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A Critical Look at Organizational Responses to and Remedies for Sex Discrimination

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Many factors influence the responses of people in organizations to sex discrimination. Sex-role stereotyping and other forms of conscious and nonconscious prejudice exert a powerful influence, as has been amply documented by the contributors to Parts II and III of this volume.[1] Reluctance on the part of men, who comprise the majority of corporate decision makers, to give up the privileges enjoyed by themselves and their friends has also slowed organizational progress toward gender equity.[2] Neither prejudice nor bald self-interest (on the part of oneself or one's membership group) is an attractive motive of which any decision maker would be proud.

It is our contention that another motive, one generally considered to be quite laudable, has also interfered with the readiness of American work organizations to correct and remedy sex discrimination in employment. Specifically, we contend that the American adherence to justice, linked with certain preconceptions about individual initiative, has – ironically – sometimes hindered efforts to promote gender equity at work.

Our thesis is developed in four sections of our chapter. In the first section, we briefly outline some of the major findings of social psychologists who study social justice issues. We then look at how organizations have enacted policies designed to allow them to conform to the Civil Rights legislation of 1964. The third section of the chapter takes juridical reactions to sexual harassment lawsuits as an example of how the courts deal with challenges to the persistence of sex discrimination in American organizations. We conclude with a brief examination of the benefits of monitoring the results of procedures as well as the procedures themselves, finding that a concern with distributive justice must be

coupled with the concern for procedural justice if organizations are to achieve in fact the gender equity implicitly promised by the civil rights legislation four decades ago.

Social Psychology of Social Justice: What We Know About How Americans React to Injustices

Over the last four or five decades, social and organizational psychologists have expended considerable energy theorizing and investigating how people form perceptions of justice and injustice and how those perceptions influence interpersonal behavior. Although there is a clear distinction between studies of justice, on the one hand, and, on the other, legal studies, it seems obvious that research into social justice might yield insights of use to organizations grappling with questions of sex discrimination. By looking at the conceptual and empirical advances within psychological studies of social justice, we can find and understand obstacles to the achievement of gender equity at work.

Belief in a just world

Melvin Lerner[3] helped launch social psychological studies of social justice when he documented the regularity with which people sought to justify their actions. In a classic set of experiments, Lerner extended the observation about justification by placing individuals in the peculiar situation of witnessing the unjustified suffering of another person. When given the opportunity, the participants readily compensated the hapless victim. But, oddly, when (and only when) they were denied the opportunity to compensate the victim, participants in the experiment engaged instead in victim derogation. It seemed that individuals had a need to convince themselves that those who suffer deserve to suffer. Other experiments showed the inverse: when one bears witness to good fortune, one comes to elevate the recipient of the good fortune.

Lerner's general conclusions about people's need to believe in a just world have been substantiated by other researchers.[4] Contemporary researchers have emphasized individual differences, studying the correlates of a strong need to believe that the world is just.[5] Yet, 40 years after the germinal experiments, Lerner's basic insight about "the fundamental illusion" of justice remains unchallenged.

Special case of denial One particular form of the belief in the just world has received a great deal of attention by researchers: the tendency of people in disadvantaged groups to imagine that they are personally exempt from the discrimination that they know to affect their membership group. When Crosby first stumbled across the phenomenon in the late 1970s, she dubbed it "the denial of personal disadvantage."[6] Twenty years later, the phenomenon has been

documented by two dozen studies, conducted by a number of research teams investigating attitudes and feelings among a variety of populations.[7] The phenomenon has formed the basis of Crosby's endorsement of affirmative action as the one antidiscrimination measure that does not require the aggrieved to come forward on their own behalf.[8]

Several factors enable people to convince themselves that they are personally exempt from the forces of discrimination. First, a great deal of employment information remains confidential or private. Often employees do not know the wages or salaries of their fellow workers. Second, even when information is shared, most comparisons are local. Thus, women workers typically compare themselves to other women workers, shielding themselves from the distress that they could feel upon making cross-gender comparisons.[9] Finally, direct comparisons can be ambiguous as long as they are multi-dimensional.[10] For example, a woman manager in Department X who does not obtain a raise and who knows that her male colleague has obtained one may avoid anger by focusing on his greater seniority and ignoring her greater education while her sister in Department Y in the same situation can avoid frustration by concentrating on her male colleague's greater education and downplaying her own greater seniority.

The ability to explain away apparent inequities by emphasizing one trait and downplaying another is not limited to people appraising their own situations. As Crosby and colleagues have documented, individuals have extreme difficulty detecting sex (or other) discrimination when the relevant information is presented in a manner that is analogous to the way individuals in organizations would typically encounter it – on a case-by-case basis.[11]

Distributive justice

Distributive justice refers to the perceived fairness of the distribution of outcomes, such as pay, promotions, and decisions about grievances. Research has shown that perceptions of fairness are affected by the type of allocation norm that is salient in a given situation.[12] Equity norms (e.g., the person who contributes the most, gets the most), are generally preferred when economic productivity is the primary goal; equality norms (everyone gets the same) guide situations where group harmony is important; and need-based norms (the neediest gets the most) are important under conditions of personal development or social welfare.[13]

Research on distributive justice and related theories, such as equity theory, has generally shown that people react to distributions of rewards and of burdens in predictable ways.[14] When people are made to see that the ratio between their own rewards (e.g., pay) and their own qualifications (e.g., education, effort, seniority) is less than the ratio of rewards and qualifications obtained by a specific or generalized other individual, people experience anger or resentment and engage in behaviors designed to alleviate the distress, such as sabotage and revenge. Research has found, for example, that employees have even resorted

to theft and sabotage in reaction to perceptions of pay inequity.[15] Similarly, when people are made to feel that their own ratio of rewards to qualifications is greater than that enjoyed by another or others, they experience guilt and then engage in behaviors (e.g., working extra hard) that alleviate guilt.

Procedural justice

Early theorizing and research concentrated on people's reactions to the outcomes of social interactions, but it ran into difficulty when researchers noticed patterns of findings for which there were no readily available accounts. David Messick and colleagues noted that when people are asked to describe examples of unfairness, concerns about pay and promotions and other forms of allocation rank lower than concerns about how one has been treated[16] – a form of justice that came to be known as procedural justice.

Research and theory on procedural justice and related concepts has been abundant, with Thibaut and Walker providing the seminal treatise.[17] These researchers were interested in individuals' reactions to dispute-resolution procedures in legal arenas, and argued that what mattered most to disputants was whether they had a sense of control over final decisions. *Process control* refers to the ability to control the information that is presented on one's behalf – a concept that has been labeled "voice."[18] *Decision control*, or "choice," is the ability to have a say in the how the outcome is determined.

Thibaut and Kelley's interest in procedural justice has been elaborated on and modified by Tom Tyler. Like Thibaut and Kelley, Tyler and his colleagues envision people as being much more concerned with issues of procedural justice than with issues of distributive justice. Where Tyler parts company from Thibaut and Kelley is in his understanding of the reasons for the concern with procedural justice. Whereas Thibaut and Kelley emphasized the instrumental aspects of a concern with procedural justice, Tyler has insisted on the relational aspects. In a long series of studies, Tyler has developed the theme that procedural justice helps individuals to satisfy their concerns about their status within a group and also their concerns about the group's position within society.[19]

Although Tyler has been unwilling to claim that some aspects of procedures are universally seen as fair, he has noted that individuals assume that they are being treated with fairness when they are treated with respect.[20] Other theorists, some of whom seek to make a distinction between interactional justice (which looks at how procedures are enacted) and procedural justice (which also looks at how procedures are developed), have echoed the importance of interpersonal respect.[21]

A great deal of empirical research has now confirmed the importance of procedural justice issues. Individuals like to have allocations that go in their favor. Yet, they tend to accept allocation decisions that are not in their favor if they believe that the rules that guided those decisions were procedurally fair.[22]

One group of researchers examined a sample of 996 recently fired or laid off workers to determine what factors accounted for their making a wrongful

termination charge.[23] Being treated poorly by one's supervisor at the time of termination and being given an insufficient explanation for the termination – both essential elements of interpersonal justice – were the strongest predictors of making a charge. Similarly, Goldman, Paddock, and Cropanzano in a qualitative interview study of 34 individuals who had filed Equal Employment Opportunity Commission (EEOC) complaints found that while concerns for distributive injustice played a role in the decision to file a claim, procedural injustice concerns were paramount to their decision to continue pursing the claim.[24]

Of special interest to researchers of procedural justice is the issue of voice. Individuals deeply value having an opportunity to give voice to their perspectives, even when decisions have already been made so that the information is of no instrumental value.[25] Being listened to, even just ceremonially, has been found to be a strong predictor of job satisfaction and of pro-organizational behaviors and attitudes. Conversely, being denied an opportunity to voice opinions about how they were treated on the job or being treated with disrespect when voicing their complaint to authorities within their organizations has been found to be an impetus for filing complaints with the EEOC.[26]

Retributive justice

Recently some psychological justice researchers have articulated another dimension to justice motives not adequately explained by distributive and procedural concepts. Asking the provocative question, "Why do people seek to punish others?" Darley and Pittman have concluded that punishment occurs as a means for repairing rents in the social fabric.[27] Punishment is meant to enforce symbolic messages of culturally relevant justice values.

Darley's conceptualizations bear some similarity to the jurisprudence of tort law, the foundational basis of employment discrimination doctrine. Darley notes that when a wrong is committed, individuals assess the intentions and degree of fault of the person who caused the harm to decide the magnitude of punishment warranted or compensation owed. If the harm-doer did not intend to cause harm and acted within reasonable bounds that would normally not cause harm, the act is viewed as accidental. Accidental harms, Darley posits, direct attention less at issues of punishment of the harm-doer and more toward the compensatory goal of making the victim whole. If the harm-doer knew or should have known her or his acts would cause harm or did not follow normal standards of care, then the harm-doer is viewed as negligent and thus deserving of some punishment. Finally, when the harm-doer desires or knows that his or her acts may lead to harm and nonetheless proceeds to engage in the activity to cause that harm, the acts are viewed as intentional and deserving of severe punishment.

The emphasis on intentions and fault, evident in Darley's analysis of retributive justice, sheds light on why it is so difficult to diminish discriminatory practices in organizations. Leaders in contemporary American business

organizations almost never set out to harm a specified group of employees or potential employees. Rather, they usually intend to behave in ways that they might describe as upholding standards. To uphold standards is surely not an act worthy of correction, let alone punishment.

The problem is that standards have a way of maintaining the status quo and of excluding the disenfranchised, even as they do so without individuals' awareness or conscious intention. Norton, Vandello, and Darley[28] describe a process they call "casuistry," which is the unconscious shift in emphasizing seemingly objective criteria to justify a social-category-based selection decision. In one of their six studies documenting and testing the parameters of casuistry, Norton et al. found that male undergraduates, acting as managers in a personnel selection task where they chose between a highly qualified male and female applicant for a construction-related job, not only overwhelming chose the male candidate, but justified their decision on the criterion on which the male candidate scored higher. In one condition the male candidate had more experience than the female candidate (she had better educational credentials), and in another condition, these criteria were reversed, with the male candidate having the greater educational credentials. In justifying their selection decision, participants almost always mentioned the "justified" criterion (education or experience), and rarely mentioned gender as factor in their decision making. These studies suggest that we can fool ourselves into believing we are following procedurally just principles, such as using objective criteria for decision making, when in fact we are still operating in a biased fashion.

In sum

Volumes of research studies conducted in the US and Canada show that people care a great deal about justice, and especially about procedural justice. It is also clear that even well-intentioned policies and procedures can perpetuate discriminatory practices because fair-looking procedures can be inaccurately conflated with nondiscriminatory working conditions. As long as people are treated with respect, they may never even notice, let alone lodge complaints about, the ways in which they are ill treated. And as long as decision makers can imagine themselves to be pure of motive, they may never even look to see what results are wrought by their policies and procedures.

Organizational Responses to Civil Rights Legislation

Before the civil rights revolution, employers, unless they were unionized, operated with close to unfettered discretion. Antidiscrimination legislation, particularly Title VII of the Civil Rights Act of 1964 (Title VII), represented an unprecedented limitation on managerial authority. The product of a vibrant political movement, civil rights legislation also gave rise to expectations of

bias-free workplaces and fair treatment. The desire to avoid legal battles and the quest for public legitimacy – an effort to bring organizations in line with society's emergent values – served as catalysts for organizations to create equal employment opportunity (EEO) compliance mechanisms to signal their adherence to the new laws.[29] Given the importance of procedures in creating the impression that justice obtains, and given the importance of the appearance of justice for people's trust in and loyalty to organizations, it is hardly surprising that employers' responses to antidiscrimination legislation consisted of implementing procedures intended to show that previously disadvantaged people are now fairly treated.

Some procedures have been codified in organizational policies and supported by organizational structures. Sociologists offer persuasive evidence that Title VII was the impetus for the development and broad implementation of a range of personnel practices that today are viewed as commonplace. These practices include non-union grievance procedures and disciplinary hearings;[30] the establishment of EEO offices;[31] the use of formal performance evaluations and salary classification;[32] the writing of employment at-will clauses in employment contracts designed to forestall wrongful discharge suits;[33] the use of sexual harassment grievance procedures,[34] maternity leave policies,[35] and the creation of diversity training.[36]

The legacy of the 1960s manifests itself in another way as well. Executive Order 11246, signed by President Johnson in 1965, requires non-construction (service and supply) contractors with 50 or more employees and federal government contracts of $50,000 or more to develop written affirmative action programs. Affirmative action employers must monitor their workforces to make sure that they employ qualified female workers and qualified ethnic minority workers in proportion to their availability for various job classifications. When self-monitoring reveals discrepancies between the availability of female talent and the utilization of female talent, corrective steps must be taken.[37]

Although affirmative action law has always provided employers with considerably more guidance than has EEO law, both forms of civil rights measures initially allowed and still do allow employers some latitude in terms of implementation. Title VII, in particular, presented employers with a broad, undefined prohibition, leaving uncertain the scope of the practices that would ultimately be deemed illegal.[38] It is only over time, and often through the compliance efforts of employers themselves, that the vague contours of Title VII's proscriptions have taken firmer shape.[39] Indeed, no less an authority than the U.S. Supreme Court has proclaimed that one of the purposes of antidiscrimination law is to encourage employers to adopt effective organizational structures for the purpose of lessening discrimination.[40]

Into the uncertain legal atmosphere stepped human resource professionals and management lawyers. These allied professional groups responded opportunistically to the civil rights changes in the legal landscape. Soon after Title VII's passage, such professionals began calling for and developing solutions to what they described as looming legal threats to employers.[41]

The success of antidiscrimination efforts was uneven. Although many business leaders felt discomfort about being seen as out of step with American society's changing norms, there was often palpable managerial resistance to changing the status quo and organizational procedures perceived as tried and true. In some instances, managers were truly disturbed by what they saw as changing the rules of conduct in the middle of a set of interactions.[42] One way that some companies resolved the tension between the forces for stasis and the forces for change was to announce symbolic adherence to EEO law while minimally disturbing the firm's existing operations.[43] General remedial measures can be, and in many instances demonstrably have been, easily decoupled from a firm's day-to-day activities.[44] This is not to say that organizations enacting cosmetic compliance measures necessarily regard their efforts in this light. As noted above, adherence to justice principles can mask the presence of bias and make discrimination very difficult to detect.

Studies of success

Although there is an impressive literature documenting the rise and spread of EEO policies and procedures, much less is known about their effectiveness. Several scholars have sought to identify the elements of civil rights compliance that are associated with increasing representation of women in employment and particularly within the managerial ranks. Konrad and Linnehan surveyed human resource executives at over 100 firms in the Philadelphia area, asking them to report the extent to which their organizations had adopted various affirmative action or EEO practices. These practices were categorized as either identity blind or identity conscious. Identity-blind practices included processes designed to treat people the same regardless of gender or race. Identity-conscious practices, in contrast, formally recognize gender or race in an attempt to remedy current discrimination, redress past injustices, and/or achieve fair and visible representation of women and minorities in leadership positions.[45]

As one would expect, government contractors, who were all affirmative action employers, were significantly more likely than other employers to use identity-conscious practices. Interestingly, being subject to an EEO lawsuit in the last five years and being subject to a compliance review were also positively associated with the adoption of identity-conscious programs and structures. Konrad and Linnehan found, in turn, the adoption of identity-conscious practices was positively related to the percentage of women in management and the level of the highest-ranking woman in the organization. Adoption of identity-blind structures was not associated with these or related criteria.

Similar findings were obtained in a study of the workforce participation of women and minorities in 207 different organizations.[46] Organizations that had general structures like EEO offices and affirmative action plans were more likely than others to embrace specialized practices like affirmative action recruitment programs. Yet, in the absence of such specialized programs, general antidiscrimination efforts lost their potency. Indeed, when an organization's affirmative

action plans were largely symbolic, rather than substantive, women tended to be underrepresented in the organization, a finding consistent with an earlier study.[47] General corporate EEO offices and training programs designed to convey needed skills to underrepresented groups did not seem to better the position of women either.

A more recent study makes the important point that the most effective antidiscrimination measures are those that require someone in an organization to take responsibility both for identifying local causes of bias and for monitoring changes in the conditions that create inequality.[48] Using changes in the representation of women and minorities in management as the measure of success, a study by Kalev, Dobbin, and Kelley of 810 work establishments concluded that structures designed to combat individual bias – diversity training, mentoring and networking programs, and diversity performance evaluations – lack the positive impact of those that require analyzing and monitoring organizational-level diversity outcomes.

Some of the details of Kalev et al.'s study are especially revealing. They discovered that firms adopting diversity-training programs actually see a decline in the odds of women achieving management status. Companies that evaluate managers on the basis of their performance in promoting diversity are likely to see slight increases in the percentages of white women entering managerial ranks but also some decreases in the chances for black men. Firms with networking programs experience increases in the representation of white women but no significant effects for other groups. Mentoring programs appear to increase the representation of African American women, leaving other underrepresented groups untouched. In contrast, firms with affirmative action plans, diversity committees, and diversity staff tend to experience across the board increases in underrepresented groups. These latter programs, argue the study authors, establish organizational responsibility for the changes necessary to realize a diverse workforce.

Efforts to reduce subjectivity in recruitment and hiring processes also appear to affect female representation in the managerial ranks. A study of over 500 randomly selected organizations in the US found the adoption of formal policies, such as open recruitment, is associated with a higher percentage of women managers.[49] Conversely, reliance on informal recruitment and market competition for managerial jobs is related to less female representation in managerial ranks. Formalized practices appear to decrease discrimination by removing subjectivity in the appraisal process.

Two independent examinations of promotion decisions in the Senior Executive Service (SES) of the federal government suggest that utilizing the principles of procedural justice combined with a progressive, EEO-supportive culture shows promise for creating and sustaining true gender equity. The SES is a corps of senior executives and agency managers who serve just below the top presidential appointees. SES members act as a conduit between the President's appointees and the federal workforce of agencies with representation in the President's cabinet. Examining selection decisions from 1987 to 1992,[50] and

then expanding their analysis to include promotion decisions from 1995 to 1999,[51] a team of researchers found female candidates proportionately more likely to be promoted than male candidates, despite the fact that between 84 and 88 percent of the candidates were men. Women's higher qualifications tended to account for their promotion success.

The more recent Powell and Butterfield study (2002) sought to determine whether women's advancement into the SES represented truly substantive gains. That study surveyed a sample of 1,000 male and female SES members across all federal agencies. It found that women and men were almost equally likely to be located in agencies that had considerable discretionary power. Women, moreover, tended to rate their job responsibilities higher than did men.[52] The positive political environment for women in government generally, along with that particular public employer's strong commitment to equal opportunity, may well account for this success.[53] Likewise, these encouraging results may be attributable to formal processes, such as fair and open recruitment procedures, uniform selection procedures, and open record keeping of the decision-making process.[54]

More research is needed before a given antidiscrimination structure can comfortably be deemed to produce positive effects for disadvantaged groups. Nonetheless, the preliminary studies described above assess the effectiveness of various antidiscrimination measures across organizations and begin to enumerate the characteristics of policies that are positively associated with progress for working women. Read together, they indicate that the most effective remedies are formal and identity-conscious policies that promote concrete organizational responsibility for change and are most difficult to segregate from daily organizational life.

Assessing the climate generally

EEO policies do not exist in the abstract. They are embedded in real organizations, and their effectiveness is influenced by organizational climate. A policy or practice deemed generally effective by researchers may have limited utility when adopted by a particular employer.

One way of gauging organizational climate is to assess employees' beliefs about the legitimacy of their employers' compliance efforts; those beliefs are a key component of assessing the everyday impact of civil rights law. Employees' interpretations of their employer's compliance efforts may affect their willingness to make use of existing structures to pursue their rights.[55] If an organizational climate sends the message that antidiscrimination efforts are not taken seriously or that complainants face potential retaliation, no amount of policy promulgation will bring about substantive change. Additionally, gender differences may be operative in the way employees react to specific organizational practices. Such differences, for example, have appeared in studies of grievance resolution procedures.[56] Employers who are serious about creating conditions of gender equality must, in designing institutional responses to civil rights law,

take into account which groups may be reluctant to avail themselves of such structures and take steps to reduce employee hesitancy.

It might seem logical to look at the number of lawsuits as a gauge of progress toward equity in employment. One might naively assume that as efforts to eliminate sex discrimination are increasingly successful, the number of lawsuits would decrease. Such a point of view does not, however, take into account the inconvenient fact that individuals are loath to seek redress for wrongs when they know that their efforts are unlikely to reap benefit and likely to cause distress to themselves.

A recent study of Nielson and Nelson[57] is especially instructive about the likelihood that aggrieved parties might seek to improve their situation through legal action. Included in the study is an analysis of data available on employment discrimination litigation in the federal courts from 1990 to 2001. Nielsen and Nelson conceptualize employment discrimination litigation as a "disputing pyramid." The base is comprised of a large number of people with perceived injuries, a subset of that group go on to become informal claims, fewer still become full-blown disputes between the parties, even fewer result in a formal filing, and the smallest number are those cases that actually go to trial.[58] Reviewing the empirical research relevant to each of the categories that make up the pyramid, Nielsen and Nelson come to stark conclusions about the practical effect of antidiscrimination law. Few workers who perceive they are discriminated against take informal or formal action to redress their grievances, most of those who do sue their employers never reach trial, those who reach the trial phase lose over 60 percent of the time, and those victorious at trial receive only modest awards.[59] The picture revealed by Nielson and Nelson varies considerably from popular and media accounts of employment discrimination litigation, which frighten employers and have even helped create a market for employment practice liability insurance.[60]

Court Responses to Complaints Against Employers: What Happens in Sexual Harassment Suits

Up to this point, our analysis has relied on social scientific explanations of why discrimination is easily masked and difficult to detect, rendering many policies adopted to eliminate bias as more symbolic than substantive. As we examine the role of the courts in this section, it is worth noting that current employment discrimination law imposes barriers on the ability of plaintiffs to successfully litigate bias claims. A disparate treatment claim, the most common form of employment discrimination claim, requires proof of discriminatory intent. Unconscious bias, often a factor in organizational decision making that disadvantages out-groups, can be difficult to address under this legal theory.[61] Other complex forms of disadvantage, such as organizational culture,[62] patterns of workplace interaction that over time exclude women,[63] and sex segregation

of occupational categories[64] fit uneasily within prevailing legal conceptions of discrimination.

Apart from these significant limitations, a question arises: Within the confines of existing legal theories, do the courts distinguish adequately between organizational compliance that is merely symbolic and organizational compliance that is, in fact, substantive? If the courts can tell the difference between real programs and procedures and those that are only cosmetic, legal remedies may serve as a sharp instrument for social change. If the courts are generally unable to differentiate between organizations that are going through the motions of change and organizations that are making a sincere effort to bring about change, then lawsuits will, at best, serve as blunt instruments against discrimination.

A number of studies have looked at how the courts treat at least one antidiscrimination measure: sexual harassment policies. However, the process by which courts came to equate corporate grievance procedures and antiharassment policies as compelling evidence of nondiscrimination is detailed convincingly by sociologist Lauren Edelman and her colleagues.[65] The story is not one of judicial innovations, but instead involves the interventions of human resource professionals and management attorneys. In the early 1980s, when there was little legal support for their assertions, these professionals began recommending grievance procedures as mechanisms for avoiding liability claiming, among other things, that courts were favorably disposed toward employers who implement internal procedures.[66]

Courts, with the U.S. Supreme Court taking the lead, over time responded by acting in conformity with the stated expectations of the personnel and legal professions. More specifically, courts ultimately embraced a grievance procedure defense to sexual harassment claims where the victim's employment environment has been adversely affected but he or she has suffered no tangible employment action such as termination, demotion, or a cut in pay.[67] In order to avoid legal liability in such cases, the defense requires the employer to prove: (1) that it exercised reasonable care to prevent and correct promptly any harassing behavior; and (2) that the employee unreasonably failed to avail herself of preventative or corrective opportunities provided or to avoid harm otherwise.[68] The sexual harassment grievance procedure, first recommended by human resources and legal professionals as a litigation prevention device, has thus become the primary evidence used by employers to demonstrate they acted reasonably to prevent harassment. Similarly, the employee's failure to make use of such procedures is a major way of establishing the affirmative defense's second prong. Through a process Edelman dubs "legal endogeneity," the meaning of sexual harassment law compliance has been determined not by the courts charged with enforcing Title VII but by the very organizations that the law was designed to regulate.[69]

Edelman and her colleagues see this judicial deference to organizational practice as problematic. The existence of a sexual harassment grievance procedure has come to be equated by judges with legal compliance. Judicial deference to

organizational policies typically exists apart from any searching inquiry into whether these common structures function effectively overall or in a given workplace.

The possibility that legal compliance might be merely symbolic rather than substantive is especially troubling to those who envision civil rights law as a potentially transformative force because courts are unlikely to be aware of the organizational dynamics that may undermine employees' rights.[70] For example, procedures may lack due process protections or the full panoply of remedies available in litigation. Additionally, employees concerned about retaliation or bias may decide not to use such procedures, even though the failure to lodge a grievance when a procedure is available can be fatal to an employee's harassment suit.[71] Perhaps the most significant danger, however, is that the absence or presence of a harassment grievance procedure may be used as the yardstick for legal compliance rather than a court undertaking an inquiry into the effectiveness of the device in eliminating workplace harassment.

Recent analyses by legal scholars confirm Edelman's fears. Reviewing courts' approach to the defense, one legal analyst has identified a judicial preoccupation with procedural matters.[72] Rather than assessing whether harassment policies are generally effective, the courts concentrate on procedural details such as whether employer complaint mechanisms include a bypass procedure clearly identifying personnel to whom complainants can go when they might otherwise need to lodge the complaint with their harassers.[73] Beiner has found courts tremendously unsympathetic to plaintiffs who fail to use existing grievance procedures, notwithstanding their very rational concerns about the repercussions of lodging a formal complaint.[74] Similarly, West reports that despite language in the Supreme Court decisions establishing the necessity of adopting effective preventive policies to create nondiscriminatory environments, the focus in harassment litigation is on what transpires after harassment occurs. The employer's duty to prevent harassment is easily satisfied by creating and disseminating an antiharassment policy with a grievance procedure.[75]

The courts' form over substance approach to employers' compliance efforts is also evident in the unthinking acceptance by employment lawyers and judges of harassment and diversity training as a vaccination against and antidote for discriminatory work environments.[76] Judges have embraced the pedagogical approach by incorporating it into civil rights doctrine – educational efforts like training are relevant to the availability of punitive damages – by citing training as favorable employer evidence in litigation, and by making it a regular component of consent decrees, without ever inquiring about whether training accomplishes what it purports to accomplish. Yet social scientists confess that we know very little about how and when these educational programs actually work and in some cases their use can give the impression that discrimination is being meaningfully addressed when in fact it is not.[77]

We do not discount the role of litigation in providing incentives for some employers to undertake meaningful steps to eliminate workplace bias. Yet the tendency of many organizations to create structures that are purely ceremonial,

coupled with evidence that courts defer to some of these devices as evidence of nondiscrimination, underscores the need to move beyond litigation to identify strategies that create and sustain gender equity. As many have noted, monitoring the outcomes of one's policies and procedures is a vital component of positive change.[78] Careful monitoring of results is at the heart of affirmative action as established by Executive Order 11246.

Monitoring

Affirmative action

If the process of bringing a lawsuit is reactive, occurring in reaction to a perceived problem, the policy of affirmative action is proactive, intended to ward off probable problems. Affirmative action is not a policy that differs from the majority of American law, but it is a controversial and often poorly understood policy.

Several factors contribute to the confusion that the American public seems to feel about affirmative action. First, the label applies to a number of different practices in education and employment. Second, the media has tended to seek heat rather than light, emphasizing the extent of controversy and failing to provide definitions or explanations of how affirmative action operates.[79]

Although poorly understood, affirmative action in employment, as established by Executive Order 11246, applies to 20 to 25 percent of the American workforce. All 3 million federal government employees are covered by affirmative action as are the employees of the roughly 200,000 establishments that do business with the federal government. About half of the federal contractors are in the construction industry and half are not.

The central principles of affirmative action are surprisingly simple. In essence, every affirmative action employer commits to being both gender conscious and race conscious and commits to monitoring how well it is doing in terms of employing people from targeted classes. Along the dimension of race, the targeted classes include African Americans, Hispanic Americans, Asian Americans, and Native Americans. Along the dimension of gender, women constitute the targeted class. For each targeted class, and for every relevant job classification, an affirmative action employer must calculate two statistics: availability and incumbency (or utilization). Availability refers to the proportion of the qualified workforce for each job classification to come from each targeted class. An organization might, for example, determine that women comprise 30 percent of the people with the qualifications to be lawyers but only 2 percent of the people qualified to be welders. The calculation of availability statistics allows for some small measure of discretion, but the process is by now rather well defined and routine. Even more constrained is the calculation of incumbency.

When incumbency figures fall short of availability, the organization must consider remediation. Sensible plans and timetables are devised. As long as the

organization makes a good faith effort to correct its deficiencies, no punitive measures are taken. Organizations that flagrantly flout the responsibility to bring incumbency into line with availability can be disbarred from receiving federal contracts. Disbarment occurs very rarely.

Republican administrations are not known to apply affirmative action law with the same vigor as Democratic administrations. Nonetheless, affirmative action has been credited with a portion of women's economic advances over the past four decades. Contrasts between federal contractors and other companies in the same sectors of the economy show the former to provide more jobs and better jobs to women than do the latter.[80] Given the importance of monitoring for the advancement of women, and given the centrality of monitoring to affirmative action, the salutary effect of affirmative action is not surprising. One of the ways in which affirmative action policy proves especially effective is in its insistence on examining outcomes or results of procedures as well as the procedures themselves.

Court-ordered monitoring

Another example of the promise of monitored remediation is that of court-ordered monitoring, which is also an expression of litigation's potential for bringing about meaningful change. Here, the case of Mitsubishi Motor Manufacturing of America is instructive. In 1998 Mitsubishi set out to transform its auto plant in Normal, Illinois from an environment of rampant sexual abuse and harassment to one where women could work under conditions of equality, dignity, and respect. After years of allowing horrendous conditions to flourish, the automaker changed course in the face of vigilant government prosecution, high-profile publicity, and an aggressive consumer campaign spearheaded by the National Organization for Women. As part of a $34 million lawsuit settlement with the EEOC, Mitsubishi extensively revised its existing sexual harassment policy to ensure convenient mechanisms for reporting harassment, prompt investigation and resolution of complaints, progressive discipline for those retaliating against complainants, and written communication of investigatory findings. An appeal mechanism for complainants dissatisfied with the company's findings or proposed remedial actions was established.

Managers and supervisors were informed of their duty to actively monitor compliance with the new policy. Handling EEO issues became a criterion for supervisory performance evaluation and was linked to the bonus/salary structure. A significant percentage of the Normal plant workforce – from new assembly-line workers to supervisory employees and even senior managers – was given mandatory sexual harassment training. A nursing room for nursing mothers was created.[81]

Although there is some question about the depth of the change in organizational climate at the Normal plant,[82] and indeed some of the steps taken by the company have been found generally by researchers as unhelpful in bringing about gender equity, there is no doubt that Mitsubishi has taken very seriously

the need for organizational change. Not only has it agreed to undertake changes, it has also acknowledged the need to expose the plant to outside scrutiny. The company agreed for three years to allow three court-appointed monitors to observe, investigate, and report on its efforts to eradicate sexual harassment. In May 2001, Mitsubishi received a clean bill of organizational health from them.[83]

The Mitsubishi case, however, was unusual. Most successful discrimination suits or negotiated settlements, in contrast, culminate with more common legal remedies like back pay, reinstatement, and the provision of job training to those denied it. These devices are designed to correct discrete legal violations rather than to bring about large-scale transformation of a particular workplace, and provisions for employer accountability are noticeably absent.

Parting Thoughts

Whether transformation comes dramatically as in the case of Mitsubishi Motors or slowly and steadily as in the case of most federal contractors and other organizations practicing affirmative action, change can be sustained only when those in and around the organization feel that both the goals and the means to reach the goals are fair. Given the prevalence of procedural justice issues, as distinct from issues of distributive justice, those who would make American employers as just in substance as they are in slogan need to engage in a special balancing act. On the one hand, they must never lose sight of the need to collect and assess the hard data of achieved results. On the other hand, they must be constantly ready to educate people about the fairness of the procedures by which results are assessed.

Notes

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