Disputes Processing Research Program

WORKING
PAPER

DPRP 10-8

EMPLOYERS' HANDLING OF DISCRIMINATION COMPLAINTS: THE TRANSFORMATION OF RIGHTS IN THE WORKPLACE

by

Lauren B. Edelman

Howard S. Erlanger

John Lande

University of Wisconsin - Madison

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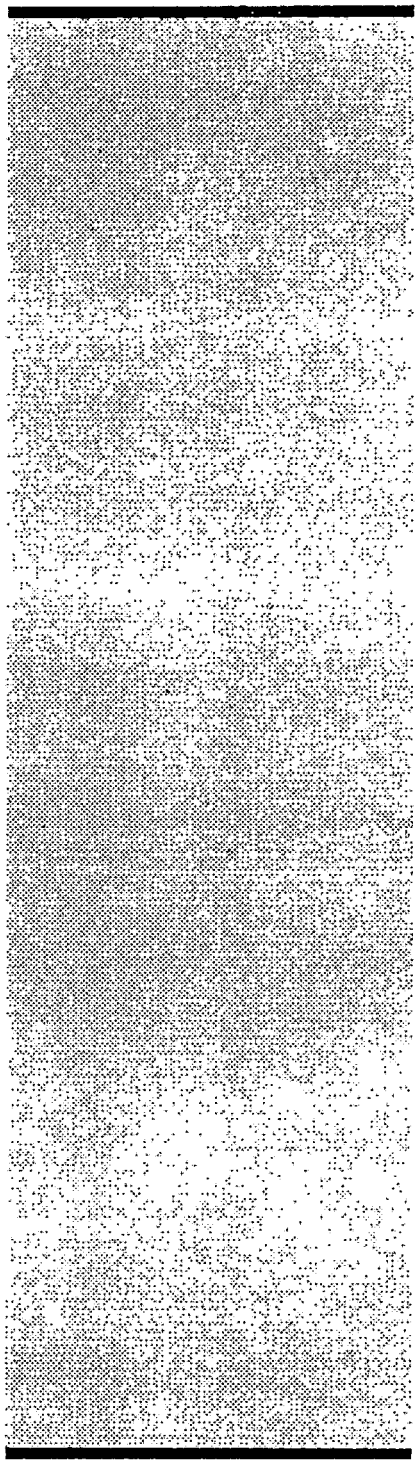

Institute for
LEGAL STUDIES

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Abstract

Civil rights law creates administrative and legal channels for redressing complaints regarding equal employment opportunity and affirmative action (EEO/AA). Employers cannot forbid employees from using these formal legal channels, but they can encourage employees to use internal complaint procedures instead. Advocates of "alternative dispute resolution" (ADR) suggest that such extra-legal procedures provide better solutions to a much broader range of problems than do courts and administrative agencies, but critics contend that these forums tend to undermine formal legal rights. Drawing from interviews with organizational personnel who handle discrimination complaints, this paper examines the nature of internal complaint handling procedures, focusing on the extent to which they adopt, reject, or alter the standards of external legal forums. Our findings support arguments of both ADR supporters and critics. Because employers are concerned both with avoiding litigation and improving employee morale, their internal complaint handling forums tend to be oriented toward resolving complaints quickly and to complainants' satisfaction, regardless of their legal merit. But at the same time, because employers do not use formal legal standards and tend not to make public declarations about what constitutes discrimination, the internal handling of EEO/AA complaints tends to undermine the societal realization of rights articulated by EEO/AA law.

INTRODUCTION

Civil rights law -- in particular, Title VII of the 1964 Civil Rights Act (Title VII) -- creates administrative and legal channels for redressing complaints regarding equal employment opportunity and affirmative action (EEO/AA).[1] Employers cannot forbid employees to use these formal legal channels to express their EEO/AA complaints, but they can encourage employees to use internal complaint procedures instead, thus potentially insulating themselves from intervention of regulatory agencies, lawsuits, and liability.

To the extent that employers handle EEO/AA complaints internally, they essentially privatize the adjudication of public rights[2]. This has enormous potential to affect the rights of minority and female employees who claim to have been the victims of discrimination, as well as the rights of white and male employees who have been accused of discrimination.[3] Similarly, the privatization of EEO/AA complaint handling has the potential to affect both employers' liability for discrimination and their practices to prevent and deal with future problems of discrimination.

In this paper, we examine how employers' internal complaint procedures affect the focus of complaint handling and the construction and realization of rights created by EEO/AA law. We are particularly interested in any transformations that occur in the nature of legal rights when employees use internal forums to exercise those rights. Our focus is on the potential for the immediate needs of complainants and managers to recast the issues and thus change the nature of remedies for discrimination complaints.

THE CREATION OF INTERNAL PROCEDURES AS ALTERNATIVES TO FORMAL LAW

While our primary focus is on the effect of employers' internal complaint procedures on the construction of rights, it is important to look first at how these dispute handling procedures have come about, and how they have themselves been influenced by law. Employers' motivations for creating internal complaint procedures are likely to affect both the way in which complaints are handled and the resolutions of those complaints. In different

contexts, the literatures on sociology of law and on organizations and environments address the relation between formal legal process and the development of informal alternatives to that law.

A basic premise of the sociology of law literature is that formal legal process generates and shapes informal legal processes. In his discussion of the role of law in capitalist society, for example, Max Weber (1954: 30) pointed out that although few contract disputes reach the courts, "economic exchange is quite overwhelmingly guaranteed by the threat of legal coercion." That theme is also implicit in Macaulay's (1963) study of contract disputes. Macaulay found that businessmen in contractual relationships tend to work out disputes informally rather than to invoke formal contract remedies. Both the language of contracts and the potential for breach of contract suits, however, help to shape informal bargaining. In another study, Macaulay (1966) found that a law that created an administrative process for the appeal of car dealer franchise terminations engendered informal bargaining between car manufacturers and dealers; in some cases, the head of a dealers' association acted as an informal mediator. Again, the threat of invoking formal sanctions motivated informal negotiations.

While Macaulay's work shows the effect of law on informal legal process, Mnookin and Kornhauser (1979) assert that laws create "shadows" over private negotiations so that, overall, the outcomes of private negotiations should be similar to the outcomes of formal litigation. Mnookin and Kornhauser note, however, that the outcomes of informal negotiation may differ from those of formal litigation where one party is more willing to risk litigation than the other, where the parties have different abilities to pay for litigation, or where one party can exercise power over the other. In general, then, the legal impact literature suggests that employers' forums for handling discrimination complaints will, at least loosely, parallel those of the formal legal system; employers' forums for complaint handling should operate "in the shadow" of EEO/AA law.

Whereas the sociology of law literature analyzes the development of informal legal processes generally, the organizations and environment literature points to organizational motivations for creating internal complaint handling procedures. Early "rational" theories view organizations as rational actors that create peripheral structures (including complaint procedures) in order to "buffer" (or insulate) themselves from the environmental uncertainty (e.g. Thompson 1967; Lawrence and Lorsch 1967; Galbraith 1977), to increase efficiency (e.g. Williamson 1975), or to manage or strategically adapt to their external environments (Pfeffer and Salancik 1978; Aldrich and Pfeffer 1976). These theories suggest that organizations may create and encourage the use of complaint handling forums as rational means of handling the threat of liability.

More recent "institutional" theories of organizations offer a different explanation for the creation of new structures, which has slightly different implications for how they might operate. These theories posit that organizations adopt institutionalized elements of their environments in order to gain legitimacy (Meyer and Rowan 1977; DiMaggio and Powell 1983). Whereas the rational theories view efficiency as the driving force behind organizational actions, institutional theories hold that organizations will often sacrifice efficiency in order to gain legitimacy. In earlier papers that draw upon these institutional theories, Edelman (1990, 1991) argues that organizations are highly attentive to their legal environments, and that new law motivates organizations to adopt structures that visibly demonstrate attention to legal norms. EEO/AA laws are particularly likely to result in the adoption of such "symbolic structures," because they are ambiguous as to the meaning of compliance, emphasize procedural as opposed to substantive compliance, and have relatively weak enforcement mechanisms. Thus the organizations and environments literature suggests that employers create internal complaint handling forums as structures designed to enhance legitimacy and to protect organizations from legal threats. But if legitimacy rather than effectiveness is the motivation for creating such structures, the

process and outcomes of these procedures may differ substantially from formal EEO/AA litigation.

Together, these literatures help to explain how EEO/AA law prompts organizations to create internal alternatives to legal and administrative forums for discrimination complaints. But whereas traditional sociology of law suggests that internal procedures and outcomes will roughly parallel legal procedures and outcomes, Edelman's (1991) argument suggests that the procedures may function as symbols of compliance without producing results similar to those of the legal system. Thus these theories leave open the question of how employers' internal complaint procedures affect the construction and realization of employees' legal rights.

THE EFFECTS OF INTERNAL COMPLAINT PROCEDURES ON LEGAL RIGHTS

The extant literature says little about the specific issue of how internal EEO/AA dispute handling procedures affect the recognition of employees' civil rights, and tends to be prescriptive or descriptive rather than analytical (e.g. Meacham 1984; Westin and Feliu 1988).[4] However, the impact of internal complaint procedures on legal rights raises a question that has received considerable attention in the general literature on "alternative dispute resolution" (ADR).[5] Employers' internal complaint procedures are a form of ADR in the sense that they are alternatives to formal legal and administrative forums for attempting to secure legal redress.

The literature on ADR reflects a tension between two perspectives: (1) a critique of the courts and formal adjudication as nonresponsive to many social needs, and (2) a critique of ADR, arguing that informal alternatives to legal forums exacerbate class and race differences and inhibit social and legal reform. For the sake of clarity and simplicity, we refer to those who adopt these positions as "proponents" and "critics" of ADR, respectively, although we recognize that this distinction greatly oversimplifies the range of arguments. For our purposes, the most relevant distinction between proponents and critics of ADR is that critics argue that ADR undermines legal

rights while proponents argue that parties' interests and needs rather than "rights" are the important issue, and that ADR is better suited for meeting those interests and needs than is formal adjudication.

Advantages of Alternatives to Litigation

Proponents of ADR criticize courts for being overly concerned with rights, and argue on that basis that, relative to ADR, courts are limited both in the types of problems they can redress and the types of remedies they can provide. They contend that parties have interests or needs that often differ from or go beyond legally justifiable claims (Menkel-Meadow 1984). Mediators, it is argued, can help parties to discover their real interests, which may differ from the interests that the parties articulate (Moore 1986; Fisher and Ury 1981; Menkel-Meadow 1984).

A related point is that ADR may allow "extra-legal justice," or the achievement of goods or rights to which parties have no legal right (Luban 1989). Luban (1989: 409) gives the example of a mediator helping disputants in an employment discrimination suit in which the plaintiffs have a legitimate grievance but one that would not entitle them to any legal remedy. ADR may offer plaintiffs their only hope of justice in such an instance.

Many of the other advantages claimed for ADR concern efficiency and the "quality" of ADR processes and outcomes. While they are not framed in terms of rights, these arguments are suggestive of the effects that employers' internal complaint processes may have on the construction of EEO/AA rights within organizations. Proponents argue that, relative to litigation, ADR is generally faster (Wolf et al. 1985; Roehl and Cook 1982), less expensive for parties that reach agreement (Pearson and Thoennes 1985a), less adversarial and more responsive to party needs (Menkel-Meadow 1984), offers more flexibility and a greater range of solutions, including solutions that may meet both parties' interests (Bush 1989) and is associated with greater party satisfaction (Pearson and Thoennes 1985b; Wolf et al. 1985). In short, proponents argue that ADR is both more efficient and more likely to satisfy disputants than formal litigation.[6]

In the employment context, these arguments are important for a number of reasons. The most important is that employers' internal complaint procedures may be able to redress employees' EEO/AA-related problems in cases where a court could not. Freed from the constraints of law and legal process, dispute handlers within organizations can tailor solutions to the parties' wishes and needs. Other implications are that the use of internal procedures may provide a quicker end to specific incidents of discrimination, that the process of achieving redress will be a less unpleasant experience than would formal litigation, and that employees will be more satisfied with the result.

If employers' internal procedures seem less onerous and forbidding or more effective to employees with grievances than does the formal administrative procedure, then the internal procedures could begin to overcome one of the greatest obstacles to redress of discrimination complaints: the fact that the vast majority of people who feel they have suffered illegal employment discrimination do not do anything about it (Curran 1977; Miller and Sarat 1981). Curran (1977) found that only 29% of respondents who reported having job discrimination problems took any action, and of those who took some action, only 15% used an external dispute handling forum. These were the lowest rates for all 27 types of problems she studied. Similarly, Miller and Sarat (1981) found that only 29.4 percent of their survey respondents with discrimination grievances made a claim for redress compared with 79.9 - 94.6 percent of respondents with seven other types of grievances. Only 3.9 percent of their survey respondents who reported a dispute about their claims of discrimination filed complaints in court, compared with an average of 11.2 percent for all types of disputes. Bumiller (1988) helps to explain these grim statistics. In a series of interviews with persons who reported that they had been subjected to employment discrimination but did not take any action, she found that victims of employment discrimination avoided seeking redress because of fear of retaliation, the desire not to feel like victims, and fear that action would be futile.

A study by Eisenberg (1990) suggests that the last fear may be quite justified. In a study of cases involving job discrimination brought in federal district courts from 1978 - 1985, Eisenberg reports that plaintiffs won 21% of their cases. In comparison to most other types of cases, this figure is quite low. Of 72 categories of claims, only four had lower plaintiff win rates than employment discrimination. The findings of Curran, Miller and Sarat, and Bumiller suggest that employees may be quite reluctant to use internal as well as external forums for pursuing EEO/AA-related claims. But given Eisenberg's findings, employers' internal forums may offer employees an important alternative. It is possible, moreover, that the high success rate of defendants in litigation reflects an effort by employers to resolve their "losing" cases outside the courts.

Problems with Alternatives to Litigation

While proponents of ADR point to the failures of formal adjudication and argue that alternatives can better meet parties' needs, critics argue that legal rights are important -- especially when they protect people who do not enjoy political and social power -- and that ADR may seriously undermine those rights. Responding to proponents' claims that interests and needs are more at issue than rights, critics argue that informal dispute handling ignores legal rights (Adler, Lovass, and Milner 1988), or undermines legal rights by changing the way in which disputes are framed (Silbey and Sarat 1989) and by lowering parties' expectations of what they are entitled to (Luban 1989). Silbey and Sarat (1989: 479) argue that:

> ADR advances a non-rights based conception of the juridical subject ... Eschewing rights, ADR proponents deploy the discourse of interests and needs. They reconceptualize the person from a carrier of rights to a subject with needs and problems, and in the process hope to move the legal field from a terrain of authoritative decision making where force is deployed to an arena of distributive bargaining and therapeutic negotiation.

In the domain of EEO/AA law, claims framed in terms of rights are often absolute: in theory, law grants minorities and women in the workplace an absolute right not to be discriminated against by their employers.[7] When claims are framed in terms of interests or wants, on the other hand, they are more conducive to compromise.[8] Presenting claims in ways that are conducive to compromise is of course important in modes of ADR such as mediation, where a resolution requires agreement by the parties.[9] In cases where one party (in this case, the employee) has a legitimate rights-based claim, compromises based on stated needs can undermine both legal rights and the public policy underlying those rights: a complainant may, for example, agree to a <u>less</u> discriminatory workplace when she has a (theoretical) legal right to a <u>non</u>discriminatory workplace. The ramifications of the shift from rights to interests and needs, moreover, goes beyond the immediate case: claims based on rights are generalizable whereas claims based on interests and needs are more often individual in nature (Minow 1987; Silbey and Sarat 1989). Internal complaint handling, then, may shift the focus of EEO/AA law from equal

treatment for minorities, women, and other protected employees to the just resolution of individual employees' problems. In so doing, the treatment of employment discrimination through internal complaint procedures may impede the achievement of rights by depoliticizing and individualizing violations of EEO/AA law, and it may suppress employees' knowledge of their legal rights.

A second critique of ADR that is relevant to the employment context is that the lack of formal protections of litigation (such as the right to an attorney) renders many forms of ADR more sensitive than formal legal mechanisms to power and class differences between the parties (Fiss 1984; Delgado et al. 1985). Without those protections, ADR reproduces societal differences in power and privilege, which allows more powerful parties to circumvent legal rights won by those with less power (Lazarson 1982; Auerbach 1983). For example, Fiss (1984: 1078) charges that "Settlement ... is based on bargaining [which] accepts inequalities of wealth as an integral and legitimate component of the process" whereas adjudication "knowingly struggles against those inequalities." Similarly, Delgado et al. (1985) argue that because ADR lacks formal protections, racial and ethnic prejudice are more likely to affect outcomes in ADR than in formal legal processes.[10] Although the formal legal process is certainly subject to the effect of power imbalances (Galanter 1974; Curran 1977), these critics assert that weaker parties generally are better protected in the formal process.[11]

Party inequality is a particularly salient issue in the context of employment discrimination. Employees with EEO/AA complaints are almost exclusively minorities and women whereas management is predominantly white and male; in private firms, even affirmative action officers and complaint handlers tend to be white and male. To the extent that societal prejudices and power differences affect the dynamics of negotiation and argument, and to the extent that formal due process protections do in fact constrain bias, employers' internal complaint procedures may place complainants in a very weak position, thus seriously undermining their legal rights and at the same time perpetuating the advantaged positions of whites and males.

A third criticism of ADR is that it removes important claims from the legal system, where they might be formally legitimated and thus of value to others in subsequent conflicts (Fiss 1984). Critics assert that by both removing claims from the legal system and reinforcing positions of power and privilege, ADR neutralizes the important conflicts that might engender social reform (Abel 1982). In the employment context, this argument raises the concern that organizational complaint handling may prevent disputes about what constitutes discrimination from entering the legal system, thus thwarting development of precedents helpful to protected classes of employees and blocking the public condemnation of discrimination.

The handling of complaints in organizations raises one distinctive issue. Most ADR mechanisms involve a third-party mediator or arbitrator who has no structural connections to the parties in the dispute; in the language of practitioners, the third party is "a disinterested neutral." While the nature and meaning of neutrality is always problematic (Cobb and Rifkin 1991), it is especially so in the employment context. In handling internal complaints, employers have an interest in the resolution of complaints to avoid the filing of external complaints or lawsuits.[12] Thus, employers are in effect both adjudicators[13] and potential disputants. Moreover, employers establish most of the rules of the game: they specify the nature of the complaint process and the conditions under which it may be used. Many internal complaint handling mechanisms do not provide for decision-making by an external third-party and employers retain significant control throughout the process. An example of the problems involved when "neutrals" are employed by one of the parties may be found in Handler (1986), who gives an account of an incident where mediators working for a state agency were fired for informing the non-state parties of their legal rights.

Internal complaint handling may well be even more sensitive than other forms of ADR to the effects of party inequality. Whereas disputants in most forums are at least formally equal (e.g. both are citizens), employers and employees are formally unequal: employees agree to a subordinate status when

they accept employment. When employees allege discrimination on the part of their supervisors or other superiors, they are -- by virtue of their position in the hierarchy -- the less powerful party. Even when employees allege discrimination by co-workers of equal or lesser status, power is an issue because those employees are implicitly, if not directly, asserting that their employers are illegally discriminating by failing to provide a discrimination-free workplace. Given the formal inequality of employers (or managers) and employees, and the fact that employees who have discrimination complaints often fear retaliation (Bumiller 1988), employees may have difficulty being strong advocates on their own behalf.[14] The managers who handle complaints, moreover, have career ties to the employer, which creates the appearance -- and sometimes the reality -- that the person making the decisions represents the employer's interests (Edelman, Petterson, Chambliss, and Erlanger 1990). Nonetheless, employers' interest in avoiding the costs and adverse publicity of litigation may lead them to work hard to resolve employees' grievances, and even to grant concessions that are not legally required.

DIMENSIONS OF COMPLAINT HANDLING PROCEDURES

The issues raised by the dispute resolution literature together with the distinctive features of complaint handling in the employment context frame our study of the employers' internal handling of discrimination complaints. Since, as noted earlier, the vast majority of EEO/AA grievances never reach the courts or even the administrative agencies, the construction of EEO/AA law within the firm is critical: it largely determines the nature of the environment that employees work in and the de facto impact of civil rights laws. Further, as employers handle EEO/AA complaints, they help to construct the meaning of EEO/AA law within the firm, which in turn mediates the impact of EEO/AA law on society.

To examine the effect of employers' internal complaint handling on the internal construction and realization of rights created by EEO/AA law, we first examine employers' stated reasons for creating complaint procedures and

resolving complaints internally as well as their general philosophies on EEO/AA law and its relation to their organizations. We then examine four dimensions of internal complaint procedures: (1) access (how easy or difficult it is to use the procedures); (2) procedural protections; (3) the use of law or legal criteria in decision-making; and (4) the nature of remedies that result from the procedure.[15]

Access to a dispute handling forum is a critical gateway to the redress of employment discrimination; barriers to access result in violations of law going unchallenged. The ease with which a forum may be used and the culture within which disputing takes place may help to overcome psychological barriers to access. A hostile culture clearly reduces access to redress. In contrast, genuine efforts to redress complaints may create a culture conducive to use of the procedure.

To evaluate ease of access in the organizational setting, we consider how difficult it is to invoke the procedure, whether the complainant must file a formal written complaint, and what guarantees are offered against the possibility of retaliation. We also asked complaint handlers to comment on their impressions regarding ease of access. We use this information to assess the extent to which organizational procedures replicate or overcome the barriers to access that characterize the formal legal process and to consider whether there are barriers to access that are unique to the organizational setting.

Procedural protections affect legal rights by influencing the likelihood that employees who do pursue redress will be able to overcome the class and power differences inherent in the employment relation. Following Delgado et al.'s argument that many of the due process protections present in the formal process help to overcome bias, we compare external organizational processes with the legal process on the following dimensions: the use of attorneys or other representatives, allocations of burdens of proof to the respective parties; the types of evidence that may (or may not) be used; whether the facts are fully investigated; and whether the parties have adequate

opportunities to present their cases. While administrative agencies, and even courts, may not always pay attention to rules of evidence and burdens of proof and provide no guarantees of a full investigation, there are at least formal guarantees of these protections, which make it easier for complainants to demand them. However, we keep in mind the fact that the formal process may also fail to provide some of these protections. The procedural protections we asked about include: the involvement of lawyers in the internal process, the use of legal rules of evidence, and the use of legally specified burdens of proof.

The use of law (and extra-legal factors) in decision-making may significantly affect the likelihood of redress. The legal criteria for deciding whether employment practices are discriminatory come primarily from two doctrines: disparate treatment and disparate impact.[16] In their internal complaint procedures, employers are under no obligation to follow either the logic or the specific rules set forth in those doctrines. Employers may recognize one legal theory but not the other[17] or they may alter the legal burden of proof.[18] Employers may also consider extra-legal factors such as whether the employee has a long tenure with the organization, how well the employee fits the company image, or the effect of a decision on work and morale. Employers may expand as well as constrict the criteria employed by the courts and external agencies; for example, they might consider (race- or gender-conscious) "affirmative action" factors where courts would not. To assess decision making criteria, we compare the criteria that employers use with the legal theories used by the courts.

The nature of the available remedies, like the nature of the process itself, affects the ability of employees with discrimination complaints to overcome class and power differences inherent in the employment relation. The remedies available in internal and external forums are crucial both for the relief that individuals may receive and the effects on general patterns of discrimination in the workplace. The formal legal process provides for individual remedies such as back pay and attorney's fees. It may also require

the cessation of discriminatory practices and order affirmative action as a remedy for Title VII violations. And on the societal level, perhaps the most important remedy available in the formal system is a public declaration that certain acts are discriminatory and illegal. Internal complaint procedures may constrict legal rights of discrimination victims if, in cases where the complainant would receive relief through legal channels, the internal procedures resolve individual problems without halting discrimination (for example, by merely transferring the complainant to another department); if they fail to label illegal actions as discriminatory (for example, by resolving individual problems without determining whether discrimination occurred or by failing to acknowledge discrimination when it is determined to have occurred); or if they do not provide compensation (such as back pay where an employee is denied a promotion because of race or sex). On the other hand, they may expand relief available to discrimination victims if they fashion remedies broader than those typically employed by courts (for example, by setting up training programs to inform managers how to eliminate discrimination or sexual harassment) or if they provide remedies in cases in which victims would receive no relief if adjudicated in legal forums (for example, by resolving a problem where it was impossible to prove that discrimination occurred). We examine the variety of remedies that employers use and attempt to determine the frequency with which they are used.

Because the relationships among these four dimensions (and the factors that comprise those dimensions) are complex, we expect employers' internal complaint mechanisms to, in various ways, expand, constrict, and alter the rights of employees with discrimination complaints to challenge and achieve redress for employment discrimination.

DATA AND METHODOLOGY

Sample

To examine the effect of EEO/AA law on handling EEO/AA complaints within organizations, we conducted open-ended interviews with management personnel

who handle internal EEO/AA complaints in ten large organizations (we refer to these persons as "complaint handlers"). We selected organizations from lists supplied by the local chambers of commerce of the largest employers in two counties in a midwest state. Of the ten employers selected, one had fewer than 1000 full time employees, six had between 1000 and 5000 employees, and three had more than 5000 employees. Although ours is not a random sample, we selected the organizations without knowledge of their EEO/AA practices or, in particular, their methods of handling EEO/AA complaints. In order to ensure that complaint handlers would have sufficient personal knowledge about their current employers to provide reliable information, we conducted full-scale interviews only with complaint handlers who had personally handled at least five internal discrimination complaints for their current employers.[19] We sought some variation in types of organizations, and our final sample included: a government agency, a college, an insurance company, two hospitals, a utility, a printing company, a bank, a welding company, and a bottling company.

Because our sample is small and nonrandom, our findings may not represent that general pattern of EEO/AA dispute handling. In particular, since we chose large employers, our findings should not be considered representative of smaller employers, who may use more ad hoc methods of dispute handling. Furthermore, by interviewing only personnel who identify themselves as EEO/AA complaint handlers, we miss the complaint handling strategies of employees' supervisors and other management personnel who may attempt to resolve discrimination complaints. Another concern about validity arises from the fact that the interview data are self-reports; complaint handlers may exaggerate the availability, thoroughness, impartiality, and fairness of internal dispute handling in order to portray their employers and their own work favorably.

Interviews

The interviews lasted about two hours each and all were conducted by the same person. The interviewees were promised confidentiality. We used a list

of questions as initial probes, but the interviews were essentially open-ended. Follow-up questions were based on the complaint handlers' responses. Because of the open-ended nature of our interviews, and because we made some revisions to our questions after the first few interviews, there was some variation in the content and flow of the interviews. However, we were able to obtain fairly consistent information on the four dimensions of complaint procedures discussed earlier. The interviews were tape-recorded and transcribed for analysis.

FINDINGS

Employers' Reasons for Creating Internal Complaint Procedures

Two themes were prominent in employers' reasons for creating internal procedures for handling EEO/AA complaints. The first, predictably, was the importance of avoiding litigation. Nine of the ten complaint handlers said that avoiding litigation was a major motivation for developing an internal alternative. They were primarily concerned with avoiding the costs associated with litigation but also worried about the negative publicity that might result.

The second is less obvious: all of the complaint handlers emphasized that attention to EEO/AA concerns is simply a good management practice. One even said that he would encourage nondiscrimination even in the absence of laws and legal sanctions. For example, one complaint handler told us that "if the law wasn't there we'd still be doing what we're doing because we think it's the right thing to do and ... [it's] sound personnel practice." Several complaint handlers pointed out that resolving complaints early helps to promote good employee morale and an environment conducive to high productivity. For example, one complaint handler said:

> In our environment, we try to create a win-win environment where the manager and the supervisor realize by addressing problems early on that they can resolve their problems and get the work done, be happy with how things are going and be productive. It is our goal to retain any employee because turnover is costly. And we'd rather fix the problems, create a better environment through better understanding and communication.

The same complaint handler drew an analogy between fixing EEO/AA problems and recycling, arguing that repairing existent relationships was more efficient than starting over. Avoiding litigation and maintaining good personnel practices, moreover, are not competing factors; rather they were often coupled in complaint handlers' explanations of why their companies had internal complaint procedures.

The frequent references to the advantages to management of compliance with EEO/AA law suggest that normative legal ideals have -- at least in their abstract form -- been fairly well institutionalized in organizations. But as

we will show in our analysis of how internal complaint handling procedures work, employers do not incorporate many of the more specific attributes of EEO/AA law and the formal legal process, and they add a number of features that are not present in the formal system.

Access to Internal Complaint Handling Procedures

While several aspects of internal complaint procedures may help to allay employees' reluctance to bring complaints, most of the complaint handlers stated that access is still problematic in the organizational setting. One factor that affects access is the availability of a variety of different internal methods for handling complaints so that employees may choose the method that they feel most comfortable with. All ten organizations offer the possibility of a formal investigation, in which the complaint handler interviews involved parties, decides whether further action is necessary, and, if so, either makes or recommends a remedy for the problem. Eight of the ten organizations also provide a type of mediation in which they meet with the complainant(s) and respondent(s) to try to reach an agreement (sometimes referred to as an "action plan") to resolve the problem. Five of the organizations provide an informal counseling mechanism for employees who want to discuss their concerns about possible grievances without necessarily taking further action. Thus, in most of the organizations we studied, employees have two or three methods available to pursue their discrimination grievances.

The informal counseling possibility may be an important gateway to the use of any of these procedures. We heard from many of the complaint handlers that employees often want to talk over a situation without necessarily taking any action. Several of the organizations facilitate this by agreeing not to take further action unless the complainant requests it. Complaint handlers who allow this possibility think that it increases access by allowing them to encourage further action when they think it is appropriate.

Irrespective of what types of procedures employers offer, not all internal forums make it easy for employees to initiate the process. In four of the ten organizations, a grievant must sign a written complaint to initiate

an investigation. This requirement raises the stakes of taking the initial step: several complaint handlers said that employees are often afraid of "putting their necks or names on the line" by making discrimination complaints. Because employees may fear retaliation, the written complaint requirement may be especially likely to deter complaints by employees when those complaints are against their immediate supervisors. One complaint handler said that the purpose of this requirement was to prevent frivolous complaints. (If he communicates this to employees, they may feel reluctant to make complaints out of fear of having their complaints being branded as "frivolous.") In the other three organizations that require written complaints, the complaint handlers personally prefer counseling or mediation because they believe full investigations cause more anxiety, especially for complainants. In these organizations, the requirement for a written complaint may serve as a partial barrier; while it may not prevent employees from pursuing grievances internally, it may effectively channel some cases into counseling or mediation and away from investigations.

Several complaint handlers reported that their personnel policies required them to investigate some types of allegations - typically those involving claims of illegal or unsafe conditions - regardless of the wishes of the grievant. Several complaint handlers also expressed preferences for investigations over mediation or counseling so that they can address the issues thoroughly or justify their actions in the event of a later external complaint. Such policies and preferences, if employees are aware of them, may also constitute barriers for employees who simply want to receive information or advice.

While we have no direct evidence, it seems reasonable to assume that the variety of complaint handling methods, and the fact that they are readily available and entail no expense, would encourage their use. Furthermore, internal complaint procedures offer a fairly fast method of complaint handling: six complaint handlers said that internal cases are usually completed within two weeks, two said that their cases are usually completed

within two months, and one said that the longest it would take to complete a case would be three months. External complaint procedures take much longer, especially if the case involves a lawsuit.

On the other hand, fear of retaliation may be as great or even greater in the internal system since the employee is confronting the employer more directly. Although all of the employers in our sample have policies prohibiting retaliation, and complaints of retaliation were rare, the complaint handlers we spoke to said that it is not uncommon for employees to fear retaliation. Thus fear of retaliation may be a barrier to access in the internal as well as the external forums.

Procedural Protections

There are a number of ways in which employers' complaint handling mechanisms differ notably from the formal legal process for seeking redress of EEO/AA complaints. First, while the formal legal process is primarily adversarial in character, organizational complaint handling processes are much more inquisitorial: the complaint handler takes the initiative and primary responsibility for directing the process.[20] While the inquisitorial style requires less effort on the part of the parties, it may give the complaint handler considerably more influence over both the process and the outcome of cases.

Second, lawyers rarely participate in the internal processes. Four of the complaint handlers said that they had never been contacted by an attorney for an employee in internal complaints, four said that they had been contacted by attorneys only rarely or occasionally, and one estimated that she receives some communication from an employee's attorney in 25% of her internal cases. The complaint handler for the latter organization said that attorneys are more likely to accompany their clients in cases with high levels of strife and distrust to insure that they receive fair resolutions. She suggested that when lawyers participate in the internal process, they tend not to engage in the kind of adversarial conduct common in litigation. Another complaint handler said that when lawyers accompany employees, they tend to be friends or

relatives of the employees and often just listen and support the employee. But a different complaint handler said that having lawyers present can change the character of the meeting (presumably making it more formal and adversarial).

In external cases, employees have a right to legal representation. Especially during the early phases of the administrative complaint process, however, many employees do not use lawyers. A hearing officer for a state EEO agency told us that only about 10 to 15% of complainants were represented by attorneys at the investigation stage of the agency's process. She also commented that most attorneys would not take an employee's case unless the agency had already completed the investigation and determined that there was probable cause to believe that a violation occurred. For cases that reach the litigation stage, of course, one would assume that virtually all employees have attorneys.

Third, complaint handlers in organizations do not follow legal rules about what type of evidence is admissible. Most complaint handlers reported that they generally accepted whatever evidence the parties and witnesses offered, including "hearsay" evidence (second or third party accounts of events), which is inadmissible in formal legal proceedings. However, complaint handlers do consider the nature of the evidence when deciding how much weight to give it. Several reported that they were cautious about giving too much weight to hearsay unless they had corroboration for that information. Especially when there is a conflict over what happened, complaint handlers look for corroborating evidence.

And fourth, complaint handlers in organizations also do not generally follow the complex legal rules specifying burdens of proof for plaintiffs and defendants. Although these rules move the burden of proof back and forth depending on who has proven what and what legal theory the plaintiff uses, the plaintiff (employee) bears most of the burden under legal rules. Interestingly, two of the complaint handlers said that, if anything, they operate as if the employer has the burden of proof. This practice reduces the risk of liability, should the employee file an external complaint.

Thus, employers' internal procedures have different protections than do external procedures. Internal procedures lack some of the basic due process protections that arguably help to check bias on the part of decision-makers and to compensate for power differences between the parties. However, this may be offset by employers' efforts to use their internal procedures as a way to avoid lawsuits, and in the event of lawsuits, to avoid liability. The complaint handlers interviewed for this study seemed to make every attempt to take employees' complaints of discrimination seriously, to conduct thorough investigations of complaints (interviewing all parties and witnesses), check behavior they consider discriminatory, and to satisfy employees who make complaints. From their own reports, moreover, they are quite successful. Most complaint handlers said that very few of the employees who make internal complaints "appeal" them by filing external complaints. Moreover, most reported that although some employees did file external complaints, employers were quite successful overall.[21]

There are important differences, however, between a forum concerned with legal rights and due process and a forum concerned mostly with avoiding liability: whereas the former seeks (at least in theory) to articulate legal rules through specific cases, the latter focuses on resolving cases in a satisfactory manner. The significance of this difference will be more apparent as we examine the role of law in the decision-making processes of internal complaint handlers.

The Use of Law in Decision Making

EEO/AA law appears to play only a minor direct role in how complaint handlers evaluate internal allegations of discrimination. When asked whether they used legal standards such as the disparate impact or disparate treatment analyses to reach a decision, the complaint handlers uniformly told us that they did not. Several complaint handlers pointed out that they were not lawyers and could not be expected to be conversant with legal details. One complaint handler said that EEO/AA law was a "secondary" consideration in his decision making, another said that law is "always kind of there, but not overt," and a third said that law was "definitely a factor" but that she could not think of any cases where EEO/AA law affected the outcome of a complaint. Two said the law was very important, but that they viewed law as a minimal standard: they wanted to ensure fair and ethical treatment of employees whether or not the law would require it. Two other complaint handlers said that when the law "goes too far," they do not worry about taking actions inconsistent with the law.

While complaint handlers do not worry about the details of EEO/AA law, the specter of legal sanctions is always present in the background and, indirectly, affects their decision-making. Complaint handlers say that they consider how each case would look if considered in external forums, and they are especially anxious to resolve those that (they think) might result in liability. One complaint handler said that the threat of liability leads them to be cautious.

> Our approach is to be conservative. We want to take the hard stance and to do all the right things, really to avoid the liability.

Nonetheless, internal complaint handlers do not adopt the calculus of the courts and EEO agencies; they simply construe law as a general requirement of fair treatment and replace legal analyses with their own understandings of fair treatment. When asked what fairness meant, complaint handlers had a variety of responses, but most were -- broadly speaking -- based more on general notions of procedural fairness than on EEO/AA law. They mentioned:

consistent treatment, prior notice of rules, protection from retaliation, giving the complainant an opportunity to be heard, and impartial consideration of complaints. Four complaint handlers suggested a more substantive element of fairness: they said that the resolution should be fair. Interestingly, only three complaint handlers said that fairness meant consistency with the law. One complaint handler (who seemed more knowledgeable about EEO/AA law than most) gave a particularly lucid description of fairness. She said that both the procedure and the outcome ought to be fair, and, she explicitly equated the disparate treatment and disparate impact (which she refered to as "differential treatment and business necessity)[22]," with fairness.

> When you stand back and look at affirmative action laws and policies, the essence of them is whether or not there has been fair treatment. ... Differential treatment and business necessity and all of those things all have fairness as a premise. ... Everyone wants to think that not only the resolution is fair but that the Affirmative Action Office conducted a fair investigation. ... I think the ultimate fairness ... in terms of society looking at it, is whether you have conducted an investigation that was free of biases.

Internal complaint handlers, then, appear to transform the analysis of discrimination into a requirement of fair treatment of employees. One effect of this transformation is that whereas administrative agencies and courts simply decide whether or not illegal discrimination has occurred, complaint handlers in organizations expand the focus of their decision-making to encompass a number of managerial, as opposed to legal, issues. Most importantly, they consider whether poor management or business practices may be the underlying problem. For example, in a case where the complainant alleged sexual harassment, the complaint handler determined that:

> [Sexual harassment] had nothing to do with it - it was a larger work group issue in terms of how these people work together and so I brought in a psychologist who worked with the group on how to ... work together as a team. It wasn't that this person was putting down women, he was putting down everybody.

In another case, where a disabled employee complained that "reasonable accommodation" was not provided even after it had been requested through the appropriate channels, the complaint handler found that:

> [There were] a number of management problems. ... The request for a reasonable accommodation wasn't processed and responded to in a

> timely manner. And it wasn't because it was an accommodation request, ... management realized that they really had made poor work assignments to everyone in the area, so the disabled employee was just an extreme example of a poor management decision.

Internal complaint handlers also consider whether personality conflicts or problems on the part of the employee might have generated the complaint. One complaint handler, for example, made the comment that:

> Sometimes it's a matter of personality clashes. The individual thinks that it might be either race or sex discrimination and it is strictly a personality clash between the two of them.

Another said that:

> This one individual somehow feels that they've been treated unfairly and then when you get to the meat of it it's often times someone who has significant employment problems. Their attendance is terrible. They sometimes have personal problems. In the case of someone with personal problems or other things that are impacting them we do have an EAP [employee assistance program] and so I would try and divert them to that.

In sum, whereas legal adjudicators decide only whether or not employers' practices or policies constitute illegal discrimination, complaint handlers in organizations decide whether or not there is a correctable problem of any sort. The complaint handlers we spoke to generally believed that the majority of complaints they receive do in fact constitute problems, but that those problems are most frequently not discrimination but rather issues of poor management practices, personality conflicts, or personal problems on the part of the employees. This raises the possibility complaint handlers may redefine problems that are in fact discrimination as management or personal problems, although without an independent means of determining whether or how often discrimination occurred, we cannot address that issue.

The Nature of Remedies

There are striking differences both in the conditions under which remedies are available in internal and external forums, and in the nature of the remedies that may be provided. In legal adjudication, remedies in legal forums are available only after the employer is found to have violated the law. When there is a violation, the employers are liable for any sanctions. Of course, when cases are settled out of court, employers often agree to take remedial actions without admitting discrimination. Within organizations,

employers may provide remedies regardless of whether the respondents violated the law; for example, where they perceive that problems are due to personality clashes, poor communication, or bad management practices. When there are sanctions, they are not directed at the employer as an entity but at the respondents.

Remedies available under law include back pay and attorneys' fees to the afflicted individuals as well as remedial employment actions including corrections of discriminatory employment decisions (e.g. offering opportunities for employment or promotion), cessation of discriminatory actions (e.g. stopping harassing behavior), and accommodations for handicapped employees. In Title VII cases, courts may order affirmative action in the form of training or recruitment programs.

According to the internal complaint handlers we talked to, none of their employers ever provide monetary awards. As in external cases, they do sometimes order (or recommend where they do not have authority to order) modifications to discriminatory employment decisions, cessation of discriminatory actions, or accommodations for handicapped employees. In four organizations, complaint handlers sometimes arrange for training of respondents regarding discrimination. More frequently, internal complaint handlers discipline or threaten future discipline of managers or other employees who discriminated or otherwise caused the problem. Nine of the complaint handlers had exercised some sort of disciplinary procedures, including verbal warnings, demands that the offender apologize to the victim, a note in the file, threats of future discipline, modified evaluations, and in three of the organizations, termination. The seriousness of the discipline varied tremendously: in one organization, three of ten cases resulted in terminations; in another, two out of ninety cases resulted in terminations (and only five of the ninety cases involved any discipline); another handles about 75 percent of its cases by requiring an apology, sometimes adding a warning about future discipline.

Several complaint handlers commented on the "fine line" they walk when exercising discipline: they tend to be very discreet about discipline because they worry about protecting the identity of the complainant and about lawsuits by the person being disciplined for slander or privacy violations. Eight of the organizations have policies or practices of keeping complaints confidential. Two of those companies said that despite those policies, news of complaints often spreads informally "through the grapevine." None said that they intentionally publicize decisions or disciplinary actions. One complaint handler, for example, gave the following account of how and why they kept a decision and remedy quiet.

> We did terminate him. We told him the reason was sexual harassment... We went back to the employees. We told them that we took an employment action. We didn't tell them why. ... We didn't go back and say that he was terminated for sexual harassment. We just said that he was no longer employed by the corporation because we wanted to protect his rights, the right to privacy that he had.

Where complaint handlers determine that the problem is managerial in nature, they take action to correct the management problems rather than punish managers for discrimination. When they determine that the problem involves personality conflicts or other types of personal problems, the remedy often involves moving the employee to another part of the company. Thus, several said that the resolution of some cases involved arrangements so that the employees' "paths don't cross." In such cases, there are usually no attributions of fault and no discipline involved.

Most of the organizations also use mediation as one form of remedy, in which case the nature of the remedy depends on what type of agreement the parties reach. Complaint handlers described some mediation that resulted in the offer and acceptance of an apology, and some that resulted in supervisors being trained in a certain area (usually sexual harassment). As the following description of mediation shows, the goal of mediation when it is used as a remedy is more therapeutic than disciplinary.

> Typically, the first session is what I call get it all out... You let them dump the load and you know that's a very tense, difficult, session. ... It's part of what this grieving process you call stages and these types of things you have to kind of

> follow stages ... Part of it is just a lay it out on the line and ... then break it into pieces, you know, look at the different parts. ... And then there's usually follow-up meetings. If it's that involved and that deep of a problem I would try and have one of the professional staff here handle it because ... I don't have the time to deal with that kind of ongoing therapy.

In some cases, where the complaint handler determines that there was no discrimination, it appeared that mediation was used as a means of convincing the employee that there was no discrimination as well as a means of improving work relationships. For example, one complaint handler gave the following account of a case involving an age discrimination complaint.

> One example ... was age discrimination ... when an individual claimed he or she did not get a particular promotion. We investigated that ... in seeking the support material to convince the individual, the complainant, that was not the case. ... The individual ... didn't accept it totally and we therefore had to, in essence, mediate the conclusion by drawing the supervisor in. ... Then we try to develop more of a rapport between the supervisor and the individual.

In sum, whereas remedies in the legal system are aimed at compensating the plaintiff for loss due to illegal discrimination and ordering remedial employment actions, remedies in internal complaint forums are primarily geared toward repairing and improving relations between employees and their supervisors, and among employees. And whereas decisions in legal cases involve public declarations that the employer discriminated, decisions in cases handled internally tend to be private and discreet.

DISCUSSION AND IMPLICATIONS

While the ten large organizations we studied operate in the shadow of the law, it is a very light shadow with hazy edges. EEO/AA law is clearly an element of the context in which the organizational dispute handling takes place, but resolution is not directly dependent on the content of the law. In these organizations, EEO/AA law affects internal complaint handling primarily as a diffuse standard of fairness and a threat of legal sanctions. The employers attempt to meet those broad interests by handling complaints in a fair manner and providing resolutions that keep most complainants satisfied. But they do not incorporate specific legal theories of discrimination or legal methods of assessing allegations.

Legal forums approach EEO/AA dispute handling from a very different perspective and with very different objectives than do workplace forums. Legal forums use individual cases to define the vague concept of discrimination and to fashion appropriate remedies for particular violations of the law. Employers seek to avoid liability and to promote a productive business environment, with good working relationships and high employee morale. Thus, employers' interest is in complaint resolution more than in defining or remedying discrimination.

Whereas a central function of courts is the determination of whether rights have been violated, in organizational dispute handling, determinations of fault are far less important than returning the organization and its personnel to a state of high morale, smooth functioning, and good employee relations. Thus, even if employers are not oriented to EEO/AA law as such, that does not mean that employees' complaints will not be resolved: the employers we studied generally do try to resolve all types of problems in ways that are satisfactory to employees. But because employers' primary concern is fostering a good work environment rather than replicating legal procedures and outcomes, they pay much more attention to the parties' stated interests than to the proper legal remedy.[23]

From an individual complainant's perspective, many of the arguments advanced by proponents of ADR apply to the internal complaint processes we studied -- especially if the complainant is more concerned with a prompt resolution than with vindication of legal rights. Employees may obtain legal resolution only through an often lengthy, difficult, expensive, adversarial, and uncertain process of proving (or credibly threatening to prove) a violation. Internal procedures, by contrast, offer employees a faster, less adversarial, and less expensive means of pursuing their claims, while embodying notions of fairness and often offering a variety of methods for resolving complaints. And most importantly, the internal procedures in these organizations offer employees a much greater likelihood of satisfactory resolution of their complaints -- even where those complaints do not involve

violations of law and would not, therefore, be redressed by a court of law. Use of the employers' forums also offers employees a greater possibility of continuing the work relationship.

Employers also benefit from handling complaints internally: both complaints themselves and information obtained during investigations of complaints help employers to discover managerial problems and poor working relationships as well as arguably illegal practices that might expose them to liability. As employers resolve complaints, they also make modifications to managerial practices, working conditions and relationships, and employees' behaviors that interfere with productivity. At the same time, they can avoid costly litigation and legal sanctions.

Yet our study also shows that internal complaint procedures have serious potential to undermine legal rights, thus bearing out the concerns of ADR critics. There is a clear shift in emphasis from legal rights to individual parties' interests, and from the application and definition of EEO/AA law to the resolution of managerial and individual problems. This is evident not only in the fact that internal complaint handlers pay little attention to employees' rights under EEO/AA law, but also in the language that complaint handlers use to describe their processes.

Whereas the rhetoric of rights is central to courts and administrative agencies, the rhetorics of therapy and of management are far more pervasive in organizational complaint handlers' accounts. Especially when discussing mediation, complaint handlers emphasize the importance of encouraging parties to "dump the load," "feel better about the situation," "ease tension," and "grieve." One complaint handler explicitly referred to mediation as therapy and most of the others spoke of employees' "problems" rather than employees' "rights". Complaint handlers repeatedly characterized remedies in terms of managerial goals such as "developing rapport between employees and supervisors;" rectifying "management problems" and "poor work assignments;" reassigning people to avoid "personality clashes;" and "improving communication." In contrast, there is almost no language about legal rights;

when the term "rights" is used, it is usually in a nonlegal sense (e.g. one complaint handler spoke of using mediation to "help parties understand each other's rights and responsibilities.")

To the extent that employees accept these classifications as the underlying causes of their problems, they are less likely to think that their complaints merit legal redress and will be less likely to pursue external legal solutions. While some employee complaints no doubt arise from personal or management problems, there is nevertheless a substantial risk that the tendency to characterize discrimination complaints in these terms will "cool out" legitimate discrimination complaints.

By resolving problems without recognizing rights, employers privatize and depoliticize the public right to equal employment opportunity. Each problem is treated as a private situation involving a particular individual, which requires a private resolution. Individual complaints are rarely linked to public rights and ideals, and the complaint resolution process does not involve public recognition of those rights. In addition, because the internal process focuses on solving what complaint handlers perceive as the problems of individual employees, it is unconcerned with such matters as elaborating a definition of discrimination or equal employment opportunity, or articulating a standard that other employees (or prospective employees) can appeal to when they encounter similar problems. Employers' interest in keeping disputes quiet and discreet raises one of the most important differences between legal and organizational resolution of discrimination complaints. When a lawsuit is tried in court, there is a public declaration that the challenged behavior is or is not discriminatory; other employees may rely on those public declarations either to bring their own lawsuits or to negotiate informal settlements. When discipline is exercised within organizations, however, there is no public declaration. Instead both the decision and the remedy are kept quiet, so that, in a sense, each employee must renegotiate the meaning of discrimination. Because internal disputes are usually treated as private affairs affecting only those parties who are directly involved, internal

complaint handling forums are unlikely to have the general deterrent effect that publicized lawsuits have on at least some employers.

Finally, the symbolic value of internal complaint procedures may strengthen employers' legitimacy and authority in a way that makes it more difficult for employees to challenge employment practices. First, because internal complaint-handling procedures formalize the right to appeal -- a basic element of due process -- they symbolize legality and fairness both to employees and to the external world: thus, regardless of their effect on rights, they are an important source of legitimacy and may even constitute evidence of nondiscrimination, should employers be sued (Edelman 1990, 1991). But where symbolic attention to EEO/AA issues exists in the absence of treatment that is in fact nondiscriminatory, it may make it more difficult for employees to convince external agencies or courts that they have been victims of discrimination. Second, since employers are the final arbiters of internal complaints, internal forums tend to reaffirm employers' authority over employees and autonomy from outside intervention, which may discourage challenges from employees. In contrast, legal procedures call attention to formal limits on employers' authority and autonomy, which may be empowering to employees.

Of course, formal adjudication of EEO/AA complaints is no panacea: plaintiffs who pursue legal decisions and remedies must endure an arduous and expensive process with only a small chance of success. Yet when they win (and even, sometimes, when they lose), they move the process of social reform forward and make it easier for those employees who follow them. While employers' internal complaint handling procedures offer a quicker solution for the individual, the legal route may offer a greater chance of progress for the class (race, gender, etc.) that is represented by that individual. Thus, while internal complaint handling may better serve the interests of individuals (and employers), the formal legal system, by drawing societal (and employers') attention to legal rights, may better serve the public interest in social justice.

NOTES

1. Employees may file complaints with the Equal Employment Opportunity Commission (EEOC), which was created by Title VII, or with state or local EEO agencies. The EEOC or state agency may attempt to conciliate the dispute, and if that fails, may pursue legal action. If the agency does not pursue legal action, it must issue a "right to sue" letter, which gives the employee the right to initiate a lawsuit.

2. Law, including EEO/AA law, creates rights for individuals, but with the purpose of pursuing broader public goals, e.g. the elimination of discrimination. Silbey and Sarat (1989: 472) argue that "Rights have a clear public aspect in the sense that they imply a willingness to make demands on the state, to use public institutions, or to appeal to collective sentiments for validation of those claims."

3. We refer to these employees as complainants and respondents, respectively. Note that in legal and administrative forums, the respondent is the employer rather than an individual within the organization who is accused of committing discriminatory acts.

4. Westin and Feliu (1988) address EEO/AA disputes only tangentially. They describe general workplace dispute resolution techniques in a number of high-profile firms and report that a growing number of organizations are using them for EEO/AA disputes.

5. The term "alternative dispute resolution," which is commonly used to refer to a wide variety of dispute handling mechanisms such as arbitration and mediation, can lead to confusion because it suggests - misleadingly - that ADR processes are necessarily all similar and are all informal alternatives to courts (Baruch-Bush 1989; Galanter 1989). We recognize these problems, but we use the term for lack of a better alternative.

6. Others question the validity of these arguments (e.g. Galanter 1988; Esser 1989; Tyler 1989; Luban 1989) or present empirical evidence

suggesting that differences may be due to characteristics of parties or their disputes rather than dispute handling forums (e.g. Vidmar 1984, 1985, 1987).

7. We do not argue that such rights actually produce discrimination-free workplaces. (In another paper, Edelman (1991) argues that civil rights laws invite symbolic rather than substantive responses). We mean simply that the existence of the right in theory allows claims to be framed in absolute terms.

8. This argument follows from the work of Wilhelm Aubert (1963), who argued that conflicts over values result in absolute positions and are less amenable to compromise solutions than conflicts over interests, which presume a consensus over values.

9. Of course, settlements occur in majority of cases brought externally as well. But, in general, lawyers must help clients to reconceptualize their claims in order for settlement to be possible. When parties' insist on what they are legally entitled to, adjudication is probably more likely.

10. Delgado et al. point to a number of features of adjudication that operate to reduce bias and protect weaker parties; including the principle of stare decisis, the Code of Judicial Conduct, rules of civil procedure, rules of evidence, representation by attorneys, and public scrutiny of judicial decisions.

11. Cobb and Rifkin (1991) found that some mediators consciously attempt to compensate for power differences between the parties but they also note that it is difficult to reach a balance between neutrality and assisting a weaker party.

12. Employers also have an interest in maintaining high employee morale of both complainants and respondents.

13. In some cases, the Chief Executive Officer (CEO) is the final decision-maker. In other cases, an official in an ombudsperson or personnel capacity adjudicates disputes. While such officials may appear to be more neutral than the CEO or line managers, their personal career interests are likely to constrain their ability to deviate substantially from managerial interests (Edelman et al. 1990).

14. If employers retaliate against employees who file discrimination complaints, employees may have legal recourse either under Title VII or, in some states, under wrongful discharge doctrines. However, given the expense of legal action and the fact that it is often difficult to prove that retaliation was the motivation for employers' actions, employees may justifiably fear retaliation.

15. These four dimensions are not mutually exclusive: for example, the nature of remedies or of procedural protections may influence access by making the procedure appear friendly and fair or hostile and futile. Nevertheless, distinguishing among these dimensions facilitates analysis of employer's complaint procedures.

16. Under the disparate treatment doctrine, the plaintiff must prove that the employer intended to discriminate on the basis of race, sex, or another forbidden basis and that any legitimate reason articulated by the employer is really a pretext (McDonnell Douglas Corp. v. Green 431 U.S. 324, 1977). Under the disparate impact doctrine, the plaintiff need not prove intent to discriminate, but must prove that an employment practice adversely affects a protected group of employees. If the employer shows that the practice significantly serves a legitimate employment goal, the plaintiff must prove that an alternative practice would be equally effective in achieving the employer's legitimate goals (Wards Cove Packing Co., Inc. v. Antonio 109 S.Ct. 2115, 1989). The rules announced in Wards Cove substantially increased the plaintiff's

burden of proof and reduced the employer's burden of proof in disparate impact cases from the rules set out in Griggs v. Duke Power Co. (401 U.S. 424, 1971). As a practical matter, most Title VII suits are brought under the disparate treatment theory.

17. For example, an employer may always require proof of intent to discriminate.

18. For example, employers may assume that their burden of justifying policies that adversely affect minorities is easily met. Conversely, employers may ignore burdens of proof altogether and redress the complaint as if employees had proved their allegations, in order to forestall external legal action.

19. We contacted a total of 28 organizations in order to obtain our sample. Of the 18 that we did not conduct full scale interviews with, 15 did not meet our sampling criterion and three refused to participate.

20. Of course, there is variation in both forums. In particular, the administrative portion of the external process can be somewhat inquisitorial in character, since agency officers will usually conduct an investigation, and will attempt conciliation if the investigation results in a finding of a probable legal violation. If the conciliation fails, however, the process becomes more adversarial: there is a hearing on the merits, and an administrative appeal if a party is dissatisfied with the decision from the hearing. If that fails, or if the agency does not pursue the case, there may be a lawsuit.

21. Three of the complaint handlers reported that they won all of the cases filed externally. Five said that they won the large majority of such cases. Two did not know since they did not personally handle external complaints.

22. Business necessity is a legal defense to the use of a procedure that has a disparate impact.

23. Some of the differences we observed between internal and external forums may be due in part to the fact that most, if not all, disputes handled internally involve continuing employees with complaints about their treatment during employment. In contrast, many of the claims handled by external forums involve employees who have either been terminated or have been refused employment in the first place. At the same time, the distinctive characters of the two forums may influence employees' choice of forums for different types of complaints.

REFERENCES

Abel, Richard L. (1982) The Politics of Informal Justice, Vols. 1 and 2. New York: Academic Press.

Adler, Peter, Karen Lovaas, and Neal Milner (1988) "The Ideologies of Mediation: The Movement's Own Story," 10 Law and Policy 317.

Aldrich, Howard E., and Jeffrey Pfeffer (1976) "Environments of Organizations," 2 Annual Review of Sociology 79.

Auerbach, Jerold (1983) Justice Without Law?: Resolving Disputes Without Lawyers. New York: Oxford University Press.

Aubert, Vilhelm (1963) "Two Types of Conflict and of Conflict Resolution," 7 Journal of Conflict Resolution 26.

Baron, James N., Frank R. Dobbin, and P. Devereaux Jennings (1986) "War and Peace: The Evolution of Modern Personnel Administration in U.S. Industry." 92 American Journal of Sociology 350.

Bumiller, Kristin (1988) The Civil Rights Society: The Social Construction of Victims. Baltimore: Johns Hopkins University Press.

Bush, Robert A. Baruch (1989) "Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments," 66 Denver University Law Review 335.

Cobb, Sarah and Janet Rifkin. (1991) "Practice and Paradox: Deconstructing Neutrality in Mediation," 16 Law & Social Inquiry 35.

Curran, Barbara A. (1977) The Legal Needs of the Public: The Final Report of a National Survey. Chicago: American Bar Foundation.

Delgado, Richard, Chris Dunn, Pamela Brown, Helena Lee, and David Hubbert (1985) "Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution," 1985 Wisconsin Law Review 585.

DiMaggio, Paul J., and Walter W. Powell (1983) "The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields." 48 American Sociological Review, 147.

Edelman, Lauren B. (1990) "Legal Environments and Organizational Governance: The Expansion of Due Process in the Workplace," 95 American Journal of Sociology 1401.

----- (1991) "Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law," Unpublished manuscript.

Edelman, Lauren B., Stephen Petterson, Elizabeth Chambliss, and Howard S. Erlanger (1990) "Legal Ambiguity and the Politics of Compliance: Affirmative Action Officers' Dilemma" Institute for Legal Studies Discussion Paper.

Eisenberg, Theodore. 1990. "Testing the Selection Effect: A New Theoretical Framework with Empirical Tests," 19 Journal of Legal Studies 337.

Erlanger, Howard S., Elizabeth Chambliss, and Marygold S. Melli (1987) "Participation and Flexibility in Informal Processes: Cautions from thee Divorce Context," 21 Law & Society Review 585.

Esser, John P. (1989) "Evaluations of Dispute Processing: We Do Not Know What We Think and We Do Not Think What We Know," 66 Denver University Law Review 499.

Felstiner, William L. F., Richard L. Abel, and Austin Sarat (1980-1981) "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...," 15 Law & Society Review 631.

Fernandez, Linda Hadbavny (1979) A Guide to the Wisconsin Fair Employment Act. Madison: Wisconsin Department of Industry, Labor, and Human Relations.

Fisher, Roger and William Ury (1981) Getting to Yes. Boston: Houghton Mifflin.

Fiss, Owen M. (1984) "Against Settlement," 93 Yale Law Journal 1073.

Freeman, Alan (1982) "Legitimating Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine," in Marxism and Law, eds. Piers Beirne and Richard Quinney. New York: Wiley.

Galanter, Marc (1974) "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," 9 Law & Society Review 95.

----- (1988) "The Quality of Settlements," 1988 Journal of Dispute Resolution 54.

----- (1989) "Introduction: Compared to What? Assessing the Quality of Dispute Processing," 66 Denver University Law Review xi.

Galbraith, Jay (1977) Organization Design. Reading, Mass.: Addison Wesley.

Handler, Joel (1986) The Conditions of Discretion: Autonomy, Community, Bureaucracy.

Lawrence, Paul R., and Jay W. Lorsch (1967) Organizations and Their Environment: Managing Differentiation and Integration. Boston: Graduate School of Business Administration, Harvard University.

Lazarson, Mark (1982) "In the Halls of Justice, the Only Justice is in the Halls," in The Politics of Informal Justice, ed. Richard Abel. New York: Academic Press.

Luban, David (1989) "The Quality of Justice," 66 Denver University Law Review 381.

Macaulay, Stewart (1963) "Non-Contractual Relations in Business: A Preliminary Study," 28 American Sociological Review 55.

----- (1966) Law and the Balance of Power: The Automobile Manufacturers and their Dealers. New York: Russell Sage Foundation.

Meacham, Colquitt (1984) "The Use of Mediation to Resolve Employment Discrimination Complaints," 28 Boston Bar Journal 21.

Menkel-Meadow, Carrie (1984) "Toward Another View of Legal Negotiation: The Structure of Problem-Solving," 31 UCLA Law Review 754.

Meyer, John W., and Brian Rowan (1977) "Institutionalized Organizations: Formal Structure as Myth and Ceremony," 83 American Journal of Sociology 340.

Miller, Richard E., and Austin Sarat (1981) "Grievances, Claims, and Disputes: Assessing the Adversary Culture," 15 Law & Society Review 525.

Minow, Martha "Interpreting Rights: An Essay for Robert Cover," (1987) 96 Yale Law Journal 1860.

Mnookin, Robert H., and Lewis Kornhauser (1979) "Bargaining in the Shadow of the Law: The Case of Divorce," 88 Yale Law Journal 950.

Pearson, Jessica, and Nancy Thoennes (1985a) "Divorce Mediation: An Overview of Research Results," 19 Columbia Journal of Law and Social Problems 451.

----- (1985b) "Mediation Versus the Courts in Child Custody Cases," 1 Negotiation Journal 235.

Pfeffer, Jeffrey, and Gerald R. Salancik (1978) The External Control of Organizations. New York: Harper & Row.

Roehl, Janice A., and Royer F. Cook (1982) "The Neighborhood Justice Centers Field Test," in R. Tomasic and M. Feeley eds., Neighborhood Justice: Assessment of an Emerging Idea, New York: Longman, Inc.

Silbey, Susan, and Austin Sarat (1989) "Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject," 66 Denver University Law Review 437.

Singer, Linda R. and Ronald A. Schechter, "Mediating Civil Rights: The Age Discrimination Act" 4 NIDR Reports.

Thompson, James D. (1967) Organizations in Action. New York: McGraw-Hill.

Tushnet, Mark (1984) "An Essay on Rights," 62 Texas Law Review 1363.

Tyler, Tom R. (1989) "The Quality of Dispute Resolution Processes and Outcomes: Measurement Problems and Possiblities," 66 Denver University Law Review 419.

----- (1990) Why People Obey the Law. New Haven, Conn.: Yale University Press.

Vidmar, Neil (1984) "The Small Claims Court: A Reconceptualization of Disputes and an Empirical Investigation," 18 Law & Society Review 515.

----- (1985) "An Assessment of Mediation in a Small Claims Court," 41 Journal of Social Issues 127.

----- (1987) "Assessing the Effects of Case Characteristics and Settlement Forum on Dispute Outcomes and Compliance," 21 Law & Society Review 155.

Weber, Max (1954) Max Weber on Law in Economy and Society. Max Rheinstein (ed.). Edward Shils and Max Rheinstein (trans.) Cambridge, MA: Harvard University Press.

Westin, Alan F., and Alfred G. Feliu (1988) Resolving Employment Disputes Without Litigation. Washington, D.C.: Bureau of National Affairs.

Westin, Alan F., and Alfred G. Feliu (1988) Resolving Employment Disputes Without Litigation. Washington, D.C.: Bureau of National Affairs.

Williamson, Oliver E. (1975) Markets and Hierarchies: Analysis and Antitrust Implications. New York: Free Press.

Wolf, John, Sander Lund, and Brenda Miller (1985) "Evaluation of Mediation as a Means of Resolving Employment Discrimination Disputes," unpublished paper.

Statutes

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e.

Cases

Griggs v. Duke Power Co. 401 U.S. 424 (1971)

McDonnell Douglas Corp. v. Green 431 U.S. 324 (1977)

Wards Cove Packing Co., Inc. v. Antonio 109 S.Ct. 2115 (1989)