Title VII Consent Decrees: Affirmative Inaction

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TITLE VII CONSENT DECREES: AFFIRMATIVE INACTION?

(In enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex or national origin."

INTRODUCTION

Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, prescribes employment discrimination by making it a violation of federal law "to fail or refuse to hire or discharge any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin." Upon a finding that an unlawful act of employment discrimination has occurred, Title VII provides that it may be enjoined and that the court may order any affirmative action that may be appropriate including, but not limited to, "reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate." Thus, the focal point of any employment discrimination case becomes the remedies section of the United States Code—section 2000e-5(g). This section dictates the types of

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3. Id. § 2000e-2(a).
4. Id. § 2000e-5(g).
5. Id. § 2000e-5(g) provides:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an
relief that will be available. The most preferred form of relief, under that provision, is the consent decree, a judicially approved pretrial settlement between the parties. However, unless one is a Title VII specialist, armed with previous experience in the drafting and implementing of consent decrees, it is very difficult to tell whether any particular decree is "good"; that is, whether it has satisfied, to the fullest extent possible, the Title VII objectives of eradicating employment discrimination and making "whole" each employee who has suffered from such discrimination.

employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

6. The vast majority of Title VII cases ought to be concluded by negotiated settlements rather than by trials followed by judicially devised remedies. Once the parties have vigorously pursued discovery, it is often all over but the shouting. The evidence in Title VII cases frequently consists of little more than documents and data. Once this had been produce, the parties are in a position to settle the matter without going through the time and expense of a trial.


However, that vigorous pursual of discovery may be quite costly for the Title VII practitioner who may have to work on a case for a number of years without compensation in hopes of being awarded her attorney's fees. "Plaintiffs should be aware that extensive discovery may be undertaken by the defendants. Typically, the plaintiff in a Title VII suit can expect extensive interrogatories and the taking of his deposition at least once." NATIONAL EMPLOYMENT LAW PROJECT, LEGAL SERVICES MANUAL FOR TITLE VII LITIGATION 55 (1975).

Some recent Supreme Court decisions have called into question the receptivity courts would give a Title VII case actually brought to trial. In Washington v. Davis, 426 U.S. 229 (1976), the Court held that in order to prove the unconstitutionality of alleged racial discrimination in employment, the plaintiff must show intent to discriminate; racially disparate impact is not enough. Although the court was not disallowing disparate impact as a means of proving discrimination under Title VII, this holding may be viewed as threatening to Title VII cases. And in Gilbert v. General Electric Co., 429 U.S. 125 (1976), the Court held that it was not sex discrimination under Title VII to deny disability insurance for pregnancy, for that policy does not discriminate against women as opposed to men, but differentiates between pregnant women and unpregnant people. In that same decision, the Court noted that EEOC guidelines are not entitled to "great deference" in analyzing congressional intent. Id. at 140-41.

7. Two points need to be made here: First, within the realm of "good" decrees, the employer or employee may be favored to a greater or lesser degree. To this extent, this comment will define "good" from the employee's point of view. Second, remedial provisions will vary if one is representing a class or an individual. The discussion to follow will focus on class remedies.
In order to facilitate the drafting of consent decrees which fulfill these objectives, this comment will first, briefly examine the general types of Title VII remedies available for employment discrimination. Then, drawing almost totally from proposed or judicially approved consent decrees, it will identify key substantive provisions which can put the action into any affirmative action plan, contributing to its effectiveness. By identifying these provisions, the author hopes to supply some guidelines for the practitioner faced with the settlement of an employment discrimination lawsuit.

**TITLE VII REMEDIES**

*Purpose*

Under section 2000e-5(g), two basic forms of relief are available to remedy Title VII violations: negative injunctions and mandatory (affirmative) injunctions. The former is prescriptive, stopping the unfair system or practice, while the latter is both compensatory—adjusting for past wrongs—and corrective—creating a new system of practices that will be fair. A court may impose either or both of these forms of relief upon an employer who has been guilty of a Title VII violation.

Although all consent decrees specify that the defendant employer has not been found guilty of discrimination, in negotiating “a meretricious Title VII case, the plaintiff always has recourse to his or her federal right to redress in court. That factor alone may suggest that the best negotiating approach is from the outset to ask your adversary for what you believe a court would order and to tell your adversary, ‘Either you meet my demands or the court will order you to do so.’”

The courts, in determining what they will order the defendant to do, have prescribed relief on the basis of their interpretation of the somewhat abbreviated language of section 2000e-5(g), the legislative history of that section, and precedent established thereunder. These materials, taken together, clearly indicate that the central purpose of these two basic forms of relief is to make the aggrieved party “whole,” by eliminating

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9. See FAIR EMPLOYMENT LITIGATION, supra note 6, at 430, where the authors divide the forms of relief into three categories: prescriptive, corrective, and compensatory. This comment will treat the latter two as variations within the single category of affirmative relief.
10. Id. at 416.
the effects of past discrimination as well as preventing similarly illegal discrimination in the future."

Thus, the primary function of any consent decree is to fulfill this "make whole" objective. In order to achieve this result, it becomes necessary to examine the key provisions that should be a part of any successful consent decree.

**CONSENT DECREES PROVISIONS**

**Introduction**

A perusal of only a few consent decrees would illustrate that the specific remedial provisions within them vary as much as the factual situations upon which they are premised. That is, of course, to be expected, for a good decree should be tailor-made for its parties, with the make-whole objective in mind.

In order to fulfill the requirements of that goal, it is beneficial to review other decrees, a task made difficult by both the lack of ready access to such decrees and the time involved in reviewing them. What follows, therefore, is a capsulized discussion of the general categories of consent decree provisions, such provisions having been drawn from a sampling of Title VII consent decrees and settlements. Although an attempt has been made to touch on every potential type of provision, the

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11. A section-by-section analysis introduced by Senator Williams to accompany the Conference Report on the 1972 amendment to Title VII speaks to the "make whole" purpose of the new section 2000e-5(g):

   The provisions of this subsection are intended to give the courts wide discretion in exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section [2000e-5(g)] the courts have stressed that the scope of relief under the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

   Id. at 418.

118 Cong. Rec. 7168 (1972). The Supreme Court strongly reiterated this "make whole" purpose in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), where it stated that:

   It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination.

   Title VII deals with legal injuries of an economic character occasioned by racial or other antiminority discrimination. The terms "complete justice" and "necessary relief" have acquired a clear meaning in such circumstances. Where racial discrimination is concerned, the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.

*Id.* at 418.
list is not exhaustive, and it is up to the individual Title VII practitioner to draw from these general guidelines, the specifics most suited to the situation with which she or he is dealing.

**Proscriptive Orders**

Whatever the specific circumstances of an individual case happen to be, every consent decree should include a broad proscriptive order enjoining illegal discrimination in the future. Based on those decrees examined, its form is usually a simple prohibition of any future discrimination because of race, color, sex, or national origin which is in violation of Title VII. The effect of such an injunction against illegal discrimination is to permit the court to hold in contempt any party who continues to engage in such discrimination.

For the same reason, the decree should also enjoin any retaliatory action against any complaining employee. Such a provision ensures that employees who have asserted or who continue to assert their Title VII rights will not be discriminated against because of their exercise of those rights.

**Compensatory Affirmative Relief**

In addition to these broad proscriptive orders, consent decrees should provide very specific affirmative remedies to compensate for past discrimination as well as to make corrections in the employer's practices which would otherwise continue to result in discriminatory effects. Compensatory relief may consist of economic benefits such as back pay and fringe benefits, promotions and transfers, and recruitment of those who were dismissed or refused employment on account of the employer's

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12. An example of a proscriptive order of this kind can be found in Tribune Decree, supra note 6, at 9. The Tribune decree provided: "Company and Union shall not discriminate against any person because of race, color or national origin in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) et seq. or 42 U.S.C. § 1981." Id.


The [defendants] agree that there shall continue to be no discrimination or retaliation of any kind against any person because of opposition to any practice declared unlawful under Title VII of the Civil Rights Act of 1964, as amended, or because of the filing of a charge, giving of testimony or assistance, or participation in any manner in any investigation, proceeding or hearing under Title VII of the Civil Rights Act of 1964, as amended.

*Id.* at 3.
discriminatory activities. Provisions for this type of affirmative relief should be included in a consent decree wherever they are appropriate or necessary to fulfill the make-whole objectives of Title VII.

**Back Pay.** The most obvious form of compensatory relief for past discrimination is back pay. Specifically provided for in the statute, back pay compensates the victims of discrimination for wages lost due to the past discrimination, limited, however, to the period of two years before the charge was filed with the Equal Employment Opportunity Commission (EEOC).

Back pay is probably the most strongly resisted of all Title VII remedies. However, in a strong show of support for this form of relief, the Supreme Court, in *Albemarle Paper Co. v. Moody,* concluded that when employees or applicants for employment have lost the opportunity to earn wages because an employer has engaged in an unlawful discriminatory employment practice, "backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purpose of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." Therefore, if the Title VII practitioner believes she has a winning case, there exists a firm basis for demanding back pay; if the chances for success in litigation are less definite, counsel, when drafting a proposed settlement, will have to determine the extent to which a full back pay award should be compromised. Arriving at a proper back pay award can be a complex task and the practitioner has little help beyond a careful analysis of the circumstances surrounding previous awards. Although the courts have shown strong support for the award of back pay, as one commentator noted:

> [n]ot many have thus far dealt with the complex problem of determining the amount of back pay due members of a

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15. Id.
17. Id. at 421. The Court noted that if a district court declines to award backpay, it should carefully articulate its reasons. Id. The Court premised this decision on the "make whole" purpose underlying Title VII, see note 11 and accompanying text, supra, and the definition in Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971), that the primary objective of Title VII was a prophylactic one, and that the threat of backpay provides the spur or catalyst which causes employers to evaluate their employment practices. Id. at 417-18.
class found to be the victims of unlawful discrimination, and no definite standards have been established in the area to guide the courts and counsel. Back pay awards have been tailored largely to the circumstances of the particular class...  

Economic fringe benefits. Monetary relief is not limited to recovery of lost wages, but can extend also to recovery for the loss of any economic fringe benefit resulting from discrimination including, for example, pension rights and disability benefits. As with back pay, it may be difficult to determine the amount to which the aggrieved party is entitled. In one case, this problem was rectified by providing that for every year a female or minority employee works in a previously underrepresented category, he or she would receive two years worth of credit for fringe benefits.

Promotions or transfers. Compensatory relief may consist not only of economic benefits but, where required to fulfill the goals of Title VII, may include promotions or transfers of the victims of past discrimination. The rationale behind this type of relief is to place the aggrieved parties in the positions they would have occupied were it not for the violations of Title VII. This type of remedy may be provided via the outright promotion or transfer of particular employees or by the implementation of training programs designed to ensure the mobility of employees who were discriminated against.

19. Id. § 92, at 117.
20. Notice of Pendency of Class Action and Proposed Settlement, Alvaniz v. California Processors, Inc., No. C-73-2183 WHO, at 12 (N.D. Cal. Oct. 28, 1975) [on file at SANTA CLARA L. RIV.]. It should be noted that there has been intervention on this proposed decree but not on the basis of these fringe benefit agreements.
21. For example, in Consent Decree, Wells v. Bank of America, No. C-71-409 CBR (N.D. Cal., filed July 24, 1975) [hereinafter cited as Bank of America Decree], a very unique and detailed system was developed for the promotion and mobility of the aggrieved employees. The defendant bank established four trust funds which provided $3,750,000 for four different types of training programs leading to such promotions or transfers. A management and training trust was provided for female college graduates in the lower employment classifications to train for management positions. Id. at 15. Those women who had achieved managerial classifications were provided with a self-development trust which provided individual grants for the development of their creative and intellectual capacities. Id. at 19. In addition, an international development trust provided for advancement to more responsible positions in international banking, id. at 23, and yet another fund provided individual and group grants for all of the plaintiffs in support of their development of banking management skills. Id. at 28.
Recruitment of past applicants and former employees. In addition to the compensatory forms of relief provided for those who remain employed by the defendant, those who have been dismissed or not hired due to discriminatory practices may be made whole by affirmative recruitment which will place them in their rightful position. A provision establishing this type of relief should require the defendant to accord those who have not been employed, or who have been fired in violation of Title VII, priority status upon reapplication for employment.\textsuperscript{22}

Corrective Affirmative Relief

In addition to the compensatory methods, the corrective affirmative modes of relief are designed to remedy any present and continuing effects of past discrimination. These affirmative modes include specific goals for hiring and promotions, corrective training programs, procedures for the validation of testing and minimum position requirements, employee recruitment programs and methods for eliminating discriminatory stereotypes. The inclusion of these types of corrective remedies is appropriate whenever the consequences of past discriminatory policies are likely to continue to have a discriminatory effect even after the rescission of such policies.

Goals and timetables. The most controversial area of corrective affirmative relief is that of promotional and hiring goals which constitute the major portion of many, if not most, affirmative action plans. As the following discussion will indicate, this form of relief attempts to ensure the active participation of employers in building a work force reflecting the available pool of workers for the job in question.

Despite this objective, the 1964 Civil Rights Act precludes preferential treatment of "any individual or to any group because of the race, color, religion, sex or national origin of such individual or group."\textsuperscript{23} Therefore, the hiring or promotion of unqualified women or minorities over qualified white males, as part of a corrective hiring program, is illegal under Title VII.

It is the confusion over the distinction between the estab-

\textsuperscript{22} Wells \textit{v.} Bank of America, which involved discrimination against women who had applied for positions as management trainees, resulted in a decree which provided that "women college graduates who can be satisfactorily identified as having unsuccessfully applied for employment as a management trainee with the [defendant] between January 1, 1969 and May 1, 1973, shall, upon reapplication for a management training position, receive priority consideration." \textit{Id.} at 28.

lishment of these goals and an *absolute* requirement to meet them which has aroused a chorus of dissent over this type of affirmative corrective relief. Rather than being absolute, however, these affirmative action goals, which have been approved by the courts,\(^{24}\) are based on both the availability of *qualified* persons and the anticipated vacancy rate. As explained by Dr. Bernice Sandler, Director of the Project on the Status of Education of Women, "'[g]oals are an attempt to estimate what the employer's work force would look like if no illegal discrimination based on race or sex had ever existed.'\(^{25}\)

Though the obligation to meet the goal is not absolute, efforts must be made through recruitment, impartial testing, and interview practices to find well qualified persons among the group(s) previously excluded. Only in a small number of extreme cases, where a long history of institution-wide discrimination has been demonstrated, are absolute quotas used.\(^{26}\) Absent these extreme circumstances, flexible corrective goals are the preferred alternative. Thus, it is important to consider the manner in which these goals are established.

Goals are initially determined by examining the "relevant labor force," or the employer's potential applicant pool, and determining what percentage of that pool is minority and female. For example, in the proposed consent decree in *Garza v. County of Monterey*,\(^{27}\) the relevant labor force was drawn from the county labor force as determined by the California Employment Development Department.\(^{28}\) Alternatively, in *Mueller v. Greyhound Lines West*,\(^{29}\) since Greyhound recruited nationally, the applicant pool was the "national work-force." Finally, in *Gray v. Tribune Publishing Co.*,\(^{30}\) the decree designated two counties, where the newspaper was generally circulated, as the


\(^{25}\) *Affirmative (In) Action: How Do You Read It*, *EQUAL RIGHTS MONITOR*, January/February, 1977, at 9 [hereinafter cited as *Affirmative (In) Action*].

\(^{26}\) Id.

\(^{27}\) Proposed Consent Decree, *Garza v. County of Monterey*, No. C-73-2074 RFP(SJ) (N.D. Cal. 1976) [on file at SANTA CLARA L. REV.] [hereinafter cited as County of Monterey Decree].

\(^{28}\) Id. at 12-13.


\(^{30}\) Tribune Decree, *supra* note 6.
area containing their applicant pool. As a result, the size of the relevant labor force or applicant pool turns on the circumstances of the individual case. It is up to the individual practitioner to determine what applicant pool will best serve the interests of his client and the objectives of Title VII.

After the appropriate labor force has been established, the particular employer's work force must be examined and compared to it. This comparison generally yields a disparity between the percentage of women and minorities in the employer's work force and the corresponding percentage in the relevant labor force. Based on this disparity, the goal of the corrective plan is to achieve "parity," that is, to have the work force adequately reflect the labor force. It cannot be overemphasized that the goals must be realistic, and should not, for instance, require the defendant to employ more persons from a minority group than are currently available and qualified for any particular position.

As noted in Rios v. Enterprise Association Steamfitters Local 638, the figures upon which the goals are based must be relevant, rational, and explained. The court should be guided by the most precise standards and statistics currently available.

After arriving at the parity figure, the number of years over which it is to be achieved must be determined. By estimating how many vacancies generally arise, and what portion of that number should be hired from the claimant's group, one can arrive at the number of years the entire process should take.

31. Id. at 4 & exhibit A.
32. FAIR EMPLOYMENT LITIGATION, supra note 6, at 450.
33. For example, if the general labor force is 25% Spanish-surnamed, it may not be realistic to expect the employer to meet a goal of hiring 25% Spanish-surnamed individuals in a professional category. The Title VII practitioner should, for example, contact professional schools to determine the number of minorities graduating and the projections of the number of minority graduates for the next 5 years.
34. 501 F.2d 622 (2d Cir. 1974).
35. Id. at 633.
36. It should be noted that there are conflicts which arise when an attorney is representing both minority employees and non-minority women in a Title VII dispute. Most practitioners represent either minorities or women, and it is better to do so rather than represent the interests of both. On a theoretical level, there does not appear to be a problem in representing both groups (or any number of oppressed groups), for the employer's relevant labor force has X% minority, X% women, and from those percentages goals are established. However, should any compromise be required in order to gain the benefits of a consent decree, the interests of women and minorities could readily conflict with one attorney representing those conflicting interests.

Another problem which might arise if the practitioner is representing both women and minorities or is developing, for example, an affirmative action plan for women when the employer already has a plan for minorities, is the problem of "double-
Finally, the decree should specify how the hiring timetable was established and provide for its annual revision based on a reexamination of the most current relevant labor force statistics and the company’s hiring and promotion performance over the preceding year.37

Training programs. As previously noted, training programs may provide compensatory benefits, allowing for transfers and promotions.38 In their corrective mode, such programs perform one of two distinct functions. First, they may affirmatively encourage female and minority employees to move into those positions where they have traditionally been underrepresented. Second, they may be used to convey the corrective programs’ aims and provisions to the personnel who will be instrumental in implementing it.

Examples of programs which have been developed to fulfill the first function include: individual evaluation and counseling,39 individual or group assessment of the full spectrum of career opportunities,40 formal career development opportunity counting.” The employer may hire a minority female and count her as both a woman and a minority under the plan—literally a “two for the price of one” approach. On a theoretical level, this double-counting should not be necessary, for the employer would want to have his work force reflect the labor force and would want to attempt to achieve his goals, counting the minority woman as a minority or a woman. But the consent decree is a compromise. In order to gain its benefits for her plaintiffs, counsel may allow for a limited amount of double-counting. Counsel, however, will also have to determine just how much double-counting to allow, considering all the factors involved.

37. In the County of Monterey Decree, supra note 27, at app. A, for instance, each job category (such as professional, technical, office and clerical, etc.) was first examined and the total number of employees in that category, as well as the number of those employees were white, black, Spanish-surnamed or “other”, was noted. Next, the disparity between the present work force and the relevant labor force was determined. Last, the plan delineated how many black, Spanish-surnamed and “other” employees would constitute the goal of the County of Monterey to have employed in the number of years allotted to reach parity, thereby making the county’s work force a reflection of the relevant labor force.

Next, each county department (such as Sheriff, District Attorney, etc.) was examined for the same factors. Id. app. B. The reason for establishing goals for each department, as well as for each job category, was to achieve parity in each of the departments. Absent this procedure, the members of minority groups subsequently hired might end up concentrated within a single department. For example, the job category of professional requires five black employees in order to meet an affirmative action goal. If the district attorney hired five blacks, thereby meeting the county’s goal in the professional category, the other departments—medical center, sheriff, etc.—would have no affirmative goal to reach and could ostensibly maintain an all-white male hierarchy. Therefore, the Title VII practitioner should strive for a work force integrated at all levels and in all areas even though the statistical “groundwork” may be laborious.

38. See note 21 and accompanying text supra.
39. Xerox Settlement, supra note 13, at 5.
40. Id.
instruction,\textsuperscript{41} funding for career change as well as career development,\textsuperscript{42} part-time or summer employment as a means of training,\textsuperscript{43} and funding programs.\textsuperscript{44} This list of possible programs is by no means exhaustive, and, as with all substantive provisions in any consent decree, it will vary depending on the needs of the employees in question.

However, since the ultimate objective of any corrective program is to direct persons into those positions for which they are qualified and interested, training should not be used by the employer to impede that progression. Therefore, the agreement should specify the type of training which is to be offered.\textsuperscript{45} Nor should the training be required across-the-board, since some employees may be ready for transfer or promotion without further training, and the employer should not be allowed to use uniformly required training as a stumbling block to advancement.\textsuperscript{46}

Turning to the second function of a corrective training program, those employees who will be instrumental in implementing the affirmative action program should not merely be notified of its provisions, but trained to implement it. The consent decree should therefore include specific methods for training those who will be responsible for or involved in recruitment efforts, hiring decisions or training programs.\textsuperscript{47}

In addition, a decree aimed at eradicating sex discrimina-
tion should further specify that a portion of the training be
directed at the elimination of stereotypes.\textsuperscript{48} One settlement
decree examined, for example, provided for training “to elimi-
nate preconceived ideas of jobs that might be thought of as
‘male jobs’ or ‘female jobs.’”\textsuperscript{48}

Validation of testing and job specifications. In the past,
job applicants and employees seeking transfer or promotion
have frequently fallen victim to an employer’s practice of arbi-
trarily requiring a college degree or a high school diploma when
such qualifications were not essential or even necessarily useful
to the successful performance of the job in question.\textsuperscript{50} In \textit{Griggs v. Duke Power}, the Supreme Court condemned this type of
arbitrary practice, demanding that testing must reasonably
measure job performance.\textsuperscript{51} Therefore, a good consent decree
should require employers to “validate” any existing testing
procedures and job specifications to ensure that they are job
related and not simply perpetuating illegal discrimination.

Recruitment. In its corrective mode,\textsuperscript{52} recruitment focuses
on the employer’s affirmative efforts to make women and mi-
norities aware of, and encourage their application for, openings
for positions in which they have been previously underrepre-
sented. These recruitment efforts can either be directed to non-
employees outside the company or toward in-house employees.

In order to encourage the application of the underrepre-
sented from the labor force, many comprehensive decrees have
required the defendant to maintain a file of women and minori-
ties who have previously applied for employment but have not
been hired (generally called an affirmative action file) and to
notify them of openings.\textsuperscript{53} Job openings should also be adver-
tised in a wide range of publications including those read
mainly by women and minorities, with organizations whose
membership predominately includes women and minorities,
and with radio and television stations with a predominately
female or minority audience.\textsuperscript{54} In addition to these forms of

\textsuperscript{48} See text accompanying note \textsuperscript{59} infra.
\textsuperscript{49} Xerox Settlement, supra note 13, at 7.
\textsuperscript{51} 401 U.S. at 436.
\textsuperscript{52} Recruitment may also serve a compensatory function when the employer
recruits those people who have been dismissed or not hired due to discriminatory
practices. See note 21 and accompanying text supra.
\textsuperscript{53} See, e.g., \textit{Consent Decree, Lewis v. FMC Corp.}, No. C-74-2327 RFP, at 14
(N.D. Cal., filed Nov. 10, 1976) [hereinafter cited as FMC Decree].
\textsuperscript{54} The Greyhound decree was especially thorough in this respect, providing lists
outside advertising, many decrees require, as part of affirmative recruitment, that notices of job opportunities also be posted for the benefit of "in-house" employees. Where such notices are used they should be sufficiently conspicuous to attract the attention of the employees at the company's facility. The mere posting of an inconspicuous or unintelligible "notice" should not suffice.\(^5\)

But "getting the word out" through clear and conspicuous forms of notice is only one-half of recruitment; the other half is getting the recruits in. One of the major problems with affirmative action has been the failure of most plans to encourage people who have grown disillusioned by past discrimination to take advantage of new opportunities when they are offered. Therefore, the decree should stipulate how the employer will encourage applicants to train and compete for higher positions.

The Wells v. Bank of America\(^5\) decree presents a particularly good example of this aspect of recruiting efforts. As an incentive for women to participate in a training program, each participant received $1500 for each year she had been employed by the bank. Thus, this decree deals with the encouragement problem directly by offering monetary incentives and this undoubtedly explains why the company was able to fill its training program so quickly.\(^5\)

Another similar problem arises when the agreement provides for the opening of traditionally "men's" jobs to women. Peer pressure may dissuade some women from applying or from staying on the jobs once they have secured them. If it appears that this might be a problem, the decree could provide that women be sent into new jobs in teams, rather than propelling them, by themselves, into what could be intimidating circumstances.\(^5\)

**Stereotyping.** When the ill to be remedied by a decree is sex discrimination, it should call for the elimination of stereotyping. A provision designed to eliminate this problem might

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5. See Ford Foundation Report, supra note 45, at 55-56.
7. Id. at 16; Ford Foundation Report, supra note 45, at 49. In addition, in order to encourage trainees to complete the program, each trainee was to receive $1,000 upon beginning training, another $1,000 during the middle of the program and any remainder upon completion of the course. Bank of America Decree, supra note 21, at 18.
provide for the revision of "any language which might imply a preference of one sex over another in any job where there is not a bona fide occupational qualification based on sex" in such documents as personnel manuals, job descriptions and employment applications. As with the team concept discussed above, provisions designed to eliminate stereotyping can make potentially intimidating circumstances more liveable.

Implementing the Decree

The discussion thus far has focused on the proscriptive, compensatory and corrective benefits which should be included in a consent decree. However, providing for the existence of such benefits is only one-half of the solution; the other half is providing for their implementation: "[A]ffirmative action plans, whether they are private plans or plans imposed by the government, have failed in large part because the affected companies have not been aggressive about implementing them." Although essentially a procedural matter, the method of implementation should, as do the benefits, form a portion of the substantive provisions of the decree. What follows, therefore, is a discussion of the two general, but highly important, aspects of implementation: notice and compliance.

Notice. Three types of notices will usually be required when implementing a decree: notice to the class of plaintiffs, notice to potential recipients of certain benefits, and notice to employees and community members. Two important considerations permeate all three types of notice. First, the effectiveness of the notice should be evaluated in tort terminology, i.e., would a reasonable person read and respond to this notice when it is seen? Second, the form and content of all notices should be agreed on by the parties and be incorporated as part of the decree.

As indicated above, notice must first be sent to the class of plaintiffs represented in the suit. Although some Title VII class actions are brought under Rule 23(b)(3) of the Federal Rules of Civil Procedure, which requires notice to class members at the initiation of the action and allows each member to "opt out," most are brought under Rule 23(b)(2). Under the latter rule, the first notice sent to members of the class will be

59. Xerox Settlement, supra note 13.
60. Ford Foundation Report, supra note 45, at 53.
one informing them of the provisions of the decree and asking them if they wish to be included or to intervene. 61

The notice sent pursuant to Rule 23(b)(2) generally includes the following information: the identity of the defendants to the lawsuit; the allegations of the complaint; the identity of the class; that the defendant has denied liability but is entering into this settlement; the date, time and location of the hearing whereby it will be determined if the court should accept the decree; a general outline of the terms of the decree; where the complete proposed decree may be obtained; and that a class member satisfied with the terms of the decree need not appear at the hearing. 62

Although most of the decrees examined did not do so, it is strongly advised that a succinct one-page personal letter from the plaintiff's attorney accompany the notice to the class. The letter should refer to the recipient by name and indicate the reason for the letter. 63 The letter should also explain the existence and nature of the lawsuit and include a description of the proposed settlement. In addition, it should inform the recipients where they or their attorneys can obtain further information concerning the settlement and should inform them of their potential rights and any deadlines for pursuing such rights. 64

In addition to these substantive matters, the form of the notice sent should be sufficiently conspicuous to attract the attention of persons to whom it is directed. Forms of notices have been held inadequate on this point in the past because of their brevity as well as their length. 65 The practitioner should

61. According to Fed. R. Civ. P. 23(d)(2), notice under a Rule 23(b)(2) action is discretionary.

62. It should again be emphasized that the consent decree is a compromise. The defendant may, for example, want the notice phrased in such a way as to play down the fact that back pay benefits are available. The Title VII attorney will have to decide here, as in other like situations, whether such a compromise is preferable in view of the total benefits to be gained therefrom.

63. For example, the letter might begin with the phrase: "As a female employee of X Co. . . ." or "As a woman who submitted an application for employment to X Co. . . .".

64. Interview with Russell W. Galloway, Jr., former staff attorney for the Affirmative Action Compliance Unit of the Legal Aid Society of Alameda County, California, in Santa Clara, Cal. (Jan. 10, 1978).

65. For example, the substance of the notice given pursuant to the FMC Decree, supra note 54, was adequate, but the form was inadequate because it would not attract the attention of the reasonable person to the extent that a document of its importance should. It was printed on one side of an 8 1/2" x 11" sheet, the print was extremely small and the language was technical. If one wished to be excluded from the class or to object, it was necessary to write to the court, appropriately refer to the case in contention, and act by a certain date which was also inconspicuous.
therefore ensure that the notice sent will both attract the attention of the recipient and encourage her to investigate its details.

In appropriate circumstances, it may be necessary to send notice to previous victims of discrimination (e.g., those who have been discharged or not hired) in order to inform them of their rights under the provisions of the proposed settlement. As with notice to the class, the objective should be to gain the attention of the reasonable person. The notice sent to the women eligible for training programs under the decree in *Wells v. Bank of America* illustrates this point. In that case, after the parties agreed to the substance of the notification letter, a form was enclosed on which the addressee need only mark "yes" or "no" as to whether she wished to participate, and a self-addressed envelope was enclosed. Addressees from whom no reply was received in two weeks were to receive a second, identical letter marked "last notice," and if no reply was received two weeks thereafter, the answer was deemed to be negative.

The decree should also contain provision for notifying all employees and members of the community who will be instrumental in implementing the affirmative action program. For example, in the *NAACP v. Imperial Irrigation District* decree, each supervisor or member of the defendant’s personnel department was to be instructed, either individually or in a group, regarding the provisions of the plan; a summary of the plan was to be posted in the employee newspaper, newsletter, and on the bulletin boards and was to become part of the orientation for new employees; and defendants were to contact by letter or in person the placement and guidance officers of all local high schools and colleges to explain the provisions of the affirmative action program. It should be noted here, how-

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66. The notice given pursuant to the Greyhound Decree, *supra* note 29, was printed on 8 ½" x 11" paper and double spaced in large type. Because of the print, the notice was eight pages long; however, the second page contained an underscored sentence warning the reader that her rights might be affected by the "proposed settlement described in this notice." This notice was very thorough; however, its length may have "lost" some of its intended recipients. If counsel should decide that a long notice is necessary, it would be preferable to indicate, on the first page, why the notice is personally important to the reader and emphasize what actions and deadlines will be important to that person.


68. *Id.* at 15.

69. *NAACP Decree*, *supra* note 43.

70. *Id.* at 8.
ever, that the form and substance of all writings and the sub-
stance of the training programs should be approved by both
parties in advance and incorporated as part of the decree. Also,
it would be preferable to have group meetings with current
employees to explain the parameters of the affirmative action
program, so they have advance notice of the changes which will
take place.

Compliance. As noted earlier, the best of benefits will ben-
efit no one unless they are implemented and, even more impor-
tantly, unless provisions for compliance are included in the
decree.

In order to be effective the decree must be monitored by
both parties. To ensure rigorous compliance, it is best to desig-
nate a specific company official to monitor the defendant com-
pany's compliance with the decree.71 Part of this official's du-
ties should include keeping records of compliance and prepar-
ing periodic reports based on those records. The substance of
the records will vary depending on the various forms of relief
involved, but their objective is to provide those monitoring the
decree with the information required to determine if its goals
are being met. In the Bank of America decree, where the spe-
cific reporting forms had been agreed to by the parties, the
record provision provided: "Said reports shall set forth statisti-
cal and documentary data with respect to progress in the
achievement of affirmative action goals as set forth herein,
recruitment and hiring practices, training, promotions, trans-
fers, turnover and salaries."72

Similarly, the settlement in Mueller v. Greyhound Lines
West provided for an especially inclusive list of records and (as
should be done in all decrees) provided examples of each form
to be used and incorporated these into the decree.73

Although all decrees provide that the EEOC or plaintiff's
attorneys shall receive copies of progress reports made by the
defendant, the Bank of America decree went well beyond this
minimum requirement. It stipulated that semiannual reports

71. In recognition of the importance of its affirmative action duties, the Bank of
America appointed a vice-president to head its own monitoring activities. Ford Foun-
dation Report, supra note 46, at 51. And as part of its program, Xerox established the
position of Employee Resource Programs Manager and Female Affirmative Action
Manager in each of its regions to report to the Regional Personnel Manager. Xerox
Settlement, supra note 13, at 11.
72. Bank of America Decree, supra note 21, at 31.
73. Greyhound Decree, supra note 29, at 14-18, exhibit 11.
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were to be made to the plaintiff's attorney, if desired an audit might be conducted to determine the accuracy of all the information, and that the bank was obligated to pay the plaintiff's attorney a substantial fee for her continued monitoring of the program.

Compliance monitoring is greatly facilitated if, whenever the employer is required to act under the decree, by giving notice or otherwise, provisions are made for deadlines. For example, in the Bank of America decree, the bank was required to select women eligible for training programs. The evaluation and selection of these women was to be completed within ninety days of the effective date of the decree. In addition to this tight schedule, the bank was required to supply the plaintiff's attorney with specific information about each potential beneficiary and the results of all evaluations.

In addition to providing for deadlines, some decrees promote implementation of their programs by providing that managers' success in meeting the objectives of the affirmative action program "will be an important factor in their own performance appraisals for compensation purposes." One must keep in mind that this provision may only be effective if it too is monitored.

Finally, consent decrees should provide not only for effective monitoring but they should also stipulate what will be considered a failure to comply with the terms of the decree. Whomever is responsible for monitoring the program for the plaintiffs, must decide if any given deviation is sufficient to be considered noncompliance. Many decrees define noncompliance in terms of any "significant" or "substantial" deviation from the prescribed goals. Thus, in the Leisner v. New York Telephone Co. settlement, any deviation of 2% forced the company to justify its failure to comply. Precision in drafting these provisions is important to those responsible for monitoring, and to the defendant company since it needs to know the

74. Bank of America Decree, supra note 21, at 32.
75. Ford Foundation Report, supra note 45, at 51.
76. Ford Foundation Report, supra note 45, at 44.
77. Xerox Settlement, supra note 13, at 9. See also Bank of America Decree, supra note 21, at 9.
78. See, e.g., Bank of America Decree, supra note 21, at 9. The Bank of America decree provided for such monitoring by making the evaluations available for inspection.
nature of compliance.\(^80\)

In providing for allegations of noncompliance, the decree should set out definite procedures for the complaining party to follow, as well as a time frame within which the company must respond. Similarly, the decree should establish the nature of the showing that the plaintiff will be required to make in support of a claim of noncompliance. The *Bank of America* decree dealt with these issues by placing the burden of proof on the bank to demonstrate that it had made good faith efforts to comply with the plan.\(^81\) Alternatively, in *Gray v. Tribune Publishing Co.*, the decree placed the burden on the plaintiffs to show that the defendant had not made a good faith attempt to meet its goals.\(^82\)

In each instance, the company's "good faith" is "at the heart" of the compliance issue but it generally goes undefined in the consent decree.\(^83\) A definition of good faith would clearly facilitate the monitoring of compliance. Therefore, if the decree is to be successful, it seems that the practitioner should make a colorable attempt to define this term.

**CONCLUSION**

The compensating and implementing provisions of a consent decree outlined in this comment are not meant to cover every conceivable situation that may confront the Title VII practitioner. Nevertheless, it should provide a set of broad guidelines which will enable the individual practitioner to provide adequate representation for clients in Title VII consent decree negotiations. It must be kept in mind, however, that it is the needs of the represented class that dictate the terms of any consent decree. For the decree to be successful, this premise must govern the relief provisions included in the settlement.\(^84\)

Despite the broad remedial aims of Title VII and its relief provisions, in its thirteen years of existence it does not appear to have eradicated the employment inequities against which it was directed. Women and minorities are still clustered at the

\(^{80}\) Ford Foundation Report, *supra* note 45, at 52.

\(^{81}\) *Bank of America* Decree, *supra* note 21, at 30.

\(^{82}\) *Tribune Decree*, *supra* note 6, at 9.

\(^{83}\) See Ford Foundation Report, *supra* note 45, at 59-60. *But see FMC Decree*, *supra* note 53, at 7. The FMC decree created a rebuttable presumption of good faith if FMC spent $20,000 annually for training.

\(^{84}\) See also *Specter*, *supra* note 18, § 156, at 211.
bottom of the employment spectrum. Gradually, effective Title VII consent decrees are beginning to alleviate this problem. In providing for compensatory benefits which make the victims of discrimination "whole," and in stipulating exacting implementation and compliance procedures, the Title VII practitioner is helping to create concrete employment opportunities, where only illusory promises previously existed.

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85. In 1962, the median earnings of a woman working full time was 59% of the median income earned by a male working full time. U.S. Bureau of the Census, Dept't of Commerce, Statistical Abstract of the United States 383, table 617 (1976). In 1974, she earned 57% of the median income of her male counterpart. Id. In 1969, the median wage earned by a black male was 68% of that earned by a white male. Id. at 373-76, table 602.