

# Recent Multimillion-Dollar Settlements May Cause Employers to Avoid Hiring Women and Minorities for Less Desirable Jobs to Improve the Statistical Picture.

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In late December 1994, eight women filed a putative class action in the U.S. District Court for the Northern District of California charging that The Home Depot Inc. systematically had discriminated against female employees and applicants at 99 of its stores in seven Western and Southwestern states.<sup>1</sup>

The complaint alleged that the superstore chain's Western Division had segregated its employees into two different work forces: one, primarily male, enjoying preferential treatment and opportunities for advancement; and the other, primarily female, holding a disproportionate share of the lowest-level jobs with little opportunity for advancement. The plaintiffs are represented by Oakland, Calif.'s Saperstein, Goldstein, Demchak & Baller, the firm that Business Week recently dubbed "The SWAT Team of Bias Litigation."<sup>2</sup>

Certain claims in this case are distinctly similar to allegations asserted by the Saperstein firm on behalf of plaintiffs in three other suits in which

grocery chains recently paid almost \$150 million to settle employment discrimination claims involving more than 500 California stores. In November 1993, Albertson's Inc. agreed to pay \$29.5 million to resolve discrimination claims by female and Hispanic employees in 144 of its California stores.<sup>3</sup>

In April 1994, Safeway Inc. agreed to pay \$5 million to settle sex discrimination claims involving 216 stores in Northern California.<sup>4</sup> Dwarfing both of these settlements, however, was an agreement reached in December 1993 providing that Lucky Stores Inc. would pay as much as \$107.5 million to settle discrimination claims by female employees in 188 of Lucky's grocery outlets in Northern California.<sup>5</sup>

When the Lucky Stores settlement was announced, The New York Times reported that the agreement "could alter

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<sup>1</sup> Butler v. Home Depot Inc., No. C94 4225 (Dec. 20, 1994)

<sup>2</sup> "The SWAT Team of Bias Litigation," Business Week, Jan. 23, 1995, at 88.

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<sup>3</sup> "Settlement of \$29.5 Million Announced on Race, Sex Claims Against Albertson's," Daily Labor Report, Nov. 23, 1993 at A-12.

<sup>4</sup> "Safeway Will Pay \$5 Million to Settle Suit Over Promotion at Northern California Stores," Daily Labor Report, April 5, 1994, at A-5.

<sup>5</sup> "Settlement of \$107.25 Million Announced in Sex Bias Suit Against Lucky Stores," Daily Labor Report, Dec. 17, 1993, at A-1.

the personnel practices throughout the grocery industry.”<sup>6</sup> It is not only in the grocery industry, however, that personnel practices may be altered by the settlement. Practices may change dramatically in any number of industries that employ large numbers of minorities or women. Such changes will not necessarily benefit those groups.

To appreciate why the Lucky Stores settlement may prove to be disadvantageous to minorities and women, one must examine the court decision underlying that settlement, and which, very likely, influenced both Albertson’s and Safeway to reach settlements. In August 1992, in *Stender v. Lucky Stores*,<sup>7</sup> Judge Marilyn Hall Patel, of the U.S. District Court for the Northern District of California, issued a lengthy opinion, finding that Lucky Stores had discriminated against women in a range of employment practices.

A central feature of Judge Patel’s ruling was the determination that Lucky Stores had discriminated in the “initial placement” of women. Judge Patel evidently had meant that women were not fairly considered for the grocery department in Lucky’s supermarkets. Women made up about 35 percent of new hires.

Judge Patel reached that conclusion, however, not because women were shown to have made up substantially more than 35 percent of persons seeking jobs in the grocery department, but because women constituted 84 percent of persons hired into the less desirable deli-bakery and general merchandise departments.<sup>8</sup>

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<sup>6</sup> Jane Gross, “Big Grocery Chain Reaches Landmark Sex-Bias Accord,” *The New York Times*, Dec. 17, 1993, at A-1.

<sup>7</sup> 803 F. Supp. 259.

<sup>8</sup> *Id.* at 332-33.

Possibly of greater importance, Judge Patel found that among the reasons punitive damages might be warranted against Lucky Stores was that its management had “abandon[ed] two affirmative action programs despite continued evidence of a gross gender imbalance in the Deli-Bakery and General Merchandise Departments.”<sup>9</sup>

In other words, Lucky Stores had had too many women in those jobs and had decided not to do anything about it.

Lucky Stores tried unsuccessfully to persuade the 9<sup>th</sup> U.S. Circuit Court of Appeals to hear an interlocutory appeal. Then, faced with years of damage proceedings before it would have an appealable judgment, Lucky Stores gave in, settling for an amount in the range of the liability estimates of the plaintiffs’ lawyers, though sparing itself considerable attorney fees and a great deal of adverse publicity.

The *Lucky Stores* agreement, however, was not the first \$100 million settlement in which plaintiffs had relied heavily on a group’s high representation in an employer’s less desirable positions. In November of 1992, Shoney’s Inc. agreed to pay \$105 million to settle claims of racial discrimination at 1,700 restaurants in 36 states.

In that case, which also was litigated by members of the Saperstein firm, plaintiffs maintained that the best single indicator of what the level of black representation in food server and other “front-of-the-house” jobs would have been, absent discrimination, was the level of black representation in other positions at Shoney’s. Thus, the more blacks Shoney’s had hired as cooks and for other “back-of-the-house” jobs, the greater was its liability for putatively

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<sup>9</sup> *Id.* at 336.

excluding blacks from front-of-the-house jobs.

Almost since the day Title VII of the 1964 Civil Rights Act became law nearly 30 years ago, people have been trying to prove in one manner or another that a group has been discriminatorily excluded from one job by pointing to that group's high representation in another job. A firm rejection of that approach occurred in 1979 in another case brought in the Northern District of California.

In *Edmonds v. Southern Pacific Transportation Co.*,<sup>10</sup> Judge Alfonso J. Zirpoli rejected claims that Hispanics were discriminatorily assigned to laborer positions rather than operating craft jobs, when there was no evidence of discrimination against Hispanics seeking the craft jobs. Judge Zirpoli observed, "Plaintiffs imply that Southern Pacific must deny Hispanic applicants jobs they seek and qualify for because it has 'too many' of them. Such is not the law."<sup>11</sup>

A decade later, the U.S. Supreme Court reached the same conclusion. In 1989, in *Wards Cove Packing Co. v. Atonio*,<sup>12</sup> the court issued an opinion that has been justly criticized for cavalierly reversing 18 years of precedent concerning an employer's burden in justifying employment procedures that disadvantage minorities or women. The opinion, however, was entirely sound in its rejection of an approach to statistical proof that was as pernicious as it was illogical.

The *Wards Cove* case involved an Alaskan cannery where non-cannery workers had a minority percentage that appeared to be roughly in line with the minority percentage of the labor market

from which those workers were recruited. But minorities, filled a far higher proportion of the cannery jobs, which, for a variety of reasons, were considered less desirable than the non-cannery jobs. The plaintiffs argued that minorities should have been more equally distributed between these jobs, and the 9<sup>th</sup> Circuit essentially agreed.<sup>13</sup>

The case had a superficial appeal in light of what four dissenting justices would term "an unsettling resemblance to aspects of a plantation economy."<sup>14</sup> Yet, a Supreme Court majority recognized not only that internal comparisons of this nature could not prove discrimination, but that the plaintiffs' argument was an invitation to employers to avoid liability by hiring fewer minorities for less desirable jobs.<sup>15</sup>

The key to its analysis was the court's observation that what the plaintiffs claimed was the labor market for non-cannery jobs was "at once both too broad and too narrow."<sup>16</sup> It was too broad, the court maintained, because most cannery workers did not seek non-cannery jobs, and it was too narrow because it did not include the many persons not employed in cannery jobs who were part of the labor market for non-cannery jobs.<sup>17</sup>

It is the latter point that is of particular consequence. Sometimes many persons hired into an employer's less desirable jobs will be qualified for and interested in the employer's better jobs, and those persons thus are part of

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<sup>10</sup> 19 FEP Cases 1052.

<sup>11</sup> *Id.* at 1075.

<sup>12</sup> 490 U.S. 642.

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<sup>13</sup> *Atonio v. Wards Cove Packing Co.*, 827 F.2d 439 (9<sup>th</sup> Cir. 1987).

<sup>14</sup> 490 U.S. at 663 n.4 on 664 (Stevens, J., Joined by Brennan, J., Marshall, J., and Blackmun, J., dissenting).

<sup>15</sup> 490 U.S. at 654.

<sup>16</sup> *Id.* at 653.

<sup>17</sup> *Id.* at 653-54.

the comparison pool for determining whether the group has been discriminatorily denied hire into the better jobs.

Typically, however, they make up only a very small part of that pool. The great majority is comprised of persons who were not hired at all and whose racial or gender composition are unknown.

As a general rule, minorities and women constitute a higher proportion of the persons seeking, or at least willing to accept, an employer's less desirable jobs than an employer's better jobs. Reasons for this tendency include differences in interests and qualifications, as well as the fact that minorities and women may have fewer alternatives in a society where many employers do discriminate against them.

But whether a particular employer discriminates with regard to its more desirable jobs usually will have little bearing on how large a proportion of its poorer jobs are filled by minorities and women. Because it is expected that minorities and women will comprise a higher proportion of an employer's poorer jobs whether or not the employer discriminates with regard to the better jobs, the high representation of minorities and women in the poorer jobs logically cannot be probative of discrimination.

Yet, neither the view that a perceived overrepresentation of minorities and women in less desirable jobs is essentially irrelevant to the issue of whether they have been discriminatorily denied hire for more desirable positions,<sup>18</sup> nor the foregoing

interpretation of the *Wards Cove* analysis, are shared universally.

Judge Patel, for example, though citing *Wards Cove* for the proposition that internal work-force comparisons are inadequate to prove discrimination,<sup>19</sup> nevertheless appeared to rely on such comparisons to find not only that Lucky Stores had discriminated against the persons hired into the poorer jobs but also that the discrimination was sufficiently egregious to warrant punitive damages.

Nor do these views seem to be shared by the U.S. Department of Labor, whose Office of Federal Compliance Programs plays a leading role in enforcing the prohibition of employment discrimination in the private sector.

In March 1994, in *Department of Labor v. Honeywell Inc.*,<sup>20</sup> the Secretary of Labor, without even citing the *Wards Cove* decision, upheld an administrative law judge's ruling that Honeywell had discriminated against women at its Minneapolis-St. Paul facilities by hiring them for less desirable jobs at higher rates than it hired them for its more desirable jobs. Like the California grocery stores, Honeywell would have been less vulnerable had it hired fewer women for jobs deemed to be less desirable.

The case was settled in September 1994 by an agreement that cast all of the 3,200 women whom Honeywell had hired into the less desirable jobs as victims of discrimination. The \$6.5 million settlement amount, \$3.5 million of which would go to the affected class, might be considered either a quite modest recovery given the size of the class or a very large one given the

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<sup>18</sup> The group's representation in the poorer job is highly relevant to a determination of whether the group has been discriminatorily denied promotion from the poorer job to the better job.

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<sup>19</sup> 803 F.Supp. at 322.

<sup>20</sup> The decision is printed in Daily Labor Report, March 3, 1994, at E-1.

fundamental defect of the principal claim.<sup>21</sup>

To disparage these cases is hardly to say that none of them involved actual discrimination. On the contrary, they may have involved all sorts of discrimination, including even the discriminatory exclusion of women or minorities from the less desirable jobs.

But what typically leads to litigation in contexts in which the gender or racial makeup of the work force differs dramatically from job to job is the filing of a discrimination charge by a woman or minority who either has been terminated or has been denied a promotion to a better job.

Such a claim may or may not have merit, but, regardless of its merit, the claim often will occasion an examination of the employer's overall policies with regard to the claimant's group.

Determining whether there exists a pattern of discrimination as to any aspect of an employer's personnel practices rarely is easy. In order actually to prove, or disprove, that an employer engaged in discriminatory hiring with regard to its better jobs, it generally is necessary to review large numbers of applications, including particularly the applications of the persons who were not hired. Those applications may not always be available and will be expensive to analyze when they are.

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<sup>21</sup> For a sampling of other contexts, when a group's high representation in one job has played a large role in creating the perception that the group has been excluded from other jobs, see "Illusions of Job Segregation," *The Public Interest*, Fall, 1988, at 54; "Indiscriminate Reading of Statistics Can 'Prove' Bias Where None Exists," *Manhattan Lawyer*, April 25, 1989, at 11; "Are Bias Statistics Nonsense?" *Legal Times*, May 8, 1989, at 22; and "Unlucky Stores: Are They All Guilty of Discrimination?" *San Francisco Daily Journal*, Jan. 29, 1993, at 5.

In this context, the single factor most easily interpreted to suggest that something is amiss is the glaring pattern of job segregation- regardless of whether discrimination by the employer has in any manner contributed to that pattern. The emphasis given to that pattern not only obscures the inquiry into whether there has been any actual discriminatory exclusion from the better jobs but also obscures whether there has been any discriminatory exclusion from the poorer jobs.

Decisions like *Lucky Stores* create a considerable problem for a variety of employers. Supermarkets throughout the country- whether or not they exclude women from better jobs- are likely to have concentrations of women in their lower-paying jobs that are little distinguishable from those that proved so problematic for *Lucky Stores* of Northern California. Retailers, whether or not they exclude women and minorities from their more remunerative, big-ticket sales jobs, are likely to have much higher concentrations of women and minorities in their sales-clerk jobs.

There is no easy solution for such employers. Lawyers may tell them that the fact that they hire large numbers of minorities and women into their lower-paying jobs logically cannot show that they hire too few minorities and women into their better jobs.

Counsel also may advise that the Supreme Court has, in fact, so ruled. But, as illustrated by the *Lucky Stores* decision, attorneys will not be able to guarantee how a case will come out in court- leaving aside how a claim of job segregation may be perceived by the public during the course of protracted litigation.

Lawyers, however, can guarantee that there will be two factors distinguishing

their clients' cases from the *Lucky Stores* case. First, in order for Judge Patel to conclude that punitive damages against Lucky Stores were warranted, she had to rule- erroneously, it would turn out, according to the Supreme Court's recent decision in *Landgraf v. USI Film Products*.<sup>22</sup>- that the punitive damages provisions of the Civil Rights Act of 1991 applied retroactively.<sup>23</sup> In future cases, by contrast, there will be no doubt as to the availability of punitive damages.

Second, in the *Lucky Stores* case, plaintiffs had to persuade a federal judge of the probative value of superficially appealing, if fundamentally illogical statistical analysis. In consequence of the Civil Rights Act of 1991, however, future cases- *Butler v. Home Depot Inc.* among them- are likely to be tried before juries, in which case the superficial appeal of such analyses is likely to have even greater sway.

Under these circumstances, it will not be surprising as the Supreme Court observed in *Wards Cove* and as Judge Zirpoli had suggested a decade earlier, if employers give increasing thought to whether they may have too many minorities or women in jobs deemed not to be the most desirable, even if not wholly undesirable to the persons applying for them.

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<sup>22</sup> 114 S. Ct. 1522 (1994).

<sup>23</sup> 803 F.Supp. 318, 324.Ū