); Anne Lawton, *Operating in an Empirical Vacuum: the* Ellerth *and* Faragher *Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 198–99 (2004) (asserting that the affirmative defense recognized in *Ellerth* and *Faragher* reward employers for developing policies and procedures that do not actually deter sexual harassment).

78. To the extent that the sociological literature deals with EEO litigation, it is concerned more with damage actions and the monetary incentives they create than with injunctive requirements. Alexandra Kalev & Frank Dobbin, *Enforcement of Civil Rights Law in Private Workplaces: The Effects of Compliance Reviews and Lawsuits Over Time*, 31 L. & SOC. INQUIRY 855 (2006); Sheryl Skaggs, *Producing Change or Bagging Opportunity? The Effects of Discrimination Litigation on Women in Supermarket Management*, 113 AM. J. SOC. 1148 (2008); Sheryl Skaggs, *Legal-Political Pressures and African American Access to Managerial Jobs*, 74 AM. SOC. REV. 225 (2009). There are, however, a few sociology papers that examine the impact of injunctions on workplace diversity. *See* Elizabeth Hirsh & Youngjoo Cha, *For Law and Markets? Employment Discrimination Law Suits, Market Performance, and Managerial Diversity* (Working Paper), *available at* http://faculty.chicagobooth.edu/workshops/orgs-markets/pdf/HirshMarketsWin2014.pdf; Wooten & James, *supra* note 26.

79. Selmi, *Price of Discrimination*, *supra* note 26, at 1298–99.

80. *Id.* at 1251.

reform."[81] 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.[82] 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.[83] His focus is therefore on the private class action, and he does not claim that his portrait of private remedies describes the EEOC's litigation practice. Indeed, Selmi acknowledges differences between private lawyers and the EEOC.[84] 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 reform and to assist complainants based on the merits, not the monetary value, of their claims.[85] 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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81. *Id.* at 1331.

82. *See id.* at 1297.

83. *See* 18 U.S.C. § 1981a (2012).

84. 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. *See id.* at 1311. At the same time, he criticizes the agency's recent efforts in large class action suits as "almost comically inept." *Id.* 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. *See 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").

85. *See, e.g.*, EEOC, SYSTEMIC REPORT, *supra* note 7, at 1.

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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, without much regard to whether they operate to integrate the workplace. 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.[86] The Commission processes tens of thousands of charges annually, investigating the allegations and determining whether or not there is cause to believe that discrimination occurred.[87] 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

86. 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, *see* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2012); Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2012), age, *see* the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2012), and disability, *see* the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2012). 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. *See* 42 U.S.C. §§ 2000ff to 2000ff-11 (2012). Alternatively, employees may file charges with state fair employment agencies where they exist. For simplicity, we refer here only to the EEOC's role.

87. *See, e.g.*, *Charge Statistics FY 1997 Through FY 2013*, EEOC, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Aug. 16, 2014).

court.[88] 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 twenty-five thousand employment discrimination cases each year in federal district courts.[89] 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.[90] The charging party has the right to retain her own lawyer and intervene in the EEOC's lawsuit.[91]

During the period of this study, the EEOC filed a few hundred cases each year in federal court.[92] 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 anti-discrimination policy, they essentially addressed individual grievances. In other cases, the EEOC aimed to have a broader effect. In carrying out its mission of "promot[ing] equality of opportunity in the workplace,"[93] the Commission has—to varying degrees over time—emphasized its commitment to opposing systemic discrimination.[94] A 2006 Task Force Report highlighted the Commission's

88. Section 706 of Title VII of the Civil Rights Act of 1964, 29 U.S.C. § 2000e-5 (2012); 29 C.F.R. § 1601.28(a) (2013).

89. *See* ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, tbl. C-2A, annually, for years 1997–2006, *available at* http://www.uscourts.gov/Statistics/JudicialBusiness/archive.aspx (follow each year hyperlink; under "Detailed Statistical Tables, the link for "U.S. District Courts—Civil," and then follow "C-2A").

90. 42 U.S.C. § 2000e-5 (2012). 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 84, at 5; Belton, *supra* note 12, at 918. 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.

91. On occasion, a charging party obtains a right to sue letter and files suit in federal court first. The EEOC may then choose to intervene in the private lawsuit. *See* OFFICE OF GEN. COUNSEL, EEOC, REGIONAL ATTORNEYS' MANUAL (2005), *available at* www.eeoc.gov/eeoc/litigation/manual. Based on the cases sampled in the EEOC Litigation Project, this party configuration is far less common.

92. 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 2013*, EEOC, http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm (last visited Aug. 16, 2014); EEOC, PERFORMANCE AND ACCOUNTABILITY REPORT, FY 2012 (2012), *available at* http://www.eeoc.gov/eeoc/plan/2012par_discussion.cfm.

93. *See Fiscal Year 2008 Performance and Accounting Report Highlights, Mission Statement*, EEOC, http://www.eeoc.gov/eeoc/plan/archives/annualreports/par/2008/highlights.html (last updated Jan. 9, 2009).

94. 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 Educ. and Labor*, 97th Cong. 321 (1981) (statement of J. Clay Smith, Jr., Acting

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"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."[95] For much of its history the EEOC has seemed to consider its systemic cases the most important component of the agency's litigation docket. These are the cases that receive attention in congressional oversight hearings, and that the EEOC features in its annual reports,[96] agency histories,[97] 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.[98]

But the Commission has not necessarily been successful in fully leveraging these advantages. The Task Force report itself criticized the

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EEOC Chair). These criteria included factors such as low utilization rates of women or minorities and use of policies or practices with a disparate impact on women or minorities. Richard I. Lehr, *EEOC Case-Handling Procedures: Problems and Solutions*, 34 ALA. L. REV. 241, 255–56 (1983) (describing then-extant provision of the EEOC Compliance Manual). 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 Hearing Before House Comm. on Appropriations*, 99th Cong. 332, 338 (1986). *See generally* 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.

95. EEOC, SYSTEMIC REPORT, *supra* note 7, at 1–2.

96. *See, e.g.*, EEOC, FY 2008 PERFORMANCE AND ACCOUNTABILITY REPORT (2008), *available at* http://www.eeoc.gov/eeoc/plan/archives/annualreports/par/2008/par2008.pdf.

97. *See, e.g.*, *Focusing Enforcement Efforts on Systemic Discrimination*, EEOC, http://www.eeoc.gov/eeoc/history/35th/1970s/focusing.html (last visited Aug. 21, 2014).

98. EEOC, SYSTEMIC REPORT, *supra* note 7, at 2.

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."[99] 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 "concentrat[ing] on individual rather than class action litigation"[100] 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.[101] 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 workplace.[102] 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.[103] As explained in detail in Part IV, *infra*, we attempt to identify the EEOC's systemic cases and estimate that they amounted to about 9% of its litigation docket during the period of our study.

Because the Supreme Court's recent opinion in *Wal-Mart* appears to make it more difficult to certify employment discrimination class actions,[104] 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

99. *Id.* at Executive Summary, 1.

100. Selmi, *Value of the EEOC*, *supra* note 84, at 21.

101. 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 fifteen 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. EMPIRICAL LEGAL STUD. 175 (2010).

102. Selmi, *Price of Discrimination*, *supra* note 26, at 1297.

103. *See, e.g.*, EEOC, EEOC, FY 2008 PERFORMANCE AND ACCOUNTABILITY REPORT, *supra* note 96, at 10.

104. *See supra* note 3 and accompanying text.

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of discrimination, and observers expect that it will play a larger role in pursuing systemic discrimination in the future.[105] Understanding its injunctive practices is thus crucial for assessing existing theories of structural reform and considering the prospects for such efforts in the future.

III. THE CASE STUDIES

In order to get a textured sense of the EEOC's injunctive practices during the period of our study, we undertook three case studies by interviewing the lawyers involved and closely examining the case documents. The first case, *EEOC v. Dial Corporation*,[106] alleged sexual harassment of women workers. In the second, *EEOC v. McKesson Water Products*,[107] 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*,[108] on theories of sex and disability discrimination. Although we selected these cases simply to cover a range of situations—big and medium in size, alleging race and sex discrimination, and involving differing roles for private counsel—they turned out to map onto our theoretical landscape well. *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. One feature that emerges from the case studies that is worth highlighting, though it is tangential to this Article's particular project, is that the conduct alleged is not subtle second-generation-type

105. *See supra* Introduction.

106. EEOC v. Dial Corp., 156 F. Supp. 2d 926 (N.D. Ill. 2001) (documents and information available at CIVIL RIGHTS LITIGATION CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=7947).

107. EEOC v. McKesson Water Prods., No. 2:01-cv-09496-FMC-PJW (C.D. Cal., filed Nov. 5, 2001) (documents and other information available at CIVIL RIGHTS LITIGATION CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=9099).

108. EEOC v. PJAX, Inc., No. 2:03-cv-00759-TFM-IJS (W.D. Pa., filed May 27, 2003) was a sexual harassment case. Documents and other information on this case are available at CIVIL RIGHTS LITIGATION CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=8756. EEOC v. PJAX, Inc., 1:03-cv-01535-JFM (D. Md., filed May 27, 2003), concerned hiring. Documents and other information on this case are available at CIVIL RIGHTS LITIGATION CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=8801.

http://openscholarship.wustl.edu/law_lawreview/vol91/iss6/7

discrimination. Rather, the allegations include blatant and egregious race and sex discrimination.[109]

A. Dial[110]*: 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.[111] The EEOC took over two years to investigate; in March 1998, it made a "reasonable cause" finding in her favor.[112] Statutorily required attempts at conciliation made little progress. The EEOC requested $300,000 (the statutory cap) in damages for Allen; Dial offered $5000.[113] 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, and Dial was equally resolute that it would deal only with the charging party's grievance.[114] Accordingly, the EEOC filed suit in May 1999, alleging a pattern and practice of sex discrimination by the creation of a hostile work environment thick with sexual harassment and sex-based harassment, and sought monetary relief for all those who had suffered harassment, as well as prospective injunctive relief.[115]

This case might be thought to meet the "gladiator" description. Dial, a billion dollar company,[116] was a free-spending opponent, and the litigation

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109. For a more systematic analysis that similarly finds a great deal of remaining first-generation discrimination, see VINCENT J. ROSCIGNO, THE FACE OF DISCRIMINATION: HOW RACE AND GENDER IMPACT WORK AND HOME LIVES (2007). Selmi similarly argues that the nature of discrimination in high profile class actions has stayed largely the same, involving overt racial discrimination and stereotyping of women's interests as workers. *See* Selmi, *Price of Discrimination*, *supra* note 26, at 1297.

110. 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 106. Notes from the interviews are on file with the authors.

111. *See Dial*, 156 F. Supp. 2d at 930.

112. *Id.*

113. *Id.* at 941–42.

114. Telephone Interview with Noelle Brennan, former EEOC attorney (Oct. 30, 2009).

115. Complaint at 2–4, *Dial*, 156 F. Supp. 2d 926 (N.D. Ill. 2001) (No. 1:99-cv-03356).

116. *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. Dial was acquired by the German conglomerate Henkel Corporation in 2004 for $2.875 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.

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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.[117] 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 Illinois, rejected these arguments in a thorough opinion in 2001.[118] The EEOC's evidence suggested "that the work environment at [Dial] was sexually charged in a way that was offensive and demeaning to women."[119] 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 making suggestive or threatening remarks, as well as open displays of sexually explicit materials.

For two years, the case proceeded towards jury trial, which was eventually scheduled for April 28, 2003.[120] 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.[121] 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"[122]) gives much of the credit for

117. *See* Docket, *Dial*, 156 F. Supp. 2d 926 (N.D. Ill. 2001) (No. 1:99-cv-03356), *available at* http://www.clearinghouse.net/chDocs/public/EE-IL-0075-9000.pdf.

118. *See Dial*, 156 F. Supp.2d 926.

119. *Id.* at 950.

120. In the meantime the EEOC filed another, unrelated case against the Dial Corporation, involving allegations of discriminatory physical tests for factory jobs in a meat 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 8th Circuit in 2006. *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) (documents and information available at CIVIL RIGHTS LITIGATION CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=9306).

121. *See* EEOC v. Dial Corp., No. 1:99-cv-03356 (N.D. Ill., Feb. 14, 2003), *available at* http://www.clearinghouse.net/chDocs/public/EE-IL-0075-0018.pdf.

122. Telephone Interview with George F. Galland, Dial Monitor (Oct. 28, 2009).

the subsequent settlement to that ruling; it provided, he says, "powerful leverage,"[123] because it allowed the EEOC to "structure the case for trial in a way that was, we thought, equitable but very favorable."[124] 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 Dial's corporate leadership and their 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.[125] Dial's status as a familiar household brand ("Aren't you glad you use Dial? Don't you wish everybody did?"[126]), 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!"[127]

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.[128] 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.[129] The amount was at the time the second highest sexual harassment settlement in the Commission's history,[130] and

123. Telephone Interview with John Hendrickson, Regional Attorney, EEOC (Oct. 16, 2009).

124. *Id.*

125. *See id.*

126. *See 65 Years of Dial*, DIAL SOAP, http://www.dialsoap.com/65-years-of-dial (last visited Aug. 21, 2014) (follow "Select a decade: 1950" and then follow the arrows through "Facts" until reaching 1953).

127. Interview with John Hendrickson, *supra* note 123.

128. Joint Motion for Entry of Consent Decree at ¶ 17, EEOC v. Mitsubishi Motor Mfg. of Am., Inc., 990 F. Supp. 1059 (C.D. Ill. 1998) (No. 1:96-cv-01192-JBM). Documents and information are available at CIVIL RIGHTS LITIGATION CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=9787.

129. Consent Decree at ¶ 20, EEOC v. Dial Corp., No. 1:99-cv-003356 (N.D. Ill. 2003), *available at* http://www.clearinghouse.net/chDocs/public/EE-IL-0075-0006.pdf.

130. 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., No. 4:98-

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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. In the end, about 100 claimants received a total of about $10 million in disbursed damages.[131] And 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 . . . .[132]

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, or new district court complaint.

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cv-40014-NMG, 1999 WL 342043 (D. Mass May 20, 1999), at *1 (documents and information available at CIVIL RIGHTS LITIGATION CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=8308); Joint Motion for Entry of Consent Decree, *supra* note 128.

131. Press Release, EEOC, Monitors Report Consent Decree in Sexual Harassment Case is Working at Dial (May 26, 2004), *available at* http://www.clearinghouse.net/chDocs/public/EE-IL-0075-0010.pdf.

132. Consent Decree at 4–5, *Dial*, *supra* note 129.

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 . . . ."[133] 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.[134] And Dial agreed to post notices throughout its plant explaining the decree and the anti-harassment policy[135]—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,[136] and to "link" "evaluation of [each] supervisor's handling of equal employment opportunity issues . . . directly to supervisor salary/bonus structure."[137] 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.[138] "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."[139] 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

133. *Id.* at 11.
134. *Id.* at 12.
135. *Id.* at 11.
136. *Id.*
137. *Id.* at 12.
138. Interview with John Hendrickson, *supra* note 123.
139. *Id.*

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itself, he had previously 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.[140]

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.[141] 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.[142]

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 nine 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 violations, or because the EEOC's own relationship with Dial was insufficiently cordial[143] 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."[144] And the EEOC's lawyers we interviewed agreed that when a settlement seems to need a great deal of follow-up, they try to get a monitor or consultant appointed rather than seeking

140. For the identities of the monitors, see Consent Decree at 13, *Dial*, *supra* note 129. For their backgrounds, see Telephone Interview with Nancy Kreiter, Dial Monitor (Nov. 18, 2009); Interview with Reginald Jones, Dial Monitor (Nov. 11, 2009).

141. Consent Decree at 13, *Dial*, *supra* note 129.

142. *See id*. at 13–15.

143. 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. *See* EEOC v. Dial Corp., No. 4:95-cv-01726 (E.D. Mo. Sept. 13, 1995). 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.

144. Interview with John Hendrickson, *supra* note 123. By contrast, he describes "serious money" as "the lingua franca of business" and therefore more universally sought.

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.[145]

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.[146] 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.[147] 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.[148] 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 Employment Class Action Consent Decree Settlement Survival," 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

145. Final Report of the Consent Decree Monitors to the Parties and the Court, EEOC v. Dial Corp., No. 1:99-cv-03356 (N.D. Ill., 2005), *available at* http://www.clearinghouse.net/chDocs/public/EE-IL-0075-0012.pdf.

146. Interview with Nancy Kreiter, *supra* note 140.

147. Interview with John Hendrickson, *supra* note 123.

148. Telephone Interview with Anonymous Source (Nov. 2009).

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> litigation posture they will subvert the healing and normalization that the settlement contemplates.[149]

Although it is impossible to determine whether monitoring or some other factor was responsible, the 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.[150]

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.[151] 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.[152]

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 discovery and substantive motions than usual—twelve, which puts it at the ninety-fifth percentile of resolved cases in the sample. And it took longer than usual to come to closure—nearly four years (ninety-seventh percentile). Its decree is relatively long—nineteen pages (seventy-sixth 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[153]*: Collaborationist?*

In 1998, Steven Crutchfield and seven other African-American employees filed charges with the EEOC accusing their employer of race

149. Reginald E. Jones, *Ten Tips for Employment Class Action Consent Decree Settlement Survival*, THE PRACTICAL LITIGATOR, Sept. 2006, at 37.

150. *See, e.g.*, Second Year Report of the Consent Decree Monitors to the Parties and to the Court, *Dial*, No. 1:99-cv-03356 (N.D. Ill. 2005), *available at* http://www.clearinghouse.net/chDocs/public/EE-IL-0075-0015.pdf; Final Report of the Consent Decree Monitors to the Parties and the Court, *Dial*, No. 1:99-cv-03356 (N.D. Ill. 2005), *available at* http://www.clearinghouse.net/chDocs/public/EE-IL-0075-0012.pdf.

151. *See* Docket, *Dial*, *supra* note 117.

152. Interview with Reginald Jones, Dial Monitor (Nov. 11, 2009).

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

http://openscholarship.wustl.edu/law_lawreview/vol91/iss6/7

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.[154] Crutchfield's cousin's husband was Tony Lawson, an experienced class action employment lawyer in private practice, and Lawson represented the complaining employees from the start.[155] He was able to devote substantial resources to it because of a grant he received from the Impact Fund,[156] an organization that provides support to small firms litigating big civil rights cases.[157] 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."[158] The EEOC's investigation supported the charging parties' claims.[159] 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."[160] 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.[161] 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.[162] Indeed, French management got very much involved, even flying over to negotiate settlement terms. In addition,

154. Press Release, EEOC, Court Approves $1.2 Million Settlement Between EEOC and McKesson for Race Discrimination (Mar. 6, 2002), *available at* http://www.eeoc.gov/press/3-6-02.html; http://www.clearinghouse.net/chDocs/public/EE-CA-0138-0003.pdf; Amended Consent Decree, EEOC v. McKesson Water Prods. Co., Case No. 2:01-cv-09496-FMC-PJW, (C.D. Ca., May 10, 2002), *available at* http://www.clearinghouse.net/chDocs/public/EE-CA-0138-0002.pdf.

155. Telephone Interview with Tony Lawson, Attorney, Lawson Law Offices (Nov. 4, 2009).

156. *Id.*

157. *See* IMPACT FUND, http://www.impactfund.org/index.php?cat_id=4 (last visited Aug. 21, 2014).

158. Press Release, *supra* note 154.

159. Amended Consent Decree, *McKesson*, *supra* note 154.

160. Interview with Tony Lawson, *supra* note 155.

161. Indraneel Sur, *McKesson to Sell Sparkletts Unit to French Food Firm*, L.A. TIMES (Jan. 12, 2000), http://articles.latimes.com/print/2000/jan/12/business/fi-53114.

162. Telephone Interview with Kendra Tanacea, Attorney (Nov. 5, 2009).

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Danone's American general counsel, who was African American, was very interested in cleaning shop in its new acquisition.[163]

On November 5, 2001, the parties filed, simultaneously, the EEOC's complaint, a private intervenors' complaint, class certification papers, and a proposed consent decree.[164] 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, eighty-five 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.[165]

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.[166]

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,[167] and—guided, class counsel Tony Lawson says, by workers' preferences—route assignments went from

163. Interview with Tony Lawson, *supra* note 155; Telephone Interview with Jocelyn Larkin, Attorney, Impact Fund (Oct. 19, 2009).

164. *See* Docket, EEOC v. McKesson Water Prods., No. 2:01-cv-09496-FMC-PJW (C.D. Cal., filed Nov. 5, 2001), *available at* http://www.clearinghouse.net/chDocs/public/EE-CA-0138-9000.pdf.

165. *See* Amended Consent Decree, *McKesson*, *supra* note 154, at 15.

166. *See id.*

167. Interview with Tony Lawson, *supra* note 155; *see* Amended Consent Decree, *McKesson*, *supra* note 154, at 15.

http://openscholarship.wustl.edu/law_lawreview/vol91/iss6/7

discretionary to seniority-based.[168] 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.

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 [defendant] shall also post all job openings covered by this Decree on an online system accessible to all employees.[169]

The decree sets out similarly detailed provisions governing job bidding, route-assignment criteria, and route compensation.[170]

Asked how the decree became so detailed, the participants report several causes. Private plaintiffs' counsel emphasized their overall approach. They had a good deal of experience negotiating non-EEOC consent decrees, and tended, they themselves said, to take what some might consider an "overinclusive" approach to decree terms.[171] And because they had negotiated many prior decrees, including in some large

168. Interview with Tony Lawson, *supra* note 155; Interview with Jocelyn Larkin, *supra* note 163; Amended Consent Decree, *supra* note 167, at 15.

169. Amended Consent Decree, *McKesson*, *supra* note 154, at 14.

170. *See id.* at 14–16.

171. Interview with Kendra Tanacea, *supra* note 162.

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cases,[172] 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.[173] 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.[174]

A fourth important difference between the *McKesson* decree and most of the EEOC decrees in our sample is its five-year term—exceptionally long for an EEOC settlement.[175] 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 pay unspecified future fees for securing approval of the decree and implementing it over that five-year term.[176]

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[177]), 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.[178] It was even their phone number that was posted for reporting any subsequent complaints by employees.[179] They coordinated and led the drafting of new policy, at meetings involving Danone management and class counsel (but not the EEOC).[180] And class counsel, paid for their time by Danone under

172. 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. Interview with Tony Lawson, *supra* note 155; Interview with Kendra Tanacea, *supra* note 162.

173. Telephone Interview with Dana Johnson, Attorney, EEOC (Nov. 2009).

174. Interview with Jocelyn Larkin, *supra* note 163.

175. For more information, see Table 5, row 3.

176. *See* Amended Consent Decree, *McKesson*, *supra* note 154.

177. For more on Ms. Olguin's husband, District Judge Fernando Olguin, see generally *Biographical Directory of Federal Judges*, FED. JUD. CTR., http://www.fjc.gov/servlet/nGetInfo?jid=3454 (last visited Aug. 21, 2014); Press Release, The White House, President Obama Nominates Two to Serve on the US District Court (May 14, 2012), *available at* http://www.white house.gov/the-press-office/2012/05/14/president-obama-nominates-two-serve-us-district-court.

178. *See* Amended Consent Decree, *McKesson*, *supra* note 154, at 11.

179. Telephone Interview with Heidi-Jane Olguin, President, Progressive Management Resources (Nov. 5, 2009).

180. *Id.*; Interview with Kendra Tanacea, *supra* note 162.

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.[181]

As in the *Dial* litigation, where interview subjects emphasized that cases that called for 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."[182] 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."[183] 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."[184]

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,

181. Interview with Kendra Tanacea, *supra* note 162.
182. Interview with Tony Lawson, *supra* note 155.
183. Telephone Interview with Anna Park, Regional Attorney, EEOC (Nov. 20, 2009).
184. *Id.*

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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.[185]

So if *McKesson* is a collaborative case, the features that put it in that category may reflect the involvement of private 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 for their 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—stem from the same causes.

C. PJAX[186]*: 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.[187] 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

185. Interview with Tony Lawson, *supra* note 155.

186. This case study is based on review of two cases, both captioned *EEOC v. PJAX, Inc.*, 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.

187. *See* Complaint, EEOC v. PJAX, Inc., 1:03-cv-01535-JFM (D. Md., filed May 27, 2003), *available at* http://www.clearinghouse.net/chDocs/public/EE-MD-0093-0001.pdf [hereinafter Md. Complaint, *PJAX*]; Complaint EEOC v. PJAX, Inc., 2:03-cv-00759-TFM-IJS (W.D. Pa., filed May 27, 2003), *available at* http://www.clearinghouse.net/chDocs/public/EE-PA-0133-0002.pdf [hereinafter Pa. Complaint, *PJAX*].

http://openscholarship.wustl.edu/law_lawreview/vol91/iss6/7

personal chores for the owners such as picking up laundry and having the owners' personal cars cleaned.[188] One complainant said she was asked by a PJAX manager to perform sexual favors for his bookie, in order to reduce his gambling debt.[189] 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,[190] 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[191]; the EEOC's Maryland lawyer reports of PJAX that "they didn't seem to take conciliation very seriously."[192] In May 2003, the EEOC simultaneously brought two suits in two different U.S. district courts; a case in the Western District of Pennsylvania focused on the sexual harassment charges while one in the District of Maryland alleged discriminatory failures to hire.[193]

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."[194] 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.[195] At the time, PJAX described the sexual harassment allegations as "unfounded and salacious."[196] Even six years later, in an interview, Hardy continued to describe the sexual harassment case as "vicious."[197] Far from encouraging settlement, in his view those accusations "caused people to be entrenched

188. *See* Md. Complaint, *PJAX*, *supra* note 187.

189. *Id.*

190. Telephone Interview with M. Jean Clickner, Attorney, EEOC (Oct. 20, 2009); Telephone Interview with Debra M. Lawrence, Attorney, EEOC (Nov. 4, 2009).

191. Telephone Interview with W. Scott Hardy, Partner, Cohen & Grisby (Oct. 30, 2009).

192. Interview with Debra M. Lawrence, *supra* note 190.

193. *See* Md. Complaint, *PJAX*, *supra* note 187; Pa. Complaint, *PJAX*, *supra* note 187.

194. Interview with W. Scott Hardy, *supra* note 191.

195. Press Release, EEOC, PJAX, Inc. Charged with Sexual Harassment and Failure to Hire Class of Women for Non-Traditional Jobs (May 27, 2003) (on file with authors).

196. Lou Ransom, *U.S. Files Sex-Harassment Lawsuits Against Trucking Company*, PITTSBURGH TRIB. REV. (May 28, 2003), http://triblive.com/x/pittsburghtrib/business/s_136705.html.

197. Interview with W. Scott Hardy, *supra* note 191.

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and to want to defend themselves even more, and held up the resolution of the Baltimore [hiring] case."[198] 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."[199] 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."[200]

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.[201] 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.[202]

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

198. *Id.*
199. Interview with M. Jean Clickner, *supra* note 190.
200. Interview with Debra M. Lawrence, *supra* note 190.
201. The length of litigation puts PJAX at the sixteenth percentile on this measure; *cf.* Table 6.
202. Consent Decree, EEOC v. PJAX, Inc., 2:03-cv-00759-TFM-IJS (W.D. Pa., Nov. 20, 2003), *available at* http://www.clearinghouse.net/chDocs/public/EE-PA-0133-0003.pdf.

http://openscholarship.wustl.edu/law_lawreview/vol91/iss6/7

were rejected because of their disabilities.[203] In addition, PJAX agreed to give all class members priority hiring consideration.[204]

The more general injunctive provisions of the decree were imposed for two years (a fairly typical length of time, as 71.6% of the decrees in our sample specified terms of 2 to 3 years), 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.[205]

In addition, as per usual, the PJAX decree required anti-discrimination training for all employees who dealt with hiring, and the posting of anti-discrimination policies at all its facilities and terminals nationwide.[206]

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 follow-up to make it a strong tool. About 16% of the EEOC's systemic cases are like *Dial* and *McKesson*, designating an outsider to serve as consultant or monitor. But in another 13% 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. Both sides agree that such deputation was a very important part of the PJAX case. 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

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203. Consent Decree at 3–5, EEOC v. PJAX, Inc., 1:03-cv-01535-JFM (D. Md., Nov. 24, 2003), *available at* http://www.clearinghouse.net/chDocs/public/EE-MD-0093-0002.pdf.

204. *See id.* at 7–9.

205. *Id.* at 9.

206. *Id.* at 12–13.

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Resources Specialist" position and fill that role with someone who had "a professional background in the field of human resources."[207] 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.[208]

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."[209] 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."[210] These types of bureaucratization are prevalent remedies in the EEOC's decrees; designed, of course, to minimize the opportunity for bias to operate and to facilitate both internal and external monitoring. Over three-quarters of the Commission's decrees in systemic cases involving hiring or promotion include record-keeping 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—even more than in the *McKesson* case—is managerialism. And here, the priority given to standard management techniques (often unrelated to civil rights) is coupled with the designation of a particular manager, a human resources specialist, to carry out those techniques. The EEOC's role is as a 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.

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207. *Id.* at 9.
208. *Id.*
209. *Id.* at 9–10.
210. *Id.* at 10.

IV. THE EEOC'S SYSTEMIC LITIGATION

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 Part, 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.[211] So in order to capture the cases most likely aimed at structural reform, we used seven criteria. Any case that met any one of these criteria was screened into the set of cases we call "systemic." The first two criteria are legal theories that suggest a collective element—allegations of a pattern or practice of discrimination,[212] or a disparate impact claim.[213] The

211. 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 filings with 20+ victims," and "suit resolutions with 20+ victims." *See* 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 FY 2009 Performance and Accountability Report Highlights*, EEOC, http://www.eeoc.gov/eeoc/plan/2009parhigh_discussion.cfm (last visited Aug. 21, 2014) (reporting nineteen 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 FY 2011 Performance and Accountability Report Highlights*, EEOC, http://www.eeoc.gov/eeoc/plan/2011parhigh_discussion.cfm (last visited Aug. 21, 2014). 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) involved multiple aggrieved parties (but fewer than 20) and 63 (14 percent) involved challenges to systemic discrimination." *Id.*

212. *See* 42 U.S.C. § 2000ee-6(a) (2012).

213. Title VII doctrine encompasses both 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.

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next two criteria ask whether twenty or more individuals were potentially affected by the suit.[214] The remaining three criteria focus on the breadth of the remedy obtained—namely, whether twenty or more complainants received monetary relief, whether the monetary relief totaled $1 million or more in real (2007) dollars, and whether the relief included an affirmative action remedy. The first two criteria 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.

Using these criteria, we identified a set of 281, which we refer to as the EEOC's "systemic cases."[215] Because our initial dataset was a stratified random sample of cases, we estimate that the total number of systemic cases brought by the EEOC over the ten-year period of our study was about 307, representing approximately 9% of the EEOC's litigation caseload during that period.[216] Table 1 lists the number of systemic cases in our sample by year and the percentage of those cases that satisfied each of our inclusion criteria.

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. See Ricci v. DeStefano, 557 U.S. 557, 576–78 (2009), for a discussion of the difference between disparate treatment and disparate impact claims under Title VII. Disparate impact cases are necessarily class-based rather than individual claims and are therefore systemic in nature.

214. We used 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. If either variable suggested that the case involving twenty or more individuals, we included it in the systemic cases.

215. These data are a subset of those collected in the EEOC Litigation Project. Our data selected and coded for that project are 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 from October 1996 through 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 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 2,316 of the EEOC's cases filed over a ten-year period of time. Of those, 281 met one or more of our criteria for inclusion in the set of "systemic" cases analyzed here.

216. Cases classified by the EEOC as intended to benefit more than one employee, all cases concluded by a contested 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 id.* 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 twenty 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 1,109, and so an additional 26±10 (95% confidence interval) 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.

Our criteria cannot precisely identify those cases and only those 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: SUMMARY CHARACTERISTICS OF EEOC SYSTEMIC CASES FILED FY 1997–2006

		Percentage of cases in systemic sample satisfying each criteria:						
Fiscal Year Filed	**Systemic Sample**	**Pattern or Practice**	**Disparate Impact**	**20+ benefitted parties (EEOC data)**	**20+ complainants listed in court docs**	**20+ claimants awarded monetary damages**	**$1 million damages (EEOC data)**	**Affirmative Action**
1997	19	37%	11%	53%	0%	26%	42%	5%
1998	18	28%	11%	56%	0%	33%	61%	11%
1999	23	48%	13%	17%	9%	4%	35%	9%
2000	32	47%	13%	41%	9%	13%	22%	13%
2001	34	38%	18%	38%	3%	21%	26%	6%
2002	31	42%	13%	32%	6%	16%	39%	6%
2003	39	56%	10%	36%	5%	18%	33%	8%
2004	32	63%	13%	31%	3%	0%	22%	3%
2005	28	61%	18%	21%	0%	7%	21%	7%
2006	25	64%	12%	16%	4%	4%	4%	4%
Total	**281**	**49%**	**13%**	**33%**	**4%**	**14%**	**29%**	**7%**

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. Race, national origin, or color discrimination claims, grouped together as "race" in the figure, are included in over a third of the systemic docket, as are retaliation claims. 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).[217]

217. In our non-systemic sample, 18% and 8% of the cases involve claims for disability or religious discrimination, respectively.

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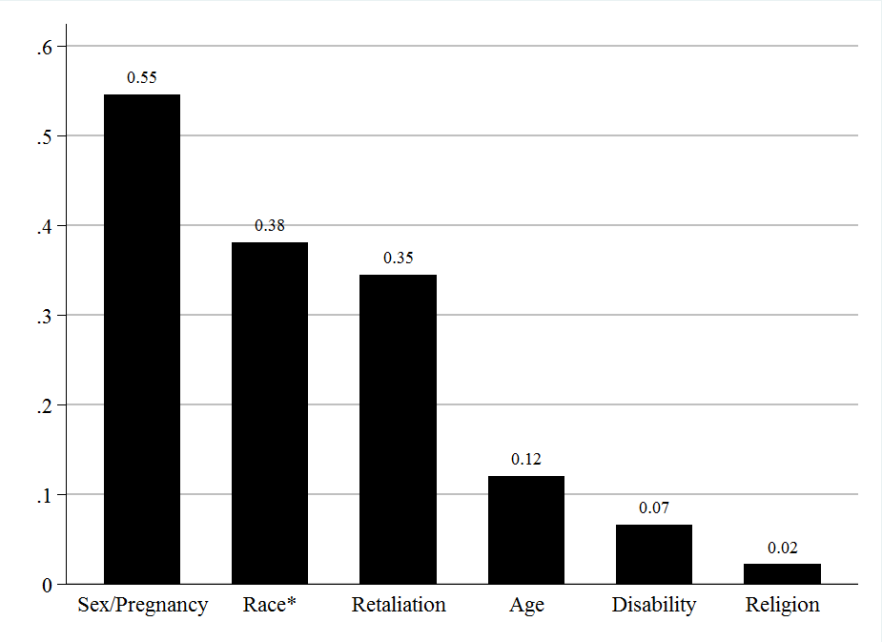
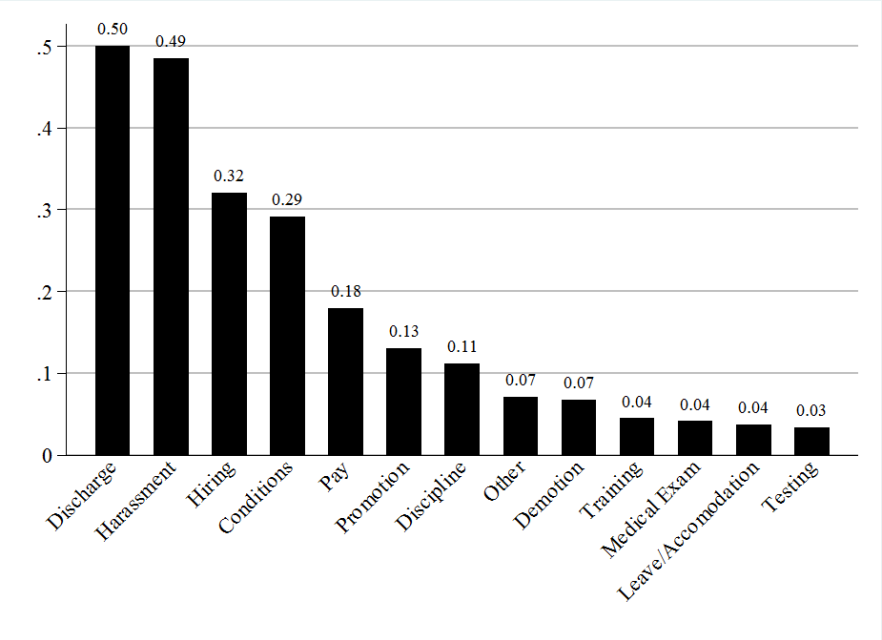
FIGURE A: BASIS OF SUIT, EEOC SYSTEMIC CASES FILED FY 1997–2006
PROPORTION OF CASES ALLEGING EACH BASIS



*: "Race" includes race, national origin, and color.

Figure B reports the proportion of systemic cases raising different types of employment issues. As is true of the EEOC's docket as a whole, the cases most often deal with allegations of 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 FY 1997–2006
PROPORTION OF CASES INVOLVING EACH ISSUE



With this brief summary as context, we turn now to a systematic analysis of these cases. In addition to examining features of the litigation, we look at the terms of the injunctive remedies obtained by the EEOC in these cases, whether through settlement or contested court order.[218]

Upon examination of the litigation characteristics of these cases and the type of injunctive terms obtained, we find little evidence that the EEOC's systemic cases fit the gladiator theory's depiction of structural reform litigation as hard-fought contests over liability with injunctive remedies requiring intense judicial engagement. Instead, these cases appear to involve fairly modest stakes, low-intensity litigation and, in most cases, minimal judicial oversight over decree implementation. Similarly, the cases do not match the collaborative theorists' vision of contextually-

218. 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 of the injunctive terms rests on an analysis of the 215 systemic cases resolved by settlement or court order in which we had access to the actual decree of orders.

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sensitive, problem-solving collaborations. The injunctive relief obtained in these suits impose a fairly standardized set of remedies, most of which are peripheral to the firms' core operations and fail to establish meaningful systems of accountability. Rather than seeking to fundamentally transform defendants' operations, the remedies imposed reflect routinized, bureaucratic solutions—the kinds of "best practices" endorsed by human resources professionals and embraced by firms as a rational (if not necessarily effective) response to anti-discrimiantion mandates.

A. Moderate-Size Cases

Even when the EEOC appears to be pursuing systemic forms of discrimination, its cases were moderate in size. 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

Filing year	**N**	**Mean**	**Median**	**90 %ile**	**Max**	**Total, by year**
1997	10	41	21	127	163	410
1998	9	79	56	351	351	707
1999	8	9	7	23	23	71
2000	14	34	5	56	330	475
2001	21	13	8	28	33	268
2002	19	24	8	52	224	448
2003	26	25	6	67	216	646
2004	17	7	4	17	18	115
2005	16	219	3	29	3413	3502
2006	9	18	2	138	138	163
All years	**149**	**46**	**7**	**56**	**3413**	**6805**

* Among cases with documention of number of persons compensated

TABLE 3: MONETARY AWARD,* EEOC SYSTEMIC CASES FILED FY 1997–2006. REAL (2007) DOLLARS, IN THOUSANDS

Filing year	N	Mean	Median	90 %ile	Max	Total, by year
1997	17	$1,537	$ 957	$ 3,235	$ 7,631	$ 26,125
1998	18	$2,809	$1,238	$11,525	$12,256	$ 50,558
1999	19	$2,213	$ 752	$ 8,847	$11,266	$ 42,053
2000	31	$2,404	$ 293	$ 2,107	$54,158	$ 74,535
2001	29	$3,262	$ 477	$ 6,112	$59,260	$ 94,589
2002	27	$1,123	$ 439	$ 3,549	$ 4,113	$ 30,311
2003	35	$ 792	$ 412	$ 2,254	$ 2,800	$ 27,715
2004	31	$ 789	$ 521	$ 1,500	$ 6,178	$ 24,449
2005	22	$4,463	$ 219	$10,845	$50,153	$ 98,186
2006	16	$ 275	$ 113	$ 800	$ 1,800	$ 4,406
All years	245	$1,930	$ 425	$ 3,188	$59,260	$472,926

* Among cases with damages awarded (most data from document review; some from EEOC).

Whether viewed in terms of the number of people benefitted or by the amount of money changing hands, the EEOC's systemic cases are fairly modest. 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.

From this summary picture, it is difficult to know what explains the relatively modest size of these cases. It is possible that, given the changing nature of discrimination, more subtle forms of bias are less likely to generate blockbuster cases worth millions. Alternatively, private counsel specializing in employment discrimination class actions might be filing the big money class actions before the EEOC has the chance to act. The agency does have the power to intervene in privately filed employment discrimination suits, but it does not do so often, perhaps because it chooses instead to devote its resources to unrepresented parties. Whatever the explanation, the vast majority of the EEOC's cases—even those that might be characterized as systemic—are quite modest in scope.

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B. Low-Intensity Litigation

In contrast to the early depiction of structural reform cases as hard-fought contests, the EEOC's systemic cases overwhelmingly involve low-intensity litigation. As seen in Table 4, the vast majority of the systemic cases we examined—more than 87% of the resolved cases—ended by settlement.[219] A mere handful—8% of resolved cases—ended through some sort of litigated judgment.[220]

TABLE 4: TYPE OF RESOLUTION, SYSTEMIC EEOC CASES FILED FY 1997 TO 2006*

	N	**%**
1. Settlement	229	87.4%
2. Withdrawal by EEOC	3	1.1%
3. Default judgment	9	3.4%
4. Litigated Judgment for Def't	8	3.1%
5. Litigated Judgment for EEOC	13	5.0%
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 sixty-one, or 70.3% of the systemic cases that settled, were resolved without a single substantive motion being filed,[221] and forty-three, or 19% of settled cases, were

219. 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.

220. Note, however, that for those few cases that do not settle, appeals are common: the EEOC filed notices of appeal in six of the eight cases in the sample in which it lost; defendants filed a notice of appeal in eight of the thirteen cases in which they lost.

221. By "substantive motions" we mean any motions to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), motions for judgment on the pleadings, motions for summary judgment and motions for judgment as a matter of law.

resolved before the defendant even filed an answer. Discovery motions[222] 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 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 2006) (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 RESOLVED EEOC SYSTEMIC CASES, FY 1997–2006

	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

The first row of Table 6 sets out the length of the pre-resolution litigation, which is often very modest. In fact, in about 6.5% of the systemic cases, resolution is reached in the first month after filing, often with joint resolutions proposed for court approval simultaneously with the

222. 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.

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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 one and three years. The dockets do not show particularly intense conflict during that time, however, as Table 5 shows—an average of three motions are filed (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 2 sets out, they tend to be fairly short—sixteen pages is the mean, and 75% have fewer than twenty 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. Nearly 72% of the decrees specified a term of 2 to 3 years.

Of course, litigation does not necessarily end with the entry of a judgment.[223] In structural reform cases, the implementation phase may entail vigorous contestation. And 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.[224] 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,[225] or a facility is closed[226]). In just two of the decrees does

223. In all sorts of institutional reform litigation, experience teaches that the most crucial work may take place *after* the decree is entered. *See, e.g.*, PHILLIP J. COOPER, HARD JUDICIAL CHOICES: FEDERAL DISTRICT COURT JUDGES AND STATE AND LOCAL OFFICIALS (1988); M. KAY HARRIS & DUDLEY P. SPILLER, AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS (1977); Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725. As Lloyd Anderson wrote in a study of the implementation phase in structural reform cases, "Approval of the consent decree . . . is just the beginning of a new and crucial phase of the case, that of implementing the promises in the decree." *Id.* at 727. *See also* Selmi, *Price of Discrimination*, *supra* note 26, at 1330 ("[W]hen 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.").

224. *See, e.g.*, Consent Decree at 10–11, EEOC v. Pinnacle Nissan, Inc., CIV 00-1872-PHX-MHM (D. Ariz. Feb. 20, 2003), *available at* http://chadmin.clearinghouse.net/chDocs/not_public/EE-AZ-0085-0004.pdf; EEOC v. Milgard Mfg. Inc., No. 01-MK-1731 (OES) (D. Colo., filed Aug. 31, 2001) (documenting several extensions to the decree) (Documents and information about the case available at CIVIL RIGHTS LITIGATION CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=8450).

225. *See* EEOC v. Sbarros Italian Eatery, 2:00-cv-00774-DB (D. Utah, filed Sept. 29, 2000) (documents and information available at CIVIL RIGHTS LITIGATION CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=9187).

termination depend on the defendant achieving some measure of reform.[227] Nor do the docket sheets show evidence of massive implementation struggles. Only in three or four of the cases do the docket sheets reflect any post-decretal injunction-related activity.[228] Thus signs of post-decree implementation struggle are nearly non-existent. Of course much implementation work may be done without any record making it into a court file, but one would expect major disputes to leave their mark on docket sheets.

In short, contrary to the gladiator theory's depiction of structural reform litiation as hard-fought battles over liability and remedial terms, the EEOC's systemic cases during the period of our study are best characterized as modest-sized, low-intensity disputes that were resolved without epic struggles.

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226. *See, e.g.*, EEOC v. Hamilton Sundstrand Corp., No. 1:03-cv-01663-ZLW-PAC (D. Colo., filed Aug. 29, 2003) (documents and information available at CIVIL RIGHTS LITIGATION CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=8387).

227. *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 (additional documents and information available at CIVIL RIGHTS LITIGATION CLEARINGHOUSE, 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.") (additional documents and information available at CIVIL RIGHTS LITIGATION CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=7903).

228. In *Milgard Mfg. Inc.*, there were four decree extensions, from three to five years, because of compliance issues. *See Case Profile:* EEOC v. Milgard Manufacturing Incorporated dba Milgard Windows, THE CIVIL RIGHTS LITIGATION CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=8450. In *EEOC v. Ingersoll Int'l, Inc.*, No. 3:99-CV-50362 (N.D. Ill, filed Nov. 3, 1999) (documents and information available at CIVIL RIGHTS LITIGATION CLEARINGHOUSE, 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 Texas* and *EEOC v. STI Holdings, Inc.*, there were efforts to enforce or extend the decree. *See* EEOC v. Enterprise Rent-A-Car Co. of Tex., No. 5:99-CV-01088-ECP (W.D. Tex., filed Sept. 30, 1999) (documents and information available at CIVIL RIGHTS LITIGATION CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=9390); EEOC v. STI Holdings, Inc., No. 03-C-0543-S (W.D. Wis., filed Sept. 30, 2003) (documents and information available at CIVIL RIGHTS LITIGATION CLEARINGHOUSE, http://www.clearinghouse. net/detail.php?id=8764).Other cases do exhibit non-substantive post-decretal activity, such as notification to the court about distribution of monetary awards, attorneys' fees motions, etc.

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C. Standardized Terms

Focusing on the injunctive terms obtained by the EEOC in its systemic cases, we found that the consent decrees and court orders imposed a fairly standardized set of terms, including simple, rule-based prohibitions of discrimination. Moreover, the standard remedies were hardly directed at transforming the structure of the workplace; instead they tended to emphasize peripheral remedies or impose procedural requirements rather than altering the firm's core functions. This pattern does not match the expectations of the collaboration theory. A true problem-solving approach would result 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. Nor do the observed remedies comport with the collaboration theory's skepticism of traditional rule-based remedies that narrowly define compliance "as the absence of identifiable conduct violating those rules,"[229] or its call for "functionally integrated" remedies[230] that link the processes for pursuing anti-discrimination goals with the employer's core productive and personnel activities. Far from developing contextually-based remedies in which firms are incentivized to problem-solve,[231] we primarily observed the often boilerplate repetition of a stock set of injunctive terms.

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, 81%). These orders take the form of the traditional rule-enforcement remedy as a rigid and externally defined prohibition.

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229. Sturm, *Second Generation*, *supra* note 18, at 475; *see also* Green, *Discrimination in Workplace Dynamics*, *supra* note 18, at 145 (seeking to hold employers responsible for "organizational choices, institutional practices, and workplace dynamics that enable the operation of discriminatory bias").

230. Sturm, *Second Generation*, *supra* note 18, at 519.

231. *Id.*; *see also* Green, *Discrimination in Workplace Dynamics*, *supra* note 18, 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).

TABLE 7: TYPES OF REMEDIES IN EEOC SYSTEMIC CASES
(N=215)

Type of remedy	N	%
1. Rule Enforcement Remedies		
a. Defendant prohibited from discriminating	189	88%
b. Defendant prohibited from retaliating	174	81%
c. Other requirements	30	14%
2. Peripheral Remedies		
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%
3. Procedural Remedies		
a. Advertising/recruitment requirements	34	16%
b. Require objective hiring/promotion criteria	30	14%
c. Require recruitment, hiring or promotion protocols	30	14%
d. Require objective job descriptions	12	6%
4. Outcome Focused Remedy		
a. Quantitative goals specified	20	9%

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 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.[232] Others respond to the unique facts of a case, such as orders requiring that certain named individuals be fired, or not be re-hired,[233] or, in one case, an order prohibiting a firm from sponsoring company events at "adult entertainment establishments."[234] In

232. *See* EEOC v. Pemco Aeroplex, Inc., 383 F.3d 1280 (11th Cir. 2004) (documents and information available at CIVIL RIGHTS LITIGATION CLEARINGHOUSE, http://www.clearinghouse. net/ detail.php?id=9454).

233. *See, e.g.*, EEOC v. Lockheed Martin, No. 1:05-cv-00479-SPK-LEK, 2007 WL 4468658 (D. Haw. Dec. 18, 2007) (documents and information available at CIVIL RIGHTS LITIGATION CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=6096); EEOC v. Midamerica Hotels Corp., No. 4:03-CV-00107-HEA, 2004 WL 758054 (E.D. Mo. Mar. 11, 2004) (documents and information available at CIVIL RIGHTS LITIGATION CLEARINGHOUSE, http://www.clearinghouse. net/detail.php?id=8411).

234. Modified Injunction Order at 4, EEOC v. Custom Companies, Inc., No. 1:02-cv-03768, 2007 WL 1810495 (N.D. Ill. June 21, 2007) (documents and information available at CIVIL RIGHTS LITIGATION CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=7999).

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another case, the injunctive remedy required the defendant employer, a private school, to offer tuition waivers for the complainants' enrolled children.[235] Such a remedy, while certainly creative and context-specific, does not seek to address structural sources of second-generation discrimination.

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.[236] An example of a functionally integrated remedy would be the ongoing collection of demographic data to identify and correct problems of underrepresentation in certain job categories and to hold managers accountable for their personnel decisions.[237] Other examples would require reconfiguring job ladders or skill tests. 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—and procedural remedies, while requiring behavior changes, do not necessarily alter the core decision-making processes of the firm.

As seen in Table 7, peripheral remedies were the type most frequently deployed after rule enforcement 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, 86%). Far less common—though potentially important, as we argue below—were remedies imposing certain procedures on a firms' personnel practices, such as a requirement that objective criteria be used for hiring and promotion (row 3.b, 14%), or that job openings be publicized in ways designed to reach all potentially qualified applicants (row 3.a, 16%).

Of course, not all types of remedies are appropriate in all cases. For example, requiring objective promotion criteria might be warranted in a

235. EEOC v. Univ. of the Incarnate Word, No. 5:99-cv-01090-OLG (W.D. Tex., filed Sept. 30, 1999) (documents and information available at CIVIL RIGHTS LITIGATION CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=8413).

236. *See* Green, *Discrimination in Workplace Dynamics*, *supra* note 18, at 148.

237. *See* Sturm, *Second Generation*, *supra* note 18, at 516–17.

case alleging a discriminatory failure to promote, but 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.[238] 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.[239] 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.[240]

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.[241] Another required the employer to provide the EEO notices on employees' paychecks, along with contact information for reporting violations.[242]

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,

238. *See* Green, *Discrimination in Workplace Dynamics*, *supra* note 18, at 149.

239. *See* Sturm, *Second Generation*, *supra* note 18, at 477.

240. 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 (2011), *available at* http://www.iwpr.org/publications/pubs/ending-sex-and-race-discrimination-in-theworkplace-legal-interventions-that-push-the-envelope-1.

241. EEOC v. Arrowhead Bagel Co., 2:00-cv-01860-SMM (D. Ariz., filed Sept. 28, 2000) (documents and information available at CIVIL RIGHTS LITIGATION CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=9000).

242. Consent Decree at 6, EEOC v. Midamerica Hotels Corp., 4:03-CV-00107-HEA, 2004 WL 758054 (E.D. Mo. Dec. 6, 2004), *available at* http://www.clearinghouse.net/chDocs/not_public/ EE-MO-0054-0006.pdf.

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harassment and retaliation policies and procedures,"[243] or impose substantial discipline "upon any supervisor or manager who engages in sex discrimination or permits any such conduct to occur."[244] 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.

To summarize, the EEOC's remedies are quite standardized in their terms. There is little sign of the kinds of flexible, contextualized remedial design highlighted in collaborationist accounts. Most common are simple, rule-based prohibitions of discrimination, requirements for EEO training, and notice to employees of their anti-discrimination rights. Although the efficacy of these types of remedies is not our focus here, it is worth pointing out that social science evidence increasingly suggests that these are unlikely to be effective remedies for workplace discrimination, and may even decrease integration or increase bias.[245]

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243. 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 (additional documents and information available at CIVIL RIGHTS LITIGATION CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=8747).

244. 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 (additional documents and information available at CIVIL RIGHTS LITIGATION CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=8962).

245. *See, e.g.*, Cheryl R. Kaiser et al., *Presumed Fair: Ironic Effects of Organizational Diversity Structures*, 104 J. PERSONALITY & SOC. PSYCHOL. 504 (2013) (presence of a diversity program induced experimental subjects to discount evidence of discrimination); Lisa Legault, Jennifer N. Gutsell & Michael Inzlicht, *Ironic Effects of Antiprejudice Messages: How Motivational Interventions Can Reduce (but Also Increase) Prejudice*, 22 PSYCHOL. SCI. 1472 (2011) (priming experimental subjects by highlighting external anti-discrimination norms increased tested bias); Elizabeth Levy Paluck & Donald P. Green, *Prejudice Reduction: What Works? A Review and Assessment of Research and Practice*, 60 ANN. REV. PSYCHOL. 339 (2009) (analyzing 985 studies but finding no solid evidence that training reduces bias); Frank Dobbin, Daniel Schrage & Alexandra Kalev, Do Affirmative Action and Equal Opportunity Work? Evidence from Private-Sector Workplaces tbl. 2 (2013) (unpublished manuscript) (on file with authors) (finding negative effect on managerial integration from existence of grievance procedures); Frank Dobbin & Alexandra Kalev, You Can't Make Me: Resistance to Corporate Diversity Training (2013) (unpublished manuscript) (on file with authors) (concluding that training programs that focus on legal compliance appear to result in declines in management diversity).

D. Limited Mechanisms of Accountability

Critical to any effective structural reform remedy is a method of ensuring that the defendant is accountable for its compliance with public norms. One important component of accountability is the generation and sharing of data about matters such 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.[246] Such data is necessary not only to identify problems; they also make it possible to hold firms accountable for implementing meaningful changes. In addition, accountability likely requires the on-going involvement of the court or third parties empowered to identify problems and ensure compliance with the decree terms. Although the EEOC's systemic cases often required firms to generate data about their operations, the limited use of effective monitors raises doubts about the extent to which firms were meaningfully held accountable for structural change.

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 that 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, 56%), 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.

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246. *See* Sturm, *Second Generation*, *supra* note 18, at 519–20; Green, *Discrimination in Workplace Dynamics*, *supra* note 18, at 155.

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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. Quantitative Goals Specified	20	9%
a. Outcomes required to be reported	10	
b. Outcomes assessed against goals	5	

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 operate or to engaging in proactive problem-solving.

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 5% respectively, in rows 2 and 1). The other types of compliance measures identified (10%, 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%

TABLE 10: REMEDIES INVOLVING ACCOUNTABILITY TO STAKEHOLDERS AND INTERMEDIARIES IN EEOC SYSTEMIC CASES (N=215)

	Any Stakeholder Role	Requiring Complaint/ Incident Report to Stakeholders	Requiring Compliance Reports to Stakeholders	Requiring Stakeholder Access for Monitoring	Other Roles for Stakeholders Specified
1. Any Stakeholder Access	205	115	178	123	53
2. Internal Stakeholders					
a. Internal Manager	33	1	2	3	27
b. Peer Worker Group	1	0	0	0	1
c. Union	0	0	0	0	0
3. External Stakeholders					
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. As discussed above, early theories of structural reform litigation emphasized the on-going role of the judge in ensuring adherence to anti-discrimination norms. Collaboration theorists, by contrast, suggest a crucial role for intermediaries—individuals and nongovernmental organizations who can "translat[e] and mediat[e] between formal law and workplace practice."[247] Estlund similarly emphasizes the role of intermediaries in assessing the efficacy of labor standards. 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."[248]

247. *See* Sturm, *Second Generation*, *supra* note 18, at 523.
248. *See* Estlund, *Rebuilding the Law*, *supra* note 59, at 325.

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Examining the decrees in our sample reveals modest efforts to empower external intermediaries. In roughly 16% of the cases, appointed monitors or outside consultants who specialize in EEO matters are given some role in implementing the remedial terms. (Tbl. 10, rows 3c and d) In a similar proportion of the cases, an internal manager at the firm was given some responsibility or authority regarding decree implementation. (row 2a)

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 215 did we see any effort to involve workers in the problem-solving[249] 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. (Tbl. 10, rows 2b and c) Unfortunately, we lack information about base rates—we do not know in 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[250] might well have discouraged other efforts to involve employees in problem-solving. Still, the nearly complete lack of any provisions calling for accountability to line-employees, the ultimate stakeholders in cases involving discrimination and harassment, is notable.[251]

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 cases—201 out of 215—the defendant is obligated to report to the EEOC or submit to monitoring by it. (Tbl. 10, row 3a) Thus, of all the potential monitors and stakeholders, the EEOC is the principal entity

249. *See* EEOC v. Rainbow Rest. Props., Inc., No. 0:06-cv-00988-PJS-JJG (D. Minn., filed Mar. 7, 2006) (documents and information available at CIVIL RIGHTS LITIGATION CLEARINGHOUSE, 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 [defendant] regarding its marketing and advertising efforts." Proposed Consent Decree at 5, *EEOC v. Rainbow Rest. Props, Inc.*, No. 0:06-CV-0098-PJS-JJG (D. Minn. Apr. 27, 2007). 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.

250. *See* Estlund, *Rebuilding the Law*, *supra* note 59, at 362–63; *see also id.* at 363 n.199 (documenting the scholarly discussion).

251. *Cf. id.* at 333 (arguing that the regulatory model renders employees the passive beneficiaries of the government's protection).

empowered with information and rights of access that might be leveraged to hold firms accountable for engaging in meaningful reform.

The decrees alone do not tell us if or how the EEOC exercises 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 seventy 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.[252] 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.[253] 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.[254] In addition, perhaps we see little evidence of ongoing 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.

To summarize, the decrees in the systemic cases show some efforts toward holding firms accountable, primarily in the form of generating information about on-going complaints. Nevertheless, they largely appear to neglect an important aspect of ensuring accountability—namely, empowering stakeholders within the firm or appointing outsiders who are able to engage in effective monitoring.

E. Enforced Managerialism

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,

252. *See supra* Part III.A (discussing decree and monitoring for Dial), and Part III.B (discussing decree and monitoring for McKesson).

253. *See supra* Part III.C (discussing PJAX's creation of a "Human Resources Specialist" instead of engaging an outside monitor for post-decree monitoring activities).

254. *See, e.g.*, *supra* text accompanying notes 138–46, 183.

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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.[255] Although the sociological literature focuses on firms' voluntary responses to general legal mandates, rather than particularized litigation, our study suggests that the EEOC has played a role through its systemic injunctive litigation in ratifying those responses and in 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-litigation 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.[256] 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."[257]

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.[258] EEOC lawyers, however, are

255. *See supra* notes 68–76 and accompanying text.

256. *See generally, e.g.*, Dobbin & Kelly, *How to Stop Harassment*, *supra* note 76 (explaining spread of grievance procedures and training as responses to sexual harassment law); Edelman et al., *Endogeneity of Legal Regulation*, *supra* note 21 (describing development of grievance procedures as a response to anti-discrimination law); Frank Dobbin & Alexandra Kalev, *The Origins and Effects of Corporate Diversity Programs*, *in* OXFORD HANDBOOK OF DIVERSITY AND WORK 253 (2013) [hereinafter Dobbin & Kalev, *Origins*].

257. *See generally* DOBBIN, INVENTING EQUAL OPPORTUNITY, *supra* note 22 at 101–32, 220–33 ((discussing development of bureaucratic personnel practices relating to hiring and promotion).

258. Selmi, *Price of Discrimination*, *supra* note 26, at 1298–99. The EEOC's lawyers confirm this account in large part—they report that intervenors' counsel are generally pretty uninterested in

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.[259] (Other incentives may, of course, encourage EEOC employees to seek high damages,[260] 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.[261] 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 at the time.[262] 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.[263] 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*[264] and *Albemarle Paper*[265] that defined discrimination

injunctive relief. *See, e.g.*, Interview with Anna Park, *supra* note 183 ("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."); Interview with Dana Johnson, *supra* note 173 ("My perception is that the EEOC is much more interested in getting ongoing injunctive relief than the private bar, for obvious market-driven reasons.").

259. *See, e.g.*, Interview with Dana Johnson, *supra* note 173.

260. *See, e.g.*, Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement: Innovation and Optimal Punishment, with Antitrust Applications*, 127 HARV. L. REV. 853 (2014) (arguing that public agencies have self-interested reasons for seeking to maximize financial recoveries through litigation).

261. EEOC, SYSTEMIC REPORT, *supra* note 7, at 2.

262. *See* DOBBIN, INVENTING EQUAL OPPORTUNITY, *supra* note 22, at 102–03.

263. *See id*. at 103.

264. 401 U.S. 424 (1971) (holding that Title VII prohibited intelligence testing or high school

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expansively. These decisions suggested that anti-discrimination statutes barred more than animus, and that many previously accepted employer practices could constitute actionable discrimination. The courts have, in more recent years, been far more skeptical of this kind of reasoning,[266] 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,[267] 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.[268]

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.[269] In the face of legal ambiguity, firms are motivated to adopt structures or practices that visibly signal compliance with the law.[270] As Dobbin and Kelly 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."[271] And once the Court signaled its

completion requirements when they had the effect of disqualifying blacks at a disproportionately high rate without demonstrable connection to job performance).

265. 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).

266. *See* Bagenstos, *Structural Turn*, *supra* note 20, at 21–24; Robert L. Nelson, Ellen C. Berrey & Laura Beth Nielsen, *Divergent Paths: Conflicting Conceptions of Employment Discrimination in Law and the Social Sciences*, 4 ANN. REV. LAW SOC. SCI. 103, 104–07 (2008).

267. *See* Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

268. *See generally* DOBBIN, INVENTING EQUAL OPPORTUNITY, *supra* note 22, at 220–32; *see also, e.g.*, Edelman et al., *Endogeneity of Legal Regulation*, *supra* note 21.

269. *See* Edelman, *Legal Ambiguity*, *supra* note 22, at 1537.

270. *Id.* at 1542.

271. Dobbin & Kelly, *supra* note 76, at 1237.

acceptance of these structures as a sign of compliance,[272] 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."[273] 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 twenty 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."[274]

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272. In *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), the Supreme Court held that in cases that did not involve a tangible employment action such as demotion or firing, an employer can assert an affirmative defense to liability for sexual harassment when it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer". *Burlington*, 524 U.S. at 765. It then suggested that the affirmative defense is more likely available to an employer that had promulgated an anti-harassment policy and provided a complaint procedure. *Id.*

273. Walter Connolly, Jr., the attorney who represented Mitsubishi in the class action suit against it, made this comment in an interview following the Supreme Court's decisions in *Faragher* and *Ellerth*. DOBBIN, INVENTING EQUAL OPPORTUNITY, *supra* note 22, at 214 (citing Jane Daugherty, *Racial Discrimination Charges Rise in Michigan*, DETROIT NEWS, July 15, 1998).

274. Interview with John Hendrickson, *supra* note 123.

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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."[275] Similarly, Selmi describes these types of remedies as "cosmetic in nature" and "primarily designed to address public relations problems,"[276] while Bisom-Rapp dismisses training programs as "symbolic gestures" whose efficacy has little empirical support.[277]

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.[278] 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.[279] 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,

275. Bagenstos, *Structural Turn*, *supra* note 20, at 29.
276. Selmi, *The Price of Discrimination*, *supra* note 26, at 1250.
277. Bisom-Rapp, *Ounce of Prevention*, *supra* note 77, at 6, 29.
278. *See* DOBBIN, INVENTING EQUAL OPPORTUNITY, *supra* note 22, at 21.
279. *See generally* Kalev, Dobbin & Kelly, *Best Practices*, *supra* note 76 (diversity training has negative effect); Dobbin & Kalev, *Origins*, *supra* note 256 (summarizing literature); Bisom-Rapp, *Ounce of Prevention*, *supra* note 77 (summarizing studies).

indeed, useful.[280] 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."[281] 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.[282] 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 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

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280. *See generally* Dobbin & Kalev, *Origins*, *supra* note 256 (reviewing the literature); Kalev, Dobbin & Kelly, *Best Practices*, *supra* note 76 (finding mixed effects).

281. Barbara F. Reskin, Debra B. McBrier & Julie A. Kmec, *The Determinants and Consequences of Workplace Sex and Race Composition*, 25 ANN. REV. SOC. 335, 343–44 (1999).

282. *See* Kalev, Dobbin, & Kelly, *Best Practices*, *supra* note 76, at 590. Similarly, bureaucratic oversight that imposes accountability has been found to increase the effectiveness of organizational practices intended to increase diversity. *See* Frank Dobbin, Daniel Schrage, & Alexandra Kalev, *Someone to Watch Over Me: Coupling, Decoupling, and Unintended Consequences in Corporate Equal Opportunity* (Working Paper), *available at* http://www.wjh.harvard.edu/~dobbin/cv/working papers/Someone_to_Watch_Over_Me.pdf.

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legal ideals."[283] 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."[284] 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.[285] When the personnel profession recasts civil rights imperatives as initiatives that are good for business, it 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

283. Edelman et al., *Diversity Rhetoric*, *supra* note 22, at 1592.

284. 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).

285. Edelman et al., *Diversity Rhetoric*, *supra* note 22, at 1592.

. . . sees us as an agency which is there to manage employment discrimination disputes,"[286] 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, claims about what types of employer conduct are wrongful and should be prevented are deeply controversial.[287] 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.[288] 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.[289] Indeed, under a more individualized, fault-based understanding of discrimination, the EEOC might find it difficult to pursue even rather routine managerialist remedies.[290]

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286. Sturm, *Second Generation*, *supra* note 18, at 551.

287. *See* Bagenstos, *Structural Turn*, *supra* note 20, at 36–40.

288. *Id.* at 39, 41–44.

289. Scholars have proposed a number of reforms intended to boost the agency's effectiveness in combating workplace discrimination. *See, e.g.*, Green, *Future of Systemic Disparate Treatment Law*, *supra* note 3 (arguing for enhanced role for EEOC); Selmi, *Price of Discrimination*, *supra* note 26 (suggesting that the EEOC play a more active role in overseeing implementation of consent decrees in private class actions); Sturm, *Second Generation*, *supra* note 18, at 566 (calling for the EEOC to play a larger role in pooling information and building networks for effective problem-solving); David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 695–711 (2013) (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.

290. The Supreme Court's recent decision in *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011),

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In any event, to repeat, our project is positive not normative. This Article 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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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.

http://openscholarship.wustl.edu/law_lawreview/vol91/iss6/7