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BEYOND DISPUTE: *EEOC V. SEARS* AND THE POLITICS OF GENDER, CLASS,
AND AFFIRMATIVE ACTION, 1968-1986

by

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ABSTRACT OF THE DISSERTATION

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In 1973 the federal government began investigating Sears, Roebuck & Co. for discrimination against women employees because, among other things, its commissioned sales force was predominantly male. At trial, Sears argued that women were not interested in commissioned positions because they were too demanding. The decision, which found Sears not liable for discrimination, sparked a great deal of debate among feminists and in the media over the expert witness testimony of two women's historians. Employing oral histories, organizational records, court documents, and media accounts I use the case as a lens through which to view broader historical issues regarding women and work, social class, and national political changes during the 1970s and 1980s. I give a detailed social history of the case, focusing on the players and events that affected the outcome, and a legal-political history of the time period as reflected through developments in the case.

This dissertation recovers cross-class organizing at the beginning of a case known only for its divisiveness. It examines dynamics within second-wave feminism, including the implications of a shift in focus to the Equal Rights Amendment, the role of the equality/difference dilemma, and whether the loss in court to Sears was merely a defeat. The company's corporate personality foreshadowed the lengths to which it would go to

fight the EEOC. I also reveal a significant amount of resistance within the first Reagan administration to changes in civil rights policy and show that the case continued with strong support despite ambivalence on the part of the government. The long litigation process ensured a case that looked very different from its beginnings. The feminist debate surrounding the trial highlights the end of a much longer story and distracts attention from critical issues. I argue for de-centering this feminist dispute, and remembering the case instead for what it can tell us about debates over affirmative action, attempts by women activists alternatively to work within and challenge national policy, the limits of the law and second-wave feminism for improving the lives of working women, and the reasons why the workplace revolution for women stalled and remains so today.

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Chapter 1

Introduction

At the beginning of the twenty-first century, U.S. workers are more concerned than ever with how to balance work and family. Articles abound about Generation Y taking advantage of the demand for middle-class and professional workers by pressing for flexible workplaces. The failure of U.S. society to address adequately the issue of women and work, both working-class and professional, has even generated a new genre of popular fiction. Authors move from discussing the challenges facing single professional women in the 1990s to stories of these career women after they got married and had children.¹ The quintessential question is how a working woman struggles to “have it all.”² A more insidious form of this writing, reflecting the backlash against women, are stories that subtly predict doom and disaster for working mothers.³ Finally,

¹ Often, the same “chick lit” authors were the first to expand into “mommy lit”, following their characters as they dated, got married, and had children. Jane Green followed Jemima J (New York: Broadway Books, 2000), Mr. Maybe (New York: Broadway Books, 2001), and Bookends (New York: Broadway Books, 2002) with Babyville (New York: Broadway Books, 2003). Her publisher described her as winning “the hearts of thousands of readers with her fresh take on single life and the dating jungle,” and then applying “her golden touch to the next phase of a girl’s life, in an irresistible new novel about two young women coping with the chimes of their biological clocks.” (on www.bn.com)

² I Don’t Know How She Does It (New York: Knopf, 2002) by Alison Pearson humorously tells the story of a high-powered banker trying to balance motherhood and work who is jealous of the nanny who cares for her children. Seemingly on the verge of offering a new solution for working women, Pearson’s character nevertheless quits her job, finding an individual solution to a very global problem, making a “choice” only available to affluent women, and even idealizing traditional domesticity by moving her family to the country. (Nevertheless, in response to an interview question on NPR about whether feminism had failed women, Pearson said it was the fault of society for not finding a viable solution or taking family responsibility on as an issue.) The end of the book supposedly offers a compromise when she starts a business from home, but still presents the only options as full-time capitalist-exploitation neglect-your-children work or staying home completely.

³ In A Perfect Arrangement (Chapel Hill, N.C.: Algonquin Books of Chapel Hill, 2001), Suzanne Berne’s character earns more money than her husband, who works from home, but still feels guilty for commuting into the city to work as an attorney. Though appearing to address the conflicts faced by working mothers, Berne punishes her protagonist with almost losing her marriage, losing a pregnancy with twins, having a child with developmental disabilities that she has too little time to figure out, and her ultimate fear, a nanny who appears to be perfect in every way but abuses her child. The two caregivers are enemies, reinforcing the image of women catfighting, and the message is that the mother, exhausted from

showing that women cannot win either way, there are stories attacking stay-at-home mothers.⁴ Although these books focus on white, middle-class and professional women who “choose” to work and can afford to pay for private childcare, they also provide a hidden window into class relations among women, the affluent mother and the working-class nanny.⁵

The non-fiction work on this subject offers little help. In 2002, Sylvia Ann Hewlett warned career women they would realize they delayed their fertility too long and regret not having children.⁶ In 2007, Leslie Bennetts warned women not to stop working – even temporarily – when they have children or risk financial ruin if their husband dies, becomes disabled, or divorces them.⁷ This steady stream of books inflames the so-called “mommy wars” between stay-at-home and career women and ignores poor and working-class women who have no choice but to work. They throw out contradictory messages. STOP WORKING or you will not have and/or will neglect your children. DON’T STOP WORKING or you will lose your financial security. And yet they offer little help to regular women, working- or middle-class, who try one day at a time to piece together

trying to do everything, is focusing on the wrong things. There is no explanation of how her husband, who floats from job to job, could support them if she decided to “do the right thing” and stay home.

⁴ *The Nanny Diaries* (New York: St. Martin’s Press, 2002), written by two college graduates about their experiences as nannies, is a scathing attack on privileged upper class New Yorkers, who, everyone can finally agree, have their priorities in the wrong place: the father on work, money, and affairs, and the mother on her own activities and figuring out how to keep her husband. It is the mirror image of the other books: mothers with too much time on their hands who do not raise their own children, written from the point of view of the sympathetic nanny. Again, the two caregivers are enemies.

⁵ The nanny is usually invisible, with little information provided about her life, and defies reality as a young white “governess” with no childcare concerns of her own, rather than an underpaid illegal immigrant who leaves her own children in her home country to raise the children of affluent white women. If even the young white unmarried nanny is portrayed as evil, it is not difficult to imagine what would happen if she were portrayed more accurately as a racial other.

⁶ Sylvia Ann Hewlett, *Creating a Life: Professional Women and the Quest for Children* (New York: Talk Miramax Books, 2002).

⁷ Leslie Bennetts, *The Feminine Mistake: Are We Giving Up Too Much?* (New York: Voice/Hyperion, 2007).

some kind of balance between family and work. They work opposite shifts from their husbands so they can maximize childcare coverage. They work part-time or in lower-stress jobs so they can fulfill their family responsibilities. They seek higher-paid jobs to maximize their earnings during the time they have to be away from their children. More importantly, by pitting women against each other and focusing on their “choices” these books continue to put the burden on the individual woman. They do not discuss how the government should expand mandated leave, subsidize childcare, limit the work day to six hours, or reward companies that institute family-friendly policies. They do not lay out model policies for employers and unions or publicize those that have particularly bad or good policies.

The prevalence of this literature demonstrates how U.S. society fails to appreciate the complexity of this issue and, because catfights among women sell more newspapers, focuses instead on the work-or-stay-home dialectic. Much of the debate follows the standard narrative of “second-wave” feminism, that women who came of age just before the women’s movement in the 1960s felt unappreciated and wondered about missed opportunities for something beyond family.⁸ The next generation entered the workforce as a result of second-wave feminism, where they fought sexual harassment and opened male-dominated jobs, giving the following generation the opportunity to work in whatever jobs they wanted. This path created the “superwoman,” who could not

⁸ See, for example, Anne Tyler, *Ladder of Years* (New York: Knopf, 1995). I refer to second-wave feminism to indicate the liberal feminist, generally middle-class branch of the women’s movement that gained new attention in the 1960s and 1970s and focused mostly, though not exclusively, on women’s legal rights. Nevertheless, my work confirms that even organizations generally categorized within this branch had members who came out of the civil rights, anti-war, and grass-roots women’s liberation movements, as well as from labor union backgrounds, and who cared less about legal rights than everyday problems facing working women. At times I also refer to the reemergence of the “women’s movement,” which broadly includes the movements for social change for women – second-wave feminism and the grass-roots women’s liberation movement – which gained attention in the late 1960s and 1970s.

complain because she had been given so many options, and thus tried to “have it all,” family and a fulfilling career. The current popular literature tries to represent the next generation, raised since second-wave feminism and the beneficiary of the hard work of those who came before. They started families later in life and rejected the structure of the workplace that previous generations of women fought to enter. Their male counterparts share their resentment in having to sacrifice family lives for work, and, where they can afford to, are willing to turn down money for flexibility. Men and women want to share more equally the burdens of supporting their families and parenting their children.

However, this narrative is incomplete and these concerns nothing new. In the early twentieth century new economic opportunities opened up for white women but shifting gender roles bred concern among reformers about the future of the family, leading to efforts to “protect” women in the workplace as potential mothers.⁹ Protective legislation was passed to shield women from some of the worst effects of industrialization, for example, by setting minimum wages and limiting working hours. However, some argued that basing such laws on their status as the “weaker” sex institutionalized women’s subordinate position in society and limited access to higher-paying positions needed to support their families.¹⁰ Scrutiny of working mothers also increased with industrialization and women’s wage work, requiring them to put in a “double day” at home.¹¹ Social programs to ease the burden of working women and

⁹ See, for example, Alice Kessler-Harris, Out to Work: A History of Wage-Earning Women in the United States (New York: Oxford University Press, 1982), 179 and chap. 6.

¹⁰ For a discussion of the development and role of protective legislation, see Kessler-Harris, Out to Work, chaps. 7 and 8. Attachment to the home and family had long been used to justify lower wages, under the reasoning that women were not permanent workers. Kessler-Harris, Out to Work, chap. 11.

¹¹ Reformers lectured working and immigrant women on caring for their children, imposing middle-class notions of motherhood. During the Lawrence Mill strike of 1912, women faced criticism for not stretching their wages farther and for sending their children to live with middle-class families during

political justifications for their shifting roles changed depending on the interests of male workers and the government.¹² During World War II, the government offered childcare and food to entice women to replace men fighting abroad in the labor force. After the war, in order to make room for returning soldiers women were forced back to their lower-status positions or out of the workplace completely.¹³ The rise of second-wave feminism and the women's liberation movement in the 1960s and 1970s brought women back into the workplace in large numbers, threatening traditional family roles and sparking a backlash.¹⁴ The meaning of motherhood has been socially constructed throughout history and applied differently based on race and class but, despite the conventional narrative of traditional family values, has virtually always meant supporting one's family financially.¹⁵ Improvements for women in the workplace have been widespread but unfinished, getting professional women into jobs in large numbers but leaving unresolved the issues that would enable them to stay there, and leaving working-class women

the strike, despite the fact that they were taking radical action to fulfill their traditional roles of caring for their families. Ardis Cameron, Radicals of the Worst Sort: Laboring Women in Lawrence, Massachusetts, 1860-1912 (Urbana: University of Illinois Press, 1993). During the Depression women supported their families in low-paying jobs when their husbands could not find work, but faced accusations of taking jobs from men. Kessler-Harris, Out to Work, chap. 9.

¹² In the colonial period men and women's work were concentrated in the home. See, for example, Laurel Thatcher Ulrich, A Midwife's Tale: The Life of Martha Ballard, Based on Her Diary, 1785-1812 (New York: Random House, 1990); Kessler-Harris, Out to Work, A Note of Acknowledgement. Later, women's work became invisible as they remained at home constrained by the notion of separate public and private spheres. Jeanne Boydston, Home and Work: Housework, Wages, and the Ideology of Labor in the Early Republic (New York: Oxford University Press, 1990).

¹³ Some remained in the workplace in "response to increasing economic demands on the family." Kessler-Harris, Out to Work, 299 and chap. 10.

¹⁴ Kessler-Harris, Out to Work, chap. 11.

¹⁵ For example, while arguing that women should stay home with their children, Congress has repeatedly limited assistance to "welfare" mothers, disproportionately black women, unless they went out to work.

underpaid compared to men with similar skills and responsibilities. In addition, the double burden of caregiving and wage work applies across all races and classes.¹⁶

One prolonged legal battle of the 1970s and 1980s illustrates this stalled revolution in work-family conditions and helps us understand why it has not yet been resolved. In 1973 the Equal Employment Opportunity Commission (“EEOC” or “Commission”) began investigating allegations of employment discrimination at Sears, Roebuck & Co. At the time, successes against other corporations made it seem likely that Sears would settle its case and agree to hire more women and minorities. However, after four years of investigation, two years of settlement talks, six years of litigation, and one year in trial, the results turned out very differently. At trial in 1985, Sears argued that female employees “were not interested” in commission sales positions because they were too stressful and competitive and the jobs conflicted with their family responsibilities. Historian Rosalind Rosenberg testified on behalf of Sears that differences in hiring and promotion could be explained by social norms rather than discrimination. Labor historian Alice Kessler-Harris testified for the EEOC that working women had always taken the opportunity to earn more money when it was offered to them, and that Rosenberg had universalized an assumption about white middle-class women – that they prioritize domestic duties over wage work – to all women.¹⁷ The trial court decision cleared Sears of any liability, sparking an intense debate among feminist scholars and in

¹⁶ See generally, Arlie Russell Hochschild with Anne Machung, The Second Shift: Working Parents and the Revolution at Home (New York: Viking, 1989).

¹⁷ Alice Kessler-Harris, “Equal Employment Opportunity Commission v. Sears, Roebuck & Company: A Personal Account,” Radical History Review 35 (1986): 57.

the media. Indeed, the case became known mainly for the conflicting testimony of the two female historians.¹⁸

The case began as a way to address access to the workplace – granting women greater opportunities to take traditionally male-dominated jobs. But media attention and creative legal arguments highlighted another sensitive issue, how the workplace should accommodate women’s needs as caregivers. Perhaps hoping to skirt powerful new anti-discrimination laws, Sears reshaped the case by arguing that women did not actually want the jobs at issue. It skillfully exploited this more vulnerable issue, which no laws clearly addressed, and turned feminists, who had no consensus on the issue, against each other. Labor feminists – working-class and union women who had worked to improve the status of women workers since the end of World War II – were well-aware of the challenges of incorporating work and family and did not necessarily disagree with Sears’ claims that women wanted jobs that accommodated their family responsibilities.¹⁹ Middle-class liberal feminists were more focused on gaining access to male-dominated professional jobs, and accepted the idea that they might have to act like men – as if they had no family responsibilities – in order to get them. Through battles in the media and among scholars, the Sears case brought to a head class differences among working women and priorities among different feminists. In the process, it left working women of all classes and feminists of all types disheartened about the prospects for improving the workplace.

¹⁸ EEOC v. Sears Roebuck & Co., 628 F. Supp. 1264 (N.D. Ill. 1986), aff’d, 839 F.2d 302 (7th Cir. 1988).

¹⁹ Dorothy Sue Cobble, The Other Women’s Movement: Workplace Justice and Social Rights in Modern America (Princeton and Oxford: Princeton University Press, 2004).

The Social and Political Terrain

It had not started this way. The massive case against an industry leader began during a time of great hope and change, made possible by a convergence of the civil rights movement, reemergence of the women's movement, work by labor feminists, and a changing national political landscape through the mid-twentieth century.

A grass-roots black freedom struggle in the South through the 1930s, 40s, and 50s faced bitter resistance from southern states and limited help from the federal government but finally forced the law to change in the 1950s and 1960s.²⁰ It was helped in part by rising influence for labor unions and a growing Democratic Party coalition of immigrants, the poor, blacks, and unions which continued New Deal policies into the postwar era and created a favorable political climate for government involvement in social and economic change. In 1961, President Kennedy ordered government contractors to implement and report on affirmative action efforts. Several states established fair employment practices commissions to address discrimination; New York's commission became the model for the federal government.²¹ Responding to heightened protests by the black freedom movement, President Johnson pushed the Civil Rights Act of 1964 and the Voting Rights Act of 1965 through Congress.²² Initially intended as broad-based civil rights legislation to protect African Americans and not to cover sex discrimination, Title VII of the Civil Rights Act of 1964 ("Title VII") nevertheless prohibited employers from discriminating on the basis of protected

²⁰ See Charles M. Payne, I've Got the Light of Freedom: The Organizing Tradition and the Mississippi Freedom Struggle (Berkeley: University of California Press, 1995).

²¹ Hugh Davis Graham, The Civil Rights Era: Origins and Development of National Policy 1960-1972 (New York and Oxford: Oxford University Press, 1990), Introduction, 21-22, chaps. I-VII.

²² See generally Graham, The Civil Rights Era, chaps. I-III.

classifications such as race, sex, and religion.²³ During the 1960s, the judiciary became the most active branch in the equal employment opportunity fight, using the new law to order reinstatement and back pay for employees who suffered race discrimination.²⁴ Throughout the 1970s, courts ordered companies to implement affirmative action programs such as hiring one black worker for each white one until the effects of discrimination had been eliminated.²⁵

The Civil Rights Act of 1964 also established the EEOC, giving it limited powers “of conference, conciliation and persuasion” to pressure employers to change discriminatory practices. However, the EEOC was not permitted to order employers to “cease and desist” from discriminating or to sue them directly.²⁶ The new agency exuded a sense of confidence even as it struggled to figure out how to enforce the law. Vice Chairman Luther Holcomb described “the early period as ‘a time of intensity and excitement. We wished there were more days in a week and hours in a day. We sensed

²³ There was virtually no discussion of women during congressional debates until the last minute, when, as legend has it, one congressman supposedly added “sex” as “a joke” in an effort to defeat the bill, but it passed nonetheless. See Equal Employment Opportunity Commission, Equal Employment Opportunity Commission: The First Decade (Washington, D.C.: EEOC, 1974), 11; Alice Kessler-Harris, In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in 20th-Century America (New York: Oxford University Press, 2001), 239-46; and Carl M. Brauer, “Women Activists, Southern Conservatives, and the Prohibition of Sex Discrimination in Title VII of the 1964 Civil Rights Act,” The Journal of Southern History 49(1) (Feb. 1983): 37-56.

²⁴ Even civil rights advocates “who find fault with it on other grounds acknowledge[ed] the [Supreme] court . . . handed down strong case law.” Peter Milius, “Jobs Become Leading Rights Issue,” Washington Post, 24 July 1979, A2. In 1969, the Court held that an employment practice need not be intentionally discriminatory to be unlawful; a discriminatory effect was enough. Griggs v. Duke Power Co., 401 U.S. 424 (1971) (requirement of high school diploma and general aptitude tests, even where applied evenly to whites and blacks, is discriminatory where not job-related). Subsequent cases legitimized the use of statistics in measuring employment discrimination and approved back pay for victims of discrimination.

²⁵ See, for example, Milius, “Jobs Become Leading Rights Issue”; Robert Pear, “U.S. Agencies Vary on Rights Policy,” New York Times, 16 November 1981, A1; see generally, Graham, The Civil Rights Era, Introduction.

²⁶ EEOC, The First Decade, 10-11.

the historic role that had been thrust upon us.”²⁷ Staff members felt they were engaged in something important, helping to determine what practices were discriminatory, what remedies would be available, and how to enforce Title VII for years to come.²⁸

Although it was a charge-based agency, the EEOC sought to address discrimination on a systemic level. Chairman Stephen N. Shulman explained,

the law’s prohibition against discrimination is often viewed as a prohibition against doing something to harm someone In fact, . . . discrimination is often not a specific incident, but a way of life. . . . Non-discrimination in these terms means the difficult process and hard work of challenging the system. . . .²⁹

The EEOC was seeking industry-wide reform. It held hearings on discrimination in the textile industry in North and South Carolina (1967), the financial and communications industries in New York (1968), the aerospace, motion picture, and television industries in Los Angeles (1969), and electric and gas utilities from across the country in Washington, D.C. (1971) as well as general minority and female employment in Houston (1970). The agency concluded that “relatively little progress had been made” and industries were not likely to change without being forced to do so.³⁰ Experience with civil rights laws in the South had taught that they alone were not enough; “the value of such laws depended

²⁷ EEOC, The First Decade, 13 (citing “Interview with Luther Holcomb, Former Vice Chairman, U.S. Equal Employment Opportunity Commission” (June 1974)). One attorney explained that during the first few months, “we spent a lot of time . . . creating a procedure for the routine handling of cases. . . . We were starting from ground zero. No one had ever done this before.” EEOC, The First Decade, 13-14 (citing “Interview with Delano Lewis, Administrative Assistant to Representative Walter E. Fauntroy (D-D.C.)” (May 1974)).

²⁸ “Like many new laws, Title VII . . . had more bones than it had flesh. A law extending generalized protection to a group of people has to be interpreted in many law suits and administrative proceedings before the protected people will know exactly what their new rights are.” EEOC, The First Decade, 17.

²⁹ EEOC, The First Decade, 18 (citing Alfred W. Blumrosen, Black Employment and the Law (New Brunswick, N.J., 1971), 33).

³⁰ EEOC, The First Decade, 21-24.

upon their enforcement.”³¹ In 1972 Congress granted the EEOC increased powers to sue employers directly in federal court, leading to more settlements and broader investigative powers to reach smaller employers, unions, and state and local governments.³² It also signaled the EEOC would be the “lead [federal] agency . . . in all matters of employment discrimination.” The EEOC viewed this as a new “Enforcement Era” and increased the number of offices, staff, and charges filed.³³

These efforts helped force companies to open their ranks to African Americans and set the standard for how the government would address employment discrimination – by requiring employers to implement affirmative action plans that set goals and timetables for integrating their workforces. Despite the EEOC’s limited power, many employers recognized the changes coming and integrated African Americans into their workforces relatively quickly. Even President Nixon instituted affirmative action campaigns in the late 1960s, though more for political than racial justice reasons.

Successes in the civil rights movement and in using Title VII to open the workplace to blacks gave women hope that they could follow a similar path in addressing sex discrimination. Many white women involved in the civil rights movement found their activist voices by participating in Freedom Summer or marching for housing rights. Others joined the New Left, where some became disenchanted with fighting for social justice while being treated as second-class citizens. A number of these women initiated a

³¹ EEOC, The First Decade.

³² EEOC, The First Decade, 10, 27. See, for example, Milius, “Jobs Become Leading Rights Issue”; Pear, “U.S. Agencies Vary on Rights Policy”; see generally Graham, The Civil Rights Era, Introduction, 4, noting that sit-ins in the South and the election of JFK catapulted civil rights into the national consciousness and forced all three branches of the national government to confront and try to resolve the problems of discrimination for first time since Reconstruction.

³³ EEOC, The First Decade, 26-27, 30.

movement for women's liberation in the mid-1960s, using the grass-roots organizing tactics they had learned in the Student Nonviolent Coordinating Committee (SNCC) or Students for a Democratic Society (SDS), to draw attention to their cause.³⁴ Some pointed directly to their work fighting discrimination against African Americans as opening their eyes to discrimination against women and became leaders of the earliest women's liberation groups.³⁵

Other women came to activism on behalf of working women through the labor movement. After World War II labor feminists challenged inequality in industries and unions, protesting dismissals when men returned from the war and fighting job segregation. Their actions helped shape the economic rights agenda for second-wave feminism.³⁶ Labor feminists also served on President Kennedy's Commission on the Status of Women and worked for the Equal Pay Act of 1963, which laid the groundwork for the liberal wing of the women's movement by bringing these issues into public debate.³⁷ Many labor women became leaders in new feminist organizations or inspired

³⁴ Doug McAdam, Freedom Summer (New York and Oxford: Oxford University Press, 1988), 180, 182; Todd Gitlin, The Sixties: Years of Hope, Days of Rage (New York: Bantam Books, 1987), 366, 370, 371; see generally, Sara Evans, Personal Politics: The Roots of Women's Liberation in the Civil Rights Movement and the New Left (New York: Knopf: distributed by Random House, 1979).

³⁵ McAdam noted that, "In Chicago, for example, Heather Tobis and Jo Freeman were central to the movement from the outset." McAdam, Freedom Summer, 182. See also Mary J. Nowlen, "NOW Board member talks about role of women," the herald, 22 August 1973, UIC, NOW Chicago, 78-034, Box 6, Folder 7.

³⁶ See generally Nancy F. Gabin, Feminism in the Labor Movement: Women and the United Auto Workers, 1935-1975 (Ithaca and London: Cornell University Press, 1990); Cobble, The Other Women's Movement.

³⁷ Union women in the postwar period played an important role in bringing about changes for gender equality and the emergence of the feminist movement in the 1970s. The International Union of Electrical Workers (IUE) was receptive to women's demands because of a large female membership, competition for members from another union, and centralized management. Working-class women often refused to support the ERA and abandon protective legislation because of unique circumstances that middle-class feminist leaders did not appreciate. Nevertheless, without union women's efforts in challenging gender inequality in the workplace, the later "second-wave" feminist movement would not

those who did. Labor leaders Dorothy Haener and Catherine Conroy were involved in the founding of the National Organization for Women (NOW) in 1966 and the United Auto Worker's (UAW) union initially housed NOW's headquarters at its offices in Detroit.³⁸

The founders of NOW included a broad range of women with a variety of concerns, including middle-class feminists such as Betty Friedan and government workers such as Justice Department attorney Mary Eastwood. They envisioned NOW as an "NAACP for women," a civil rights organization that could eliminate sex-segregated job advertising and pressure the EEOC to enforce Title VII on behalf of women.³⁹ Feminists focused on equal legal rights quickly accepted the model set by African Americans, using Title VII as the legal inroad, the EEOC as the enforcement tool, and affirmative action as the remedy. Although the EEOC had focused on claims of race discrimination, women, and particularly labor union women, followed blacks in "flood[ing] the system with complaints."⁴⁰ Fearing that sex would be given short shrift and wanting to ensure that women received adequate attention, NOW equated race with

have come about. Dennis A. DeSlippe, Rights, Not Roses: Unions and the Rise of Working-Class Feminism, 1945-80 (Urbana and Chicago: University of Illinois Press, 2000).

³⁸ Mary J. Nowlen, "NOW Board member talks about role of women"; Mary Jean Collins-Robson, personal bio, n.d., UIC, NOW Chicago, 78-034, Box 7, Folder 5.

³⁹ Mary J. Nowlen, "NOW Board member talks about role of women"; Mary Jean Collins-Robson, personal bio; Cobble, The Other Women's Movement, 185. On getting the EEOC to enforce gender discrimination generally, see Graham, The Civil Rights Era, chap. VIII.

⁴⁰ William Chapman, "An Agency in Shambles; The EEOC 11 Years Later: An 'Unbelievable Morass,'" Washington Post, 6 February 1977, A1. Many complaints came from union women, who were comfortable filing grievances, came from a culture expecting fair treatment of employees and complaints to get it, and were protected by the union from retaliation. Cobble, The Other Women's Movement, 183.

sex against the objections of some labor women, insisting it be addressed any time and in the same way, that race was addressed.⁴¹

In response to charges of discrimination filed by working-class women and direct actions staged by middle-class equal rights feminists to draw attention to inequities in the workplace, the EEOC began to look at the gender balance of company workplaces. In the early 1970s it investigated AT&T, which employed large numbers of women as telephone operators, for race and sex discrimination.⁴² NOW worked closely with the EEOC and staged protests to pressure the company to settle with the government, while women workers formed caucuses to bring about change from within the company.⁴³ After investigations by the Department of Labor and the Federal Communications Commission (FCC), AT&T began to negotiate “in earnest” and signed an unprecedented settlement in 1973, agreeing to implement wage increases and payments totaling \$45 million to women and minority victims of discrimination.⁴⁴ A settlement for

⁴¹ NOW leader Ann Scott argued that any action which did not address all affected classes (race, sex, ethnicity) “would constitute the setting of priorities, which is against the national public policy . . . set forth in . . . Title VII.” Ann Scott, Vice President, Legislation, “Statement of The National Organization For Women On The Appointment of John Powell As Chairone of the Equal Employment Opportunity Commission,” NOW Legislative Office, December 12, 1973, p. 2, UIC, NOW Chicago, 78-034, Box 3, Folder 1. After a victory against AT&T, Scott claimed the EEOC’s success was based on “simultaneously attack[ing] systemic discrimination against females, blacks, and Spanish-surnamed Americans. . . . These three elements are essential ingredients in any major effort to eliminate job discrimination.” Some labor women, such as those from the UAW, supported equating race and sex discrimination. This was in large part because they worked in male-dominated industries where protective legislation was a disadvantage in competing with men, and because they were more likely to be covered by the Fair Labor Standards Act and thus did not need protective legislation as much as some others. In female-dominated industries, where many women did not want to enter men’s jobs, unions fought to maintain protective legislation. Cobble, *The Other Women’s Movement*, 171, 186-87.

⁴² EEOC, *The First Decade*, 27.

⁴³ Anne Ladky, telephone interview by author, 20 March 2002. With regard to women’s caucuses, see Lois Kathryn Herr, *Women, Power, and AT&T: Winning Rights in the Workplace* (Boston: Northeastern University Press, 2003).

⁴⁴ EEOC, *The First Decade*, 27. On the AT&T case generally, see Herr, *Women, Power, and AT&T* and Marjorie A. Stockford, *The Bellwomen: The Story of the Landmark AT&T Sex Discrimination Case* (New Brunswick: Rutgers University Press, 2004).

management workers followed in 1974.⁴⁵ Their role in the settlement convinced the EEOC and women's groups they could win against other employers, and they immediately began to pursue other companies.⁴⁶ The EEOC proudly stated that big business was alarmed by its "new effectiveness," bragging that "[f]ear is not too strong a word to use about the way the companies feel about the EEOC now."⁴⁷ It acknowledged modeling other cases on AT&T, stating that its "first major action . . . to obtain an industry-wide settlement under its new powers suggests that the major principles of the AT&T case are vital in the new enforcement era."⁴⁸ The AT&T settlement put companies on notice that they could be forced to pay huge amounts for discriminatory practices.⁴⁹ Buoyed by victories against race discrimination and momentum from the women's movement, the EEOC found companies willing to settle quickly rather than risk restructuring or expensive judgments in a lawsuit. Big business was paying attention.

When the EEOC initiated its investigation of Sears in 1973, it appeared there was little chance it would lose. Social movements, civil rights legislation, and court enforcement against corporate giants offered the methods and model for attacking discrimination. A favorable political climate made employers afraid and the promise of change in the workplace likely. Working-class women were experienced in challenging

⁴⁵ EEOC, The First Decade, 29; Suzanne Stocking, ed., "AT&T AGAIN," NOW Compliance Newsletter, No. 13, July 1974, p. 8, UIC, NOW Chicago, 78-34, Box 3, Folder 1.

⁴⁶ Anne Ladky, telephone interview by author, 20 March 2002. In 1974, the government sued the major U.S. steel companies and the United Steelworkers of America, AFL-CIO for discriminatory practices. After five months of negotiation, the parties approved a consent decree providing \$31 million in back pay and establishing affirmative action goals for the industry. EEOC, The First Decade, 29.

⁴⁷ EEOC, The First Decade, 28 (citing O. Fritz Wenzler, labor-relations counsel for the U.S. Chamber of Commerce).

⁴⁸ EEOC, The First Decade, 29.

⁴⁹ EEOC, The First Decade, 28 (citing "Labor Report: Strengthened EEOC Accelerates Action Against Business, Labor Employee Discrimination," National Journal, 23 June 1973, 913-21).

workplace inequities, and offered a deep pool of victims whose sheer numbers pressured the EEOC to investigate. The EEOC's case against Sears appeared to be just one step on the way to transforming the workplace for women and minorities and at a meeting with reporters, Sears' equal employment opportunity director admitted, "The government thinks they've got a case like steel or AT&T."⁵⁰

Problems and Challenges

Despite the positive atmosphere for action against Sears, there were signs that the case might be more difficult than anticipated. There was, for instance, a long history of class tensions among feminists over how best to improve the lives of working women. In the early 1900s middle-class feminists in the National Women's Party (NWP) worked for women's suffrage and later an Equal Rights Amendment (ERA). Many working-class women, however, feared the ERA would undercut newly-passed protective legislation, and argued that middle-class feminists did not understand the harsh working conditions they faced and the need for practical assistance such as minimum wages.⁵¹ These class divisions resurfaced in the 1960s and 1970s. After passage of Title VII, some labor feminists opposed adding "sex" to covered classifications because they feared it would invalidate laws that protected women in the workplace; and in the 1970s, when the ERA was resurrected as a political goal, labor feminists voiced similar concerns.⁵²

⁵⁰ Jerry Knight, "Sears Facing Major Bias Complaint," The Washington Post, January 26, 1979, D1.

⁵¹ Nancy F. Cott, The Grounding of Modern Feminism (New Haven: Yale University Press, 1987), 138.

⁵² One such woman, former labor organizer and head of the Department of Labor's Women's Bureau, Esther Peterson, opposed the ERA because it threatened protective legislation that curbed abuse of working women. For example, state minimum wage laws covered many occupations dominated by women – such as domestic and agricultural work – that were excluded from the federal laws and thus vulnerable to exploitation. Peterson preferred to focus on practical solutions to the everyday problems of working women rather than symbolic equality. She supported the Equal Pay Act of 1963, which despite having a

Nevertheless, these positions were not fixed, and women across the class divide supported opposing sides for a variety of complicated reasons.⁵³

The founding of NOW in the mid-1960s also reflected class issues, as its push for the ERA alienated some labor women who asked that they be given time to gain the support of their male-dominated unions.⁵⁴ Labor feminists were less likely to attack unions for discrimination, though they acknowledged that some took the needs of women workers less seriously than others.⁵⁵ For their part, some middle-class East Coast members resisted holding NOW's organizing conference in the Midwest because it might give too much power to labor union women. Such conflicts led many labor women to leave NOW in the late 1960s, but the organization nonetheless established a headquarter office in Chicago as well as in New York City and Washington, D.C.⁵⁶ Labor women eventually returned to NOW and supported the ERA, but debates over what would help working women most remained by the time the Sears case arose in the early 1970s.

Educated middle-class feminists, who had been excluded from traditionally male-

limited scope laid the groundwork for further improvements in gender rights. Esther Peterson With Winifred Conkling, Restless: The Memoirs Of Labor And Consumer Activist Esther Peterson (Caring Publishing, 1997). See Kessler-Harris, Out to Work, chap. 11; and DeSlippe, Rights, Not Roses, 65.

⁵³ For example, some NWP women opposed the sex amendment because they hoped a defeat for the Civil Rights Act would mean support for the ERA. Cobble, The Other Women's Movement, 175. See also footnote 43 regarding the complexities of labor women wanting to retain protective legislation.

⁵⁴ Tully-Crenshaw Feminist Oral History Project Records, 1961-2001; Interview with Mary Eastwood by Muriel Fox, March 7, 1992, pp. 21, 48-49, 90-92. MC 548, Series I, Subseries A, 3.4-3.7. Schlesinger.

⁵⁵ At an AFL-CIO convention in San Francisco, CWA President Glenn E. Watts noted the "sad commentary on us that only 22 or 23 delegates . . . are women." However, Myra Wolfgang, vice president of Hotel & Restaurant Employees called new pledges "half a loaf", in part because of the federation's refusal to endorse CLUW presumptively because it had a large number of members from non-affiliated unions. Rex Hardesty, "ERA Support Cited: New Efforts Pledged for Women's Rights," AFL-CIO News, Vol. XX, No. 41, October 11, 1975, 2, UIC, NOW Chicago, 78-34, Box 7, Folder 6.

⁵⁶ Tully-Crenshaw Feminist Oral History Project Records, 1961-2001; Interview with Mary Eastwood by Muriel Fox, March 7, 1992, pp. 19, 25, 43, 48, 93. MC 548, Series I, Subseries A, 3.4-3.7. Schlesinger.

dominated professional jobs, focused largely on access to the workplace, using anti-discrimination laws to open up jobs and promotions. Working-class feminists, who were not necessarily interested in taking over male-dominated blue collar jobs, remained focused on pay equity and family-related concerns such as maternity leave and childcare.⁵⁷

Many labor feminists also questioned the wisdom of treating race and sex the same under the law and wondered whether the tactics that had improved the workplace for blacks were the same as those needed to improve it for women.⁵⁸ The road to obtaining equal opportunity laws had been different for African Americans than for women. The passage of Title VII followed decades of grass roots struggles, legal challenges by the NAACP, and concerted pressure on employers and the federal government.⁵⁹ Women, however, were almost accidental beneficiaries of Title VII, which preceded widespread grass roots efforts calling for an end to discrimination in the workplace. Labor women had pressed for changes in their unions and through the Women's Bureau of the Labor Department, but they wanted pay equity legislation that raised their wages rather than laws granting them access to male jobs.⁶⁰ Since the

⁵⁷ Working women often preferred professionalization of their current jobs and comparable pay over a transfer to traditionally male jobs. See Dorothy Sue Cobble, "A Spontaneous Loss of Enthusiasm: Workplace Feminism and the Transformation of Women's Service Jobs in the 1970s," *ILWCH* 56 (Fall 1999): 23-44.

⁵⁸ For an extensive discussion of the decision to treat sex discrimination like race discrimination, see Kessler-Harris, *In Pursuit of Equity*, chap. 6.

⁵⁹ Title VII was specifically designed to address racial inequality, calling for access to jobs for black men, which would reaffirm the role of men as breadwinners and the head of the household. Cynthia Deitch, "Gender, Race, and Class Politics and the Inclusion of Women in Title VII of the 1964 Civil Rights Act," *Gender & Society* 7 (June 1993).

⁶⁰ Their work resulted in the Equal Pay Act of 1963 (EPA), requiring equal pay to men and women in the same jobs. They would have preferred equal pay for men and women in comparable jobs, but the EPA was one step that helped lay the groundwork for later progress toward gender equality. DeSlippe, *Rights, Not Roses*. The Equal Pay Act, rather than Title VII, was designed to address sexual inequality. Nevertheless, it also protected the jobs of male workers who competed with women, thereby

protections given to women in Title VII were not the result of long-term activist demands, as they had been for blacks, there was more doubt over how to enforce the law and whether it would help women, and its effects were more limited and a longer time in coming.

Moreover, the law did not fully meet the needs of working women. Title VII addressed access to jobs and promotions, but failed to take into account what working-class women had known all along, that it was just as important to address family responsibilities once there. Many professional women, who had not been in the workplace in large numbers until the 1970s, did not fully understand this until they too had to combine work and family. Gaining access to the workplace by “acting like men” – focusing on work to the exclusion of family concerns – institutionalized this standard and left little room for designing the next step. Enforcing Title VII on behalf of women was a first step, but did not restructure the workplace or address family concerns that working-class and professional women shared by the 1980s and 1990s. Moreover, women clearly did have child-bearing capabilities that men did not, which could not be ignored if women were to enter and prosper in the workplace. When racial barriers were removed, it was easier to argue there was no difference between the ability of a black or white man to perform the same job. When gender barriers were removed, however, women still had to miss work for childbirth and had caregiving responsibilities – though socially constructed – which affected their employment. Since labor feminists had been unable to restructure the workplace to protect all male and female workers, they had sought protective legislation for women as the next best thing. The difference between

preserving the gender hierarchy. Had the goal really been to improve the working lives of women, they would have obtained comparable worth. Deitch, “Gender, Race, and Class Politics and the Inclusion of Women in Title VII of the 1964 Civil Rights Act.”

the cases against AT&T and Sears is that while both were about access to better jobs and pay, the AT&T case remained focused on these issues while the rhetoric surrounding the Sears case shifted to emphasize family responsibilities.

Changes in the political climate also signaled trouble for the EEOC's case against Sears. Drastic changes in the 1960s and 1970s fueled a backlash against the women's movement, as feminism and women who left the home to work were blamed for the loss of traditional values and the "unraveling of the family."⁶¹ Although the women's movement made a case like Sears possible in the early 1970s, it was not decided until thirteen years later at the height of the backlash. The favorable climate in which Sears began also ultimately gave way to one more hostile to change in the workplace. By the early 1970s, the economy had worsened, and Americans were being asked to sacrifice for the first time in decades. The political unrest of the 1960s, including the civil rights and anti-war movements, inspired a call for law and order from working-class members of the Democratic coalition. President Nixon capitalized on this discontent, helping to bring about the fall of the New Deal political order. Concurrently, an emerging conservative movement culminated in the election of Ronald Reagan as President in 1980. Despite progress in gaining political and economic rights, both the civil rights and women's movements left many behind, particularly those living in poverty. Republicans formed a new coalition that would dominate the political scene for decades to come, including working-class whites, big business, and evangelical Christians. Viewed in a broad historical context, the Sears decision was partly the result of political changes between

⁶¹ Ruth Rosen, The World Split Open: How the Modern Women's Movement Changed America, (New York: Viking, 2000), 300. On the backlash generally, see Rosen, 331-336; Susan Faludi, Backlash: The Undeclared War Against American Women (New York: Crown, 1991).

1973, when the investigation began and it appeared the EEOC would easily win, and 1986, when the lawsuit was decided in favor of the company.

In the end, the changing political climate converged with historic divisions within the women's movement. Working-class women helped set the agenda for challenging large corporations through efforts to improve the workplace and by filing complaints of discrimination. Initially they were able to work with middle-class feminists, including at the beginning of the Sears case, but a lingering class divide foreshadowed the fight over the expert testimony for which the case became known. Thus, despite the momentum and support of the women's movement which helped make a case such as Sears possible, the race model for fighting discrimination precluded a comprehensive solution to the problems of women in the workplace. At the same time, feminists' broader agenda was stalled by the backlash and a changing political climate.

The Significance of the Sears Case

Although much was written about the expert testimony following the trial, no one has looked at Sears from a broad historical perspective to understand the people involved and the full implications of the case.⁶² Rather than re-hash the legal arguments, this dissertation in part offers a social history of the case, focusing on the players and events that affected the outcome. It also provides a legal-political history of the time period as reflected through developments in the case. Although remembered for the bitter debate

⁶² See, for example, John Leo, "Are Women 'Male Clones'?", TIME, 18 August 1986, 63-64; Ruth Milkman, "Women's History and the Sears Case," Feminist Studies 12(2) (1986): 375-400. Several works on second-wave feminism and the women's liberation movement in the early 1970s mention early efforts to force Sears to change its policies, usually in the context of women's groups' organizing or cases against other employers such as AT&T. See, for example, Nancy MacLean, Freedom is Not Enough: The Opening of the American Workplace (New York: Russell Sage Foundation and Cambridge: Harvard University Press, 2006), 138-139 (in context of organizing by women's groups and founding of new groups such as Women Employed; women's advocacy groups and workplace caucuses; and change in non-union workplaces); Sara M. Evans, Tidal Wave: How Women Changed America at Century's End (New York; London: Free Press, 2003), 87; Herr, Women, Power, and AT&T, 49, 88.

between feminist historians, Sears can be used instead as a lens through which to view broader historical issues regarding women and work, social class, and national political changes during the 1970s and 1980s. In offering the first detailed account of the Sears case, I argue that it should be remembered instead for what it can tell us about debates over affirmative action, attempts by activists alternately to work within and challenge national policy, and the limits of the law and second-wave feminism for improving the lives of working women.

Chapters and Organization

The chapters are organized topically and chronologically. Chapter Two examines the formation of grassroots coalitions surrounding working women's issues from which the organizations that pursued the Sears case arose. In the late 1960s and early 1970s, activists with strong ties to the civil rights, women's liberation, and labor movements formed NOW Chicago and Women Employed (WE). These groups worked to build connections with African-American and Asian-American groups focused on economic equity and with other working women's organizations, such as 9 to 5, the National Association of Working Women in Boston, from around the country.⁶³ These connections reveal a level of cross-class organizing that challenges the notion that NOW members were uniformly out of touch with the needs of working-class women and the larger women's liberation movement. The Sears trial was simply the end of a much broader grass roots campaign for economic rights for women, including direct action to force numerous industries to change their practices and successes against some of the largest employers of the day. Although the coalitions were ultimately not strong enough

⁶³ 9 to 5, National Association of Working Women (U.S.) Records, 1972-1986; Ellen Cassedy, Staff Director, 9 to 5, to Arlie Scott, NOW Action Center, March 16, 1979. 88-M96--89-M104, folder 24. Schlesinger Library, Radcliffe Institute, Harvard University, Cambridge, Mass.

to sustain a long-term fight against Sears in the face of competing priorities, and their absence limited the effectiveness of early campaigns to upgrade women's jobs, cooperation and concerted organizing were present early on in a case that came to be known only for its divisiveness.

Chapter Three examines NOW Chicago's organizing activities to pressure Sears to change its policies and its efforts to bring NOW's national organization on board the campaign between 1973 and 1975. As the case progressed, personal politics, new leadership, and changing priorities within the women's movement made it a constant challenge to maintain support for the case, and with limited resources, NOW became preoccupied with other issues. In 1974, a Chicago NOW member and co-chair of the Sears Action Task Force narrowly lost the election for the presidency of NOW to an East Coast member; as a result the organization moved toward an emphasis on the ERA and away from the Midwest-oriented focus on workplace issues. NOW's character as a large multi-issue organization precluded a long-term commitment to one case, particularly without a union ally focused on improving pay and conditions or women organizing from within the company, as there had been with AT&T. Nevertheless, unions had tried – and failed – for decades to organize Sears, and thus, a general women's organization was perhaps the last best hope for challenging the company. Without NOW the case may never have been brought at all. Moreover, despite the losing court case in 1986, NOW's efforts helped force Sears to change its policies in the mid-1970s, thereby “losing the battle but winning the war.”

Chapter Four explores how women's groups and the EEOC underestimated Sears' willingness to fight back and its differences from AT&T. Social justice advocates chose

Sears, which employed large numbers of women and had a public image to protect, because it was a prime target for direct action. Over the next thirteen years, however, Sears thwarted their expectations. While other corporations feared the EEOC and settled quickly, Sears' aggressive corporate culture and virulent anti-unionism prevented it from giving in. The corporation's attorney, former civil rights lawyer Charles Morgan, led a successful public relations campaign on behalf of his client. The company's decentralized corporate organization and the structure of its workforce – designed to maintain the loyalty of full-time male employees at the expense of mostly part-time women and to avoid unionization at all costs – demonstrated the lengths to which it would go to fight the EEOC.

Chapter Five discusses the changing political context of the 1970s and 1980s as seen through the EEOC over two chairmanships and three presidential administrations. The case began in the early 1970s, when President Nixon encouraged advances for minorities despite a racist political rhetoric, and the EEOC's new power convinced many corporations to change their policies.⁶⁴ It faltered in the mid-1970s when, faced with the breakup of the Democratic coalition and an increasingly conservative electorate, President Carter moved toward the center and alienated women's groups that helped elect him.⁶⁵ In the 1980s, President Reagan redefined civil rights policy through Assistant Attorney General for Civil Rights William Bradford Reynolds, insisting that the Civil Rights Act of 1964 did not allow minority preferences but only color-blind equal

⁶⁴ Dean J. Kotlowski, Nixon's Civil Rights: Politics, Principle, and Policy (Cambridge: Harvard University Press, 2001).

⁶⁵ Gary M. Fink and Hugh Davis Graham, eds., The Carter Presidency: Policy Choices in the Post-New Deal Era (Lawrence: University Press of Kansas, 1998), chaps. 1, 11.

treatment.⁶⁶ The EEOC thus tried the case in 1984 and 1985 in a very different political climate than the one in which it began thirteen years earlier. However, government policy and bureaucracy change very slowly, and there was more resistance than expected from within the government to new affirmative action policies, particularly during Reagan's first administration. Despite a lack of public support from the administration, the case continued unabated, with dedicated attorneys, a team of experts, and regular financial support from the Commission.

Chapter Six traces the prolonged litigation through the EEOC filing suit in 1979 and the trial in the mid-1980s. The litigation process reveals a different case than the one commonly known, in which the EEOC initially pursued race as well as sex discrimination claims and the publicly defiant Sears was willing to settle some claims. By the time it went to trial in 1985, Sears had worn down the EEOC with relentless claims that the agency had a conflict of interest in the case and had capitalized on media reports to create the impression that the commission had a weak case. Nevertheless, EEOC attorneys were confident in their case and, despite an unfriendly administration, the commission repeatedly approved more funding for the case, making it the largest that the EEOC had ever taken on.

Chapter Seven examines the trial, attorneys, judge, court decision, and appeals process. It shifts the focus from the debate between expert witnesses, viewing it instead as the end of a longer story about a lost opportunity to improve working women's lives and a shift in political attention regarding affirmative action. Although the investigation and case against Sears had been going on for almost twelve years by the time Rosalind

⁶⁶ Raymond Wolters, Right Turn: William Bradford Reynolds, the Reagan Administration, and Black Civil Rights (New Brunswick and London: Transaction Publishers, 1996).

Rosenberg and Alice Kessler-Harris testified in 1985, the media had paid relatively little attention. Its coverage then pitted the two women against each other, and historians and feminists chose sides rather than re-defining the debate in their own terms. After a lengthy trial, focus on the details of the dispute distracted attention from the problems of working women, at Sears and elsewhere. In the end, Sears became a case that historians and feminists remember all too clearly but wish to forget, and that other people do not remember at all.

Labor History

This examination of Sears adds to studies of labor history by examining how cross-class cooperation gave way to class tensions – rooted in early twentieth century debates over protective legislation – between working women and the professional witnesses who tried to represent them at trial.⁶⁷ It follows recent women’s historians by examining the influence of labor feminists such as Catherine Conroy on the next generation of activists, including those who became leaders of NOW Chicago and WE.⁶⁸ It also examines class relationships within the women’s movement and the interaction between second-wave feminists and labor women, including their debates over whether to treat race and sex the same and what would help working women most. Second-wave feminism brought significant progress for middle-class women and more limited change for working-class women. Yet, feminist debates often precluded a deeper understanding of structural problems – such as the balance between work and family – that affected both the working women at Sears and the professional women involved in the case. This

⁶⁷ Working women have been willing to break with male workers and create alliances across class lines where it is helpful to do so. Dorothy Sue Cobble, Dishing It Out: Waitresses and Their Unions in the Twentieth Century (Urbana: University of Illinois Press, 1991).

⁶⁸ Cobble, The Other Women’s Movement.

dissertation adds to recent attempts to question the notion of a woman's "choice" and to redefine the male model of work to accommodate women's lives in a meaningful way.⁶⁹

Social Activism

This dissertation also contributes to studies of women's social activism. While early women's histories argued that the fight for rights by middle-class white women grew out of their role as the arbiter of the domestic sphere, later work found that such activism emerged equally out of involvement with race and class struggles.⁷⁰ Emphasis is now placed more squarely on giving voice to the goals of women activists in their own communities and on their distrust of political or legal change from above to solve their problems.⁷¹

This study of Sears recovers the early involvement of activists and working women's groups in Chicago who initiated the case but were later obscured by the attention paid to the expert witnesses. It adds to our understanding of the fundamental role that local women's activism plays in bringing about social change by showing how their involvement, which had been so essential in prior cases, was lacking in the Sears case and may have contributed to its loss. Nevertheless, without their participation few changes would have been made at the company and the case would not have existed at all. This dissertation builds on the work of others in rethinking feminist activism in the

⁶⁹ It also follows recent histories of how those traditionally excluded obtained access to the workplace, arguing that "access is not enough." Nancy MacLean, Freedom is Not Enough.

⁷⁰ On the argument that women's activism grew out of their domestic roles, see Nancy F. Cott, The Bonds of Womanhood: "Woman's Sphere" in New England, 1780-1835 (New Haven: Yale University Press, 1977); Kathryn Kish Sklar, Catharine Beecher: A Study in American Domesticity (New York: Norton, 1976). For recognition of women's broader social activism on the basis of racial, class, and ethnic bonds, see, for example, Nancy A. Hewitt, Women's Activism and Social Change: Rochester, New York, 1822-1872 (Ithaca, N.Y.: Cornell University Press, 1984).

⁷¹ For example, Temma Kaplan, Crazy for Democracy: Women in Grassroots Movements (New York: Routledge, 1997).

1960s and 1970s by recognizing that feminist activists, as well as the state and Sears, shaped the outcome of the case. Moreover, the impact of activists' withdrawal from the case in the mid-1970s makes a powerful statement about the importance of "local people" in bringing about social change.

Second-Wave Feminism

The Sears case also directly engages the history of second-wave feminism. Second-wave feminists posited that the first wave of modern feminism, which began with Seneca Falls and lasted up through the passage of women's suffrage in 1920, failed to challenge fundamental problems rooted in economic and familial structures. Despite the efforts of labor women to address gender inequities during and immediately following World War II, feminism lay largely dormant until 1963. Betty Friedan published The Feminine Mystique that year, giving voice to legions of housewives who yearned for something more than raising a family and igniting a new movement – or second wave – of feminism.⁷² The President's Commission on the Status of Women, also established in 1963, provided a structure for addressing some women's concerns while the emergence of the civil rights movement inspired others to rethink the meaning of justice and equality. Women also entered the workplace in large numbers in this period and the movement gained in power and momentum through the mid-1970s, when it supposedly began a decline. A growing conservatism and a backlash against the women's movement joined with battles within the movement, leading to fragmentation. Moreover, even with

⁷² Leila Rupp and Verta Taylor, Survival in the Doldrums: The American Women's Rights Movement, 1945 to the 1960s (New York: Oxford University Press, 1987); Betty Friedan, The Feminine Mystique (New York: Norton, 1963).

diverse branches of the movement coming together to press for ratification of the ERA, that campaign culminated in its defeat in 1982.⁷³

Feminists during this period were generally identified as liberal, radical, or socialist. Liberal feminists sought equal rights for women within the existing political and economic structure primarily through legal remedies, working to extend the rights of men to women. Radical feminists emphasized the role of power relations between men and women and sought to dismantle patriarchal institutions and transform society. Socialist feminists agreed there needed to be broad societal change but believed that class and racial oppression also had to be addressed.⁷⁴ Despite the differences in ideology and background, second-wave feminists often were accused of not being inclusive. The women who responded to Friedan's book were primarily white middle-class women who could afford to stay home and raise their children. They were accused of dominating the media coverage of second-wave feminism, and while hoping to join with women of other races and classes, of expecting them to simply share their agenda.⁷⁵

Women's historians have questioned this prevailing narrative of second-wave feminism. In particular, they challenge the periodization of second-wave feminism, and indeed, the very notion that there were separate waves of feminism. Instead, they argue,

⁷³ For internal and external battles undermining feminist unity and the movement ending after the early 1980s, see, for example, Evans, Tidal Wave. See also Alice Echols, Daring to be Bad: Radical Feminism in America, 1967-1975 (Minneapolis: University of Minnesota Press, 1989).

⁷⁴ Estelle B. Freedman, No Turning Back: The History of Feminism and the Future of Women (New York: Ballantine Books, 2002), chaps. 3, 5; Evans, Tidal Wave; Echols, Daring to be Bad.

⁷⁵ For example, second-wave feminists had trouble understanding the reluctance of some labor feminists to support enforcing Title VII on behalf of women and the ERA because they feared losing important workplace protections. Similarly, white second-wave feminists prioritized the right to abortion, ignoring that many poor and minority women had opposite reproductive rights concerns such as forced sterilization. Echols, Daring to be Bad; Rosen, The World Split Open; Rosalyn Baxandall and Linda Gordon, eds., Dear Sisters: Dispatches from the Women's Liberation Movement (New York: Basic Books, 2000).

there was a significant amount of feminist activity going on between the two waves, during the years when feminism was supposedly dead.⁷⁶ This activity laid the groundwork and helped shape the agenda for second-wave feminists when they re-energized the movement in the 1960s and 1970s. Finally, the women's liberation movement developed at the same time as, but out of different impulses and with different goals than, second-wave feminism; it grew out of a long history of involvement in civil rights and anti-war movements.⁷⁷ Scholars urged others to think of a broad array of efforts with "no permanent waves," encompassing many different types of feminism and types of activism to improve the lives of women across racial, class, sexual, and other differences.⁷⁸

Questioning the periodization of second-wave feminism required recognizing different types of activism which had been left out of the dominant narrative. Dorothy Sue Cobble identified labor feminists, working-class women who worked for gender advancement in the workplace while incorporating issues of class, and whose interests were sometimes contrary to middle-class feminists in the late 1960s and early 1970s. Labor feminists helped set the agenda for future reform and the re-emergence of the

⁷⁶ Dorothy Sue Cobble stresses continuity rather than seeing the feminist movement as two disjointed waves, arguing that labor feminists were working within their unions to improve the workplace for women during the years when feminism was supposedly dead. Cobble, The Other Women's Movement, 7. See also Joanne Meyerowitz, Not June Cleaver: Women and Gender in Postwar America, 1945-1960 (Philadelphia: Temple University Press, 1994). Even Friedan's self-portrayal as a dissatisfied housewife masked her working-class, left-wing, and labor activist background and inspirations. Daniel Horowitz, Betty Friedan and the Making of The Feminine Mystique: The American Left, the Cold War, and Modern Feminism (Amherst: University of Massachusetts Press, 1998).

⁷⁷ See, for example, discussion of Heather Booth's activism in the civil rights, new left, and women's liberation movements. McAdam, Freedom Summer, 127, 131-132, 180, 182, 204; Evans, Personal Politics, 64, chap. 7, p. 207; Kirkpatrick Sale, SDS (New York: Random House, 1973); James Miller, "Democracy Is In The Streets": From Port Huron to the Siege of Chicago (New York: Simon and Schuster, 1987), chap. 11; Evans, Tidal Wave, 9, 85; Echols, Daring to Be Bad, 65-66, 72.

⁷⁸ See, for example, Nancy Hewitt and Beth Hutchison, "No Permanent Waves: Recasting Histories of American Feminism," (New Brunswick, NJ: Rutgers University, The Institute for Research on Women, May 13, 2005) (symposium).

women's movement by a new generation of leaders.⁷⁹ Others worked to write the efforts of African-American and other women of color back into feminist history.⁸⁰ Identifying these different kinds of feminists involved looking beyond organizations focused exclusively on gender oppression as many feminists worked as part of mixed-gender groups focused on race, class, and other issues.⁸¹ Finally, efforts were made to recover the diversity that existed within the second wave.⁸²

⁷⁹ Cobble, The Other Women's Movement, Intro., 7, 9, chap. 7, 182. In the late 1970s, many of the older concerns of labor feminism resurfaced, including needing "social supports for childbearing and child rearing, and comparable worth to raise the pay and status of women's jobs."

⁸⁰ See, for example, Benita Roth, Separate Roads to Feminism: Black, Chicana, and White Feminist Movements in America's Second Wave (Cambridge: Cambridge University Press, 2004); Becky Thompson, "Multiracial Feminism: Recasting the Chronology of Second Wave Feminism," Feminist Studies 28(2) (Summer 2002). Black women were at the heart of challenging workplace conditions and pressing for affirmative action. Nancy MacLean, Freedom is Not Enough.

⁸¹ Becky Thompson noted that during the 1970s women of color were involved on three fronts not generally reflected in the narrative of SWF: in white-dominated women's organizations; in women's caucuses in mixed-gender organizations; and in developing autonomous Black, Latina, Native American, Asian feminist organizations. Black feminists were more likely to question the liberal feminist goal of gaining equality in "a system that, as Malcolm X had explained, was already on fire." Thompson, "Multiracial Feminism." See also Cobble, The Other Women's Movement; Gabin, Feminism in the Labor Movement; Cynthia Harrison, On Account of Sex: The Politics of Women's Issues, 1945-1968 (Berkeley: University of California Press, 1988); Marisa Chappell, "Rethinking Women's Politics in the 1970s: The League of Women Voters and the National Organization for Women Confront Poverty," Journal of Women's History 13(4) (Winter 2002): 155-179. Finally, other women (and men) were involved in feminist activity not through the "independent women's movement" but through liberal mixed-gender organizations in their own worlds, often working within the system to bring legitimacy and resources to a broader and more diverse membership and agenda than previously thought. Susan M. Hartmann, The Other Feminists: Activists in the Liberal Establishment (New Haven: Yale University Press, 1998).

⁸² Stephanie Gilmore questioned the focus on divisions within the women's movement and its narrow conception of race and class, arguing that feminists in the 1960s and 1970s formed broad grass roots coalitions across race, class, regional, and other lines on a wide range of social justice issues, even during the period of supposed division and decline. Stephanie Gilmore, ed., Feminist Coalitions: Historical Perspectives on Second-Wave Feminism in the United States (Urbana and Chicago: University of Illinois Press, 2008). See also Stephanie Gilmore, "The Dynamics of Second-Wave Feminist Activism in Memphis, 1971-1982: Rethinking the Liberal/Radical Divide," NWSA Journal 15(1) (Spring 2003) on the attempt to move beyond the traditional liberal/radical divides in feminist history and many organizations acting in both liberal and radical ways depending on the political situation and the place and influencing each other. On the radical women's movement persevering through more grass roots political agendas during the 1970s and 1980s and emerging rejuvenated though transformed in the 1990s by a new generation who came of age politically during the conservative 1980s with new tactics and allies, see Nancy Whittier, Feminist Generations: The Persistence of the Radical Women's Movement (Philadelphia: Temple University Press, 1995).

Recovering these different kinds of feminisms also necessitated challenging the decline of the women's movement. For example, the women's liberation movement saw a rise in influence in the late 1970s and 1980s, as its grass-roots efforts spread throughout the country and often became mainstream. Similarly, for multiracial feminism, the late 1960s and 1970s were a low point because a focus on a monolithic feminism excluded its views. But the defeat of the ERA "coincided with" a rise of coalitions built across class, race, and gender lines, and that addressed a variety of issues from welfare rights to domestic violence. This created a "flourishing movement" in the 1980s and made the 1990s a high point for multicultural feminism.⁸³

Among its many accomplishments, second-wave feminism helped provide momentum for, and legal challenges to, opening male jobs that traditionally had been closed to women. Liberal feminists, many of whom were middle-class and well-educated, had been excluded from jobs for which they were qualified and interested. They focused on gaining access to the workplace through anti-discrimination laws. Many embraced a broader agenda, including issues such as child care, but these concerns received less attention from legislators and were far less successful than legal victories prohibiting sex discrimination and harassment in the workplace. As a result, their movement left much undone, including gaining equal pay or comparable worth for women who did not necessarily want to take over men's jobs and securing family benefits for women and workers in general.⁸⁴

⁸³ Thompson, "Multiracial Feminism." Stephanie Gilmore's recovery of grass roots coalitions during and after the period of supposed division and decline of second-wave feminism also challenges this periodization. Gilmore, ed., Feminist Coalitions.

⁸⁴ "Second wave feminism had helped transform the climate for gender politics, opening up new opportunities and freedoms for all women, but the problems of how to realize those rights and how to make them a reality for the majority of women remained." Cobble, The Other Women's Movement, 222.

The Sears case helps us understand the history of second-wave feminism, a movement that included the efforts of working women's groups and the EEOC to address workplace discrimination. This dissertation adds to studies of second-wave feminism by highlighting a political and legal focus yet also drawing more attention to the later stages of second-wave feminism. The Sears case appeared to be both a product and a microcosm of second-wave feminism. It grew out of a time of great promise for improving the lives of working women, embodied the debate over whether women should be treated "the same as" or differently from men and from African Americans, suffered from the backlash against women that accompanied the rise of the New Right, and followed (but also challenged) the declension narrative of second-wave feminism.⁸⁵ This dissertation also helps draw attention back to women's economic issues, which often have been neglected in favor of other important issues such as violence against women and reproductive rights.⁸⁶ It is part of a new generation of women's history, turning an analytical gaze on "second-wave" feminism in the hopes of infusing the current narrative with issues of race, class, and region.

This dissertation also fits within local studies of the women's liberation movement which have replaced a linear narrative with one that emphasizes regional, racial, and class distinctions.⁸⁷ The Sears case began in the Midwest, a hub of labor

⁸⁵ The case followed a similar trajectory to the campaign for the Equal Rights Amendment. Passed in 1972, it was quickly ratified by 30 out of the necessary 38 states. There was much hope that the last states would ratify it within the seven-year deadline, later extended another three years. As time went on, however, support waned and conservative opposition grew, and the amendment was questioned and confused for many of the same political reasons as the shift in the Sears case. Jane J. Mansbridge, Why We Lost the ERA (Chicago: University of Chicago Press, 1986), chap. 1; p. 12-13; Rosen, The World Split Open, 89, 332.

⁸⁶ Nancy MacLean, "The Hidden History of Affirmative Action: Working Women's Struggles in the 1970s and the Gender of Class," Feminist Studies 25(1) (1999): 69.

⁸⁷ Judith Ezekiel, Feminism in the Heartland (Columbus: Ohio State University Press, 2002).

union activity, which fueled much of the feminist movement there; for example, Chicago was the center of the Coalition of Labor Union Women (CLUW). Although NOW was later seen as a white middle-class organization, its Chicago chapter had a broader membership in terms of race and class. Although labor women and NOW parted ways over issues such as the ERA, early alliances influenced national policy toward gender issues in the workplace. As this study of the Sears case shows, second-wave feminism and organizations traditionally thought of as dominated by white middle-class women, were not monolithic and included many activists with backgrounds in the labor and civil rights movements who focused on grass-roots race and class issues as much as gender. Even the EEOC combined race, gender, and class in the Sears case, based on the charges of discrimination it received from working women at Sears. It initially filed race and sex discrimination lawsuits and pursued a pay equity claim up through trial. That we remember only the gender claims and the issues about access to commission sales jobs reflects just how incomplete our current history of the case is, and how much its telling has been dominated by the original narrative of second-wave feminism.

This study also adds to discussions of the periodization of second-wave feminism by demonstrating concerted cooperation among different types of women where there was thought to be only divisiveness. Moreover, it shows one impact of the decision to focus the movement's, and in particular NOW's, attention on the ERA. This shift in the late 1970s left other issues, including the Sears case, without the crucial support of activists, whose withdrawal helps explain why the EEOC lost this case when it had won similar cases against other large employers. It also helps explain why, despite huge improvements in the workplace for women, a significant amount was left undone and

largely remains so today. The circumstances surrounding NOW's shift also contributes to our understanding of the dynamics of second-wave feminism.

Moreover, the Sears case causes us to rethink the defeat of the EEOC and the decline of certain branches of second-wave feminism. Changes made to Sears' workplace, regardless of the EEOC's loss in court, suggest that the case was a victory for feminists as well as a defeat. Other cases continued to be settled and won by the EEOC through the 1970s and 1980s, despite changing political times and a more hostile administration, demonstrating that not all was lost in the Reagan era and there may have been more progress than we thought. Sears was just one of many cases, and rather than remembering this era through the EEOC's defeat, these continuing efforts by the EEOC suggest that the women's movement may have had more longevity and influence, and Title VII a greater impact, than we generally allow.

The Equality/Difference Dilemma

The Sears case sheds light in particular on significant barrier for second-wave feminism, the equality/difference dilemma. With roots going back to the nineteenth century separate spheres ideology that claimed women belonged in the home, the debate centered on whether women should demand the same or special treatment from men. In the early twentieth century working-class women who supported protective legislation often – though not always – found themselves at odds with equal rights feminists such as the NWP, which wanted an ERA.⁸⁸ The NWP and labor women continued to disagree over whether to allow sex-based differences through the 1950s into the 1960s.⁸⁹ With the

⁸⁸ Cott, The Grounding of Modern Feminism.

⁸⁹ Cobble, The Other Women's Movement, 68.

re-emergence of the feminist movement in the late 1960s and 1970s, the debate became embodied in the differences between liberal and cultural feminism.

Liberal feminists largely focused on gaining access to the workplace and sought equality within the existing system by extending the rights of men to women. They feared that any special treatment of women, while it might bring benefits they needed, could be used to institutionalize their inferior position in society. On the positive side, claiming equality forced people to take it seriously, and women moved forcefully into male-dominated jobs, gaining mainstream acceptance for the principle of non-discrimination relatively quickly. This approach worked well for eliminating official obstacles to equality in the workplace and brought about numerous successful cases. Legal scholars refer to it as “formal equality” under the law.

On the negative side, however, feminists quickly realized that equal treatment under the law did not necessarily mean equal results (or “substantive equality”), and proved to be limited in improving the workplace for all women.⁹⁰ A formal equality approach to employment discrimination fell short for women of color, for example, who had to separate their gender and racial identities to meet different standards of proof and damages for race and sex discrimination claims.⁹¹ Lesbians did not even have the

⁹⁰ For example, in Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979), the Court found no violation of the equal protection clause where a veterans’ preference statute disproportionately affected women, who were less likely to be veterans than men. The Court noted, “the Fourteenth Amendment guarantees equal laws, not equal results” and found that the statute intended to benefit veterans of either sex and thus had no discriminatory purpose.

⁹¹ See Angela P. Harris, “Race and Essentialism in Feminist Legal Theory,” Stanford Law Review, 42 (1990): 581, condemning essentialism as used by the feminist movement to present a unified agenda but fragments the different experiences of black women, and arguing feminists must recognize a “multiple consciousness” that accounts for gender *plus* race, class, or sexual orientation and the self-contradiction that often comes along with it. Others proposed creating a new category of protection for black women under the equal protection clause. Since they are already entitled to strict scrutiny based on their race, they should be evaluated on an even higher “plus” standard to account for their gender, which

privilege of formal equality, since sexual orientation remained unprotected by discrimination statutes such as Title VII or the Constitution.⁹² Thus, although a formal equality approach removed significant legal barriers to employment for women, its reach was severely limited.

The cultural feminist argument was advanced most famously by Carol Gilligan in her 1982 treatise In a Different Voice, which described, among other things, how women and men handled relationships differently. Feminists who wanted to recognize women's differences from men took pride in the things that made them uniquely feminine and argued they should be accommodated and valued, even if that necessitated special preferences. They argued that gender-neutral laws devalued gender differences and often led to results that made women's lives worse rather than better. Many labor feminists, too, conscious of everyday problems in the workplace, argued that differences should be taken into account to ensure that women would not lose benefits such as maternity leave. They believed that women needed special treatment to get true equality, but were often labeled as being against feminism.⁹³ "Equality" feminists feared that an approach that acknowledged women's differences might lead to a return of women to a separate domestic sphere or provide the justification for arguments that women "chose" low-paid and low-status jobs because they fit better with feminine characteristics.⁹⁴

merits intermediate scrutiny. Judy Scales-Trent, "Black Women and the Constitution: Finding Our Place, Asserting Our Rights," Harvard Civil Rights-Civil Liberties Law Review 24 (1989): 9.

⁹² DeSantis v. Pacific Tel. & Tel. Co., Inc., 608 F.2d 327 (9th Cir. 1979); Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987) (FBI's refusal to hire lesbian did not violate equal protection clause because consensual sodomy is not a constitutionally protected fundamental right); Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997) (en banc) (state entitled to withdraw offer of employment from woman who "married" another woman).

⁹³ Carol Gilligan, In a Different Voice: Psychological Theory and Women's Development (Harvard University Press 1982); Cobble The Other Women's Movement, 7.

⁹⁴ Joan C. Williams, "Deconstructing Gender," Michigan Law Review 87 (1989): 807-09.

The equality-difference debate was carried out in newspaper articles, court decisions, and law review articles. The media highlighted the bitterness between the two sides and downplayed any subtleties because, as with Kessler-Harris and Rosenberg, they believed it was more entertaining to watch a catfight among women. Apart from the differences between men and women, the debate raised the question of how much to acknowledge race, class, and other differences among women. By pitting women against men the debate assumed that all women were the same, that they had more in common with other women than they did with men of their same race or class, and that the differences from men were the primary source of their oppression.⁹⁵ Second-wave feminists recognized how hard it was to maintain momentum for social change and perhaps feared that too many different viewpoints would dilute their bargaining power. The debate became particularly potent during the fight for the ERA in the late 1970s, when many factions of the movement joined together to work for ratification, a gender-neutral approach which led to “losses as well as gains for women.”⁹⁶ The dilemma even permeated mainstream debate over the ERA, as feminists and non-feminists became fixated on questions both large and small, such as whether the ERA would mean that women could be drafted or whether there still could be separate restrooms for men and women.

⁹⁵ See Alice Kessler-Harris, A Woman's Wage: Historical Meanings & Social Consequences (Lexington, Kentucky: The University Press of Kentucky, 1990), 114 for discussion of feminist lawyers' disagreement over whether to ask for special or equal treatment, which, in 1986 and 1987 focused on pregnancy disability leave.

⁹⁶ Cobble, The Other Women's Movement, 8. Cobble notes the complexities and divisions within the women's movement over whether to demand special treatment for pregnancy and women's differences. Betty Friedan came to support it in the 1980s, but NOW was against it. *Ibid.*, 217-18. Among labor women, black women and UAW members were more resistant to special treatment. *Ibid.*, 91-92.

The debate consumed legal scholars as much if not more than historians as they tried to decide how to create and apply the rather inflexible law – whether to enforce the same laws as for men or pass new laws for women. Catherine MacKinnon proffered a dominance analysis, arguing that women’s experiences were inseparable from their lack of power, that their “difference” was not social or biological but rather rooted in their subordination to male power.⁹⁷ This theory was particularly useful for areas of employment law such as sexual harassment. A post-modern approach argued there was no one reality for women, that their experiences varied based on their race, class, and sexual preference and were inseparable from a historical, social, and political context. They rejected the dominance approach for privileging gender and failing to take into account other (constantly shifting) identities.⁹⁸

Despite the overwhelming attention given to this debate, some began to look beyond it. Some quarreled with the notion of treating women as a monolithic category, arguing that they had different priorities and identities, and that treating them all the same

⁹⁷ Catherine MacKinnon, Feminism Unmodified: Discourses on Life and Law (Cambridge: Harvard University Press, 1987); see also Andrea Dworkin, Pornography: Men Possessing Women (New York: Perigee Books, 1981).

⁹⁸ See, for example, Drucilla Cornell, Beyond Accommodation: Ethical Feminism, Deconstruction, and the Law (New York: Routledge, 1991). For other legal scholars on the equality/difference issue, see Mary Joe Frug, Postmodern Legal Feminism (Routledge: New York 1992); Martha Minow, Making All The Difference: Inclusion, Exclusion, and American Law (Ithaca: Cornell University Press, 1990); Martha Chamallas, Introduction to Feminist Legal Theory (New York: Aspen Law & Business, 1999); and Joan C. Williams, “Dissolving the Sameness/Difference Debate: A Post-Modern Path beyond Essentialism in Feminist and Critical Race Theory,” Duke Law Journal 1991(2) (April 1991): pp. 296-323. Herma Hill Kay advocated pursuing equality of opportunity rather than formal equality. She saw pregnancy as an “episodic occurrence” rather than an immutable characteristic, and suggested that women be treated differently than men only during pregnancy, thereby making them “equal to men in their ability to work and make reproductive choices.” Herma Hill Kay, “Equality and Difference: The Case of Pregnancy,” Berkeley Women’s Law Journal 1 (1985): 1. Christine Littleton argued for an “acceptance model,” which accepted cultural differences but addressed the “consequences of gendered difference” rather than its sources: “[E]liminating the unequal consequences of sex differences is more important than debating whether such differences are ‘real,’ or even trying to eliminate them altogether.” Christine A. Littleton, “Reconstructing Sexual Equality,” California Law Review 75 (1987): 1279. Joan Williams argued that debates about sameness and difference obscured the real issue, the social construction of market and family work.

– whether as equal to or different from men – privileged the interests of white middle-class women. Others argued that the debate wrongly accepted a male standard, noting that maternity leave was only considered special treatment when men were the norm. In this vein, some challenged the notion that women – with many caregiving responsibilities – had to face a labor system premised on “an ideal worker with no family responsibilities.”⁹⁹ In fact, labor feminists had “never resolved the tension between equality and difference strategies, nor did they see the necessity of doing so.” They did not see them as incompatible, arguing that “gender difference must be accommodated and that equality can not always be achieved through identity in treatment. Theirs was a vision of equality that claimed justice on the basis of their humanity, not on the basis of their sameness with men. Where the male standard . . . didn’t fit their needs, they rejected it.”¹⁰⁰ By the 1990s the debate had lost much of its hold on feminists and they moved on to other concerns, seeing the framework as a fundamentally unworkable dichotomy.¹⁰¹

The Sears case helps us understand the state of the women’s movement with regard to the equality-difference dilemma. Though it should not necessarily have surprised us given its long historical roots, many feminists were hopelessly stuck on a long and at times bitter argument over equality vs. difference. The Sears case drew so much attention because it embodied all that seemed unresolvable about the equality-difference dilemma. Saying women were not interested in certain jobs because of their

⁹⁹ Williams, “Deconstructing Gender,” 802.

¹⁰⁰ Cobble, The Other Women’s Movement, 7-8. Labor feminists did not think men should be the standard to which they aspired and instead women’s work should be revalued. Women “should not have to become *like men* in order to deserve first-class citizenship.” Ibid., 59-60.

¹⁰¹ See Joan Wallach Scott, “The Sears Case,” chap. in Gender and the Politics of History (New York: Columbia University Press, 1999); Williams, “Deconstructing Gender,” 797.

family responsibilities highlighted gender differences in a way that was not used to help them but to resist improvements, leaving little room to discuss what working women really needed. Some pointed to the case as an example of how feminists' acknowledgement of women's differences could be used against them and criticized Sears, Rosenberg, and the court for using it to reinforce traditional stereotypes about women.¹⁰² In the process, the meaning of the case changed over time. What started as an attempt to remedy discrimination faced by working-class women ended as a liberal feminist debate. Those involved at the beginning dropped out of the case and followed it only in passing. By comparison, equal rights feminists knew virtually nothing about the case for the first twelve years, when they suddenly engaged in debates surrounding the trial.

The nastiness surrounding the expert witness debate and the way that dispute was used to reinforce the equality/difference dilemma was largely due to conservatives and the media stoking the controversy and creative arguments by Sears' attorneys. It is true that some second-wave feminists accepted the "choice" framework too readily, and, like labor feminists before them, were unable to bring about structural changes in the gendered construction of home and work. Regardless of blame, however, the controversy showed just how deep and bitter the divide still was in the 1980s and distracted attention away from the issues at hand. It prevented many feminists from addressing deeper economic issues that might lead to structural change; women could get into the workplace as long as they acted like men, but to change existing capitalist and gender systems was something else entirely.

¹⁰² Williams, "Deconstructing Gender," 805-806, 814. Williams also blamed Sears lawyers for using the "compliments of domesticity" against women and feminists who "delude themselves if they think they can rehabilitate [its] compliments without its insults." Ibid., 816, 820.

Nevertheless, in hindsight it appears that Sears, while a low point in this feminist debate, may have also been a turning point when feminists finally moved beyond the equality-difference dilemma. Some explicitly drew the connection between the case and the debate's hopelessness.¹⁰³ Each side had feared that the other position could be used against women, but now it became clear that their preoccupation with the debate itself could cause problems as well. It was not, after all, just about whether to address "difference," as even Sears did that, but rather in what context or framework to discuss women's needs.

This dissertation re-emphasizes what feminists have learned since the mid-1980s, that it is time to move beyond many of the feminist concerns (like "equality" vs. "difference") of the 1970s and 1980s. Feminist scholars have continued to point out that the debate offered a false dichotomy and that rather than try to solve the essential riddle, this framework needs to be transcended in feminist history and policy.¹⁰⁴ Equality and difference are not necessarily incompatible and one without the other is insufficient without addressing the fundamental issues that allow women to find a productive, permanent, and prosperous place in the workforce. There also have been new efforts by a growing group of scholars to address work-family issues and the need to revalue care-giving.¹⁰⁵ Those who argued that it was just a matter of time before women were able to

¹⁰³ Scott, "The Sears Case," in Gender and the Politics of History.

¹⁰⁴ Cobble, The Other Women's Movement, pp. 7-8, introduction, conclusion; Joan Scott, "Deconstructing Equality-versus-Difference: Or, the Uses of Post-structuralist Theory for Feminism," Feminist Studies 14 (Spring 1985): 157-211; Lise Vogel, Mothers on the Job: Maternity Policy in the U.S. Workplace (New Brunswick: Rutgers University Press, 1993); Amy E. Butler, Two Paths to Equality: Alice Paul and Ethel M. Smith in the Era Debate, 1921-1929 (Albany: State University of New York Press, 2002).

¹⁰⁵ Hochschild, The Second Shift (recognizing women's double day of work and the "stalled revolution"); Jerry A. Jacobs and Janice Fanning Madden, eds., "Mommies and Daddies on the Fast Track:

move up the pipeline to the highest positions of power can – thirty years later – no longer deny that something else is keeping women from those positions. Access itself is not enough. More than 50 percent of law school graduates but only 14 percent of law firm partners are women. Women who can afford to leave their jobs in large numbers to raise their children. Although this has been referred to as “opting out,” placing the burden again on women, recent work has undermined the “choice” framework by suggesting that professional women are not leaving voluntarily but rather being pushed out of the workplace.¹⁰⁶ I build on this literature, suggesting that Sears should be remembered for how it illuminates the larger history of working women and feminism rather than just the ongoing feminist debate over “equality” and “difference.” In doing so, it can help us understand why the revolution in the workplace for women was stalled, and why it remains so today.

Legal History

This dissertation also provides the first legal history of the Sears case. Although much was written about it at the time, it focused either on the fight among feminists or on re-analyzing the legal merits of the case. Despite the protracted discussion, much is unknown about the case, such as the fact that it was the result of a long investigation and negotiation period and initially focused on race as well as sex discrimination and on wage claims as well as hiring. Looking at Sears from a broad historical perspective provides insight into the interaction of history and law and the ability of law to bring about social

Success of Parents in Demanding Professions,” The Annals of The American Academy of Political and Social Science 596(1) (November 2004).

¹⁰⁶ Lisa Belkin, “The Opt-Out Revolution,” New York Times Magazine, October 26, 2003; Pamela Stone, Opting Out?: Why Women Really Quit Careers and Head Home (Berkeley: University of California Press, 2007).

change. This dissertation also provides a legal history of the EEOC, including cases against major corporations in the 1970s and 1980s which are assumed to have ended with Reagan but continued to be settled into the 1980s. Examining these developments more carefully alters how we remember this era: through the EEOC's defeat or as creating greater progress in employment discrimination cases than previously thought. Even the loss in court takes on new meaning when the effect on Sears of bringing the litigation itself is examined.

Despite the tensions between law and history, they are most helpful when analyzed together. Although most observers of the Sears case focus on the conflicts between historians testifying in court, the expert witnesses were just one small part of a much larger case, not considered particularly important by the lawyers on either side and not determinative of the outcome. The law adds a uniquely practical aspect to our examination, while history allows us to examine the legal process itself, which is often ignored in legal analysis. Like many cases, in Sears the legal process cannot – and should not – be divorced from the merits of the case. The delayed process determined which women would receive a remedy and how much, while the mere existence of the litigation helped to bring about change at Sears. The process sometimes affects people as much or more than the merits of the dispute, and history helps show us how.

Why should lawyers care about Sears? After all, it did not set any new standards in law and was merely a Northern District of Illinois case affirmed by the 7th Circuit, not a Supreme Court case. Was it just another employment discrimination case in which the company won? Compared to historians and graduate students, labor and employment lawyers and law students have never heard of the case, reflecting how what is important

in law and history can differ. The Sears case provides a window into ways in which law has helped improve the workplace for women, the limits of the law in doing so, and the methods that have succeeded where it did not, such as grass-roots activism and labor organizing. It touches on the ways in which the law is and is not an effective instrument for social change. It points out the implications of employment discrimination laws and affirmative action for issues of gender, class, and race, particularly how the law impacts professional and working-class women differently. This dissertation builds on recent efforts to create a new cause of action for discrimination based on care-giving responsibilities. Historically linking early twentieth-century battles over protective legislation to efforts of second-wave feminists to open access to male-dominated jobs provides crucial lessons for future legal doctrine. The law must not essentialize women as a group and ignore race, class, and other differences; it must focus on family responsibility irrespective of gender, protecting men as well as women; and it should be part of a broader agenda that includes other tools such as labor organizing and grass-roots activism.

U.S. History

Finally, the Sears case can be used as a lens through which to view broader changes in post-war U.S. history, such as the decline of the New Deal order, rise of the New Right, and backlash against the women's movement. Although the 1970s traditionally has been analyzed as the aftermath of the 1960s or the lead-in to 1980s, this dissertation builds on recent efforts to view it as a distinct period of study.¹⁰⁷ It also

¹⁰⁷ See, for example, Beth Bailey and David Farber, eds., America in the Seventies (Lawrence: University Press of Kansas, 2004); Jefferson Cowie, "Nixon's Class Struggle: Romancing the New Right Worker, 1969-1973," Labor History 43(3) (2002).

builds on calls to integrate national and local history.¹⁰⁸ This dissertation is simultaneously a top-down and bottom-up study, analyzing how women's activists and the state interacted and influenced each other as they tried to work within the limits of the law, the federal bureaucracy, and the rising power of the Right and big business to change the workplace. Although the case reflects the decline of liberalism, beginning with great promise during a time of significant social change and ending with a win for big business in the middle of Reagan's presidency, it also refines the story of the rise of conservatism. It was not monolithic and included sites of resistance within the administration, showing that despite significant changes in policy, not all was lost during the Reagan era. The Sears case continued to receive more funding than had ever been given to a case before, while the EEOC continued to settle other cases against major companies through the late 1970s and 1980s. In this light, Sears can be seen as a victory as well as a defeat.

Conclusion

While feminists today have the benefit of building on the remarkable progress made in the 1960s, 70s, and 80s, there are new concerns and the terms of the debate have changed. Now that women's right to be in the workplace is unquestioned, the issue is how to keep them there and allow them to prosper. Thirty years of women entering the workplace has failed to meet the expectations of second-wave feminists, since women did not move up the pipeline in the numbers expected, but rather hit a glass ceiling that remains today. The focus needs to be less on using antidiscrimination laws and more on

¹⁰⁸ See, for example, Steven F. Lawson, "Freedom Then, Freedom Now: The Historiography of the Civil Rights Movement," *The American Historical Review* 96(2) (April 1991): 457; Steven F. Lawson and Charles M. Payne, Debating the Civil Rights Movement, 1945-1968 (Lanham, Md.: Rowman & Littlefield, 1998).

addressing work-family issues that preclude women's full participation and limit their ability to earn promotions and increased pay. These concerns are not new, and we can draw on the lessons of labor feminists about what women need in the workplace and their model of demanding both equality and difference.

Although those who remember the Sears case most often want to determine who was responsible for keeping working women's voices quiet, such a focus is almost beside the point. Only by remembering the case accurately can we understand where the revolution was stalled and what needs to be done to finish it. The law can help, and new efforts to prohibit discrimination based on caregiving responsibilities and to legislate policies that ease family burdens are major steps in the right direction, if not yet enough. But the Sears outcome underscores that the law alone is not enough, and litigation is a clumsy method of bringing about change.¹⁰⁹ Working-class women have always been in the workplace and middle-class professional women are now there to stay. Deeper structural changes will require the involvement of working women on their own behalf, their advocates, unions, male workers with similar interests, and broad coalitions to reach a more lasting and meaningful solution. That solution must take into consideration not just women's ability to work as men traditionally have but also to meet their family responsibilities.

¹⁰⁹ Even Joan Williams, who has pioneered a new cause of action for discrimination based on caregiving responsibilities, notes that lawsuits "are the worst possible vehicle for social change, . . . except for nothing, and that's where we are right now." She would prefer "legislation guaranteeing all workers paid sick leave, paid parental leave and access to affordable child care," but acknowledges that very little is happening "in public policy in this arena." When "people say, 'Well, the lawsuits are limited achievements,' I say: 'Well, compared to what? You're not in Europe.'" Eyal Press, "Family-Leave Values," New York Times Magazine, July 29, 2007.

Chapter 2

The Cooperative Origins of *EEOC v. Sears*

Although the Sears case is remembered for its divisiveness in the feminist community, it was actually born of cooperation among women's groups trying to force corporate employers to change their discriminatory practices. In the early 1970s, several women's groups in Chicago formed with a focus on working-class women and employment issues, trying to extend the protections of Title VII of the Civil Rights Act of 1964 in a practical way. Their members came from backgrounds in civil rights, housing reform, women's liberation, and the labor movement and were generally experienced in social protest. These groups formed bonds with similar organizations across the country, helping each other's causes by staging nationwide protests or applying pressure to a company from several directions in an attempt to improve the workplace for women. One by one, they targeted specific industries that employed large numbers of women, such as banking, insurance, and retail, and forced employers to change their practices. They used a variety of strategies involving direct action: identifying corporate employers as targets; demanding that they change their discriminatory practices; and picketing or using public relations tactics to shame them into doing so. They also used litigation, reaching out to working women through leafleting and community meetings at the Young Women's Christian Association (YWCA) and helping them file charges of discrimination with the Equal Employment Opportunity Commission (EEOC or "commission").

Sears, headquartered in Chicago, was just one of the many corporations targeted by this coalition of working women's groups. Sears did not begin simply as a case where an individual woman sued the company or complained to the EEOC because she was

denied a promotion, although many women did file charges of discrimination against the corporate giant, which encouraged the EEOC to investigate. Instead, the Sears case was largely the result of long-term cooperation among women's groups in Chicago trying to bring about widespread changes in the workplace. Their goals were much broader than a single employer, encompassing direct action against many different corporations and industries. They never intended to pursue a thirteen-year lawsuit against Sears, but only to shame or scare it into changing its employment practices as they had done with companies such as AT&T. As Sears dug in, however, the coalitions that were successful in direct action were unable to sustain a commitment to long-term litigation. NOW's national Sears Action Taskforce (or "Sears Subcommittee") pursued the company for several years, but eventually it too had to tend to other priorities. Nonetheless, the original coalition helps us understand the political atmosphere in Chicago in the 1970s and the beginnings of the women's groups that eventually decided to pursue Sears.

Women's Groups in Chicago

As the home of the Brotherhood of Sleeping Car Porters, the Packinghouse Workers, and other important labor unions, Chicago was indisputably a center of industrial unionism throughout the twentieth century. For the same reasons, it also became a center of women's labor activism, reaching its apex with the founding of the Coalition of Labor Union Women (CLUW) there in 1974. However, years before the founding of CLUW, working women's groups formed in Chicago and drew members from labor unions and civil rights organizations. Several of the founding members of the National Organization for Women (NOW) came from the Midwest labor movement, such as Catherine Conroy of the Communications Workers of America (CWA) and Dorothy

Haener of the United Auto Workers (UAW). Other feminist activists of the 1960s came from Wisconsin, including Kay Clarenbach, a professor and chair of the Office of Women's Education Resources at the University of Wisconsin (UW) and the first chair of NOW's board of directors.¹ When NOW formed, Clarenbach ran its operations out of her office at UW, but the organization soon moved to the UAW in Detroit, which provided office space and administrative support. Then, a dispute developed between members who wanted the organization to support the Equal Rights Amendment (ERA) and labor union women who asked that the issue be put off while they tried to get their male union leaders to support it. The resulting conflict led a number of labor women to leave NOW in late 1967, and to the organization moving its national office from Detroit to the nation's capital.² It was not, however, much more than a fledgling organization, with operations at one point run out of Mary Eastwood's apartment in Washington, D.C.³ In the early 1970s, three separate headquarters were set up, in New York, Washington, D.C., and Chicago. Each office handled a different aspect of the organization, with Chicago handling membership and administration.⁴ Aside from the prominent role Chicago played on the national level, a local NOW chapter also formed there in 1967, just a year after the organization began. From the beginning it was more diverse by race

¹ Gerda Lerner Papers, 1941-2001; Wisconsin Women's Network and Wisconsin Women's Council, "25 Years: Looking Back, Moving Forward," A Tribute to Kay Clarenbach, October 20, 1985. MC 498, Box 3, Folder 1. Schlesinger; Cobble, The Other Women's Movement, 185.

² Tully-Crenshaw Feminist Oral History Project Records; Interview with Mary Eastwood by Muriel Fox, March 7, 1992, pp. 48, 92-93. MC548, Series I, Subseries A, 3.4-3.7. Schlesinger; Evans, Tidal Wave, 25, 89; Cobble, The Other Women's Movement, 185.

³ Tully-Crenshaw Feminist Oral History Project Records; Interview with Mary Eastwood by Muriel Fox, March 7, 1992, pp. 21, 25, 48-49, 90-91. MC548, Series I, Subseries A, 3.4-3.7. Schlesinger.

⁴ NOW Papers; Wilma Scott Heide to Anne Ladky, President of Chicago NOW, June 6, 1974. MC493, Box 52, Folder 18. Schlesinger.

and class than many other chapters and drew heavily from labor unions for its members and leaders, such as Conroy.

It was not surprising then, that Chicago NOW focused on women's work and employment issues from its inception. In the 1960s, it played an instrumental role in challenging sex-segregated job advertising, one of the first issues the young organization focused on in order to enforce Title VII on behalf of women.⁵ In September 1973, NOW publicized a Supreme Court decision declaring sex-segregated help-wanted ads illegal. It said the victory came after three and a half years of litigation based on a NOW complaint and a "5 year campaign by NOW and other women's groups across the country."⁶

Mary Jean Collins, an early member of Chicago NOW, became a leader in the effort to force employers to change discriminatory practices and later spearheaded the Sears action. Collins grew up in Milwaukee, Wisconsin with a mother who worked outside the home. After graduating from high school, she did clerical work at Taylor Electric Company for two years and then attended Alverno College, a small Catholic all-women's college in Milwaukee run by Sister Austin Doherty and Sister Joel Read. Sister Austin, Collins' history teacher, "first challenged [her] to think about woman's role in society," awakened her to "women's potential," and "got her thinking" by asking the class why half the population makes so little contribution to society. In 1966, Sister Austin became a founder of NOW and later asked Collins to join the organization.⁷

⁵ Anne Ladky, telephone interview by author, 20 March 2002.

⁶ Suzanne Stocking, ed., NOW Compliance Newsletter, No. 10, September 1973, pp. 1-3, UIC, NOW Chicago, 78-34, Box 2, Folder 8.

⁷ Mary Jean Collins-Robson, resume, n.d., UIC, NOW Chicago, 81-18, Box 41, Folder 338; Mary J. Nowlen, "NOW Board member talks about role of women"; Carol Kleiman, "Executive Wins in Man's World," Chicago Tribune, 22 May 1969, UIC, NOW Chicago, 78-034, Box 2, Folder 11; Phyllis Stevenson, "The woman from NOW: 'I was not in the constitution at all'", The Herald, 21 March 1973, 1, UIC, NOW Chicago, 78-034, Box 6, Folder 7.

After graduating from college in 1963, Collins applied for jobs at an employment agency. She told them she did not want a typing job, and when they made her take a typing test anyway, she never returned.⁸ She became interested in women's rights when she was unable to get the jobs she was interested in and for which she was qualified. "It didn't occur to me until after I had finished college," Collins later recalled, "that I was not in the Constitution at all."⁹ Collins briefly taught seventh grade but "did not find it challenging enough, and decided to try business." She used her secretarial skills to get a job with a small electronics firm, where the sales manager gave her a chance to do some buying; she felt certain she would not have gotten the job had she not started in clerical work. Collins then returned to Taylor Electric in 1964 as Inside Sales Representative for four years.¹⁰

Collins' activism was evident early on. She married Jim Robson and in the late 1960s both participated in open housing marches in Milwaukee led by Father James Groppi and the National Association for the Advancement of Colored People (NAACP) Youth Council. In 1967, she helped found the Milwaukee chapter of NOW and then became its treasurer.¹¹ Aside from NOW, Collins was at various times a member of the Chicago Urban League, American Civil Liberties Union, and Common Cause.¹² Collins and her husband combined their surnames and both used the last name Collins-Robson, until their divorce in the mid-1970s. She noted with irony that it was "easy for a woman

⁸ Nowlen, "NOW Board member talks about role of women."

⁹ Stevenson, "The woman from NOW."

¹⁰ Kleiman, "Executive Wins in Man's World"; Collins-Robson, resume.

¹¹ Nowlen, "NOW Board member talks about role of women"; Collins-Robson, personal bio; Collins-Robson, resume; Stevenson, "The woman from NOW."

¹² Collins-Robson, resume, n.d.

to change her name. . . . Her husband just has to change his name and hers changes automatically.”¹³

In 1968, Jim’s job was transferred to Chicago, and he and Collins moved to Hyde Park, where she worked for Allied Radio Corporation in a management position as its first female electronics re-buyer. In 1969, she moved to Westinghouse Electric’s Semiconductor Division as Inside Sales correspondent. Around the time of their move to Chicago, Collins applied for a credit card at a department store and became angry when the store would not consider her credit information, but only her husband’s.¹⁴

Collins’ origins in the women’s movement was rooted in a labor and activist background. When asked who influenced her and who were her “own heroes in the women’s movement,” she pointed to Kay Clarenbach for “helping hold the organization together when it was ‘a very fragile flower,’” and to Catherine Conroy, a member of the trade union movement, for “bringing a strong element of reality to the movement because of her experience with dealing with women in the work force.”¹⁵ After Collins moved to Chicago, she met Conroy, who worked for the Bell System and had founded the Chicago NOW chapter and become its first president. Conroy oriented her toward employment issues, which were very important to the Chicago NOW chapter.¹⁶ Collins quickly worked her way up in the local and national NOW organization. From 1969 to 1970, she served as president of the Chicago chapter and then became NOW’s Midwest regional

¹³ Nowlen, “NOW Board member talks about role of women.”

¹⁴ Nowlen, “NOW Board member talks about role of women”; Stevenson, “The woman from NOW”; Kleiman, “Executive Wins in Man’s World”; Collins-Robson, resume.

¹⁵ Nowlen, “NOW Board member talks about role of women”; Mary Jean Collins, interview by author, 14 November 2003, Washington, DC. For more background on Conroy see Cobble, The Other Women’s Movement, chap. 1.

¹⁶ Mary Jean Collins, interview by author, 14 November 2003; Cobble, The Other Women’s Movement, 185.

director, spending most of her time organizing chapters. Also in 1970, she was elected to NOW's board of directors and left her job to form C-R Office programs with Jim, a printing company to distribute NOW's growing number of publications to its burgeoning membership ("25,000 members in 600 chapters").¹⁷ Collins later became co-chair of the national Sears Action Task Force, and after leaving NOW's board in the mid-1970s, returned in the 1980s as national Action Vice President.

Like many of the Chicago NOW women, Collins developed strong skills in organizing. She was a product of the Midwest Academy, an organization formed in 1973 by Heather Tobis Booth, which was dedicated to training "leaders and organizers working in social change projects across the country."¹⁸ Booth had a long history of activism, including involvement in the civil rights movement. She participated in Freedom Summer, which had an "enormous effect" on her, making her "really feel [that she] wanted to do this kind of thing for the rest of [her] life."¹⁹ Its legacy for her was "the positive impulse to action," changing not just attitudes but the willingness to act on them.²⁰ Booth was also part of the New Left and married a founding member of Students for a Democratic Society (SDS).²¹ Like many women in the New Left, she felt disenchanted with its failure to adequately address gender issues and became an early

¹⁷ Stevenson, "The woman from NOW"; Collins-Robson, personal bio; Mary Jaspers, "Local feminist running for national NOW president," the herald, 22 May 1974, UIC, NOW Chicago, 78-034, Box 6, Folder 7; Collins-Robson, resume; Nowlen, "NOW Board member talks about role of women."

¹⁸ Papers of NOW Officers -- Lightfoot, 1971-1977; Heather Booth to "Friend" (sent to J. Lightfoot), Chicago, n.d. (mid-1975), p. 1. MC 485, Box 7, Folder 20. Schlesinger.

¹⁹ See, for example, McAdam, Freedom Summer, 127, 131-132; Evans, Personal Politics, 64.

²⁰ McAdam, Freedom Summer, 131.

²¹ See, for example, Sale, SDS; Miller, "Democracy Is In The Streets", chap. 11.

member of the women's liberation movement.²² She helped found both the West Side Group, an early women's liberation group in Chicago, with many women from SDS and the New Left, and the Chicago Women's Liberation Union (CWLU), and worked in community organizing in Chicago in the early 1970s.²³

In 1973, Booth started the Midwest Academy to train organizers, using settlement money she won against a Chicago publishing firm that laid her off from her editor's position for working to improve conditions for secretaries.²⁴ She billed the organization as "indispensable in winning structural social change in America because it provides a decisive component -- the systemic approach to political and social action." In a time of "recession and political crisis," Booth saw the skills taught at the Academy as especially important. "When people are disorganized," she wrote, "their alienation, anger and fear is exploited and turned against themselves. . . . we must create strong organizations that enable people to identify and move against their real enemies -- the monopolies, the corrupt officials, the arrogant corporations."²⁵ By 1975 the Midwest Academy claimed to have taught more than 120 students and consulted "with thousands of people in over 150 additional organizations."²⁶ As evidence of its success, the Academy cited graduates of its two-week training sessions and their contributions to social change in their own organizations: "The success of the Academy is a reflection of the work done by Alumni.

²² Evans, Personal Politics, chap. 7, p. 207; McAdam, Freedom Summer, 180, 182 (citation omitted).

²³ Evans, Personal Politics, 207; Evans, Tidal Wave, 9, 85; Echols, Daring to Be Bad, 65-66, 72; McAdam, 182, 204.

²⁴ McAdam, Freedom Summer, 204-05.

²⁵ Booth to "Friend", n.d. (mid-1975), p. 1.

²⁶ Booth to "Friend", n.d. (mid-1975), p. 1.

The national respect the Academy has gained is a testimony to the organizations you are building, the changes you are winning.”²⁷

Like Collins, the members of Chicago NOW had significant experience in organizing and activism. Others also attended the Midwest Academy, including Judith Lightfoot, Anne Ladky, and Day Piercey Creamer.²⁸ Both Collins and Piercey worked as consultants for the Academy, Collins on the women’s movement and Piercey on working women.²⁹ The Chicago NOW women were well-organized and experienced, even running focused and effective election campaigns within their own organization. Upon her election to the national board of directors at NOW’s 1974 convention in Houston, one Rochester NOW member thanked the “‘Chicago Machine’ who supported me before and during the election, and who encouraged me to put my philosophy in position statements so that those attending the conference would know where I stood on the issues.”³⁰

More than many other chapters, Chicago NOW oriented itself toward everyday issues, particularly those related to paid labor. In an August 26, 1974 article about a protest and meeting with Sears Bank officials as part of Women’s Equality Day activities, Chicago NOW’s secretary noted, “We’re after ‘bread and butter’ issues. . . . These are the things that affect women’s daily lives.”³¹ NOW’s national office regularly reported on such efforts in Chicago, for example, noting in April 1974 its attempts to pressure

²⁷ Papers of NOW Officers -- Lightfoot, 1971-1977; Heather Booth to Judy Lightfoot, March 17, 1975, pp. 1-2. MC485, Box 7, Folder 20. Schlesinger.

²⁸ Hereafter referred to as Day Piercey.

²⁹ See, for example, Booth to Lightfoot, 17 March 1975, p. 3.

³⁰ Barbara Kuzniar, “A Victory,” The Forum, July 1974, National Organization for Women, Genesee Valley Chapter, UIC, NOW Chicago, 78-034, Box 7, Folder 5.

³¹ NOW Papers; Karen Hasman, “Women here mark 54th year of vote,” Chicago Daily News, August 26, 1974, p. 8. MC 496, Box 44, Folder 19. Schlesinger.

steel companies and unions to improve conditions for women.³² At NOW's 1974 national convention in Houston during the height of an economic recession, the Compliance Task Force proposed a resolution on the tenth anniversary of the Civil Rights Act that "NOW declares employment discrimination a priority issue for the coming year and dedicates itself to national, state, and local actions to obtain expansion, development, and enforcement of anti-discrimination laws, and to such further actions as will ensure truly equal employment opportunity for all persons." The Task Force stressed, "Note that the key word is 'priority.' Strong organizational commitment will be necessary if we are to move forward, or even to preserve the meagre (sic) gains of the past, during the coming year of heightened economic threat." Chicago NOW submitted a resolution calling "for action to maintain our rights in the affirmative action area and prevent the discriminatory use of layoffs."³³

After the Houston convention, which had been rife with internal organizational battles, national NOW leader Wilma Scott Heide sent a letter of appreciation and reflection to Chicago NOW. In what appeared to be a "pep talk" in response to that chapter being pushed aside at the convention, Heide praised its crucial role,

In those truly superb achievements and continuing struggles (sometimes with ourselves and each other), Chicago NOW as a chapter and especially but not only particular people have had and will have key roles. I know of no other chapter in the U.S.A. that has 2 people on NOW Executive Committee plus 3 on NOW Board of Directors. Chicago NOW's roles especially but not only in Sears actions, ERA, Steelworkers NOW, Bicentennial, etc. etc. is significant in Chicago, Illinois and nationally. NOW's very vital Membership Services and Administrative Office are in

³² Suzanne Stocking, ed., "Women Begin to Test Their Strength against Steel," NOW Compliance Newsletter, No. 12, April 1974, UIC, NOW Chicago, 78-034, Box 2, Folder 2.

³³ Stocking, ed., "NOW CONFERENCE RESOLUTIONS," NOW Compliance Newsletter, No. 12, April 1974, p. 4.

Chicago. No other city in NOW has had and has such reality and potential for local and national leadership and membership development.³⁴

Despite its intentions, however, questions remained about whether Chicago NOW really represented working-class women and their needs. An Associated Press (AP) article about the August 26, 1974 Equality Day action at Sears Bank quoted a Mrs. Kennedy, “a cashier and the 39-year-old mother of five,” as saying, “Equality day may be all right for people who have nothing else to do, but when you get up at daybreak, get breakfast, take three kids to the baby sitter, then get yourself to work, you don’t have much time to think about equality.” The problem went far beyond Chicago. Another woman, a housewife from Mount Vernon, New York who returned to work when her children were grown, “said she wasn’t even aware that yesterday was a special day. What did it mean to her? ‘Not a thing . . . I doubt that anybody pays the slightest attention.’” Although the AP article may have been framed to include contradictory feminist and anti-feminist views, it certainly challenged Chicago NOW to demonstrate that working women believed the organization’s interests and concerns represented their needs.³⁵

Moreover, it appeared that NOW focused heavily on promotions and “getting ahead,” rather than on improving the pay and conditions of existing working-class jobs. A November 4, 1974 “Tower Tattler” flyer proclaimed “good news and bad news” at Sears. On the one hand, Sears had done a comparative study of clerk and typist salaries and found that its employees were underpaid as compared to other companies in Chicago’s downtown “Loop” area, so it gave them a small raise. That was not enough

³⁴ Heide to Ladky, 6 June 1974, p. 1.

³⁵ NOW Papers; AP, “Suffrage anniversary: Women observe ‘Equality Day’”, Chicago Tribune, August 27, 1974, section 1, p. 2. MC 496, Box 44, Folder 19. Schlesinger.

for NOW, however, which demanded “access to better jobs through job posting, training programs, . . . meaningful review procedures, . . . decent benefits and respect for our work, . . . equal pay for equal work . . . instead of phony job classifications that help management hide . . . equal pay violations from the government.”³⁶ While many women wanted to be promoted out of female-dominated jobs, especially those who were highly-educated and had professional aspirations, many working-class women simply wanted more respect, higher pay, and better working conditions for the clerical or sales jobs they already had.

In part to address more specifically the needs of working-class women, several working women’s activists formed Women Employed (WE) in 1973. Day Piercey was the moving force behind the new organization, an attempt to focus more exclusively on work issues for women, including clerical workers in Chicago’s downtown Loop area. Like Booth, Piercey had a long history of activism. As a student she was involved in community organizing and women’s liberation groups. In 1969 she moved to Chicago and became the first staff member of CWLU, working out of an office at the YWCA. There she became involved in day care issues after holding “rap groups with working class women,” and along with Booth created an action committee for decent child care through CWLU. Modeling themselves on Caesar Chavez’ farmworkers’ union, Piercey worked with Booth and the Midwest Academy to organize women workers.³⁷ Through her work with women at the Southwest YWCA, Piercey saw they had limited opportunity for economic independence and felt there was a need for an organization specifically to

³⁶ NOW Papers; NOW, “Tower Tattler: Good News & Bad News,” Vol. 1, No. 6, 4 November 1974. MC 496, Box 209, Folder 68. Schlesinger.

³⁷ Evans, Tidal Wave, 85-86; McAdam, Freedom Summer, 204.

support economic rights. She asked the YWCA to transfer her to its center in the Loop, where she interviewed a lot of people and decided on community organizing goals.³⁸ Like the farmworkers' union, WE sought to win some legal victories and then perhaps move on to traditional union organizing.³⁹ The organization hoped to appeal to women previously considered unorganizable, as well as those who might not join a group like NOW, identify as feminists, or organize around more controversial issues such as reproductive rights.⁴⁰ WE represented one example of different parts of the women's movement coming together on working women's issues.⁴¹

Piercey worked closely with Chicago NOW in founding WE. During its early years, NOW leaders volunteered at WE, holding leadership positions and using their organizing experience to help it get started.⁴² One such member, Anne Ladky, served as president of Chicago NOW from 1973 to 1975.⁴³ Ladky grew up in the Midwest and was active in community organizing for housing and civil rights. After graduating from college she worked in publishing in Chicago and in 1971 helped found a citywide group called Women in Publishing, which urged publishers to use nonsexist language. Like

³⁸ Anne Ladky, interview by author, 12 March 2003, Chicago, IL.

³⁹ Evans, *Tidal Wave*, 87.

⁴⁰ Evans, *Tidal Wave*, 87; Anne Ladky, interview by author, 12 March 2003, Chicago, IL.

⁴¹ Sara Evans notes, "The liberal desire to battle discrimination in the legal arena, the radical feminist insistence on awakening a female 'class consciousness,' and the socialist-feminist attraction to community organizing-all 'worked,' and each reshaped the other. NOW task forces on working women, for example, by the early seventies found ready allies among women in emerging socialist-feminist groups interested in organizing clerical workers." Evans, *Tidal Wave*, 45.

⁴² Anne Ladky, interview by author, 12 March 2003, Chicago, IL; Evans, *Tidal Wave*, 45 n. 78.

⁴³ Anne Ladky, telephone interview by author, 20 March 2002.

Collins, she was influenced by Conroy to join NOW and later became co-chair of its Sears Action Task Force. In 1977 Ladky moved to WE.⁴⁴

The question of whether WE's membership was working-class is a complicated one. A large percentage of working women during this period were clerical workers, and they ranged from higher income administrative assistants to minimum wage file clerks. Many of the secretaries who joined WE were well-educated and underemployed women who wanted but could not get the same professional jobs as men. Ladky noted that some of the "angriest" women were college-educated. In fact, she argued that WE had limited success with its secretaries' network in the 1980s because it found that most women wanted to get out of secretarial work rather than improve the pay or conditions within the occupation. Those women may not have been working-class, but rather over-educated for, but confined to, clerical jobs. Working-class women in secretarial positions often wanted to improve their pay and conditions rather than have to train for and switch to a traditionally male-dominated job. Ladky blamed employers for the decline of the profession because they refused to make secretarial work a viable career path with corresponding salary raises and benefits. Regardless of their aspirations or education, however, virtually all women were low-wage workers when WE began.⁴⁵ With limited opportunities for promotion, a history of exploitation by bosses, and confinement to sexualized and stereotyped jobs, they could be considered working-class regardless of whether gender or class barriers kept them there. More importantly, regardless of their

⁴⁴ Evans, *Tidal Wave*, 91; Anne Ladky, interview by author, 12 March 2003. Ladky is now Executive Director of WE.

⁴⁵ Anne Ladky, interview by author, 12 March 2003.

class identity, WE and Chicago NOW members prioritized the needs of working-class women and tried to form ties with employed women in low-wage female-dominated jobs.

In its early years, WE organized around certain industries, for example, pressuring insurance companies to post job openings and speaking to women steel workers in Gary, Indiana about their working lives. After 1976, WE became less industry-oriented and adjusted its organizing strategies as its membership and the status of women in the workplace changed. By the late 1970s, as women began moving into better jobs, there was more demand for programs such as how to write resumes and negotiate for a higher salary. In an attempt to build its membership, WE shifted its focus somewhat from working-class women to middle-class women, becoming partly a self-help organization that helped individual women “help themselves.”⁴⁶

Other Strategies and Actions Against Employers

During the early 1970s, both NOW and WE engaged in a variety of actions directed toward forcing employers to change their practices. NOW’s national organization established a Compliance Task Force to enforce discrimination laws through direct action, lobbying, litigation, and other pressure on corporations and government agencies responsible for implementing the laws. Individual task force members coordinated action in areas such as federal, state, and local governments, compliance agencies, employment agencies, and newspaper employment advertising.⁴⁷

⁴⁶ Finally, in 2000 WE leaders recognized that middle-class and professional women had more opportunities and were likely to call a lawyer if they felt discriminated against, and the organization returned to its roots, committing itself to advocacy for low-wage women, who had less power in the workplace and would benefit from its assistance the most. Anne Ladky, interview by author, 12 March 2003.

⁴⁷ Stocking, ed., NOW Compliance Newsletter, No. 10, September 1973, p. 2, UIC, NOW Chicago, 78-34, Box 2, Folder 8.

The Task Force published a lengthy newsletter updating members on recent developments and court cases. One regular section, “NOT NOW CORPORATIONS,” listed companies and unions targeted for action by particular NOW chapters. In September 1973, for example, the newsletter listed Allstate Insurance in San Diego, Boeing in Seattle, and General Dynamics and the International Association of Machinists and Aerospace Workers in San Diego. The Task Force relied on NOW’s extensive chapter network to coordinate these actions, requesting that members forward any sex discrimination complaints against these companies to the local contact person: “Combining our efforts is what it’s all about!”⁴⁸ NOW also used the newsletter to stir interest in possible new campaigns and recruit members to coordinate them. In September 1973, the employment areas considered “ripe” for action included primary and secondary school teaching, library work, clerical and secretarial work, and banking, all of which employed large numbers of women generally “massed at the bottom of the employment pyramid.”⁴⁹ By April 1974, NOW also targeted “Women in Office Work” and “AT&T” among its priorities for “SPECIAL COMPLIANCE PROJECTS.”⁵⁰

Wherever possible, the Task Force tried to take advantage of successful local actions by expanding them to other regions. In 1973, a statewide coalition founded by New Jersey NOW members issued a report on the status of women in New Jersey’s state government and filed a class action complaint with the state civil rights division and the EEOC, charging sex discrimination in all aspects of state employment. NOW’s national organization took an optimistic view of what this could mean for future actions: “NOW

⁴⁸ Stocking, NOW Compliance Newsletter, No. 10, September 1973, p. 1.

⁴⁹ Stocking, NOW Compliance Newsletter, No. 10, September 1973, p. 2.

⁵⁰ Stocking, ed., “Special Compliance Projects,” NOW Compliance Newsletter, No. 12, April 1974, p. 2, UIC, NOW Chicago, 78-034, Box 2, Folder 2.

members in at least one other state are beginning an action against sexism in their Government. We hope NOW will soon have related projects going in all 50 states. If you are a state government employee, you too can be a complainant. If not, you can help blow the whistle on behalf of those who are.”⁵¹

WE, which focused exclusively on employment issues, also engaged in a broad range of activities. It carefully chose corporate targets, going after the biggest and most visible companies, such as AT&T, or entire industries that employed large numbers of women and had a history of discrimination, such as steel, insurance, communications, retail, and banking. It went after them one by one, using direct action tactics like protests and publicity to get them to change practices such as refusing to post job openings so that women could apply. Where necessary, WE initiated litigation. Members handed out questionnaires and used the information they received to file discrimination lawsuits against major corporations such as Kraft.⁵² New WE members checked off whether they were interested in the Insurance Project, Banking Project, Public Employees Project, Secretaries’ Project, Fundraising Committee, or Member-at-large, and contributors were notified that these individual committees met once a week.⁵³ After its first year, chairwoman Darlene Stille listed some of WE’s accomplishments, which included getting the federal government to investigate sex discrimination at Kraft; convincing the state insurance commissioner “to set up a task force of Women Employed members and representatives from various insurance companies . . . to investigate sex discrimination”;

⁵¹ Stocking, NOW Compliance Newsletter, No. 10, September 1973, p. 5. (emphasis added)

⁵² Evans, Tidal Wave, 87.

⁵³ Women Employed Membership Card, 1974, UIC, WE, 2000-16, Box 16, Folder: Membership – 1974; Betsy Clarke, Staff Member, Women Employed to unknown (left blank), n.d., UIC, WE, 2000-16, Box 16, Folder: Membership – 1974. (undated unsigned draft letter)

and filing sex discrimination suits against Carson's department store with the EEOC and the Department of Labor's Wage and Hour Division.⁵⁴

One early target for NOW and WE was the banking industry, which employed large numbers of women in low-wage jobs. NOW's December 1973 Compliance Newsletter reported on a victory against the California banking industry by a coalition that included California NOW, NAACP, League of United Latin-American Citizens (LULAC), Mexican-American Legal Defense and Education Fund (MALDEF), Chicano Law Students Association, and Employment Law Center of San Francisco. They won a settlement from the Bank of California which included goals and timetables for hiring women and minorities. The coalition then asked officials of other banks to issue voluntary affirmative action plans "to bring hiring and promotions into line with population breakdowns." This strategy succeeded, as all the major banks provided information and meetings with officials and at least one bank agreed to the coalition's goals and timetables and set up a training program. One Los Angeles NOW member attributed this victory to the coalition maintaining its cohesiveness and power by being "united on goals which relate to the interests of all," and to relying on the precedent of the Bank of California lawsuit and settlement. NOW immediately noted that this settlement "could be used as an example nationwide, [with] the same strategy repeated by local coalitions," and the various actions could then be coordinated "to put together a nationwide action."⁵⁵ By April 1974 the Compliance Task Force was advertising "A Strategy Kit for Achieving Equal Employment Opportunity in the Banking Industry" to

⁵⁴ Darlene Stille, Women Employed Chairwoman, to Friend of Women Employed, February 15, 1974, UIC, WE, 2000-16, Box 16, Folder: Membership – 1974.

⁵⁵ Suzanne Stocking, ed., NOW Compliance Newsletter, No. 11, December 1973, UIC, NOW Chicago, 78-034, Box 3, Folder 1.

help chapters or state compliance task forces plan actions to move area banks toward equal employment opportunity, “while also building firm coalitions with other civil rights groups and public interest law firms.” The kit included a history of the California bank action, basic strategy guide, goals for banks, press clippings, and the consent decree from the Bank of California lawsuit.⁵⁶

The Impact of AT&T

Another main target was AT&T. In 1970, AT&T applied to the Federal Communications Commission (FCC) for a rate increase. The EEOC, which then lacked the power to sue companies directly for discrimination, had received many charges of discrimination from female workers of AT&T. Several EEOC attorneys creatively decided to “piggyback” on the power of the FCC by “intervening” in its case. Pointing to statistical evidence of its imbalanced workforce, the EEOC argued the FCC should deny AT&T’s rate increase because it discriminated against minorities and women. NOW’s LDEF, NAACP, and MALDEF joined the EEOC as co-petitioners in the FCC case.⁵⁷ NOW planned grassroots actions to coincide with and support the EEOC investigation and negotiations with AT&T in Washington, D.C. For example, the Compliance and Enforcement Task Force organized an AT&T Happy New Year action at the beginning of 1972, which participating chapters in Chicago, Wichita, and Delaware deemed

⁵⁶ Stocking, ed., “Bank Kit Available,” NOW Compliance Newsletter, No. 12, April 1974, p. 5, UIC, NOW Chicago, 78-034, Box 2, Folder 2.

⁵⁷ Scott, Statement of NOW On The Appointment of John Powell As Chairone of the EEOC, 1; MacLean, Freedom is Not Enough, 153, noting the coalitions surrounding the AT&T campaign “worked together to call attention to the injustices all of their constituencies faced in that corporate empire”: “Black and Latino groups denounced the discrimination affecting women, many of them white, as NOW denounced the discrimination affecting ‘Blacks and Spanish Americans.’” On the AT&T case generally, see Herr, Women, Power, and AT&T and Stockford, The Bellwomen.

“worthwhile, even fun.” The Task Force also considered doing a follow-up AT&T action when the FCC hearings ended.⁵⁸

Individual chapters also coordinated actions to get the most out of the government investigation. In March 1971, New York NOW filed a sex and race discrimination complaint with the state attorney general, which eventually led to a separate consent decree with New York Telephone Company, providing “minimum percentages for filling vacancies; comprehensive study of ‘women’s utilization percentage’; annual target[s] for each job classification; transfer to other departments; abolishing military service as job qualifications; [and] goals for hiring males as operators and clericals,” with compliance to be reviewed by the Division of Human Rights and a committee of employees.⁵⁹

Atlanta NOW touted its role in AT&T in a list of its “major gains for working women in America and Atlanta”: “A massive back-pay settlement for women working at AT&T affiliates, including Southern Bell.” In Atlanta, NOW chapters “filed charges, picketed, leafleted and worked with the women of Southern Bell to achieve success.”⁶⁰

In January 1973, AT&T signed a major settlement agreement with several government agencies, including the FCC, EEOC, Department of Justice, and Department of Labor, providing back pay for affected workers, affirmative action programs, and goals and timetables for hiring and promoting women. Although not completely satisfied with the final settlement, NOW “still believe[d] it was, by far, the most significant step

⁵⁸ Mary Lynn Myers, Report to the National Board of Directors of NOW, February 1972, p. 1, UIC, NOW Chicago, 78-34, Box 2, Folder 8.

⁵⁹ NOW Compliance and Enforcement Task Force Newsletter, No. 9, June 1973, p. 4, UIC, NOW Chicago, 78-34, Box 2, Folder 8.

⁶⁰ NOW Papers; Atlanta NOW [?], WHAT IS N.O.W.?. MC 496, Box 209, Folder 67. Schlesinger.

ever taken by a Federal agency in combating employment discrimination.”⁶¹ NOW’s Vice President for Legislation, Ann Scott, pointed to three aspects of the AT&T litigation that were “essential . . . in any major effort” to end employment discrimination: “(1) The EEOC simultaneously attacked systemic discrimination against females, blacks, and Spanish-surnamed Americans. (2) The settlement provided comprehensive goals and timetables for the sexual and racial integration of all jobs at all levels, including sexual integration of jobs traditionally held only by women. (3) The settlement further provided comprehensive relief for the victims of past discrimination, including significant amounts of back pay.”⁶²

In June 1974, AT&T signed another court order with the federal agencies concerning wage discrimination in management jobs and agreed to provide \$7 million in backpay and \$23 million in wage adjustments for 25,000 employees. Although it did not admit violating the Equal Pay Act or Title VII, the company also agreed to change its system for determining salaries for 175,000 first and second level management jobs – 63,000 of whom were women – and Labor Department solicitor William J. Kilberg kept open the possibility of a future settlement for higher management employees.⁶³ In

⁶¹ Scott, Statement of NOW On The Appointment of John Powell As Chairone of the EEOC, 1. The Communications Workers of America (CWA) tried to set aside the agreement, according to NOW, because the union felt it constituted reverse discrimination against white males. The federal district court rejected CWA’s claim, saying it “had been given every opportunity to participate in the negotiations and had declined,” and allegedly criticized the CWA “for failing to represent its female members.” Lynne Darcy, “AT& T (OR WHEN WILL THE PHONE STOP RINGING?),” NOW Compliance Newsletter, No. 14, November 1974, p. 5, UIC, NOW Chicago, 78-034, Box 3, Folder 1.

⁶² Scott, Statement of NOW On The Appointment of John Powell As Chairone of the EEOC, 2. (emphasis in original)

⁶³ Darcy, “AT& T (OR WHEN WILL THE PHONE STOP RINGING?),” NOW Compliance Newsletter, No. 14, November 1974, p. 5, UIC, NOW Chicago, 78-034, Box 3, Folder 1; Eileen Shanahan, “AT&T Ends Pay Inequity for Managerial Employees,” The New York Times, May 31, 1974, 1; EEOC, The First Decade, 29; Suzanne Stocking, ed., “AT&T AGAIN,” NOW Compliance Newsletter, No. 13, July 1874, p. 8, UIC, NOW Chicago, 78-034, Box 3, Folder 1.

reviewing AT&T's compliance with the first agreement, the government found "widespread violations and [was] negotiating with AT&T to correct the violations."⁶⁴

Women's groups tried to learn from the AT&T victory and quickly made plans to use it as a model for future actions against other corporations. At the national NOW convention in February 1973, EEOC attorney and NOW member David Copus presented "HOW WOMEN CAN TAKE ADVANTAGE OF THE AT&T SETTLEMENT" as part of a series on "Strategies for Business Compliance and Government Enforcement." He laid out the EEOC's three-pronged strategy against AT&T: (1) attacking race and sex discrimination simultaneously and treating them as inextricably linked; (2) treating sex discrimination in pervasive, institutional terms, relying on inferences drawn from statistics; and (3) selecting "a target which was large, highly visible (both in jobs and corporate presence), and conscious of its image, and which employed a significant number of females in traditionally female jobs (large 'affected class' problem)." After listing some of the gains, such as establishing goals and timetables, changing the transfer and promotion system to use company-wide seniority, revising advertising and recruiting materials and internal manuals, provisions for moving men into traditionally female jobs and women into accelerated management training programs, and \$15 million in backpay, Copus confidently predicted that "[w]omen nation-wide should be able to demand, with considerably [sic] forcefulness, these same remedies from other employers. The fact that the EEOC and the Department of Labor . . . insisted on and received these remedies from the nation's largest employer can be a powerful precedent." Copus also offered the use of

⁶⁴ Darcy, "AT& T (OR WHEN WILL THE PHONE STOP RINGING?)," NOW Compliance Newsletter, No. 14, November 1974, p. 5, UIC, NOW Chicago, 78-034, Box 3, Folder 1; Shanahan, "AT&T Ends Pay Inequity for Managerial Employees," 1.

AT&T's affirmative action plan, which "contain[ed] local goals, hiring shares, etc. (useful to whipsaw other local employers.)"⁶⁵

It would be hard to overestimate the impact of the win against AT&T on the decision of working women's groups to pursue Sears. NOW saw its role in the AT&T case as crucial, and took credit for much of its success: "NOW's pressure was responsible for the landmark case of this type in which women and minorities at At and T [sic] were awarded \$50 million. NOW seeks to bring similar pressure on Sears."⁶⁶ It looked for comparisons to AT&T everywhere. NOW's June 1973 Compliance Newsletter noted that the Department of Justice had charged Delta and United airlines and five airline labor unions with sex and race discrimination and that it resulted in a settlement similar to AT&T's.⁶⁷ It failed to mention one major difference, however: that no one had sued the union in the AT&T case, and thus the presence of the union acted as a powerful check on the corporation and a source of protection for complaining workers.

In dealing with Sears, NOW and WE focused only on the similarities with AT&T: both were prime targets for direct action, were large national corporations, employed significant numbers of women, and had public images to protect. They failed to appreciate key differences, however, such as the fact that Sears was virulently anti-union. Most of AT&T's workforce, on the other hand, was unionized, and the significant number of complaints they filed with the EEOC motivated the agency to investigate AT&T. Another crucial difference was the racial diversity of the workforce. AT&T had

⁶⁵ Rosenberg Papers, 1979-1987; David Copus, "HOW WOMEN CAN TAKE ADVANTAGE OF THE AT&T SETTLEMENT," SIXTH NATIONAL N O W CONFERENCE, Washington, D.C., February 17, 1973, pp. 13-14. 87-M143--87-M171, Box 2, Folder 76. Schlesinger.

⁶⁶ NOW Papers; NOW SAYS SEARS SHORTCHANGES WOMEN, 1974, p. 2. MC 496, Box 44, Folder 18. Schlesinger.

⁶⁷ NOW Compliance and Enforcement Task Force Newsletter, No. 9, June 1973, p. 2.

a large percentage of African-American employees, and their complaints of race, rather than gender, discrimination motivated the EEOC to investigate AT&T. These complaints drew Copus to investigate AT&T in the first place, as race discrimination was still his main concern, although other staff members tried to focus on gender. In building its case, the EEOC team relied on a book detailing how the company's discriminatory policies left blacks in low-level and low-paying jobs.⁶⁸ It also relied on the statistical work of its top researcher, Phyllis Wallace, herself a victim of race discrimination and Jim Crow education, who documented how company policies channeled African Americans into the worst jobs.⁶⁹ The EEOC issued a report based on AT&T's own documents and statistics setting forth a strong case of race discrimination. Although the company did relatively well in hiring black women, policies favoring workers with high school diplomas and requiring employment tests for craft jobs kept black women concentrated in the lowest-paid, most demeaning jobs, and rarely allowed them entry into management jobs.⁷⁰ By comparison, Sears had a smaller percentage of African-American employees, and many of the EEOC complaints were drafted by women's groups such as Chicago NOW and WE with the help of individual Sears women. Although the EEOC's case against Sears was originally based on race and gender, the race cases were settled early on and only the sex discrimination claims went to trial.⁷¹

⁶⁸ Stockford, The Bellwomen, 14-15, 28.

⁶⁹ MacLean, Freedom is Not Enough, 131-132.

⁷⁰ Stockford, The Bellwomen, 84-85.

⁷¹ In general, African-Americans, including black women, were in the forefront of challenging employment discrimination and their efforts spread to other groups, including white women. MacLean, Freedom is Not Enough, Section I; Cobble, The Other Women's Movement, chap. 1. On black women coming to dominate operator positions in the Bell System, see Venus Green, Race on the Line: Gender, Labor, and Technology in the Bell System, 1880-1980 (Durham, N.C.: Duke University Press, 2001).

In the wake of the AT&T settlement, NOW used a variety of strategies in attacking employment discrimination, including direct action, administrative complaints, and litigation. It relied heavily on filing charges of discrimination with the EEOC and state fair employment practices offices, either helping women employees to do so or filing class actions on their behalf. A May 1973 issue of Family Circle, a mainstream women's magazine, named NOW as a resource for advice on how to file a complaint in an article entitled, "How to Show The Boss He's Wrong When He Won't Treat You Right."⁷²

NOW and WE also gathered statistical proof to support their charges of discrimination. They collected evidence from each department in an institution, either through written proof or anecdotal accounts, such as going to the facility "undercover" and counting numbers of male and female employees. The AT&T case had been largely based on statistical evidence. In a publication on achieving equity in academia, one NOW leader noted, "There is variation on what is considered proof, but so far, a statistical argument has tended to be considered a prima facie case." Members were cautioned to set the stage for both individual and class relief by gathering the name of "at least one plaintiff as a representative of the affected class" for "each kind of discrimination," i.e. recruitment, hiring, tenure.⁷³

NOW and other women's groups also demanded meetings with top officials at local corporations to discuss their affirmative action plans, often with an accompanying publicity event such as a rally or press release. The Compliance Task Force published a

⁷² NOW Compliance and Enforcement Task Force Newsletter, No. 9, June 1973, p. 5.

⁷³ Ellen Morgan, Comfort Me With Apples: A Hard-Core Action Handbook on Achieving Equity for Women in Academe, National Organization for Women, Task Force on University Compliance, p. 23, UIC, NOW Chicago, 81-18, Box 12, Folder 106.

survey by the NOW chapter in Minneapolis-St. Paul ranking local corporations on criteria such as willingness to meet with NOW representatives, availability of affirmative action programs for employee and/or public review, job descriptions, and maternity benefits. It hoped the survey “could serve as an excellent guide for action by any employment/compliance task force seeking to define the problem areas in their local industries.”⁷⁴

At a time when Title VII was just beginning to be interpreted, NOW was also eager to go to court to make its mark. In the context of equity in academia, a NOW leader noted, “we need test cases to get favorable decisions and to establish precedents in the areas of sex discrimination.” She argued that courts would provide more protection to employees because “you will get money and budget lines and the firing of individuals who discriminate more easily . . . , and . . . it is less likely to result in firings of women who protest or call attention to sexist abuses.” Even the availability of administrative remedies through the EEOC and other agencies should not stop litigation where useful: “If you know the agencies in your region will not be effective or sympathetic, you may wish to choose the court route immediately.” Women’s groups were frustrated with administrative agencies for being slow to respond to charges due to a massive backlog and for being too lenient toward corporations, such as approving the steel industry settlement without any backpay. Moreover, they questioned whether employers even took the agency seriously, especially before 1972, when the EEOC gained enhanced powers to directly sue corporations for discrimination. Courts were seen as more powerful, and able to “order an affirmative action plan which is much more stringent”

⁷⁴ Stocking, ed., “Chapter Surveys Area Sex Bias,” NOW Compliance Newsletter, No. 12, April 1974, p. 5, UIC, NOW Chicago, 78-034, Box 2, Folder 2.

than those required by the compliance agency. Despite this eagerness for litigation, however, there was no illusion that the courts could “be relied on to be impartial and free of sexism.”⁷⁵

Nonetheless, especially after seeing how litigation helped force AT&T to negotiate, women’s groups were even more likely to see the courts as the answer. The introduction to the “Strategies for Business Compliance and Government Enforcement” meeting at the February 1973 NOW Convention noted, “It is apparent that employment discrimination cases should move into court as fast as possible. The Federal court can achieve quicker and more satisfactory relief than a government agency. Government agencies are in business to conciliate and conciliation has not deterred sex discrimination in employment. Court awards, orders and consent decrees (like AT&T) set precedents and build case law which will benefit other women fighting for employment opportunities.”⁷⁶ Whether it was true that the courts were faster, women’s groups suddenly were eager to use a precedent they believed was set by the AT&T case, that disparities based on statistical evidence constituted evidence of sex discrimination.

Women’s Groups’ Relationship With the EEOC

NOW and WE also worked closely with the EEOC, in a contentious but cooperative relationship. On the one hand, they cooperated over cases such as AT&T, with the women’s groups helping female employees file charges and applying external pressure on employers through public relations actions. On the other hand, NOW Chicago and WE saw themselves as watchdogs of the EEOC, which despite having the

⁷⁵ Morgan, Comfort Me With Apples, p. 23.

⁷⁶ Rosenberg Papers, 1979-1987; Joan Hull, Introduction, SIXTH NATIONAL NOW CONFERENCE, National Task Force on Compliance and Enforcement, Washington, D.C., February 17, 1973, p. 1. 87-M143--87-M171, Box 2, Folder 76. Schlesinger.

power to force employers to change, never did quite enough fast enough to satisfy advocacy organizations. NOW and WE constantly monitored the EEOC and pressed it to enforce the laws more effectively and promptly. NOW's long history with the EEOC reached back to its founding in 1966, when it was formed largely to pressure the EEOC to stop newspapers and employers from using sex segregated advertising and to enforce Title VII on behalf of women as well as minorities.⁷⁷ In fact, Aileen Hernandez, the first female commissioner of the EEOC, left the agency to become the second president of NOW "because it would not implement its mandate to end sex discrimination." Since then, however, "N.O.W. and the EEOC . . . gradually [began] to work in a partnership in attempting to eliminate the evils of employment discrimination."⁷⁸

Women's organizations took great interest in who was appointed to enforce anti-discrimination laws. In July 1970, NOW President Hernandez wrote to President Nixon to complain about an unsatisfactory nominee to the commission, a "socialite who has never held a job."⁷⁹ Hernandez emphasized the "herculean" tasks a commissioner was required to perform and that those affected by the EEOC had a right to a qualified and committed expert. She implored him to appoint "someone knowledgeable and committed to the cause of equality in employment opportunity for all" but also remained adamant that at least one woman (and preferably more) be on the commission. She threatened that "[t]o do less" than "nominate only those persons who are capable of fulfilling this

⁷⁷ Scott, Statement of NOW On The Appointment of John Powell As Chairone of the EEOC; Cobble, The Other Women's Movement, 185.

⁷⁸ Scott, Statement of NOW On The Appointment of John Powell As Chairone of the EEOC, 1.

⁷⁹ Aileen C. Hernandez to Hon. Richard M. Nixon, 7 July 1970, p. 1, UIC, NOW Chicago, 78-034, Box 3, Folder 1.

responsibility with maximum effectiveness” would “certainly affect the credibility your administration has with racial and ethnic minorities and with women.”⁸⁰

In December 1973, Ann Scott testified for NOW at hearings on the appointment of John Powell as chair of the EEOC, expressing concern over whether the agency would further the goals of eliminating discrimination.⁸¹ She noted that the 1972 Employment Discrimination Act gave the EEOC power to file lawsuits, and that the commission had included sex in over 55 percent of its cases since July 11, 1973. The commission “has vigorously defended its sex discrimination guidelines and has not lacked the courage to litigate novel issues of sex discrimination such as maternity leave and transfer policies for clerical workers into plant or craft jobs. N.O.W. wants to see a continuation and strengthening of EEOC’s current approach.”⁸² After Powell became chairman, NOW officers and Compliance Task Force members met with him in February 1974 to emphasize NOW’s concerns, including that back pay be included in every settlement agreement, particularly in the steel industry; that the new “Tracking System,” which focused on large employers, continue “because of its enormous potential effectiveness”; and that voluntary agreements were generally insufficient and inadequate. NOW members also pointed to internal problems such as the “enormous” number of sex discrimination complaints from female EEOC employees, and cautioned members to be vigilant that Powell’s new policy of limiting company investigations to the actual charges

⁸⁰ Hernandez to Nixon, 7 July 1970, p. 2.

⁸¹ Scott, Statement of NOW On The Appointment of John Powell As Chairone of the EEOC, 1.

⁸² Scott, Statement of NOW On The Appointment of John Powell As Chairone of the EEOC, 3.

made in order to reduce the backlog “do not compromise the rights of the charging parties.”⁸³

NOW also monitored the EEOC’s policy changes and guidelines, such as a 1973 reorganization in which the commission hired 400 new lawyers and established regional litigation centers in Atlanta, Chicago, Denver, Philadelphia, and San Francisco to pursue complaints of job discrimination. After the 1972 amendments to Title VII, the commission had used its new litigation power to bring twenty suits in one month, against companies such as General Motors and the UAW; Euclid & Cleveland in Ohio; National Steel Corp. and the Independent Steelworkers Union; Weirton in West Virginia; General Electric in Lynchburg, Virginia; and Metropolitan Life Insurance in New York City. In addition, eighty more cases were being prepared for filing.

In response to the reorganization, NOW quickly recommended that chapters ask their local EEOC office how they could “cooperate with them”; how complaints against the companies “can be joined with the government agency’s action”; how complaints could be expanded to include sex discrimination;” and “how to get the regional or district EEOC office to file against a sexist employer.” The Task Force also recommended persuading state or local agencies to hold public hearings on women’s economic and social position in the community, such as the week-long 1970 New York City Commission on Human Rights hearings on “Women’s Role in Contemporary American Society” initiated by NOW-NYC.⁸⁴ At such hearings, the agency could issue press

⁸³ Stocking, ed., “NOW - EEOC Meeting,” NOW Compliance Newsletter, No. 12, April 1974, p. 3, UIC, NOW Chicago, 78-034, Box 2, Folder 2.

⁸⁴ NOW Compliance and Enforcement Task Force Newsletter, No. 9, June 1973, p. 3.

releases and invite industry members to participate, and NOW could arrange for women to testify and suggest topics and people to speak.

NOW also took note when the EEOC instituted a new “Track System,” which focused its efforts on four to six large national corporations (Track 1) and 20-40 smaller companies (Track 2). The companies were allegedly among the most biased employers in the nation, chosen based on the number of complaints filed with the EEOC, the number of employees in the company and the industry, and the “growth potential of the company and industry.” Track 1 corporations would be investigated by the new National Programs Division, headed by attorney David Copus, a high-profile member of the commission’s AT&T team and a NOW member. The commission intended to spend up to half of its \$40 million budget investigating the target companies and conciliating the complaints. If conciliation failed, it planned to initiate litigation before July 1974. The Track 2 companies would be distributed throughout EEOC’s seven regions. Despite its new focus on wide-reaching national actions, the EEOC intended to continue processing individual complaints. However, in light of the 60,000 complaint backlog, NOW strongly welcomed a more systemic approach to discrimination.⁸⁵

Women Employed was particularly involved in legislative changes concerning the EEOC. Between 1976 and 1978, WE representatives testified at least seven times before House and Senate Subcommittees on issues such as Equal Opportunity Laws in the Banking Industry; Budget Appropriations for the EEOC and Department of Labor’s Office of Federal Contract Compliance (OFCC); and in support of President Jimmy Carter’s Equal Employment Opportunity Reorganization Plan. It also issued comments

⁸⁵ Stocking, ed., “EEOC on the Track System,” NOW Compliance Newsletter, No. 10, September 1973, p. 8, UIC, NOW Chicago, 78-34, Box 2, Folder 8.

on Affirmative Action Regulations, changes in EEOC structure and procedures, EEOC recordkeeping regulations, and an assessment of Government Equal Employment Opportunity Enforcement agencies.⁸⁶

In fact, the women's organizations relied on the resources and reach of the EEOC for much of the investigatory work that they, as small non-profit organizations, could not do. Since it was a charge-driven agency, the women's groups initially filed charges of discrimination against employers they wanted the commission to investigate and then used EEOC findings to support their own actions, such as pressuring employers to settle discrimination claims. In just this way, at a May 1974 Sears annual shareholders meeting, NOW members announced they had filed charges of discrimination against the company. They issued a press release announcing, "It is up to the EEOC to investigate these and other abuses at Sears. NOW intends to continue taking action to insure equality in employment for women."⁸⁷ Working women's groups trusted this method as it had proved effective where the commission did a major investigation and issued significant findings, such as in the AT&T case. In 1972, NOW's Compliance and Enforcement Task Force assured board members that the fact that the FCC lacked money and staff to investigate AT&T's requested rate increase would not affect hearings on the EEOC's petition against AT&T. Since "EEOC has already done the investigative work required on the discrimination at AT&T," the FCC could not use lack of money and staff to avoid

⁸⁶ Women Employed Publications, pp. 2-3, UIC, WE, 2000-16, Box 39.

⁸⁷ NOW Chicago, "SUMMARY OF THE SEX DISCRIMINATION CHARGES AGAINST SEARS," Press Release: Sears Annual Meeting to Include Sex Discrimination Charges, 20 May 1974, p. 4, UIC, NOW Chicago, 83-27, Box 1, Folder 2.

responding to the charge. The EEOC intended to proceed with the hearings, and NOW asked to testify.⁸⁸

Despite their reliance on the EEOC, women's groups in the early 1970s had few illusions that the commission would solve the problem of discrimination on its own. A NOW handbook on achieving equity in academia encouraged activists to skip the full administrative process and go to court immediately if they knew "the agencies in [their] region [would] not be effective or sympathetic." One NOW leader noted, "It has been the experience of some very knowledgeable and dedicated feminists that complaining to a federal agency is a slow process which brings scant results." Regional offices differed in "commitment and effectiveness," and some investigators of discrimination were even sexist. Despite this cynicism about the usefulness of the compliance agencies, she held out hope "that pressure . . . from large numbers of women may be effective in persuading them to change internal attitudes and tighten enforcement." She stressed another form of power they held, that "OUR TAX MONEY PAYS FOR THE AGENCIES."⁸⁹ NOW was aware it would have to pressure compliance agencies to accomplish its agenda and was well-organized for the task. The Compliance Task Force was virtually dedicated to that job, as seen by activities such as the "Strategies for Business Compliance and Government Enforcement" presentations at the 1973 national conference. There members related how they carried out particular actions:

NOW's Task Force on Compliance and Enforcement must take action to assist women to help themselves achieve compliance by their employer and to make government agencies responsive to sex discrimination complaints. If women aspire to progress in business they will have to assert their employment rights granted by Federal, state and local statutes

⁸⁸ Myers, Report to the National Board of Directors of NOW, February 1972, p. 1.

⁸⁹ Morgan, Comfort Me With Apples, p. 23 (emphasis in original).

and executive orders. Employers must be confronted and government pressured for enforcement of the laws which forbid sex discrimination in employment.⁹⁰

Where warranted, the women's groups were willing to even openly attack the agencies. NOW Compliance Task Force members concluded that a November 22, 1971 meeting on university compliance with the Department of Health, Education & Welfare's (HEW) Office of Civil Rights in Washington, D.C. led to "less-than enthusiastic enforcement efforts on sex discrimination, less than sensitive responses to our efforts and women's problems in general . . . , and unreasonable delays in processing every case we file." As a result, in February 1972, Task Force Coordinator Mary Lynn Myers recommended to the board immediate court action against HEW-OCR.⁹¹ The Task Force also criticized the OFCC, which monitored government contractors for compliance with anti-discrimination laws, for not sanctioning discriminating companies by rescinding approval of inadequate affirmative action plans.⁹²

Similarly, NOW members of the California Coalition of National Organizations did not hesitate to criticize the EEOC for entering into voluntary agreements and consent decrees without consulting the minority and women workers affected by them. The coalition sent a petition to Powell, complaining that the EEOC's procedures weakened its bargaining power and cast it in a paternalistic role. In fact, the coalition said, it was more successful negotiating on its own than with EEOC representation. For example, NOW won a 60 percent minority quota in the San Francisco Police Department and a 40 percent goal for women in management from Bank of California and Security Pacific Bank,

⁹⁰ Hull, Introduction, SIXTH NATIONAL NOW CONFERENCE, 17 February 1973, p. 1.

⁹¹ Myers, Report to the National Board of Directors of NOW, February 1972, p. 1.

⁹² Lynne Darcy, "Judicial Push on Executive Orders," NOW Compliance Newsletter, No. 14, November 1974, p. 6, UIC, NOW Chicago, 78-034, Box 3, Folder 1.

while the EEOC settled for 25 percent minorities and 5 percent women in craft positions at PG&E.⁹³

Working women's groups even attacked compliance agencies for discrimination within their own ranks and for failing to set a good example for corporations. Myers reported to NOW's board in February 1972 that the Task Force had received numerous complaints and negative feedback from women who worked for the agencies. She noted that the Task Force was appointing someone to coordinate in-house compliance work regarding federal, state, local compliance and enforcement agencies which "will be a big job, and a very trying one."⁹⁴ The Task Force stated, "NOW has no tolerance for sex discrimination practiced by a government agency which administers laws prohibiting sex discrimination in employment." NOW's board later pledged to "move on any federal compliance agency that internally practices sex discrimination or shows a lack of sensitivity in handling sex discrimination complaints" and to "initiate decertification procedures with the EEOC against any state and/or local agency which does not administer its civil rights law to bring relief to the aggrieved parties." It urged chapter compliance coordinators to report federal agencies demonstrating discriminatory practices, lack of responsiveness to sex discrimination complaints, and "documentation on how a state and/or local agency's application of its civil rights law does not bring relief to the complainant/s." NOW obtained the EEOC's own EEO-1 report, showing the representation of women at each level within the agency, and two task force members visited the EEOC's Northeast Regional Director to identify "the lack of adequate female

⁹³ Stocking, ed., "NOW Joins in Challenge to EEOC's Voluntary Settlements," NOW Compliance Newsletter, No. 12, April 1974, p. 6, UIC, NOW Chicago, 78-034, Box 2, Folder 2.

⁹⁴ Myers, Report to the National Board of Directors of NOW, February 1972, p. 2.

representation at the higher grade levels, personnel not performing, and offices where employees were not properly trained.”⁹⁵

Forging Feminist Coalitions

In working to change employment practices, the women’s groups in Chicago made significant efforts to establish coalitions to build their actions and support others. Chicago NOW, and especially Mary Jean Collins, focused particularly on class issues. They worked closely with WE, whose mission was specifically to help working-class women. Together, activists in these groups organized across class lines in an attempt to build coalitions around the issues faced by working women. Chicago NOW and WE had a particularly close relationship, with officers and members moving back and forth between the two organizations during the early years. Collins and Ladky had a strong personal relationship and later served as co-coordinators of NOW’s Sears Action Taskforce. On Sears specifically, the two organizations divided up the work; NOW members leafleted at the Sears Tower while WE members focused on Sears retail stores. They also maintained ties to other organizations focused on working women’s issues. For example, the YWCA worked on sex and race discrimination, and throughout the early 1970s, Chicago NOW held its board meetings at the Loop YWCA.⁹⁶

More than many of her colleagues, Collins’ brand of feminism focused on women’s employment and issues of class, and she worked hard to make NOW’s membership reflect this objective. In a 1974 interview, she claimed that among the

⁹⁵ NOW Compliance and Enforcement Task Force Newsletter, No. 9, June 1973, p. 2.

⁹⁶ NOW Chicago, Board Agenda, 5 June 1974, UIC, NOW Chicago, 81-18, Box 15, Folder 126; NOW Papers; Memorandum from Mary Jean Collins and Anne Ladky to NOW Chapter Presidents, Sears Subcommittee, Board of Directors, and Task Force Coordinators, November 9, 1974, p. 3. MC 496, Box 44, Folder 18. Schlesinger.

things that bothered her most about NOW was that of its 40,000 members only 10 percent were black and 10 percent men. She pledged to boost those numbers and for “next year’s membership rolls . . . to carry hundreds more names of blue collar workers.” She noted, “We have attracted and begun to meet the needs of many new groups of women, including nurses, older women, secretaries and clerical workers, and blue collar workers.” Collins viewed most feminist issues through the lens of economic concerns. For example, she pointed to “the new minimum wage bill cover[ing] household workers for the first time” as a success.⁹⁷ Collins argued that pay issues were “crucial . . . for women, because seven million women in this country are the sole supporters of their families, either children, dependent parents, or another person besides themselves.” She also echoed the concerns of labor feminists, such as maternity leave and child care: “Men and women should not be burdened or punished because they choose to have children, so you can expect to hear more about paid maternity and paternity leave.” She further asserted, “The community must also develop good child care centers to help take the burden off individual parents, and help to provide an enriched educational system for the children.”⁹⁸

When asked to state NOW’s top priorities, however, Collins wavered between employment and other issues. In a 1973 newspaper interview she cited passage of the ERA and abortion as NOW’s top priorities.⁹⁹ In a 1974 position article discussing her run for NOW’s presidency, she argued, “Our major priority at the [Houston] convention will be passage of the Equal Rights Amendment (ERA),” probably in large part because

⁹⁷ Colleen Dishon, “Largest feminist group: N.O.W. has outlived lib jokes,” Family today - Chicago today, 30 May 1974, p. 18, UIC, NOW Chicago, 78-034, Box 6, Folder 7.

⁹⁸ Stevenson, “The woman from NOW.”

⁹⁹ Nowlen, “NOW Board member talks about role of women.”

her home state of Illinois still needed to ratify it. However, another “overriding concern” was economics: “We need to move faster on those jobs which have typically been considered ‘women’s work’, . . . such as clerical workers, secretaries, bank tellers, nurses, and social workers. Why aren’t these women being paid the salaries they’re entitled to? Why is it that a male nurse or a male secretary receives more than his female counterpart?” She wanted to address the needs as well of “new constituencies” such as older women, blue collar workers, and minority women by working on employment, child care, education, and credit issues.¹⁰⁰

One significant project was to work with female steelworkers in Gary, Indiana “so they could make their charges of unequal treatment stick against U.S. Steel.” The EEOC and other federal agencies negotiated with steel companies and the United Steelworkers of America (AFL-CIO) on an industry-wide settlement in the style of AT&T. Chicago NOW worked on a grassroots counterpart to the federal investigation and negotiations. It held a public hearing with government compliance agencies in Gary in December 1973, “at which women members of the Steelworkers Union testified on problems of sex discrimination . . . in the U.S. Steel Mills.” The April 1974 Compliance Newsletter reported that the meeting was very successful and resulted in formation of a women’s group within the union, and that Chicago NOW had filed a charge with the EEOC on behalf of women steelworkers in Gary. Although the Justice Department and EEOC assured NOW that women would be included in the industry-wide settlement, the organization was taking “appropriate steps to see that women’s rights are protected

¹⁰⁰ Jaspers, “Local feminist running for national NOW president.”

should the agreement prove inadequate in any way.”¹⁰¹ Despite spending “hundreds of hours providing know-how to women in the mills of Gary,” Collins acknowledged that efforts to form a Steelworkers NOW faced significant obstacles.¹⁰² One colleague wrote, “The future of Steelworkers NOW, . . . does not look promising -- for both interpersonal and union/political reasons.” However,

You may be interested to know that you, Dorothy [Haener?], and some of the other members of Chicago NOW made a significant impact on [one woman, who] . . . seems to be determined to move ahead to a larger framework. By chance, last week, she met some women who had been involved in a small NOW chapter in Highland . . . , Indiana. She plans to work with them on a broad range of issues -- both work-related and community, and to help broaden the base of that chapter. So, even if there is no Steelworkers NOW, all has by no means been lost.¹⁰³

In May 1974, the EEOC, Department of Justice, and Department of Labor signed an industry-wide settlement agreement with the major steel companies and the union. NOW filed a motion to intervene, asking the court to “modify the agreement to provide adequate protection of the rights of women represented by NOW,” by awarding back pay and affirmative action promotions to women in the steel industry. NOW was permitted to intervene not as an organization but only on behalf of three female employees representing former, present, and future employees of the steel companies. However, the district court refused to modify the agreement, and NOW appealed to the Fifth Circuit

¹⁰¹ Stocking, “Women Begin to Test Their Strength Against Steel,” NOW Compliance Newsletter, No. 12, April 1974, p. 1.

¹⁰² Dishon, “Largest feminist group,” p. 18.

¹⁰³ Nancy Seifer to Mary Jean Collins, New York, NY, 4 September 1974, UIC, NOW Chicago, 78-034, Box 7, Folder 4.

Court of Appeals, arguing the agreement failed “to address the historic and pervasive discrimination which has deprived women of opportunities in the steel industry.”¹⁰⁴

With varying levels of success then, NOW and WE also tried to maintain a connection to union women and the labor movement. NOW had a mixed relationship with these constituencies. On the one hand, it created some enemies with its willingness to attack unions as well as corporations that discriminated against women.¹⁰⁵ However, difficult economic times and resulting hardships for working women led to an awareness that union women and their organizations played a crucial role in preventing employers from laying off large numbers of women and in negotiating for better working conditions. On one memo discussing an August 1970 FCC order requiring common carriers to develop affirmative action programs for minorities and women, a member of NOW’s Federal Compliance Committee wrote, “Get support: Get other local organizations to support your proposals. If you get nowhere with your meeting, get some other community groups to ask for meetings to discuss the same question.” She wrote in by hand, “Important: Also attempt to get the support of the union, if there is one

¹⁰⁴ Lynne Darcy, “Steel [Or is it Steal],” NOW Compliance Newsletter, No. 14, November 1974, p. 5, UIC, NOW Chicago, 78-034, Box 3, Folder 1.

¹⁰⁵ Dishon, “Largest feminist group,” p. 18 (“N.O.W. has declared open season on factory management and union bosses who discriminate against women.”). NOW often found itself at odds with labor feminists, for example, over programs offering social welfare to mothers. NOW preferred equal opportunity and an increase in individual income over a focus on family income, which it feared would “reinforce . . . traditional gender roles and strengthen[ed] the male breadwinner ideal.” Labor feminists, however, stressed that “women, like men, were not . . . unencumbered individuals” and “[t]he right to a life apart from work and the economic value of reproductive labor needed acknowledgement.” Cobble, The Other Women’s Movement, 216. Similarly, NOW clashed with California labor groups who refused to support the ERA unless labor protections were also extended to men. Nevertheless, the two sides were often able to find a productive common ground. After California ratified the ERA the two sides worked together to expand the reach of former state sex-based labor standards. *Ibid.*, 194.

involved!”¹⁰⁶ And there was cause for hope that some unions would ally with NOW, which had a Labor Union Task Force that held well-attended workshops at its national conferences.¹⁰⁷ In early 1974, Dorothy Haener, who had re-joined NOW, wrote to Collins about setting up a National Task Force on Women in Poverty. She could not handle all of the recent requests for information and said, “it seems to me that under the crisis and serious unemployment that now exists, we are almost compelled to do something.”¹⁰⁸ The two corresponded about related issues, with Collins noting, “It looks like we’ll get the minimum wage through Congress again, if we can only pressure Nixon into signing it.”¹⁰⁹

Moreover, just as union women had worked on the founding of NOW, NOW members encouraged the growth of CLUW. Union members who had been active in forming NOW and the National Women’s Political Caucus (NWPC), including those from the UAW, International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers (IUE), CWA, American Federation of State, County and Municipal Employees (AFSCME), and American Federation of Teachers (AFT), also initiated the formation of CLUW. It was traditionally hard for labor women to organize across union lines, and they often did not know what women in other unions were doing. Members of women’s groups such as NOW and Women’s Equity Action League (WEAL)

¹⁰⁶ Lucy Komisar, The N.O.W. Phone Company Anti-Discrimination Affirmative Action Kit, National Organization for Women, Federal Compliance Committee, p. 4, UIC, NOW Chicago, 78-34, Box 2, Folder 8.

¹⁰⁷ See, for example, Marjorie Stern to Mary Jean Collins-Robson, 14 April 1974, UIC, NOW Chicago, 78-034, Box 7, Folder 4.

¹⁰⁸ Dorothy Haener to Mary Jean Robson, cc: W. Heide; A. Hernandez, 22 March 1974, UIC, NOW Chicago, 78-034, Box 15, Folder 7.

¹⁰⁹ Mary Jean Collins to Dorothy Haener, 20 March 1974, UIC, NOW Chicago, 78-34, Box 2, Folder 2.

encouraged labor activists to raise women's issues within their unions, and their organizations provided one way for women from different unions to get to know each other, which would be necessary for CLUW to come about.¹¹⁰

Collins herself maintained close ties with union allies, including encouraging the growth of CLUW in 1974. She wrote to Haener in March of that year, "It really looks like the coalition of Labor Union Women is going to draw a tremendous crowd. It is like a dream come true. I hope good things come from it."¹¹¹ After the CLUW convention, Marjorie Stern, the leader of the AFT caucus, credited NOW with helping to create a favorable atmosphere for CLUW: "We certainly did have over 1,000 women at the CLUW meeting! No one expected 3,300! What a fantastic success. . . . We may take some of the program prerogatives from NOW, but without the atmosphere in American society that NOW has created we surely wouldn't be an organization at all."¹¹² Collins responded, "CLUW was a wonderful success - I look forward to working on common goals. See you in Houston."¹¹³ Collins also maintained union ties through the Midwest Academy. In 1975, she served on its Board with Day Piercey, Staff Director of WE; Henry Scheff, Research Director for Citizens Action Program; and labor activists Paul Booth, International Representative for AFSCME, and Liz McPike, Coordinator for AFSCME Illinois.¹¹⁴

¹¹⁰ Evans, Tidal Wave, 89. Of course, the origins of CLUW run much deeper, including to the work of African-American women trade unionists such as Addie Wyatt. See Cobble, The Other Women's Movement, 32, 201-05.

¹¹¹ Collins to Haener, 20 March 1974.

¹¹² Stern to Collins-Robson, 14 April 1974.

¹¹³ Handwritten note from Mary Jean Collins to Marge Stern, n.d. (ca. 1974?), UIC, NOW Chicago, 78-034, Box 7, Folder 4.

¹¹⁴ Booth to "Friend", n.d. (mid-1975), p. 3.

As for WE, some of its members were union women, and the organization saw unions as potential allies and interacted with them frequently early on. However, WE wanted to maintain its independent agenda and not become simply a feeder organization that organized women and turned them over to unions as members. Some working women's groups did affiliate with unions, most notably 9 to 5, the Organization for Women Office Workers, in Boston, which formed Local 925 of the Service Employees International Union (SEIU) in 1981.¹¹⁵ WE did not follow this route, in part because it was interested in challenging both non-union and anti-union employers, as well as discriminatory unions.

The interest of working women's groups in developing coalitions around class issues extended to their campaign against Sears, which, they argued, was the largest general retailer in the United States, and thus responsible for the poverty-level wages earned by the average female salesclerk. In August 1974 Chicago NOW pressed the U.S. Commission on Civil Rights to hold public hearings on Women in Poverty, focusing specifically on Sears "as the largest employer of clerical workers in the city of Chicago." Ladky testified on "the overall employment practices of Sears and the implications of Sears' strategies to avoid compliance with EEOC laws," while female workers testified about "low pay, lack of promotional opportunities and discriminatory hiring practices" – all countering Sears' claims that it was a model of equal employment opportunity. The hearings "received national media attention," helping to "make Sears' practices known to women throughout the country as well as to interested organizations," and the Sears

¹¹⁵ Anne Ladky, interview by author, 12 March 2003; Evans, *Tidal Wave*, 89.

Subcommittee subsequently made contact with other organizations with complaints against Sears with whom it hoped “to be working . . . over the coming months.”¹¹⁶

Chicago NOW also worked to merge race with class and gender issues. The Subcommittee planned to work with the Indiana Black Caucus, which voted to boycott Sears for moving its fifty-year-old store in central Gary, Indiana to a suburban shopping center inaccessible by public transportation. Sears ignored an August 1974 petition with 10,000 signatures and a September march led by Gary mayor Richard G. Hatcher protesting the anticipated loss in city revenue, and made plans to close other inner-city stores, such as its Mission District store in San Francisco. One Gary councilman declared, “We, the black community, built you up and now it’s time for the black community to break you down.” Ladky arranged to meet with a group from Gary, and plans were made to bring the protest to the National Black Caucus, which “expressed interest in working with NOW to expose this policy.”¹¹⁷ In a lengthy memo to NOW leaders, Collins and Ladky noted that a nonprofit retail industry study found that minorities “continue to hold the dirtiest, lowest-paid, least-skilled jobs” and that the retail industry, particularly major chains, lag “behind all employers in hiring minorities,” in part because of their location in suburban shopping centers away from large urban minority populations.¹¹⁸

¹¹⁶ Lynne Darcy, “SEARS SUBCOMMITTEE COALITION ACTIVITIES,” NOW Compliance Newsletter, No. 14, November 1974, p. 9.

¹¹⁷ NOW Papers; “Hatcher Leads Protest against Move by Sears,” Chicago Sun-Times, September 8, 1974, p. 104. MC 496, Box 44, Folder 19. Schlesinger. NOW Papers; Mary Jean Collins-Robson and Anne Ladky, Sears Action Bulletin, No. 4, October 1974, p. 2. MC 496, Box 209, Folder 66. Schlesinger. Memorandum from Collins and Ladky to NOW Chapter Presidents et al., November 9, 1974, p. 2. Aileen C. Hernandez to Ray Graham, 20 November 1974 (in possession of Rebecca Davison).

¹¹⁸ Memorandum from Collins and Ladky to NOW Chapter Presidents et al., 9 November 1974, p. 2.

Another potential coalition partner in the fight against Sears was the Asian League for Equality. In August 1974, leaders of the Asian League, the Japanese American Citizens League, and the Filipino American Council met with Sears executives such as Ray Graham, who directed Sears' equal employment opportunity efforts, about "problems of recruitment and promotion of Asian personnel at Sears." Between 1969 and 1973, the percentage of Asians employed by Sears dropped from .6 percent to .5 percent, despite increases for all other minority groups. Asian-American organizations also received complaints from Sears employees about lack of promotional opportunities. In response, Graham argued that the total number of Asians employed increased from 836 to 2,027 during that period, and then alienated the Asian-American leaders by claiming that Sears did not need a specific affirmative action plan for Asians because they comprised less than two percent of the U.S. population. The groups were eager to take action by increasing recruitment, sending a press release to Asian newspapers, and contacting legislative representatives about the meeting and what they intended to do.¹¹⁹ In September, Ladky wrote to a Task Force leader about "lots of coalition possibilities opening up," and mentioned that the Asian League was setting up a meeting for them with Asian women employed at Sears.¹²⁰ In return, the Sears Subcommittee helped the Asian League collect information for filing charges of discrimination.¹²¹

¹¹⁹ NOW Papers; Memorandum from Hiroshi Kanno to Members, September 5, 1974. MC 496, Box 44, Folder 19. Schlesinger. Memorandum from Collins and Ladky to NOW Chapter Presidents et al., 9 November 1974, p. 2.

¹²⁰ NOW Papers; Memorandum from Anne Ladky to Lynne Darcy, September 12, 1974, p. 1. MC 496, Box 44, Folder 19. Schlesinger.

¹²¹ Memorandum from Collins and Ladky to NOW Chapter Presidents et al., 9 November 1974, p. 2.

In a November 1974 memo, Collins and Ladky updated NOW chapter presidents, national and Sears subcommittee leaders, board members, and allies from other organizations about groups they were “working with . . . on the possibility of coalition action” against Sears. The Senior Skills Foundation was angry about Sears’ mandatory retirement policy and its refusal to hire people over sixty-five for part-time work needed to “supplement inadequate Social Security benefits.” The National Consumers League focused on “product safety, widespread ‘bait and switch’ tactics practiced by Sears, and Sears’ intensive lobbying against legislation to create a national Consumer Protection Agency.”¹²² While gathering evidence about Sears’ employment practices, Atlanta NOW’s Special Sears Committee used the YWCA, which worked on race and sex discrimination issues, as the drop-off point for their “spy” to bring data.¹²³ Collins and Ladky noted they were “working with these groups on the possibility of coalition action” against Sears.¹²⁴

Collins and Ladky also reported that the Interfaith Center on Corporate Responsibility (ICCR) and National Council of Churches had helped force Sears to disclose its national employment data in its 1973 Annual Report and was “anxious to work with NOW” on the Sears campaign. In November 1974, ICCR “voted to make Sears a national and local action target” and found “that a (shareholder) resolution

¹²² Memorandum from Collins and Ladky to NOW Chapter Presidents et al., 9 November 1974, pp. 2-3.

¹²³ Papers of NOW Officers -- Lightfoot, 1971-1977; Memorandum from Judith Lightfoot to Sears Sub/Compliance re: “Thisa and thata on the state of affairs in Southeastern Territory”, October 3, 1974. MC 485, Box 3, Folder 12. Schlesinger.

¹²⁴ Memorandum from Collins and Ladky to NOW Chapter Presidents et al., 9 November 1974, p. 3.

requesting local facility information is needed.”¹²⁵ As a result of work done by NOW national board member Carole De Saram, ICCR decided to choose Sears “as a local and national action target.”¹²⁶

Aside from coalitions across class, race, and ethnic lines, the women’s groups in Chicago formed bonds with activists on other causes and working women’s organizations across the country. One source of these coalitions was the Midwest Academy’s training programs, which brought together a diverse group of students in each “class,” enabling them to make connections across class, racial, and regional lines that endured beyond the two-week training period. The Academy tried to maintain a strong alumni network, publishing a newsletter with updates on its former students, and asking them to contact classmates to help in fundraising.¹²⁷

Chicago NOW members were a regular fixture in Midwest Academy training sessions, including Sears committee chair Agnes Kelley, legislative committee chair Ryan Leary, who worked on a new ERA strategy, and Libby Tessner and Portia Morrison, who coordinated a Women’s Equality Day advertising book campaign to raise money for the “Women for Jobs and Justice” program. Collins and Ladky attended the summer 1973 class, and by summer 1975, reported back on coordinating NOW’s national campaign against Sears. WE students included Day Piercey and Jackie Ruff, who left WE in September 1975 after a year and a half of organizing “to join the staff of 9 to 5 [in

¹²⁵ Memorandum from Collins and Ladky to NOW Chapter Presidents et al., 9 November 1974, p. 2.

¹²⁶ Minutes of the National Organization for Women National Board Meeting, Denver, Colorado, 9-10 November 1974, p. 7, UIC, NOW Chicago, 78-034, Box 6, Folder 5.

¹²⁷ Booth to Lightfoot, 17 March 1975, p. 4. Papers of NOW Officers -- Lightfoot, 1971-1977; Barb Jones, Alumni Association Report, Midwest Academy, Summer, 1975, p. 1. MC 485, Box 7, Folder 20. Schlesinger.

Boston] to work on its organizing drive.”¹²⁸ Ann Scott, NOW’s Legal Vice-President from 1971 to 1975 and a Midwest Academy alumna, left a career in academia to become a lobbyist and consultant to the Secretary of Labor on prohibiting race discrimination by federal contractors, organized many NOW chapters, led ERA ratification efforts, and monitored EEOC enforcement until her untimely death from cancer in 1975.¹²⁹ Other Midwest Academy graduates contributed to the women’s movement. Morag Fullilove proposed sending a woman’s lobbyist to the Illinois legislature. Kit Duffy, who joined the Loop YWCA Board as chair of Chicago Women Against Rape Task Force, worked for state legislation to ensure better reporting and treatment of rape victims. In 1975 Mary Ann Lupa, NOW’s Illinois State Legislative Coordinator, worked on mobilization efforts for states needed to ratify the ERA.¹³⁰

These Chicago activists forged connections at the Midwest Academy that stretched across the country and across diverse issues and agendas. Male and female alumni from the 1973-1975 classes went on to a broad range of community organizing, from the environment – a canvassing director for Citizens for a Better Environment – to civil rights – working in Claiborne County, Mississippi to elect more black county officials. Academy alumni ran community programs in Boston, Illinois, North Carolina, and Madison, Wisconsin to protest excessive utility rate increases. Peter Wood promoted a Lifeline Program for every family to get a fixed amount of electricity at a rate they

¹²⁸ Jonesi, Alumni Association Report, pp. 3-5.

¹²⁹ Jonesi, Alumni Association Report, Midwest Academy Notes, In Memoriam. Some speculated that the organization would have continued on the working women-focused path advocated by Chicago NOW had Scott lived.

¹³⁰ Jonesi, Alumni Association Report, pp. 4, 6.

could afford and pushed for broad rate restructuring.¹³¹ In the area of labor organizing and workers' rights, one alumnus directed the Springfield office of AFSCME Illinois, whose "next step" was to organize 10,000-16,000 clerical workers throughout the state, while another organized cotton mill workers in Columbia, South Carolina in the Brown Lung Association and targeted the state legislature for workers' compensation and the Occupational Safety and Health Administration for better health standards and enforcement in the textile mills.¹³² Buddy Robinson worked with Wisconsin Welfare Rights Organization in Madison, "targeting state welfare bureaucracies for proposing welfare cuts when the cost of basic needs has sharply risen." He also lobbied the legislature for a tenant's bill of rights, and against utility companies that shut off service to welfare families unable to meet rising fuel costs. Joan White and Amy Parks, who were charged with welfare fraud by the West Virginia Welfare Department for allegedly political reasons, were long-time activists in the Welfare Rights Organization. Parks was found not guilty and the charges against White were dropped after "300 black and white supporters rallied in Fairmont, West Virginia" the night before the trials began.¹³³ Thus, the connections students made, though often focused on labor organizing, crossed racial, class, regional, and community lines.

Aside from NOW "and other women's groups striving to maintain and extend affirmative action," the Midwest Academy worked with a number of groups in community and labor organizing, including "the Citizens Action Program in Chicago and other . . . groups fighting . . . to return power and financial resources to communities;

¹³¹ Jonesi, Alumni Association Report, pp. 3-6.

¹³² Jonesi, Alumni Association Report, pp. 3, 5.

¹³³ Jonesi, Alumni Association Report, pp. 3-4.

Women Employed and the American Federation of State, County and Municipal Employees [AFSCME] winning new rights for white collar employees; and Georgia Power and other consumer groups battling utility rate increases and regressive rate structures.” Academy trainees were “working in organizations across the country, . . . from Wisconsin where the Peoples Rights Organization is defending welfare rights to Boston where 9 to 5 [the Organization for Women Office Workers] is protecting women’s rights.”¹³⁴ By 1975, the Academy focused even more attention on the women’s movement and labor organizing. Among its key fights, the Academy listed ratification of the ERA, “the effort to maintain the National Organization for Women as a coherent national force, the birth and growth of [CLUW], and the experimentation with the Women Employed model of mass work for women’s rights.”¹³⁵ Heather Booth explained, “We have worked with several rank and file labor efforts, and plan to expand activity supporting organizing and program to meet the current economic crisis.”¹³⁶

The Midwest Academy’s programs enabled organizers to connect and cooperate across the country. Collins and Ladky, for instance, attended the summer 1973 class with Ellen Cassedy, staff director of 9 to 5, which advocated on behalf of working women in clerical jobs. Cassedy spent two months working with WE in Chicago, and back in Boston, 9 to 5 supported NOW’s case against Sears when, several years into the investigation, Sears filed its own lawsuit against the federal government in an attempt to

¹³⁴ Booth to “Friend”, n.d. (mid-1975), p. 1.

¹³⁵ Booth to Lightfoot, 17 March 1975, p. 1.

¹³⁶ Booth to Lightfoot, 17 March 1975, pp. 2-3 (Aside from Collins and Piercey, other Academy consultants included Liz McPike, Coordinator of Illinois AFSCME, on labor organizing and working women, and Paul Booth, International Representative for AFSCME, on labor.).

preempt the EEOC's lawsuit against it.¹³⁷ Boston's 9 to 5 organized a protest in front of the Sears store in Cambridge, Massachusetts, where members distributed flyers and collected signatures for a petition urging Sears to drop its suit against the government agencies, "cooperate with the [EEOC] and settle the outstanding complaint," pay \$20 million in back wages, and "adopt an affirmative action program."¹³⁸ Cassedy even reached out to the national organization for guidance, proposing simultaneous demonstrations at Sears stores in several cities to NOW's Action Center in Washington, D.C. Although they hoped to draw attention to Sears' opposition to affirmative action, thereby increasing the cost of its lawsuit and discouraging other employers from bringing similar ones, she was concerned that might give the company "a platform they otherwise wouldn't have."¹³⁹

Also in Boston, the YWCA, though not directly involved in the campaign against Sears, made its own pragmatic efforts to change the company's workplace policies by organizing job training programs for low-income women in non-traditional jobs such as auto repair. Sears donated the equipment and an instructor, with the intent that graduates would be qualified for higher-paying jobs in traditionally male occupations, at Sears or elsewhere.¹⁴⁰ Although planned through local Sears facilities, YWCA Executive Director Juliet Brudney clearly viewed the projects as national in implication. She maintained

¹³⁷ Evans, *Tidal Wave*, 86.

¹³⁸ 9 to 5 Organization for Women Office Workers, "Equal Employment at Sears?: The Real Story Behind the Sears Law Suit," 1979, Schlesinger, 9 to 5; Judith McCullough to Captain Cosack, Cambridge Police, 28 March 1979, Schlesinger, 9 to 5; Conrad C. Fagone, Commissioner, City of Cambridge Public Works Department, to Judy McCullough, 6 April 1979, Schlesinger, 9 to 5; 9 to 5 Organization for Women Office Workers, "9 to 5 Organization for Women Office Workers, Petition to Sears," Schlesinger, 9 to 5.

¹³⁹ Ellen Cassedy, Staff Director, 9 to 5, to Arlie Scott, NOW Action Center, 16 March 1979, Schlesinger, 9 to 5.

¹⁴⁰ See, for example, Boston YWCA Records, 1858-1988; Juliet F. Brudney, Executive Director, Boston YWCA to Charles Worcester, attaching first draft of the "How To Manual," December 23, 1976. 89-M3. Schlesinger.

contact with former Sears CEO and philanthropist Julius Rosenwald's son and daughter-in-law, with whom she discussed the workshops when she "ran into" them on Martha's Vineyard during the summer of 1977.¹⁴¹

Despite the current historical narrative that says NOW was divided ideologically between East Coast and other chapters, Chicago NOW and WE worked closely with working women's groups from around the country. NOW leaders also recognized that in pursuing a company such as Sears, the strength of their national action depended on the participation of local chapters. Only with grassroots support and local action could they apply the kind of public attention that had helped force AT&T to settle with the EEOC. The Compliance Task Force took the lead by updating chapters and making suggestions for future actions, but acknowledged candidly in its June 1973 newsletter, "NOW's strength is all of your local actions."¹⁴²

Conclusion

The media attention surrounding the Sears case around the time of the trial in the mid-1980s gives the mistaken impression that the case developed on its own, the result of a few individual women suing the company for discrimination. Instead, the case has roots going back to the formation of working women's groups in Chicago in the late 1960s and early 1970s. These groups pursued a broad campaign for economic rights for women, including direct action to force numerous industries to change their practices. Often in conjunction with the EEOC, this coalition enjoyed major successes against some

¹⁴¹ Boston YWCA Records, 1858-1988; Donald Chamberlain to Worcester, September 20, 1977. 89-M3. 89-M3. Schlesinger. Boston YWCA Records, 1858-1988; Juliet Brudney to Mrs. Julius Rosenwald (Dear Judy), September 26, 1977, 89-M3. Schlesinger. Family tree, 1963, Papers of Julius Rosenwald, 1905-1963, University of Chicago Library, Special Collections Research Center, Box 61, Folder 14.

¹⁴² NOW Compliance and Enforcement Task Force Newsletter, No. 9, June 1973, p. 5.

of the largest employers of the day, most notably AT&T. Having established networks across class, race, and regional lines, some of those working women's groups eventually turned to Sears.

The cross-class coalitions and NOW's and WE's efforts to build connections with African-American and Asian-American groups focused on economic equity challenge the notion that NOW was out of touch with the needs of working women and the larger grassroots women's liberation movement. To be sure, NOW's attitude at times reflected the self-centeredness, or lack of coalition mentality, that its critics noted. A February 1973 Compliance Task Force report suggested that in exchange for referring people to their "sisters" at Womanpower Consultants for information on model affirmative action plans and EEO for women, a service NOW did not provide, the organization might ask for a percentage of the fee. The report also questioned whether they should "only refer companies to consulting services run by NOW members."¹⁴³ Regardless, the presence of working women's groups in Chicago indicates that it is too simplistic to argue that all regions and members of NOW ignored the needs of working-class women.

It is not clear that the coalitions were strong enough to sustain a commitment to long-term litigation, and in fact, although it tried to cooperate with other organizations interested in Sears, NOW largely pursued the company on its own during the mid-1970s. Eventually even NOW dropped out of the case when other priorities and internal divisions competed for its attention and resources. This decreasing attention to cross-class and cross-race coalitions by the end of the 1970s limited the effectiveness of early campaigns to upgrade women's jobs at Sears and elsewhere, and may help explain why

¹⁴³ Myers, Report to the National Board of Directors of NOW, February 1972, p. 2.

women's groups were ultimately less successful against Sears than other corporations.

What is certain, however, is that cooperation and concerted organizing were present early on in a case that came to be known for its divisiveness. Recovering the work of these women's groups in the Sears case highlights a widespread and varied effort to improve the workplace for women, and a history we can draw upon in contemporary feminist-labor alliances.

Chapter 3

Feminists Challenge Sears: NOW

As part of their broader efforts to improve the workplace, women's groups in Chicago finally decided to take on the retail industry. Their prior success with AT&T and its similarities to Sears contributed to the decision to go after the retail giant, as did Sears' size, profitability, and employment of large numbers of women. In 1973, Chicago NOW and WE began fighting Sears' refusal to turn over its affirmative action plan. By the end of the year, they broadened their efforts, investigating Sears' policies through leafleting and interviewing women, and used the information gained to file charges with the EEOC and support protests against the company. As NOW grew and as Chicago NOW sought to broaden its campaign against Sears, Mary Jean Collins and Anne Ladky turned to the national organization for financial and organizational support for their cause. For example, they secured a resolution at NOW's 1974 national convention pledging action against the company. Emboldened by the resolution, Collins and Ladky spent that summer bringing governmental force to bear, applying pressure through Sears' shareholders, and convincing local chapters to support the expanded national action.

Decision to Pursue Sears

After successful actions against other industries such as banking and insurance, NOW began to focus on the concentration of low-paid women in, and discriminatory practices of, the retail sales industry. The April 1974 Compliance Newsletter reported on a federal court decision against retailer J.M. Fields awarding eight years of back pay and wage increases to women supervisors who had been paid less than men for substantially equal work. The Court rejected the argument that supervisors in "hardline" departments

(men) earned more because their jobs involved more skill than supervisors in clothing and other “softline” departments (women), and said that softline departments actually involved similar duties and more training time.¹ Thus, by the time many of these same issues arose in the Sears case, NOW was quite familiar with them.

The women’s groups looked to Sears for several reasons. First, the company loved to brag that it was “the world’s largest retailer of general merchandise,” and thus its size (the fifth-largest U.S. corporation) and market share made it a logical target. In 1973, it had record net sales of \$12.3 billion, a 12 percent increase over the previous year, and a net profit of \$680 million, a 9.6 percent increase. Sears also employed 395,000 U.S. women and men. Women’s groups used Sears’ vanity against itself, arguing that as the largest employer, its policies set the standard for employment practices throughout the retail industry.² Since changes at Sears would improve working conditions for many women, its policies had “an impact on individual lives and the economy as a whole.”³ Moreover, any action against Sears would attract public and media attention simply because it was the biggest retailer. Sears was also a good target because it was the second-largest employer of women in the U.S., with 52.7 percent of its employees being women. In 1973 its workforce was filled with “low-paid women and minorities,” with most women working in salesclerk or clerical positions. Thus, any changes secured by

¹ Suzanne Stocking, ed., “New Developments in Retail Sales,” NOW Compliance Newsletter, No. 12, April 1974, p. 8, UIC, NOW Chicago, 78-034, Box 2, Folder 2.

² NOW Papers; NOW, Inc., Chicago Chapter, “Sears Denies Women Equal Opportunity,” Research Report Prepared By the National Organization for Women, Inc., Chicago Chapter, May 1974, p. 1. MC496, Box 44, Folder 18. Schlesinger; NOW Papers; NOW Public Information Office, “Why Sears?,” New York, NY, November 1974, p. 1 (flyer or PR information sheet by Sears Sub-committee). MC496, Box 209, Folder 70. Schlesinger; NOW Papers; New Jersey NOW, “DO YOU SHOP AT SEARS?,” MC496, Box 209, Folder 69. Schlesinger.

³ NOW papers; Chicago NOW Research Report, p. 1. MC496, Box 44, Folder 18. Schlesinger.

NOW and WE would affect the greatest number of women employed in retail. Finally, many of Sears' customers, to whom it owed its financial success, were women.⁴

Earlier victories against AT&T and the steel industry also contributed to the decision to pursue Sears. Women's groups focused on the similarities between Sears and AT&T, such as that both were national corporations with facilities across the country. NOW had succeeded against AT&T by mobilizing chapters to organize locally against the company. With hundreds of stores, Sears was similarly susceptible to pressure around the country. Moreover, both companies had well-known public images to protect, making them good targets for direct action.⁵ Indeed, unlike AT&T, Sears had to attract customers; it cultivated an image as a caring company, reminded employees how happy they should be to work there, bragged about the percentage of the total American workforce it employed, and depended on women and minority shoppers. Both AT&T and Sears also employed large numbers of women in low-paying jobs. At AT&T, women generally worked as operators, with very few in line work and installer positions. At Sears' retail stores most women worked as salesclerks in "soft goods" departments, such as housewares, candy, and women's clothing, and at Sears headquarters in Chicago, they worked in clerical jobs. Women's groups felt confident that Sears, recognizing that changes were coming in the workplace, would settle quickly with the EEOC as had other employers.

⁴ NOW Papers; New Jersey NOW, "DO YOU SHOP AT SEARS?." MC496, Box 209, Folder 69. Schlesinger; NOW Papers; "NOW SAYS SEARS SHORTCHANGES WOMEN," p.1 [template for press release]. MC496, Box 44, Folder 18. Schlesinger; NOW Papers; NOW Public Information Office, "Why Sears?," New York, NY, November 1974, pp. 1-2 (flyer or PR information sheet by Sears Sub-committee). MC496, Box 209, Folder 70. Schlesinger; NOW Papers; Chicago NOW Research Report, p. 1. MC496, Box 44, Folder 18. Schlesinger.

⁵ Anne Ladky, telephone interview by author, 20 March 2002.

In deciding to pursue Sears, however, women's groups ignored crucial differences from AT&T. Although these factors are discussed in more detail in later chapters, most notably AT&T was accustomed to negotiating with a powerful union, while Sears did everything possible to keep out the union. As a result, AT&T employees were used to the grievance process while Sears employees had few outside channels to complain about problems at work. In addition, Sears' corporate culture resisted being forced to do anything, and the company was willing to pour unlimited resources into winning the case. Unlike AT&T, there were no individual managers who recognized the benefit of cooperating with the EEOC and settling the case. Sears fought it on principle, at any expense.

Disclosure of Employment Data

Women's groups first confronted Sears in 1973 over its refusal to release publicly its affirmative action plan.⁶ Before passage of Title VII in 1964, the federal government had little power to prevent private employers from discriminating against women and minorities. In 1965, the Office of Federal Contract Compliance Programs (OFCCP) was formed, eventually becoming part of the Department of Labor, to ensure that companies doing business with the federal government complied with equal employment opportunity and affirmative action requirements. The OFCCP could rescind the government contractor status of a company that discriminated against women and minorities or failed to submit hiring and promotion data and implement affirmative action plans to enable the agency to monitor compliance. In fact, NOW pursued Sears rather than other retailers in part because of its federal contractor status. The government

⁶ Dishon, "Largest feminist group," p. 18.

represented another – and until the EEOC gained increased powers to sue corporations, one of the only – forms of pressure it could put on Sears. Just as the EEOC had harnessed the strength of the more powerful FCC in the AT&T case, women’s groups used the federal government and taxpayers who supported the company’s federal contracts to pressure Sears.⁷

Women’s groups argued that as a federal contractor, Sears was required to disclose its affirmative action plan to the public, including goals and timetables for hiring women and “breakdowns” of the types of jobs held by women and minorities.⁸ Sears, however, “embarked on a major campaign to keep its affirmative action plan secret and prevent the public from obtaining information about [it] from the government.”⁹

Women’s groups were not the only ones who had learned from the AT&T case. Sears had seen AT&T “hang itself” by turning over literally truckloads of employment data to the EEOC, which then used it to find “reasonable cause” for discrimination.¹⁰ At the risk of appearing uncooperative, Sears was determined not to provide any ammunition against itself, resisting the women’s groups’ requests and actively litigating the issue for several years.

The battle for Sears’ affirmative action plan extended beyond women’s groups. During the second half of 1973, agencies such as the Council on Economic Priorities (CEP), General Services Administration (GSA), Department of Labor, and Department of

⁷ NOW Papers; Memorandum from Collins and Ladky to NOW Chapter Presidents et al., November 9, 1974, p. 2. MC 496, Box 44, Folder 18. Schlesinger.

⁸ NOW Papers; Carolyn Toll, “A support-ERA call is put on Holy Name,” Chicago Sun-Times, 27 August 1974, p. 2. MC496, Box 44, Folder 19. Schlesinger.

⁹ NOW Chicago, Press Release: “Sears Annual Meeting to Include Sex Discrimination Charges,” 20 May 1974, p. 2, UIC, NOW Chicago, 83-27, Box 1, Folder 2.

¹⁰ Bill Brown, telephone interview by author, 26 February 2004; see also Stockford, The Bellwomen, 27.

Justice requested Sears' affirmative action plan, addressed its objections, and negotiated for the right to turn over the information to the public. At the end of November, the Justice Department finally decided to release it.¹¹ In the meantime, the EEOC had filed a Commissioner's Charge against Sears in August 1973 and made it the subject of a Track I ("high priority") investigation. In December, Sears sued the GSA, OFCC, and Department of Labor and sought a restraining order to prevent any release of data until the issues were resolved in court. Sears complained that "publication of sensitive minority and female statistics, [and] critical self-analysis . . . without other contextual explanatory data is a prejudiced and inaccurate impression of Sears' employment practices." It also argued that turning over such information would "precipitate unwarranted civil rights litigation, [and] prejudice Sears' position" and the ongoing employment discrimination proceedings. Clearly, the retailer feared that disclosure could lead to new charges of discrimination.¹²

Sears was also concerned about its public image and business interests. It argued that disclosure would "subject [the company] to unjustified opprobrium of the public and its employees upon whom its success as a business enterprise is fundamentally dependent," jeopardize any advantage against competitors, and "seriously injure Sears

¹¹ NOW Papers; "Sears' Action Against Disclosure of AAP, 1973" (timeline of Sears' actions re: disclosure of Affirmative Action Program, July - December 1973). MC496, Box 44, Folder 19. Schlesinger.

¹² NOW Papers; "Sears Files Suit, Sears' Suit Against GSA, DOL, OFCC, The Government's Case, 1973-74," p. 1 (typed notes on Sears suit against GSA, OFCC, DOL for restraining order to prevent release of Affirmative Action Plan information until issues resolved by court). MC496, Box 44, Folder 19. Schlesinger; NOW Papers; "NOW SAYS SEARS SHORTCHANGES WOMEN," pp. 1-2. MC496, Box 44, Folder 18. Schlesinger; NOW Papers; Chicago NOW Research Report (citing Civil Action No. 2149-73, United States District Court for the District of Columbia. Sears, Roebuck and Co., Plaintiff versus General Services Administration et al, Defendants). MC496, Box 44, Folder 18. Schlesinger.

goodwill with the public and its employees.”¹³ NOW rejected Sears’ arguments, claiming the company did everything to protect its image “short of cleaning up its employment practices.”¹⁴ It noted, “[a]lthough Sears claims to have a model Affirmative Action Plan,” its record in “promotions, equal pay, benefits and hiring are among the worst.”¹⁵ The group claimed some victory, however, noting that Sears’ concern indicated that it “clearly fears action by NOW.”¹⁶

Finally, in an attempt to show how much progress it had made, Sears released a one-page employment data chart listing statistics on women in broad job categories as part of its 1973 annual report. The company also claimed it had administered a formal affirmative action program for more than five years. The chart listed percentage changes in minority and female employment between February 1969 and August 1973 by general job category, i.e. officials and managers; professionals; technicians, sales workers; office and clerical; and craftsmen.¹⁷ Sears noted that the number of women in the Officials and Managers category had increased 70.2 percent between 1969 and 1973.¹⁸ NOW declared Sears’ information inadequate because it failed to provide information on individual

¹³ NOW Papers; “Sears Files Suit, Sears’ Suit Against GSA, DOL, OFCC, The Government’s Case, 1973-74,” p. 1. MC496, Box 44, Folder 19. Schlesinger; NOW Papers; “NOW SAYS SEARS SHORTCHANGES WOMEN,” p. 2. MC496, Box 44, Folder 18. Schlesinger; NOW Papers; Chicago NOW Research Report (citing Civil Action No. 2149-73, United States District Court for the District of Columbia. Sears, Roebuck and Co., Plaintiff versus General Services Administration et al, Defendants). MC496, Box 44, Folder 18. Schlesinger.

¹⁴ NOW Papers; Sears Action Bulletin, No. 5, November 1974, p. 1. MC496, Box 209, Folder 66. Schlesinger.

¹⁵ Papers of NOW Officers -- Lightfoot, 1971-1977; Atlanta NOW, “NOW’S SEARS ACTION – WHY.” MC485, Box 3, Folder 12. Schlesinger.

¹⁶ NOW Papers; Sears Action Bulletin, No. 5, November 1974, p. 1. MC496, Box 209, Folder 66. Schlesinger.

¹⁷ NOW Papers; Sears, Roebuck & Co., “Progress in Equal Employment Opportunity: a special report on Sears Affirmative Action,” 1974. MC496, Box 44, Folder 19. Schlesinger.

¹⁸ NOW Papers; Chicago NOW Research Report, p. 1. MC496, Box 44, Folder 18. Schlesinger.

facilities, to help determine whether Sears implemented affirmative action in particular communities.¹⁹

NOW also argued that Sears only released the information “[i]n response to the negative publicity of the EEOC’s announcement and pressure from civil rights and church groups.” Although it claimed to be the most open corporation in America for releasing this information, it continued to “fight in court to prevent disclosure of [its] affirmative action plan and unit employment information.”²⁰ In an attempt to pressure Sears, NOW had allied itself with the Interfaith Center on Corporate Responsibility (ICCR) of the National Council of Churches. ICCR voted to make Sears a national and local action target, noting that “the figures released in the 1973 Annual Report hide discrimination existing at the local and regional levels and . . . a (shareholder) resolution requesting local facility information is needed.” NOW reported that the ICCR was “anxious to work with NOW on this campaign” and urged members who were Sears stockholders to contact the Stockholder Action Coordinator.²¹

Sears’ data showed that in 1969, 86.4 percent of women employees worked in office and clerical or sales jobs, and in 1973, 83.1 percent still did. Between 1969 and 1973, the number of women working as officials and managers went from approximately 4.3 to 6.3 percent, an increase of approximately 1.9 percent in four years.²² NOW argued

¹⁹ NOW Papers; “Sears Files Suit,” p. 1. MC496, Box 44, Folder 19. Schlesinger.

²⁰ NOW Papers; Chicago NOW Research Report, p. 1. MC496, Box 44, Folder 18. Schlesinger; NOW Papers; Mary Jean Collins-Robson and Anne Ladky, Sears Action Bulletin, No. 4, October 1974, p. 1. MC496, Box 209, Folder 66. Schlesinger.

²¹ Lynne Darcy, “TRYING TO KEEP THE SEXISM IN THE CLOSET – DISCLOSURE AT SEARS”, NOW Compliance Newsletter, No. 14, November 1974, p. 9, UIC, NOW Chicago, 78-034, Box 3, Folder 1.

²² NOW Papers; Collins-Robson and Ladky, Sears Action Bulletin, No. 2, July 1974, p. 2. MC496, Box 209, Folder 67. Schlesinger; NOW Papers; Long Hwa-shu, “Sears accused, denies job bias against women,” Daily News, Chicago, 23 August 1974. MC496, Box 44, Folder 19 [18?]. Schlesinger; NOW

that “since the actual number of women in this category is so small, the real change represented by that percentage is . . . insignificant.”²³ In fact, Sears’ data held limited value in understanding its true workforce, as such numbers could be calculated in different ways to find percentages that looked good for the company. An increase of women in Officials and Managers could be misleading if Sears included low-level, non-supervisory managerial positions (women who were managers in name only). Similarly, the data failed to show different levels of management; at AT&T women were clustered at the lowest levels of management and virtually absent from the higher levels.²⁴ Finally, a general “Sales Workers” category did not distinguish the number of women in commissioned and non-commissioned sales. As in most employment discrimination cases, each side could interpret the same “objective” numerical evidence to support its position.

Investigating Sears

In order to help their case against Sears, women’s groups in Chicago began gathering information on the company’s employment practices. NOW and WE divided up the work, with NOW focusing on the Sears Tower and WE on retail stores. Members went to stores covertly to count the number of men and women working in each department and talk to female employees. They found women confined to certain departments where they earned little or no sales commission. Men worked in departments that carried large commissions, such as home appliances and auto parts.

Papers; NOW Public Information Office, “Why Sears?,” p. 1. MC496, Box 209, Folder 70. Schlesinger; NOW Papers; Chicago NOW Research Report, p. 1. MC496, Box 44, Folder 18. Schlesinger.

²³ Chicago NOW Research Report, Schlesinger, NOW MC496, Box 44, Folder 18, p. 1.

²⁴ NOW Papers; Sears, Roebuck & Co., “Progress in Equal Employment Opportunity.” MC496, Box 44, Folder 19. Schlesinger.

Even where commission percentages were the same, men sold higher-priced items and therefore earned more. The women's groups followed up with leafleting to learn more about various job categories.

In 1973, NOW used the opening of the Sears Tower as an opportunity to demonstrate against Sears, leafleting employees moving into the Tower about the types of discrimination they faced. The leaflets listed information about Sears' employment practices ("Did You Know _____?") or asked: "WHAT'S YOUR JOB SITUATION?" and stated that Chicago NOW "is interested in talking to you confidentially about employment problems you've encountered at Sears." They provided a tear-off portion at the bottom for women to fill out their name and telephone number and an address to return it to NOW. NOW then followed up to interview individual women about their experiences at Sears. The women's groups used the data it gathered to support further actions against the company, and even included it on future flyers.²⁵

In light of Sears' intransigence on the disclosure issue, NOW increased national efforts to pressure the company to change its discriminatory practices. NOW's national office formed a Sears Action Task Force (also known as the "Sears Subcommittee") headed by Collins and Ladky. The Subcommittee sent updates on the Sears project to board members and Action Bulletins to NOW chapters suggesting ideas for protests against local stores and received a strong response.²⁶ In December 1973, the Compliance

²⁵ NOW Papers; "NOW Catalogs Surprise for Sears," Tower Tattler, 21 May 1974. MC496, Box 209, Folder 68. Schlesinger.

²⁶ See, for example, NOW Papers; Memorandum from Collins and Ladky to NOW Chapter Presidents et al., November 9, 1974, p. 2. MC 496, Box 44, Folder 18. Schlesinger; NOW Papers; Collins-Robson, Ladky, and Darcy, Sears Action Bulletin No. 6, December 1974. MC 496, Box 209, Folder 66. Schlesinger; NOW Papers; Collins-Robson, Ladky, and Darcy, Sears Action Bulletin No. 2, July 1974. MC 496, Box 209, Folder 67. Schlesinger; Collins-Robson, personal bio., UIC, NOW Chicago, 78-034, Box 7, Folder 5. The Sears Action Subcommittee of the National Task Force on Compliance is referred to interchangeably as the "Sears Action Task Force" and the "Sears Subcommittee".

Newsletter listed Sears under its list of “NOT NOW CORPORATIONS,” announcing a new campaign against Sears in Seattle and noting, “[t]his action is particularly important in our monitoring of EEOC Track I and Track II cases.”²⁷

In March 1974, NOW and WE members met with Ray Graham, Sears’ employee in charge of equal employment opportunity, in an effort to pressure the company to release its employment data. Graham refused to release the local Chicago affirmative action plans, saying, “By disclosure we run the risk of harming our efforts to implement equal opportunity.” In response, NOW and WE announced a joint protest the next day at Sears’ State Street store to demand that the manager call chairman of the board Arthur Wood to set up a public meeting with women regarding Sears’ employment practices. NOW and WE advertised this action on joint “N.O.W./WOMEN EMPLOYED” letterhead, using slogans such as “Sears’ Keep-it-a-Secret Sale” for female shoppers and stressing that WE and NOW “aren’t buying Sears’ spring line: A Special on Sex Discrimination.” NOW argued, “women fon’t (sic) get commission sales jobs or buyer’s jobs in this store -- and . . . at the Tower, women don’t get the pay or respect they deserve -- and they don’t get any opportunities for promotion either.”²⁸

NOW and WE drew attention to the fact that the EEOC’s recent victories against large employers had corporations “running scared.” They published a flyer called the “Tower Tattler,” which updated members and Sears women on their actions against Sears. They also fostered the notion that in the wake of the AT&T decree, “Sears has

²⁷ Stocking, ed., NOW Compliance Newsletter, No. 11, December 1973, UIC, NOW Chicago, 78-034, Box 3, Folder 1.

²⁸ NOW Papers; N.O.W./Women Employed, “FOR IMMEDIATE RELEASE: N.O.W. and Women Employed Announce Sears’ Spring Line: Special on Sex Discrimination,” March 26, 1974, pp. 1-2 (press release; attached: slogan sheets, statement). MC496, Box 44, Folder 19. Schlesinger.

plenty to be afraid of. It . . . is not content to be the world's largest retailer or the owner of the world's tallest building. Sears also wants to tower above the rest of big business in the field of sex discrimination. But they aren't going to be able to get away with it." NOW and WE further linked Sears to offending corporations by noting that AT&T's chairman of the board and Kraft's president were both on Sears' Board of Directors. They argued that Sears was afraid to release its employment data because it "knows what happens when the public finds out about employment practices": "What is Sears afraid of? . . . They are afraid that Sears will join AT&T and other corporations forced to pay for the effect of discriminatory practices."²⁹ As the disclosure issue dragged on, NOW argued it was critical because it had "enormous impact on the whole compliance area." The OFCCP had been lax about enforcement, the EEOC was overwhelmed with a backlog of cases, and "all compliance mechanisms were severely weakened by the policies of the Nixon administration." If corporations did not fear the government, they would feel free to keep their practices secret out of concern for their public images with no accountability to advocacy groups.³⁰

Filing Charges, Hearings, and Actions Against the Company

In May 1974 Chicago NOW published the evidence gathered from interviews with 100 Sears women who responded to leaflets in a research report entitled "Sears Denies Women Equal Opportunity." It then used this information and the help of women

²⁹ NOW Papers; NOW/Women Employed, "SEARS SPRING LINE: special on sex discrimination," Tower Tattler 1(1), Chicago, IL, 1974. MC496, Box 44, Folder 19. Schlesinger; NOW Papers; N.O.W./Women Employed, "FOR IMMEDIATE RELEASE: N.O.W. and Women Employed Announce Sears' Spring Line," 26 March 1974, Second Statement. MC496, Box 44, Folder 19. Schlesinger; NOW Papers; "Sears Sizzles as Women Turn Up Heat," Tower Tattler 1(4), 14 June 1974. MC496, Box 209, Folder 68. Schlesinger.

³⁰ Darcy, "TRYING TO KEEP THE SEXISM IN THE CLOSET," NOW Compliance Newsletter, No. 14, November 1974, p. 9, UIC, NOW Chicago, 78-034, Box 3, Folder 1.

employees to draft charges of discrimination for the EEOC on behalf of office employees in the Sears Tower and store employees at the State Street store.³¹ NOW knew that the commission considered the number of charges filed against a company when deciding whether to investigate it. The commission had focused on AT&T largely because it received so many complaints from female employees; in turn the number of complaints was so high because AT&T employed so many women. Thus, in an attempt to focus the EEOC's attention and persuade it to investigate Sears, NOW encouraged women to file charges against the company. On May 20, 1974, Chicago NOW filed a class action "charge of discrimination" with the EEOC "on behalf of all female employees of Sears," alleging continuing discrimination. It divided the class action charges into three categories: Job Classification, Promotions, and Equal Pay, Benefits, Leaves, and included a detailed four-page attachment setting forth the specific sites of discrimination.³² In order to "dramatize the frustrations faced by women at Sears," NOW included the stories of individual women in its research and charge. Although this later became an issue at trial when the EEOC decided not to call individual witnesses to testify, NOW appreciated early on the importance of both statistical and anecdotal evidence.³³

NOW alleged discrimination in the way the company classified employees into either "timecard" or "checklist" jobs. The Sears Tower housed most of the company's 49 buying departments, each responsible for a line of goods "such as stoves or floor

³¹ NOW papers; Chicago NOW Research Report, p. 1. MC496, Box 44, Folder 18. Schlesinger; Collins Papers; NOW Chicago, History of the Sears Campaign, 1975, p. 1. MC493, Box 15, Folder 4. Schlesinger; NOW Papers; "NOW Catalogs Surprise for Sears," Tower Tattler, 21 May 1974. MC496, Box 209, Folder 68. Schlesinger; NOW Papers; "Sears Shortchanges Women," Retail Reader 1(1), 27 July 1974. MC496, Box 209, Folder 68. Schlesinger.

³² Rosenberg Papers; EEOC Charge Filed by NOW-Chicago, 20 May 1974, pp. 1-3. Box 2, Folder 78. Schlesinger.

³³ NOW papers; Chicago NOW Research Report, pp. 5-6. MC496, Box 44, Folder 18. Schlesinger.

covering or men's sportswear," and 63 general departments "responsible for corporate planning, data processing, [and] merchandise development," including about 7,000 Sears employees. NOW learned that those holding timecard positions in each buying department were generally hourly employees, subject to low status and low pay, received few benefits and little opportunity for advancement, and were predominantly women. Checklist positions were salaried, higher status, and higher paid, with benefits and promotion opportunities, and were generally filled by men. Only checklist employees were eligible for bonuses, an annual physical, preference for a Sears charge account, discounts for catalog orders, sick pay, flexible starting times and lunch hours, higher matching amounts for profit sharing because of higher salaries, and stock options.

As an example, the charge noted that each buying unit included a Buyer plus an Assistant Buyer or a Buyer's Assistant. The Assistant Buyer and Buyer's Assistant positions involved the same work, the only "difference [was] an economic one." Buyer and Assistant Buyer were checklist positions while Buyer's Assistant was a timecard position, earning substantially lower wages and few benefits. Most checklist positions were filled by men from the "field" (retail staff) or checklist employees from other departments, while most timecard positions, including Buyer's Assistants, were filled by women, often clerical staff from within the department. "R.D." alleged that two buyers shared an assistant buyer and a buyers' assistant. They decided to split into two teams: (1) buyer and assistant buyer and (2) buyer and buyer's assistant. The buyer's assistant was a woman, had a lesser title, and remained a timecard employee, while the male assistant buyer received all the privileges associated with checklist status. Women with

education and skills equal to men were placed in clerical positions while men started at the retail level, which was essential for promotion to checklist positions.³⁴

The women interviewed also revealed a lack of promotional opportunities. Women with college degrees remained in clerical positions with limited wage growth while men were hired right out of college or into management training jobs and quickly promoted past them. Sears told secretaries “their skills [were] too specialized to make them eligible for any other jobs,” or that it was bringing in a supervisor from another department because “it would be hard for you to supervise people you have been working with.” When women requested promotions the company told them no positions were available, ignored their requests, or transferred them laterally to another department. “G.M.”, an assistant supervisor, complained that she was transferred laterally when she asked for a promotion. Although she knew more than the male supervisor and employees brought questions to her, he earned more money and had the title. “P.D.”, a Word Processing operator, complained she had to first take a step down – to a regular secretary position – in order to be promoted to executive secretary, which was the top of the ladder but still a timecard position. Sears told her she was “too specialized” and therefore “not transferable” into another type of work. “What they really mean,” she said, “is that the . . . operators are already trained and useful just where they are, and there’s no point in finding someone else.”³⁵ The charge alleged that Sears did not tell senior women about openings and managers unilaterally promoted men with less experience without posting the job. When one woman asked for training, Sears sent her to typing classes to train for

³⁴ Rosenberg Papers; EEOC Charge, pp. 1-3. Box 2, Folder 78. Schlesinger; NOW papers; Chicago NOW Research Report, pp. 2-3, 4-5. MC496, Box 44, Folder 18. Schlesinger.

³⁵ NOW papers; Chicago NOW Research Report, pp. 3, 5. MC496, Box 44, Folder 18. Schlesinger.

a lateral move from clerk to buyer's secretary, although typing was not required for men to get lateral moves or promotions.³⁶

The report also alleged that Sears made little information available to women workers. Sears' Equal Opportunity Department distributed an affirmative action questionnaire asking women what training and promotions they were interested in and promising an interview, but women heard nothing more about it. Office managers knew about "the few training programs that do exist, but [did not] inform the women in their departments, even when asked specifically." "B.G.", a clerical assistant in a buying department for three years, asked her office manager about a training program for women buyers she heard about, but got no results for over a year. Moreover, Sears did not reimburse women for tuition money and even a college degree or masters degree did not lead to a checklist promotion. Women had to take a typing test in the initial job interview while men took a test "to grade [their] management potential." Managers told employees they could be fired for discussing their wages or bonuses with other employees, and often refused to tell women their job classifications, making it harder to determine what promotions were available. "M.R.", a clerical employee, complained that her interviewer led her to believe "the job would be more professional."³⁷

Under Equal Pay, Benefits, Leaves, NOW alleged that Sears discriminated by refusing to hold a female employee's job during maternity leave, although it held a male employee's job while he was in the military. "M.R." complained that Sears demoted a statistician who returned from maternity leave. NOW also claimed that managers at

³⁶ Rosenberg Papers; EEOC Charge, pp. 1-3. Box 2, Folder 78. Schlesinger.

³⁷ NOW papers; Chicago NOW Research Report, pp. 3-5. MC496, Box 44, Folder 18. Schlesinger.

Sears' State Street store in Chicago placed women in clerical work or departments selling small ticket items and men in departments selling large ticket items. Even if both departments earned the same percentage commission, men earned higher wages because they sold more expensive items, which meant unequal wages for equal sales work. "A.J.", a timecard employee, received only a 35 cent raise in two years, despite 10 years of experience and earning her B.A. She earned the highest salary in her category and trained many in the department, but Sears brought in supervisors from other departments who required new training. Her story illustrated what many believed was Sears' policy of promoting from within, as long as you were a man.³⁸

On the same day it filed the charges, NOW members attended Sears' annual shareholders meeting in Chicago and passed out a press release announcing their complaints to shareholders and the Board of Directors.³⁹ A NOW member and Sears shareholder made a statement "charg[ing] the firm with discrimination in promoting women." Chairman Arthur Wood did not respond but later denied any sex discrimination at Sears and said it was "'one of the very few major American corporations' to release EEOC statistics in its annual report."⁴⁰ Chicago NOW publicized its action, holding a rally outside the meeting which was covered by the Chicago Tribune, and emphasizing the issue's national potential. Subcommittee co-chair Collins warned, "[t]hese charges

³⁸ Rosenberg Papers; EEOC Charge, p. 4. Box 2, Folder 78. Schlesinger; NOW papers; Chicago NOW Research Report, pp. 4-5. MC496, Box 44, Folder 18. Schlesinger.

³⁹ Collins Papers; NOW Chicago, "History of the Sears Campaign, 1975," p. 2. MC493, Box 15, Folder 4. Schlesinger; NOW Papers; "NOW Catalogs Surprise for Sears," Tower Tattler, 21 May 1974. MC496, Box 209, Folder 68. Schlesinger; NOW Chicago, Press Release: Sears Annual Meeting to Include Sex Discrimination Charges, 20 May 1974, UIC, NOW Chicago, 83-27, Box 1, Folder 2; F. K. Plous Jr., "NOW charges sex bias at Sears," Chicago Sun-Times, 21 May 1974, UIC, NOW Chicago, 83-27, Box 1, Folder 1.

⁴⁰ Alvin Nagelberg, "Sears sales and earnings set new records," Chicago Tribune, 21 May 1974, p. 9, UIC, NOW Chicago, 83-27, Box 1, Folder 1; Plous, "NOW charges sex bias at Sears."

are the first stop in a major national campaign by NOW against Sears,” and “chapters across the country are ready to take action against Sears to see that justice is done.”⁴¹

Resolution and Challenges in NOW National Efforts

In addition to bringing their case to the EEOC, Collins and Ladky also spent May 1974 preparing to bring their cause to the seventh National NOW Convention in Houston, in the hopes of making it truly a nationwide campaign.⁴² Although the convention invigorated their campaign, it also showed that personal politics within NOW and the multi-issue nature of the organization would limit its ability to maintain a long-term action against Sears.

In one sign that the timing was right for the Sears action, NOW members were clearly concerned with economic issues in Houston. Resolutions before the convention included those “to make employment discrimination a priority issue for the coming year and to take action against employers who use layoffs to eliminate affirmative action.” NOW was especially concerned about discriminatory layoffs during the recession which was then gripping the nation: “‘Last hired, first fired can easily become a reality. In difficult times, history shows that it is easy to lose past gains.’”⁴³ Chicago NOW submitted – and the national organization passed – a resolution authorizing action against Sears. It stated:

WHEREAS the retail industry is sustained by the underpaid work of women, and

⁴¹ Barbara Jordan Moore, ed., “NOW Files Sex Discrimination Charges Against Sears Roebuck & Company,” Women Today IV(12), Washington, D.C., 10 June 1974, p. 78, UIC, NOW Chicago, 83-27, Box 1, Folder 1; NOW Papers; “NOW Catalogs Surprise for Sears,” Tower Tattler, 21 May 1974, MC496, Box 209, Folder 68. Schlesinger; NOW Chicago, Press Release: “Sears Annual Meeting to Include Sex Discrimination Charges,” 20 May 1974, pp. 1, 3, UIC, NOW Chicago, 83-27, Box 1, Folder 2.

⁴² Jaspers, “Local feminist running for national NOW president.”

⁴³ Dishon, “Largest feminist group,” p. 18. This issue, of course, represented one source of tension between women’s groups and labor activists, who resisted efforts to undermine seniority rights through affirmative action.

- WHEREAS Sears, Roebuck, the largest retail corporation in the United States, is a major offender in failing to meet equal employment opportunity standards, and
- WHEREAS Sears' disregard for equal opportunity laws affects thousands of women nationwide, be it therefore
- RESOLVED that the National Organization for Women take action both nationally and locally against Sears to insure their compliance with equal employment opportunity laws.⁴⁴

Collins and Ladky also organized a workshop on the Sears issue, where they expected about 50 people.⁴⁵ They did not expect, however, several Sears employees who attended the workshop, disrupted the meeting, prevented business from being conducted, and spoke out against the resolution.⁴⁶ Sears, it seemed, may have used NOW's own tactics against it by sending company loyalists to the convention as NOW members, just as NOW had rallied its members who were Sears' shareholders to wield their power at the annual meeting.

NOW members were clearly rattled by the incident. They debated how many "spies" came to disrupt the meeting (6 to 20), whether they could exclude members whose dues were paid for by their employers, and how to distinguish between those who came on their own and those who came as Sears employees.⁴⁷ One suspected Sears

⁴⁴ NOW Papers; Collins-Robson, Ladky, and Darcy, Sears Action Bulletin, No. 1, July 1974, p. 1. MC496, Box 209, Folder 66. Schlesinger; Stocking, ed., "NOW Conference Resolutions," NOW Compliance Newsletter, No. 12, April 1974, p. 4, UIC, NOW Chicago, 78-034, Box 2, Folder 2; NOW Papers; Act NOW Against Sexism at Sears [notice in July issue of Do It NOW]. MC496, Box 44, Folder 19. Schlesinger; Collins Papers; History of the Sears Campaign, p. 2. MC493, Box 15, Folder 4. Schlesinger; Dishon, "Largest feminist group," p. 18.

⁴⁵ Anne Ladky, President, NOW Chicago to Mary Jean Collins-Robson, NOW Task Force Coordinator, 2 May 1974, UIC, NOW Chicago, 78-034, Box 4, Folder 4.

⁴⁶ NOW Papers; Lynne Darcy to Fran Kolb, 22 July 1974, p. 1. MC496, Box 44, Folder 19. Schlesinger.

⁴⁷ NOW Papers; Message from Fran Kolb to Lynne Darcy re: Sears Action, Princeton, NJ, 18 May 1974 ("Secondly, we do not know of 20 people - according to someone else who was at the meeting, there were 1/2 dozen. . . . There is some real question about some of the statements in the Chapter Alert on Sears - First people often have membership pd by co - they pay for Kiwanis, Rotary, why not NOW? Secondly, .

employee, Peggy Hardigree, sent in her NOW dues paid for by Sears; in response, the Atlanta chapter informed her of the Sears resolution and stated, “There is a long established national and local policy that members of NOW may not speak against national policy of the organization.”⁴⁸ This presented a dilemma for NOW. As seen by its leafleting activities and efforts to talk to Sears women, the Subcommittee very much wanted to include women employees of Sears in “future action.”⁴⁹ In the AT&T case women employees and their internal caucuses had played a crucial role in forcing the company to change.⁵⁰ One NOW leader stated, “it is essential that we support those employees who desire to work as NOW members with their (sic) companies toward elimination of sexist policies and practices.”⁵¹ However, a tension existed between NOW wanting employees to be involved on their own behalf and being afraid of what it might mean to let Sears employees express what they actually wanted. It also raised the question of whether NOW, or any outsider, could accurately represent their needs, foreshadowing the court debate to come. Although NOW focused on getting women access to promotions and more money, perhaps the Sears women did not want to sell home appliances but rather wanted better conditions for flexible jobs that fit with their family obligations.

. . . several of those . . . had paid their own way to the Convention because they came as NOW members - not Sears employees.”). MC496, Box 44, Folder 19. Schlesinger; NOW Papers; Lynne Darcy to Fran Kolb, 22 July 1974, p. 1. MC496, Box 44, Folder 19. Schlesinger.

⁴⁸ NOW Papers; Cynthia Hlass to Peggy Hardigree, 25 June 1974. MC496, Box 44, Folder 18. Schlesinger.

⁴⁹ NOW Papers; Collins-Robson and Ladky, Sears Action Bulletin, No. 2, July 1974, p. 1. MC496, Box 209, Folder 67. Schlesinger.

⁵⁰ Herr, Women, Power, and AT&T.

⁵¹ NOW Papers; Darcy to Kolb, 22 July 1974, p. 2. MC496, Box 44, Folder 19. Schlesinger.

Nevertheless, NOW members tried to portray the workshop incident as a sign that Sears was “very disturbed by NOW’s action and . . . doing whatever they can to counteract it.”⁵² The organization issued another “Tower Tattler,” noting “Summer has barely begun, but Sears management knows the heat is on,” and giving its own version of the conference. It alleged that “management tempers in the Tower are rising -- over Memorial Day weekend, Sears sent corporate executives . . . on an all expenses paid trip to the NOW National Conference The Sears defenders weren’t on any vacation, however,” but rather “came to declare Sears a ‘model employer’” and argue that NOW and women employees “‘don’t have the facts.’”⁵³ The conference “refused to buy their line” and passed a resolution for action. A sidebar entitled “Feightner’s Fables” listed fables “fabricated” by Jeanne Feightner, assistant to Sears Director of Equal Opportunity.

FABLE: The goals of NOW and the goals of Sears are the same.

FACT: NOW fights sex discrimination; Sears profits by it.

FABLE: Sears would be glad to give NOW its affirmative action plan.

FACT: Sears has filed suit to keep their plans secret.

FABLE: Sears is a model employer.

FACT: Sears denies equal pay, promotional opportunities and decent benefits to its women employees.⁵⁴

In addition to Sears’ willingness to fight back, the Houston convention also bore signs of problems within NOW that could mean trouble for its continued involvement in the case. Mary Jean Collins ran for the presidency of NOW and came to the convention with her Chicago NOW allies extremely well-organized, issuing position papers on where she stood, running with a slate of candidates, and pressing the Sears campaign as a major

⁵² NOW Papers; Darcy to Kolb, 22 July 1974, p. 2. MC496, Box 44, Folder 19. Schlesinger.

⁵³ NOW Papers; “Sears Sizzles as Women Turn Up Heat,” Tower Tattler 1(4), 14 June 1974. MC496, Box 209, Folder 68. Schlesinger. See also Papers of NOW Officers -- Lightfoot, 1971-1977; Atlanta NOW, “NOW’S SEARS ACTION – WHY.” MC485, Box 3, Folder 12. Schlesinger.

⁵⁴ NOW Papers; “Sears Sizzles as Women Turn Up Heat,” Tower Tattler 1(4), 14 June 1974. MC496, Box 209, Folder 68. Schlesinger.

part of her platform. She noted, “The role of president involves not only stressing the goals of NOW to the country but also spending a lot of time with the organization itself in terms of strengthening it. . . . Women need to know there’s a powerful organization behind them fighting for their rights.”⁵⁵ NOW’s Board and its Chicago office staff was “dominated” by Collins’ supporters.⁵⁶ In the organization’s first contested election, she faced Karen DeCrow, a lawyer and NOW’s Eastern Regional Director from Syracuse, New York. The candidates were to “give seven-minute speeches followed by a brief question and answer session” on Saturday, and then the more than 3000 delegates would have about four hours to decide how to vote. Balloting was to take place between 5 p.m. and midnight with results announced around noon on Sunday.⁵⁷ However, the vote required numerous runoffs and much late-night politicking, and in the end Collins, the Midwest Regional Director, narrowly lost to DeCrow, the Eastern Regional Director.⁵⁸

The Sears action was closely associated with Collins and eventually suffered as a result of her loss. Had she won, Collins certainly would have increased NOW’s efforts on the case. Of course, Collins also used the Sears case as the center of her campaign to launch her into the presidency. The close election could have gone either way, and the new leaders had their own interests and priorities different from the Chicago NOW women. For various reasons, as much related to personal politics and interests as

⁵⁵ Jaspers, “Local feminist running for national NOW president.”

⁵⁶ Evans, *Tidal Wave*, 110.

⁵⁷ Jaspers, “Local feminist running for national NOW president.”

⁵⁸ Barbara Ryan, *Feminism and the Women’s Movement: Dynamics of Change in Social Movement, Ideology and Activism* (Routledge: New York, 1992), 71. Sara Evans notes that, in a sign of the influence of women’s liberation, DeCrow called for an emphasis on lesbian rights, racial minorities, and working-class women, while Collins resisted increased focus on lesbians because “that’s not where the mainstream is.” However, Collins’ focus on local organizing on “concrete issues like pay equity, affirmative action, and daycare never had an opportunity to flourish”. Evans, *Tidal Wave*, 110.

ideological goals, the organization moved toward a focus on the ERA and away from Collins' Midwest-oriented focus on working women. Because the Sears case was so closely associated with Collins, those who opposed her did not give it the attention it needed. The Sears case, then, was more a casualty of Collins' loss of the presidency than any conscious decision by NOW members that working women's issues were not important. After her defeat, courting national support for the case became harder. Although in the short-term the convention's resolution invigorated the Sears action and signaled a new national effort against the retailer, it also quietly signaled the end.

Building National Support

After the convention, Collins and Ladky spent the summer of 1974 preparing for the national campaign, which they hoped would begin in earnest when members returned from vacations in the fall.⁵⁹ They put a notice in the July issue of Do It NOW, suggesting that local chapters find Sears stores in their area, "Check out the problem of employment discrimination . . . Walk through the store to note departmental sex-segregation of sales personnel, etc. [and] Talk casually with salespeople Sears sent people to the Conference to speak against this resolution. They are running scared. It is up to each of us to make sure their fears are justified." Following the strategy used against the banking industry, the Subcommittee prepared Chapter Action kits for distribution in June with "background information and suggestions for action."⁶⁰

⁵⁹ NOW Papers; Darcy to Ladky, Chicago, 10 June 1974. NOW MC496, Box 44, Folder 19. Schlesinger.

⁶⁰ NOW Papers; "Act NOW Against Sexism at Sears." MC496, Box 44, Folder 19. Schlesinger. As discussed in Chapter 2, NOW and WE relied heavily on tactics used successfully against the banking industry in designing campaigns against companies such as Sears. A lawsuit was only one part of a broader strategy to bring the company to settle as the banking industry had done.

In July, Collins, Ladky, and Compliance Task Force Coordinator Lynne Darcy sent out the first “Sears Action Bulletin,” designed to “share strategy and information as we build a campaign to end sex discrimination” and allow participating chapters to “report their successes and share plans so that NOW power is coordinated for the greatest impact possible.” The Bulletin contained general background information and claimed that chapters “all over the country” had “responded to the resolution and [were] ready to join in a national action program.” They wanted a coordinated program that would still allow women to “take action on their own behalf to change discriminatory conditions,” one that had “national, regional, and area focus” but still was “based in the heart of the organization -- chapter action.” They asked for comments and information about Sears’ practices in different parts of the country. For those new to the case, the Bulletin also addressed the question of “why Sears,” discussing the company’s size, workforce, status in the industry, the disclosure fight, and its selection as an EEOC Track 1 case. It argued that pressure from NOW was crucial in making the EEOC award back pay. There was a good chance for women to “actually win results” against Sears since, unlike the steel case, they had power as customers and employees: “In every chapter there are probably women who . . . want Sears credit, . . . [or] jobs with promotional opportunities at Sears stores and offices.”⁶¹

The Sears action leaders acknowledged the difficulties inherent in taking on the giant retailer, including its massive resources and anti-union activity. Since employees had no job protection and the company had an extensive profit-sharing plan which masked discrimination and lack of other benefits, employees may be reluctant to speak

⁶¹ NOW Papers; Collins-Robson, Ladky, and Darcy, Sears Action Bulletin, No. 1, July 1974, pp. 1-2. MC496, Box 209, Folder 66. Schlesinger.

up, and feel they had “to protect their jobs more carefully.” The leaders cautioned against underestimating Sears, noting it was “determined to fight in court” to prevent the release of its affirmative action plan and was not above using aggressive tactics such as seeking a restraining order against the government. They assumed Sears would respond similarly to other threats. Finally, the Bulletin emphasized the importance of the Sears action in light of inadequate enforcement by compliance agencies. NOW had no illusions that enforcement agencies would proceed on their own, nor did it understate its own influence: “Enforcement of any affirmative action plan, no matter how inadequate, depends on the amount of pressure . . . exerted by NOW and other organizations.”⁶²

The same month, Bulletin Number 2 briefed chapters on which compliance agencies could investigate Sears and would be most accessible, including the EEOC, the Department of Labor’s Wage and Hour Division, the GSA, and OFCCP. It provided sample leaflets and instructions on how to research Sears’ practices at local retail stores and file charges of discrimination and warned that research gathered “is not an end in itself,” but rather to be used “as a tool for successful action.” Chapters needed detailed “first-hand” information – both statistical information, such as the number of male and female employees in each department, and “personal stories of sex discrimination” – in order “to determine the extent of discrimination” and to formulate demands “on pay and promotions within each . . . unit.” Filing charges around the country would “help focus the task of EEOC, . . . insure . . . they understand the extent of employee dissatisfaction,” and allow NOW to influence “eventual . . . negotiations” with the company. The Bulletin offered creative ideas for obtaining statistical information, such as calling a department to

⁶² NOW Papers; Collins-Robson, Ladky, and Darcy, Sears Action Bulletin, No. 1, July 1974, p. 3. MC496, Box 209, Folder 66. Schlesinger.

complain about a product and noting the sex of the manager. It urged caution when getting personal stories, as Sears employees were “not used to voicing their complaints” and could be fired for discussing wages. The organizers thus suggested subtle comments such as remarking to a salesperson how tired she must be on her feet all day: “I suppose when you become a department manager, you won’t have to do that anymore.” In an effort to maximize the advantages of having a national organization with hundreds of chapters, it covered almost every detail, even noting that peak business hours were the best time to count the number of men and women in a department without drawing any attention, but slow times were best for talking to salespeople.⁶³

Collins and Ladky were pleased with chapters’ response to their call, estimating that 50 chapters were participating by August 1974 and 100 chapters by October.⁶⁴ In Boston, NOW’s Eastern Massachusetts Chapter Economic Task Force distributed questionnaires at the local Sears store asking women whether they had ever worked at Sears or knew someone who had, whether they had done business with Sears, applied for a Sears charge card, or been a stockholder, and whether they would be interested in helping with the campaign “to eliminate sex discrimination at Sears.”⁶⁵ Atlanta NOW became one of the most supportive chapters, with member Judy Lightfoot investigating Sears’ main store during the summer of 1974. She made three visits in one month and “hardly dented it at all,” recommending that three people be assigned in order to properly

⁶³ NOW Papers; Collins-Robson and Ladky, Sears Action Bulletin, No. 2, July 1974, pp. 1-2, 3-4. MC496, Box 209, Folder 67. Schlesinger; “Issue One: Discrimination in Employment,” 1974?, p. 4, UIC, NOW Chicago, 83-27, Box 1, Folder 2.

⁶⁴ NOW Papers; Collins-Robson and Ladky, Sears Action Bulletin, No. 3, August 1974. MC496, Box 209, Folder 66. Schlesinger; NOW Papers; Collins-Robson and Ladky, Sears Action Bulletin, No. 4, October 1974, p. 1. MC496, Box 209, Folder 66. Schlesinger.

⁶⁵ Papers of 9 to 5; Eastern Massachusetts Chapter National Organization for Women Economic Task Force, “Sears Questionnaire.” Schlesinger.

investigate it. Clerks “seem so anxious to talk, one does not have a chance to cover too many departments in one visit.” She found many women working part-time, doing the same work and often the same hours as full-time employees, but without job security, benefits, or commission. Lightfoot categorized employees by department: Garden Shop (2 male); Lingerie (all female, one part-time); Sundries (2 part-time females); Bath, Curtains, Custom (male supervisor; the rest female: one full-time; 2 decorators on straight commission; 2 part-time clerks; and 1 full-time clerk); Carpets (1 male); and Catalogue pick-up (female clerks take orders and give out tickets; 5 males and 1 female).⁶⁶

However, not all chapters felt they should join the Sears action. NOW’s Orlando Area chapter noted in its July 1974 newsletter, “Nationally, SEARS is supposed to be discriminating in many areas, but . . . they are cooperating with us locally.”⁶⁷ Collins and Ladky worried that Sears hired NOW women off the picket lines or appeared polite to appease them and undermine their actions. Collins requested more from the Orlando chapter so that it could “obtain as clear a picture of Sears’ activities as possible and it would be a great help if you would send us anything you know about Sears, positive as well as negative.”⁶⁸

In addition to extending the action to other regions of the country, Chicago NOW also expanded the issues on which it organized to other aspects of Sears business. When

⁶⁶ Papers of NOW Officers -- Lightfoot, 1971-1977; Judith Lightfoot, “Sears Ponce De Leon Store, Report to employment Committee 8-20-74,” 20 August 1974. MC485, Box 3, Folder 12. Schlesinger.

⁶⁷ NOW Papers; Orlando Area NOW, NOW newsletter from Fern Park, FL, 1974. MC496, Box 44, Folder 19. Schlesinger.

⁶⁸ NOW Papers; Collins-Robson and Ladky to Pat Harris, 16 August 1974. MC496, Box 44, Folder 19. Schlesinger.

the Consumer Federation of America gave Sears an “anti-consumer” award for fighting legislation to create an independent consumer protection agency, NOW suggested chapters contact consumer groups in their area.⁶⁹ NOW also leafleted Sears Bank, asking customers whether they wanted Sears Bank to be using their money.⁷⁰ At its July 1974 Board meeting, Chicago NOW discussed “new facets” of the Sears campaign with significant potential for action, such as credit, minimum wage, and part-time employee benefits, and whether they would help build membership.⁷¹ As much as the action was intended to help the women of Sears, it was also intended to help NOW.

In a large multi-issue organization with competition for resources, it was a constant challenge for Collins and Ladky to maintain national support for their cause. On one hand, the July 1974 Compliance Newsletter provided evidence of how important the Sears action was to the national organization. It listed “Sears, Roebuck & Co.!” first in its list of NOT NOW CORPORATIONS and had a front page article on Sears. It noted that Sears was a good national target because it was big and “BAD – a leader in the struggle of corporations to keep their affirmative action statistics secret,” anti-union, [and] part of the “Old (White) Boys Club,” as well as vulnerable to the influence of

⁶⁹ NOW Papers; Collins-Robson and Ladky, Sears Action Bulletin, No. 2, July 1974, p. 4. MC496, Box 209, Folder 67. Schlesinger.

⁷⁰ NOW Papers; “At Sears, Sex Discrimination Runs in the Family,” 1974?. MC496, Box 209, Folder 68. Schlesinger.

⁷¹ Minutes from Chicago NOW Board Meeting, 25 July 1974, p. 2, UIC, NOW Chicago, 81-18, Box 15, Folder 126. Aside from discrimination claims and the disclosure issue, women’s groups also criticized Sears for denying credit to women or refusing to take into account a woman’s own credit record and only considering her husband’s. In 1971, an offended Indiana man wrote to Sears vouching for his ex-wife’s responsible nature and skills in managing the family finances, as well as the status of her court-ordered alimony. He shrewdly noted that neither he nor his ex-wife would shop at Sears again, and that he was sending copies of his letter to “magazines, congressmen, officials of federal and state regulatory agencies, and officials of federal and state departments of commerce and justice.” NOW Papers; James A. Stegenga to The principle executives of “Sears, Roebuck & Co.,” 18 January 1971. MC496, Box 44, Folder 18. Schlesinger.

women customers, employees, and citizens.⁷² By August 1974, Collins and Ladky reported that the Board had authorized additional funds for the subcommittee, and the agenda for the August National Board meeting dedicated sixty minutes to “Sears Campaign Strategy,” much longer than the other reports of twenty or thirty minutes.⁷³

However, Collins and Ladky had to compete with other causes for national attention and resources. Just as they had learned from AT&T, NOW members quickly tried to build on Sears with actions against other corporations. When Darcy asked Joyce Snyder, co-coordinator of the Media Reform Task Force, to analyze the portrayal of women in Sears ads and catalogues, Snyder proposed a campaign against General Electric. She noted that GE could be attacked on many different levels for sexist practices, such as “employment, maternity benefits, child care, [and] portrayal of women in . . . ads, credit, cable properties, broadcast station properties.” She also wrote that she had already rallied support from other NOW members and that there were no Sears stores in New York City for them to work on.⁷⁴

Such a “call to action” to NOW’s “many task force coordinators” must have been seen as potentially drawing attention away from Sears. It highlighted the political job that Collins and Ladky faced of stirring up national and local interest in their cause to make it a priority for the national organization in the face of competing projects. Snyder acknowledged that a GE action might “take away the limelight from Sears” and adjusted

⁷² Stocking, ed., “Look Out, Sears - You Can’t Stop NOW!,” NOW Compliance Newsletter, No. 13, July 1974, pp. 1-2, UIC, NOW Chicago, 78-034, Box 3, Folder 1.

⁷³ NOW Papers; Collins-Robson and Ladky, Sears Action Bulletin, No. 3, August 1974. MC496, Box 209, Folder 66. Schlesinger; NOW Papers; National Organization for Women, Board of Directors, Agenda, 3-4 August 1974. MC496, Box 2, Folder 37. Schlesinger.

⁷⁴ NOW Papers; Joyce Snyder to Lynne Darcy, 27 July 1974, p. 1. MC496, Box 44, Folder 19. Schlesinger.

her timeline somewhat, but still called in her favors, asking those she had helped, including Collins and Ladky, for their support on her project. She noted, “I understand that the government will soon come down on G.E. as they have AT&T, so if NOW does it [first] we will seem foresightful indeed.”⁷⁵ Darcy politely dismissed Snyder’s attempt to start an action, saying although it had “fantastic potential,” she was concerned about beginning “too many actions at once” and recommended putting it off until Sears was finished. She warned that chapters “are somewhat leary of national actions anyway” and to do otherwise would be “confusing and demanding” of them. Following through with Sears would give them the “chance to develop techniques and learn through our mistakes.”⁷⁶ Thus, some NOW members looked to build on the Sears action and move on to other targets before it even got off the ground. Subcommittee leaders had to be vigilant, constantly courting chapters reluctant to join national actions in order to prove their importance to national leaders.⁷⁷

Involving the Federal Government

While trying to build national support, the Sears Subcommittee moved forward during the summer of 1974 by bringing governmental pressure to bear on Sears. In July NOW helped arrange a U.S. Commission on Civil Rights (CRC) hearing on the links between sex discrimination and poverty among women. Sears defied a subpoena to testify, objecting that it duplicated the EEOC investigation. Moreover, since Sears was the only employer required to appear, the subpoena implied that its employment practices

⁷⁵ NOW Papers; Snyder to Darcy, 27 July 1974, p. 2. MC496, Box 44, Folder 19. Schlesinger.

⁷⁶ NOW Papers; Lynne Darcy to Joyce Snyder, 12 August 1974. MC496, Box 44, Folder 19. Schlesinger.

⁷⁷ Chapters were generally wary of national actions. Maryann Barakso, Governing NOW: Grassroots Activism in the National Organization for Women (Ithaca: Cornell University Press, 2004), 60-63.

were “‘unique and a major factor’ in poverty among Chicago women.” The retailer insisted instead that it had an affirmative action program and was “committed to employing members of minority groups.” The CRC chairman “angrily” recessed the hearing and held a closed session on how to proceed, eventually rescheduling it for the next month.⁷⁸

On August 22, the CRC finally held its hearing on women in poverty in Chicago. Sears employees testified that only women were expected to get coffee and sandwiches and empty ashtrays; women in the furniture department did the same work as men but were classified as buyers’ assistants rather than assistants to the buyer and thus did not receive benefits; and even with a bachelor’s degree and some graduate work one woman could not get promoted above clerical assistant.⁷⁹ They testified about “low pay, lack of promotional opportunities and discriminatory hiring practices,” countering executives’ claims that the company was a model of equal employment opportunity.⁸⁰

Sears officials responded with a news release claiming that the allegations of discrimination had “no merit” and that it had made progress in affirmative action programs.⁸¹ One executive testified that 13.2 percent of officials and managers at corporate headquarters were women, a 2.4 percent increase since February 1, 1973, and

⁷⁸ NOW Papers; Betty Washington, “Sears defies subpoena to hearing on sex bias,” Daily News, Chicago, 25 July 1974. MC496, Box 44, Folder 18. Schlesinger; NOW Papers; Betty Washington, “6 subpoenas still aimed at Sears,” Daily News, Chicago, 26 July 1974. MC496, Box 44, Folder 18 [19?]. Schlesinger; NOW Papers; “Women charge job bias: 6 from Sears snub rights hearing,” Chicago Tribune, 26 July 1974. MC496, Box 44, Folder 18 [19?]. Schlesinger.

⁷⁹ Collins Papers; NOW Chicago, “History of the Sears Campaign,” 1975, p. 2. MC493, Box 15, Folder 4. Schlesinger; NOW Papers; Karen Hasman, “Sears aides charge sex bias,” Daily News, Chicago, 22 August 1974. MC496, Box 44, Folder 19 [18?]. Schlesinger.

⁸⁰ Lynne Darcy, “SEARS SUBCOMMITTEE COALITION ACTIVITIES,” NOW Compliance Newsletter, No. 14, November 1974, p. 9, UIC, NOW Chicago, 78-034, Box 3, Folder 1.

⁸¹ NOW Papers; Hasman, “Sears aides charge sex bias.” MC496, Box 44, Folder 19 [18?]. Schlesinger.

argued that the problem – and women’s place in society – was “deeply rooted in the fabric of American society.” The company then refused to release personnel data for competitive reasons, claiming that Montgomery Ward & Co. “would try to hire away outstanding Sears female and minority employees.”⁸²

Ladky, only twenty-six years old at the time, testified for NOW that Sears practices kept women in poverty because they were “ghettoized” in low-paying, dead-end jobs in certain industries.⁸³ She “outlined . . . the implications of Sears’ strategies to avoid compliance with EEOC laws” and blamed discrimination for the high percentage of employed women living in poverty.⁸⁴ The retail industry employed 18 percent of working women and women constituted 60 percent of its workforce, but median wages changed only slightly between 1968 and 1972 due to an increase in the minimum wage, “not a change in corporate policy.” Since Sears dominated the industry in sales, profits, and number of employees (“twice as many people as its closest competitor”), if it had made the progress it claimed during the past five years, there would have been “a noticeable impact on median wages and on promotions for women in the industry.” Since the company refused to provide data proving otherwise, she had to assume no progress was being made.⁸⁵

⁸² NOW Papers; Long Hwa-shu, “Sears accused, denies job bias against women,” Daily News, Chicago, 23 August 1974. MC496, Box 44, Folder 19 [18?]. Schlesinger; NOW Papers; “Sears denies sex bias charge after testimony by female workers,” Beacon-News, Aurora, IL, 23 August 1974. MC496, Box 44, Folder 19 [18?]. Schlesinger.

⁸³ Collins Papers; “History of the Sears Campaign,” p. 2. MC493, Box 15, Folder 4. Schlesinger; NOW Papers; Hasman, “Sears aides charge sex bias.” MC496, Box 44, Folder 19 [18?]. Schlesinger; NOW Papers; Anne Ladky, “Testimony prepared for presentation to the U.S. Commission on Civil Rights, Public Hearings,” 22 August 1974, p. 1. MC496, Box 44, Folder 18. Schlesinger.

⁸⁴ Darcy, “SEARS SUBCOMMITTEE COALITION ACTIVITIES,” NOW Compliance Newsletter, No. 14, November 1974, p. 9, UIC, NOW Chicago, 78-034, Box 3, Folder 1.

⁸⁵ NOW Papers; Ladky, Testimony for U.S. Commission on Civil Rights hearing, pp. 2-3. MC496, Box 44, Folder 18. Schlesinger.

Ladky also urged the CRC to examine Sears' policy of employing 60 percent part-time employees. These workers received no sales commissions, limited benefits, no chance for promotion, and "less than a living wage," even though they often worked 40 hours per week. Ladky argued these policies, not society's attitudes, kept women in poverty. She asked the CRC to consider the societal cost of such a policy, which required workers to subsidize their low wages with public assistance and food stamps. Finally Ladky complained about the failure of government agencies to enforce civil rights laws that NOW had worked so hard to pass. For example, the OFCCP did not suspend Sears' federal contracts despite its refusal to disclose its affirmative action plan. Ladky warned that "NOW's investigation of Sears is just beginning."⁸⁶

Meetings with Sears Officials

Another Subcommittee tactic involved demanding meetings with Sears officials. As part of Women's Equality Day activities on August 26, 1974, Chicago NOW members demonstrated against discrimination by Sears Bank. They went into the office of the assistant vice president of personnel, but he quickly ended the meeting because of the reporters and television cameras following the protestors. He "refused to present any timetable for implementing equal opportunity goals or statistics on hiring and promotion of women by the bank." Ladky said that since six members of Sears, Roebuck and Co. sat on the board of the Sears Bank, discrimination in the bank and retail stores was "interchangeable." NOW members leafleted customers, urging them to close their bank accounts.⁸⁷

⁸⁶ NOW Papers; Ladky, Testimony for U.S. Commission on Civil Rights hearing, pp. 3-4, 5, 7. MC496, Box 44, Folder 18. Schlesinger.

⁸⁷ NOW Papers; Karen Hasman, "Women here mark 54th year of vote," Chicago Daily News, 26 August 1974, p. 8. MC496, Box 44, Folder 19. Schlesinger; NOW Papers; Associated Press, "Suffrage

In September, Atlanta NOW members secured a meeting with Con Massey, Sears' Office of Territorial Personnel Manager, at Sears' territorial headquarters. Cathie Del Campo and Judy Lightfoot reported that Massey criticized them for not using facts but refused to give them the territorial data and affirmative action plan, claiming each store had its own separate plan. He insisted that Sears had instituted a new Mandatory Achievement Goals (MAG) program to move minorities and women into non-traditional positions and made store managers responsible for implementing it. At the same time, however, he criticized NOW for confronting store managers for affirmative action plans, claiming they could not do anything. Del Campo and Lightfoot complained that Sears employees did not seem to know about MAG, questioning its "word-of-mouth quality," but Massey insisted that employees learned of it through the annual report and meetings with managers. He even claimed that the program had caused a white-male backlash as evidence that employees knew about it, but Del Campo and Lightfoot labeled this argument an attempt to make NOW look like the "bad guys" rather than Sears. Massey confirmed that Sears was moving to a 60/40 percent part-time to full-time workforce and argued that Sears discriminated "no more than others." Del Campo and Lightfoot also asked about Peggy Hardigree, the employee who came to the Houston convention, and took Massey's evasiveness as proof that she was reporting back to the company. Overall,

anniversary: Women observe 'Equality Day'," Chicago Tribune, 27 August 1974, p. 2. MC496, Box 44, Folder 19. Schlesinger; NOW Papers; Toll, "A support-ERA call is put on Holy Name," p. 2. MC496, Box 44, Folder 19. Schlesinger. See also NOW Papers; The Bank Teller: Overburdened Women Underbudgeted at Sears 1(2), 4 November 1974. MC496, Box 209, Folder 68. Schlesinger.

they were pleased with the meeting as they felt their agenda was followed, and they obtained information without giving any away.⁸⁸

Atlanta NOW believed that conditions were “as bad or worse” in that city’s stores as in Chicago, where NOW had already filed charges.⁸⁹ The chapter followed up the meeting with Massey with leaflets informing employees about their discussions and their efforts to obtain personnel data, and asking for information about MAG.⁹⁰ Collins and Ladky pointed to Atlanta as an example of a “very successful campaign to contact Sears employees” and inform them about the filing of EEOC charges.⁹¹ They attached an Atlanta NOW leaflet to the December 1974 Sears Action Bulletin as an example, featuring a disturbing drawing of a man holding two bags of money labeled “Purchases” and “Taxes” with his foot on the neck of a woman lying on the ground. The flyer announced, “Your tax dollar and purchase today support sex discrimination at Sears.”⁹²

NOW spent the fall of 1974 trying to meet with Sears officials and picketing to pressure Sears. By September, Ladky felt certain their actions were having an impact: “I’m sure Aug 26 freaked Sears out.” She reported the Subcommittee was “really growing.”⁹³ In October, Atlanta NOW leafleted at the Territorial Headquarters to tell

⁸⁸ Papers of NOW Officers -- Lightfoot, 1971-1977; Judith Lightfoot and Cathie Del Campo, Notes on September 30, 1974 meeting with Con Massey at Sears Territorial headquarters in Atlanta, 30 September 1974? (date of meeting), pp. 1-2. MC485, Box 3, Folder 12. Schlesinger.

⁸⁹ Papers of NOW Officers -- Lightfoot, 1971-1977; “NOW’S SEARS ACTION – WHY.” MC485, Box 3, Folder 12. Schlesinger.

⁹⁰ NOW Papers; Atlanta NOW, “What is Sears Secret?” (flyer), Sears Bulletin No. 1, October 1974. MC496, Box 209, Folder 67. Schlesinger.

⁹¹ NOW Papers; Memorandum from Anne Ladky to Lynne Darcy, 12 September 1974, p. 2. MC496, Box 44, Folder 19. Schlesinger.

⁹² Collins-Robson and Ladky, Sears Action Bulletin, No. 6, December 1974, p. 4. MC496, Box 209, Folder 66. Schlesinger; NOW Papers; Atlanta NOW, “DO YOU KNOW SEARS’ SECRET?,” Sears Bulletin No. 3, December 1974. MC496, Box 209, Folder 67. Schlesinger.

⁹³ NOW Papers; Ladky to Darcy, 12 September 1974, p. 2. MC496, Box 44, Folder 19. Schlesinger.

employees what NOW had learned about Sears practices, “encourage them to tell us their stories . . . about sex discrimination and to file charges,” and draw out “disgruntled employees.”⁹⁴ Even without the data to back it up, they had “great confidence that cases [would] come piling out.”⁹⁵ Employees were “anxious to take leaflets” and even came back to get extras for their friends. Sears managers were lurking about and appeared “unnerved.” Many “black men took leaflets and agreed that there was both race and sex discrimination at Sears.”⁹⁶

On November 19, Atlanta NOW President Cynthia Hlass released a Research Report similar to the Chicago one, setting forth the results of their leafleting actions at the Ponce De Leon store.⁹⁷ The report followed a sample from the October Sears Action Bulletin No. 4 as “a compilation of . . . preliminary research” to be given to the press as background.⁹⁸ It repeated many of the same arguments about Sears: its record sales and large number of employees, its role in setting guidelines for the entire industry, and its impact on “individual lives and the economy as a whole” as well as the disclosure issue and Track 1 status with the EEOC. The report included a table for the Atlanta area,

⁹⁴ Papers of NOW Officers -- Lightfoot, 1971-1977; Instructions for Leafletters, [action October 16-17, 1974]. MC485, Box 3, Folder 12. Schlesinger; Papers of NOW Officers -- Lightfoot, 1971-1977; “Sears Action Glorious Success: Employees Respond, Management Reactions as NOW Leafletters Carry the Message,” ca. 16-17 October 1974, p. 2 (typewritten notes (press release?) reporting on the October 16-17, 1974 Atlanta action). MC485, Box 3, Folder 12. Schlesinger.

⁹⁵ Papers of NOW Officers -- Lightfoot, 1971-1977; Memorandum from Judith Lightfoot to Sears Sub/Compliance re: “Thisa and thata on the state of affairs in Southeastern Territory,” 3 October 1974. MC485, Box 3, Folder 12. Schlesinger; Papers of NOW Officers -- Lightfoot, 1971-1977; “Sears Action Glorious Success,” p. 1. MC485, Box 3, Folder 12. Schlesinger.

⁹⁶ Papers of NOW Officers -- Lightfoot, 1971-1977; “Sears Action Glorious Success,” pp. 1-2. MC485, Box 3, Folder 12. Schlesinger.

⁹⁷ NOW Papers; Statement by Cynthia Hlass, President of Atlanta NOW (press release?), 19 November 1974, p. 1. MC496, Box 44, Folder 18. Schlesinger.

⁹⁸ NOW Papers; Collins-Robson and Ladky, Sears Action Bulletin, No. 4, October 1974, p. 1. MC496, Box 209, Folder 66. Schlesinger.

compiled from eight retail or catalog stores, showing that male employees “predominate” in high ticket departments while women “work mainly” in low ticket departments. Even in the Men’s Clothing Department, men sold the more expensive suits while women sold other clothes. At the Fashion Apparel Distribution Center in Tucker, Georgia, men held “management positions,” and women were “clustered in . . . lower echelon jobs” such as clerical work. The report also summarized interviews with women who responded to leaflets, noting they knew “virtually nothing” about Sears’ affirmative action plan or the MAG plan, and managers failed to tell them “about the few training programs that do exist, . . . even when asked specifically.” Like Chicago, the Atlanta report also included “stories of individual women” to “provide insight into the charge of sex discrimination” with virtually the same complaints as the Chicago women.⁹⁹ On the same day Atlanta NOW filed seventeen sex discrimination charges with the EEOC, and in December 1974, filed three more sets on behalf of anonymous Sears employees.¹⁰⁰ It requested that the charges “be sent directly to Washington to become part of the Track I case.”¹⁰¹

In November the Subcommittee sent local chapters detailed information on how to plan actions, gather information, file charges, and gain publicity. It included sample press releases, information about the shareholder meeting, and a summary of charges filed, and even provided tips on the most attractive signs for television cameras, methods

⁹⁹ NOW Papers; Atlanta NOW, Research Report prepared by The National Organization for Women, Inc. Atlanta Chapter, November 1974, pp. 1-6. MC496, Box 44, Folder 18. Schlesinger.

¹⁰⁰ NOW Papers; Atlanta NOW, “DO YOU KNOW SEARS’ SECRET?,” Sears Bulletin No. 3, December 1974. MC496, Box 209, Folder 67. Schlesinger; NOW Papers; Atlanta NOW, “Sears’ Secret Is Out,” Sears Bulletin No. 2, November 1974. MC496, Box 209, Folder 67. Schlesinger.

¹⁰¹ NOW Papers; Statement by Cynthia Hlass, p. 2. MC496, Box 44, Folder 18. Schlesinger.

for pressuring the EEOC to respond quickly, and procedures for setting up administrative hearings in their own city.¹⁰²

1974 Christmas Action

With more NOW chapters involved by the end of 1974, the Subcommittee organized Sears actions to reach female customers during the Christmas shopping season.¹⁰³ Sears Action Bulletin number 6 provided suggestions for the pre-Christmas action and announced that over 50 chapters planned to join, including ones in Wisconsin, Michigan, Atlanta, and Chicago. New Jersey NOW “[led] the way with 19 chapters participating.” The December 14 protests were intended “to publicize NOW’s nationwide campaign against sex discrimination . . . , inform Sears’ customers and employees, and . . . build [the] chapter’s Sears program by involving as many . . . members as possible.”¹⁰⁴

Collins and Ladky recommended two actions that could be modified to meet local needs. The first, “visual and attention-getting,” involved picketing and leafleting customers to give exposure to NOW’s campaign. Members should hold a short rally, then picket and distribute leaflets outlining NOW’s work. Chapters should choose the time and store location “for maximum publicity and contact with shoppers” and recruit twice as many people as they needed. They should use signs giving “as much exposure as possible to NOW’s name, the issues, and . . . Christmas slogans if possible.” The Sears Action Bulletin also suggested writing a special Christmas carol and renting a

¹⁰² Issue One: Discrimination in Employment, 1974?, pp. 4-6, UIC, NOW Chicago, 83-27, Box 1, Folder 2.

¹⁰³ Collins Papers; “History of the Sears Campaign,” p. 2. MC493, Box 15, Folder 4. Schlesinger.

¹⁰⁴ NOW Papers; Collins-Robson and Ladky, Sears Action Bulletin, No. 6, December 1974, pp. 1-2. MC496, Box 209, Folder 66. Schlesinger.

sound system to draw a bigger crowd. If Sears managers appeared to “talk,” NOW members should set up a future time and announce it to the group, but not interrupt the action: “your timetable is to advertise Sears practices to their customers on a Saturday shopping day.” Members should be “friendly and full of Christmas spirit in dealing with Sears shoppers,” who were expected to react positively, and ensure that NOW members had a good time. The action should end with a rally to “announce your next steps, and/or songs” and then gather afterwards to share details, which would help build the group and celebrate its success.¹⁰⁵

A second action, for chapters focused on the credit issue or that had held another action recently, involved leafleting customers on consumer issues. Members would follow the same format but talk more with customers “about Sears practices, obtain information . . . pressure . . . Sears management in an area other than employment, and, of course, . . . give [Sears] bad publicity.” Collins and Ladky suggested distributing cards with consumer and credit information and the name and number of the store manager to encourage people to complain. Members should call “identifying themselves as customers who are shocked about Sears’ practices, rather than as NOW members.”¹⁰⁶ The other side of the card could announce NOW’s national discrimination campaign and ask for support. They recommended stapling candy to the cards as a “gimmick to increase consumer response” because few shoppers would turn it down, no matter how rushed. Collins and Ladky reported, “Most shoppers saw this as a friendly gesture, and many were willing to talk about the problems they have had.” The Subcommittee also

¹⁰⁵ NOW Papers; Collins-Robson and Ladky, Sears Action Bulletin, No. 6, pp. 1-2. MC496, Box 209, Folder 66. Schlesinger.

¹⁰⁶ NOW Papers; Collins-Robson and Ladky, Sears Action Bulletin, No. 6, p. 3, MC496, Box 209, Folder 66. Schlesinger.

distributed a press release template for the December campaign, with background on the grievances and space for local chapters to fill in their name, location, local Sears coordinator, and president.¹⁰⁷

The Milwaukee Sentinel reported on a Christmas action in Wisconsin, where a NOW member dressed as Ms. Claus led picketers asking customers not to shop at Sears. The paper noted, “Maybe it was the yuletide spirit, but Ms. Claus had a kindly air. She spoke warmly to children, gently to their parents.” Few shoppers refused to enter the store, but some agreed to read the materials or not buy anything. “Ms. Claus” said men seemed more receptive to the boycott than women, including “[o]ne young man who . . . looked incredulously at the pretty Ms. Santa, with long blond hair hanging down over her scarlet costume. ‘Can you be a woman’s libber?’ he asked.” “All we want is equal opportunity,” she replied. She warned that picketers might be “back at all Sears stores each Saturday until Christmas spreading limited good cheer.”¹⁰⁸ On December 21, the paper carried Sears’ response. The store claimed that it was “making progress locally and across the nation” toward improving employment practices for women and minorities and “sincerely believe[d]” its goals were “identical with those of NOW.”¹⁰⁹ Ladky forwarded the clipping to Collins with a note questioning why “NOW actions are always covered in the feature pages” and “Sears responses in the front section.”¹¹⁰

¹⁰⁷ NOW Papers; “NOW Charges Sears with Unfair Credit and Customer Service Practices,” 1974. MC496, Box 44, Folder 18. Schlesinger.

¹⁰⁸ Dorothy Austin, “‘Ms. Claus’ Leads Pickets,” Milwaukee Sentinel, 2 December 1974, UIC, NOW Chicago, 83-27, Box 1, Folder 1.

¹⁰⁹ “‘Progress’ Reported By Sears in Hiring,” Milwaukee Sentinel, 21 December 1974, UIC, NOW Chicago, 83-27, Box 1, Folder 1.

¹¹⁰ Handwritten note from Anne Ladky to Mary Jean Collins-Robson, undated [after 21 December 1974], UIC, NOW Chicago, 83-27, Box 1, Folder 1.

Concerns About The Tenuous Status of the Subcommittee

Despite their relative success in garnering chapter support for the Sears action, Collins and Ladky appeared to be constantly aware of its tenuous status within the national organization. They regularly sent progress reports to board members, emphasizing how many chapters had joined as a sign that the case was important to NOW members and, therefore, worthy of increased national support. In November, they sent a lengthy memo to chapter presidents, the subcommittee, board of directors, and task force coordinators, justifying continued support for their cause by emphasizing the importance of the Sears campaign for NOW. They recapped recent activities such as the August 26 leafleting, meetings with managers “to obtain information about local policies,” the CRC hearings, and planned Christmas consumer actions. They described their contact with other organizations, including the National Black Caucus, ICCR, the Senior Skills Foundation, the Asian League for Equality, the National Consumers League, and the YWCA. Collins and Ladky stressed the potential for building coalitions with these groups around the Sears campaign because it affected so many different groups – older women, minorities, poor women – and so many issues, including employment, credit, and consumer practices.¹¹¹

Under “Background on the Sears Campaign and Its Importance to NOW,” Collins and Ladky provided the usual arguments about Sears’ influence in the industry, percentage of women employees, and low wages. They claimed “considerable success in making contact with women employees,” which was “essential . . . for developing our strategy in line with the issues of greatest importance to women employees, for impact on

¹¹¹ NOW Papers; Memorandum from Collins-Robson and Ladky to NOW Chapter Presidents et al., pp. 1-3, 7-8. MC496, Box 44, Folder 18. Schlesinger.

the EEOC, and because real change at Sears is more likely if the women there act on their own behalf and gain confidence as they work with NOW.” The future of women’s economic status depended on continued involvement in the Sears campaign, to combat corporations “inventing new ways to maintain the status quo of cheap female labor.” The two NOW leaders reprinted Sears’ annual report data and detailed the checklist/timecard and commission issues. They also noted it was necessary to resist the trend toward a part-time workforce because it “circumvent[ed] equal pay laws,” limited union organizing, and reduced benefits. The Subcommittee summarized Sears’ Track I and federal contractor status and charges filed and claimed that the Sears case would follow the same path as AT&T, with an EEOC investigation forcing “negotiations . . . toward a settlement.”¹¹²

Collins and Ladky also emphasized why Sears should remain a top priority for NOW. It had to fight the disclosure issue to avoid setting a precedent that other employers could ignore equal employment opportunity laws and public accountability. Public pressure was crucial to enforce hard-won legislation, ensure that employers complied with the laws, and focus attention on the EEOC’s findings. The steel industry negotiations and settlement barely reflected the interests of women because the public had paid little attention to it. As employees and consumers of Sears, however, women could have a greater impact in this case. Finally, they emphasized NOW’s self-interest in the Sears action, as an “opportunity to build” the organization by involving different committees and chapters against a single target. It could be used to expand NOW’s base and win a significant victory and the publicity and credibility that went with it.

¹¹² NOW Papers; Memorandum from Collins-Robson and Ladky to NOW Chapter Presidents et al., pp. 1-5, 7. MC496, Box 44, Folder 18. Schlesinger.

Underscoring their need to recruit members to the cause, the memo even encouraged NOW leaders to join the campaign and offer suggestions.¹¹³

Their efforts paid off. By the end of 1974, the Sears campaign remained a priority for the organization, or at least for the Compliance Subcommittee. The November 1974 Compliance Newsletter listed Sears first under its “NOT NOW CORPORATIONS” and “SPECIAL COMPLIANCE PROJECTS,” and asked stockholders to join in a shareholder action. The newsletter dedicated at least one full page to updates on Sears actions, including the CRC hearings, chapter actions, and the disclosure lawsuit.¹¹⁴

In addition, the Sears Campaign Status Report played a central role on the agenda for the November 1974 National Board Meeting in Denver, Colorado. Collins again reported that over 100 chapters had joined the campaign, and that NOW asked the CRC “to determine how many Sears employees were receiving food stamps since the average wage of women at Sears is \$2.00 per hour.” She reported on coalition activity and direct actions, but said “there was [not] yet sufficient pressure . . . to start meetings between NOW and Sears representatives.” The board also focused on other class issues. It allocated budget money for 1975 for a full-time employee to “implement . . . the mandate of NOW National Conference Resolutions on Women & Poverty and Older Women,” and listed child care, housing, labor unions, minority women and women’s rights, and women and poverty among its national task forces. It also passed a motion to consider

¹¹³ NOW Papers; Memorandum from Collins-Robson and Ladky to NOW Chapter Presidents et al., pp. 5-8. MC496, Box 44, Folder 18. Schlesinger.

¹¹⁴ Lynne Darcy, NOW Compliance Newsletter, No. 14, November 1974, pp. 1, 7, 9, UIC, NOW Chicago, 78-034, Box 3, Folder 1.

waiving membership dues for women in prison and require that an “ex-convict” be chosen as co-coordinator of the Task Force on Criminal Justice.

NOW’s Attention Distracted

However, the Board also prioritized issues besides Sears and class concerns in November, including allocating more money for the ERA Emergency Fund Budget.¹¹⁵ One member reported back to the 1974 Western Regional Conference that the national Sears Action was “[o]ne of the most significant projects being undertaken by NOW.” However, he also reported that the major issues at the board meeting included efforts to ratify and fight rescission of the ERA: “[a]fter ratification, it will be necessary to devote great efforts to ERA implementation to eliminate sex discrimination in statutes throughout the country [and] . . . administrative practices.”¹¹⁶

It was not unusual for NOW to juggle multiple issues. Still, the November 1974 Board meeting hinted at signs of lingering tensions within NOW that may have affected its commitment to the Sears case. In an ongoing debate several leaders challenged Collins’ ownership of C-R Programs, the company that handled the organization’s printing. They felt it was a conflict of interest for Collins to profit from the movement and insisted that printing jobs be opened to a public bidding process. Collins reminded them that she and her husband had quit their jobs during NOW’s early years to help keep expenses down when it could not afford to hire an outside printing company. Whether

¹¹⁵ Minutes of the National Organization for Women National Board Meeting, Denver, Colorado, 9-10 November 1974, pp. 1-3, 6-8, UIC, NOW Chicago, 78-034, Box 6, Folder 5.

¹¹⁶ Stuart Herzog, Memorandum: Report to the 1974 Western Regional Conference, 21 November 1974, p. 3 (in possession of Rebecca Davison).

for personal reasons or not, some NOW leaders used this dispute to undermine Collins' credibility.¹¹⁷

In an even stranger development, NOW's Board split in two at the end of 1974 when DeCrow and twelve board members (the "Majority Caucus") called for "structural change" and filed a lawsuit "alleging violations of the by-laws." Eventually, eleven members walked out of the December 1974 board meeting in New Orleans, while those remaining continued to conduct business.¹¹⁸ Chapters responded negatively to the dispute, noting that although they did not know what the dispute was about, board members should move beyond internal fights in the interest of sisterhood. Eventually some chapters began to withhold dues, either to harm the financially-troubled national organization, to side with those who left, or because they were angry at both sides for the continuous infighting and did not want to finance any more such meetings.¹¹⁹ This internal bickering and declining credibility on the part of the national organization could not have helped but affect its commitment to any issue, Sears-related or otherwise.

Attempts to Arrange Meetings with Sears' Leaders

In part due to NOW's internal problems, attempts to arrange a meeting between top Sears officials and NOW leaders brought mixed results at the end of 1974. Sears

¹¹⁷ See, for example, discussion of in-house distribution, Minutes of the National Organization for Women National Board Meeting, Denver, Colorado, 9-10 November 1974, UIC, NOW Chicago, 78-034, Box 6, Folder 5.

¹¹⁸ See Evans, *Tidal Wave*, 110; Ryan, *Feminism and the Women's Movement*, 71-72; correspondence regarding split in National Board of NOW, 1974-1976, UIC, NOW Chicago, 78-034, Box 14, Folder 3. Maryann Barakso characterized the split as between those who thought the group should have a strong state and national organization and participate actively in the mainstream political process, and those who thought it should reflect individual chapters' interests and work as outsiders to the political process. Barakso, *Governing NOW*, 60-63. However, Sara Evans notes there were "no deep ideological differences between the two factions, each of which agreed that the continuing existence of a national organization was paramount." Evans, *Tidal Wave*, 110.

¹¹⁹ See correspondence regarding split in National Board of NOW, 1974-1976, UIC, NOW Chicago, 78-034, Box 14, Folder 3.

Action Bulletin No. 5 discussed “HOW TO DEAL WITH LOCAL MANAGEMENT” and cautioned that local managers often appeared “responsive to NOW’s goal to end discriminatory employment practices,” but “Lip service and sympathy” were “different from positive and affirmative action.” Although Sears made corporate policy at the top, local demands could “bring to the public’s attention – ‘What is Sears hiding?’” Collins and Ladky warned about Sears’ tactics, such as offering members meetings, credit cards, and jobs, but no affirmative action plans. The Subcommittee suggested ways to “minimize[Sears’] ‘nice-guy’ tactics,” which were intended to derail “efforts to end discriminatory employment practices.” If Sears contacted a chapter for a meeting, it should pick a time convenient for the group (such as lunch time) “to maximize demonstration participation by . . . members and the press.” After the meeting, members should inform employees of the outcome and evaluate whether management claims matched their experiences. Any direct job offers for NOW members would lessen the impact and add to the “white-male backlash,” particularly since Sears had begun massive lay-offs. Instead, members should apply through the personnel office “so . . . there [would] be no misunderstanding of motives.” Finally, chapters should differentiate between EEO people and management, as the company would likely refer them to people who handle protestors rather than those who make decisions.¹²⁰

In September Aileen Hernandez offered to arrange a meeting between Sears officials and NOW leaders, including President De Crow, Collins and Ladky, and the Compliance Task Force coordinator.¹²¹ Hernandez had served as an EEOC

¹²⁰ NOW Papers; Sears Action Bulletin, No. 5, November 1974, pp. 2-3. MC496, Box 209, Folder 66. Schlesinger.

¹²¹ Aileen C. Hernandez to Jim (last name unknown), 16 September 1974 (in possession of Rebecca Davison).

Commissioner and been instrumental in getting the agency to focus on sex as well as race. She then became the second president of NOW in 1971. She later began a consulting firm to advise companies – including Sears – on equal employment opportunity issues.¹²² Her client relationship with Sears rankled some NOW members, who saw her as betraying the movement. At the same time, the fact that Sears felt the need to hire an outside consultant to assist with EEO issues reflected the movement's success; it demonstrated a new awareness on the part of the company that it had to take women and minority issues seriously.

In October Hernandez proposed a December meeting with Sears officials. She said the agenda was open and “NOW can raise any matters of concern,” but cautioned that disclosure of equal employment opportunity data from local facilities would “not be a priority” since the issue was in litigation. Although Sears wanted to explain its rationale for the lawsuit, it was “aware of NOW’s position (and mine) . . . and it would be rather fruitless to spend a lot of the meeting on this; there are many other issues that could and should be raised and discussed.”¹²³ Collins, Ladky, and Darcy sent a memorandum to NOW’s Board of Directors claiming that Sears’ proposal demonstrated their protests had affected the company, which was worried about their impact during the holiday season. They argued that this was not a time to relent because Sears refused to deal with them in good faith by discussing access to EEO data. They accused Sears of trying to co-opt NOW by scheduling a meeting to “rid themselves of public pressure.”

¹²² See, for example, Aileen Hernandez to Ray Graham, 20 November 1974 (in possession of Rebecca Davison).

¹²³ Papers of NOW Officers -- Lightfoot, 1971-1977; Aileen C. Hernandez to K. DeCrow, L. Darcy, E. Smeal, M.J. Collins-Robson, and A. Ladky, 24 October 1974. MC485, Box 3, Folder 12. Schlesinger.

Instead, NOW should increase public pressure, and the Board should “make this campaign a priority in the coming months.”¹²⁴ Their interpretation skillfully offered enough successes to convince the Board the Sears action was working, but enough challenges to persuade the Board to continue its support.

Despite earlier efforts to arrange a meeting, NOW appeared to be reluctant to meet with Sears when Hernandez offered to broker a connection. At the November Board meeting, Eleanor Smeal reported on “a continuing effort [by] Sears executives to establish a meeting with NOW Officers” since the company was “targeted by the 1974 Conference,” but also noted that the meeting had been postponed in lieu of “future arrangements.”¹²⁵ On November 20, Hernandez told Sears’ director of equal employment opportunity, Ray Graham, that she had not heard from NOW on meeting dates, but that the proposal had “stirred considerable discussion within NOW” which was “very healthy.”¹²⁶ By December, she reported she still had not heard about a date and recommended arranging meetings with other women’s groups instead so “we do not lose momentum on our activities.” She sent Graham a list of other groups “who should be encouraged to know more about Sears Equal Opportunity Policy and to become more active at the local and national levels in the implementation of that policy,” including the League of Black Women in Chicago, WEAL, National Black Feminist Organization, Comision Femenil Mexicana, Americans for Indian Opportunity, and National Conference of Puerto Rican Women. She noted, “That meeting could be the one at

¹²⁴ Papers of NOW Officers -- Lightfoot, 1971-1977; Lynne Darcy, Mary Jean Collins-Robson, and Anne Ladky to NOW Board of Directors, 8 November 1974, pp. 1-2. MC485, Box 3, Folder 12. Schlesinger.

¹²⁵ Minutes of the National Organization for Women National Board Meeting, Denver, Colorado, 9-10 November 1974, p. 4, UIC, NOW Chicago, 78-034, Box 6, Folder 5.

¹²⁶ Hernandez to Graham, 20 November 1974 (in possession of Rebecca Davison).

which your top Sears officials are introduced to activist women. We would have to prepare for that meeting in advance, but I think it might be worth while at a later stage.”¹²⁷

Hernandez’ agenda is somewhat unclear. She appeared to be undermining NOW by revealing political tensions within the organization. For instance, she wrote to Sears, in “addition to our earlier problems of communication with the Chicago NOW and National Sears Action leadership, we may have some additional burdens as a result of a rather serious internal battle within NOW which is unrelated to the Sears Project, but will have some effect on the Sears meeting because of the people involved. We may have to discuss an alternative approach.”¹²⁸ Whatever her reason for pushing Sears to sidestep NOW – because it was standing in the way of Sears’ publicity efforts on EEO?; because she legitimately wanted to broaden the diversity of groups involved? – it was clear that internal politics within NOW threatened to compromise progress on the Sears case.

Waning Interest

The development of the Sears case reflected growing tensions and changing priorities within NOW and the women’s movement in general. The detachment of women’s groups had a significant impact on the outcome of the Sears case and highlights the importance of activism in bringing about social change.

¹²⁷ Aileen Hernandez to Ray Graham, 16 December 1974, pp. 1-2 (in possession of Rebecca Davison).

¹²⁸ Hernandez to Graham, 16 December 1974, p. 1 (in possession of Rebecca Davison). It appeared that personal conflicts between Hernandez and Collins also played a role. Hernandez opposed Collins’ bid for the presidency of NOW and supported the allegations that she had a conflict of interest, because, some speculated, Collins was leading the campaign against Sears. Documenting the Midwestern Origins of the Twentieth-Century Women’s Movement, 1987-1992, Gerda Lerner, project director, Wisconsin Historical Society archives, Oral History of Kathryn Clarenbach, Catherine East, and Mary Eastwood, September 20, 1991.

Following the Christmas 1974 actions, the year 1975 began with the same commitment to the Sears campaign. In January, chapters continued their local actions against Sears stores, and some chapters filed sex discrimination charges with regional EEOC offices.¹²⁹ Local newspapers in Battle Creek, Michigan and southern New Jersey carried photographs of NOW members picketing Sears in snow and cold weather with signs proclaiming “Sears Ripps-Off (sic) Old Ladies,” “Sears Shortchanges Women Employees,” and “6.2% of Sears’ women employees are officials or managers NOT ENOUGH.”¹³⁰ In May, NOW members again attended Sears annual meeting to tell shareholders of the company’s action to lead the fight against access to the affirmative action plan.¹³¹ NOW’s Southern Regional Director asked Collins to “do a session on Sears/Compliance” at an August meeting at Emory University for state officers, board members, and chapter presidents. The presentation would allow her “to share experiences of state organizing and many of the issues in NOW’s future” and discuss “upcoming issues facing the National Conference in October in Philadelphia.”¹³²

Despite these continued actions, the focus of women’s groups on the Sears case had begun to wane as changes in the organizations affected their ability to pursue Sears. Women Employed, which had been so involved in investigating and filing the initial charges against Sears, slowly dropped out as well once the case moved into the litigation

¹²⁹ Collins Papers; “History of the Sears Campaign,” p. 2. MC493, Box 15, Folder 4. Schlesinger.

¹³⁰ NOW Papers; photograph of women picketing Sears store [stamp on back: “PHOTO BY THE BATTLE CREEK ENQUIRER . . .”; handwritten: “George Vallillee”]. MC496, Photo drawer, Folder: Demonstrations. Schlesinger; NOW Papers; photograph of four women wearing Sears picket signs, March/April 1975 [handwritten on back: (1) South Jersey NOW Kathi Grace Gillis Do It NOW Mar/Apr 75]. MC496, Photo drawer, Folder: Demonstrations. Schlesinger.

¹³¹ Collins Papers; NOW Chicago, “History of the Sears Campaign,” 1975, p. 2. MC493, Box 15, Folder 4. Schlesinger.

¹³² Memorandum from Jackie Frost, NOW Southern Regional Director, to State Officers & Chapter Presidents, 15 July 1975, UIC, NOW Chicago, 78-034, Box 6, Folder 6.

process because it mainly focused on direct action.¹³³ Like WE, the nature of NOW's organization also contributed to its withdrawal from the Sears case. The group was primarily oriented toward direct action, forcing employers to change through protests, and working with the EEOC where needed. When Sears resisted and showed its willingness to fight back at any cost, the national organization did not have the resources to follow through indefinitely.

National support for the case was also subject to personal politics. The 1974 NOW convention bore some ominous signs that it might be difficult to maintain a long-term action against Sears as new leaders came to power and causes associated with Collins suffered after her loss of the presidency. NOW's focus on the Sears case, never

¹³³ As the years went by, WE also shifted its focus to more individualistic programs to help women advance in their careers. By 1991 it touted its networks in 150 fields for women changing careers, Job Bank, seminars to "assess your skills and interests and plan your next career move," and career counseling "to give you the tools you need to confidently make your plan and market yourself." Draft of Women Employed information sheet (Version 1.1), ca. 1991, UIC, WE, 2000-16, Box 16, Folder: 1991 Rosters It offered seminars such as "Financial Planning for Today's Women" and "Choosing a Career Path: The Tools for Success," including sessions on "Planning a Successful Job Hunt," and "Interviewing Techniques That Work." "COMING UP: TWO SPECIAL EVENTS SPONSORED BY WOMEN EMPLOYED," ca. 1991, UIC, WE, 2000-16, Box 16, Folder: 1991 Membership Drive; "Attention Working Women!," ca. 1991, UIC, WE, 2000-16, Box 16, Folder: 1991 Membership Drive. Membership remained a priority, and WE recruited members by offering a discount on career development seminars and "year-round career and professional development programs." Chicago's Can-Call TV42, 30 August 1991, UIC, WE, 2000-16, Box 16, Folder: 1991 Membership

As a result of these changes, WE's membership became more professionally-oriented; or perhaps the focus changed because the membership did. A 1991 roster listed members with the following occupations: management trainer, editorial assistant, sales marketing assistant, administrative assistant, investigation & compensation specialist, sales, graphic artist, program coordinator, and attorney at a large law firm. Members paid dues of \$15, \$25, \$35, or \$45 depending on their salaries, and most of the group fell into the \$35 category, with only one each in the highest and lowest categories. Women Employed member roster, ca. 1991-92 (partial), UIC, WE, 2000-16, Box 16, Folder: 1991 Rosters WE's advocacy work focused on local, state, and national government for "stronger equal employment opportunity policies, improved work and family benefits, and the elimination of discrimination and sexual harassment" as well as "education and training for higher-paying nontraditional jobs." In an attempt to build membership, it said it was important to join "to make sure that working women's voices are heard in the legislature," but WE also emphasized, "Women Employed is your professional association." Draft of Women Employed information sheet (Version 1.1), ca. 1991, UIC, WE, 2000-16, Box 16, Folder: 1991 Rosters; Chicago's Can-Call TV42, 30 August 1991, UIC, WE, 2000-16, Box 16, Folder: 1991 Membership Nevertheless, Ladky emphasized that the lawyers and managers joined WE to work for social justice, not out of self-interest. Anne Ladky, interview by author, 12 March 2003, Chicago, Illinois.

fully secure at a national level, continued to dissipate as organizational politics surfaced again in 1975. Board members caught off guard by Chicago NOW's impressive organization and political strategy at the Houston convention learned from the experience. East Coast members such as Smeal, formerly president of Pennsylvania NOW and then chair of the national board of directors, came to the 1975 convention in Philadelphia well-prepared and organized to push their own agendas, which put the final "nail in the coffin" of the Sears case for NOW.¹³⁴ The Majority Caucus "waged a tightly organized campaign" and their "narrow victory paved the way for a streamlined organization" that, under Smeal's leadership as national president after 1977, "turned in a more focused political direction. Rather than 'do everything,' they built a disciplined and massive campaign in support of the Equal Rights Amendment."¹³⁵ Collins was in a way a victim of her own success; her well-organized campaigning and championing of her cause intensified the level of politicking within NOW, as other members rose to meet her challenge. Had it been possible to maintain national support and remain engaged with the case, the results might have been quite different.

Aside from the politics, as the organization grew, there were simply more demands on its resources and numerous groups and causes vied for attention.¹³⁶ Aware of how hard it was to maintain momentum for social change, Collins and Ladky constantly sought to justify to the national organization the importance of its continued support and the importance of the Sears case to NOW. They continually confronted the

¹³⁴ Rebecca Davison, telephone conversation with author, 11 August 2004.

¹³⁵ Evans, *Tidal Wave*, 110. The Majority Caucus prevailed in the split within NOW and pressed its agenda, increasing the organization's activity on the ERA. Barakso, *Governing NOW*, 63. NOW made the ERA a "do or die issue." Anne Ladky, telephone interview by author, 20 March 2002.

¹³⁶ Anne Ladky, telephone interview by author, 20 March 2002.

difficulties of maintaining a commitment to a single cause in a multi-issue organization. At no time could the Sears case be called the main focus of NOW. Instead, it was championed by a Chicago chapter focused on women's work issues and supported at various times by other chapters, the national organization, and other working women's groups. Moreover, without a labor union at Sears, the NOW action suffered from the absence of an organization solely committed to improving the workplace for women.

It also became harder to remain committed to the Sears case because priorities shifted within the women's movement in general, though not necessarily for the individual women involved. NOW was founded with the support of labor union women, but many soon left over the group's unwillingness to delay the ERA issue until they could gain the support of their unions. Many labor women later returned to NOW – and of course many NOW members never gave up their commitment to work issues – and by the mid-1970s many segments of the women's movement had unified to focus primarily on ratifying the ERA, sometimes to the exclusion of other important issues.¹³⁷ Even Chicago NOW was heavily involved with the ERA. In March 1975, Ladky wrote to Illinois NOW's State Coordinator emphasizing her chapter's commitment to an upcoming ILLINOIS FOR ERA Rally: "We have committed our entire chapter's full-time effort to make the rally a success." She asked for funds from the money national NOW allocated to Illinois NOW ERA activity: "Our chapter's office manager is working on the rally nearly full-time, and is supervising our work-study student whose sole work is the preparation for the rally."¹³⁸ Although Collins left NOW's leadership in the mid-

¹³⁷ Evans, *Tidal Wave*, 65, 110, 141, 171-73; Ryan, *Feminism and the Women's Movement*, 73-75

¹³⁸ Anne Ladky, President, NOW Chicago Chapter, to Maureen Rogman, State Coordinator, Illinois NOW, 28 March 1975, pp. 1-2, UIC, NOW Chicago, 78-034, Box 7, Folder 4.

1970s to work for organizations such as Catholics for Choice, in an ironic twist, after the defeat of the ERA NOW members elected her national Action Vice President and Judy Goldsmith, another Chicago NOW member, President.

Conclusion

NOW's retreat from the Sears case was in part due to the fact that once the EEOC took over and litigation began, the focus shifted to Washington, D.C. Chicago NOW had a small staff and limited resources and had no one in Washington to champion the cause for them. While the commitment remained strong when the focus was in Chicago and one chapter devoted to women's work issues could take control, it dissolved once it had to rely on the national organization or East Coast chapters with their own priorities. By 1982, NOW simply had more demands on its time and resources than it had ten years earlier, most notably the ERA. Ultimately, by the time the EEOC filed its lawsuit in 1979, the people who led the Sears effort were no longer at NOW. Collins left the national Board in 1975. Ladky's term as president of Chicago NOW ended in 1975, and in 1977 she moved to WE.¹³⁹ Similarly, other organizations that engaged in direct action against Sears were no longer involved once the case came under the control of lawyers. For example, 9 to 5 remained focused on the EEOC, but mostly on evaluating the agency's reorganization efforts.¹⁴⁰ Thus, as a practical matter, the involvement of women's groups declined in the mid-1970s as the case dragged on and away from its Chicago backers and moved to Washington, D.C. and a legal framework. The

¹³⁹ Anne Ladky, telephone interview by author, 20 March 2002; Anne Ladky, interview by author, 12 March 2003, Chicago, Illinois. Of course, it is difficult to determine whether the Sears campaign suffered because they left or they left because NOW did not support the Sears campaign.

¹⁴⁰ See 9 to 5 Papers; "Basic Components of Reorganization Plan #1." Schlesinger; 9 to 5 Papers; "Workshop on Equal Employment Opportunity." Schlesinger; and 9 to 5 Papers; "Model for Improved Charge Processing in Selected EEOC Field Offices." Schlesinger.

organization's direct action focus, less well-suited to long-term litigation, made it difficult to remain committed to the case, leaving the EEOC to pursue the case without grass-roots support.¹⁴¹ For many reasons, the strong working relationship that NOW and the EEOC had in the AT&T case simply was absent in Sears.¹⁴²

Without the kind of help and pressure from advocacy groups that had been crucial in AT&T, the commission had trouble successfully prosecuting the case. Civil rights groups generally do not trust that an underfunded governmental agency can effectively litigate a case on its own; instead, it requires constant supervision and pressure to continue as well as help in gathering information and attracting media attention.¹⁴³ In fairness to NOW, however, the AT&T case proceeded relatively quickly, and the company actively participated in settlement negotiations. Sears, on the other hand, dug in and fought to the end. It was, perhaps, too much to expect any advocacy group to maintain the same level of commitment for thirteen years. Thus, the Sears case raises questions about whether the law alone can bring about social change. For a variety of reasons, the EEOC was left on its own, and the growing detachment of women's groups had a significant impact on the outcome of the Sears case. Of course, this was not the only factor in explaining the loss, and subsequent chapters discuss Sears' opportunity to

¹⁴¹ WE learned these lessons from the past when it remained committed to a case it initiated against Harris Bank in 1974 for over a decade, until the Department of Labor finally reached a successful result in 1989. Anne Ladky, telephone interview by author, 20 March 2002; Anne Ladky, interview by author, 12 March 2003, Chicago, Illinois; Philip Shenon, "Chicago Bank to Pay \$14 Million In Resolving Discrimination Case," New York Times, January 11, 1989. Of course, it may also have been easier for WE to do so since it was more of a single issue organization than NOW.

¹⁴² Anne Ladky, telephone interview by author, 20 March 2002.

¹⁴³ Women's advocacy groups learned from civil rights battles that they needed to apply constant pressure on federal agencies to bring about governmental change. See, for example, Steven F. Lawson, Black Ballots: Voting Rights in the South, 1944-1969 (New York: Columbia University Press, 1976), chap. 2, examining the central role of the NAACP in getting courts to overturn the white primary and the Justice Department to enforce it.

learn from AT&T's experience and take advantage of weaknesses in the EEOC.

Nevertheless, the fact that the EEOC lost the case after women's organizations withdrew illustrates the crucial role of grassroots activism in bringing about social change in the law or governmental policy.

On the other hand, although the court case dragged on for thirteen years, NOW's presence, however limited, had a significant positive impact on changing workplace practices at Sears.¹⁴⁴ As discussed in the next chapter, there was no union ally or group dedicated solely to workplace issues in large part because unions had repeatedly tried – and failed – to organize Sears. Thus, women's groups represented the next best – and perhaps only remaining – alternative for forcing the company to change. Without NOW, there may have been no lawsuit against Sears at all.¹⁴⁵

Between 1973 and 1975, women's groups pursued Sears using a variety of efforts. The Sears action peaked in the fall of 1974, and by 1975 competing priorities and a split in NOW led to declining attention to the case. Women's groups viewed Sears as just one of many corporations and industries under their scrutiny and had much broader goals than bringing down that corporation. They never intended or expected to pursue a thirteen-year lawsuit against the corporate giant, but only to shame and scare it into changing its employment practices as they had with AT&T. Why this presumption failed is the subject of the next chapter.

¹⁴⁴ For example, Sears erased the Buyer's Assistant/Assistant Buyer job distinction as soon as NOW/WE announced it. Anne Ladky, telephone interview by author, 20 March 2002.

¹⁴⁵ Of course, the presence of a union may have been no guarantee either. Unions and women's groups did not always agree, as seen when the union challenged the AT&T settlement for violating seniority provisions.

Chapter 4

A Model of Corporate Resistance

When the EEOC initiated its investigation against Sears in 1973, it appeared there was no way it could lose. The social movements of the 1960s and early 1970s for equality for blacks, women, and other marginalized groups, combined with the passage of civil rights legislation, promised significant changes in the American workplace. In its early years, the commission exuded a sense of real promise as it struggled to enforce the new law, Title VII. Many EEOC staff members came from the civil rights movement and were personally dedicated to eliminating discrimination. Despite its lack of power to sue, the new agency acted with determination, as it talked about going after systemic or industry-wide discrimination and restructuring the workplace.

With clear momentum and legislative support, in the late 1960s the EEOC made great strides toward eliminating race discrimination and integrating blacks in the workplace. Since the EEOC lacked any enforcement power until 1972, most of these changes were made by negotiating with companies, which then established affirmative action plans for hiring and promoting blacks. Sears claimed it had been working with the EEOC since the mid-1960s and that it was one of the first large corporations to establish an affirmative action plan. In addition to significant changes for African-American employees and increased powers to sue granted to the agency in 1972, cases such as AT&T signaled to employers that the EEOC “meant business” with regard to sex discrimination. The affirmative action programs and huge back pay settlement imposed on AT&T put previously unaccountable companies, especially those that employed large numbers of women, on notice that they would be expected to change. These early

settlements made many large corporations fear EEOC intervention and they rushed to settle rather than face potentially huge financial judgments.

When the EEOC began to pursue Sears, there was little doubt the company would be required to pay huge amounts of money to its workers. One newspaper noted, “The government’s claims against Sears could approach the scale of EEOC’s settlement with [AT&T], which agreed to give \$12 million in back pay and \$40 million in raises the first year and is expected to pay eventually \$100 million in compensation to women and minority workers.”¹ Women’s groups and the EEOC were not the only ones aware of the potential parallels with cases against other large corporations. At a meeting between executives and reporters, Sears’ equal employment opportunity director Ray Graham said, “The government thinks they’ve got a case like steel or AT&T.”²

These earlier cases had a major impact on how Sears reacted to the EEOC’s investigation and lawsuit. It argued with righteous indignation that the attacks were unwarranted because it had a strong record of affirmative action, that women and minorities did not want the disputed jobs, and that any imbalance in its workforce was due to social prescriptions rather than discrimination. Moreover, if it had failed in affirmative action, it was because its decentralized corporate structure made it difficult to implement changes from above. The company responded as it did to most problems, by relying on consultants and experts, but also hiring an aggressive and creative attorney. Over the thirteen years following its designation as a Track 1 company, Sears managed to thwart the organization and expectations of the EEOC and women’s groups. Why Sears decided to fight back and how it won despite settlements by other large corporations can

¹ Jerry Knight, “Sears Facing Major Bias Complaint,” The Washington Post, 26 January 1979, D1.

² Knight, “Sears Facing Major Bias Complaint.”

be explained in part by examining its corporate structure and culture, attitude toward unions, concern with image, and use of welfare benefits.

Building a Retail Empire

Throughout the twentieth century Sears had experienced almost uninterrupted success. Started as a mail order business selling farm equipment, clothing, and household goods to rural Americans in the late 1890s, Chicago clothing manufacturer Julius Rosenwald built it into a “catalog empire, with an unparalleled system of mass distribution.”³ His successor, General Robert E. Wood, transformed the company from a catalog to a retail empire. In charge of supplies for the Panama Canal during World War I and then employed by Sears’ biggest competitor, Montgomery Ward, Wood recognized the demographic shift from the farm to the city and the decreasing need for mail-order and increasing interest in automobile and home repair supplies.⁴ In 1925 he opened Sears’ first retail store – an immediate success – inside its Chicago mail-order plant, and began offering automobile insurance in 1931.⁵ Sears’ profits came mainly from “hard goods” such as auto supplies, hardware, sporting goods, and “big ticket” items, including furniture and home appliances. It tried to distinguish itself from five-and-dime stores by selling high quality hard goods at low cost, and from department stores by avoiding “soft goods” that were subject to changing styles, increased product turnover, and lowered

³ Sears, Roebuck and Co., 1984 Annual Report (LexisNexis Academic, Dec. 31, 1984), 6 [Sears own history, timeline]; Sanford M. Jacoby, “Changing Styles: Sears Roebuck,” Modern Manors: Welfare Capitalism Since the New Deal (Princeton, NJ: Princeton University Press, 1997), 95; “Narrative History of Sears, 1886, 1887, 1890s,” www.searsarchives.com; Donald R. Katz, The Big Store: Inside the Crisis and Revolution at Sears (New York: Viking Penguin, 1987), 10.

⁴ Jacoby, 95, 99; Katz, 13. See also James C. Worthy, Shaping an American Institution: Robert E. Wood and Sears Roebuck (Urbana, Illinois: University of Illinois Press, 1984), 14-16; “Narrative History of Sears, 1925,” www.searsarchives.com.

⁵ Jacoby, 99; Sears, Roebuck and Co., 1984 Annual Report, 6-7; “Narrative History of Sears, 1930s,” www.searsarchives.com.

potential volume discounts. Sears also differed from department stores by being the first “store for the family,” with both male and female customers and salespeople.⁶

During the Depression Sears did better than its competitors despite declining orders and increasing layoffs, and the company took advantage of “rock-bottom rents” to lease new stores and take “business away . . . from small merchants [and] department stores.” After World War II, most retailers feared another depression and cut back, but Sears anticipated built-up consumer demand and expanded aggressively into suburban shopping areas and the South and West, making it “well situated to profit from the postwar surge in suburban homeownership” and rapid growth through the 1950s.⁷ Sears loved to tout its dominance of the American marketplace. By 1972, it accounted for more than one percent of the U.S. Gross National Product; two out of three Americans shopped there during any three month period; more than half of all households had a Sears credit card; and it was one of the eight largest corporations in the world.⁸ By 1984 the company claimed a merchandising customer base of 40 million households.⁹ On the eve of its trial with the EEOC, Sears had about 9800 domestic suppliers; 28 buying departments in Chicago; 302,000 merchandising employees; 798 retail stores, and territorial offices in Atlanta, Chicago, Los Angeles, and Philadelphia.¹⁰ The company also operated Sears Savings Bank and in 1983 started Sears World Trade, Inc., a

⁶ Jacoby, 100, 103.

⁷ Jacoby, 100-102; Sears, Roebuck and Co., 1984 Annual Report, 7; “Narrative History of Sears, 1980s to today,” www.searsarchives.com. It also expanded into financial services, establishing Allstate Insurance Co. in 1957 to offer life insurance and acquiring Coldwell Banker and Dean Witter in the 1980s.

⁸ Katz, book flap, viii.

⁹ Sears, Roebuck and Co., 1984 Annual Report, page unknown.

¹⁰ Securities and Exchange Commission, Form 10-K, 4-5, Sears, Roebuck and Co., 1984 Annual Report, Part I and II.

brokerage and trading company.¹¹ Sears liked to see itself as “a private enterprise ennobled and made powerful by its perceived dedication to a public purpose.”¹²

Structuring Gender

Whether the result of cultural stereotypes or corporate discrimination, Sears treated male and female employees differently with regard to wages and benefits. As early as 1910 a vice commission in Chicago investigated the link between low wages for women and prostitution, and a 1913 state committee hearing focused specifically on wages at Sears.¹³ Its policies favored married men, including wage premiums and hiring preferences after World War II. Men were also the primary beneficiaries of the company’s generous profit-sharing plan, since participation was limited to workers with one year of service and they were not vested until after five years. Women had higher turnover and more irregular employment and thus became vested less often. Forfeited benefits “reverted to the general fund,” which was “essentially a transfer payment from unmarried women to married men.” Although welfare benefits for women were above average for the industry, they were below that of Sears men because they depended on seniority and full-time status.¹⁴

Sears also structured its workforce to ensure stable jobs for men. The company employed more men than most retailers; in 1939-40, 43 percent of full-time employees

¹¹ 10-K Report, 18, Sears, Roebuck and Co., 1984 Annual Report, Part I and II.

¹² Katz, vii. Its board of directors included Julius Rosenwald II and Donald H. Rumsfeld. 10-K Report, 25, Sears, Roebuck and Co., 1984 Annual Report, Part I and II.

¹³ This incident mirrored the 1974 U.S. Commission on Civil Rights hearing on women and poverty targeting Sears. Moreover, Sears made similar arguments in the early 1970s, that although it may have discriminated against women, so too did all other companies.

¹⁴ Jacoby, 97, 98, 104, 108, 109.

were men, as compared to 20 percent in department stores.¹⁵ Men dominated the big-ticket and hard goods departments while women dominated the soft goods. To justify such segregation, Sears argued that male customers preferred to buy masculine items, such as “guns, tools, and boots,” from other men. However, even gender-neutral items such as furniture, or items bought or used by women, like home appliances, were sold by men.¹⁶ Sears showed the limitations of this argument during World War II, when it hired women to fill shortages in full-time positions. The company justified the shift by telling local managers that with so many male customers away at war they had to cater to female customers, who “prefer to be waited on by other women rather than men.”¹⁷

Throughout much of its history Sears claimed that women were not experienced in or compatible with selling hardware and appliances. However, the company relied heavily on training programs for men hired right out of school; presumably it also could have trained women for those jobs, and in fact, it did so when needed during World War II.¹⁸ Moreover, during the war store managers emphasized the benefits of hiring women, saying they were cheaper labor, “better at detail work,” and “good housekeepers . . . who do much to tone up the appearance of their departments.” Nonetheless, after the war Sears again began favoring men for full-time jobs. Sears claimed the ensuing drop in the number of women was due to rehiring veterans, but over 60 percent of new hires between 1945 and 1948 were men. The company was about to begin a huge expansion and needed a large pool of full-time employees from which to draw new managers.

¹⁵ Jacoby, 97, 102-103.

¹⁶ One EEOC attorney noted the folly of the notion that women who use washers and dryers could not sell them. Gerald Letwin, interview with author, 9 July 2004, Washington, DC.

¹⁷ Jacoby, 103, 105.

¹⁸ Letwin noted that Sears touted its own training programs, saying “you can learn this stuff.” Gerald Letwin, interview with author, 9 July 2004, Washington, DC.

Moreover, the turnover of women remained high since they were expected to quit after getting married. To prevent non-commission salespeople from demanding commissions, the company kept the two groups separate, with different work hours and break times. Women who did have big-ticket sales jobs often faced harassment from co-workers.¹⁹

Sears also crafted the gender composition of its workforce to avoid unionism. It gave full-time men, who were generally older and married, stable jobs and promotions, which they would not want to jeopardize by becoming involved in union activity. Sears rarely hired part-time men, who it assumed were less qualified, unable to get full-time work, or would “become bitter and lose their self respect” and be more susceptible to unionism. Full-time women were generally young and single. Though often dissatisfied with the lack of opportunity, they posed a limited threat as they constituted a small part of the workforce and worked only for a short time between high school and marriage. Unlike department stores, Sears also had an extensive part-time female workforce of mostly older housewives who were seen as less susceptible to unionism. The part-time workforce deterred unionism by subsidizing full-time career-track positions for men by lowering labor costs and keeping male employees happy with good jobs and benefits. Conspicuously absent was a workforce of full-time older women, which dominated other retailers and tended to be more dissatisfied with their jobs and active in unions.²⁰

Sears also emphasized gender differences in order to minimize class differences among male managers and workers. With facilities all across the country, the company lacked community ties to hold it together, and thus relied on gender and a “carefully contrived corporate culture.” Sears worried that lower status employees such as stock

¹⁹ Jacoby, 103-105.

²⁰ Jacoby, 105-107.

clerks and warehouse workers were more likely to join unions, and tried to reduce their isolation from other store activities. The company recruited managers from state universities rather than the Ivy League (as Macy's did), and favored lower-middle-class students over those whose fathers were professionals. The company trained managers not to restrict workers unnecessarily, as it would lessen their sense of goodwill and initiative.²¹ The company also limited status distinctions by capping executive salaries and giving the same benefits to all full-time employees.²² Sears tied the amount employees could contribute to the retirement plan to non-managerial salaries, so that executives and workers with the same amount of seniority would receive similar benefits. Thus, Sears brought lower class men into the company fold at the expense of women by treating all full-time workers (mostly men) the same and encouraging bonds between male workers of all classes.²³

One Woman's Challenge

Although Sears justified the segregation of men and women into different departments by claiming that women were not interested in the higher-paying

²¹ Jacoby, 105, 113, 114, 120, 127. Sears compensated executives less through high salaries and more through appreciation of company assets in the hopes that they would "look upon themselves and their work as though they were in business for themselves." Worthy, 145.

²² Jacoby, 128. Sears geared the upper limit of profit-sharing participation to higher rank and file employees. Thus, regardless of his salary, an executive would not benefit more than a salesman with a comparable number of years of company service. Worthy, 152-53.

Sears also minimized class differences between customers and employees. It avoided style-dependent products, selling standardized items with low turnover to both working-class customers and "cost conscious" professionals. This was a departure from department stores, where social distinctions existed between workers and managers. Macy's and Marshall Field's recruited managers from the Ivy League and were less likely to promote from within. Jacoby, 99, 100, 127-128. Customers "were either from the upper class or wanted to be treated as if they were" by working-class salesclerks. Department store owners tried to make workers appear middle-class, even as store policies and wages constantly reminded them they were not. See Susan Porter Benson, Counter Cultures: Saleswomen, Managers, and Customers in American Department Stores, 1890-1940 (Urbana and Chicago: University of Illinois Press, 1986).

²³ Jacoby, 108-109; Worthy, 152-53.

commission sales positions, women did complain about the lack of opportunities and harassment. In 1972, Marilyn Fumagalli, an 18-year-old junior college student from Joliet, Illinois, joined Sears as a part-time bookkeeper in the automotive department. She was politically aware, having protested the war in Vietnam during high school and supported abortion rights. She considered herself a radical, but was also naïve and idealistic, and felt like “the world was her oyster.” Although Fumagalli intended to pursue a career in photojournalism, she became interested in the work going on around her at Sears and took a night course entitled *Women Know Your Car*. The garage manager told her that new department hires received all of their training on the job, and she told him she was interested; she thought it would be a good experience and she would learn something new about the work in that setting. The manager referred her to the personnel department, which told her she would be the next hire. However, over the next five months she saw three new hires come in and felt she was being passed over. When she asked again, her male co-workers and supervisors began to tease and then harass her. One co-worker asked, “Can you pick up that tire there?” Another told her he would order her a uniform and steel-toed shoes, giving her the feeling she was being “played.” When she complained, the store manager told her she was too sensitive. Although it had previously been a comfortable place to work, Fumagalli now felt ridiculed and picked on; after about a year she left for a job at a hospital. The experience provided an “education” that was “disheartening,” tempered her enthusiasm, and “wounded her spirit” at the height of her idealism.²⁴

²⁴ Marilyn Fumagalli, telephone interview by author, 16 June 2005, Chicago, Illinois.

Although Fumagalli was not sure she had a case against Sears, she needed to talk to someone to confirm what she felt. There was a lot of “buzz” about women’s rights at the time and she saw a notice in the newspaper for the Joliet Job Discrimination Board. She met with a man there who told her she definitely had a case and referred her to the Illinois Fair Employment Practices Commission, which referred her to the EEOC. The EEOC later consolidated Fumagalli’s charge of discrimination along with many other charges against Sears, making them the “original charging parties” in its case against the company. Sometime after leaving Sears, Fumagalli responded to a notice on a bulletin board at Joliet Junior College to help form a branch of NOW. She met Anne Ladky when the NOW leader came to help them organize, but never became involved in NOW’s Sears Action. NOW gave her a sense of camaraderie; it lessened her isolation and put her experience in a cohesive context through consciousness-raising and political actions for change. The work felt extremely vital.²⁵

While Sears often ignored complaints from women like Fumagalli, it carefully constructed the gender and class makeup of its workforce in order to deter unionization. The company’s decision to fight back against the EEOC – and indeed the fact that it found itself in this predicament to begin with – can be understood by examining the lengths it went to keep its male employees happy and prevent any impulse toward unionism.

Anti-Unionism and Corporate Culture

Sears also carefully designed its corporate structure to avoid unionism. Its organizational model dated back to the early years of the company, when General Wood

²⁵ Marilyn Fumagalli, telephone interview by author, 16 June 2005, Chicago, Illinois.

avored a decentralized system with limited power for upper management and strong control by local store managers.²⁶ Of course, Sears believed in relying on the self-initiative of individual managers only if they had been well-trained by the company. Sears recruited store managers straight out of college and from those returning from World War II. It put them through a comprehensive management training program, promoted them often, and expected them to move where needed, often at great personal sacrifice for their families. To retain these managers, Wood offered stronger benefits than the rest of the retail industry, promoted from within, and promised lifetime job security and a well-funded retirement.²⁷

Between 1935 and 1948, the company appeared centralized because of a limited hierarchy, but in reality managers “could not keep close tabs on the far-flung retailing operation.” After World War II, Sears reestablished a system of territorial offices, which held “enormous” power over hiring and firing, but the company remained a “relatively flat organization” with only a few layers between the president and store employees. The corporate office set sales techniques, layout procedures, and operating methods, but store managers had a lot of power in deciding which items to sell, pricing, and job responsibilities. Managers also controlled their own cash, making them free to support their communities (and boost Sears’ local image) by donating money after a natural disaster. Their power was further enhanced by the fact that middle managers oversaw

²⁶ Worthy, 134-36. Wood was a “conservative populist” who criticized big government for being overly centralized and out of touch with the people; he disliked bureaucracy and organizational charts and feared that too much systemization would suck the self-motivation out of managers. He preferred them to be “entrepreneurial,” with “widely diffused” responsibility. Jacoby, 124-126.

²⁷ Katz, 13, 28, 581, chap. 17; Worthy, 140-41.

more stores than they could effectively monitor, did not travel the routes often, and thus, did not know what it was like “out there” in the field.²⁸

Sears’ personnel department played a key role in maintaining its independent non-union workforce. Looking for an “organizational glue to hold a decentralized empire together,” the company used a personnel department which supervised local store managers with “consistent standards” and “companywide personnel policies ranging from profit sharing to a folksy work culture.”²⁹ Despite the company’s decentralization, national executives controlled personnel matters such as choosing managers the company could train and then trust to run its stores. The personnel department gave field representatives significant power to make promotions, and department head Clarence Caldwell held similar power with regard to executives. Moreover, the personnel department held a higher status within Sears than in most companies, with Caldwell acting as a vice president and several others as top executives. In the early 1950s, Caldwell wrote that the company would fight unions to the last because it would prevent “lower productivity, higher labor costs, periodic strikes, and ‘constant bickering.’”³⁰

Sears also maintained significant control over personnel matters and threats of unionization through extensive use of company surveys and employee interviews. First developed by consultants in the late 1930s, Sears’ program became “one of the largest and most sophisticated applications of behavioral and social science research to personnel problems” within the industry.³¹ Sears’ program was the “most extensive organizational

²⁸ Jacoby, 125, 126; Katz, 28, 581.

²⁹ Jacoby, 123-124.

³⁰ Jacoby, 114 (quote from book, not memo), 123, 126.

³¹ Jacoby, 112, 120.

morale survey ever carried out” until the U.S. Army instituted surveys during World War II. Between 1939 and 1942, Sears surveyed 37,000 employees in 150 retail stores and 10 mail-order plants, and after the war used it in anticipation of issues arising from the company’s expansion.³² Throughout the rest of the century, Sears maintained some type of detailed employee survey program, administered by anthropology, psychology, and sociology consultants, or by the company itself.

The company used the surveys to monitor attitudes and identify problem departments. The personnel department gathered significant amounts of data about employees, broken down by “occupation, sex, tenure, age, [and] marital status,” and produced detailed statistical analyses in an effort to understand factors affecting company morale. The department met with managers of difficult departments and issued a report comparing their scores to other units. Local managers were required to set up and submit a plan for solving the problem to the national personnel department. Some interviewing methods gave employees a chance to air their grievances while giving Sears indirect and “inexpensive ways of deterring unions.” Surveys also allowed the company to identify unhappy managers, “reinforce[ing]” the power of the central personnel department, and made management more responsive to employees, for company purposes or otherwise. Sears also established company “democratic” institutions to address workers’ concerns, such as a meeting where executives answered employee questions, and appointing employee delegates to an advisory council to the profit-sharing fund. Although unusual for the retail industry, they offered employees little real power.³³

³² Jacoby, 115-116, 119.

³³ Jacoby, 112, 115-116, 121-122, 126-127, 140-142.

Aside from surveys, Sears relied heavily on consultants and behavioral psychologists to understand employee motivations. In the 1930s and 1940s the company began using psychological profile tests to screen manager applicants for traits such as “sociability, emotional stability, and agreeableness.”³⁴ Executive James C. Worthy, a former department store labor relations manager, recommended smaller stores and stores in smaller communities as a way to improve morale through less hierarchy and division between workers and management. Sears hoped that a flat hierarchy favoring managers “with strong social skills” made the company less susceptible to unions than “tall, rigid” organizations with a strict division of labor, such as GM and Ward’s.³⁵

Historically, the company also demonstrated a preference for handling problems internally, at almost any cost. Despite its claims of decentralization, Sears kept tight control over labor and employment issues and used welfare benefits to address morale problems. Its welfare programs began at the turn of the twentieth century and included social groups, distribution of public library books, a Mutual Benefit Association for employee health expenses, and a new plant with gardens, athletic facilities, a branch YMCA, subsidized restaurants, and a hospital with free treatment for workers. These reforms “placed Sears in welfare capitalism’s vanguard” and Sears subsequently

³⁴ Jacoby, 108, 112, 117-119, 128-129.

³⁵ Jacoby, 129. Only in the late 1960s and early 1970s, when faced with increasing competition and declining sales, did Wood question the company’s structure by hiring consultants to evaluate its internal organization. Consultants analyzed the jobs within Sears’ corporate structure and found the company was “frozen in time.” Jobs were not categorized and managers often did not know which employees worked under them, what they did, or what they were paid. Yet company leaders feared that any attempt to follow consultant recommendations and redefine jobs would mean laying people off in contravention of Sears’ implicit promise of job security; stirring up controversy over allowing one territory to see another’s records; and allowing “field men” to see how the national company was run. Katz, 28, chaps. 1, 2.

instituted vacation policies and yearly bonuses. Between 1935 and 1960, the company competed directly with and had to match department stores' "lavish welfare programs."³⁶

The ultimate manifestation of Sears' welfare capitalism was its extensive profit-sharing plan. Employees liked the fund because Sears' stock steadily increased from the 1930s on, multiplying 11 times in value by 1957. Some drew more from profit-sharing than they had earned their entire lives, and stories circulated about janitors who earned low wages but retired with huge pensions.³⁷ Sears rarely fired employees, and those who were hired out of school and stayed for their entire careers accumulated a significant pension; most corporate employees left Chicago for retirement homes in Florida, California, or Arizona.³⁸ Though touted as "one of the nation's most generous and publicized . . . plans," the profit-sharing plan was designed to serve company purposes. Sears increased contributions with seniority to entice employees to stay and limit turnover. Most of the plan's assets were invested in company stock, which inflated stock prices and the company's financial image, and prevented outside takeovers or interference.³⁹ Of course, when sales and stock prices declined in the early 1970s, profit-sharing was no longer such a wonderful benefit, certainly "no compensation for low pay, [and] lack of promotional opportunities and benefits."⁴⁰

Although Sears was ahead of most retailers concerning benefits, it lagged behind large unionized firms such as GM. It nonetheless became a pioneer in using welfare

³⁶ Jacoby, 98, 102.

³⁷ Worthy, 152; Jacoby, 110.

³⁸ Hymen Bear, telephone interview by author, 27 June 2005.

³⁹ Jacoby, 97, 109-111.

⁴⁰ NOW Papers; "Good News & Bad News," Tower Tattler 1(6), November 4, 1974. MC496, Box 209, Folder 68. Schlesinger.

capitalism to safeguard against unionism, using its knowledge about people and applying behavioral science to the workplace. In the 1950s the retail giant increased benefits because of concern over the gap between it and unionized companies, while threatening employees with the loss of profit-sharing if a union came in.⁴¹ Sears' extensive use of welfare benefits showed how strongly it wanted to handle problems within the company, even at the expense of a costly retirement plan and high consultant fees.

Aside from welfare benefits, Sears' corporate culture developed in conjunction with a long history of resisting union attempts to organize the company. In 1937 unions began to organize department stores extensively, including Macy's, Gimbel's, and Woolworth's in New York. Two competing unions, one less active representing mostly grocery clerks, the AFL's Retail Clerks (Clerks), the other an "upstart" CIO affiliate, the Retail, Wholesale, and Department Store Employees Association (RWDSEA), organized retailers, relying on support from the Teamsters to block deliveries and shut down a store. In the Spring of 1937, Sears management was shocked by mail-order plant strikes in Minneapolis and Chicago, and in San Francisco a union won a multi-employer contract with department stores including Sears.⁴²

Chain stores disliked unionism because they feared it would spread from one city to another, and indeed, Sears had hundreds of facilities across the country to worry about. From 1937 to 1947, Ward's successfully fought off the RWDSEA, wearing it down before it could move on to Sears. Ward's president resisted so vehemently that in 1944 President Roosevelt ordered the army to seize and operate its main warehouse and ten retail stores, and to forcibly remove the president, who had barricaded himself in his

⁴¹ Jacoby, 110-111, 120, 140-142.

⁴² Jacoby, 113.

office. Compared to Ward's president, who paid little attention to "people" issues, Wood "championed personnel management as a form of internal public relations" and installed a high-powered personnel officer much earlier than most retailers.⁴³

Sears used aggressive tactics where it deemed necessary. In the mid-1930s the company hired labor relations consultant Nathan Shefferman, a "colorful" figure from the "hucksterish, pseudoscientific side of the personnel management movement."⁴⁴

Shefferman formed a consulting firm, Labor Relations Associates (LRA), which employed labor attorneys, personnel experts, and industrial psychologists, and grew quickly with financial backing and client referrals from Sears. Organizing drives were referred to Sears' labor relations department, which was run by Shefferman. He sometimes used unsavory tactics to thwart union efforts but in Minneapolis, San Francisco, and Seattle, recognized that some degree of unionism was inevitable, and thus pursued a "containment" policy. Sears negotiated with the Clerks or the Teamsters in order to hold off more militant CIO unions and made side deals requiring employees in certain cities to pay union dues while publicly denying that unionization had occurred. Shefferman even worked closely with the Teamsters, becoming personal friends with leader Dave Beck and developing a modern filing system for the union, which paid him a \$12,000 commission on the purchase of a new headquarters in Washington, DC. Shefferman sent Beck and other union leaders "considerable sums" and personal favors financed by Sears, including expensive dinners and a vacation in Hawaii for Beck, Shefferman, and their wives, and Sears appliances and furniture at wholesale prices. The

⁴³ Jacoby, 114-115. This undermined any claim by Sears that it did not know that an imbalance existed between men and women.

⁴⁴ Jacoby, 130.

Teamsters containment policy succeeded in other cities, preventing widespread unionization and any Teamsters organizing drive by the 1950s.⁴⁵

LRA helped defeat a number of organizing campaigns by the AFL's Retail Clerks at Sears stores and suppliers. From the mid-1930s to the mid-1950s it fought attempts to organize Sears' Fenway store in Boston by setting up an employee union, using enticements and threats to persuade its leader not to affiliate with the Clerks, and stalling the election so long that the Clerks lost. The Clerks attributed their loss to Sears' "clever" firing of its members: "It does not appear that we have much chance to win elections . . . because of the use they can make of FEAR and because of the deadly efficiency with which they operate."⁴⁶ LRA used interviews and surveys to identify union supporters and then coerced them into withdrawing or fired them. Although it was unlawful to poll employees during an organizing drive, Sears simply left it to LRA. In the 1950s LRA had groups of workers meet with management to discuss problems; it got employees to talk openly about their concerns and provided LRA with information. Shefferman created a pseudoscientific "Chart of Relationships" with a "subjective measure of loyalty to management." Supervisors used it to approach managers with the "power of persuasion," including hints, bribes, transfers, and dismissals. Another LRA technique was to create confusion and slow momentum through unlawful methods such

⁴⁵ Jacoby, 130-134. Sears justified fighting unions in order to preserve the spirit and tradition of the company: "We must not lose sight of the fact that our interests and those of our employees are identical." Jacoby, 114 (internal citations omitted). This echoed the company's arguments in the EEOC case in the early 1970s, when it insisted that its interests and those of NOW were the same.

⁴⁶ Shefferman established the Sears Roebuck Employees' Council (SREC) in 1938, and its leader, Roy Webber, won company concessions by threatening to call in the Clerks. In 1949, the Clerks tried to organize SREC members but Sears offered Webber a significant raise and he switched his support back to the SREC. At one point, Sears even offered Webber a better job at a store in South America, and when he refused to go, LRA sent a private detective to investigate reports of "sexual perversion." In 1953 the SREC voted to affiliate with the Clerks, but Shefferman stalled the election for two years and the union lost. Sears later fired Webber, and although the NLRB reinstated him, it had a chilling effect on other union activity. Jacoby, 134-135.

as funding different pro-management employee committees, creating competing diversionary campaigns to dilute votes for the union, and arranging for organizers to be hired away to other unions. Sears and Shefferman also used lawful tactics such as filing numerous objections and appeals with the National Labor Relations Board (NLRB) to delay the election.⁴⁷

Nevertheless, Sears protected its image by publicly distancing itself from Shefferman. In 1957, the Senate McClellan Committee hearings focused mainly on labor corruption and the Teamsters, and Sears escaped relatively unscathed. Sears acknowledged its mistakes and the Committee treated it leniently. When confronted about a respectable company relying “so heavily on an outfit like LRA,” Sears personnel executive Wally Tudor blamed his predecessor, Caldwell, for “poor judgment” in giving Shefferman “too much latitude.” He said Sears had barely used Shefferman since his retirement in 1948 and portrayed LRA as an unauthorized organization. Sears emerged unharmed, with most people seeing the hearings and Shefferman “as an indictment of labor’s corruption, not of management’s shortcomings.”⁴⁸ In actuality, Sears only terminated its relationship with LRA just before the hearings, and promised to rehire Shefferman afterwards. Even after Shefferman retired from Sears, the company referred organizing attempts in Boston, Philadelphia, and Indianapolis to his firm between 1948 and 1957. Local managers did not like LRA being involved in their stores, but had no

⁴⁷ Jacoby, 134-137. On one occasion, the NLRB found for the Clerks in Boston but Shefferman convinced the agency’s executive secretary to quit his job and join Sears’ legal defense team, and the NLRB overruled the earlier decision against Sears.

⁴⁸ Jacoby, 130, 133, 137-139, 140-142.

choice since despite its claims of “store autonomy, [Sears] judged labor relations too important to be left to local managers.”⁴⁹

Even without Shefferman, Sears managed to resist unionization. After the McClellan hearings, the Teamsters and Clerks began national campaigns at Sears. The company instituted an employee relations campaign, giving prizes to those who answered questions about its benefit programs, stressing that Sears’ wages, benefits, and promotions were better than at unionized companies, and raising fears that unionization would harm the profit-sharing plan. It also increased benefits and wages in certain locations as determined by morale surveys and in 1959 surveyed all 205,000 employees to predict union tendencies. Over the next two years, there were only a few NLRB elections at Sears units and the union won only one, at a Fresno, California warehouse with thirty-five workers. The Clerks surveyed workers about wages and management, promised better pay and shorter hours, and linked Shefferman to Sears and the Teamsters. In response, the company threatened to fight Clerks’ locals in cities where it had negotiated since before World War II, initiated decertification elections, and in 1960 fired 200 San Francisco employees for refusing to cross a picket line. The Clerks responded with a national boycott. Using tactics later adopted by NOW, they handed out “The Shame of Sears” pamphlets to shoppers and organized demonstrations around the country, including at the Miss America Pageant. Nevertheless, the boycott had little impact and by 1963 the Clerks no longer made Sears a priority. The boycott finally ended in 1967, with the Clerks’ leader saying, “It had become apparent that a boycott

⁴⁹ Jacoby, 130, 137-138, 141.

would never be substantially effective against a monster with such resources.”⁵⁰ Sears’ aggressive public resistance to unionization while privately negotiating on several fronts demonstrated the lengths to which it would go to resist outside interference in running its company.

Decentralization and Discrimination

Sears relied on its decentralized structure as a matter of convenience to explain its affirmative action shortcomings. When the EEOC criticized Sears in the 1970s for not hiring women and minorities in sufficient numbers, Sears argued that its personnel department had focused on employment opportunity issues earlier than most other corporations but its store managers in the “field” resisted any incursion into their power or orders from above to change their policies. If a manager did not want to hire blacks despite a large percentage in the local labor market, he simply did not hire any. Even when they hired minorities, “college-educated black employees were being relegated to the candy department or the shipping docks, without any plans for moving them along.” Sears claimed that affirmative action memos from Chicago “were often suppressed in the territories.” Despite commitment at the corporate level, it argued, the decentralized system was “not geared to demanding or monitoring change.”⁵¹ Thus, the company blamed any failures to hire and promote women and minorities on local store managers, who “finessed” the affirmative action programs established by headquarters.⁵²

⁵⁰ Jacoby, 138-140.

⁵¹ Katz, 138-139.

⁵² Former corporate personnel and public relations executive James C. Worthy even published a book discussing Sears’ decentralized structure in 1984, just in time to testify at the EEOC trial in support of Sears. See, for example, Worthy, Note on the Author, 122-23.

In hiding behind its claims of good intentions and recalcitrant local managers, however, Sears failed to acknowledge that the corporate office had more control over operations than it admitted. For example, Sears maintained significant control over its suppliers. The company owned several factories, giving it more control over inventory and product quality than most retailers. It challenged the existing pattern of independent merchants selling hard goods, and undercut their prices with an efficient distribution system and volume discounts. The strong merchandising departments in Chicago and New York handled all buying, which gave the company a great deal of power with regard to its suppliers.⁵³ Thus, where it wanted or needed control, Sears effectively centralized certain aspects of its business.

Maintaining Public Image

Sears was also characterized throughout its history by an extraordinary concern with its public image. In the late 1890s, Sears supported agricultural programs for farmers to combat rumors spread by independent southern merchants and improve its image in rural areas. In the early 1930s, it lobbied against anti-chain tax bills and fair trade laws prohibiting sales below cost and “worked hard to make friends in high places” when targeted by independent merchants and politicians for loss of community taxes. It directed a public relations campaign to “convince [rural and Southern] consumers that Sears was not just a store but an American institution worthy of their support.” The company sponsored agricultural scholarships and encouraged local managers to participate in civic activities, donate corporate money to local organizations, and purchase supplies locally. Thus, Sears’ decentralization was also a deliberate strategy to

⁵³ Jacoby, 99, 100, 106, 126.

help it assimilate into the community, getting locals to accept it as their store and minimizing the fact that profits were earned by a large national corporation.⁵⁴

Sears proved successful at honing its image over the next three decades, until the opening of the new Sears Tower in 1973 created a crisis for the company. Before then, most people saw Sears as a small-town catalog company operating out of one of its distribution centers, such as Memphis or Greensboro. Few people knew it was a big corporation headquartered in Chicago. When the company moved from its old brick complex on the west side of the city to the 110-story skyscraper – the world’s tallest building when it opened – Sears’ low profile suddenly changed. The corporate giant began to attract the same kind of scrutiny as other large corporations: the “Tower became less a monument to invincibility than a lightning rod.” The company feared that its “faltering . . . seemed to trigger an instinct to pile on. Writers, regulators, business experts, and . . . the general public all appeared eager to partake of the dark pleasure of unmasking the most trusted company in the world.”⁵⁵

Sears’ Response to EEOC

Sears’ corporate culture, especially its attitude toward unions, can help explain its reaction to the EEOC case, its decision to fight back, and its ultimate success against the federal government. In various respects, Sears’ culture sustained its challenge to the EEOC.

Sears responded to the EEOC’s investigation and lawsuit with outrage and indignation. It argued the attack was unwarranted because the company complied with all discrimination laws, had a stellar affirmative action record, and was making

⁵⁴ Jacoby, 98-99, 101-102.

⁵⁵ Katz, viii, 135, 137-138.

significant progress.⁵⁶ Sears claimed it had established a “sophisticated and progressive” affirmative action program even before it set up a formal system for hiring minorities in 1968, and that senior managers had been focused on “egalitarian hiring practices” for over a decade, earlier than most other corporations.⁵⁷ Sears had hired a full-time personnel staff and a very capable long-time store manager, Ray Graham, to direct its affirmative action programs. Graham reported to Charlie Bacon, Vice President of Human Resources, and was very committed to improving “the numbers.”⁵⁸ In February 1973, just after the AT&T settlement, chairman Wood held a meeting of 250 top managers from around the country in Chicago to “review the corporation’s commitment” to affirmative action. Wood “warned the Field soldiers that if they did not like hiring and promoting blacks and women they should leave the company.”⁵⁹ Wally Tudor conducted a campaign “to force managers to change their arbitrary and, if not discriminatory then certainly idiosyncratic, hiring and promotion practices,” telling store managers and field executives not to tell him they could not find qualified blacks to hire.⁶⁰

Under Wood the company also voluntarily instituted a company-wide affirmative action program (the Mandatory Achievement of Goals or “MAG” program), which required “women or minorities to get half of all future job openings,” and made significant progress in improving its numbers. One Sears attorney noted the plan was so

⁵⁶ Even if it had not made the affirmative action progress expected, Sears argued, it was no worse than any other retailer and had been unfairly singled out.

⁵⁷ Katz, 138; NOW Papers; Sears, Roebuck & Co., “Progress in Equal Employment Opportunity: a special report on Sears Affirmative Action,” 1974. Box 44, Folder 19. Schlesinger; see also Hymen Bear, telephone interview by author, 27 June 2005.

⁵⁸ Hymen Bear, telephone interview by author, 27 June 2005.

⁵⁹ Katz, 139; NOW Papers; Sears, Roebuck & Co., “Progress in Equal Employment Opportunity.” Box 44, Folder 19. Schlesinger.

⁶⁰ Katz, 138-139.

vigorous that the company even hired a woman pilot for the corporate jet to balance out the male pilots, though he felt that was going too far.⁶¹ In order to break “local resistance,” the personnel department dispatched staff to convince some racist territorial leaders to support the program. In practice, however, the MAG program had loopholes: if a qualified woman or minority could not be found a white man could be hired, and women’s groups alleged that employees were not always told about the program or how to apply for one of the relevant job openings.⁶²

If it did have an imbalanced workforce, Sears blamed everyone but itself. It blamed outsiders, such as government regulators and the media, for “kicking it while it was down.” It blamed its highly trained local managers for exercising power the company had given them and could easily take away. And it blamed women and minorities themselves. Company officials claimed that women were not qualified for or interested in the jobs that would change the makeup of Sears’ workplace – the higher-paying commission sales jobs – because they were too demanding and they preferred hourly work. The company also claimed it simply “acquiesced” to societal values of the time: women did not sell refrigerators because they did not have the traits needed to do so.⁶³ The company believed that men made better big-ticket salespersons, as evidenced by company manuals which described the ideal salesperson in masculine terms, such as “aggressive” and “socially dominant.”⁶⁴ NOW even accused Sears of blaming women for its financial woes and layoffs: “Management is blaming its troubles on government

⁶¹ Hymen Bear, telephone interview by author, 27 June 2005; Katz, 139.

⁶² Katz, 139, discussing local managers resistance to company affirmative action programs.

⁶³ Hymen Bear, telephone interview by author, 27 June 2005.

⁶⁴ Jacoby, 103, 104.

pressure and ‘unqualified women and minorities’ rather on its ‘poor management policies.’ How can Sears management pass the buck to women and minorities who don’t even hold decision-making jobs in the company?”⁶⁵

Sears also argued that any failures of its affirmative action efforts resulted from its decentralized structure. By claiming it could not monitor change, the company essentially asked the EEOC to accept that affirmative action requirements were met as long as it said the right things, or had good intentions, regardless of whether actual changes were made. However, the nature of Sears’ survey and reporting systems belied its claims that local managers had so much power they could not be forced to hire minorities or women. Highly-trained managers who had to submit reports on how to improve morale could presumably be expected to forward affirmative action plans and EEO-1 data. It was easy to blame a diverse group of local managers when affirmative action efforts faltered, but when resisting unionization was the goal, Sears’ corporate organization managed to wield its power forcefully over local facilities.⁶⁶ Moreover, if local profits were suffering, Sears’ national organization would find a way to force local managers to improve quickly.⁶⁷ Thus, despite its outward commitment to a decentralized structure, the company’s anti-union tactics and strong training programs demonstrated that it clearly could, and did, exercise significant centralized control when deemed important enough. The company could have implemented affirmative action changes had it wanted to, and in fact, it did so by the mid-1970s.

⁶⁵ NOW Papers; “Good News & Bad News,” Tower Tattler 1(6), November 4, 1974. MC496, Box 209, Folder 68. Schlesinger.

⁶⁶ Jacoby, 112.

⁶⁷ Katz, 139.

Sears also saw itself as the victim in the EEOC case. Although the company had appeared invincible in the mid-1960s, increasing competition led to a decline in sales by the early 1970s.⁶⁸ Journalist Donald L. Katz was granted access to company records and saw the turning point as 1972, when the Sears Tower was built. Over the next five years, the company declined, paralyzed by internal strife, lawsuits, financial problems (including stagnant profits and declining stock prices), and negative publicity. For the “first time in modern memory,” Sears laid off employees. Katz melodramatically described the situation: “An organization that only five years earlier had seemed utterly unstoppable was now a crippled leviathan, and by 1977 many of those who depended upon Sears, who studied it or loved it, had come to believe that if something was not done very quickly, the company was doomed.”⁶⁹ Then in 1979 Sears was ordered to pay a former sales clerk millions of dollars in a patent infringement case for defrauding him of rights to a ratchet wrench he invented. The case brought negative attention to the company, and a Washington Post editorial celebrated the decision as the little guy beating the big villain, showing how far the corporate giant’s image had fallen. Combined with scrutiny from government regulators, declining sales, and other lawsuits for discriminatory insurance practices, product safety issues, and deceptive advertising, the company felt “as if someone had declared open season on [it].” Thus, as the EEOC case developed, Sears considered it one more instance of being attacked by hostile forces. The company criticized as unfair “the widely publicized casting of Sears as a villainous force

⁶⁸ Katz, 28, chap. 1.

⁶⁹ Katz, viii, xi, xii.

against the cause of equal opportunity.” Its anger over being “kicked while it was down” helps explain why it decided to fight back rather than settle the case.⁷⁰

Sears also viewed the EEOC’s investigation and lawsuit against it as an onerous and indefensible burden. Although the company had faced individual charges before, some of which it settled expeditiously, this was its first massive case. The EEOC required Sears to retrieve and produce massive amounts of employment data from its 150 largest facilities. The company later complained that the information was not computerized and thus it was an enormous retrieval job, requiring them to ship boxes and boxes of documents to Washington, DC.⁷¹ However, Sears’ survey programs undermined its claims that it had limited access to centralized employment data. Its detailed comparisons of employee morale across departments demonstrated the company’s ability to collect and synthesize data on different categories of employees throughout the country. Indeed, Sears’ data-collecting program put it “at the center of the human relations movement in the 1940s and 1950s.” This was not an average company that wondered what its employees thought or how they behaved. Sears hired sociological and economic experts and situated itself at the forefront of the rising tide of corporate behavioral and psychological studies, surveying employees over a thirty-year period in order to “forecast” with precision which departments were susceptible to union activity.⁷² It is thus hard to credit any argument in the 1970s that it was too burdensome to collect EEO and affirmative action data for women’s groups.

⁷⁰ Katz, 137-141. However, Katz argued that the company came back; the crisis led to a “revolution” which transformed the company from an inward-looking, private “corporate culture,” to a “variegated, futuristic corporation.” Katz, viii, xi; “Narrative History of Sears, 1940s to 1970s,” www.searsarchives.com.

⁷¹ Hymen Bear, telephone interview by author, 27 June 2005.

⁷² Jacoby, 111, 112, 120.

As the investigation and lawsuit progressed and began to involve people at all levels of the corporation, Sears grew resentful. Local store managers struggled to improve their employment numbers to comply with the 2-on-1 affirmative action plan and gave the company “a lot of flack” about the MAG plan requirements. Once discovery began, they had to provide massive numbers of documents to the other side. This caused a lot of “anguish” from merchants who were trying to keep lagging sales up in an environment where new competitors such as Wal-Mart were emerging. Many felt that managers should be working on getting customers into the store rather than the affirmative action plan. However, employees were seen as good soldiers and loyal to the company, doing what they had to do. At local facilities people were discussing the case, and store managers talked about complying.⁷³ Even those not directly involved in the case suffered. Katz sympathized with young white male employees, lamenting that they suffered under “heightened scrutiny” during the case, limiting their promotional opportunities “at the very time when they were already growing restless because of the business stasis and rumors of massive personnel contractions.”⁷⁴ White middle managers “sat in the lunchrooms . . . and talked about how none of their male children would ever stand a chance at Sears these days.”⁷⁵

Within Sears, the lawsuit took its toll financially and in morale. Media reports and public comments about the case ranged from being supportive of “Telling’s *chutzpah*” to being glad that “[f]inally Sears is taking on something its own size.” However, the “suits still weighed upon the ongoing governmental crisis inside the

⁷³ Hymen Bear, telephone interview by author, 27 June 2005.

⁷⁴ Katz, 140-141.

⁷⁵ Katz, 362.

company.” The lawsuit dragged on, taking on “a life of its own,” eventually costing over \$100 million. Personnel executives resented the glare of the upcoming trial and lawyers, claiming it prevented them from making employment decisions without endless analysis. In 1982 department head Charlie Bacon left the company “because he didn’t want to be a details man.” He complained that personnel at Sears “was becoming a numbers game,” where scientific studies were required in order to do anything, and that “the life had lost its savor.” However, chairman Telling convinced him to continue monitoring the EEOC case from his retirement in Hilton Head, South Carolina.⁷⁶

Sears did not simply complain about the lawsuit; it fought back. The company’s long history of using experts, statistical analyses, and surveys to resist unionization, even at enormous cost, foreshadowed how it would handle the EEOC lawsuit. It hired a “vast array of professionals,” including consultants, statistical experts, and historians, to survey and analyze the company in the hopes of supporting the claim that it did not discriminate.⁷⁷ In fact, Sears’ fondness for statistical analysis made its limited use at the trial all the more glaring. Sears argued only that the EEOC’s analysis was flawed, spending much expert time and money trying to disprove its numbers. However, the company never offered an alternative analysis to prove that the makeup of its workforce reflected no discrimination. In light of its expertise in processing data, the company presumably would have offered a positive argument if it had the evidence to support one.⁷⁸ Sears knew its workplace was unbalanced and could not claim otherwise.⁷⁹ Thus,

⁷⁶ Katz, 140-141, 362, 369, 500. Katz deflected blame from Sears by claiming the lawsuit “crippled” the personnel department at a time when the “comparatively enlightened organization could have been helpful in closing some of the widening rifts.” Katz, 141.

⁷⁷ Katz, 362.

⁷⁸ Jacoby, 112.

it argued that such differences in employment patterns were caused by factors other than discrimination.

Charles Morgan

Sears also responded to the EEOC lawsuit by hiring attorney Charles Morgan to fight the charges aggressively. As a child, Morgan moved with his family from Kentucky to Birmingham, Alabama in 1945. His mother was very southern, had relied on “colored help” in Kentucky, and believed that her family treated blacks well. His father grew up without much money and eventually made his career with an insurance company; Morgan claimed he had no prejudices, but had grown up in an area with few blacks.⁸⁰ The city of Birmingham developed along with the steel industry but by 1945 had suffered from labor unrest and violence which exacerbated poor living conditions for workers and shifted control of production to northern companies. Blacks were excluded from civic life, which was controlled by a few elite whites. Morgan’s family, however, lived in a prosperous suburb, and he had a happy childhood.⁸¹

Although his parents wanted to send him to college in the East, Morgan wanted to go into Alabama politics and felt that attending the state university would be the best way to make the contacts he needed. Among the political leaders who had a strong impact on him were Illinois Governor Adlai Stevenson and Jim Folsom, Alabama’s populist governor who criticized northern and corporate interests while appealing to poor farmers and workers and treating blacks fairly. As a member of the Young Democrat

⁷⁹ Hymen Bear, telephone interview by author, 27 June 2005.

⁸⁰ Charles Morgan, Jr., *A Time to Speak* (New York, Evanston, and London: Harper & Row, 1964), 16-18.

⁸¹ Morgan, chap. II.

organization, Morgan was also exposed to George Wallace's early populist appeal before segregation took hold as the main political issue.⁸²

After graduating from law school, Morgan worked for a law firm in Birmingham. In order to gain court experience he represented a black man accused of murdering a black widow and learned much about daily life and the barriers to justice for blacks, such as the difficulty in getting witnesses to talk. The ambitious Morgan then opened his own law firm, "stepped up [his] community affairs activities and waited for the 'big case.'"⁸³ In the 1940's and '50s, Bull Connor rose to power in Birmingham, taking charge of the police and fire departments. The 1958 campaign for governor was dominated by candidates who opposed integration, leaving Morgan with no moderate to vote for.⁸⁴ He somewhat melodramatically described,

The responsible people of Alabama – our business interests, our civic leaders, organized labor, our educators, our communications media, our clergy and public officials themselves – had permitted the democratic process of our state to disintegrate into raucous and dangerous demagoguery. Not a "moderate" voice was raised, not a "moderate" hand lifted, not a "moderate" protest uttered as candidates for the highest office in Alabama campaigned from the Tennessee Valley to the Gulf of Mexico, shouting defiance of law and court orders.⁸⁵

Morgan claimed that no one was preparing Birmingham for the racial changes that were coming or leading it to comply with the law. He campaigned to merge the wealthy white suburbs into Birmingham, but was defeated by whites who wanted their own school system in case the city was forced to integrate.⁸⁶

⁸² Morgan, chap. III.

⁸³ Morgan, 50, chap. IV.

⁸⁴ Morgan, 50-52.

⁸⁵ Morgan, 52.

⁸⁶ Morgan, chap. V.

Morgan was aware of the political power of the segregation issue. He and other young leaders had decided against moving East in order to try to renew Birmingham and push for economic growth and a more progressive future. He helped represent a young man arrested for agitating by gathering whites and blacks together, but worried about being identified “with a case involving racial issues.”⁸⁷ He believed the segregation issue was a trap, in which he and every other white man in Alabama eventually would have to get involved. While representing a white Methodist minister who refused to reveal who supported his causes, Morgan received threatening phone calls at his home. He saw this “as a turning point when he had to stand up for the things he believed personally; he could not, as he did in politics, keep some detachment from it.”⁸⁸ However, as the race issue heated up, Birmingham residents became more defensive about their role, for example, in beating the Freedom Riders in 1961, and became even more resistant to change. While working on a reapportionment case, Morgan received more threatening phone calls in the middle of the night. He installed floodlights around his house and told a leading segregationist he would call and wake him to let him know of every such call he received.⁸⁹

On September 16, 1963, the day after the Birmingham church bombing that killed four black girls, Morgan reflected on how frustrating his efforts had been to improve his city. He described the mindset of Birmingham at the time, where people condemned the violence but in some way believed that blacks brought it on themselves. Liberal whites felt guilty and pledged money to help, but never spoke up, defending their city to the rest

⁸⁷ Morgan, 65, 99.

⁸⁸ Morgan, chaps. VI, VII.

⁸⁹ Morgan, 93, 99, 111-112, chaps. VIII, IX.

of the country out of concern for its image and blaming everything on “outside agitators.” Local citizens had been living with violence and were tired of hardship and the lack of prosperity enjoyed by the rest of the country. Morgan made a speech to the city’s Young Men’s Business Club, putting the blame on all of them, and on Birmingham in general, and arguing they could no longer stand by and watch.⁹⁰ His comments were picked up in the national news.⁹¹

At the time of his speech, Morgan had just opened his own law practice. He had moved into a new office and bought furniture and, with very few clients,” was depending “on the telephone ringing every day with new cases.” But after the speech “his phone rang only with threats.” He and his wife had to leave Birmingham so he could find work, moving briefly to Alexandria, Virginia, where they had friends. Morgan was asked to make speeches “all over the country” and then to write a book about “what in his life caused him to speak out as he did.” The next summer he accepted a job opening and directing the ACLU’s southern regional office in Atlanta, where he made his name as a civil rights attorney, filing voting and jury rights lawsuits all over the South.⁹² Morgan even spoke on a panel at the conference of state commissions on the status of women in 1966 where NOW was founded.⁹³ After eight years in Atlanta Morgan and his wife returned to Washington in late 1971, where he supervised the ACLU’s lobbying office.

⁹⁰ Morgan, 8, chap. I.

⁹¹ Hope Eastman, interview by author, 8 July 2004, Bethesda, Maryland.

⁹² Camille Morgan to author, by e-mail, 20 June 2007; George Kannar, “Sears Shall Overcome,” The New Republic, 10 March 1979, 18; Hope Eastman, interview by author, 8 July 2004, Bethesda, Maryland. Interestingly, Morgan mostly sued the government, including the city of Birmingham and the state of Alabama, rather than corporations, for discrimination. Camille Morgan to author, by e-mail, 23 June 2007.

⁹³ Tully-Crenshaw Feminist Oral History Project Records, 1961-2001; Interview with Mary Eastwood by Muriel Fox, March 7, 1992, 15. MC 548, Series I, Subseries A, 3.4-3.7. Schlesinger.

He spoke out early on against President Nixon, traveling to colleges and ACLU chapters around the country to talk about impeachment. After President Carter's election Morgan left the ACLU and started his own firm in April 1977 with two former ACLU lawyers. They used an office holding overflow furniture from another firm and his wife Camille worked as their secretary, but they had no clients.⁹⁴

Soon thereafter, Morgan gave a speech in Napa, California. Sears' vice president Phil Knox was in the audience and liked what he heard. Sears was unhappy with the firm currently representing it and liked Morgan's approach, confronting government and "giving [it] the opportunity to do the right thing" rather than taking a more defensive approach.⁹⁵ After the EEOC issued its reasonable cause finding against the company in 1977, Morgan went to Chicago to discuss the case with Sears, and "said he thought he could save them several hundred million dollars." While on vacation that summer "he read constantly of their history and reputation and business practices," including the schools Julius Rosenwald built for black children in the south and the fact that Sears "rehired all [of its employees] who had gone to war . . . as well as any other veteran who needed a job." Sears was "a very patriotic company" and was "terribly offended" by the EEOC allegations. Although other big companies had settled, Sears thought it "had done a great job at affirmative action" and wanted to defend itself.⁹⁶ The company hired Morgan Associates to represent it, becoming his firm's first major client. As a former civil rights attorney, Morgan seemed an unlikely candidate to defend corporate interests

⁹⁴ Camille Morgan to author, by e-mail, 20 June 2007; Hope Eastman, interview by author, 8 July 2004, Bethesda, Maryland.

⁹⁵ Hope Eastman, interview by author, 8 July 2004, Bethesda, Maryland.

⁹⁶ Camille Morgan to author, by e-mail, 20 June 2007. On Rosenwald's extensive philanthropic activities, see Katz, 10-11.

against the EEOC and was disparaged for working for “civil rights for corporations.”⁹⁷

Yet his transformation from civil rights to Sears’ attorney mimicked broader political themes of the period, most notably the decline of liberalism and rise of corporate power. Sears’ decision to hire Morgan to lead its legal response and “construct a countersuit” against government regulatory laws was a clear indication of its attitude toward the EEOC investigation.⁹⁸

Sears’ Approach

Sears’ decision to go to trial and win at any cost rather than settle the case is partly explained by its historic emphasis on public image. In the early 1970s, Sears demonstrated this attitude by aggressively fighting demands by women’s groups to turn over its affirmative action plan, arguing that NOW had singled it out unfairly and even suing in court to prevent disclosure. Only later, in its 1973 Annual Report, did Sears release a one-page summary of relevant data, which provided limited information regarding its true employment picture. This response to the disclosure issue was a sign of the type of opponent Sears would be in future litigation and should have warned women’s groups not to assume the company would respond to the EEOC investigation with a quick settlement. Unlike Sears, other Track I companies such as GM and GE settled with the EEOC during the 1970s and 1980s. But after years of failed negotiations with Sears, the EEOC finally filed its discrimination lawsuit “amid [the company’s] nose dive of 1979.” Despite being faced with numerous other problems, Telling decided that “rather than trying to appease the government agency . . . he would make a federal case out of the

⁹⁷ Kannar, “Sears Shall Overcome,” 19; Hope Eastman, interview by author, 8 July 2004, Bethesda, Maryland.

⁹⁸ Katz, 140.

situation.” He told Sears’ attorneys, “Let’s not roll over and play dead this time.”⁹⁹

Sears prided itself on its refusal to let outsiders force it to do anything, and its decision not to disclose its affirmative action plan or to settle demonstrated its unwillingness to “take things lying down.”

Sears’ corporate culture, and especially its attitude toward unions, also helps explain its resistance to the EEOC. The company was “famed for its distrust of outsiders,” believing in promotion from within and providing lifetime job security and an impressive retirement in exchange for unwavering loyalty. Sears projected an air of certainty and confidence, a “swagger . . . born of so many years of so much unquestioned power and success.”¹⁰⁰ It was built on an old-school, old boys network, where the territorial leaders were referred to as the “kings” and built themselves palace-like offices. As Katz noted, most Sears officers in 1977 were over six feet tall.¹⁰¹ Katz describes the company as having a “‘snap-decision-from-the-guts’ tradition, that long-held, old-culture belief that a good person of Sears blood could take a quick look at someone and know whether there was value there without asking a single question.”¹⁰² This was a company used to doing what it wanted that resisted being forced to do anything.

Sears’ ability to keep out a major union also made the job of the EEOC and women’s groups more difficult. At the same time, its anti-union stance may have influenced the EEOC’s and NOW’s decision to go after Sears. Since the company had effectively beaten the unions by 1967, Title VII offered a new way to get Sears to change

⁹⁹ Katz, 139-141.

¹⁰⁰ Katz, 579.

¹⁰¹ Wood liked his executives “tall and lean” so “for 50 years a Sears man who ‘looked the part’ stood somewhere around six foot two.” Katz, 4-5, 28.

¹⁰² Katz, 580.

its workplace practices. Yet, union organizing involved workers in a much more significant way than an EEOC action. Perhaps the EEOC and women's groups should have anticipated that if Sears could beat back the efforts of workers organizing within the company, it would be even harder to change the company from the outside. Moreover, the involvement of workers themselves had been a key element in earlier EEOC victories. AT&T workers, for example, were already unionized and women employees were able to press for changes to discriminatory policies from inside the company while the EEOC and advocacy groups provided pressure from the outside.¹⁰³

In fact, NOW and WE knew about Sears' aggressive anti-union activity and reputation, but made too little of it. Ladky acknowledged that they underestimated the counter-pressure the company would apply to non-unionized employees as a result of the lawsuit. They also took too lightly the differences between Sears and AT&T.¹⁰⁴ The presence of the union at AT&T meant that employees had certain rights and NOW and the EEOC had allies. Even though NOW and other women's groups were sometimes at odds with the union over issues such as implementing affirmative action changes in contravention of seniority provisions, workers were accustomed to demanding rights and being protected while doing so. At Sears, however, there was limited hope for organizing from within to bring about change, and no powerful entity such as a union to apply pressure to the company on another front. Moreover, union employees were familiar with the process of complaining about unfair workplace conditions and less afraid to do so because they had more job security. It was harder for Sears employees to protest unfair treatment or resist pressure from the company. They were not in the habit of filing

¹⁰³ Herr, Women, Power & AT&T.

¹⁰⁴ Anne Ladky, telephone interview by author, 20 March 2002.

grievances, so the idea of filing charges of discrimination with an outside agency may have seemed unfamiliar and dangerous. Moreover, without union backing, workers likely feared they were risking their jobs if they complained, testified, or agreed to be a named plaintiff in a case.

Sears' resistance to unionization also demonstrated that it was not disposed to negotiating with its employees in any context. A unionized company is more used to negotiating regular contracts and working with the union on a professional basis. Just as Sears refused to publicly negotiate with unions and resisted a national contract like Ward's had signed with the Teamsters, it also resisted any global or company-wide settlement with the EEOC. Instead, just as Sears brokered private deals with the Teamsters, it quietly settled the EEOC's cases involving race discrimination and some of the individual EEOC charges, in part so those employees would not testify against the company.¹⁰⁵ To the end, Sears was concerned with its image. Similarly, the stalling tactics that Sears used in dealing with the Clerks in the 1950s foreshadowed the tactics it used to great effect in the EEOC case, dragging out the litigation until the case finally went to trial in 1985 in a more favorable political climate.¹⁰⁶ Nevertheless, despite its declining financial fortunes and the money it stood to lose, Sears' motivation was not solely, or even primarily, economic. It was a principled, ideological resistance to being told what to do, to being singled out for practices that other companies did as well, and to

¹⁰⁵ Hymen Bear, telephone interview by author, 27 June 2005.

¹⁰⁶ Sears, perhaps, saw itself as "taking one for the team," fighting a long and costly battle in order to wear down the EEOC and prevent other retailers from having to do the same, in the same way that Ward's likely saw its prolonged fight with the unions.

being attacked when it had tried to “do the right thing” by implementing affirmative action measures.¹⁰⁷ It saw itself as resisting on behalf of the retail industry as a whole.

Sears’ response to, and ultimate success against, the EEOC can be understood by examining its history as a corporation. Sears’ decentralized corporate structure gave the company less control over local hiring, though more than it acknowledged, and an easy scapegoat, while its obsession with image suggested that it would be likely to resist change, at least publicly, and fight to win at any cost. Its corporate culture of paternalism and welfare capitalism, and history of resisting outside pressure to change, illustrated its strong desire to handle company problems internally, without governmental or other involvement. The company’s resistance to unionization and demands by women’s groups foreshadowed how aggressively it would fight the EEOC, while also making the EEOC’s job harder without a union ally. Women’s groups and the EEOC who viewed AT&T as the model underestimated Sears’ willingness to fight back and the important role a union could play, direct or indirect, in bringing about change. Finally, the company’s reaction to the EEOC case and its hiring of Charles Morgan, as well as its history of using welfare benefits, experts, and statistical analysis, showed the depth of its determination, its skill at resisting outside interference, and the lengths to which it was willing to go to find creative approaches to beating the federal case against it.

¹⁰⁷ Howell Harris describes this as an American managerial belief in its fundamental “right to manage” without interference from the government or anyone else. See, for example, Howell J. Harris, The Right to Manage: Industrial Relations Policies of American Business in the 1940s (Madison: University of Wisconsin Press, 1982). Indeed, employment law reaffirms the notion that courts have no authority “to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers,” unless they involve discrimination. Hutson v. McDonnell Douglas Corp., 63 F.3d 771, 781 (8th Cir. 1995).

Chapter 5

EEOC Politics

Thirteen years after it began, the EEOC lost its case against Sears. Although it appeared to be a sure win for the EEOC when it began the case in 1973 in the wake of AT&T, Sears' resistance delayed the case long enough that a shift in the national political climate gave the giant corporation the advantage by the time the trial began in 1985. President Carter's nominee for EEOC chair, Eleanor Holmes Norton, inherited a commission with damaged credibility. She turned it around with good management, though her focus on cleaning up the backlog came somewhat at the expense of broader systemic cases. President Reagan was swept into office in part on promises to fundamentally change the civil rights policy of the prior twenty years, and the rise of conservatism helps explain how Sears beat the EEOC thirteen years after the investigation began. However, change came slowly to the EEOC, and chair Clarence Thomas initially resisted administration incursions into his power. Despite efforts by the Reagan administration to transform the meaning of affirmative action, the Sears case continued through a series of unfavorable political shifts. The continuation of the EEOC litigation can be explained by the slow pace of bureaucratic change in the federal government, resistance from within the administration, the dedication of EEOC staff members, and the unstoppable tide of change in the workplace, led by activists without regard to whether they could rely on the government as an ally.¹ Despite the rising conservative climate, changes at the top, and attempts by Reagan to change meaning of affirmative action, gains continued to be made in EEOC cases during the years in which

¹ MacLean, Freedom is Not Enough.

the Sears case slowly progressed, as the changes faced resistance and were more limited than previously thought.

President Nixon and the EEOC

The EEOC's investigation of Sears began in a relatively conducive political environment. Although Nixon had invoked racist attitudes to win over Southern whites during the elections of 1968 and 1972 he accepted the existence of the new civil rights laws and the EEOC throughout the AT&T and steel cases.² As Hugh Davis Graham noted, he “confirmed the Kennedy-Johnson legacy in civil rights law in much the same way that Eisenhower had confirmed the New Deal – not by embracing it, but by accommodating to it on the margins in a way that guaranteed its legitimacy and secured its permanence in the federal establishment.”³ Beyond simply accepting existing policies, Nixon actually helped advance civil rights – albeit more out of concern for politics than racial justice – and recognized that women and African Americans had the right to similar opportunities as white men. He desegregated more southern schools than ever before, supported revoking tax-exempt status for segregated private schools (something Reagan later tried to reverse), and gave the EEOC more authority.⁴ One administration member described the “pattern of civil rights enforcement” during his first term as “operationally progressive but obscured by clouds of retrogressive rhetoric.”⁵ Coming at

² Dean J. Kotlowksi, Nixon's Civil Rights: Politics, Principle, and Policy (Cambridge: Harvard University Press, 2001); Leonard Garment, Crazy Rhythm: My Journey from Brooklyn, Jazz, and Wall Street to Nixon's White House, Watergate, and Beyond . . . (New York: Times Books, Random House, 1997), chap. 8.

³ Hugh Davis Graham, The Civil Rights Era: Origins and Development of National Policy 1960-1972 (New York and Oxford: Oxford University Press, 1990), 4.

⁴ Garment, 203-19; Kotlowksi; William C. Berman, America's Right Turn: From Nixon to Bush (Baltimore: The Johns Hopkins University Press, 1994), 11.

⁵ Garment, 220.

a key point, Nixon's policies helped shape the way future presidents would deal with civil rights.⁶

The Nixon years were difficult ones for the EEOC. In 1969 Nixon appointed Bill Brown, a Republican African-American attorney appointed to the commission by President Johnson, as chair.⁷ In 1972 Congress granted the EEOC increased powers to sue employers directly, which Brown tried to use to broaden the power of the commission.⁸ He reorganized it to attack systemic discrimination by creating the National Programs Division (NPD) under the control of David Copus, one of the government's star attorneys from the AT&T team. The NPD received 60 percent of the EEOC's resources to investigate large cases against nationwide employers (referred to as "Track 1" cases). The remaining money was distributed to individual cases and to regional offices to handle more local "Track 2" cases.⁹ The NPD examined the number of charges of discrimination filed against a corporation, its economic power, the number of workers, and the potential for redressing past discrimination, and eventually filed Commissioner's Charges against several of the largest – GM, GE, Ford, and Sears – in September 1973.¹⁰ Although civil rights authorities in the Departments of Labor and Defense had already given "clean bills of health" to the affirmative action efforts of some of these companies, the young EEOC signaled its determination to assert itself as the

⁶ Kotlowski.

⁷ Bill Brown, telephone interview by author, 26 February 2004.

⁸ Peter Masley, "Bias Complaints; U.S. Agencies Lag in Resolving Charges of Discrimination," Washington Post, 28 September 1977, A3; Bill Brown, telephone interview by author, 26 February 2004. Before the amendments, the only thing the EEOC could do if a corporation did not agree to change its policies was refer the case to the Department of Justice to litigate, with no control over whether it would actually happen.

⁹ Bill Brown, telephone interview by author, 26 February 2004; Stockford, The Bellwomen, 209.

¹⁰ Philip Shabecoff, "A Full Right to Fairness," The New York Times, 23 September 1973, 215.

main anti-discrimination agency.¹¹ It spent several years in the 1970s investigating these Track 1 companies, including four years on Sears.¹²

Despite Brown's efforts, the EEOC spent much of the 1970s enforcing its consent decree with AT&T, which failed to comply fully and made limited progress in affirmative action. In 1978 the Wall Street Journal reported that although women had better salaries and more responsible jobs, none had reached the highest levels of management.¹³ New York Telephone, NJ Bell, and Southern New England Telephone failed – by thousands – to meet job and promotion goals for 1973 and 1974, and AT&T was ordered to pay an additional \$2.5 million and held to “new and stricter” goals until

¹¹ Philip Shabecoff, “Rulings on Job Bias Vary Among Agencies,” The New York Times, 30 September 1973, 28.

¹² Brown had a mixed relationship with the administration. He appealed to Nixon's desire to decrease the welfare rolls by arguing the government had to ensure African Americans had good jobs with benefits. He asserted the agency's independence by refusing to ask permission before going after AT&T. Each time Congress cut the EEOC's funding Brown relied on his friend Len Garment, Nixon's counsel and the token liberal in the White House, to help restore it. Bill Brown, telephone interview by author, 26 February 2004. Politics also affected Brown's ability to negotiate settlements. In the steel case the Departments of Labor and Justice were willing to accept a promise to end race discrimination, but Brown thought it was important to have total settlements of which the commission could be proud and refused to accept anything that did not include back pay. Brown also had to stand up to his presumed successor, John Powell, who began negotiating with other agencies and the steel and union leaders before he was confirmed. Brown declared that the EEOC would pursue the steel industry regardless of any settlement made. Bill Brown, telephone interview by author, 26 February 2004; Kotlowski; Garment, 220; Philip Shabecoff, “Job Equality Pact In Steel Industry Being Negotiated,” The New York Times, 5 December 1973, p. 1. In April 1974 Powell's EEOC reached a settlement with goals and timetables for moving women and minorities into underrepresented occupations but no back pay. Powell ran the commission as less of an independent agency, giving up the units Brown put in place and leaving his Track 1 cases to languish, although the investigation against Sears and the other companies continued. Bill Brown, telephone interview by author, 26 February 2004.

The NAACP opposed the steel settlement because it feared it would preclude individual lawsuits against the industry. Philip Shabecoff, “Steel and Union Accept Job Equality,” The New York Times, 16 April 1974, 64; UPI, “Fund Asks Court to Void Settlement in Steel Bias Suit,” The New York Times, 7 December 1974, 60. Although it supported broad industry reform, the NAACP was equally concerned with protecting the rights of individuals to have their grievances addressed in a timely manner. Advocacy organizations had a complicated relationship with government agencies; they cooperated with it but also criticized its shortcomings. See, for example, Lesley Oelsner, “Justices to Weigh F.P.C. Role on Bias,” New York Times, 15 October 1975, 19. NOW rigorously evaluated the EEOC and pushed for improvements, making things difficult for the enforcement agencies.

¹³ Georgette Jasen, “Ma Bell's Daughters: Women Got Big Gains in '73 AT&T Job Pact, But Sexism Cry Persists,” Wall Street Journal, 28 February 1978, 1; Jack Egan, “Changes May Be Needed In AT&T Hiring Program,” Washington Post, 4 July 1978, D6.

the deficiencies were made up. Challenges to the consent decree continued almost up to its expiration in January 1979.¹⁴ Thus, even when it “won” cases against discriminating corporations, the EEOC had much work to ensure the changes actually came about.

By the end of the Nixon administration, the commission was at a low point. In addition to enforcement problems, the EEOC faced a backlog of discrimination charges so large – an estimated 100,000 by 1974 – that it damaged the agency’s credibility. In February 1977, the Washington Post said the commission had resolved 13,000 fewer charges in 1976 than the year before, and the Government Accounting Office (GAO) concluded that a complainant had just a 1 in 33 chance of his or her charge being settled successfully the same year it was filed.¹⁵ The commission also faced management problems and high turnover at the top. John Powell, Brown’s successor, was “charged with inefficient, often high-handed administration” and resigned in March 1975 under pressure from the administration of Gerald Ford, who replaced Nixon in 1974. His successor resigned a year later before being able to show any results, as did the only Mexican-American commissioner, leaving the EEOC with only three members.¹⁶ By

¹⁴ Eileen Shanahan, “AT&T is Penalized Anew for Job Bias; \$2.5 Million Will Be Paid for Violations,” New York Times, 14 May 1975, 1; Jasen, “Ma Bell’s Daughters,” 39; Egan, “Changes May Be Needed In AT&T Hiring Program.”

¹⁵ Lynne Darcy, “CAN CONGRESS ROLL THE BACKLOG?,” NOW Compliance Newsletter, No. 14, November 1974, 7, UIC, NOW Chicago, 78-034, Box 3, Folder 1; William Chapman, “An Agency in Shambles; The EEOC 11 Years Later: An ‘Unbelievable Morass,’” Washington Post, 6 February 1977, A1; Ernest Holsendolph, “General Accounting Office Reports That Progress of Equal Employment Commission is ‘Limited’,” New York Times, 30 September 1976, 19.

¹⁶ Ernest Holsendolph, “Job Panel Head Urged to Resign,” New York Times, 16 March 1975, 37; “Chairman to Leave Panel on Job Rights,” New York Times, 19 March 1975, 22; Holsendolph, “General Accounting Office Reports That Progress of Equal Employment Commission Is ‘Limited’”; Staff Reporter, “EEOC Chairman’s Resignation Poses Problem for Ford,” Wall Street Journal, 14 April 1976, 7. EEOC regional offices also faced government investigation for misuse of travel expenses, misrepresentation of hours worked, and using government facilities for political and personal activities. Ernest Holsendolph, “Job Rights Panel Faces Mismanagement Inquiries,” New York Times, 2 May 1976, 26.

February 1977 the commission had had six chairs and ten executive directors in 11 years, with no chair staying for a full term.¹⁷

Critics also complained of a lack of communication between complaint investigators and the attorneys who filed lawsuits. Although some thought a strong leader could solve the problems, the chair's job was seen as one without much power and was usually held by "political friends, short-timers looking for a place to work until something better [came] along."¹⁸ Even when a chair like Brown supported an expanded role for the agency, many of the commission's problems stemmed from its position as a large agency that lacked real enforcement powers.¹⁹ In fact, many argued the EEOC's problems ran even deeper, to a "fatal flaw" in its structure as a charge-driven agency, which caused it to be "hopelessly bogged down in individual complaints" whose resolution, "even cumulatively . . . has no significant impact on job discrimination." They argued the commission should abandon its case-by-case approach and focus on systemic discrimination, freeing up funds used for individual complaints to litigate major suits. However, such plans angered advocacy groups, who insisted on both addressing systemic discrimination and ensuring that individual complainants were heard. The commission itself opposed abandoning the individual complaint system: "[s]ome of these people have waited since Eve left the garden to get a fair shake and you can't leave them with nothing." But even those who supported the complaint system acknowledged it did

¹⁷ Chapman, "An Agency in Shambles"; "Chairman to Leave Panel on Job Rights"; Holsendolph, "General Accounting Office Reports That Progress of Equal Employment Commission Is 'Limited'"; Staff Reporter, "EEOC Chairman's Resignation Poses Problem for Ford," Wall Street Journal, 14 April 1976, 7.

¹⁸ Chapman, "An Agency in Shambles."

¹⁹ Ernest Holsendolph, "New Powers Urged for Job Rights Agency," New York Times, 25 March 1975, 29.

little to end discrimination, as many cases were simply closed when the parties lost interest.²⁰

By the late 1970s, morale was low among EEOC staff members. Many had come from the civil rights movement because they believed in the cause, but became disillusioned over time. The Washington Post described an anonymous staff member, likely David Copus, who was drawn to the commission out of law school by its idealism and commitment. Despite a big success in forcing a major corporation (likely referring to AT&T) to pay millions in back pay to women and minority employees, he described the EEOC as an “unbelievable morass” with “no leadership” and an “incompetent” field staff “riddled with empty positions.” He lamented, “I’m going to leave. I’m fed up. I can’t stand it anymore.”²¹ In fact, Copus did leave the commission in frustration in April 1977, a sharp change from only four years earlier when he lectured women’s groups on how to use the AT&T case to change the world.²² Since Copus’ NPD spent those four years investigating the Track 1 companies, one can only assume that the problems he complained of affected the case against Sears. Finally, the recession and layoffs in the mid-1970s erased many of the commission’s earlier gains.²³ The New York Times quoted one critic in 1975 who rejected the EEOC as a “mechanism for major changes in

²⁰ Chapman, “An Agency in Shambles.” Judith Lichtman of the Women’s Legal Defense Fund argued, “The whole purpose of Title 1 (sic) was to remove the burden from individual employees and make the government investigate complaints.” Ibid.

²¹ Chapman, “An Agency in Shambles.”

²² David Copus, interview by author, 13 November 2003, Washington, DC.

²³ The New York Times noted that white women lost ground in the income gap and black women made no progress at all into higher-income jobs. Charlayne Hunter, “Economist Finds Widening in Black-White Income Gap,” New York Times, 29 November 1975, 30. The commission also postponed guidelines that would protect women and minorities from disproportionate layoffs through rotated furloughs and work sharing. Ernest Holsendolph, “Equal Employment Guideline on Layoffs Delayed,” New York Times, 16 April 1975, 12.

earnings distribution” and instead urged a “minority group effort to push for a comprehensive job program.”²⁴

Thus, by 1977 the commission was in disarray. It lacked credibility due to its backlog, leadership problems, and enforcement and image issues. It was under attack from both civil rights groups, complaining that its prosecutions were ineffective, and businesses, for interfering with management decisions. One EEOC source said, “We really don’t have any constituency at all. We haven’t got any friends.”²⁵ Another predicted the agency’s demise, claiming that it would merge with a super-agency with overall authority for enforcing civil rights legislation.

Eleanor Holmes Norton

Nevertheless, the election of President Jimmy Carter in 1976 buoyed feminist expectations.²⁶ In March 1977, he nominated Eleanor Holmes Norton for EEOC chair, pleasing feminist and civil rights groups alike.²⁷ A member of the last segregated class of

²⁴ Hunter, “Economist Finds Widening in Black-White Income Gap”.

²⁵ Chapman, “An Agency in Shambles.” Of course, a government agency presumably should play the moderator between the two sides. Neither businesses nor environmental groups always agree with the decisions of the Environmental Protection Agency (EPA). The fact that neither side agreed might mean the commission was simply doing its job.

²⁶ Gary M. Fink and Hugh Davis Graham, eds., *The Carter Presidency: Policy Choices in the Post-New Deal Era* (Lawrence, Kansas: University Press of Kansas, 1998), 3 (internal citations omitted). Carter was elected with the help of feminists who hoped they could make even more significant progress in EEO than they had under Nixon and Ford. Carter did make advances in pregnancy discrimination, but feminists were disappointed overall in the attention paid to their issues. He failed to recognize that the women’s movement represented diverse groups with concerns beyond equal rights and stayed out of debates until the last minute, requiring women to work more through Congress, agencies, and women in the White House. By the end of his term Carter had so alienated feminists that had helped elect him that they withdrew support for his reelection. Susan M. Hartmann, “Feminism, Public Policy, and the Carter Administration,” chap. 11 in Fink and Graham.

²⁷ The appointment of women to administration positions reflected the extent to which feminists had suddenly become government insiders. Nevertheless, they had to deal with limitations from the administration and increased demands from outside groups to which they used to belong. Activists used the opportunity to build coalitions with women in the administration and find federal funding. Hartmann, chap. 11 in Fink and Graham. This type of contact between EEOC staff and NOW members prolonged the Sears’ litigation, as the company argued the case should be dismissed because of a conflict of interest.

a Washington, DC high school, Norton picketed businesses closed to blacks while attending Antioch College. At Yale Law School she was remembered as a brilliant student who talked “about using the law as an instrument for social change.” Norton was one of three attorneys who wrote the brief for the Mississippi Freedom Democratic Party, the African-American group that forced the national Democratic Party to reform its delegate selection system in 1964. She clerked for Judge A. Leon Higgenbotham, who presided over the AT&T consent decree. She then worked for the ACLU on First Amendment issues, even obtaining a favorable Supreme Court decision for George Wallace and the National States Right Party. She noted that blacks “got a real charge out” of the fact that Wallace “had to come to a black woman for help.”²⁸ In 1970, Norton became chair of the New York City Commission on Human Rights. New York had been one of the first states to establish a fair employment practices commission after World War II and fight discrimination on the state level before the federal government passed Title VII in 1964. These state commissions, particularly New York, set the model that other agencies, including the EEOC, later followed.²⁹ During her tenure, Norton eliminated the New York City Commission’s backlog, resolving 60 percent of cases within three months, and her success became the blueprint for her EEOC job: “Service delivery has to become a priority Once the agency developed a body of civil rights guidelines, it didn’t shift rapidly enough to delivery techniques.”³⁰

²⁸ Jacqueline Trescott, “Eleanor Norton: A Fighter In the EEOC Chair,” The Washington Post, 22 June 1977, B1.

²⁹ Paul D. Moreno, From Direct Action to Affirmative Action: Fair Employment Law and Policy in America, 1933-1972 (Baton Rouge and London: Louisiana State University Press, 1997), chaps. 5 and 6.

³⁰ Trescott, “Eleanor Norton.”

There was a lot of interest in Norton as a working woman and a feminist.³¹ Only forty years old, she was married and the mother of two young children, and particularly concerned with class issues. In a 1978 commencement address to the University of District of Columbia, she warned the mostly African-American graduating class “not to become so wrapped up in middle class ambitions that they ‘walk away’ from the plight of the hard-core black poor.” She cautioned the privileged group not to “leave . . . behind” the “new and angry underclass . . . a virtual pariah class, a minority among minorities.” Although they were likely “hungry for the security denied past generations,” she warned, “It is a heavy burden that you bear. It is made heavier by the continuing awful contrasts in our community.”³²

Norton promised to control the backlog at the EEOC and speed up complaint processing. The NYC Commission had also been called “unmanageable,” and she believed the EEOC’s problems could be solved with “hard-headed and no-nonsense direction.”³³ Norton also saw organized labor as an ally in efforts to end job discrimination.³⁴ She pledged to stop expanding individual complaints into class-action suits but would monitor hiring and promotion practices of large corporations and bring class-action suits against those with growing work forces, large Hispanic populations,

³¹ Austin Scott, “New York’s Eleanor Norton Said Choice To Head EEOC,” Washington Post, 25 March 1977, A8. The Washington Post ran a profile in its Style section, describing the contrast between “the frailty of Norton’s looks [and] the sharp tumble of her works and the hammering actions of her hands.” It noted she removed “man” from the “Chairman” title on her office door, but would “not take offense at whatever [she was] called.” Trescott, “Eleanor Norton.”

³² John Lardner, “UDC Graduates Warned About a New Minority,” Washington Post, 15 May 1978, C3.

³³ Trescott, “Eleanor Norton.”

³⁴ Philip Shabecoff, “Mrs. Norton Terms Labor Ally on Bias,” New York Times, 5 July 1977, 15.

and problems in hiring women and minorities.³⁵ She would reduce the backlog by holding informal fact-finding conferences with the parties; investigate complaints promptly; and settle more charges informally rather than entering them into the backlog. Investigators would work with attorneys from the beginning, rather than passing cases off to them when settlement failed.³⁶

Norton was well-respected by those who worked for her. Her Executive Assistant and Legal Counsel at the EEOC described her as a “wonderful . . . savvy person.” Although the job was not easy, she never minded when Norton called her at midnight. Norton was a committed and politically brilliant civil rights lawyer who thought about every angle and knew all the key players of the racial justice and women’s rights movements. She was a dynamic and charismatic leader who wanted to make a dramatic impact; she brought in talented people, turned the EEOC’s procedures upside down, instituted rapid charge processing, and issued its first sexual harassment guidelines.³⁷

Norton had many challenges, including dealing with criticism of the EEOC and the Carter administration from all sides. Businesses opposed any focus on patterns and

³⁵ Robert Reinhold, “U.S. to Monitor Hiring Practices of Big Concerns,” New York Times, 5 January 1978, 1.

³⁶ Staff Reporter, “EEOC Adopts System to Speed Case-Handling,” Wall Street Journal, 21 July 1977, 14; Walter Mossberg, “Wary Watchdogs: Besieged By Criticism, Job-Bias Agencies Seek to Bolster Programs,” Wall Street Journal, 26 August 1977, 1. In the meantime, the Carter administration made plans to reorganize civil rights enforcement, including consolidating twenty-five agencies into one independent agency (the EEOC) focused on industry-wide bias. Mossberg, “Wary Watchdogs”; Hugh Davis Graham, “Civil Rights Policy in the Carter Presidency,” chap. 10 in Fink and Graham. A New York Times editorial agreed that a competent leader, “sustained Presidential attention,” and strengthening, restructuring, and expanding the EEOC was needed. Editorial, “The Equal Employment Mess,” New York Times, 12 February 1977, 15; Austin Scott, “Carter to Seek EEOC Expansion to Curb Job Bias,” Washington Post, 23 February 1978, A8; Nathaniel Sheppard Jr., “N.A.A.C.P. Opens Summit Conference in Chicago; Other Transfers Listed ‘A Seething Volcano’ Phrase Is Opposed,” New York Times, 6 May 1978, 10; Mike Causey, “U.S. Employees, Kuwait Settle”, “End of an Era,” Washington Post, 6 December 1978, B2; Walter Pincus and T. R. Reid, “In Fine Print: Cut at FBI, Growth at Rights Offices,” Washington Post, 24 January 1978, A15.

³⁷ Jane Dolkart, interview by author, 16 July 2004, Dallas, Texas.

practices of discrimination against classes of employees, preferring simply to confirm that they had set affirmative action goals and not discriminated against individuals.³⁸ The administration also faced criticism from the left. In December 1977 National Urban League executive director Vernon Jordan and other black leaders said that although he personally appeared to be committed to helping the urban poor, they doubted Carter would allocate enough money. Civil rights groups even fought among themselves over the viability of his reorganization plan.³⁹ The Leadership Conference on Civil Rights criticized Carter for making “little use of the moral influence of his office to further public understanding of continuing denials of opportunity and to rally public support for effective civil rights enforcement,” for not naming a senior civil rights adviser, and for a “poor” civil rights record in health and social services.⁴⁰

Norton also had to balance individual charges with a focus on systemic discrimination. In March 1978 the commission issued internal guidelines for charging employers with race and sex discrimination.⁴¹ In August it emphasized actual hiring of women and minorities and substantive violations by deciding not to prosecute employers for technical violations such as paperwork errors.⁴² At the end of the year Norton

³⁸ Mossberg, “Wary Watchdogs”; Liz Roman Gallese, “Battle Over Bias: Some Companies Fight Tougher Federal Drive on Discrimination,” Wall Street Journal, 17 February 1978, 1.

³⁹ Several senators worried about abolishing the CSC while the NAACP’s Washington Bureau head claimed it was “so encrusted with discriminatory practices . . . that it simply cannot be trusted to police or enforce non-discrimination policies.” David E. Rosenbaum, “Black Leaders Find Carter Ready to Aid,” New York Times, 15 December 1977, 25; Scott, “Carter to Seek EEOC Expansion to Curb Job Bias.”

⁴⁰ Austin Scott, “Mondale Affirms U.S. Commitment On Civil Rights,” Washington Post, 31 January 1978, A1.

⁴¹ Robert Reinhold, “U.S. Equal Opportunity Agency Lists Criteria for Prosecution,” New York Times, 21 March 1978, 47.

⁴² Warren Brown, “U.S. Will Streamline Enforcement of Job Bias Laws,” Washington Post, 23 August 1978, A6.

confirmed the commission would emphasize broad patterns of discrimination over individual complaints, using class action lawsuits, back pay awards, loss of government contracts, and an improved settlement process.⁴³

Norton's tenure was marked by several important affirmative action cases which had the potential to affect government policy. In June 1978 the Supreme Court narrowly upheld the principle of affirmative action in the Bakke case but struck down a quota system that a thirty-eight-year old white engineer claimed denied him admission to medical school at the University of California. The Court held that race could be a factor in determining university admissions but strict numerical quotas could not be used unless they were the result of a consent decree. In the face of this decision, the federal government was alternately defensive and defiant. Norton responded that the decision would not change anything, since the commission had been using "race conscious remedies" all along and "very strong remedies" were still needed. Employers could not simply advertise that they offered equal employment opportunity; they had to "take some action . . . to recruit from sources that might not otherwise make themselves available."⁴⁴ The EEOC encouraged employers to "comply with the law . . . without waiting for a government agency . . . to commence enforcement action."⁴⁵

⁴³ Reinhold, "U.S. Equal Opportunity Agency Lists Criteria for Prosecution"; "Equal-Employment Unit to Stress Bias Patterns," New York Times, 3 December 1978, 69; Jerry M. Flint, "Washington Plans Affirmative Action Push in '79," New York Times, 24 December 1978, 1.

⁴⁴ Peter Barnes, "Bakke Ruling Won't Deter Affirmative Action, U.S. Aides Say," Washington Post, 30 June 1978, A4; "Job Opportunities Deemed Unequal; Despite the Laws," Washington Post, 3 July 1978, A4; Egan, "Changes May Be Needed In AT&T Hiring Program." In a sign of changing times, an increasing number of challenges to affirmative action programs were "reverse discrimination" claims by white males. Steven V. Roberts, "White Males Challenge Affirmative Action Programs," New York Times, 24 November 1977, A1.

⁴⁵ Helen Dewar and Morton Mintz, "High Court to Review Case Over 'Reverse Bias' on Job," Washington Post, 12 December 1978, A1. Employers took a different interpretation of Bakke. Although the Supreme Court had recently affirmed its affirmative action program, AT&T implied that after its consent decree expired it might stop setting aside a percentage of spaces for women and eliminate the

Since Bakke “left doubt over how far . . . employers [could] go in setting up affirmative-action plans . . . to correct racial imbalances by giving preference to minority workers,” the Supreme Court agreed to hear the Weber “reverse discrimination” case at the end of 1978, in which a white man claimed he was rejected for a job because the company had an affirmative action program calling for 50 percent black and female participation. The company and the government both argued that invalidating the program would threaten job programs for minorities and voluntary affirmative action programs because racially preferential practices were needed to combat disparities due to historical discrimination.⁴⁶ In June 1979, notwithstanding its Bakke ruling, the Supreme Court upheld affirmative action plans based on evidence of a racial imbalance, finding that companies instituting one did not need to show a past history of discrimination.⁴⁷

Meanwhile, Norton succeeded in resolving several cases initiated by Bill Brown. In January 1979, the commission and Labor and Justice Departments notified the U.S. District Court in Philadelphia that AT&T had substantially complied with its 1973 consent decree and orders to eliminate discrimination against women and minorities. This finally marked the end of the AT&T case, “a pioneering chapter in the history of employees’ civil rights.” Since the case began, affirmative action plans had become “a fixture of the corporate scene,” despite Supreme Court debates. Although the government certified it was satisfied with the outcome, problems remained at AT&T.

provision requiring it to “pass over candidates with greater seniority or . . . qualifications” for “basically qualified” minorities if a target was not met. Egan, “Changes May Be Needed In AT&T Hiring Program.”

⁴⁶ Dewar and Mintz, “High Court to Review Case Over ‘Reverse Bias’ on Job.”

⁴⁷ United Steelworkers of America, AFL-CIO v. Weber, 443 U.S. 193 (1979); Keith Richburg, “Quota Decision Reactions Mixed,” Washington Post, 28 June 1979, A4; Morton Mintz, “Racial Quotas in Job Training Backed,” Washington Post, 28 June 1979, A1. Civil rights advocates claimed the decision limited Bakke, requiring companies to proceed with affirmative action plans, but others claimed it was limited to the specific situation and left unclear what was a permissible plan.

Women had been slow to move into jobs requiring strenuous work, such as climbing poles, and statistical increases for women and minorities in total jobs and management were not impressive. The EEOC warned AT&T that more changes were needed, but perhaps exhausted by years of enforcement, did not recommend extending the decree.⁴⁸ In June 1978, Norton settled the Track I race and sex discrimination case against GE, which agreed – in lieu of “becoming engaged in lengthy adversary proceedings” – to spend \$31.9 million for training, back pay, affirmative action programs, and “bonuses” for past discrimination; implement numerical goals for hiring and promoting women and minorities; and submit to five years of monitoring.⁴⁹ In November 1980, Ford agreed to settle its seven year-old race and sex discrimination case in exchange for \$23 million in training and back pay, in order to end “longstanding areas of disagreement between [itself] and government agencies” and avoid “prolonged litigation.”⁵⁰

Norton’s EEOC also became the first to address the new employment issue of sexual harassment. A January 1980 newspaper article described the issue of “sexual blackmail” from a report finding widespread harassment at the Department of Housing and Urban Development (HUD), which prompted other agency investigations and

⁴⁸ Bradley Graham, “AT&T Found in Compliance on Ending Job Bias,” Washington Post, 18 January 1979, A10; Staff Reporter, “AT&T Has Complied With Antibias Decree, U.S. Attorneys Say,” Wall Street Journal, 18 January 1979, 2.

⁴⁹ “GE to Spend \$31.9 Million In Bias Accord,” Washington Post, 16 June 1978, A1.

⁵⁰ Warren Brown, “Ford Agrees to \$23 Million Settlement of Sex, Race Discrimination Complaint,” Washington Post, 26 November 1980, A6.; Ernest Holsendolph, “Ford Motor to Spend \$23 Million to Settle Bias Case,” New York Times, 26 November 1980, B4. Regardless of the recent court debates, affirmative action and the EEOC still had enough legitimacy to convince some of the nation’s largest employers it was better to settle than endure a long litigation process. Sears seemed to feel that because it had stopped discriminating against women in 1974, it should not have to settle pre-1974 claims. However, other companies chose to settle old claims rather than drag them out, eager to avoid AT&T’s fate. Stockford, 209-11. Economic troubles also motivated settlements; “widespread layoffs” in the auto industry led the commission to give Ford more time to meet employment targets, and agree not to contravene union recall rights. Brown, “Ford Agrees to \$23 Million Settlement of Sex, Race Discrimination Complaint”; Holsendolph, “Ford Motor to Spend \$23 Million to Settle Bias Case”. Sears, on the other hand, proceeded regardless of cost, which arguably contributed to its own economic downturn later on.

programs to correct the problem. The article warned that if the government did not change out of fairness, it may be forced to through threats of lawsuits and damages paid by taxpayers.⁵¹ In an attempt to make sexual harassment a form of sex discrimination under the Civil Rights Act, in March 1980 the EEOC proposed rules defining workplace sexual harassment and making employers responsible for the actions of its supervisors. During the previous fiscal year, 1300 sexual harassment charges had been filed, approximately 7 percent of all charges.⁵² In a sign the issue was gaining attention, the New York Times described how major employers had begun instituting training programs and issuing statements that sexual harassment would not be tolerated. Although some employers claimed that sexual harassment was not a real problem, the EEOC's announcement that they had a duty to eliminate harassment, would be liable for employees who harassed others, and might be subject to lawsuits motivated corporations and other institutions to educate themselves, for example by hiring consulting firms such as the Working Women's Institute to advise them on how to deal with such issues.⁵³ At the end of 1980, the EEOC issued its final "Guidelines on Discrimination Because of Sex," with its importance underscored by the way some obsessed over the titillating possibilities. One offensive Washington Post article questioned what would happen when a man promotes a woman simply because he "finds her fetching," and what constitutes sex ("going all the way or just maybe petting above the waist"). It argued the

⁵¹ Mike Causey, "New Course Drawn on Sexual Abuse," Washington Post, 23 January 1980, C2.

⁵² Staff Reporter, "EEOC Devises Rules Defining On-The-Job Sexual Harassment," Wall Street Journal, 12 March 1980, 4; With Analysis From Monitor Correspondents Around the World, Edited by Ruth Walker, "Legal barriers placed around sexual harassment," Christian Science Monitor, 13 March 1980, 2.

⁵³ Georgia Dullea, "Sexual Harassment at Work: A Sensitive and Confusing Issue," New York Times, 24 October 1980, A20.

issue undermined the EEOC's political power since it should be addressing "real, substantive issues – traditional discriminations – [not] like some sort of bureaucratic busy-body that cannot itself discriminate among various forms of discrimination."⁵⁴ Perhaps not surprisingly, the Washington Post settled its own sex discrimination suit with the EEOC at the same time.⁵⁵

Despite efforts to trivialize sexual harassment and thereby the commission, by the time the EEOC filed suit against Sears in 1979, Norton's reorganization was considered a success. In just eighteen months she had used "common-sense tactics" for quickly handling cases needing more attention and significantly reduced the backlog and shortened the average conciliation time from two years to sixty-five days.⁵⁶ Democrats had faced harsh criticism from the Republicans on the EEOC's inefficiency and brought Norton in to fix it. She did what they asked, cleaning up the backlog, reorganizing the agency, and restoring its respect, even though focusing so closely on individual charges left limited time for systemic cases.⁵⁷ Since the passage of the Civil Rights Act of 1964, the Washington Post argued, Title VII had become its central section, and "[a]ccess to

⁵⁴ Richard Cohen, "Sex: Not the Only Way To Please the Boss," Washington Post, 30 November 1980, B1, leering over whether "sex: was "whatever Prince Charles does with his rumored intended that let her uncle . . . assure the world she was still (knock on wood) a virgin"; Walter Pincus, "'Sexual Nonharassment': Yet Another Form of Discrimination," Washington Post, 17 November 1980, A3. Another article analyzed the "reality" that men hired attractive women, the jealousy of corporate wives, and how to dress for business trips and social occasions: "Working closely with a colleague, said one woman, 'is not a whole lot different from making love. When you see someone's mind unfold and you learn how it works and that you are able to trigger the best from that mind, it becomes a very sexy experience.'" Christine Doudaa, "Women at the Top," New York Times, 30 November 1980, SM14. Women had not yet been given the presumption of professionalism. In the absence of developed case law and public opinion, harassment was not yet well-understood and coverage tended toward the trivial and voyeuristic.

⁵⁵ AP, "Complaint on Sex Discrimination Settled at The Washington Post," New York Times, 20 November 1980, A21.

⁵⁶ JoAnn Lublin, "Guideline-Happy at the EEOC?," Wall Street Journal, 28 August 1980, 18; Nathaniel Sheppard, "Fair-Employment Agency Cleans Up Its Backlog," New York Times, 24 February 1979, 8.

⁵⁷ David Copus, interview by author, 13 November 2003, Washington, DC.; Lublin, "Guideline-Happy at the EEOC?"

jobs – and to income” had become the most important civil rights issue of the 1970s. The EEOC received over 85,000 complaints a year and the courts and executive branch had become involved in defining equal employment opportunity. Employers were finally on notice that they would be forced to change, feeling “federal pressure” from “[EEO] requirements [they saw] as burdensome.”⁵⁸

Nevertheless, criticisms remained. Some argued that the commission imposed guidelines beyond that intended by the courts and Congress.⁵⁹ At the same time, some civil rights groups believed that EEO programs had been “ineffectual” and worried that progress would stall if the economy slowed. Despite its new power to sue employers, the EEOC still took years to dispose of cases. Investigators and attorneys often failed to cooperate in the early stages of an investigation, leading investigators to recommend for suit cases the attorneys later found unsupportable. The agency still lacked a strong “systemic” program, which many believed was the only way to eliminate discrimination.⁶⁰ Moreover, the wage gap between the sexes had not narrowed because women remained trapped in occupational ghettos and dominated entry-level jobs in low-paying, female-dominated areas.⁶¹

⁵⁸ Peter Milius, “Jobs Become Leading Rights Issue,” Washington Post, 24 July 1979, A2.

⁵⁹ Nathaniel Sheppard, “Fair-Employment Agency Cleans Up Its Backlog,” New York Times, 24 February 1979, 8; Lublin, “Guideline-Happy at the EEOC?”.

⁶⁰ Milius, “Jobs Become Leading Rights Issue.”

⁶¹ Leslie Bennetts, “The Equal Pay Issue: Focusing on ‘Comparable Worth’; ‘Occupational Segregation,’” New York Times, 26 October 1979, A20. On a personal level, Norton found herself caught up in the very race, gender, and class issues she tried to address. In 1978 she was accused of using a government car to drop off her son at summer camp. Spencer Rich, “EEOC Chief’s Use of Car Questioned,” Washington Post, 29 July 1978, A3. In 1980, in a precursor to the “nanny” scandals that doomed Attorney General nominees in the early 1990s, a housekeeper from Guyana sued Norton for failing to pay her overtime, contribute to unemployment, or give her the forms to pay income taxes. She argued that Norton should be “held to a higher standard than other individuals unfamiliar with the law.” Laura A. Kiernan, “Ex-Housekeeper Says EEOC Chief Owes Her \$18,663 in Overtime,” Washington Post, 4 December 1980, A16. Even Norton was not immune from the challenges of balancing work and family, or the complicated race, class, and gender issues faced by working women.

The EEOC might have had greater success if President Carter had been more effective. He came to Washington running as an “outsider,” a welcome relief after the tawdry politics of the Nixon administration and Watergate. While it helped him get elected, his outsider status proved more problematic after taking office. He disliked interest group politics so much that it compromised his ability to govern effectively. He focused too much on detail, did not advance major reforms, and lost control of the country and his administration.⁶² He was not a savvy politician, and did not satisfy Democrats, blacks, women, or the poor, including on affirmative action.⁶³ Nevertheless, circumstance also played a major role in the difficulties he faced. Elected as a centrist and forced to move even farther right, he confronted an economy that placed severe limits on recent prosperity. The inflation of the 1970s “called into question the old political and economic arrangements whereby the Democratic party maintained a sufficient degree of economic growth and prosperity to keep its coalition intact,” and dictated a change in leadership. Moreover, the decline of the New Deal coalition of labor, immigrant, and farm interests and the rise of a new coalition of religious conservatives, big business, and whites angry about special interest groups and supposed preferences for minorities made governing difficult, and his tenure just a brief interlude in an increasingly conservative political landscape.⁶⁴

⁶² Joseph A. Califano, Jr., Governing America: An Insider's Report from the White House and the Cabinet (New York: Simon and Schuster, 1981).

⁶³ William E. Leuchtenburg, “Jimmy Carter and the Post-New Deal Presidency,” Chap. 1 in Fink and Graham. One advocacy group complained the administration was “naïve and unsympathetic” to efforts to move Hispanics into top policy positions. Mike Causey, “Hispanic Group Targets 3 Agencies,” Washington Post, 11 May 1979, B2.

⁶⁴ Fink and Graham, 3-4; see also Steve Fraser and Gary Gerstle, eds., The Rise and Fall of the New Deal Order, 1930-1980 (Princeton: Princeton University Press, 1989), Part II; Berman, America's Right Turn, 11, 43, 45, 52, 55. Ineffective equal opportunity initiatives were closely related to the growing conservatism. Some lawyers lamented the declining number of public interest firms, which had handled

The Reagan Administration and the Conservative Agenda

Civil rights and women's groups had little hope for the administration of Ronald Reagan. Even if Carter had not been as helpful as they hoped, at least they had found receptive allies within the government. Since the mid-1960s, Republican and Democratic administrations alike had accepted the same definition of equal employment opportunity, even if some had been more proactive than others in implementing it. However, Reagan promised to eliminate "quotas," affirmative action, and busing, and his administration came to represent the first radical departure in civil rights policy and the direction of the EEOC. Reagan meant what he said. His transition team recommended not forcing employers to adopt affirmative action plans; requiring proof that they intended to discriminate rather than just employed fewer minorities; cutting the EEOC's budget; barring new guidelines and lawsuits for a year; and stripping the commission of its role as the lead enforcement agency.⁶⁵ Norton resigned soon after the January 1981 inauguration and the Washington Post described her farewell party as somber, with civil rights workers reassessing strategies for how to prevent the inevitable cutbacks.⁶⁶ Nevertheless, the EEOC chair was confident that affirmative action would survive. The field was "very stable" after "10 years of extraordinary and deep court cases to build the law. . . [e]ven if

"many of the controversial, trend-setting court cases of the 1970s," just as new conservative firms began to take "the offensive." Some even argued that Carter had drawn away top lawyers into his administration, making liberals a victim of their own success. They blamed apathy toward social reform and discussed strategies such as sharing resources and using part-timers from private law firms. John Yemma, "Public-interest law firms struggle as apathy dries up fund sources," Christian Science Monitor, 21 January 1980, 5. One attorney half-joked: "A president like [Ronald] Reagan would revitalize the movement." Ernest Holsendolph, "Woman on F.C.C. Stirs Dispute on Equal Opportunity," New York Times, 25 June 1980, 10.

⁶⁵ See, for example, Spencer Rich, "Reagan Panel, Citing 'New Racism,' Urges Easing of EEOC Rules," Washington Post, 30 January 1981, A2.

⁶⁶ Cass Peterson, "EEOC Chief Norton to Resign Feb. 21 to Smooth Way for Successor," Washington Post, 23 January 1981, A3; Jacqueline Trescott, "Much Adieu About Norton," Washington Post, 20 February 1981, C1.

they disbanded the EEOC tomorrow . . . there would still be thousands of court cases presented each year based on precedent.”⁶⁷

The primary architect for redefining Reagan’s equal employment opportunity and affirmative action policy was William Bradford Reynolds, new head of the Civil Rights Division at the Justice Department. Reynolds came from a very wealthy family, attended Andover, Yale, and Vanderbilt Law School, worked for the solicitor general of the U.S., and later became a partner at a large DC law firm.⁶⁸ As assistant attorney general Reynolds supervised more than 150 lawyers, many of whom had what he saw as a mission to advance the interests of blacks, if necessary by manipulating civil rights laws. Reynolds clashed with them often; he worked long hours to “review and modify [their] legal briefs . . . , making sure that ‘equal rights’ had not been twisted into ‘special preferences.’”⁶⁹ He believed racial preferences fixed little and diverted attention from important problems such as “joblessness, family dissolution, indifference to schoolwork, and the destruction of neighborhoods by crime and drug trafficking.”⁷⁰ He later admitted

⁶⁷ Deborah Churchman, “Eleanor Norton reflects on equal-employment successes,” The Christian Science Monitor, 3 March 1981, 19. Nor did Norton doubt the commission’s future, since “they would have to amend Title VII, and nobody’s going to do that”; she noted, “affirmative action . . . was made after a large, nonviolent civil rights movement, and . . . responded to a 200-year history of intentional discrimination against women and minorities. And the decision is vindicated. Every federal court has sanctioned these remedies.”

⁶⁸ Raymond Wolters, Right Turn: William Bradford Reynolds, the Reagan Administration, and Black Civil Rights (New Brunswick and London: Transaction Publishers, 1996), 6-7. Although he handled a few school desegregation and voting rights cases for the solicitor general, he mainly did commercial litigation including defending Metropolitan Edison Company after Three Mile Island.

⁶⁹ Wolters at 7, 9.

⁷⁰ Wolters at 6.

“the struggle within the administration was just as significant as the more visible and publicized struggle with outside critics.”⁷¹

Reagan and Reynolds saw themselves not as opponents of civil rights but rather as strict constructionists concerned that the original meaning of the Civil Rights Act of 1964 had been distorted. They argued the law intended to provide equal opportunity regardless of race, but had evolved to require equal results through preferences to minorities which discriminated against whites.⁷² In order to get a Supreme Court favorable to their view of civil rights, Reynolds changed the “approach of previous Republican administrations” to pay attention to the “legal philosophy as well as the technical, professional competence of prospective judges.”⁷³ His strategy included appointing sympathetic federal judges “to roll back the tide of affirmative discrimination” and persuading the courts to focus on individual rather than group rights.⁷⁴

The administration sowed confusion in the minds of Americans about what affirmative action meant, turning equal employment opportunity on its head and “quota” into a bad word. Reynolds argued that affirmative action plans distorted Congress’ goal of treating everyone the same by requiring employers to be race-conscious rather than race-neutral and thereby created unfair preferences for minorities and women which constituted (reverse) discrimination against whites and men. The administration also

⁷¹ Wolters at 8. In June 1985, the Senate Judiciary Committee rejected Reynolds’ promotion to associate attorney general but Attorney General Meese made him a trusted advisor with influence over policy regarding pornography, abortion, and the Iran-Contra affair. Ibid. at 10-12.

⁷² Wolters, Introduction. Critics said that legal notions of color-blind impartiality sounded fair but actually prolonged injustice. Ibid. at 2-3.

⁷³ Wolters at 13-14 (citing William Kristol, “The Constitution: Standing Tall on Realignment,” American Spectator (February 1985): 20-21.)

⁷⁴ Wolters at 12-13 (citing interview with Reynolds, 13 November 1991; and Kristol, “The Constitution,” 20-21.)

wanted to place the burden on the individual employee to prove that his or her employer intended to discriminate. Statistical evidence that the company employed few women or minorities was not sufficient to determine discrimination, making enforcement more difficult. The administration also argued that only actual victims of discrimination should be compensated. An employer could not be ordered to hire or promote more African-Americans to diversify its workplace pursuant to a broad-based settlement, but only an individual black employee or applicant who was discriminated against by being denied a job or promotion. This represented a major departure as, one critic argued, not all victims of discrimination can be identified and “insistence upon neutrality and color-blindness insures the continuation of current inequitable practices.”⁷⁵

Reagan succeeded in blurring the line between his words and actions. Although civil rights activists were not fooled, the administration so boldly insisted that it was committed to equal employment opportunity that the president eventually confused the meaning of affirmative action and reshaped the rhetoric surrounding the issue.⁷⁶ In 1983 Norton acknowledged the administration was winning the public relations war by confusing people: “Affirmative action is not a gratuity . . . but a legal remedy established

⁷⁵ Robert Pear, “U.S. Agencies Vary on Rights Policy,” *New York Times*, 16 November 1981, A1.

⁷⁶ Leslie Maitland Werner, “Justice Dept. Files a Plan for Minority Hiring,” *New York Times*, 22 July 1983, B5. Reagan insisted loudly and often that he supported equal rights for minorities, repeating his refrain of color-blindness and nondiscrimination for everyone. He did one thing while protesting he was doing another. He entertained black leaders at the White House, but altered civil rights policies that had been in place “through both Republican and Democratic administrations, for two decades.” He opposed the Civil Rights Act of 1964 but liked to recount a story about taking a black college teammate to his home rather than let him stay at a segregated hotel. Reagan paid lip service to “the principles of equality” while gutting civil rights policies. He claimed to be for equality, but was against the “traditional remedies,” such as busing and affirmative action, needed to bring it about. At key agencies “enforcement . . . slowed or stopped altogether,” making the laws were meaningless. The EEOC allegedly “receded into obscurity under a . . . mandate to take a probusiness attitude in discrimination cases” and Justice Department lawsuits were “out of favor.” Howell Raines, “Blacks Shift to Sharper Criticism on Civil Rights,” *New York Times*, 26 July 1981, section 4, 4; Pear, “U.S. Agencies Vary on Rights Policy”; Julia Malone, “Black conservatives like ‘Jay’ Parkers step into Reagan limelight,” *The Christian Science Monitor*, 11 February 1981, 4.

by the courts after . . . evidence” of discrimination. “We need to find a way to better explain these remedies.”⁷⁷ Reagan made it possible to take previously unthinkable positions on discrimination, couching bigotry in the language of equal opportunity. He built a new political coalition, using social issues such as law and order, abortion, busing, and quotas to appeal to millions of working-class whites who had not voted Republican before.⁷⁸ The key to his political success, according to one black critic, was that he “found a way to make racism palatable and politically potent again.”⁷⁹

In practical terms, this meant taking a position at odds with every administration over the previous twenty years. Since the mid-1960s, Republican and Democratic administrations had generally seen civil rights policy in the same vein. Although some were more proactive than others, they agreed that remedies were meant to integrate minorities into the workplace and correct past discrimination, not to create a new cause of action for white men. Reagan’s approach marked the first significant departure in civil rights policy and the direction of the EEOC. The administration also sought to weaken the Voting Rights Act of 1965 by not requiring proof of intent in order to make it easier to demonstrate vote dilution; tried to restore tax-exempt status to private schools that discriminated based on race; and argued that the Weber case, allowing an employer and union to develop a voluntary affirmative action program to train and upgrade black employees, should be overturned.⁸⁰ It was an unusual approach. Reagan was the first

⁷⁷ Karlyn Barker, “Dole Tells Lawyer Group That GOP Is Concerned About Civil Rights Issues,” Washington Post, 28 September 1983, C4.

⁷⁸ Wolters at 5.

⁷⁹ Wolters at 2-3 (citing Roger Wilkins) (internal citations omitted).

⁸⁰ Tom Wicker, “‘Working On’ Blacks,” New York Times, 16 February 1982, A19; Robin Toner and Jonathan D. Glater, “Roberts Helped to Shape 80’s Civil Rights Debate,” New York Times, 4 August 2005, A14; Fred Barbash and Juan Williams, “Administration Prods EEOC on Quotas Brief,” Washington

president to have an assistant attorney general for civil rights who was not actually for civil rights, but rather against everything that “civil rights” had meant up until then.

By 1984, the Justice Department declared victory in its three-year war against affirmative action quotas. In June the Supreme Court struck down the layoff of three whites who had seniority over black Memphis firefighters hired under a court-approved affirmative action plan. The justices ruled that courts may not interfere with seniority systems when layoffs are necessary. The policy behind Title VII’s enforcement provision allowed only remedies rewarding “actual victims” of discrimination. Reynolds felt vindicated: “it’s been a struggle to maintain our position in the face of an awful lot of shrill criticism, much of it political” He broadly interpreted the decision as an “unequivocal” statement that court-ordered quotas were illegal. He then pledged to re-examine all government anti-discrimination agreements and tell the EEOC and OFCCP not to use quotas in any new agreements. Civil rights attorneys downplayed the decision but criticized it for attacking the entire concept of affirmative action. They worried it would jeopardize fifty major affirmative action agreements and “many class-action settlements negotiated over the years,” including the ten-year-old steel industry plan. Moreover, new uncertainty over the law would make employers reluctant to settle complaints and encourage whites to file reverse discrimination lawsuits. It almost

Post, 7 April 1983, A1. Much of the Voting Rights Act work was done by 26-year old special assistant to the attorney general and future Supreme Court Chief Justice John Roberts. He wrote to a mentor, “This is an exciting time to be at the Justice Department. So much that has been taken for granted for so long is being seriously reconsidered.” Roberts responded to enraged civil rights groups, claiming the bill would “establish a quota system for electoral politics,” and prepared Attorney General Smith for a White House meeting, saying the president’s position “is a very positive one and should be put in that light.” Toner and Glater, “Roberts Helped to Shape 80’s Civil Rights Debate.”

certainly would mean new litigation over a previously-settled remedy, with Justice refusing to defend any affirmative action plans in court.⁸¹

The Reagan administration also used other means to implement its civil rights retreat. It proposed cutting the EEOC's budget by \$20 million in 1982 and \$32 million in 1983, which would mean a 10 percent staff reduction, an increased backlog, and slower processing of cases. In May 1982 the Civil Rights Commission (CRC) reported "the Federal budget is an important statement of policy" and argued that proposed cuts at the Departments of Education, HHS, Justice, and Labor, and the EEOC would reduce enforcement. Following an earlier warning that the 1982 budget could undermine progress in curbing racial discrimination, it said "this retrogressive trend is under way, and the . . . 1983 budget would accelerate it."⁸²

The administration, through the White House Office of Management and Budget (OMB), also sought to reduce governmental regulation of corporations, further weakening the power of the enforcement agencies. This meant that people focused on the cost of new regulations and backpay awards, rather than civil rights experts, increasingly made EEO policy decisions, as the dominant role in shaping policy shifted from the civil rights division of the Justice Department to OMB.⁸³ For example, Reynolds had a "real problem" with OFCCP regulations requiring federal contractors with 50 employees and contracts totaling \$50,000 to implement affirmative action plans

⁸¹ Fred Barbash and Kathy Sawyer, "Justice Dept. Declares Win Over Quotas," Washington Post, 14 June 1984, A1; Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984).

⁸² Even CRC Chairman Clarence Pendleton, who personally did not believe the cuts demonstrated a lack of commitment to civil rights, acknowledged such a widespread perception and called on the President to send a "clear signal" of his commitment. Robert Pear, "Rights Unit Says Budget Cuts Imperil Move to Curb Racism," New York Times, 28 May 1982, B8.

⁸³ Raines, "Blacks Shift to Sharper Criticism on Civil Rights"; Rich, "Reagan Panel, Citing 'New Racism,' Urges Easing of EEOC Rules."

when they employed women and minorities at less than 80 percent of their availability in the workforce because they improperly “equate[d] underutilization [of women and minorities] with discrimination.” In August 1981, Labor proposed raising the thresholds to 250 employees and \$1 million in contracts and reducing the written requirement from every year to every five years.⁸⁴ There was some resistance, however, from within the administration. In an unusual “public breach,” the “first major rift . . . within the Administration over the handling of civil rights and job discrimination cases,” the EEOC refused to approve the new regulations. Its opposition and negotiations over not limiting back pay stalled the proposal for more than two years, by which time the administration was trying to “mend fences” with women and minorities. Thus, despite growing constraints, the EEOC retained some independence in resisting the administration’s plans to change affirmative action policy.⁸⁵

The administration also attacked EEOC regulations, such as its guidelines requiring that screening tests to predict job performance be job-related and there be no less discriminatory test.⁸⁶ The Justice Department proposed changing the remedies

⁸⁴ Civil rights groups complained the new rules would eliminate too many small employers, but business leaders said that more than three-quarters of the 26 million employees worked for larger contractors and would remain covered. In fact, they complained the administration did not go far enough, failing to eliminate back pay as a remedy. Felicity Barringer and Kathy Sawyer, “Job Bias: Easing Rules Anything But Easy,” Washington Post, 29 June 1981, A11; Kathy Sawyer, “Plan to Ease Job Bias Rules Announced,” Washington Post, 25 August 1981, A1; Marjorie Hunter, “Plan to Ease Fight on Jobs Criticized,” New York Times, 8 October 1981, A19; Kathy Sawyer, “Labor’s Embattled Bias Proposals Advance,” Washington Post, 27 July 1983, A19; Felicity Barringer, “EEOC Withholds Seal of Approval,” 24 August 1981, A15; Pear, “U.S. Agencies Vary on Rights Policy.”

⁸⁵ Marjorie Hunter, “Plan to Ease Fight on Jobs Criticized.” See also Barringer and Sawyer, “Job Bias: Easing Rules Anything But Easy”; Sawyer, “Plan to Ease Job Bias Rules Announced”; Sawyer, “Labor’s Embattled Bias Proposals Advance”; Barringer, “EEOC Withholds Seal of Approval.”

⁸⁶ Civil rights groups argued the rules protected women and minorities from being disproportionately excluded from jobs, and the administration’s “attack on testing standards . . . seeks to overturn 20 years of policy positions accepted by two Republican and two Democratic administrations, by the courts and by Congress.” Seeing an opportunity to improve their position, businesses complained the guidelines forced them to spend millions to validate selection procedures without expanding opportunities; and hurt productivity. Administration officials even blamed the poor economy on the “decline in the

available for discrimination, asking only that employers “make all special recruitment efforts necessary” to attract women and minority applicants, but not asking courts to impose hiring quotas until they reached a certain proportion of the workforce.⁸⁷ The administration also considered legislation to centralize civil rights enforcement at the Justice Department, abolish the OFCCP, and repeal the EEOC’s enforcement powers. An employee would have to show that an employer intended to discriminate, rather than simply that there was a discriminatory effect, which would make it more difficult for individuals to bring lawsuits and grant more power to the attorney general.⁸⁸

Again, despite its efforts, the administration encountered a noticeable amount of resistance from its own executive agencies. In the process, the three federal agencies enforcing civil rights laws pursued different policies and made conflicting statements about affirmative action. The administration had the most control over Justice, which opposed numerical goals and timetables for hiring. Labor believed in using them as instruments of affirmative action but wanted to relieve federal contractors of intrusive regulation and paperwork. Reagan’s influence came last to the EEOC, whose policy

accuracy with which employers have been sorting people into jobs,” and said the guidelines “handicap[ped] the employer searching for qualified individuals by forcing him to think in terms of race.” Robert Pear, “Changes Weighed in Federal Rules on Discrimination,” *New York Times*, 3 December 1984, A1; Felicity Barringer, “Job Bias Debate Is Reopened,” *Washington Post*, 14 August 1981, A27; see, for example, Rich, “Reagan Panel, Citing ‘New Racism,’ Urges Easing of EEOC Rules.”

⁸⁷ Critics protested it was easier to enforce a numerical quota than determine whether hiring was done in good faith. The *Washington Post* called the policy an improvement “if it can . . . be made to produce real job gains for the victims of discrimination.” But there was the rub. A policy was only as strong as its enforcement, and a voluntary policy only effective if employers complied. In light of cutbacks disproportionately affecting minorities, the *Post* called on the administration to demonstrate “both by what it says and what it does” its commitment to eliminating job discrimination. Editorial, “Affirmative Action,” *Washington Post*, 10 October 1981, A16.

⁸⁸ Carter’s civil rights division head objected that the plan would overwhelm the Department and weaken enforcement: “a concentration of responsibility without adequate resources to carry [it] out . . . would [save] money, but . . . wouldn’t do anything for the people who need the government’s intervention.” Mary Thornton, “Shifts Eyed for Rights Enforcers,” *Washington Post*, 12 November 1981, A1.

continued basically unchanged during his first year in office and where Acting Chair J. Clay Smith openly advocated affirmative action, including setting goals and timetables.⁸⁹

The Tenure of Clarence Thomas

After Norton resigned in 1981 only two commissioners remained, and Reagan was, not surprisingly, in no rush to appoint replacements.⁹⁰ That did not prevent the agency from acting out against his policies, however. Despite being a Republican, Acting Chair Smith asserted the EEOC's independence by circulating documents in Congress arguing the administration's transition report demonstrated ignorance of the law, disregarded Supreme Court decisions, and evidenced a desire to make the EEOC a political arm of the White House with no independent power to protect minorities.⁹¹ When it did try to fill high-level civil rights jobs, the administration had problems. The "once coveted job of assistant attorney general for civil rights" in the Justice Department remained empty for almost four months after several lawyers turned it down. Even if black Republicans "disagree[d] with some aspects" of affirmative action policies, no one wanted to preside "over the dismantling of the civil rights enforcement machinery of the country."⁹²

Reagan finally nominated William Bell to head the EEOC in June 1981. His nomination ran into trouble by the end of the year, however, with civil rights groups and

⁸⁹ Pear, "U.S. Agencies Vary on Rights Policy."

⁹⁰ David Shribman, "Study Finds Women Are Systematically Underpaid," New York Times, 2 September 1981, A15.

⁹¹ Sara Fitzgerald, "The Federal Report; Executive Notes," Washington Post, 1 October 1981, A27; Rich, "Reagan Panel, Citing 'New Racism,' Urges Easing of EEOC Rules."

⁹² Nina Totenberg, "The government jobs no one wants," Christian Science Monitor, 6 May 1981, 27. Finding nominees for EEOC chair became so difficult that rumors circulated that the Reverend Ralph Abernathy or Shirley Temple Black would be chosen, prompting one lobbyist to question, "Why not Mickey Mouse?" Trescott, "Much Adieu About Norton," C1.

several senators charging Bell was unqualified to run an agency with a \$140 million annual budget, 3,000 employees, 50,000 cases, and 400 lawyers. They argued he had never held a real job, having worked as an insurance agent, real estate salesman, magazine distributor, investment consultant, and president of a sham minority recruiting firm, and run unsuccessfully for the Michigan Senate, Detroit City Council, chair of the Republican 13th Congressional District Committee, and the House of Representatives. Bell also would be the first chair who did not graduate from law school; he attended for awhile but admittedly “didn’t care for it and . . . wasn’t very successful at it.” Black groups found it difficult to oppose Bell’s nomination, however, as he was one of only a few African-Americans nominated by the White House to any post.⁹³ Democrats in control of the Senate continued to oppose Bell, fearing he would be “an easy pushover” in Reagan’s “quiet efforts . . . to loosen affirmative action rules and curb the powers” of the EEOC.⁹⁴ In mid-November, the White House tried to avoid embarrassment by postponing voting amid signs there were enough votes to defeat the nomination.⁹⁵

⁹³ Herbert H. Denton, “Hill Unit Postpones Vote On Nominee to EEOC Job,” Washington Post, 13 November 1981, A14; Herbert H. Denton, “Reagan Nominee Under Attack,” Washington Post, 4 November 1981, A1; Marjorie Hunter, “Reagan Defending Nominee to Lead Job Fairness Agency,” New York Times, 5 November 1981, A22; Iver Peterson, “Reagan Job Rights Nominee Arouses Dispute,” New York Times, 13 November 1981, A20.

⁹⁴ Herbert H. Denton, “The Bell Nomination: Sensitivity Session,” Washington Post, 22 November 1981, C7.

⁹⁵ Editorial, “Reconsider the Choice for EEOC,” Washington Post, 12 November 1981, A30; Pear, “U.S. Agencies Vary on Rights Policy”; Denton, “Hill Unit Postpones Vote On Nominee to EEOC Job.” Reagan also bowed to pressure to drop his nominee for CRC chair in February 1982. Steven R. Weisman, “President Drops Nominee for Post on a Rights Panel,” New York Times, 27 February 1982, 1. Even when his nominees succeeded, they did not necessarily follow his policies. In 1982 CRC appointee Pendleton concluded that the administration’s 1983 budget was “a new low point in a disturbing trend of declining support for civil rights enforcement.” Robert Pear, “Rights Panel Says Reagan Officials Hamper Its Work,” New York Times, 20 March 1983, 1. In 1983 the CRC declared that two years of fiscal austerity and staff reductions had seriously eroded civil rights enforcement. Robert Pear, “Cutbacks Weaken Rights Policies, U.S. Panel Says,” New York Times, 11 October 1983, A1. The next year the CRC suddenly found itself unable to obtain information from the White House and federal agencies. One editorial called Pendleton’s complaints of a “lack of cooperation . . . undermining [their] ability” to monitor enforcement a blow to

In February 1982, Reagan tried again, nominating Clarence Thomas to head the EEOC. Although his tenure later became known for allegations of sexual harassment, his start was much more muted. A 33 year-old conservative attorney and longtime Reagan supporter, Thomas had attended segregated schools in Savannah, Georgia and a religious seminary, where he faced derisive comments as the only African-American student. At Holy Cross College he participated in black student protests to change grade requirements but soon came to believe that “the high number of blacks whose low grades placed them near the bottom of class rankings or led to their dismissal . . . had less to do with the college than with the students.” Thomas felt victimized by affirmative action because whites assumed he was there only because of racial quotas. After graduating from Yale Law School, he worked for Senator John Danforth, the Missouri attorney general, and Monsanto Corporation, avoiding any job dealing with racial issues. In 1981 friends finally persuaded him to accept a position as Assistant Secretary of Education for civil rights by reminding him of “his strongly held beliefs that the path to progress for blacks differed from approaches advocated by civil rights groups.”⁹⁶ At the Education Department, Thomas had a mixed record in handling school desegregation cases, even facing a court-imposed timetable for processing complaints after accusations of being slow to enforce discrimination laws in southern schools.⁹⁷

ideological efforts to change civil rights. Pear, “Rights Panel Says Reagan Officials Hamper Its Work”; Editorial, “Hiding the Bad News,” Washington Post, 26 March 1983, A24.

⁹⁶ Herbert H. Denton, “Reagan Picks Black Lawyer for EEOC,” Washington Post, 13 February 1982, A1.

⁹⁷ Charles R. Babcock, “Contempt Ruling Sought Against EEOC Nominee,” Washington Post, 12 March 1982, A2; Steven R. Weisman, “Reagan Rescinds Rights Nomination in Wake of Outcry,” New York Times, 13 February 1982, 1.

Nevertheless, after the Bell fiasco, most civil rights activists and congressmen believed Thomas was qualified to run the EEOC.⁹⁸ The National Urban League's Washington representative acknowledged that Thomas had the same views as Reagan but was bright and personable and "I think he will listen."⁹⁹ The Washington Post praised him as "a welcome break in this pattern" of bad nominations; although many civil rights leaders disagreed with his solutions, "he knows from his own experience that there is a real problem, and he has decided in his own conscience that he wants to help resolve it."¹⁰⁰ Still, there was opposition. The League of United Latin American Citizens (LULAC) claimed that Thomas had been insensitive to Hispanic problems while at Education.¹⁰¹ Women Employed met with Thomas and found him to be "utterly defensive." They felt they could not raise any issues with him and he "carried on" about his grandfather so much that "people's mouths were hanging open."¹⁰²

Thomas acknowledged the adverse effects of racial discrimination but believed the solution was to provide equality of opportunity rather than prescribing proportional representation or a rigid quota system. Although he benefited from special programs for minorities while growing up in the Deep South in the 1960s and 1970s, he opposed affirmative action plans because he believed they often placed people in programs beyond their abilities.¹⁰³ Thomas claimed that the fact that a company did not hire

⁹⁸ Weisman, "Reagan Rescinds Rights Nomination in Wake of Outcry."

⁹⁹ Denton, "Reagan Picks Black Lawyer for EEOC."

¹⁰⁰ Editorial, "Improvement at the EEOC," Washington Post, 17 February 1982, A22.

¹⁰¹ Denton, "Reagan Picks Black Lawyer for EEOC."

¹⁰² Anne Ladky, telephone interview by author, 20 March 2002. Ladky noted they were not even "mean" to him by WE standards.

¹⁰³ Ernest Holsendolph, "Skills, Not Bias, Seen As Key For Jobs," New York Times, 3 July 1982, 5; Denton, "Reagan Picks Black Lawyer for EEOC."

minorities proportionate to their presence in the workforce was not necessarily due to discrimination, but that poor education and job preparation also were important factors in minority joblessness. To force employers to hire minorities without the proper skills would be like protecting his right “to become a concert pianist when [he] cannot play the piano” and give those individuals “false hope.”¹⁰⁴ Thomas promised to “press hard to process . . . complaints” at the EEOC, but was “skeptical of [its] past efforts . . . to file suits challenging alleged patterns of discrimination in industries.”¹⁰⁵

Once confirmed, Thomas ran the EEOC quite differently from Norton. He gave political appointees greater control over policy matters such as which cases to pursue in court. Rather than appoint an executive director, Thomas did the job himself. In August 1982, the commission approved a reorganization plan in response to criticism that it was taking a “reactive” stance on, rather than litigating, important antidiscrimination cases.¹⁰⁶ Like the administration, Thomas believed statistics were “terribly overused,” assuming discrimination “every time there [was] a . . . disparity,” when it often could be explained by historical and cultural factors. He preferred evidence of actual conduct, such as witnesses testifying about discrimination they experienced or company policies excluding women and minorities. Of course, after the early 1970s most companies changed

¹⁰⁴ Advocates argued that affirmative action only required employers to hire individuals with comparable education and skills, but Republicans fostered the notion that it meant hiring unqualified minorities over qualified whites. Holsendolph, “Skills, Not Bias, Seen As Key For Jobs.”

¹⁰⁵ Holsendolph, “Skills, Not Bias, Seen As Key For Jobs.”

¹⁰⁶ Cass Peterson, “Reorganization, Part II,” Washington Post, 26 August 1982, A17; AP, “Reorganization Is Set In U.S. Equality Panel,” New York Times, 18 August 1982, A9; Sara Fitzgerald and Sandra Sugawara, “At Last, A Full EEOC,” Washington Post, 10 May 1982, A15.

explicitly discriminatory policies, and the EEOC had to address more subtle forms of prejudice.¹⁰⁷

Thomas also agreed with the administration that remedies for discrimination should be limited to actual victims and not include numerical goals and timetables. He said that Griggs v. Duke Power Company, a 1971 case which allowed racial percentages in judging discrimination, had been “overextended and over-applied” to require minorities and women hired in proportion to their representation in the workforce. More recent Supreme Court decisions, including the Memphis firefighters’ ruling, “preclude[d] preferential treatment for anyone . . . not actually found to be a victim of discrimination” and thus called Griggs into question.¹⁰⁸ In Griggs, the court prohibited a job test that excluded blacks, even without any discriminatory intent, unless it was related to job performance. Thomas thought there were legitimate “race-neutral” job requirements, such as educational and strength tests, that might validly limit the number of women or minorities in the work force.¹⁰⁹

At the end of 1984 Thomas testified before the House Subcommittee on Employment Opportunities that statistics had been misused; although they might sometimes help prove discrimination, “every statistical disparity is not discrimination.” Using a misleading analogy, he argued that finding that an all-black basketball team at a predominately white school such as Georgetown University was the result of discrimination ignored other requirements, such as being taller than 5-foot-8, aggressive

¹⁰⁷ Pear, “Changes Weighed in Federal Rules on Discrimination.”

¹⁰⁸ Juan Williams, “EEOC Chief Cites Abuse of Racial Bias Criteria,” Washington Post, 4 December 1984, A13.

¹⁰⁹ Pear, “Changes Weighed in Federal Rules on Discrimination”; Williams, “EEOC Chief Cites Abuse of Racial Bias Criteria”; Griggs v. Duke Power Co., 401 U.S. 424 (1971).

on defense, and for Coach [John] Thompson, disciplined and a good student: “a whole range of considerations other than race.” One congressman responded that Georgetown was not accused of discrimination and likened statistics to smoke before the fire:

“disparities establish a prima facie case,” which shifts the “burden . . . to the employer.”

He encouraged Thomas to continue using statistics to indicate possible discrimination and noted the EEOC was supposed to look behind a disparity to determine whether the charge was justified. Committee Chair Augustus Hawkins could barely contain his hostility. When Thomas said he did not understand a question, Hawkins replied,

I don’t think we understand each other very well. . . . You disagree with the courts, you disagree with Title VII which prohibits bias in employment, you disagree with every opinion ever written, so I don’t know whom you’re in step with except possibly Justice Rehnquist . . . , and on that basis you are talking about changing federal policies?

Thomas insisted that just as Georgetown may not be discriminating, others may not be as well. He then confused the issue further, claiming, “it cuts both ways. Someone may have a great representation of minorities in their work force, and we may go behind that and find evidence of discrimination.” Hawkins responded, “if your views ever become universal in this country, God help us . . . you simply want to emasculate all progress we’ve made in the last 50 years.”¹¹⁰

¹¹⁰ Juan Williams, “Chairman of EEOC Tells Panel Statistics Misused to Prove Bias; Example of Georgetown Basketball Team Banned,” Washington Post, 15 December 1984, A4; see also Pear, “Changes Weighed in Federal Rules on Discrimination.” Thomas had hedged throughout his career on goals and timetables. He denounced them as a legislative aide in 1980, said he would support their limited use upon his nomination to the EEOC two years later. During his early years at the agency he resisted the administration’s “avowed goal” to “eliminate all quota-based settlements” because doing so would throw into “chaos” existing conciliation agreements. By 1984, however, he testified against them before Congress: “I do not think . . . they work, nor . . . can [we] determine what is the perfect work force representation for any group at any time.” The next year he hoped to “reverse” the “fundamentally flawed approach to enforcement” which “turned anti-discrimination laws on their heads,” and his general counsel advised field attorneys against using them. By then, Thomas was seen as largely responsible for EEOC efforts to eliminate hiring goals and timetables, as he openly criticized statistical imbalance cases and opposed affirmative action. Bill McAllister, “Under Thomas, EEOC Relinquished Rights Role,” Washington Post, 10 September 1991, A1; Anne Ladky, telephone interview by author, 20 March 2002.

One result of Thomas' towing the administration's line was that the EEOC "forfeited the position it had assumed during the Carter administration as the leading federal agency on civil rights issues." Thomas was seen as bequeathing the commission's "once dominant role on civil rights issues back to the Justice Department." Women Employed thought it was impossible to underestimate Thomas' impact, a "180-degree" turn from Norton. Changes in policy, including neglecting systemic discrimination and class-action lawsuits against large employers in favor of individual claims, slowed litigation to a crawl, paralyzing the agency. Conservatives made clear their "distaste" for the type of litigation the EEOC brought against companies like Sears, and Thomas wanted suits "built on the testimony . . . of individuals . . . victimized by discrimination" rather than aimed at helping members of a particular group. The commission never voted on such a policy shift. Instead, a "quiet revolution" occurred, carried out by "administrative fiat." The EEOC's general counsel twice "instructed . . . lawyers on what type of cases to file and what types to shun," namely, which cases "the Reagan-appointed . . . commissioners would . . . likely . . . support." As for the Sears case, Thomas continued to support it but "shocked many by publicly predicting it would fail."¹¹¹ With Thomas and the administration making no secret of the fact that they would prefer to lose the case, it became more difficult for staff members to prosecute.¹¹² In December 1984 a House Subcommittee reprimanded Thomas for changing the

¹¹¹ McAllister, "Under Thomas, EEOC Relinquished Rights Role"; Anne Ladky, telephone interview by author, 20 March 2002.

¹¹² Pear, "Changes Weighed in Federal Rules on Discrimination."

direction of the EEOC: “Do you think that it is appropriate for you, as Chairman . . . to be criticizing the Commission’s own case while [it] is still before the Court?”¹¹³

Changes in commission policy were also evident in internal struggles. In February 1984 EEOC general counsel David Slate criticized Thomas in a memorandum to staff attorneys, alleging that thousands of cases had been “curtailed [and] . . . settled prematurely and for inadequate relief” because of his new system. Attorneys were required to report the average time spent on each case, which encouraged closing cases and did not account for their complexity or merits: “The production quota system . . . governing . . . this agency works . . . at cross-purposes” with its mission” to “authorize litigation worthy of its resources.” Such a policy caused “the greatest diminution ever in this agency’s law enforcement and trial court litigation efforts,” with only 340 of 66,000 charges received in 1983 recommended for litigation. Thomas called Slate’s charges “nonsense” and insisted he had to balance compliance and litigation with avoiding a backlog. Their “bitter feud” apparently led Slate to resign in June 1984. Again, the charge-driven nature of the EEOC was partly to blame. It lacked the resources to handle the unending flow of complaints, which led to continual efforts to close cases in order to limit the backlog. In turn, the demands for individual relief continued to limit the resources available for systemic problems. The EEOC also had contradictory missions. Under its compliance goal, investigators evaluated 75,000 new charges a year and tried to resolve them efficiently by closing them, negotiating settlements, or forwarding them to attorneys. On the other hand, the general counsel was nominated to an independent four-

¹¹³ Congress, House of Representatives, Subcommittee on Employment Opportunities of the Committee on Education and Labor, Oversight Hearing on the EEOC's Enforcement Policies, 98th Cong., 2nd Sess., 14 December 1984, 11.

year term, had more autonomy than in most agencies, and depended on receiving well-investigated cases in order to develop broad-based discrimination cases for court.¹¹⁴

Thomas exacerbated these problems by changing Norton's "rapid" charge processing system in order to measure employee performance by speed and efficiency. Between 1980 and 1983 the number of new charges deemed unfounded increased from 23 to 41 percent, and the number settled dropped from 50 to 37.6 percent. Between 1981 and 1983 the number of lawsuits filed dropped from 358 to 195, and the number attacking broad-based discriminatory patterns moved from 62 in 1980 to 30 in 1981 to none in 1982 to 10 in 1983. EEOC attorneys blamed the incentive to produce results rather than closely examine a case. Another official blamed a former general counsel for turning down cases that regional staffers recommended taking to court, "causing word to spread . . . that headquarters was not interested in litigation." Thomas acknowledged the agency could handle 300 to 400 cases a year, but blamed spending constraints on investigator travel, uninvestigated cases inherited from Norton, and Congress for "this mess."¹¹⁵

Despite his views, Thomas initially challenged some of the administration's anti-affirmative action policies. As a black Reagan Republican, he was "suspect among many of . . . his agency's natural supporters – women and minorities." However, he initially stood up to the administration on some civil rights issues and created enemies with those who wanted "to slow down the civil rights enforcement machinery."¹¹⁶ In June 1983, he

¹¹⁴ Felicity Barringer, "EEOC's Two-Part Mission Pulling Its Employees In Opposing Directions," Washington Post, 12 March 1984, A17; Juan Williams, "Improper Handling of EEOC Cases Charged," Washington Post, 8 February 1984, A5; Cass Peterson and Christine Russell, "Feud Defused at EEOC," Washington Post, 26 June 1984, A11.

¹¹⁵ Barringer, "EEOC's Two-Part Mission Pulling Its Employees In Opposing Directions."

¹¹⁶ "Two Jobs for the EEOC," Washington Post, 14 March 1984, A26.

promised to insist on an enforcement provision in new OFCCP rules: “Voluntarism . . . should be continued, but there have to be sanctions and disincentives to those who refuse to do what is right.”¹¹⁷ Two months later Thomas appeared on a National Urban League panel with Reynolds and Mary Frances Berry, a CRC member replaced by Reagan. Thomas offered little support for the administration, disputing Reynolds’ claim that Justice was vigorously enforcing the law:

We cannot allow important matters of national policy to be reduced to simple matters of political posturing. . . . The issues we face are clearly too complex to be tossed around as oversimplified campaign slogans which inflame more than inform Our personal views on the laws we enforce are, at most, inconsequential. We have sworn to uphold the law.¹¹⁸

Although both Reynolds and Thomas represented the administration, they contradicted each other, with Reynolds claiming his effort had been “vigorous and uncompromising” and the administration’s enforcement “unprecedented.”¹¹⁹

The administration did what was necessary to limit Thomas’ “independence on policy issues.” In 1981 the NAACP settled a case against the New Orleans police department in exchange for an agreement requiring one black promotion for every white one until upper supervisory positions were 50 percent black. Although courts had upheld similar settlements, White and Hispanic police officers challenged the quota system. In

¹¹⁷ Milton R. Benjamin and Sara Fitzgerald, “EEOC Chairman Vows Enforcement Of Job Bias Rules for Contractors,” Washington Post, 9 June 1983, A17.

¹¹⁸ Juan Williams, “EEOC Chief Faults Administration on Curbing Bias,” Washington Post, 3 August 1983, A2; Juan Williams, “New Poverty Rationale May Be Emerging,” Washington Post, 13 August 1983, A4.

¹¹⁹ Carlyle C. Douglas, Caroline Rand Herron, and Michael Wright, “Administration Grinds Its Gears on Rights Issues,” New York Times, 7 August 1983, section 4, 4; Sheila Rule, “Debate Continues on Rights Policies,” New York Times, 3 August 1983, A13. Reynolds insisted “we cannot tailor our . . . enforcement policies to serve any particular group We cannot condemn . . . discrimination against black police officers . . . and ignore . . . Hispanics, females and white officers challenging a promotion quota that favors blacks.” Juan Williams, “EEOC Chief Faults Administration on Curbing Bias.”

early 1983 the Justice Department challenged the court-ordered quotas as unconstitutionally broad because they hurt innocent non-minorities and rewarded blacks who were not victims of discrimination. In response, Thomas' EEOC unanimously approved a brief attacking Justice's position as without legal merit, "prohibit[ing] . . . any prospective race-conscious 'affirmative action' or employment goals," and undermining years of progress in remedying discrimination. Thomas put the administration on notice that the commission would file the brief because of Justice's "dramatic departure" from established policy. He wrote to Attorney General William French Smith that Justice's "position . . . might . . . invalidate . . . innumerable conciliatory agreements . . . and adjudicated decrees" and "prohibit the courts from responding" to even a proven "long-continued and egregious pattern of discrimination."¹²⁰

However, politics trumped affirmative action efforts and the administration pressured the EEOC to withdraw its brief. The White House called Thomas to a meeting with presidential advisors, Attorney General Smith, and Reynolds. Justice Department representatives warned him the commission lacked legal authority to express independent views in such cases, and Reynolds reminded him that opposition to quotas was "explicitly set forth in the Republican Party platform." Smith said the "Government should speak with one voice," and it would damage their brief to mention a contrary position with no legal standing. The commission then voted 4 to 1 not to submit the brief, announcing it "would be within the public interest not to file" views that conflicted with Justice. Nevertheless, Thomas wrote to Smith "strongly" urging Justice to reconsider its position,

¹²⁰ UPI, "Pressure Seen in Vote to Withdraw Brief on Quotas," *New York Times*, 8 April 1983, D15; Fred Barbash, "Private Groups Plead Case for Stifled EEOC," *Washington Post*, 28 April 1983, A17; Barbash and Williams, "Administration Prods EEOC on Quotas Brief"; McAllister, "Under Thomas, EEOC Relinquished Rights Role."

or at least acknowledge the EEOC's opinion. The failure to consult was "a sharp departure from acceptable standards of inter-agency protocol" and a breach of the EEOC's role as "the chief interpreter" of the laws against employment discrimination.¹²¹

Other organizations supported the EEOC. The CRC urged Reagan to allow the brief, saying the commission's "expert opinions on . . . affirmative action . . . should be publicly aired even when they conflict" with Justice.¹²² Concerned about executive branch pressure, the House Judiciary Committee asked to see the EEOC briefs and correspondence, and a subcommittee asked the commission to reconsider its withdrawal. Administration officials called it a "jurisdictional" rather than policy decision, claiming that the EEOC, as an executive agency, was subordinate to the president's representative, the Justice Department. This again raised the issue of the EEOC's power, or lack thereof. Thomas noted, "This case . . . points out . . . the chink in our armor. We were created to take the lead responsibility in setting civil rights policy in court but we are in the executive branch which has its own opinions. So there is a contradiction there that has to be ironed out . . . this commission should be independent and this case clearly shows why."¹²³ Finally, lawyers from the Center for National Policy Review at Catholic University Law School attached the commission's brief to their own, ensuring that its

¹²¹ Barbash and Williams, "Administration Prods EEOC on Quotas Brief"; UPI, "Pressure Seen in Vote to Withdraw Brief on Quotas," New York Times, 8 April 1983, D15.

¹²² Fred Barbash and Pete Earley, "Civil Rights Unit Supports EEOC on Race Quota Case," Washington Post, 15 April 1983, A19. Chairman Pendleton, however, said, "Like you, I support affirmative action, but oppose quotas." Ibid. See also AP, "Action Is Sought on Bias Pact," New York Times, 16 April 1983, 15.

¹²³ Juan Williams, "Lawmaker Urges EEOC Not to Quit Rights Case," Washington Post, 10 April 1983, A11. Even Norton protested she did not know of any instance in the prior twenty years in which the "White House intervened in this way." Congress "gave the commission the absolute authority to file briefs [in court] and . . . the Justice Department cannot prevent it from doing so." UPI, "Pressure Seen in Vote to Withdraw Brief on Quotas," New York Times, 8 April 1983, D15.

criticism of the administration would be heard after all.¹²⁴ This represented just one of several internal skirmishes and turf wars over civil rights that embarrassed the administration and echoed the constant question of how independent the commission should be. Still, by the end of Reagan's first term, Thomas had been forced to put aside any disagreements with the administration.¹²⁵

Thomas and others resisted administration changes in other instances as well. As the administration's mouthpiece on civil rights policy, the Justice Department clashed with the EEOC over its internal affirmative action policy. In 1981 the commission required federal agencies to report how many women and minorities they employed and set out five-year affirmative action plans for addressing discrimination. Reynolds responded that Justice could find no authority for requiring goals and timetables and thus they were "premature," to which the commission replied that it had "clear legal authority" but thanked him for "informing us of your views."¹²⁶ By mid-1983 Justice had submitted only a plan regarding disabled individuals. The EEOC sent it back because it lacked goals for hiring, earlier figures for comparison, and data on recruitment and access to department buildings. One Justice official cryptically said that instead of setting goals

¹²⁴ Barbash, "Private Groups Plead Case for Stifled EEOC."

¹²⁵ Despite his positions, Thomas expressed bitterness toward African-Americans for not currying favor with him. Although he complained about Reagan no major leader had sought his influence with the administration in more than three years. Black leaders had chosen to "bitch, bitch, bitch, moan and moan, whine and whine" rather than reshape administration policies. It was an affront to Thomas' authority that his own constituency would rather shun political power: "It's a basic law of politics that you should always have access to people in power. . . . [Y]ou don't call the banker reviewing your loan application a fool." Juan Williams, "EEOC Chairman Blasts Black Leaders," Washington Post, 25 October 1984, A7. Of course, Thomas had little to offer blacks. Carl T. Rowan responded angrily, "Is it that black people are so dumb, or that they simply know who their enemy is?" Thomas was frustrated because he "gets no respect," but he had to "face the reality" that his EEOC predecessors were "held in the highest esteem" by blacks and whites alike. Blacks had survived slavery, Jim Crow, and the Ku Klux Klan; they would endure four more years of Reagan and Thomas. Carl T. Rowan, "The Real Shame," Washington Post, 30 October 1984, A19.

¹²⁶ Pear, "U.S. Agencies Vary on Rights Policy"; AP, "3 U.S. Agencies Facing Action Over Hiring Goals," New York Times, 22 August 1984, A14.

they “insure that the recruitment process includes a representative sample of all groups, and then . . . make sure the selection process is based solely on merit.”¹²⁷ The EEOC responded that the goal was flexible and everyone faced objectives and timetables for reaching them; even reporters worked on a deadline.¹²⁸ In July Attorney General Smith escalated the battle by submitting a plan for women and minorities – a year-and-a-half late – but again refused to set numerical targets. He called on the heads of each unit to make every effort to hire more women and minorities, but to rely on recruiting rather than quotas. He wrote to Thomas, who had inherited this battle when he became the commission head, that his department was “totally committed to equality of employment opportunity,” but hiring goals “often become . . . quotas, by [giving] preference . . . to applicants because of race, sex, religion or handicap. That is discrimination and that is wrong.”¹²⁹ Smith’s language reflected the administration’s creative approach, that any preference for minorities or women, even if designed to correct discrimination, in fact constituted discrimination against whites or men.

The administration wanted the EEOC to be satisfied with a pledge to not discriminate and voluntary compliance rather than measuring progress made through numbers. Reynolds argued that using quotas to solve discrimination is like “using alcohol to overcome alcoholism” and that it hurt other employees more than it helped

¹²⁷ Werner, “Justice Dept. Files a Plan for Minority Hiring”; William Raspberry, Op-Ed, “Fill in the Numbers, Please,” Washington Post, 15 July 1983, A25.

¹²⁸ Felicity Barringer, “EEOC’s Bielan Feeds on Plans, Goals, Timetables – and Paper,” Washington Post, 4 August 1983, A19.

¹²⁹ Werner, “Justice Dept. Files a Plan for Minority Hiring”; Felicity Barringer, “EEOC Chief Criticizes Justice Dept. Job Plan,” Washington Post, 7 September 1983, A15; “Attorney General Resubmits Equal Opportunity Proposal,” Washington Post, 22 July 1983, A21.

women and minorities.¹³⁰ Proponents responded that the purpose was not to provide preferential treatment but to ensure that employers were not discriminating, and that his “reformulation amount[ed] to having employers simply state that they would no longer discriminate.” Again, Thomas showed some resistance (or ambivalence) by clashing with the administration over what role “numbers” should play in civil rights. The EEOC needed numbers

to fulfill our responsibilities . . . to report to Congress on progress in the executive branch We don’t think that there’s any way we can report to Congress accurately if we don’t know where an agency is today, where it plans to be five or six years from now, and where it is in terms of progress based on that plan. . . . Justice seems to think that they don’t need those numbers. We disagree.

Thomas believed numbers could tell much about progress in eliminating discrimination, whether or not specific victims came forward to complain. He compared it to companies reporting to the EPA on hazardous emissions. Reynolds, on the other hand, “preach[ed] his anti-numbers gospel,” saying Justice would not support numerical formulas to give preferential treatment to employees who had not been victims of discrimination.¹³¹ For Thomas, perhaps, this turf battle, and his pride, trumped his general views on affirmative action.

In September 1983 the EEOC again rejected Justice’s affirmative action plan for not including goals and timetables, reflecting the “philosophical confrontation between two agencies traditionally involved with ensuring equal opportunity in the work force.” Thomas wrote to Smith, “use of goals in federal employment is presently required, has been required for some time and is necessary for this commission to carry out its

¹³⁰ Deborah Churchman, “Affirmative action: the struggle goes on for parity in the workplace,” *Christian Science Monitor*, 24 August 1983, 15.

¹³¹ Raspberry, “Fill in the Numbers, Please.”

responsibilities.” Without any “standards for determining whether minorities and women are under-represented in certain job categories” there was no way to determine whether increases in their numbers reflected an improvement or simply adding more to jobs where they were already represented: “We must look to agencies to increase their representation on a steady, continuing basis and to commit themselves to do so through setting flexible goals.”¹³²

Despite administration efforts, Justice’s attitude toward affirmative action was far from universal. Of 110 agencies required to submit hiring plans in 1983, only three others failed to do so.¹³³ The next year the National Endowment for the Humanities (NEH) followed Justice’s lead and announced it would not set numerical goals.

Chairman William Bennett wrote to Thomas, “We strongly believe that different or special treatment by this agency on the basis of these characteristics offends our best principles as a nation.” Bennett believed he was authorized to take this position “by the rights of man, the moral teaching of generations, the ancient founding faith of this country, constitutional principle and the determination of the Justice Department.”¹³⁴

One EEOC official was dumbfounded: “We’re not talking quotas here. We’re talking flexible goals to be set, targets to try and reach . . . What we want is for them to make an effort.”¹³⁵ Even Thomas, who admitted he personally agreed with Bennett that color consciousness and goals were morally wrong and unjust, “viewed [the commission’s]

¹³² Barringer, “EEOC Chief Criticizes Justice Dept. Job Plan.”

¹³³ Werner, “Justice Dept. Files a Plan for Minority Hiring.”

¹³⁴ Phil McCombs, “NEH Chief Rejects Job Rules: Bennett Balks at Goals On Women, Minorities Job Rules,” Washington Post, 19 January 1984, D1.

¹³⁵ McCombs, “NEH Chief Rejects Job Rules.”

statutory authority and obligations to be at odds with such personal views.”¹³⁶ Once again, all but three agencies complied, and even those submitted plans with a race, sex, and disability breakdown, but just refused to estimate when and how many women and minorities they would hire.¹³⁷ Although the administration could closely control the Justice Department with regard to civil rights policy, it could not necessarily do so with the other agencies. The fact that so few agencies followed its lead, and that it took several years to even get those few on board, is notable.

In another sign of resistance to administration policies, and the administration’s limited effect, the EEOC continued to settle cases with large employers. In 1982 Eastern Airlines settled a 1979 suit – “putting [it] to rest as quickly and quietly as possible” – by paying \$65,000 to 23 women who claimed they were not hired as flight attendants because of their age.¹³⁸ Dean Witter Reynolds, which was later acquired by Sears, agreed to pay \$2 million to 4000 women and minorities denied employment or promotion between 1976 and 1981, and to set up a \$3 million affirmative action program.¹³⁹ In 1983, General Motors, one of the other Track I companies targeted along with Sears, agreed to a five-year plan paying \$42.5 million to 100,000 employees and establishing hiring and promotion goals. The company decided to settle because “it will be good for

¹³⁶ Myron Struck, “3 Agencies Won’t Supply EEOC With Hiring Data,” Washington Post, 9 August 1984, A2.

¹³⁷ Bosko Jaksic, “Three Agencies Facing Crackdown,” Washington Post, 22 August 1984, A25; Struck, “3 Agencies Won’t Supply EEOC With Hiring Data”; AP, “3 U.S. Agencies Facing Action Over Hiring Goals,” New York Times, 22 August 1984, A14.

¹³⁸ UPI, “\$65,000 Payment in Bias Suit Agreed to by Eastern Airlines,” New York Times, 18 April 1982, 53.

¹³⁹ Thomas W. Lippman, “Broker to Pay \$2 Million to End Bias Suit,” Washington Post, 7 May 1982, E1.

our women and minority employees and good for the company.”¹⁴⁰ Although the agreement did not include back pay and goals were delayed because the company had 61,000 workers on indefinite layoff, making the settlement “more prospective than retrospective,” the commission promised to continue to seek back pay “in appropriate cases.”¹⁴¹ The GM settlement set numerical goals despite administration policy, the Reagan-appointed commissioners unanimously approved it, and Thomas hailed it as a “significant achievement,” illustrating the extent of disagreement among civil rights agencies and the level of resistance from within the administration.¹⁴²

Comparable Worth

On some issues, Thomas openly sided with the administration without any pressure to do so. One area in which he joined the administration in containing advances for workers was comparable worth, an employment issue gaining attention in the early 1980s.¹⁴³ Although the women’s movement had helped improve the workplace, there

¹⁴⁰ Kathy Sawyer, “Job Bias Claim Settled by GM For \$42 Million,” Washington Post, 19 October 1983, A1.

¹⁴¹ Robert Pear, “G.M. Agrees to Pay \$42 Million To End Case On Job Bias,” New York Times, 19 October 1983, A1; Sawyer, “Job Bias Claim Settled by GM For \$42 Million.”

¹⁴² Robert Pear, “G.M. Settlement and Reagan Tenets,” New York Times, 21 October 1983, A20. Even Norton continued to speak out against after she left the EEOC, believing the administration’s changes would have a limited effect on the system she helped establish. She was confident that commission policy was settled enough to withstand a chair with different beliefs: “Thousands of decisions mandate the direction of the agency, . . . with even conservative courts embracing both discrimination remedies and affirmative action.” Holsendolph, “Skills, Not Bias, Seen As Key For Jobs.” Four years later she continued to downplay the administration’s impact. She cited only one official, Reynolds, as creating confusion, saying he “used his federal office to escalate the drumbeat” against affirmative action. Instead, she painted a positive picture of civil rights policy, saying more Americans opposed race discrimination in 1984 than in 1965. American businesses had not attacked affirmative action and “deserve[d] some praise for the extent to which it has used it.” Any new controversy did “not emanate from the American people,” but rather from “a few politically motivated politicians who . . . preferred to exploit the existing puzzlement and concern over affirmative action.” Juan Williams, “Former EEOC Head Defends Use of Affirmative Action,” Washington Post, 13 December 1984, A14.

¹⁴³ NOW chair Eleanor Smeal said, “Comparable worth is going to be a key issue for the ‘80s for women. . . . If it is not solved in the courts, it will be solved by the workers themselves – and the unions.” Leon Lindsay, “‘Feminist capital’ on rocky journey toward equality,” Christian Science Monitor, 8 July

was still much to be done: “The forces of feminism and affirmative action have brought new cadres of women into the labor force,” by reducing barriers to hiring and promotion, but had not yet secured an equal place with regard to wages.¹⁴⁴ Activists and labor women sought to expand the Equal Pay Act to require equal pay for male and female-dominated jobs with substantially the same, though not identical, skills and responsibility. They pointed to the “undervaluing of jobs held by women,” noting that despite the increase in working women between 1955 and 1980, the amount women earned for every male dollar declined from 64 cents to 59 cents.¹⁴⁵

Opponents of comparable worth argued that with open access to all jobs, a woman stayed in a low-paying job as “a matter of choice. . . . She could always change jobs.”¹⁴⁶ Women were concentrated into a few job categories because of factors other than discrimination, “the legacy of social norms, women’s own choices and market forces.”¹⁴⁷ Moreover, comparing different jobs was too subjective, adversaries argued, and pay equity cases took years to litigate. As with affirmative action and statistical analysis, opponents made comparable worth sound too complicated, and a 1981 Supreme Court decision allowing pay equity claims comparing different jobs led to relatively little

1981, 2; Claudia Levy, “‘Comparable Worth’ May Be Rights Issue of ‘80s,” Washington Post, 13 October 1980, Washington Business, 3.

¹⁴⁴ Eva Hoffman and Margot Slade, “Ideas and Trends; ‘Women’s Work’ Still Pays Less,” New York Times, 6 September 1981, section 4, 18; Wayne Biddle and Margot Slade, “Ideas & Trends: The Pay Gap Has Grown,” New York Times, 22 January 1984, section 4, 9.

¹⁴⁵ Levy, “‘Comparable Worth’ May Be Rights Issue of ‘80s”; Warren Brown, “Sex Discrimination Persists in Workplace, Women’s Groups Say,” Washington Post, 29 April 1980, A18.

¹⁴⁶ Deborah Churchman, “Comparable worth: the equal-pay issue of the ‘80s,” Christian Science Monitor, 22 July 1982, 15.

¹⁴⁷ Walter Goodman, “Equal Pay for ‘Comparable Worth’ Growing As Job-Discrimination Issue,” New York Times, 4 September 1984, B9.

litigation.¹⁴⁸ Critics also argued that a job's worth should be determined by the marketplace and that implementing comparable worth would disrupt the free market system. Moreover, lowering men's salaries would help middle-class white women at the expense of minority men and encourage women to continue entering female-dominated occupations. Conservatives were also concerned that the government would hold too much control over the economy, assuming the role of personnel officer and ignoring the basic goals of producing goods and services.¹⁴⁹ Moreover, raising women's pay to parity with men's across the job market would cost an estimated \$150 billion a year, cause a "significant inflationary effect," devastate the economy, and force companies faced with overregulation and increasing labor costs to move overseas. One EEOC general counsel even invoked a Reagan party line, claiming "the trick in supply-side civil rights, like supply-side economics," is not to give any group a larger piece of the same economic pie, "but to make the pie larger."¹⁵⁰

Advocates of comparable worth argued that discrimination was to blame for the wage gap. Day Piercey, executive director of Women Employed, concluded, "There are two main reasons this practice (of assigning lower wages to jobs traditionally held by females) exists – profit and prejudice."¹⁵¹ In response to claims that evaluations of skill, education, and duties were too subjective, supporters noted that companies, unions, and

¹⁴⁸ County of Washington v. Gunther, 452 U.S. 161 (1981); Judy Mann, "Equal Pay," Washington Post, 21 September 1983, C1; Judy Mann, "Pay Equity," Washington Post, 4 April 1984, C1.

¹⁴⁹ Goodman, "Equal Pay for 'Comparable Worth' Growing As Job-Discrimination Issue"; Churchman, "Comparable worth: the equal-pay issue of the '80s"; Ruth Marcus, "The 'Comparable Worth' Debate," Washington Post, 28 December 1984, A1.

¹⁵⁰ Churchman, "Comparable worth: the equal-pay issue of the '80s"; Wallace Turner, "Pay Equity Issue Moving to Forefront," New York Times, 14 December 1984, A20; Goodman, "Equal Pay for 'Comparable Worth' Growing As Job-Discrimination Issue."

¹⁵¹ Churchman, "Comparable worth: the equal-pay issue of the '80s."

seventeen states were already doing them. As for cases being too complicated, they noted that despite having to address 3000 job categories, one Washington state case went to trial in thirteen months and took only two weeks to try.¹⁵² Moreover, the lower pay in traditionally female jobs could not be explained solely by market forces. There was a shortage of both engineers and nurses, but wages rose for engineers while nurses who would work cheaply were hired from abroad. Furthermore, unlike professional women, many working-class women wanted to improve the jobs they had rather than move into male jobs: “Women should not all have to become plumbers to make a decent wage.” Women already established as librarians deserved fair treatment even if they were not in a position to change careers, and higher wages would attract more men to predominantly female fields.¹⁵³ Finally, the cost of applying comparable worth was irrelevant; it was like arguing “it is all right to discriminate against women” and should not prevent employers from doing the right thing: “Ending discrimination costs money. . . but no one would dare raise that as a reason for continuing to pay blacks less than whites.”¹⁵⁴

The courts began hearing comparable worth cases in the early 1980s. A Pennsylvania federal court ruled that a grocer discriminated by placing women in a separate department and paying them less than men whose jobs had similar requirements.¹⁵⁵ In June 1981 the U.S. Supreme Court ruled that women could bring

¹⁵² American Federation of State, County, and Municipal Employees v. State of Washington, 578 F. Supp. 846 (W.D. Wash. 1983); Mann, “Equal Pay”; Mann, “Pay Equity.”

¹⁵³ Churchman, “Comparable worth: the equal-pay issue of the ‘80s”; Marcus, “The ‘Comparable Worth’ Debate”; Goodman, “Equal Pay for ‘Comparable Worth’ Growing As Job-Discrimination Issue.”

¹⁵⁴ Goodman, “Equal Pay for ‘Comparable Worth’ Growing As Job-Discrimination Issue”; Turner, “Pay Equity Issue Moving to Forefront.”

¹⁵⁵ Shribman, “Study Finds Women Are Systematically Underpaid.” However, another court ruled that raising the salaries of Denver city hospital nurses to equal park maintenance men would “disrupt the economic system of the USA and its way of life.” Levy, “‘Comparable Worth’ May Be Rights Issue of ‘80s.”

lawsuits under Title VII comparing their pay to that of men holding different jobs, but did not go as far as endorsing the comparable worth concept, requiring equal pay for jobs of “equal value.” The push for comparable worth was largely made by unions. The next month Local 101 of the American Federation of State, County, and Municipal Workers (AFSCME) went on strike against the city of San Jose, California after a study confirmed that wages for traditionally-female jobs women averaged 15 percent lower than those for comparable “male” jobs.¹⁵⁶ The city agreed to spend \$1.5 million to equalize pay, and the union moved on to file pay discrimination charges in Los Angeles.¹⁵⁷

In September 1983 AFSCME won a major comparable worth lawsuit against Washington state. Attorney Winn Newman used sex-segregated job advertisements and statistics to show that jobs with similar skill, effort, and responsibility paid significantly less for women than men and that the wage dropped for every increase in the number of women in a job category. In the first major application of Title VII to comparable worth, the judge ordered the state to pay \$800 million, including retroactive wages for 15,000 workers, and to establish new increased wage scales. With an eye to broad change, Newman said, “the same device of looking back at classified ads is available against every large employer in the country.” He promised to bring other suits: “The Washington case is a model of how systemic wage discrimination came into being [and] how unions and women’s organizations can use existing laws to destroy it.”¹⁵⁸ The state appealed with the support of Reagan’s Justice Department. Using the momentum from

¹⁵⁶ Lindsay, “‘Feminist capital’ on rocky journey toward equality”; Churchman, “Comparable worth: the equal-pay issue of the ‘80s.”

¹⁵⁷ AP, “Los Angeles Is Next Target Of Union in Equal Pay Strike,” *New York Times*, 1 August 1981, 13; Goodman, “Equal Pay for ‘Comparable Worth’ Growing As Job-Discrimination Issue.”

¹⁵⁸ Mann, “Equal Pay.”

the Washington case, unions brought other pay equity litigation, on behalf of: librarians in Fairfax County, Virginia; New York City police dispatchers (mostly black women) paid less than fire dispatchers (mostly white men); and 15,000 Nassau County, Long Island employees. Under pressure from unions and women's groups, many states and municipalities began to address the issue. Minnesota, for example, instituted a \$42 million plan for state employees and instructed local governments to integrate comparable worth into salary scales by 1987.¹⁵⁹

The Reagan administration also began paying attention to the momentum and legal victories for pay equity, but refused to take up the cause. At the EEOC, statistics about "women's work" being paid \$4000 less per year than work performed by men "prompted a . . . wave of sex discrimination claims." Vice Chairman Daniel Leach said the commission did not oppose comparable worth, but believed it would more likely be developed by courts than governmental regulation. Report of inequities, however, could make judges "less reluctant to intrude into the wage-setting process."¹⁶⁰ In 1984 House members introduced bills to force the federal government to enforce equal pay laws. Nonetheless, despite an EEOC report supporting comparable worth, Thomas avoided acting on the issue.¹⁶¹ Representative Barney Frank threatened to subpoena him for failing to appear before a subcommittee on wage discrimination and equal pay. He said Thomas "feels the EEOC's lack of action is indefensible . . . They say they can't do

¹⁵⁹ Marcus, "The 'Comparable Worth' Debate"; Turner, "Pay Equity Issue Moving to Forefront"; Goodman, "Equal Pay for 'Comparable Worth' Growing As Job-Discrimination Issue"; AP, "Michigan Workers Sue For Equal Pay," New York Times, 2 September 1984, 22.

¹⁶⁰ Hoffman and Slade, "Ideas and Trends; 'Women's Work' Still Pays Less"; Shribman, "Study Finds Women Are Systematically Underpaid."

¹⁶¹ Goodman, "Equal Pay for 'Comparable Worth' Growing As Job-Discrimination Issue"; Mann, "Pay Equity."

anything because they don't have a policy, but then they don't make a policy so they don't have to do anything." Thomas replied that the EEOC had set out its position a year before and there was not "much purpose" for him to appear. Three other administration officials also refused to testify, including Reynolds, "apparently as part of an . . . effort to avoid the politically explosive issue that could further damage President Reagan's standing with women before the . . . election."¹⁶² CRC Chairman Pendleton derided comparable worth as "the looniest idea since 'Looney Tunes' came on the screen" and staff director Linda Chavez warned members not to testify because the CRC had no formal position on the issue.¹⁶³ Nevertheless, Thomas finally appeared and sparred with Frank. Frank recommended that he oppose any appeal of the Washington state decision, but Thomas said the commission could not block the Justice Department's brief or file its own in a public-sector case. Despite the 1981 Supreme Court decision, Thomas said the courts and Congress had not set a standard for comparing jobs so the EEOC had to develop a policy.¹⁶⁴ The only problem was, he failed to do so.

Thus, by the end of Reagan's first term, comparable worth had "become a new ground of battle in the courts, in the legislatures and in the political arena."¹⁶⁵ Congress had taken it up, the administration was actively avoiding it, states were grappling with the Washington decision, unions were filing new lawsuits and incorporating it into labor

¹⁶² Juan Williams, "Wage Discrimination Against Women; EEOC Head Threatened With Hill Subpoena for Failing to Testify," Washington Post, 1 March 1984, AA3. In written testimony Thomas said there was no definition of "comparable worth" and he would form an EEOC task force to study wage discrimination.

¹⁶³ Berry did testify and criticized the Reagan appointees for failing to appear; before they arrived, she reported, the CRC "had been particularly alarmed about the increasing income disparities for women." Marcus, "The 'Comparable Worth' Debate"; Williams, "Wage Discrimination Against Women."

¹⁶⁴ Juan Williams, "Rights Officials Return Critics' Fire," Washington Post, 15 March 1984, A13.

¹⁶⁵ Goodman, "Equal Pay for 'Comparable Worth' Growing As Job-Discrimination Issue"; Turner, "Pay Equity Issue Moving to Forefront."

negotiations, and Democrats had made it an issue in the presidential election.¹⁶⁶ The California employees union added comparable worth to its negotiating list, while the conservative Heritage Foundation told Justice, “the fight against comparable worth must become a top priority” in the next four years.¹⁶⁷ Since the administration was hostile toward comparable worth, the issue mostly played out outside the federal government, through labor negotiations and state governments.¹⁶⁸

The Reagan Legacy

Though much has been made of Reagan’s negative impact on affirmative action, and despite the dread of civil rights groups and Democrats, his administration did not automatically reverse all the gains of the prior two decades. As Hugh Davis Graham noted, although presidents come and go, administrative agencies stay and try to enforce the laws in a day-to-day manner, and thus, an administration is not just the story of political appointees, but also the “permanent government . . . the career civil servants in the semi-independent mission agencies and their sub-baronies in departments like Labor.” Moreover, the EEOC – “the era’s fragile infant among regulatory boards” – was an independent agency with career service employees who tended to try to enforce the

¹⁶⁶ Democrats attacked the administration for supporting the Washington state appeal, called comparable worth possibly “the civil rights issue of the 1980’s,” and included “Support equal pay for women, including equal pay for work of comparable value” in their draft platform. Goodman, “Equal Pay for ‘Comparable Worth’ Growing As Job-Discrimination Issue”; Mann, “Pay Equity”; Williams, “Wage Discrimination Against Women”; “Highlights of the Democratic draft platform,” Christian Science Monitor, 19 June 1984, 6; Mike Causey, “Panel Debates Pay Equity in San Francisco,” Washington Post, 18 July 1984, B2. Their commitment highlights a lost opportunity; it shows how an issue we hear so little about today might have turned out very differently had the election gone the other way.

¹⁶⁷ Turner, “Pay Equity Issue Moving to Forefront.”

¹⁶⁸ The fact that comparable worth advocates were not able to capitalize on early successes, just as those pursuing Sears could not parlay the AT&T victory into a win, demonstrated how much political times had changed. Like the Sears trial, the comparable worth fight suffered from the growing backlash against the women’s movement. The resistance was also greater when comparable worth sought to challenge market forces in setting wages; it was one thing to tell employers to hire more women and minorities, but quite another to interfere with the free-market economy and threaten the essence of the capitalist system. See, for example, Kessler-Harris, A Woman’s Wage, chap. 5.

old policy. Norton and many others resisted Reagan's efforts, and even Thomas hesitated before capitulating to the White House, whether out of disagreement with its policies, respect for the law, or defiance at having his power challenged. The administration tried to mount a counterrevolution, but found a "formidable barrier to change" in Congress, the federal courts, and the administrative apparatus of government.¹⁶⁹ This resistance forced the administration to find creative ways to undermine what many believed was a solid legal enforcement foundation that even Reagan could not irreparably alter, and, particularly during his first administration, limited the extent of change.

Nevertheless, the administration eventually had a noticeable impact on civil rights enforcement. The changes at the EEOC between 1973 and 1984 illustrate the broader changes in political climate during the years the Sears case was being prepared for trial. When the case began in 1973, the women's movement was at its peak and activists had a string of successes in pressuring employers to change their practices, getting the EEOC to enforce Title VII on behalf of women and winning major settlements from AT&T and the steel industry. They had a strong statistical case against Sears and it appeared the company would simply settle quickly as other corporations had. However, women's groups pulled back in order to consolidate their efforts to ratify the ERA and a new era in civil rights enforcement arrived with the election of Reagan, ensuring more protection for big business. Large class-action lawsuits and the use of statistical evidence fell out of favor. By the time Sears went to trial in 1984 the Justice Department had changed its longstanding practice of seeking consent decrees that established goals and timetables.¹⁷⁰ Although some companies settled discrimination suits as "simply a way of putting the

¹⁶⁹ Graham, The Civil Rights Era, at 5, 7.

¹⁷⁰ Pear, "U.S. Agencies Vary on Rights Policy."

case to rest as quickly and quietly as possible,” Sears did not feel the same way.¹⁷¹ Those starting the case in the 1970s had only to deal with the company’s aggressiveness, but attorneys who litigated it in the 1980s also had to fight hostility from within their own agency and the administration. The EEOC thus tried the case in a very different political atmosphere from the one in which the case began, explaining how a no-lose case in 1973 could become a no-win one by 1986. The thirteen-year delay between the beginning of the case and the trial court decision played a major role in its outcome. While most argue the EEOC lost because of poor legal decisions or flaws in the case, one must question whether any company, even AT&T, would have reached a different outcome in this unfavorable political climate. Through the Sears case we see national political changes in the late 1970s and 1980s which prevented a lasting and comprehensive solution for working women. They limited the transformative potential of Title VII and other discrimination laws, as only cases alleging a statistical imbalance in the workforce held the promise of widespread structural change in the workplace. Individual harm cases promised only success for one individual at a time, comparable to using an eye-dropper to fill up a bathtub.

¹⁷¹ See, for example, UPI, “\$65,000 Payment in Bias Suit Agreed to by Eastern Airlines,” 53.

Chapter 6

The Long Litigation

Between 1973 and 1985, the Sears case unfolded. The EEOC first spent four years investigating the company, while the two sides haggled over what data the company should be required to produce. When the EEOC finally filed suit against Sears in 1979 the parties began a long litigation process, including discovery of relevant evidence, depositions, settlement negotiations, and refining the lawsuit for trial. By the time it went to trial in 1985 the case looked very different from when it started. For example, the EEOC initially filed race discrimination claims against Sears but eventually settled them and focused only on the sex discrimination claims. Despite its bravado, Sears was willing if not eager to settle with the government under certain circumstances. In addition to the well-known commission sales claims, the EEOC case also focused on pay discrimination at Sears. An examination of the long litigation process reveals how dramatically the Sears case changed over time and the importance of those changes to the outcome and the way the case and that period is remembered.

Commissioner's Charge

In 1973, the EEOC had made Sears, along with General Motors (GM), General Electric (GE), Ford Motor Company, and International Brotherhood of Electrical Workers (IBEW), one of the five Track 1 cases, large nationwide cases involving systemic discrimination. The National Programs Division (NPD), led by David Copus, investigated these cases at the EEOC's main office in Washington, DC. On August 30, 1973, the last day of his official appointment, EEOC chair Bill Brown signed Commissioner's Charges asserting there was "reasonable cause" to find that Sears and

the other Track I companies discriminated against women and minorities in employment. The EEOC alleged that Sears had “discriminated against job applicants and employees [in all facilities] across the nation on the basis of their race, sex, and national origin” in “(1) hiring, (2) wages, (3) job classification, (4) benefits, (5) terms and conditions, (6) discharge, (7) promotion, (8) training/apprenticeship, (9) layoff, (10) exclusion, (11) qualification/testing, (12) recall, (13) seniority, (14) advertising, and [other manners including recruitment and maternity leave].”¹ In so doing, the commission consolidated hundreds of individual complaints against Sears into its own national charge, pursuant to its policy “to proceed against nationwide employers, whenever possible, by use of commissioners’ complaints that potentially cover all those injured by the employers’ alleged discriminatory hiring activities.”²

It was, perhaps, not surprising that the EEOC chose to investigate both race and sex discrimination at Sears. The commission had originally focused on race discrimination in its early days, and many attorneys, such as David Copus, had come out of the civil rights movement and saw race as their main concern. In building the AT&T case, the EEOC drew on many charges of race discrimination filed by African American workers, and on well-documented statistics of race discrimination at the company from African American researcher Phyllis Wallace.³ However, female staff members pressed the commission from within, and NOW and WE from without, to focus also on sex

¹ EEOC v. Sears, Roebuck and Co., 490 F. Supp. 1245, 1248, n. 4 (M.D. Ala. 1980); Sears, Roebuck and Co. v. EEOC et al., 581 F.2d 941, 943 (DC Cir. 1978).

² Sears, Roebuck and Co. v. EEOC et al., 581 F.2d 941, 943 (DC Cir. 1978). The commission may investigate a charge of discrimination filed by an individual employee and pursue the employer on his or her behalf. Alternatively, the commission may itself file a charge on behalf of employees who it believes have been discriminated against. Sears, Roebuck and Co. v. EEOC et al., 581 F.2d 941, 942-43 (DC Cir. 1978); 42 U.S.C. 2000e-5(b) and (f)(1); 29 CFR § 1601 (1979).

³ MacLean, Freedom is Not Enough, 131-132; Stockford, The Bellwomen, 14-15, 28.

discrimination. Although the Sears case came to be known primarily for its effect on feminists, the EEOC and Copus' NPD initially focused on race as much as sex discrimination at Sears.⁴

For individual complainants, the process, though protracted, seemed promising, at least initially. After filing her individual charge in the early 1970s, former Sears employee Marilyn Fumagalli heard back from the EEOC within a few months. The commission told her it had so many charges against Sears that it was going to combine them into one large lawsuit. Unfamiliar with the charge process, she thought it was “interesting” that the Joliet Job Discrimination Board sent her to the state fair employment practices commission, which sent her to the EEOC. The agencies pushed her complaint along; she felt like they were paying attention to it. Over the next several years, she called once in awhile to find out what was going on, and the EEOC assured her it was taking care of it. The agency kept in touch well enough to keep her contact information, but otherwise, from her point of view not much happened.⁵

After the Commissioner's Charge, the NPD spent four years investigating alleged discriminatory practices at Sears. The NPD requested information from Sears about its hiring, recruitment, promotion, and compensation policies in a wide range of facilities across the country; for example, it asked for the percentage of women and minorities in particular job categories over a number of years.⁶ The EEOC examined statistical data from facilities in twenty metropolitan areas, containing 437 facilities and more than

⁴ Several historians have noted that African Americans, including black women, were in the forefront of challenging employment discrimination and their efforts spread to other groups, including white women. MacLean, Freedom is Not Enough, section I; Cobble, The Other Women's Movement, chap. 1.

⁵ Marilyn Fumagalli, telephone interview by author, 16 June 2005.

⁶ Sears, Roebuck and Co. v. EEOC et al., 581 F.2d 941, 943-944 (DC Cir. 1978).

158,000 employees.⁷ Sears objected that it was too burdensome for it to produce so much data and the EEOC agreed to reduce the request to 161 facilities and 123,400 employees. Sears gave the EEOC computerized data on sex, race or religion, facility number, department number, job code, and full or part-time status for each sample employee up through August 31, 1973.⁸ Before the commission reached a decision about whether there was “probable cause” for a finding of discrimination, the EEOC and Sears began “predetermination” settlement discussions in November 1975. Over ten months of negotiations, “Sears compiled and gave to the EEOC detailed statistical studies covering all of its approximately 420,000 employees” on its affirmative action activities, goals, and similar issues.⁹ In total, the two sides held settlement discussions from January 1974 to September 1976.¹⁰

In its 1976 annual report, Sears notified shareholders of several pending actions against the company, including the EEOC’s Commissioner’s Charge alleging violations of the Civil Rights Act of 1964. Sears did not know whether the subsequent investigation would ultimately lead to a lawsuit and believed that the “consequences of these pending actions, the investigation and claims are not presently determinable.” Management, however, believed “the ultimate liability resulting, if any, will not have a material effect on the financial position or results of operations of Sears and its consolidated

⁷ EEOC v. Sears, Roebuck and Co., 490 F. Supp. 1245, 1248 and 1248 n. 6 (M.D. Ala. 1980). The EEOC focused on Atlanta, Boston, Chicago, Cleveland, Columbus, Ohio, Dallas/Ft. Worth, Denver/Boulder, Houston, Los Angeles, Memphis, Miami, Milwaukee, Montgomery, Newark, New Orleans, New York, Philadelphia, San Francisco/Oakland, Seattle/Everett, and Washington, DC. As of January 31, 1976, Sears had 858 retail stores in all 50 states. Another 550-plus facilities include parent, territorial, group and zone offices, catalog order plants, catalog sales offices, warehouses, and service and parts centers. EEOC v. Sears, Roebuck and Co., 490 F. Supp. 1245, 1248 (M.D. Ala. 1980).

⁸ EEOC v. Sears, Roebuck and Co., 490 F. Supp. 1245, 1248-49 (M.D. Ala. 1980).

⁹ Sears, Roebuck and Co. v. EEOC et al., 581 F.2d 941, 944 (DC Cir. 1978).

¹⁰ EEOC v. Sears, Roebuck and Co., 490 F. Supp. 1245, 1249 (M.D. Ala. 1980).

subsidiaries.”¹¹ It made the same basic statement in its 1977 annual report. In fact, each annual report during this period repeats the same claims and reassurances with regard to all of the “[v]arious legal actions and governmental proceedings” pending against the company, including “ordinary routine litigation incidental to the businesses engaged in . . . [and] allegations which are nonroutine and involve compensatory, punitive or antitrust treble damage claims in very large amounts.”¹² Nevertheless, many of Sears’ in-house attorneys expected the EEOC to find probable cause because a statistical imbalance did in fact exist.¹³

Reasonable Cause Decision

In April 1977, after a four-year investigation, the commissioners voted 2 to 1 to issue the 250-page Commission Decision 77-21, which relied on statistical evidence supplied by Sears to find “reasonable cause to believe that Sears had violated Title VII by engaging in a pattern of discrimination against women, blacks, and Spanish-surnamed Americans [at all levels] in recruitment, hiring, job assignment, training, compensation,

¹¹ Sears, Roebuck and Co., 1975 Annual Report (LexisNexis Academic, Jan. 31, 1976), ¶ 13.

¹² Sears, Roebuck and Co., 1976 Annual Report (LexisNexis Academic, Jan. 31, 1977), 14; Sears, Roebuck and Co., 1977 Annual Report (LexisNexis Academic, Jan. 31, 1978), ¶ 14; Sears, Roebuck and Co., 1981 Annual Report (LexisNexis Academic, Dec. 31, 1982), ¶ 10. See also Sears, Roebuck and Co., 1983 Annual Report (LexisNexis Academic, Dec. 31, 1983), ¶ 9; Sears, Roebuck and Co., 1984 Annual Report (LexisNexis Academic, Dec. 31, 1984), ¶ 8; Sears, Roebuck and Co., 1985 Annual Report (LexisNexis Academic, Dec. 31, 1985), ¶ 8; Sears, Roebuck and Co., 1986 Annual Report (LexisNexis Academic, Dec. 31, 1986), ¶ 8; Sears, Roebuck and Co., 1987 Annual Report (LexisNexis Academic, Dec. 31, 1987), ¶ 8; Sears, Roebuck and Co., 1988 Annual Report (LexisNexis Academic, Dec. 31, 1988), ¶ 11; Sears, Roebuck and Co., 1989 Annual Report (LexisNexis Academic, Dec. 31, 1989), ¶ 11; Sears, Roebuck and Co., 1990 Annual Report (LexisNexis Academic, Dec. 31, 1990), ¶ 14; Sears, Roebuck and Co., 1991 Annual Report (LexisNexis Academic, Dec. 31, 1991), ¶ 13; Sears, Roebuck and Co., 1992 Annual Report (LexisNexis Academic, Dec. 31, 1992), ¶ 13; and Sears, Roebuck and Co., 1993 Annual Report (LexisNexis Academic, Dec. 31, 1993), ¶ 16 (discussing antitrust claims against Allstate Insurance Corp. division).

¹³ Hymen Bear, telephone interview by author, 27 June 2005.

promotion” and other conditions of employment.¹⁴ It consolidated more than eighty individual charges and alleged almost seventy violations of Title VII, including relegating women and minorities to “lower-paying, less desirable jobs,” “failing to hire” them for jobs in certain facilities “in proportion to their rate of application,” and paying women less than men, and blacks less than whites, for the same work.¹⁵

In response, Sears turned to litigation to prevent the EEOC from releasing data it obtained during the investigation and settlement negotiations. The company convinced the court to prohibit the commission from providing such information to individual employees planning to sue the company because it would encourage private litigation of a few individual complaints at the expense of a nationwide EEOC settlement potentially affecting many. If EEOC files were open to individual parties, employers also might refuse to comply with investigations, requiring the commission to use subpoenas and go to court more often.¹⁶ This decision was particularly damaging for the “original charging parties,” individuals like Marilyn Fumagalli whose charges were consolidated into the EEOC’s case. The EEOC assured them it was pursuing their claims but later dropped them all from its own case before going to trial.¹⁷ Although they had the right to obtain

¹⁴ NOW LDEF Papers; Phyllis N. Segal, Legal Director, NOW Legal Defense and Education Fund, “Sears v. Attorney General, et al.,” February 1979, 3. Box 4, Folder: Sears v. Attorney General. Schlesinger; Sears, Roebuck and Co. v. EEOC et al., 581 F.2d 941, 944-45 (DC Cir. 1978); Keith Richburg, “Job Bias Agency Decides to Proceed in Sears Suit,” Washington Post, 14 August 1979, A7; EEOC v. Sears, Roebuck and Co., 490 F. Supp. 1245 (M.D. Ala. 1980).

¹⁵ Rosenberg Papers; “EEOC Discovers Its Investigation of Sears is So Flawed, It Should Settle and Not Sue,” Employment Relations Report 1(15), 1 August 1979, 2. Box 2, Folder 82. Schlesinger; Larry Kramer, “Justice Asks Court to Drop Suit by Sears,” Washington Post, 28 March 1979, D7; Hope Eastman, interview by author, 8 July 2004, Bethesda, Maryland; EEOC v. Sears, Roebuck and Co., 490 F. Supp. 1245, 1249 (M.D. Ala. 1980).

¹⁶ Sears, Roebuck and Co. v. EEOC et al., 581 F.2d 941, 946-47 (D.C. Cir. 1978).

¹⁷ The EEOC may either investigate an employer in response to an individual charge of discrimination or file its own charge on behalf of employees it believes have been discriminated against. Sears, Roebuck and Co. v. EEOC et al., 581 F.2d 941, 942-43 (DC Cir. 1978); 42 U.S.C. 2000e-5(b) and (f)(1); 29 CFR § 1601 (1979). The EEOC received many individual charges of discrimination against

an attorney and sue on their own, former employees would still not have access to all the data the commission had gathered on the company. The EEOC issued Letters of Determination to some of the individual charging parties, notifying them they would soon receive a copy of the Reasonable Cause decision. However, Sears got the court to prohibit the commission from releasing the decision and to prescribe that the Letters of Determination contain only a brief summary of the decision, without any of the factual information on which it was based.¹⁸

Although the decision was sealed by the court, its contents became the subject of much speculation. Someone leaked it to sympathetic women employees at the Department of Labor. NOW allegedly had a copy but did not go public with it, which might have forced Sears to settle at a time when the political atmosphere had not yet shifted to its advantage. Over the next few years parts of the EEOC's case were leaked to the press and officials "hinted" it would be "one of the most-far-reaching job discrimination lawsuits ever." By the time the commission filed suit against Sears in 1979 many of the EEOC's "secret documents," accusing the company of violating job bias laws in dozens of ways, had been leaked or otherwise made public.¹⁹

The Reasonable Cause finding required the commission to open formal conciliation talks with Sears. The two sides negotiated for fourteen months, including

Sears, as well as some filed by women's groups on behalf of Sears' workers. The commission also decided to investigate Sears on its own, influenced by factors such as the number of individual charges received, the size of the company, and the number of women workers. The EEOC filed its Commissioner's Charge in 1973 and consolidated 35 individual charges into its own broad nationwide charge in the hopes that they would bolster its case. Thus, redress for these individuals depended, at least initially, on the outcome of the EEOC's broad case.

¹⁸ *Sears, Roebuck and Co. v. EEOC et al.*, 581 F.2d 941, 942, 945 (DC Cir. 1978); NOW LDEF Papers; Phyllis N. Segal, "Sears vs. Attorney General et al.," 29 May 1979, 3. Box 4, Folder: Sears v. Attorney General. Schlesinger; Jerry Knight, "EEOC Hits Sears With Bias Suits," *Washington Post*, 23 October 1979, E1.

¹⁹ Knight, "EEOC Hits Sears With Bias Suits," E1.

twenty-eight meetings and “extensive correspondence” between October 1977 and January 1979.²⁰ Hope Eastman handled much of the negotiations on behalf of Sears. As a young lawyer in the late 1960s, Eastman worked for the ACLU in Washington, where Charles Morgan was her boss. After eight years she left the ACLU to join Morgan’s new firm, around the time he took on the Sears case.²¹ Sears and the EEOC made little progress in their negotiations, never getting close to an agreement. The commission insisted on reaching a “global” settlement covering Sears’ nationwide employment practices while the corporate giant wanted to break the allegations down into discrete instances of wrongful conduct at individual facilities, hoping to whittle away the charges.²² Sears also wanted to sever the numerous individual charges from the Commissioner’s charge, but the EEOC “refused to participate in ‘piecemeal’ settlement.”²³ At one point, the commission demanded that before conciliation could continue Sears had to: (1) respond in writing to its settlement proposal; (2) agree to an intensive negotiating schedule, and (3) settle the EEOC charge and the individual charges together. Although the parties agreed to further meetings, Sears refused to provide any

²⁰ Richburg, “Job Bias Agency Decides to Proceed in Sears Suit,” A7; EEOC v. Sears, Roebuck and Co., 650 F.2d 14, 17 (2d Cir. 1981).

²¹ Hope Eastman, interview by author, 8 July 2004, Bethesda, Maryland.

²² EEOC v. Sears, Roebuck and Co., 650 F.2d 14, 17 (2d Cir. 1981); EEOC v. Sears, Roebuck and Co., 490 F. Supp. 1245, 1249 (M.D. Ala. 1980). For example, in June 1978 negotiations began to focus on company recruitment goals, which depended on the availability of women and minority applicants in the labor force. The EEOC wanted to use nationwide labor force statistics, while Sears wanted to “create particularized goals for each facility” by using local labor statistics for that area. “Little progress was made after the June 30 meeting.” EEOC v. Sears, Roebuck and Co., 490 F. Supp. 1245, 1249 (M.D. Ala. 1980).

²³ EEOC v. Sears, Roebuck and Co., 490 F. Supp. 1245, 1249-50 (M.D. Ala. 1980).

updated data because the EEOC admittedly intended to disclose it.²⁴ Finally, in January 1979 the talks broke down with the expectation that the EEOC would go to court.²⁵

Sears' Lawsuit

Before the EEOC could file its lawsuit, however, Sears went on the offensive. The company had been unhappy with its previous law firm, and after the Reasonable Cause finding in 1977, brought in Charles Morgan's firm. Morgan argued to Sears that the federal government's regulatory laws themselves were discriminatory and suggested filing a "countersuit" that would confront the government and give it the opportunity "to do the right thing." In light of Sears' attitude toward the investigation, it was not surprising that the company favored Morgan's "creative" response over a more passive, defensive approach.²⁶ Although the company believed that settlement was okay, it really wanted to take the EEOC to trial. One company attorney believed that the commission, too, really wanted to try the case. From Sears' perspective, litigation was necessary because the EEOC made no realistic settlement offer.²⁷

On January 24, 1979, while the EEOC was deciding whether to proceed with its lawsuit, Sears filed suit in Washington, DC, alleging that the federal government was responsible for the imbalanced workforce that it forced private employers to remedy.²⁸ It

²⁴ EEOC v. Sears, Roebuck and Co., 490 F. Supp. 1245, 1249 (M.D. Ala. 1980) (citing Sears, Roebuck and Co. v. EEOC, 435 F. Supp. 751 (D.D.C. 1977)).

²⁵ Richburg, "Job Bias Agency Decides to Proceed in Sears Suit," A7. One court surmised that the commission ended negotiations because Sears focused on the accuracy of the EEOC decision while the EEOC focused on the appropriate remedy to be imposed. EEOC v. Sears, Roebuck and Co., 490 F. Supp. 1245, 1250 (M.D. Ala. 1980).

²⁶ Hope Eastman, interview by author, 8 July 2004, Bethesda, Maryland; Katz, The Big Store, 140.

²⁷ Hymen Bear, telephone interview by author, 27 June 2005.

²⁸ NOW Papers; A. Dean Swift, President of Sears, to Eleanor Smeal, 24 January 1979. Box 44, Folder 21. Schlesinger; NOW Papers; Ernest Arms, "News from Sears," Press Release, January 24, 1979, 1. Box 44, Folder 21. Schlesinger.

sued the heads of ten federal agencies, including the Attorney General, Secretary of Labor, EEOC Commissioner, Secretary of Commerce, Secretary of Health, Education, and Welfare, Secretary of Housing and Urban Development, and Director of the OFCCP, as well as the Bureau of the Census, Office of Federal Statistical Policy and Standards, and Federal Agency Council on the 1980 Census.²⁹ This lawsuit effectively ended all settlement efforts, and the EEOC terminated conciliation by letter the same day.³⁰ Sears notified shareholders that it had been “informed” on January 25, 1979 that the commission decided that conciliation efforts had been unsuccessful.³¹

Sears’ lawsuit claimed that the government passed contradictory laws that made it impossible for companies to comply with recent anti-discrimination legislation and achieve a balanced workforce.³² For example, veterans’ preference laws and the Age Discrimination in Employment Act (“ADEA”), which prohibited discrimination against individuals over forty, encouraged the hiring of white males and the single-breadwinner family unit, and created an imbalanced, non-diverse applicant pool, thus making it harder to hire more women.³³ By complying with those laws, Sears argued, it made itself liable

²⁹ Complaint, Sears, Roebuck and Co. v. Attorney General of the United States, et al., U.S. District Court for the District of Columbia, 1, 3-4; “Sears Claims the Federal Government Denies Employers Due Process,” American Bar Association Journal 65 (March 1979): 326. Sears claimed that the government violated the 5th Amendment “due process rights of businesses to enforce laws, presidential orders, regulations or guidelines in that sphere.” Ibid.

³⁰ EEOC v. Sears, Roebuck and Co., 490 F. Supp. 1245 (M.D. Ala. 1980), 1250; Staff Reporter, “EEOC’s Lawyers Question Plan to Sue Sears Over Job Bias: They Say Case Isn’t as Strong As Originally Thought and Advise Out-of-Court Pact,” The Wall Street Journal, 3 August 1979, 22; see also Lyle Denniston, “U.S. Doubts It Can Win Sears Case,” Washington Star, 2 August 1979, Sears Case Records, Barnard Women’s Center Library.

³¹ Sears, Roebuck and Co., 1978 Annual Report (LexisNexis Academic, Jan. 31, 1979), ¶ 14.

³² Sears Complaint, at 7-15; 8, ¶ VI.A.11; “Sears Claims the Federal Government Denies Employers Due Process,” ABA Journal, 326. Sears claimed that the government violated the 5th Amendment “due process rights of businesses to enforce laws, presidential orders, regulations or guidelines in that sphere.” Ibid.

³³ Sears Complaint, at 7-15; 8, ¶ VI.A.11.

for violations of discrimination under Title VII.³⁴ Sears methodically analyzed the texts of dozens of federal acts or reports – as far-flung as the Internal Revenue Code, Social Security Acts, and the Food Stamp Act of 1964 – for statements that could be taken as admissions that the government issued contradictory laws and therefore itself discriminated against certain groups.³⁵ The company also claimed that the government’s 1978 decision to reorganize several agencies and consolidate anti-discrimination efforts in the EEOC could be taken as an admission that it was guilty of failing to fight discrimination effectively.³⁶

Sears also detailed its efforts to comply with anti-discrimination laws over the prior thirteen years, at a cost of more than \$100 million.³⁷ The company claimed it had a “direct business interest” in improving the standard of living of disadvantaged citizens and creating “a qualified and skilled national labor force.”³⁸ It first instituted a formal affirmative action plan in 1968, and then in 1974 established the MAG Plan, under which each unit had to hire one member of an underrepresented group for every white male hired until the proportion equaled that in the local labor force.³⁹ In non-traditional jobs, such as women in craft jobs or men in clerical positions, managers had to hire one underrepresented group member for every five traditional group members until they reached a 20 percent goal. When the company terminated a woman or minority “in underrepresented job classifications,” it had to replace them “in kind on a one-for-one

³⁴ Sears Complaint, at 19, ¶ VI.B.111.

³⁵ Sears Complaint, at 7-8, ¶ VI.A.7; 7-9; 21-22.

³⁶ Sears Complaint, at 18-19.

³⁷ Sears Complaint, at 5 ¶ V.4.

³⁸ Sears Complaint, at 5. ¶ V.5.

³⁹ Sears Complaint, at 15, ¶ VI.A.79, 80.

basis before [making] any other assignments within that . . . classification.”⁴⁰ Managers could deviate from these requirements only with advance authorization, for example, because of an inability to find a qualified applicant after a good faith effort.⁴¹ Sears noted that the GSA approved its affirmative action and MAG plans in 1977 and sent them to the Labor Department for final approval.⁴²

Sears also tried to undercut the EEOC’s potential lawsuit against it by raising certain issues in advance. The company argued that any statistical disparity in its workplace did not prove that it failed to comply with discrimination laws because the government’s data did not accurately predict the relevant retail labor market.⁴³ The EEOC could not claim that employing a disproportionate number of women in less-rewarding, lower-paying, part-time jobs was discriminatory because the government did the same through policies encouraging flexible work schedules.⁴⁴ The company asked the court to find that the government created an unbalanced workforce; the MAG Plan complied with discrimination laws; the EEOC incorrectly interpreted the law in claiming that employing women part-time violated Title VII; any orders to compile statistics regarding compliance with discrimination laws must take Sears’ needs into consideration; statistical evidence could not be used to show compliance until the government reshaped the national workforce and produced accurate statistics; and Sears would not be obligated

⁴⁰ Sears Complaint, at 16 ¶ VI.A.80.

⁴¹ Sears Complaint, at 16 ¶ VI.A.81.

⁴² Sears Complaint, at 16 ¶ VI.A.82.

⁴³ Sears Complaint, at 25-30.

⁴⁴ Sears Complaint, at 16-18. Sears even argued these actions violated its due process rights under the Fifth Amendment to the Constitution. Sears Complaint, at 19, ¶ VI.B; 25 ¶ VII.B; 31, ¶ X.

to pay back wages until the government did so. It also asked the court to halt enforcement of the relevant laws.⁴⁵

Long on innovation but short on substance, even Sears supporters questioned the suit's legal viability.⁴⁶ It was widely believed to be a preemptive strike, a public relations ploy to distract attention and support from the EEOC's case by shifting blame for the company's discriminatory practices to the government.⁴⁷ As a civil rights attorney, Morgan had become adept at using public relations tactics to advance his cause, and transferred these techniques to the corporate world on behalf of Sears.⁴⁸ Although he protested that it was not a stunt, Morgan held a press conference at the Sears Tower in Chicago to announce the lawsuit and distributed printed booklets with the complaint to the media.⁴⁹ Others feared the lawsuit would confuse people about what appeared to be a clear case against the company.⁵⁰

Sears Chairman Edward Telling spoke at the press conference. "We believe in this country," he stated, "and because we believe, we have taken this action to cut through the impossible conflicting regulations, to force a clarification of irreconcilables, to help to refocus national goals and achievable means toward those goals." He stressed

⁴⁵ Sears Complaint, at 30-32; Arms, "News from Sears," 4.

⁴⁶ "Sears Claims the Federal Government Denies Employers Due Process," ABA Journal, 325.

⁴⁷ "Battle Lines Taking Shape in Sears Suit against U.S.," American Bar Association Journal 65 (March 1979): 326; Richburg, "Job Bias Agency Decides to Proceed in Sears Suit," A7; Knight, "EEOC Hits Sears With Bias Suits," E1; Segal, "Sears vs. Attorney General," 29 May 1979, 3.

⁴⁸ NOW Papers; Swift to Smeal, 24 January 1979. Box 44, Folder 21. Schlesinger.

⁴⁹ "Battle Lines Taking Shape in Sears Suit against U.S.," 326; Kannar, "Sears Shall Overcome," 19. Critics attacked the company for "trying to set itself up as an equal employment advocate" by meeting the Reverend Jesse Jackson, a Chicago native, to garner support for its case, "instead of the foot-dragger it apparently is." Kannar, "Sears Shall Overcome," 19, 21; Steven Brill, "Sears Suit Stumbles: A Classic Case of Bad Lawyering -- and a Public Relations Fiasco," Esquire, 24 April 1979, 14. Jackson compared Sears' lawsuit to southern resistance to desegregation and accused it of going "to the jugular of affirmative action." Katz, 140.

⁵⁰ Kannar, "Sears Shall Overcome," 20.

that Sears had always been “committed to equal employment opportunity” and had a long history of meeting and exceeding earlier requirements such as the veterans acts of World War II, the Korean War, and the Vietnam War, which had “required affirmative action employment programs for veterans.” He asserted that Sears filed suit “only as a result of long and careful deliberation in which we find we have no alternative but the courts in seeking an end to a number of government actions and inactions” that restricted job opportunities for women and minorities and created conflicting compliance requirements that led to discrimination against all workers. Telling claimed that Sears had increased minority employment from 8.7 to 19.9 percent between 1965 and 1977, including an increase in officials and managers from 1.4 to 10.5 percent. He claimed the government had simply shifted its priorities over the years, “from preference for veterans after World War II to preference for minorities and women in the ‘60s,” and that Sears had “always diligently followed” its lead “through each changing phase.”⁵¹

Sears also made public a chart showing changes in female employment in several job categories between 1966 and 1978. The percentage of women in the Officials and Managers category had gone from 20 to 36 percent; in Professionals from 19.2 to 59.2 percent; Technicians from 48.1 to 50.6 percent; Sales Workers (without distinction between commission and non-commission sales), from 56.9 to 64.9 percent; Craft Workers, from 3.8 to 8.1 percent; Operatives, from 12.0 to 22.4 percent; Service Workers, from 32.3 to 44.4 percent; and all categories, from 50.7 to 56.7 percent.⁵² Nevertheless, many of these increases were either insignificant or too general to provide

⁵¹ Remarks by Mr. Telling, 2-5.

⁵² Arms, “News from Sears.” The percentage of women in the Laborers category decreased, from 34.3 to 30.7 percent.

adequate information. For example, the increased number of women Officials and Managers did not reflect whether most were managers in name only, since the category could include low-level supervisors without any employees reporting to them.⁵³

Sears also released a “Summary of Affirmative Action Progress at Sears – 1965 Through 1977,” which recounted its equal employment opportunity efforts since passage of Title VII. In 1968 it established a Department of Equal Opportunity in its National Personnel Department and appointed a full-time Director of Equal Opportunity reporting to the Vice President of Personnel. Later that year it issued a “Guide for the Development of an Affirmative Action Program” to all facilities, and territorial executives made follow-up visits “to provide guidance and assistance in developing Affirmative Action Programs in each unit.”⁵⁴ In 1970 it issued each unit a “comprehensive Affirmative Action manual” with recordkeeping and reporting procedures in order to “insure uniformity of procedures and progress.” Goals and timetables were established for each facility based on the local labor market. In 1971, the company held a two-and-a-half day meeting with fifty top suppliers, planned and led in part by EEOC officials, to discuss “their legal obligations” and “Sears concern that its service of supply not be interrupted by compliance failures.” The company stressed that these changes were a matter of business necessity that would be measured as any other business factors, such as sales and profits. In May 1973, four months before the EEOC issued its Commissioner’s Charge, Chairman Wood called an equal employment

⁵³ NOW Papers; “Summary of Affirmative Action Progress at Sears – 1965 Through 1977,” n.d., 4 (released by Sears with press release and other materials regarding its lawsuit). Box 44, Folder 21. Schlesinger.

⁵⁴ “Summary of Affirmative Action Progress at Sears,” 2; Remarks by Mr. Telling, 4.

opportunity meeting of top officers and managers which resulted in the 1974 MAG Plan.⁵⁵

Even while publicizing its positive role in fighting discrimination, however, Sears acknowledged that the “use of the term ‘mandatory’ [in the MAG plan] cannot be taken literally,” and that although the goal was to fill 50 percent of underrepresented job category openings with women and minorities, there were several commonly-used loopholes. A manager could get approval to deviate from the plan if he or she was unable to find a qualified applicant “needed to move the facility toward its long range goals.” Exceptions also could be made for candidates with “obviously superior qualifications,” without any recognition that they were more likely to be white males. Sears also touted its willingness to publish its EEO data in its 1973 Annual Report, without mentioning that it first went to court to resist turning over its employment data. The company portrayed itself as working hard toward affirmative action but needing “[a]n equal commitment by the government” to fulfill its goals.⁵⁶

Sears made an attempt to mollify women’s groups, even though they had not been directly involved in the case for several years. Sears’ President A. Dean Swift even sent information describing its action and “review[ing its equal employment opportunity] progress to date” to NOW President Eleanor Smeal “[b]ecause of your interest in equal employment opportunity.” He claimed, “Sears Affirmative Action Program has been cited as one of the best in the nation and I want to assure you that we will continue to pursue a leadership role in this effort.”⁵⁷ However, in a sign that perhaps Sears had not

⁵⁵ “Summary of Affirmative Action Progress at Sears,” 3, 5.

⁵⁶ “Summary of Affirmative Action Progress at Sears,” 6, 8.

⁵⁷ NOW Papers; Swift to Smeal, 24 January 1979. Box 44, Folder 21. Schlesinger.

improved as much as it claimed, the media coverage of the lawsuit attracted the attention of some women employees. One woman contacted NOW's Legal Defense and Education Fund (NOW LDEF) after hearing about the lawsuit. She noted that Sears hired her in the hardware department of its Iowa City store in September 1977 and hired three or four men after her, but fired her in December because the company had hired too many people and she planned to take pre-approved vacation time over Christmas. "If this could help your case you are free to use it," she noted, "I'd like to stop this unfair treatment too!"⁵⁸

Sears' efforts failed to convince feminists. NOW LDEF published an article analyzing Sears' complaint for members. Phyllis Segal noted, "while asserting that the government should do more, Sears deviously argues that it and other private employers should be required for the time being to do less." Segal called the complaint that the government's failures should excuse employers from complying with discrimination laws "disturbingly clever" for using research done by civil rights and women's groups and the "government's own critical self-analysis" to criticize the government's lack of progress. Sears co-opted the argument of women's groups that the government had failed to effectively implement and enforce equal employment opportunity to excuse its own shortcomings. Segal explained that if Sears was truly concerned with the imbalanced workforce it could have done something to improve it, such as challenging absolute veterans' preference laws or working to ratify the ERA, rather than file this lawsuit. Moreover, Sears' claim of significant progress in equal employment opportunity goals

⁵⁸ NOW LDEF Papers; Mary Reinman to NOW Legal Defense Fund, n.d. Box 4, Folder: Sears v. Attorney General. Schlesinger.

was “difficult to reconcile” with the EEOC’s 1977 reasonable cause finding.⁵⁹ She concluded, “The rights of individuals must not be trammelled in litigation that . . . seeks to shift blame and responsibility from industry to government – when in the end both institutions must share responsibility for today’s inequities and for the affirmative action needed for future fairness and justice.”⁶⁰ Even Aileen Hernandez, then heading Hernandez Associates, Urban Consultants and coordinating affirmative action workshops for Sears managers, appeared “upset by the lawsuit.” At the end of January she spoke with NOW Executive Vice President Muriel Fox and sent materials to Segal asking whether NOW LDEF had decided to “[get] involved in this.”⁶¹ Although Hernandez said Morgan “did an excellent, ‘imaginative’ job in the lawsuit and it will be hard to fight,” according to Fox she thought “women’s organizations should get together and decide how to handle” the lawsuit.⁶²

Sears’ lawsuit spurred some working women’s groups to return to direct action against the company. 9 to 5, the Organization for Women Office Workers, organized a protest in front of the Sears store in Cambridge, Massachusetts.⁶³ Members distributed flyers and collected signatures for a petition urging the company to drop its suit against

⁵⁹ Segal, “Sears v. Attorney General, et al.,” February 1979, 1-3.

⁶⁰ Segal, “Sears v. Attorney General, et al.,” February 1979, 5. NOW LDEF even researched possible bases for, and consequences of, intervening in Sears’ lawsuit. NOW LDEF Papers; Sue Ellen Dodell, “NOW’s Right to Intervene or to File an Amicus Curiae Brief in the Sears D.C. Suit,” n.d. Box 4, Folder: Sears v. Attorney General. Schlesinger.

⁶¹ NOW LDEF Papers; Aileen C. Hernandez, Hernandez Associates, Urban Consultants, to Phyllis Segal, 31 January 1979 (enclosing materials related to Sears’ suit). Schlesinger.

⁶² NOW LDEF Papers; Muriel Fox to Phyllis Segal, n.d. (regarding telephone conversation with Aileen Hernandez and Sears’ lawsuit; telephone numbers of Hernandez handwritten at top). Schlesinger.

⁶³ 9 to 5 Papers; “Equal Employment at Sears?: The Real Story Behind the Sears Law Suit,” 1979. Schlesinger; 9 to 5 Papers; Judith McCullough to Captain Cosack, Cambridge Police, 28 March 1979. Schlesinger; 9 to 5 Papers; Conrad C. Fagone, Commissioner, City of Cambridge Public Works Department, to Judy McCullough, 6 April 1979. Schlesinger.

the government, “cooperate with the [EEOC] and settle the outstanding complaint,” pay \$20 million in back wages, and “adopt an affirmative action program.”⁶⁴ Staff Director Ellen Cassedy wrote to NOW’s Action Center in Washington, DC for guidance, proposing simultaneous demonstrations at stores in several cities. Although she hoped to draw attention to Sears’ opposition to affirmative action, thereby increasing the cost of its lawsuit and discouraging other employers from bringing similar litigation, Cassedy worried that it might give the company “a platform they otherwise wouldn’t have.”⁶⁵ The group also worried that Sears’ lawsuit would confuse people about what they saw as the EEOC’s solid case against the company, and distributed flyers proclaiming “Equal Employment at Sears?: The Real Story Behind the Sears Law Suit.”⁶⁶

The Justice Department responded to Sears’ claims by asking the court to dismiss the complaint, which it called a “political essay, not a lawsuit.” It refused to comment on the merits of the allegations, arguing they could be addressed when and if they were raised by the EEOC. In the meantime, a court action could not “be founded upon ‘if’s and ‘maybe’s.’” The Justice Department argued that Sears failed to allege an actual “case or controversy” as required by the Constitution because it did not raise issues from a specific case against the company, but rather “abstract questions of policy, traditionally committed” to other branches of the government. In essence, it argued that Sears had no

⁶⁴ 9 to 5 Papers; “9 to 5 Organization for Women Office Workers, Petition to Sears.” Schlesinger.

⁶⁵ 9 to 5 Papers; Ellen Cassedy, Staff Director, 9 to 5, to Arlie Scott, NOW Action Center, 16 March 1979. Schlesinger.

⁶⁶ 9 to 5 Papers; “Equal Employment at Sears?.” Schlesinger. See also Phyllis Segal, “Sears Versus Attorney General, Et Al.: Right War, Wrong Tactics,” National NOW Times, March 1979.

cause of action until the EEOC took enforcement action against it; the company could not litigate the case in advance.⁶⁷

In May 1979, Judge June Green dismissed Sears' lawsuit for failing "to present a justiciable case or controversy."⁶⁸ As the Justice Department had argued, since the EEOC had not filed any suit against Sears there was no "adverse legal relationship" for the court to address, and it could not simply render "advisory opinions" or decide "hypothetical questions" on "speculative or conjectural" (threats of) harm.⁶⁹ The company failed to demonstrate any "causal connection" between the government's actions and the makeup of the workforce "in light of . . . many geographical, sociological and historical factors that contribute" to it. Sears' fear that the government would use statistics to claim that the company did not comply with discrimination laws was also "a vague allegation of potential future injury that does not meet the criteria [for] establishing a case or controversy." In sum, the court ruled that if the EEOC sued Sears for violating Title VII, the company would have "ample and suitable opportunity" to defend itself then.⁷⁰

Not surprisingly, Sears was unhappy with the decision. Chairman Telling pledged that Sears would no longer do business with the federal government despite its history of "loaning executives to the government during time of crisis, . . . testing government issue in its labs, and finding boots, tents, and sleeping bags for troops during

⁶⁷ Kramer, "Justice Asks Court to Drop Suit by Sears," D7.

⁶⁸ NOW LDEF Papers; Judge June Green, Memorandum Opinion, Sears, Roebuck and Co. v. Attorney General of the United States, et al., U.S. District Court for the District of Columbia, May 15, 1979. Box 4, Folder: Sears v. Attorney General, at 1. Schlesinger.

⁶⁹ Judge Green, Memorandum Opinion, at 2 (internal citations omitted).

⁷⁰ Judge Green, Memorandum Opinion, at 2, n. 1. (internal citations omitted) The court refused to consider Sears' argument that the Commissioner's charge deprived it of due process because it was a pending matter.

times of war.” Telling knew he could settle the EEOC case quietly as AT&T had done, but was unwilling to acquiesce. He “never liked the fact that you had to be wealthy and powerful to protect yourself in America, but . . . thought that if you did happen to find yourself in control of wealth and power, it was your duty to fight it out.”⁷¹ Finally, Sears’ leaders continued to shift the blame by claiming that while upper-level management was pushing for improvements in employment policies, regional managers remained outside their control.⁷²

Although Sears’ lawsuit was not taken very seriously by the media or the court, it ultimately had some significant impact. Before its filing, there seemed to be little doubt that Sears would lose to the EEOC. One writer assumed “Morgan’s diversionary lawsuit will pay for itself if it achieves even a small reduction in the ultimate back pay award Sears will have to agree to.”⁷³ In fact, the suit drew more press coverage than had been dedicated to the case as a whole and signaled that Sears would not give in to the EEOC as had other large corporations. Indeed, Sears responded more aggressively than anticipated. Once it dug in and decided to fight, it was hard for the outpaced EEOC to win. Any delay appeared to work in Sears’ favor, exhausting its opponents’ resources and waiting long enough that political change ensured a more favorable outcome.⁷⁴ Sears was able to cultivate and capitalize on a growing sense that times had changed and the EEOC’s case against it was no longer viable.

⁷¹ Katz, 140.

⁷² Katz, generally.

⁷³ Kannar, “Sears Shall Overcome,” 21.

⁷⁴ Anne Ladky, telephone interview by author, 20 March 2002.

The EEOC on the Defensive

After Sears' suit was dismissed, observers expected the "EEOC would move quickly to bring its suit" against the company. On August 1, 1979, however, disclosures suggested that the EEOC had begun to doubt its case, spurring Sears to resist even further and challenging the EEOC to proceed.⁷⁵ The Employment Relations Report disclosed that "[i]n a startling reversal of position," the EEOC was "backing away" from plans to file its nationwide discrimination suit against Sears because its "top lawyers" concluded that the government's six-year investigation into the company's employment practices and the Reasonable Cause decision (Decision No. 77-21) was full of "errors" and "flaws." Allegedly the case was not as strong as commissioners believed when it unanimously approved the Reasonable Cause finding and authorized the lawsuit in 1977.⁷⁶ Instead, the government supposedly planned to reopen negotiations with Sears in hope of settling the case "without having to resort to litigation."

The management-friendly article also reported the contents of a "series of confidential memos" that the EEOC's Office of General Counsel prepared for the commissioners. The memos allegedly revealed that some EEOC lawyers thought the evidence against Sears was too weak to pursue the broad litigation recommended in Decision No. 77-21. In a June 11, 1979 memo EEOC Acting General Counsel Issie L. Jenkins admitted to the commissioners that "Sears has been in the vanguard of voluntary affirmative action since 1974 and, with respect to minorities, possibly as early as 1969."

⁷⁵ Staff Reporter, "EEOC's Lawyers Question Plan to Sue Sears Over Job Bias," 22; see also Denniston, "U.S. Doubts It Can Win Sears Case."

⁷⁶ "EEOC Discovers Its Investigation of Sears is So Flawed, It Should Settle and Not Sue," 2; see also Knight, "EEOC Hits Sears With Bias Suits," E1; Staff Reporter, "EEOC's Lawyers Question Plan to Sue Sears Over Job Bias," 22; see also Denniston, "U.S. Doubts It Can Win Sears Case."

This allegedly undermined Decision No. 77-21's finding that Sears had engaged in a nationwide pattern of discrimination against women and minorities in virtually all aspects of employment. In a June 29 memo Jenkins "stressed . . . the critical issue in our prosecution of the Sears' litigation is our ability to demonstrate a pattern of discrimination continuing into the [relevant] period prior to the filing of the Commissioner's charge."⁷⁷ Jenkins recommended preparing the suit with no intent to file, but rather to use it to bargain for an out-of-court settlement: "A settlement based essentially on matters on which the parties were near to agreement will provide a superior remedy to any which we (based on a more complete understanding of the merits of the case than the decision provided) believe a court is likely to award."⁷⁸ The attorneys advised the commissioners to try again to settle with Sears: "pre-suit settlement . . . is likely to get speedier relief for those class members who have been waiting since 1973 or earlier for resolution of their charges."⁷⁹

Jenkins also expressed concern about the EEOC's enforcement image: "A settlement of this case on a reasonable basis, with an acknowledgement of Sears' progress, if and where appropriate, should do as much to enhance our enforcement posture than the immediate filing of suit with the prospects of three or more years before we are likely to get disposition accompanied by some uncertainty of the strength of our case." Jenkins warned that if the commission filed lawsuits "much narrower in scope"

⁷⁷ "EEOC Discovers Its Investigation of Sears is So Flawed, It Should Settle and Not Sue," 2-3; Richburg, "Job Bias Agency Decides to Proceed in Sears Suit," A7.

⁷⁸ Richburg, "Job Bias Agency Decides to Proceed in Sears Suit," A7; "EEOC Discovers Its Investigation of Sears is So Flawed, It Should Settle and Not Sue," 2-3.

⁷⁹ "EEOC Discovers Its Investigation of Sears is So Flawed, It Should Settle and Not Sue," 3; Staff Reporter, "EEOC's Lawyers Question Plan to Sue Sears Over Job Bias," 22; see also Denniston, "U.S. Doubts It Can Win Sears Case."

than the Reasonable Cause decision Sears could argue that it had negotiated in “bad faith.” The EEOC might be accused of harassing the company for insisting on a broad settlement and refusing Sears’ request to negotiate issues separately, but then filing suit on only a limited number of issues. If the court found the EEOC’s suits were “vexatious,” it would cause even greater harm to its efforts to “demonstrate[e] a strong enforcement posture” than the Court requiring the commission to pay “substantial attorneys’ fees.”⁸⁰

Despite these leaks, some EEOC sources claimed that another attorney memo took the opposite view – that the case was strong and should be pursued – and that Jenkins’ memo received attention only because it was leaked to the press.⁸¹ Subsequent memos advised the commission to “disregard” the June ones. Regardless of what the EEOC truly believed about its case, the leaked memos had a strong effect on Sears. It probably made the company believe it could reject settlement, allowed it to publicly portray the EEOC as pursuing a losing case, and gave it further hope of winning in court. The new memos “appear[ed] to return the advantage to Sears in its long struggle with the EEOC.”⁸² In response to the EEOC’s later decision to file suit, Morgan said, “Folks sue every day. Suing is one thing – winning is what matters.”⁸³

If settlement did not succeed, attorneys in the General Counsel’s Office advised the commission to break up the case into smaller pieces and bring “scaled-down race and

⁸⁰ “EEOC Discovers Its Investigation of Sears is So Flawed, It Should Settle and Not Sue,” 3-5; Staff Reporter, “EEOC’s Lawyers Question Plan to Sue Sears Over Job Bias,” 22; see also Denniston, “U.S. Doubts It Can Win Sears Case.”

⁸¹ Richburg, “Job Bias Agency Decides to Proceed in Sears Suit,” A7.

⁸² Staff Reporter, “EEOC’s Lawyers Question Plan to Sue Sears Over Job Bias,” 22; see also Denniston, “U.S. Doubts It Can Win Sears Case.”

⁸³ Richburg, “Job Bias Agency Decides to Proceed in Sears Suit,” A7.

sex-discrimination charges in separate suits.”⁸⁴ The new suits would be framed more narrowly than recommended in the Reasonable Cause decision. One nationwide sex discrimination suit should allege bias in recruitment, hiring, selection, assignment, training, transfer, promotion, wages, benefits, and terms and conditions of employment. Another nationwide suit should allege discriminatory failure to promote minorities. Other separate race bias suits should allege discriminatory hiring and layoff policies in Sears’ southern territory and discriminatory hiring policies in certain New York City and Washington, DC stores.⁸⁵

The articles also argued that the memos made “astonishing admissions” about the weakness of the EEOC’s separate race and sex claims. The commission claimed that Sears “maintained a nationwide pattern of exclusion of minorities from management positions continuing at least until July 24, 1969” and that it discriminated in hiring and layoff of minorities in its southern territory and certain stores in New York and Washington, D.C. However, a June 8 memo supposedly admitted that “Sears had ceased discriminating against minorities and had also implemented substantial accelerated affirmative action programs some years before” the Commissioner’s charge. The memo criticized the Reasonable Cause decision for “a number of failings in [its] analysis,” most notably “its reliance on examination of profiles in Sears’ sample workforce at various points in time, usually 1973, 1974, or 1976, without taking into account the fact that Sears’ practices had been changing dramatically since 1969.” It concluded, “[t]here does

⁸⁴ Staff Reporter, “EEOC’s Lawyers Question Plan to Sue Sears Over Job Bias,” 22 [quoting article, not memo]; see also Denniston, “U.S. Doubts It Can Win Sears Case.”

⁸⁵ “EEOC Discovers Its Investigation of Sears is So Flawed, It Should Settle and Not Sue,” 3.

not appear to be much in the way of discrimination against minorities for which we can both prevail and obtain meaningful relief.”⁸⁶

In contrast, the EEOC believed it had a much stronger sex discrimination case against Sears, although it too was “considerably narrower” than contemplated by the Reasonable Cause decision “that guided EEOC during . . . conciliation talks.” The commission claimed that Sears excluded women from the better, higher-paying jobs as a result of discriminatory practices in recruitment, hiring, and promotion. A memo on the sex discrimination claims conceded that the MAG plan, under which women and minorities received 50-70 percent of all vacancies, was “stringent” and had improved employment patterns since it was established in 1974. Like the race memo, it attached a comparison chart of Sears’ EEO-1 reports for 1969, 1973, and 1978 as evidence of progress. For example, the percentage of women “Officials and Managers” rose from 19.7 in February 1969 to 36.1 in January 1978. Although it was difficult to “fully evaluate” progress under MAG, its existence could make it impossible to prove most discrimination after 1973. The “absence of discrimination” after 1973 also could make a court less receptive to the government’s arguments of pre-1974 discrimination and any claims for monetary relief. The General Counsel’s Office recommended not pursuing a number of sex discrimination findings from the Reasonable Cause decision, including that: (1) women were disproportionately recruited for part-time jobs, in view of “the undeniable fact that a far greater proportion of the female work force than the male work force is interested in part-time work”; (2) men were excluded from clerical positions, because it would be hard to prove; (3) failure to pay part-time non-commission

⁸⁶ “EEOC Discovers Its Investigation of Sears is So Flawed, It Should Settle and Not Sue,” 3, 4; Staff Reporter, “EEOC’s Lawyers Question Plan to Sue Sears Over Job Bias,” 22; see also Denniston, “U.S. Doubts It Can Win Sears Case.”

salesworkers the same one percent sales commission as regular non-commission salesworkers constituted pay discrimination, because the commission could not prove the high female composition of part-time salesworkers resulted from discrimination; and (4) Sears' policy of offering terminated employees the opportunity to convert their group life insurance to an individual policy under which men generally paid higher premiums than women was unlawful sex discrimination.⁸⁷ By the time the EEOC went to trial, the original claims had been whittled down to only a few.⁸⁸

The Employment Relations Report article describing the leaks portrayed the EEOC's situation as dire: "Incredibly, they (attorneys) now have discovered the decision that had shaped EEOC's position in negotiations with Sears is fraught with 'errors' and 'flaws'." It called the memos "a startling reversal of position," implying it was quite a shock to everyone. It said the revelations about the weakness of the commission's case "raise serious questions about [its] ability to litigate on its own a nationwide suit against a large company" and "threaten [its] credibility as to whether it was needlessly harassing, or bargaining in good faith" during the six-year investigation and fourteen months of negotiations with Sears. Finally, the article claimed the commission was now faced "with what they believe is a losing case."⁸⁹

The EEOC Lawsuit

Despite Jenkins' recommendations, and amidst continuing settlement discussions, the commission debated whether to move forward. In August 1979, the commission voted to "proceed with its long-deferred job discrimination suit" against Sears. The

⁸⁷ "EEOC Discovers Its Investigation of Sears is So Flawed, It Should Settle and Not Sue," 4.

⁸⁸ Katz, 362.

⁸⁹ "EEOC Discovers Its Investigation of Sears is So Flawed, It Should Settle and Not Sue," 2-3.

commissioners left it to general counsel Leroy Clark to decide whether to bring “the one nationwide suit originally intended, or a series of smaller suits against specific Sears outlets,” but urged him to proceed quickly. Before she left the commission, Chair Eleanor Holmes Norton decided to move forward with the lawsuit.⁹⁰ On October 22, 1979, the EEOC filed five separate lawsuits against Sears based upon the Commissioner’s Charge.⁹¹ Four lawsuits alleged race discrimination at regional facilities across the country, including a pattern and practice of discrimination against blacks and Hispanics at Sears’ Brooklyn and White Plains facilities (in the U.S. District Court for the Southern District of New York) and discrimination against blacks in Montgomery, Alabama (Middle District of Alabama), Atlanta (Southern District of Georgia), and Memphis (Western District of Tennessee). The charges were much narrower than the Reasonable Cause decision, which alleged “patterns of sex, race and national origin discrimination at all levels” of the company, and did not contain a nationwide charge of race discrimination. The EEOC also filed a fifth lawsuit, a nationwide sex discrimination claim in the Northern District of Illinois, accusing Sears of discriminating against women in pay, recruiting, hiring, transferring, training, promotions, and job assignment. It sought an order for Sears to end discriminatory practices, set up a new equal employment opportunity program for women “which eradicates the effects of its past and present unlawful employment practices,” and provide back pay for women who were discriminated against.⁹²

⁹⁰ Richburg, “Job Bias Agency Decides to Proceed in Sears Suit,” A7; James Scanlan, interview by author, 8 July 2004, Washington, DC.

⁹¹ EEOC v. Sears, Roebuck and Co., 650 F.2d 14, 17 (2d Cir. 1981).

⁹² Knight, “EEOC Hits Sears With Bias Suits,” E1; EEOC v. Sears, Roebuck and Co., 650 F.2d 14, 16 (2d Cir. 1981); EEOC v. Sears, Roebuck & Co., No. 79-1957A, 1980 U.S. Dist. LEXIS 11128, at *1 (N.D. Ga. Jan. 7 1980).

Sears replied that it “welcome[d] the opportunity for a fair hearing before the courts, something we have not had in six years of dealing with the staff of the EEOC.”⁹³ Sears fought each of the five cases with similar strategies, and immediately launched legal attacks on several levels. It issued virtually identical interrogatories and requests for production of documents in each case, overwhelming the commission by having to respond to discovery requests and produce documents in several courts at once.⁹⁴ Not surprisingly, the different courts made contradictory rulings, creating more confusion. Thus, before the case ever got to trial the two sides spent many years fighting over a variety of procedural issues.

One of the first issues the parties had to deal with was the scope of the case. Soon after the suits were filed, Sears filed a series of motions for summary judgment asking the court to dismiss the complaints before making any factual findings. In May 1980 the court in Alabama agreed to dismiss Sears’ race case, and the New York court did the same the next month.⁹⁵ In September the Georgia court denied Sears’ request to delay its case until it learned the results of an appeal of issues that the various courts had disagreed on because it would not “substantially alter” the litigation or help bring about a resolution in the case.⁹⁶ Eventually, the commission sought to consolidate the five cases in the Northern District of Illinois, where the largest – and the lone sex discrimination case – was pending. It asked the judges in each case to delay the discovery process until the

⁹³ Knight, “EEOC Hits Sears With Bias Suits,” E1.

⁹⁴ EEOC v. Sears, Roebuck & Co., No. 79-1957A, 1980 U.S. Dist. LEXIS 11128, at *2 (N.D. Ga. Jan. 7 1980).

⁹⁵ EEOC v. Sears, Roebuck & Co., Civil Action No. 79-1957A, 1980 U.S. Dist. LEXIS 16068 (N.D. Ga. Sept. 9, 1980); EEOC v. Sears, Roebuck & Co., No. 79-507-N, 1980 U.S. Dist. LEXIS 11130, at *2 (M.D. Ala. Feb. 28, 1980).

⁹⁶ EEOC v. Sears, Roebuck & Co., Civil Action No. 79-1957A, 1980 U.S. Dist. LEXIS 16068, at *11-15 (N.D. Ga. Sept. 9, 1980).

consolidation decision in order to avoid conflicting discovery rulings. For example, if one court ordered the commission to produce certain documents Sears would in effect have access to those documents for all the cases, regardless of what the other judges ruled, and thus would benefit from inconsistent discovery decisions. At least one court, in Charles Morgan's home state of Alabama, denied the commission's request in January 1980, saying it had chosen to file separate suits, arguably in an attempt to find the most sympathetic judge, and thus should have to deal with the consequences.⁹⁷ A few days later, the court in Georgia found otherwise and stayed discovery pending the consolidation decision.⁹⁸ It relied on the fact that the judge in the Northern District of Illinois case believed that staying discovery would serve the interest of "efficient and uniform resolution." Since all the documents involved were from the commission's files in Washington, DC and the commission's objections applied to all the lawsuits, delaying the discovery process would help avoid "repetition and the possibility of inconsistent rulings."⁹⁹

The two sides also argued over which documents the court could consider in deciding whether to dismiss the cases. In February 1980, the Alabama court permitted the commission to rely on reports with raw statistical data on the number of black and white job applicants, but not on anything that contained Sears' self-critical analysis on how it was complying with regulations. It also allowed the commission to rely on the "goal" percentages of black employees that particular stores wanted to meet, which Sears

⁹⁷ EEOC v. Sears, Roebuck & Co., No. 79-507-N, 1980 U.S. Dist. LEXIS 11129, at *2-3 (M.D. Ala. Jan. 2, 1980); see also EEOC v. Sears, Roebuck and Co., 490 F. Supp. 1245, 1254 (M.D. Ala. 1980).

⁹⁸ EEOC v. Sears, Roebuck & Co., No. 79-1957A, 1980 U.S. Dist. LEXIS 11128, at *1-2, 4 (N.D. Ga. Jan. 7, 1980).

⁹⁹ EEOC v. Sears, Roebuck & Co., No. 79-1957A, 1980 U.S. Dist. LEXIS 11128, at *2-3 (N.D. Ga. Jan. 7, 1980).

used “to support its contention that it . . . set very high goals for its stores.” It rejected Sears’ objections that allowing such raw data would discourage other employers from keeping records on the number of black and white applicants.¹⁰⁰ Although the EEOC initially requested information on 400 Sears facilities during its investigation, it later reduced that number to 168. Its lawsuits against the company were based on alleged discrimination at some of those facilities. In September 1980, the Georgia court ordered Sears to turn over additional statistical data on sex, even though it was a race case, as such data allowed more accurate statistical analysis in determining the number of black men and black women hired.¹⁰¹ Although the commission may have been trying to obtain surreptitiously information it needed in the sex case, the court still granted it a right to a broad range of job history information (sex, social security numbers, job history, and time card/management trainee status), even for a hiring case, and limited it only to a post-August 1, 1971 time period.¹⁰²

Sears also tried to get the EEOC’s cases dismissed on a technical procedural issue, arguing that the Commissioner’s Charge, which formed the basis of the lawsuits, was invalid because it was not “verified” at the time it was signed by Brown, the head of the agency at the time. Although he verified it eleven days later, by then Brown’s official term (and arguably his authority) as chair of the commission had ended and he was simply the acting chair until Nixon’s new nominee, John Powell, was confirmed in December 1973. The courts engaged in a complicated discussion of whether Brown was

¹⁰⁰ EEOC v. Sears, Roebuck & Co., No. 79-507-N, 1980 U.S. Dist. LEXIS 11130, at *1-2 (M.D. Ala. Feb. 28, 1980). (citations omitted)

¹⁰¹ EEOC v. Sears, Roebuck & Co., Civil Action No. 79-1957A, 1980 U.S. Dist. LEXIS 16068, at *15, 18-19 (N.D. Ga. Sept. 9, 1980).

¹⁰² EEOC v. Sears, Roebuck & Co., Civil Action No. 79-1957A, 1980 U.S. Dist. LEXIS 16068, at *20, 22-24 (N.D. Ga. Sept. 9, 1980).

a *de facto* officer or *de jure* commissioner at the time. It considered issues such as what authority he had to issue the charge; what he knew about his authority and whether he knew he had not been reappointed; how it appeared to others and whether they knew he had not been reappointed; and whether the verification problem even mattered at all since it was corrected within a short period of time.

In March 1980, the Northern District of Georgia refused to dismiss the case for improper verification, in part because there was no harm to Sears from the delay or from Brown's lack of authority. It rejected Sears' argument that it needed to be protected from baseless charges or harassment, since Brown clearly had extensive knowledge of the bases for the discrimination charges against Sears.¹⁰³ The Illinois court agreed that the verification issue did not require dismissal of the case.¹⁰⁴ In June, however the Alabama court disagreed, finding that Sears was prejudiced by the failure to verify during the Commissioner's term. The EEOC made broad nationwide allegations which required the company to go to a great deal of expense to investigate and defend itself at each facility. In the end, however, the EEOC brought only a limited suit against the Montgomery store. Thus, the court ruled that Sears deserved protection from such conduct: "This Court can think of no better example of a situation where the requirement of verification should be more vigorously adhered to in order to prevent the EEOC from issuing across-the-board, catchall pattern or practice charges against nation-wide employers only to turn around and bring suit against one particular facility on limited bases and issues of discrimination." Thus, the court dismissed the complaint against the Montgomery store

¹⁰³ EEOC v. Sears, Roebuck & Co., Civil Action No. 79-1957A, 1980 U.S. Dist. LEXIS 11097, at *3, 9-12, 14 (N.D. Ga. March 14, 1980).

¹⁰⁴ EEOC v. Sears, Roebuck and Co., 650 F.2d 14, 16-17 (2d Cir. 1981).

in part for failure to comply with the verification requirement.¹⁰⁵ The New York court agreed, dismissing its case in part based on improper verification, although its decision was reversed on appeal.¹⁰⁶

Sears also argued that the cases should be dismissed because the EEOC refused to conciliate in good faith before bringing the lawsuits. When Congress passed Title VII and created the EEOC, it required the commission to try to settle complaints informally first in order to protect individuals.¹⁰⁷ Sears complained that by insisting on a nationwide settlement the EEOC had failed to negotiate in good faith on the specific instances of discrimination at certain facilities that later formed the bases of its lawsuits.¹⁰⁸ In March 1980, the Georgia Court found that the EEOC did not demonstrate bad faith by aggregating all claims nationwide rather than negotiating on individual charges at specific facilities. The twenty-eight conciliation meetings over a thirteen-month period was sufficient evidence that the EEOC participated in good faith. The court noted that “in creating the negotiation and settlement scheme,” Congress intended for the EEOC to “try to win compliance with Title VII requirements ‘with respect to all employees of a given company’ rather than rely on a piecemeal approach.”¹⁰⁹

The Alabama court found otherwise. In June 1980 it noted that the Montgomery retail store was one of 161 facilities that the EEOC investigated, using statistical data

¹⁰⁵ EEOC v. Sears, Roebuck and Co., 490 F. Supp. 1245, 1253 (M.D. Ala. 1980); EEOC v. Sears, Roebuck and Co., 650 F.2d 14, 17 (2d Cir. 1981).

¹⁰⁶ Equal Employment Opportunity Commission v. Sears, Roebuck and Co., No. 79 Civ. 5708 (KTD), 1980 U.S. Dist. LEXIS 11989, at *1-3 (S.D.N.Y., June 16, 1980); EEOC v. Sears, Roebuck and Co., 650 F.2d 14, 17 (2d Cir. 1981).

¹⁰⁷ Equal Employment Opportunity Commission v. Sears, Roebuck and Co., No. 79 Civ. 5708 (KTD), 1980 U.S. Dist. LEXIS 11989, at *3 (S.D.N.Y., June 16, 1980).

¹⁰⁸ EEOC v. Sears, Roebuck and Co., 650 F.2d 14, 16 (2d Cir. 1981).

¹⁰⁹ EEOC v. Sears, Roebuck & Co., Civil Action No. 79-1957A, 1980 U.S. Dist. LEXIS 11097, at *33-35 (N.D. Ga. March 14, 1980) (citing Sears, Roebuck & Co. v. EEOC, 581 F.2d 941, 946).

produced by Sears.¹¹⁰ The Commissioner's Charge named Sears Chicago as respondent and the EEOC served notice of the charge upon Sears in Chicago in September 1973, but not on the Montgomery facility.¹¹¹ The EEOC did not visit or communicate with the Montgomery facility during the conciliation process, did not "attempt to conciliate any specific Montgomery problem," and did not name any "particular victim" of discrimination."¹¹² However, in October 1979 the EEOC filed its lawsuit alleging that Sears had discriminated against blacks in hiring at its Montgomery store since July 1965.¹¹³ The Alabama court found that the EEOC's insistence on conciliation on a nationwide basis and refusal to negotiate on specific Montgomery issues upon which it later based its suit meant that it did not fulfill the conciliation requirement for those claims and its case was not brought in good faith and should be dismissed.¹¹⁴ Moreover, the EEOC's misconduct and bad faith over six years was sufficient to warrant dismissal of the case.¹¹⁵

The New York court agreed with the Alabama federal judge and went one step further, refusing to delay the litigation to give the EEOC a chance to conciliate properly because "the continued existence of this lawsuit would put a pall over any true conciliation proceedings."¹¹⁶ The Second Circuit Court of Appeals affirmed the

¹¹⁰ EEOC v. Sears, Roebuck and Co., 490 F. Supp. 1245, 1248 n. 6, 1250 (M.D. Ala. 1980),

¹¹¹ EEOC v. Sears, Roebuck and Co., 490 F. Supp. 1245, 1248 (M.D. Ala. 1980).

¹¹² EEOC v. Sears, Roebuck and Co., 490 F. Supp. 1245, 1249-50 (M.D. Ala. 1980).

¹¹³ EEOC v. Sears, Roebuck and Co., 490 F. Supp. 1245, 1250 (M.D. Ala. 1980).

¹¹⁴ EEOC v. Sears, Roebuck and Co., 490 F. Supp. 1245, 1258 (M.D. Ala. 1980); Equal Employment Opportunity Commission v. Sears, Roebuck and Co., No. 79 Civ. 5708 (KTD), 1980 U.S. Dist. LEXIS 11989, at *3 (S.D.N.Y., June 16, 1980).

¹¹⁵ EEOC v. Sears, Roebuck and Co., 490 F. Supp. 1245, 1253-54 (M.D. Ala. 1980).

¹¹⁶ Equal Employment Opportunity Commission v. Sears, Roebuck and Co., No. 79 Civ. 5708 (KTD), 1980 U.S. Dist. LEXIS 11989, at *3-4 (S.D.N.Y., June 16, 1980).

dismissal, finding that although the commission deserves “wide latitude” in conducting conciliation, its discretion is not “unlimited,” and it must “make a genuine effort to conciliate with respect to each and every employment practice complained of.”¹¹⁷ In this case, “[e]mployment practices at the White Plains and Brooklyn stores . . . were submerged in a broader discussion focusing on over 3,000 separate sites.” Despite the lengthy conciliation between 1977 and 1979 and “extensive correspondence,” the commission never focused on those facilities, gave Sears notice that it “intended to single out practices” there, offered Sears an opportunity to reform its practices, or made any settlement proposals based on employment practices there. Congress did not intend to allow the commission to negotiate “on one set of issues and having failed, litigate a different set.”¹¹⁸

Sears also made several other arguments, on which, not surprisingly, the individual courts differed. The company claimed the commission did not properly investigate the individual facilities on which the suits were based but only conducted a broad national investigation.¹¹⁹ It argued the EEOC failed to provide it with proper notice of its charge before filing a lawsuit because it focused on nationwide allegations rather than particular facilities.¹²⁰ Sears also alleged misconduct by the commission in using “adverse publicity to harass and embarrass” the company and damage its reputation by leaking confidential information and the Reasonable Cause Decision to the media and

¹¹⁷ EEOC v. Sears, Roebuck and Co., 650 F.2d 14, 18-19 (2d Cir. 1981) (citations omitted).

¹¹⁸ EEOC v. Sears, Roebuck and Co., 650 F.2d 14, 19 (2d Cir. 1981).

¹¹⁹ EEOC v. Sears, Roebuck & Co., Civil Action No. 79-1957A, 1980 U.S. Dist. LEXIS 16068, at *2-5, 7-9 (N.D. Ga. Sept. 9, 1980) (citations omitted).

¹²⁰ EEOC v. Sears, Roebuck and Co., 490 F. Supp. 1245, 1255-56 (M.D. Ala. 1980); 42 U.S.C. 2000e-5(b) and (f)(1) and the regulations promulgated thereunder.

NOW.¹²¹ Finally, the company relied on the EEOC's General Counsel statement that "Sears had been in the vanguard of affirmative action" to argue it was denied due process.¹²² Sears aggressively fought the EEOC's five cases on separate fronts and a variety of procedural issues, obtaining inconsistent rulings and straining the commission's ability to prosecute all of the cases at once.

Statistics

The litigation process also reflected the changes taking place with respect to use of statistics in employment discrimination cases. Although cases such as that against AT&T had been almost exclusively based on statistical evidence, a 1977 Supreme Court case signaled that courts might begin to look for anecdotal evidence to support statistics. In language that became widely cited, the court noted in the Teamsters case that its finding of a system-wide pattern or practice of employment discrimination against minorities was based on a population/workforce comparison which provided evidence of pervasive statistical disparities in the number of minorities and whites. However, the plaintiffs did not rely on statistics alone. They supported them with individual testimony about "personal experiences with the company," including more than forty acts of specific instances of discrimination, which "brought the cold numbers convincingly to life."¹²³ In a Seventh Circuit Court of Appeals case that followed Teamsters, the court held that a *prima facie* or initial case generally consists of "statistical evidence

¹²¹ EEOC v. Sears, Roebuck and Co., 490 F. Supp. 1245, 1254 (M.D. Ala. 1980); EEOC v. Sears, Roebuck & Co., Civil Action No. 79-1957A, 1980 U.S. Dist. LEXIS 11097, at *15, 27-31 (N.D. Ga. March 14, 1980).

¹²² EEOC v. Sears, Roebuck & Co., Civil Action No. 79-1957A, 1980 U.S. Dist. LEXIS 11097, at *16-17 (N.D. Ga. March 14, 1980) [statements published in Employment Relations Report, August 1, 1979 – Plaintiff could not strike them as privileged because they were already made public. Ibid. at 17, n. 4].

¹²³ International Brotherhood of Teamsters v. United States, 431 U.S. 324, 339 (1977).

demonstrating substantial disparities in the application of employment actions as to minorities and the unprotected group, buttressed by evidence of general policies or specific instances of discrimination.”¹²⁴

Although the EEOC had proved its case against AT&T almost exclusively on the basis of statistical evidence of an imbalanced workforce, it had trouble doing the same with Sears. First, Sears argued that the EEOC’s statistical analysis was flawed. Sears’ attorney Hope Eastman claimed that the evidence of discrimination simply “was not there” in the numbers as the EEOC believed, and that the statistics were unrefined. Sears believed that the EEOC’s statistical analysis was “unsophisticated,” or not detailed enough to account for all of the factors which could help explain the imbalance. The company relied on Joan Haworth, an economics expert from Tallahassee, Florida, whose analysis showed that when controlled for various factors, there was no indication of discrimination. For example, if women were 30 percent of the workforce, but not 30 percent of executives, it was necessary to look only at the pool of people who had experience at that level.¹²⁵ Thus, Eastman argued that the statistics did not say what the EEOC said they did. Interestingly, despite Sears’ argument that the statistics were wrong, it never offered its own analysis of the data, perhaps because it was obvious the numbers did show a disparity.¹²⁶ Instead, it could win by simply arguing the EEOC was wrong. The EEOC, not surprisingly, believed that it had gathered plenty of information, developed a sophisticated statistical analysis, and handled the statistical case well.¹²⁷

¹²⁴ EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264, 1276 (N.D. Ill. 1986) (citing Coates, 756 F.2d at 532 (footnote omitted)).

¹²⁵ Hope Eastman, interview by author, 8 July 2004, Bethesda, Maryland.

¹²⁶ Gerald Letwin, interview by author, 9 July 2004, Washington, DC.

¹²⁷ Jane Dolkart, interview by author, 16 July 2004, Dallas, Texas.

Even if its statistics were correct – if they proved what the EEOC said they did – Sears (and Eastman) argued there were other explanations for the imbalanced workforce, and that the existence of a statistical imbalance alone was insufficient to prove that it had discriminated. In the late 1960s and 1970s Eastman had been active in the women’s movement, helping to found Women’s Legal Defense Fund (WLDF) and trying to get the ERA passed. She believed that women’s march into the workplace had been a steady trajectory as they moved up the pipeline. Unless it was assumed that the employer bore the entire responsibility for moving women into the workplace, there were many things that could explain Sears’ data. The EEOC’s statistical analysis was missing the subtlety that women had different views about their roles in life, and not all wanted higher-paying jobs.¹²⁸ Thus, Sears argued the court needed to hear from individual women who wanted those jobs; the EEOC could not rely solely on the number of women in each category.

The fact that individual witnesses were required to show that even an explicitly discriminatory policy was enforced shows how far standards had changed on the issue of statistics since the early 1970s and AT&T. The EEOC noted that until 1975 Sears had written policies that discriminated against pregnant women. Sears acknowledged that in October 1974 it discontinued a policy of giving men a day off when their wives gave birth but not giving the same to women who gave birth. In 1978 the company eliminated its policy of involuntarily transferring pregnant women “when appearance was deemed to be a factor in the performance of the job.” It also repealed a policy which protected employees out on temporary disability from lay-off, but not women out on maternity

¹²⁸ Hope Eastman, interview by author, 8 July 2004, Bethesda, Maryland. Eastman argued that at some point it became a tenet of the women’s movement, which was supposed to free women from other people’s choices, that women should work outside the home. This stand alienated women who stayed home with their children and spawned anti-feminist leaders such as Phyllis Schlafly and animosity over the ERA.

leave. Since such explicit policies clearly violated Title VII, the commission asked the court to find in its favor on this issue without any trial or factfinding. Sears argued that since it had stopped discriminating against women in 1974, it should not be liable, even for things that preceded that. The company also submitted affidavits by individuals claiming they did not suffer or know of any discrimination on the basis of pregnancy. The court held that the commission had to prove that the policies actually were enforced against or adversely affected pregnant employees during this time period.¹²⁹ Even the existence of explicit written discriminatory policies was not enough. Although it did not need to identify every victim, the commission had to submit evidence to counter Sears' affidavits in order to prove liability.¹³⁰ The court's refusal to find for the commission even on the claims for the early years, before Sears changed its discriminatory policies, showed how much things had changed. Finally, it was notable that Sears refused to settle these early claims, even though they were undisputed. When a company has already changed its discriminatory policies, it is often just a matter of resolving the early years.¹³¹

Depositions

The discovery process between the filing of the EEOC's case in 1979 and the trial in 1985 also involved taking depositions. Eastman took the depositions of several dozen original charging parties, who the EEOC used to bring life to its charges.¹³² Marilyn Fumagalli recalled that she had not heard from the EEOC for many years, aside from keeping in touch with her contact information. Then suddenly she received a notice of

¹²⁹ *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264, 1271, 1272, 1275-76 (N.D. Ill. 1986).

¹³⁰ *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264, 1272 n. 4, n. 5, n. 6 (N.D. Ill. 1986).

¹³¹ Gerald Letwin, interview by author, 9 July 2004, Washington, DC; James Scanlan, interview by author, 8 July 2004, Washington, DC.

¹³² Hope Eastman, interview by author, 8 July 2004, Bethesda, Maryland.

deposition. By then, Fumagalli was nervous about it because she could no longer relate to the 18-year-old she had been. She had simply moved on with her life. For awhile, she thought that if the EEOC won she might be offered the job and receive back pay. However, by now she did not even think she wanted that job or to work at Sears at all. At eighteen, she saw it as just a job; she really wanted a career in photojournalism, although one must wonder if she might have felt differently had she been groomed for better jobs and received better benefits. Fumagalli continued with the case because she wanted some acknowledgment that the harassment had happened and out of a strong sense that it felt unfair to her. Despite her nervousness, on the day of the eight-hour deposition she got along well with Sears' attorney because he reminded her of her good friend's brother.¹³³ The depositions led Eastman to conclude that the allegations against Sears did not hold up against the charging parties' individual situations. For example, the EEOC used one woman as an example of being denied a commission sales job. In her deposition, however, she admitted she did not want the job because her husband would not let her take it.¹³⁴

The depositions also made clear one of Sears' early strategies, to argue that the EEOC had a conflict of interest in the case because it had close ties to NOW, which had helped or encouraged women to file charges against the company. In addition, EEOC attorney David Copus was a member of NOW, served on NOW LDEF's Board, and lived with (and later married) NOW leader Whitney Adams: "because NOW was known to have targeted Sears as a discriminatory employer, [his] alliance with NOW was

¹³³ Marilyn Fumagalli, telephone interview by author, 16 June 2005.

¹³⁴ Hope Eastman, interview by author, 8 July 2004, Bethesda, Maryland.

prejudicial to Sears.”¹³⁵ Eastman believed the EEOC’s conflict of interest was no different from a corporation trying to influence the commission’s position. The commission’s role was to enforce anti-discrimination laws but not represent either side. Public interest groups were special interest groups just like an oil lobby; they did not have a more morally sound position.¹³⁶ Sears claimed “the EEOC’s investigation of Sears advanced the partisan interests of the National Organization of Women (NOW).”¹³⁷

The EEOC disagreed. Copus claimed that his activities with NOW were minimal, that when the General Counsel mentioned the appearance of impropriety he resigned from the board, and that the General Counsel made the recommendation to issue a charge against Sears “entirely independent” of him.¹³⁸ Fumagalli noted that during her deposition it appeared that Sears’ attorney was trying to create a “conspiracy theory” by claiming that NOW had sent her to file a charge against the company.¹³⁹ EEOC attorneys also saw Morgan as trying to create a conspiracy theory. He deposed every EEOC attorney who had anything remotely to do with the case, which made them feel harassed and made few friends among his opposing counsel. Jane Dolkart, an Assistant General

¹³⁵ EEOC v. Sears, Roebuck & Co., Civil Action No. 79-1957A, 1980 U.S. Dist. LEXIS 11097, at *21-22 (N.D. Ga. March 14, 1980). Copus also lived with, and later married, NOW leader Whitney Adams.

¹³⁶ Hope Eastman, interview by author, 8 July 2004, Bethesda, Maryland.

¹³⁷ EEOC v. Sears, Roebuck & Co., Civil Action No. 79-1957A, 1980 U.S. Dist. LEXIS 11097, at *15 (N.D. Ga. March 14, 1980). This was not a wholly new argument. In February 1978, 11 insurance companies filed suit in federal court accusing the EEOC and the California fair employment agency of colluding with a private women’s group, Women Organized for Employment (WOE), in conducting a prejudicial investigation into employment practices in insurance industry. Special to the Wall Street Journal, “Insurance Firms Sue U.S., California Units Over Hiring Inquiry,” Wall Street Journal, 17 February 1978, 27.

¹³⁸ EEOC v. Sears, Roebuck & Co., Civil Action No. 79-1957A, 1980 U.S. Dist. LEXIS 11097, at *22 (N.D. Ga. March 14, 1980). Indeed, the conflict of interest argument was ironic since women’s groups believed their case against Sears failed in part because they did not have the same strong working relationship with the EEOC as they had had in the AT&T case. Anne Ladky, Interview with author, March 20, 2002, by telephone.

¹³⁹ Marilyn Fumagalli, telephone interview by author, 16 June 2005.

Counsel at the EEOC who had never been a member of NOW and had very little to do with the Sears case, unsuccessfully fought the deposition demand in court. She was disconcerted by the long deposition and the seemingly unrelated information Sears' attorneys "dug up" on her, such as her role as editor of a feminist political journal and her accepting a *pro bono* public accommodations case from WLDF to represent NOW's DC chapter regarding a party at a local college.¹⁴⁰

The Georgia court addressed the conflict of interest issue when considering Sears' motion for summary judgment. It declined to decide whether a conflict of interest existed or whether Copus' actions were inappropriate because Sears showed no deprivation of liberty or property aside from the cost of defending the lawsuit. Even if a conflict of interest did affect commission proceedings against Sears, dismissal was not required because the issues were "collateral" to the question of Sears' liability and because wrongdoing during the investigation and negotiations did not affect any court proceedings. In addition, since the case in Georgia involved only race discrimination, a conflict of interest with a women's political group was of only "tangential concern."¹⁴¹ In the sex discrimination case in Illinois, U.S. District Court Judge John F. Grady refused to dismiss the case, but said he did not "'condone' the EEOC's conduct in the handling of the matter."¹⁴² This left the conflict of interest issue open to more controversy later. To

¹⁴⁰ Jane Dolkart, interview by author, 16 July 2004, Dallas, Texas; see also James Scanlan, interview by author, 8 July 2004, Washington, DC.

¹⁴¹ *EEOC v. Sears, Roebuck & Co.*, Civil Action No. 79-1957A, 1980 U.S. Dist. LEXIS 11097, at * 22-24 (N.D. Ga. March 14, 1980).

¹⁴² Merrill Brown, "U.S. Settles Its Racial Bias Suits Against Sears," *Washington Post*, 5 June 1981, A1; Robert Pear, "Sears to Change its Hiring Policy; U.S. Ending Four Racial Bias Suits," *New York Times*, 5 June 1981, A14.

Dolkart and other EEOC attorneys, however, this was one small example of how Morgan intended to fight the entire case.¹⁴³

Race Cases Settled

Contrary to the notion that Sears was unwilling to settle any claim with the EEOC, soon after the November 1980 Presidential election, negotiations began in the four race discrimination lawsuits. In the meantime, the Alabama and New York cases were dismissed, a magistrate judge recommended dismissing the Memphis case, and the final case in Atlanta continued. Finally, in June 1981 the commission announced it had settled the race cases – “the government’s broadest race discrimination case against a major employer.”¹⁴⁴

Although Sears had faced a potential back pay award of almost \$100 million, the final settlement did not include any back pay or “monetary compensation” for victims of discrimination. The settlement focused on hiring rather than promotion and did not include any racial hiring quotas, which President Ronald Reagan opposed. Instead, it required Sears over the next five years to “try harder” to hire minorities, to compare the percentage of minorities who apply and are hired, and to maintain data on black and Hispanic applicants and hires at all facilities for longer reporting periods. Managers would have to explain a “significant disparity” between the percentage of blacks and Hispanics in the applicant pool and in the new hires.¹⁴⁵ Sears also had to add a paragraph to its affirmative action manual indicating: “Unit managers are instructed to be alert for

¹⁴³ Jane Dolkart, interview by author, 16 July 2004, Dallas, Texas.

¹⁴⁴ Brown, “U.S. Settles Its Racial Bias Suits Against Sears,” A1; Pear, “Sears to Change its Hiring Policy,” A14.

¹⁴⁵ Brown, “U.S. Settles Its Racial Bias Suits Against Sears,” A1; Pear, “Sears to Change its Hiring Policy,” A14.

instances where, in a particular period, there occurs a significant disparity between a minority group's proportion of applicants and the minority group's proportion of hires."¹⁴⁶ In exchange, the EEOC agreed not to file class-action suits against Sears on behalf of the race discrimination victims, but the individuals could sue themselves.¹⁴⁷

Despite Reagan's indication that he "might favor relaxation of EEOC regulations" and cut the commission's budget, there were "no immediate indications" that longtime EEOC staff members were unhappy with the settlement or considered it weak. Acting commission Chairman J. Clay Smith Jr. said the agreement was "directed at insuring that the employer will implement procedures to monitor its own hiring practices in ways that should assure compliance with the law." EEOC attorney James Scanlan said the government probably could not have successfully prosecuted four lawsuits and obtain such nationwide changes. Sears, too, was "pleased" that the agreement acknowledged that the commission was "satisfied" with Sears' affirmative action program. Chairman Telling believed the agreement would require only a "minor adjustment" in the program, although it had to be implemented nationwide, and indicated that the company "look[ed] forward to resolving the issues in the one remaining case in Chicago at an early date."¹⁴⁸ However, one New York Times article commented that the settlement "seemed like a mountain of litigation for a molehill of a solution."¹⁴⁹

¹⁴⁶ "A Few Words Settle; Discrimination Suit," New York Times, Week in Review, 7 June 1981, Section 4, p. 6.

¹⁴⁷ Brown, "U.S. Settles Its Racial Bias Suits Against Sears," A1; Pear, "Sears to Change its Hiring Policy," A14.

¹⁴⁸ Brown, "U.S. Settles Its Racial Bias Suits Against Sears," A1; Pear, "Sears to Change its Hiring Policy," A14.

¹⁴⁹ "A Few Words Settle," Section 4, p. 6.

Settling the race cases did not change the status of the EEOC's nationwide sex discrimination case. The commission continued with its hiring and promotion case in Chicago, no settlement talks were underway, and it was expected to go to trial in a year. Nevertheless, Sears demonstrated some willingness to settle the sex discrimination claims in private. In order to continue the case, the EEOC eventually decided to drop the individual charges. Fumagalli received a letter from the EEOC indicating that probable cause had been found but that Sears had refused to conciliate. It informed her that if she wanted to continue the case herself she had to hire a lawyer, which she did not want to do. She was disappointed, but thought that affirmative action probably would get much less attention with the new Republican presidential administration. She associated the failure to settle with a growing political conservatism at the national level and a declining momentum for change in the workplace, which were more potent than the EEOC. As a result, she did not blame the commission for dropping her charge.¹⁵⁰ A few women tried to "intervene" in the EEOC's lawsuit after the agency dropped their individual charges but were denied. One woman, Sheelagh Feigel, settled her case against Sears for just short of \$10,000, since the company would not go beyond that. Like Fumagalli, Feigel wanted to put it behind her.¹⁵¹ After more than a decade, individual complainants were ultimately left to their own devices in a political climate that offered questionable rewards for continued litigation.

Reflections on the Litigation Process

The litigation process between the EEOC and Sears reveals a very different case than the one commonly known. What began with several dozen complaints (the "original

¹⁵⁰ Marilyn Fumagalli, telephone interview by author, 16 June 2005.

¹⁵¹ Paul Brayman, telephone interview by author, 23 June 2005.

charging parties”) became consolidated into one case against the company. In addition to sex discrimination claims, the EEOC investigated and pursued race discrimination claims against the company. Contrary to the aggressive image that Sears publicly cultivated, it was willing to settle discrimination claims in certain situations. Finally, the individual complainants were dropped in order to focus on a few strong claims of discrimination in commission sales and in pay for timecard and checklist positions. The prolonged litigation resulted in a case at trial in 1984 that looked very different from when it began.

Aside from Sears’ determination to fight back, the extended litigation could be explained by the difference in resources on the two sides. Sears had virtually unlimited funds and a team of well-paid attorneys. The government had at most three lawyers working on the case and a limited budget, and Sears was quite a drain on its resources. Nevertheless, the EEOC attorneys received a great deal of support, with the commission continuing to authorize significant funds even through unfavorable political administrations. In fact, the Sears case was such an enormous undertaking, so vastly out of proportion from cases the EEOC had taken on before, that it required extensive financial support such as a huge contract for expert witnesses.¹⁵² The extended litigation process also influenced the outcome of the case, as it brought about a shift in how the case was discussed publicly. In the early 1970s, newspaper articles discussed not *whether* the EEOC would win, for that was unquestioned, but rather *how much* Sears would be forced to pay. By 1986, articles assumed the EEOC would lose and wondered whether it would be able to get out without being ordered to pay Sears’ attorneys’ fees.¹⁵³

¹⁵² James Scanlan, interview by author, 8 July 2004, Washington, DC; Jane Dolkart, interview by author, 16 July 2004, Dallas, Texas.

¹⁵³ This shift, from “we cannot lose” to “we cannot win,” traced a similar trajectory to the campaign for the Equal Rights Amendment. See Chapter 1, footnote 86.

The protracted discovery period appeared to hurt the EEOC's case. The long investigation and delay of time did not help its prospects for trial.¹⁵⁴ Sears filed numerous partial summary judgment motions, one after the other, chipping away at the government's case by getting the court to dismiss certain parts. Sears' attorneys threatened to seek an award for attorney's fees and costs for any "open-ended allegations" that were not actually litigated.¹⁵⁵ As a result, the EEOC struggled to narrow its claims and cull certain well-defined legal issues that it could prove at trial. On several occasions, EEOC attorneys wrote to Sears' attorneys to tell them they were dropping significant numbers of issues.¹⁵⁶ While these actions might demonstrate that the EEOC doubted much of its case, from a lawyer's perspective this may just have been part of the legal process. Anyone who files an employment discrimination lawsuit against a large company necessarily will include broad allegations, as he or she has no access to company records that can prove discrimination. During discovery, the two sides exchange evidence and the attorneys are able to more clearly define their claims. They also decide which claims to emphasize based on the strength of the evidence. The company, on the other hand, will try to have certain parts of the case dismissed, including those issues on which there is no dispute over the facts that a judge or jury must hear.

¹⁵⁴ Bill Brown complained that the Track 1 cases and the units he set up under the NPD were allowed to languish. Bill Brown, telephone interview by author, 26 February 2004. Brown was confident the commission would have succeeded if it had sued Sears soon after his investigations, but by the time it did so the information his team had collected was stale.

¹⁵⁵ Rosenberg Papers; Pamela S. Horowitz, Morgan Associates, to James P. Scanlan, EEOC, 9 June 1981. Schlesinger.

¹⁵⁶ See Rosenberg Papers; Gerald D. Letwin, EEOC, to Pamela S. Horowitz, Morgan Associates, 8 January 1982. Schlesinger; and Rosenberg Papers; James S. Angus, EEOC, to Pamela S. Horowitz, Morgan Associates, 12 March 1982. Schlesinger. Forgetting the pay discrimination case, Rosenberg noted, the case "initially covered a wide range of issues. Over the years, all were abandoned save one: whether Sears was discriminating against women in hiring into commission sales." Rosalind Rosenberg to author, by e-mail, 10 July 2008.

Thus, although it may have appeared that the EEOC was overburdened or uncertain about its case, it was common for a case to change significantly as part of the legal process involves both sides winnowing down the main issues to those most appropriate for trial.

In fact, the investigation into Sears was so broad, looking into every practice, that it was impossible to try such a case and the commission had to make judgments in order to shape a manageable case to take to court. Many of the charges the EEOC dropped were secondary or of little help in determining which were triable issues. The EEOC had to decide on crucial issues and focus its efforts on determining the true core of the case. Dropping the claims was not necessarily a sign of weakness, but rather the process of narrowing down to decide on several strong triable issues.¹⁵⁷ Moreover, the EEOC attorneys' recommendations to settle with Sears also was not necessarily a sign of a bad case; parties often want to settle to avoid the huge expense of going to trial. It is no surprise that the EEOC, which had never taken such a large case to trial and was mainly in the business of encouraging parties to change their policies without being sued, would want to end this suit amicably.¹⁵⁸ Likewise, even if Morgan told Sears not to settle, it would not necessarily mean its case was more meritorious than the EEOC's. A defense attorney's job is to present the case in the strongest way possible, to be an advocate for the client. Although he or she may recommend that a client settle when the case is particularly bad, a decision to fight back may be as much about strategy as about the merits of the case.

¹⁵⁷ Gerald Letwin, interview by author, 9 July 2004, Washington, DC.

¹⁵⁸ In order to encourage settlement, after it finds reasonable cause to believe there was a violation of law, the commission is required to "enter into conciliation discussions with the employer" before going to court. Sears, Roebuck and Co. v. EEOC et al., 581 F.2d 941, 942-43 (DC Cir. 1978); 42 U.S.C. 2000e-5(b) and (f)(1); 29 CFR § 1601 (1979).

Still, Eastman believed that once the case got underway, no one at the EEOC looked at the facts. No one said “the emperor has no clothes,” but rather, the case simply took on a life of its own through Democratic and Republican administrations. She attributed it not just to bad lawyering or limited resources on the part of the EEOC, but also to bad facts. Something in the government decision-making process failed to take a second look or to notice several signposts along the way.¹⁵⁹ The EEOC attorneys, however, believed the Reasonable Cause decision had been meticulously investigated and remained confident that their evidence – and their case – was strong. Although it was a difficult type of case to present to the court, all of the issues they ultimately tried were strong, appropriate, and more than viable. They believed they had a good chance to prevail on those issues and that they did a good job with the analysis, taking into account many major and minor factors which could influence the result – certainly more than had ever been done before – and that their claims were supported by the data.¹⁶⁰

Many observers accused the EEOC of continuing to fight after it was clear that the case was a loser or support had waned, but there is limited support for this theory. The EEOC attorneys strongly believed in their statistical case and resented the company’s unwillingness to acknowledge its wrongs. Sears argued that it had changed its policies by 1974, but still refused to pay restitution for discriminatory practices before that time. The company played a crucial role in explaining why the EEOC continued with the case, as it refused to settle its Track 1 case like the other companies had done.

It is also true that as career employees in an independent agency, the EEOC staff working on the case were perhaps more dedicated than other government attorneys.

¹⁵⁹ Hope Eastman, interview by author, 8 July 2004, Bethesda, Maryland.

¹⁶⁰ Gerald Letwin, interview by author, 9 July 2004, Washington, DC.

Many had come from the civil rights movement and strongly believed in enforcing Title VII to obtain equal employment opportunity for those denied it.¹⁶¹ Staff members continued to work on the case for a long time, despite leadership changes that gave authority to individuals actively and publicly critical of their case. However, the question should not be how this case managed to slip through when so many people, even within the EEOC, opposed it. Instead, the fact that it managed to get as far as it did and continued to receive huge amounts of financial support through both sympathetic and unsympathetic administrations may be a sign of the strength of the case, the overwhelming nature of the evidence, and the EEOC staff's powerful belief in it. This was not just a matter of a few dedicated people, but rather higher authorities repeatedly approving growing budgets for items such as huge expert witness fees. If this was by far the largest case the EEOC had ever taken on, then clearly it did not just slip through. As chair, Clarence Thomas did not have the power to end the case himself, though he might encourage settlement. It was bigger than one unsupportive administration. Rather than noting how little support the case received, it may be more accurate to note how much more it received than any previous case, which was even more surprising in light of the fact that it came from Thomas' EEOC and the Reagan Administration. Despite all the theories that the commission abandoned the case, in the end, it did not cut it back but rather funded and carried it on.¹⁶²

¹⁶¹ On the other hand, the EEOC may not have been unique in having so many "believers" working there, as one might find the same at the Environmental Protection Agency (EPA) or any other regulatory agency. Hope Eastman, interview by author, 8 July 2004, Bethesda, Maryland.

¹⁶² Jane Dolkart, interview by author, 16 July 2004, Dallas, Texas; Gerald Letwin, interview by author, 9 July 2004, Washington, DC.

When the EEOC finally went to trial it became clear how much things had changed in the prior twelve years. The case had moved through a long litigation that turned it into more of a legal process between attorneys than direct action on behalf of the women of Sears to force the company to change. Although the commission intended to carry on the complaints of women workers by obtaining a global settlement against Sears, the case became known instead for two women professors who testified at trial on behalf of the EEOC and Sears.

Chapter 7

The Trial

The Sears case finally went to trial in Chicago in September 1984. The trial was conducted in relative obscurity through the end of June 1985, garnering attention only from the business community about Sears being sued for millions of dollars. However, by the time the court issued its decision in January 1986 the case had attracted mainstream media attention and renewed interest from feminists – albeit a different group than before – for one small part of the trial, the expert witness testimony of two women’s historians. Despite its long history, the Sears case became known – among historians at least – only for igniting a nasty dispute about feminism and the interests of working women. This debate distracted attention from the difficult issues faced by working women and exposed a sensitive class divide between them and middle-class women.

The Lawyers

The EEOC’s legal team was headed by Jim Scanlan. Scanlan first came to the EEOC in 1973, where he did appellate work for six years, including defending the AT&T decree and monitoring its compliance. When the EEOC filed suit against Sears in 1979 he began working on the case. After several years of pre-trial litigation, including fighting Sears’ motion to dismiss, Scanlan left the EEOC. However, six months later he was persuaded to rejoin the team, which, in the interim, had added more staff members and engaged a number of experts who thought the EEOC had a strong case.¹

While Scanlan was gone Gerry Letwin took his place. Letwin first came to the EEOC in the summer of 1970 as a University of Chicago law student interested in civil

¹ James Scanlan, telephone interview by author, 22 June 2004.

rights. After graduating in 1971, he went to work for the commission full-time, where he felt the momentum for change was strong even without enforcement powers. Letwin worked in the appellate division, and then in 1977 moved to the Baltimore office when the commission decided to put lawyers in different divisions around the country. Three years later, he returned to the Washington, DC office, where the commission had already filed the five lawsuits against Sears and the team was working on procedural challenges. When Scanlan returned from his leave of absence, Letwin remained on the case, retaining responsibility for the very technical pay issue regarding checklist positions.² He found the statistical analysis extremely interesting and had little doubt the EEOC could make a strong case.³

The third main attorney when the case actually went to trial was Karen Baker. Baker came to the EEOC straight out of law school and was assigned to the Sears case immediately. Like the other attorneys, she worked on the case under stressful conditions for six years. A single mother of a seven-year-old son, Baker spent up to half of her relatively meager government salary on child-care while working on the case. She often went home at 6:30 p.m. to put her son to bed and then returned to work until 2:00 a.m., relied on her mother to care for him while she traveled, and learned to “grab moments with her son.”⁴

² Most historians know only about the allegation that Sears discriminated against women in hiring for commission sales positions but there was another main issue at trial. The EEOC also alleged that Sears discriminated “by paying female checklist management employees . . . lower compensation than similarly situated male checklist management employees,” but the issue did not provoke the same type of controversy for feminists and historians debating the case. EEOC v. Sears, 628 F. Supp. 1264, 1278 (N.D. Ill. 1986).

³ Gerald Letwin, interview by author, 9 July 2004, Washington, DC.

⁴ Maureen Murray, “Karen Baker - Joan of Arc in Chicago.” New Directions for Women 14(6) (Nov./Dec. 1985): 11.

Chuck Morgan tried the case for Sears. Charlie Bacon, Sears' longtime personnel manager who had just retired, sat at counsel's table with Morgan every day, in part because he could answer any question about the company's policies. Sears' Corporate General Counsel Phil Knox, CEO Ed Telling, and Ray Graham, the director of Sears' affirmative action programs, often attended the trial. Most were World War II veterans and "fiercely loyal to Sears."⁵ Morgan was joined on the trial by Pam Horowitz. They first met when Horowitz worked for Morgan at the ACLU office in Washington, DC one summer. She returned to work there several years later, after Morgan had left. When he got the Sears case, Morgan urged Horowitz, "who was very, very smart," to come work with him. Horowitz was in court more consistently than any other attorney, virtually every day.⁶ Hope Eastman, who had handled much of the discovery and pre-trial litigation, stayed behind in Washington to do support work for the trial team. By that time she had young children and could not travel back and forth to Chicago.⁷ Sears and the EEOC each had approximately six other attorneys who worked on the case from time to time.

The Trial

The trial opened on September 12, 1984 and was exciting but also grueling for the attorneys. At first the EEOC lawyers thought it would last a few weeks, which seemed very long. They were so busy they barely slept. It was even more arduous for Baker, who flew back and forth to see her son while essentially living in Chicago from Labor

⁵ Camille Morgan to author, by e-mail (#2), 21 June 2007; Sears, Roebuck and Co., "Equal Opportunity Report," 1985 Annual Report, 30.

⁶ Morgan to author, by e-mail, 23 June 2007; see, for example, Transcript, April 1, 1985, 12594, NARA, Sears Case Records, Box 11. Rosalind Rosenberg described Horowitz as a "smart, funny, down-to-earth woman." Rosenberg to author, by e-mail, 9 July 2008.

⁷ Hope Eastman, interview by author, 8 July 2004, Bethesda, MD.

Day on.⁸ Unlike Eastman, as a sole provider Baker may have had no other choice than to fly back and forth from Washington and leave her young son at home.

Morgan's staff also worked extremely hard. His office in Washington was open twenty-four hours a day and employed a cook for much of the time. She arrived in the morning and made breakfast for those who had stayed all night. Then she cooked lunch, because "No one went out." The firm brought in dinner from restaurants around Washington. One female attorney had a boyfriend who often came "with arms full of groceries" and cooked dinner for the team, likely because it was the only way he could see her. Morgan "urged" the married lawyers to invite their wives down for dinner "so they could actually see that their spouses were working." After dinner, they often went into Morgan's office to watch television.⁹ During the trial in Chicago, Morgan's team ordered transcripts of each day's proceedings. They were delivered to their rooms "close to midnight," and the lawyers "read every word before court the next morning."¹⁰ Morgan's wife Camille, who worked for and traveled with him, acknowledged, "Everyone worked very hard and they must have complained a lot but of course I didn't hear much of it."¹¹

Despite their common burdens, the opposing attorneys had an acrimonious relationship. The EEOC lawyers had resented Morgan ever since he had deposed their colleagues based on his conflict of interest theory. Even if they understood Sears' reasons for taking on the EEOC and its attorneys' decision to represent the company,

⁸ Gerald Letwin, interview by author, 9 July 2004, Washington, DC; Transcript, September 12, 1984, NARA, Sears Case Records, Box 19.

⁹ Morgan to author, by e-mail, 23 June 2007.

¹⁰ Morgan to author, by e-mail (#2), 21 June 2007.

¹¹ Morgan to author, by e-mail, 23 June 2007.

they resented the way its attorneys conducted the litigation. Letwin thought the Sears attorneys did what they had to do, but saw them as playing games. Horowitz was not their favorite person; she worked hard and was aggressive. Letwin acknowledged that Morgan was a courageous civil rights lawyer but found him strange.¹² The negative feelings were mutual. Years later, one Sears' attorney accused some EEOC lawyers of incompetence. Morgan's wife noted, it "was hard not to feel sorry for the EEOC." It called no live witnesses, but instead its lawyers read depositions into the record "in a boring manner." Government attorneys frequently "had to offer corrections to papers they filed previously--something [she believed the Sears team] never had to do."¹³

The nastiness was so palpable that Morgan and Letwin almost came to blows during one pre-trial hearing. At the beginning of each court session, the side with a motion usually spoke first. However, both sides always thought they had so many important motions, and tried to figure out how to go first. As a courtesy, the attorneys would introduce anyone new sitting at counsel's table. One afternoon both the EEOC and Sears wanted to gain the edge, the commission by presenting a letter explaining that it would not be ready by the trial date and the company a motion to dismiss for want of prosecution. Letwin started to re-introduce Scanlan, who had just returned from his leave of absence, when Morgan tried to take over. Both stood up and started toward the stand. Morgan, who was bigger, pushed Letwin aside, saying "I'm heavy." Letwin was genuinely startled but also did a good acting job, allowing himself to be pushed somewhat. The judge saw it happen and yelled that he was not sure who was to blame

¹² Gerald Letwin, interview by author, 9 July 2004, Washington, DC.

¹³ Morgan to author by e-mail (#2), 21 June 2007. Even Sears' expert witness Rosenberg thought all of the Sears attorneys were "first rate" but the EEOC attorneys "not as good." Rosenberg to author, by e-mail, 9 July 2008.

for the “infantile performance” and “battery under the law,” but warned them not to let it happen again or he would strike their appearance as counsel in the case and they would be out faster than they could imagine. Everyone was quiet because it was not clear who the judge was angry with, but he appeared to be directing his fury more toward Morgan.¹⁴

The Judge

Although Judge Grady handled most of the pre-trial litigation, including some of the conflict of interest issues, judges were allowed to give away cases to newly-appointed judges.¹⁵ In 1982, President Reagan appointed state court judge John A. Nordberg to the federal bench in the Northern District of Illinois, and Grady passed the Sears case on to Nordberg.¹⁶ As soon as he began working on the case, Nordberg commented on how active the litigation had been already: “one of the most impressive dockets for a case.” Grady’s notes warned: “This is a case in which discovery could go on forever, if the lawyers had their way.”¹⁷ After several years of litigation, Nordberg finally set the trial for September 4, 1984, in part so he could finish it before his law clerk, who knew the most about the case, left the next summer. While the attorneys were no doubt preparing feverishly, Nordberg took his first vacation in four years immediately before the trial began, as it turned out, with good reason.¹⁸

¹⁴ Gerald Letwin, interview by author, 9 July 2004, Washington, DC; Transcript of Proceedings before the Honorable John F. Grady, Judge, Chicago, Illinois, February 1, 1982 [document 414], 4-5, NARA, Sears Case Records, Box 9. See also, James Scanlan, interview by author, 8 July 2004, Washington, DC.

¹⁵ See, for example, Transcript of Proceedings before the Honorable John F. Grady, Judge, Chicago, Illinois, November 14, 1979, NARA, Sears Case Records, Box 9.

¹⁶ Transcript, June 28, 1985, 19051, NARA, Sears Case Records, Box 15.

¹⁷ Transcript, June 2, 1982 [document 1007-1], 4-5, NARA, Sears Case Records, Box 9.

¹⁸ Transcript, January 16, 1984 [document 1007-7], 3, NARA, Sears Case Records, Box 9.

According to his wife, Morgan believed that as a World War II veteran Nordberg “would understand Sears’ situation” in having so many veterans at the top of its corporate ladder, and thus, having fewer places for women employees. She noted, “At that time all of Sears’ top people had worked from the bottom up. Sears had never brought in people at the upper level from outside.”¹⁹ Perhaps because they all became so familiar from spending so much time together, Nordberg adopted a casual tone with the attorneys, sharing details from his life with them.²⁰ After spending ten months in trial with him, Scanlan could not help but think of Nordberg somewhat fondly over twenty years later.²¹ After the lengthy closing argument and the EEOC’s rebuttal arguments he invited everyone who had been “actively involved” in the case back to his chambers for champagne to “celebrate” its conclusion.²² Of course, his gesture was somewhat lost on the lawyers since neither side was speaking to the other.²³

No one anticipated how long the trial would last. Three months before it began, the parties and the judge estimated it would take about six months.²⁴ When the trial began, the EEOC attorneys started reading depositions into the record until Nordberg

¹⁹ Morgan to author, by e-mail (#2), 21 June 2007.

²⁰ Among other things, he discussed a computer crashing; his “extremely valuable [pregnant] law clerk” having “false labor”; his clerk’s birthday party; that his minute clerk decided to return to her original career in interior decorating; and that he had trouble working during a seminar in Madison, Wisconsin because it was so beautiful in the summer and he got to go sailing on Lake Mendota. Transcript, December 9, 1982 [document 1007-5], 2-3, NARA, Sears Case Records, Box 9; Transcript, September 7, 1984, 5A, NARA, Sears Case Records, Box 9; Transcript, July 26, 1984 [document 1007-10], 4-5, NARA, Sears Case Records, Box 9; Transcript, September 4, 1984 [document 1007-11], 2, NARA, Sears Case Records, Box 9. One afternoon in August 1983 he opened proceedings with: “Good afternoon, all. This is sort of like a reunion. Long time no see.” Transcript, August 11, 1983 [document 1007-6], 2, NARA, Sears Case Records, Box 9.

²¹ James Scanlan, telephone interview by author, 22 June 2004.

²² Transcript, June 28, 1985, 19168, NARA, Sears Case Records, Box 20; Transcript, June 28, 1985, 18950-19168, NARA, Sears Case Records, Box 20.

²³ James Scanlan, telephone interview by author, 22 June 2004.

²⁴ Transcript, June 9, 1984, 3-6, NARA, Sears Case Records, Box 9.

finally said it would be faster for him to read them himself. When Letwin protested there may be a few they wanted to read in, the judge replied, “I hope they will be relatively short duration, because I am really concerned about things moving ahead.”²⁵

Nevertheless, as the trial dragged on Nordberg tried to make the best of the situation and not blame the EEOC.²⁶ Three months into the trial he showed a sense of humor about it. At the end of the testimony of Marie Langner, a statistical expert, he said, “That concludes your testimony.” She replied, “Thank God,” and he said, “Run. Don’t walk to the nearest exit and you’re excused.”²⁷

However, Nordberg did not have unlimited patience. One Friday afternoon at the end of March 1985, Horowitz estimated that Sears would finish its direct case by May 17, but complained they were having trouble getting the EEOC to commit to its rebuttal witnesses. Getting angry, Nordberg said he did not want the trial to go beyond the beginning of June and denied the EEOC extra time to respond to Sears’ discovery requests:

I am going to finally have to set deadlines, that’s all, and you’re going to have to do whatever you have to do to fit it in. It shouldn’t have taken anywhere near this long, and it is not going to go past that time period. There are a lot of lawyers in Washington that could be assisting you on this if you are short-handed. I can’t tie up this courtroom any longer. This is absolutely way beyond the requirements of a trial of a case, the length of time that this has taken in court. And we still . . . have April and May and a week or maybe two in June, and that’s it. Now, whatever has to be done to fit that in is going to have to be done.²⁸

By Monday morning the judge was still irritable when discussing how long rebuttal expert witnesses would take. Letwin estimated two hours for each of the four witnesses

²⁵ See, for example, Transcript, September 19, 1984, 817-1005 (quote at 960), NARA, Sears Case Records, Box 7.

²⁶ Gerald Letwin, interview by author, 9 July 2004, Washington, DC.

²⁷ Transcript, December 4, 1984, 3891, NARA, Sears Case Records, Box 8.

²⁸ Transcript, March 29, 1985, 12504-05, 12508-10, NARA, Sears Case Records, Box 11.

called to rebut the non-statistical part of Sears' case. When he mentioned six other witnesses, Nordberg replied, "at the beginning I didn't have any idea we were going to run this long and I did let very extensive Direct go in initially and that's all right but we just don't have the time to du;ocate? (sic - duplicate) the written testimony to the extent that we did before."²⁹ By the end of the trial in June, the attorneys were keeping track of how many minutes they used in examining witnesses during each session.³⁰ Scanlan knew it was frustrating for Nordberg to have a ten-month trial, and admitted he did not know what made it so long, but at the time each thing seemed to make sense.³¹

Ultimately, the EEOC attorneys were disappointed in the judge, who they saw as sympathetic toward Sears. They thought he criticized the EEOC more because the Sears attorneys were more polished.³² Nordberg did rule against the EEOC in several key instances. Before the trial began he proposed appointing a neutral expert to advise the court on the complicated statistical issues. The expert would listen to the trial testimony and make a recommendation to him. The EEOC team agreed, as it believed the statistical analyses were difficult and an expert would be helpful, but Sears opposed it. Curiously, the judge changed his mind without any clear reason. He came in to court one day and told them he had read some law review articles and attended a seminar at the University of Wisconsin – although he complained it was hard to listen to five straight hours about

²⁹ Transcript, April 1, 1985, 12520, NARA, Sears Case Records, Box 11.

³⁰ See, for example, Transcript, June 25, 1985, 18723, NARA, Sears Case Records, Box 15 (Horowitz noted 2:44 for EEOC; 1:32 for Sears); Transcript, June 26, 1985, 18843, NARA, Sears Case Records, Box 15. Horowitz noted the EEOC used 26 minutes during the afternoon session, which meant that Letwin had only 6:37 left.

³¹ James Scanlan, telephone interview by author, 22 June 2004. Letwin acknowledged it was not an easy case to listen to for so long, the judge worked very hard, and the trial could have been shorter. Gerald Letwin, interview by author, 9 July 2004, Washington, DC.

³² Gerald Letwin, interview by author, 9 July 2004, Washington, DC; James Scanlan, telephone interview by author, 22 June 2004.

statistics because it was so beautiful there in the summer – and that now he could handle the statistical analysis issues on his own. The EEOC had its doubts.³³

Although the judge was confident he could understand the complicated statistics, the issue began creating problems well before the trial started. Although cases such as that against AT&T had been almost exclusively based on statistical evidence, the 1977 Teamsters Supreme Court case signaled that courts might begin to look for anecdotal evidence to support statistics. In language that became widely cited, the Teamsters court noted that its finding of a systemwide pattern or practice of employment discrimination against minorities was based on a population/workforce comparison which provided evidence of pervasive statistical disparities in the number of minorities and whites. However, plaintiffs did not rely on statistics alone. They supported them with individual testimony about “personal experiences with the company,” including more than forty acts of specific instances of discrimination, which “brought the cold numbers convincingly to life.”³⁴ A couple of months before the Sears trial started, the parties sparred over whether statistical proof alone would be enough. Scanlan noted the EEOC’s case was “essentially an expert case” based on reports they had already submitted to the Court, with much depending on what Sears would stipulate to “with respect to the background.”³⁵ Horowitz, however, said that “Unlike the EEOC, and in keeping with the Teamsters case, which talks about ‘making statistics come alive,’ Sears [would] not [confine] itself to the

³³ Gerald Letwin, interview by author, 9 July 2004, Washington, DC; Transcript, July 26, 1984 [document 1007-10], 4-5, NARA, Sears Case Records, Box 9.

³⁴ International Brotherhood of Teamsters v. United States, 431 U.S. 324, 339 (1977).

³⁵ Transcript, June 9, 1984, 3, NARA, Sears Case Records, Box 9.

presentation of a statistical case.”³⁶ Rather than call live witnesses, the EEOC attorneys began their case by reading depositions into the record.³⁷

The Experts

Rather than use testimony of individuals, both sides made wide use of expert witnesses to help parse the complicated issues. For example, data experts testified on how the EEOC coded Sears’ job applications to determine who applied for commission sales positions.³⁸ Among its many witnesses, Sears engaged Rosalind Rosenberg to testify in defense of its argument that there were other reasons besides discrimination, including social factors, for its imbalanced workforce.³⁹ Rosenberg, a Stanford Ph.D., was a recently-tenured history professor at Barnard College in New York, who had published a book on the intellectual history of feminism.⁴⁰ Rosenberg was no stranger to the concerns of working mothers and had strong feelings about discrimination. She had children while she was a student and while teaching, which made her “especially sensitive to the absence of paid maternity leave in America.” Her “experience as a working mother . . . persuaded [her] that working women shouldered a significantly greater burden of domestic care than did men, a fact that constrained their freedom in a

³⁶ Transcript, June 9, 1984, 4-5, NARA, Sears Case Records, Box 9.

³⁷ See, for example, Transcript, September 19, 1984, 817-1005, NARA, Sears Case Records, Box 7; Camille Morgan to author, by e-mail (#2), 21 June 2007.

³⁸ See, for example, Testimony of Marie Langner, data coordinator, Center for Forensic Economic Studies, Transcript, October 1, 1984, 1796-1961, NARA, Sears Case Records, Box 6; Testimony of Dr. Loren Solnick, Center for Forensic Economic Studies, Transcript, October 9, 1984, 2415, NARA, Sears Case Records, Box 6.

³⁹ Transcript, March 11, 1985, 10343A, NARA, Sears Case Records, Box 20.

⁴⁰ Curriculum Vitae of Rosalind Rosenberg, Exhibits to the Offer of Proof of Rosalind Rosenberg, Sears, Roebuck and Co. Exhibit 2-1, NARA, Sears Case Records, Box 18; Rosalind Rosenberg, Beyond Separate Spheres: The Intellectual Roots of Modern Feminism (New Haven: Yale University Press, 1982). Rosenberg spent part of her childhood living in Tucson, Arizona, where her mother, from a southern Arizona miner’s family, worked as a nurse, and her father, from a Michigan auto workers family, ran a small office supply store and taught history at the University of Arizona. Rosenberg to author, by e-mail, 9 July 2008.

workplace that had been structured for men.”⁴¹ After receiving her Ph.D. Rosenberg worked in a non-tenure track job for eight years because “there was no other job available.”⁴²

Rosenberg first learned about the case from her ex-husband, John Rosenberg, who was working for Morgan and “suggested . . . that he frame the case historically.” John asked Rosenberg for the names of some women’s historians “who might be able to provide such framing testimony,” which she provided, but she was not surprised that they “said no.” John asked if she would be willing to testify. She was reluctant at first, “for all the obvious reasons,” but as she “thought through the issues raised by the case” she concluded she should, as long as Sears “had an effective affirmative action plan in place in the years in question” and the EEOC did not produce “any women who felt they had been discriminated against,” regardless of whether they were qualified for the job. She knew her condition for testifying “was not a logical one, but it was the emotional bedrock of [her] willingness to go forward.”⁴³ Rosenberg “hoped to re-frame the issue of women and work through [her] testimony.” She had “concluded that the EEOC had gone

⁴¹ Rosenberg to author, by e-mail, 9 July 2008.

⁴² Rosenberg to author, by e-mail, 10 July 2008. At their first meeting Chuck Morgan asked Rosenberg whether there were some jobs, “truck driving for example, that men were better at than women.” She responded “that it was possible that men might be better at some jobs, but that truck driving was not one of them,” and noted she “had recently rented a big truck and . . . moved [her] family from NYC to Middletown Connecticut for a job at Wesleyan.” She had grown up in rural Arizona and “was a good driver; a truck was just a big car.” She also told him she believed that “affirmative action plans were essential to overcoming discrimination.” Rosenberg to author, by e-mail, 10 July 2008. At Barnard, Rosenberg worked for policies to help “young mothers succeed in the academy,” and was proud when it was “singled out in national reviews” as a family-friendly college. Even later, Rosenberg noted that some jobs, representing “an extreme form of the male model of work in our society,” were “harder for women to take” – even if the company did not discriminate – “as long as society demands that women shoulder the major part of domestic care.” She believed we “need a revolution in the world of work, in attitudes about gender, and in the provision of social services for equality to be possible” and was “saddened that we have not made further progress in these matters.” Rosenberg to author, by e-mail, 9 July 2008.

⁴³ Rosenberg to author, by e-mail, July 9, 2008; Rosenberg to author by e-mail, 10 July 2008. she thought it important that the case paid “attention to real life experience.”

seriously astray in bringing a case that relied . . . on an underlying assumption that men and women were similarly situated in the workforce,” and its “failure to produce a complainant opened the way for [her] to talk about the other forces working against women in the workforce.” She also hoped to enhance the reputation of women’s history. She thought her testimony “would help establish women’s historians (then an embattled, marginalized part of the profession) as capable of a nuanced understanding of politically charged issues.”⁴⁴

Sears’ lawyers spent four sessions preparing Rosenberg. The first was in Washington before she was engaged to testify, and the second was in New York City before her deposition, where the lawyers “spent a lot of time . . . trying to get [her] to answer the questions posed.” Rosenberg experienced the contradictions between history and law when she found herself “treating the deposition as a seminar.” Horowitz told her “she was going to sit next to [her] at the deposition” and kick her under the table when she “started on one of [her] free-wheeling elaborations on a point.” The third and fourth sessions were in Chicago, preparing her for her initial testimony and rebuttal testimony.⁴⁵ The work stretched over three or four years, and involved preparing and re-preparing after the trial was delayed and the EEOC’s rebuttal case. In retrospect, if she had known how much work it would take to prepare for trial she would not have agreed to testify.⁴⁶

At her deposition in July 1984, two months before the trial began, Rosenberg testified that although job availability was an important factor in women’s entry into the labor market it could not necessarily overcome early childhood socialization that pushed

⁴⁴ Rosenberg to author by e-mail, 10 July 2008.

⁴⁵ Rosenberg to author by e-mail, 10 July 2008.

⁴⁶ Rosenberg to author by e-mail, 9 July 2008.

women toward traditionally-female jobs.⁴⁷ Women with higher education, however, were more likely to overcome this socialization and go into non-traditional occupations.⁴⁸ Job availability then could not be taken as a direct measure of interest or commitment to work; instead one had to look at behavior on the job and attitudes and values expressed by those who took the jobs.⁴⁹ She cited research on retail sales in which women indicated they did not like having to sell to someone who did not need the item, which commission sales put greater pressure on them to do than non-commission sales; and that commission sales required a level of competition and aggressiveness they found distasteful.⁵⁰ Despite the work, Rosenberg found the trial exciting. She noted that unlike in the classroom, where a teacher could expound on theories “without being challenged,” in court, “[e]verything you say is scrutinized by someone who knows the material as well as, or better than, you do. No mistake goes unchallenged.”⁵¹

The EEOC also engaged several expert witnesses, including sociologist Julia Ericksen, economist Eileen Appelbaum, and historian Alice Kessler-Harris, to rebut Rosenberg and Sears’ historical analysis concerning opportunities for women.⁵² Kessler-Harris had received her Ph.D. from Rutgers University and was also a relatively junior but tenured history professor at Hofstra University on Long Island. Her work focused on women’s and labor history. In 1982, the same year Rosenberg published her book,

⁴⁷ Deposition of Rosalind Rosenberg, Part II, July 3, 1984, 3, Barnard Women’s Center Library, Sears case records.

⁴⁸ Rosenberg Deposition, Part II, July 3, 1984, 6-7, Barnard Women’s Center Library, Sears case records.

⁴⁹ Rosenberg Deposition, Part II, July 3, 1984, 27, 28, 36, Barnard Women’s Center Library, Sears case records.

⁵⁰ Rosenberg Deposition, Part II, July 3, 1984, 55, Barnard Women’s Center Library, Sears case records.

⁵¹ Rosenberg to author, by e-mail, 9 July 2008.

⁵² Transcript, April 1, 1985, 12519, NARA, Sears Case Records, Box 11.

Kessler-Harris published Out to Work, a seminal history of the development of wage work for women in the United States since colonial times. She covered topics such as the effect of industrialization and technological change, protective legislation, job segregation, and women's low-wage and low-status position in the workforce.⁵³ Kessler-Harris first heard about the Sears case around September 1984, after Rosenberg's deposition but before the trial began. Rosenberg had cited her work, so the EEOC called to ask what she thought. Kessler-Harris did not believe Rosenberg would testify but agreed to do so if she did. Finally, in March 1985 she received the call from the EEOC to testify. She had just two-and-a-half months to prepare her written testimony, which she did largely alone. She spent one evening working on her testimony with Baker, who also attended her deposition in New York City.⁵⁴

When she arrived in Chicago the day before her testimony in June 1985, Kessler-Harris had only met Baker a couple of times. She watched her cross-examine a female witness and then went with Baker to make photocopies and deliver some papers. Baker talked to her about the case while they took the subway to her apartment. It was Baker's birthday. Over her birthday dinner Baker and Scanlan prepared Kessler-Harris, telling her to answer questions with only "yes" or "no," and answer only what she was asked. Since Kessler-Harris had submitted her testimony in writing, there was little direct examination. She testified that throughout history women had entered jobs when the opportunity for better pay has been made available to them and had not chosen jobs based on their lack of risk, their interest in the jobs or products involved, or for social reasons.

⁵³ Alice Kessler-Harris, Out to Work: A History of Wage-Earning Women in the United States (New York: Oxford University Press, 1982).

⁵⁴ Alice Kessler-Harris, interview by author, 12 November 2003, New York, NY.

She pointed out that women had eagerly worked in jobs involving night work because it offered flexibility in child care, as well as travel to people's homes, heavy lifting, dirty work, and outdoor work where it offered better pay.⁵⁵ Not knowing she should do otherwise, Kessler-Harris had used absolutes in her deposition and written testimony, saying that throughout history women had always done this or never done that.

Horowitz challenged her on cross-examination. Although Kessler-Harris had learned during her one night of coaching that she should say yes or no, she did not learn how to get around it. She felt bullied, like she had to choose one extreme or the other, without any room for subtlety. She never felt quite comfortable claiming that women were just as interested as men in commission sales jobs and had spoken to Baker about the difficulty of making that argument. But she also had an intuitive assumption that Sears' argument that women were not interested in commission sales positions was not true for the groups of women that worked there. As working-class women, they worked for the money and sought higher-paying positions where available.⁵⁶

Kessler-Harris believed the judge had not read her written testimony, that he had very negative feelings about it, and almost refused to listen to what she was saying. Kessler-Harris talked about women working for income, noting that women at Sears – generally working-class rather than middle-class or professional women – placed more importance on wages than the type of work they were doing. The judge, however, talked about working for social reasons and repeatedly referred to what his wife and her friends – clearly more affluent than the women at Sears – might do. Kessler-Harris tried to play

⁵⁵ Direct Examination of Alice Kessler-Harris, Transcript, June 6 -7, 1985, 16493-16524, Barnard Women's Center Library, Sears case records.

⁵⁶ Alice Kessler-Harris, interview by author, 12 November 2003, New York, NY.

an educational role, being subtle as a historian. She found the judge to be quite “interventionist,” asking a lot of questions himself rather than waiting for the attorneys to question her.⁵⁷

Kessler-Harris felt short-changed by her lack of preparation. She had never been an expert witness before and thought the EEOC failed to “prep” her as one. Baker was busy with the trial, and Scanlan appeared to lack interest. She later heard that private law firms generally do the research and provide experts with months of preparation.⁵⁸ She believed her testimony would have been different if she had been better prepared, but did not blame the EEOC because it did the best it could under the circumstances. However, she wondered how many other witnesses’ testimony, particularly those claiming discrimination, suffered from bad preparation. It seemed that a lack of time to prepare witnesses affected the case and the quality of testimony elicited. Kessler-Harris also resented what she saw as an extreme imbalance in resources between the EEOC and Sears. She claimed it was palpable in the layout of the courtroom. At the EEOC’s table sat one young woman (Baker) and an African-American assistant. On Sears’ side sat three men, one woman, and several other young people who went in and out of the courtroom helping out. When Horowitz stood up to speak, several people handed her papers she needed.⁵⁹

From Kessler-Harris’ perspective, the case was being run almost completely by the dedicated but inexperienced and overwhelmed Karen Baker. Kessler-Harris had only

⁵⁷ Alice Kessler-Harris, interview by author, 12 November 2003, New York, NY.

⁵⁸ Expert witnesses in other government cases have been better prepared. As an expert in civil rights cases, Steven F. Lawson had two people from the Civil Rights Division of the Justice Department working with him, helping with research, discussing various arguments, and generally providing “a lot of feedback.” Steven F. Lawson to author, by e-mail, 5 November 2007.

⁵⁹ Alice Kessler-Harris, interview by author, 12 November 2003, New York, NY.

marginal contact with Scanlan, who handled the statistical case and appeared to have ambivalent feelings about the case.⁶⁰ Scanlan had little involvement with the historians' testimony and thought that although they brought attention to the case they were somewhat peripheral.⁶¹ In fact, "most of the lawyers on both sides regarded the historical testimony as of small importance." Rosenberg noted, "I had a walk-on part in a ten-act play."⁶² Kessler-Harris thought Baker was "remarkable" for all that she did, including her own photocopying, delivering documents, making phone calls to set up appointments, and deposing and preparing witnesses. It also appeared that there were fewer attorneys on the case by the time she testified than when she first got involved. Kessler-Harris believed the Reagan administration had decreed there would be no more class actions, but the court process had already begun in Sears. It embarrassed the EEOC that the case had not settled, so it could not drop it without "egg on its face." Instead, it kept the case going on a limited basis with a smaller – albeit dedicated – staff. Kessler-Harris believed that some of the decisions in the case may have been made out of a lack of resources and experience.⁶³ Surprisingly, the EEOC attorneys themselves were the only ones who did not complain about a lack of resources. Perhaps from their perspective as government employees, they were used to lean staffing and no big-firm opulence. Moreover, far more money had been dedicated to the Sears litigation than to any other EEOC case up until then.

⁶⁰ Alice Kessler-Harris, interview by author, 12 November 2003, New York, NY.

⁶¹ Alice Kessler-Harris, interview by author, 12 November 2003, New York, NY; James Scanlan, telephone interview by author, 22 June 2004.

⁶² Rosenberg to author, by e-mail, 10 July 2008.

⁶³ Alice Kessler-Harris, interview by author, New York, NY, 12 November 2003; Eileen Appelbaum, interview by author, 23 August 2004, New Brunswick, NJ.

Eileen Appelbaum had a similar experience testifying for the EEOC. She thought that no one on Sears' side was really interested in understanding the issues, and the judge believed that women should not be in the jobs in question. She thought the Sears team just wanted to exploit weaknesses in her testimony, while the judge interjected and asked questions. Both of these things are part of the adversarial legal process, but may have seemed hostile to an academic used to making nuanced arguments. Appelbaum thought the judge simply did not accept the idea that statistical analysis could be a basis for finding discrimination. It was difficult to prove a case based on hiring because it was hard to locate women who had applied to Sears specifically for these jobs. Promotion cases were easier to prove because there was no question of whether the women wanted the job; there was already a defined pool of workers who had applied for it.⁶⁴

Appelbaum also worked very hard on her testimony, spending a lot of time preparing it herself over a few months and then giving it to the EEOC to review. She found the cross-examination to be hostile, with Sears' team going back and asking about papers she had written as a student that were not relevant to the case. Appelbaum did not seem so resentful about a lack of preparation, but did find the whole experience so disconcerting that she never testified again, even though she could have earned a lot of money doing so at a time when she did not earn much teaching. Appelbaum also sensed a lack of EEOC resources, for example, for witnesses' lodging. When she went to Chicago to testify she slept in the bedroom of a lawyer's apartment while the attorney slept in the living room. She could not believe the attorney would have to be hosting someone while preparing for trial the next day. Appelbaum recalled that the EEOC team

⁶⁴ Eileen Appelbaum, interview by author, 23 August 2004, New Brunswick, NJ.

got typed versions of the transcript at the end of each day and had to flip through all the pages to find the points they wanted. Although it was the beginning of the computer age, Sears' team had its own court reporter using a computer, so they could search for specific words in the text to help prepare for the next day.⁶⁵

Reflecting back on the expert witnesses' argument that women wanted better-paying jobs, Sears' attorneys argued that the women's movement in big cities did not yet reflect the reality of most American women, particularly those working for a Midwestern company like Sears. Even if Sears employees worked for the money, the women were also married with children and took family responsibilities into consideration. As to whether Sears steered women toward certain jobs or discouraged them from applying, Eastman acknowledged the truth was probably "somewhere between interest and opportunity." She thought Nordberg recognized there was no proof of deliberate discrimination and no facts to support the EEOC's theories.⁶⁶

Summation

The trial ended on June 28, 1985.⁶⁷ Morgan provided an unusual closing argument. He presented "the most important" statistics on the trial, that there had been more than 18,949 transcript pages, 43 briefs filed, 1208 pages "thrust upon" the judge, with 511 pages of exhibits, and they had been in trial for 135 days since the previous September.⁶⁸ The phrase "something in the process" had been mentioned 46 times, "Sears" 12,922 times, "commission sales" 19,992 times, "checklist" 1868 times, and

⁶⁵ Eileen Appelbaum, interview by author, 23 August 2004, New Brunswick, NJ.

⁶⁶ Hope Eastman, interview by author, 8 July 2004, Bethesda, MD.

⁶⁷ Court reporter's certificate (at end of transcript), Transcript, June 28, 1985, NARA, Sears Case Records, Box 20.

⁶⁸ Transcript, June 28, 1985, 19046-47, NARA, Sears Case Records, Box 15.

“feeble attempt” 12 times.⁶⁹ (Clearly Sears’ team was able to search for specific words in the record, a significant help when dealing with such an enormous transcript.) Morgan noted that he had been practicing law for 358 months, 95 of which had been concerned with this case, or 26.53631 percent of his entire law career. He said the EEOC’s “valiant” paralegals and Sears’ executives Bacon and Graham agreed that the ceiling had 56,576 squares, computed at 34 times 26 times 64. The judge interjected that it was easy to see what an exciting trial it had been, and Morgan responded that Bacon described it as “exciting as watching paint dry.”⁷⁰ He even talked about how often they had spilled coffee as fatigue set in, and that he spilled water on one of the EEOC’s expert witnesses, which might have been “Freudian.”⁷¹ He noted that Nordberg received the case on his first day with the court and had spent 100 percent of his career as a federal judge concerned with it in some way.⁷² Letwin thought the judge looked bored and furious with all this “nonsense” when the trial was already over.⁷³ Turning serious, Morgan said that rather than do what was “easy” when sued by the EEOC, Sears did what was “right.” He presented it as fighting the good fight, as a question of morality. Morgan concluded, “In a demonstration of corporate courage, fueled by the belief that they were innocent, Sears chose to fight back. The evidence proves they were correct -- they were innocent, as I trust this Court will so find. Thank you.”⁷⁴

⁶⁹ Transcript, June 28, 1985, 19048, NARA, Sears Case Records, Box 15.

⁷⁰ Transcript, June 28, 1985, 19049, NARA, Sears Case Records, Box 15.

⁷¹ Transcript, June 28, 1985, 19050, NARA, Sears Case Records, Box 15.

⁷² Transcript, June 28, 1985, 19051, NARA, Sears Case Records, Box 15.

⁷³ Gerald Letwin, interview by author, 9 July 2004, Washington, DC.

⁷⁴ Transcript, June 28, 1985, 19142-43, NARA, Sears Case Records, Box 15.

The EEOC offered its closing argument. Scanlan dealt with the statistical issues for the commission sales case, and Letwin addressed the pay case.⁷⁵ Baker summarized the witness testimony, refuting Sears' statements that women could not work nights or rotating schedules by noting that noncommission salespeople were already doing so. She said the historical record and academic studies showed that women had always had jobs requiring night and weekend work because they relied on husbands and relatives for childcare. She even gave Sears the benefit of the doubt, saying it did not discriminate intentionally but rather had perceptions of women that were not true for all women. Baker argued that Kessler-Harris and Rosenberg agreed that the government had engaged in a good deal of propaganda to get women who moved into higher paying jobs during World War II to go back home because they had wanted to make more money when given the chance. Commission sales jobs offered a career and a good income for someone without skills or degrees, and therefore were a very important opportunity for women.⁷⁶ To deny them these jobs "on the basis that you believe that women, . . . are going to be less qualified and less interested than men is just absolutely the essence of discrimination."⁷⁷ Finally, turning to broader issues about change for women, Baker reminded the Court that Sears claimed that new laws such as Title IX passed in the early 1970s transformed women's attitudes. To the contrary, Baker concluded that women

⁷⁵ Scanlan noted that for all its criticisms of the EEOC's analysis, Sears did not do its own statistical analysis, presumably because it would not do the company any good. Transcript, June 28, 1985, 18964-65, NARA, Sears Case Records, Box 15. Letwin argued that Sears' statistical methods were incorrect, and that the question was not just whether the EEOC failed to include certain variables, but whether Sears included too many. Transcript, June 28, 1985, 19036, 19038-39, NARA, Sears Case Records, Box 15.

⁷⁶ Transcript, June 28, 1985, 18987-95, 18998-99, NARA, Sears Case Records, Box 15.

⁷⁷ Transcript, June 28, 1985, 18999, NARA, Sears Case Records, Box 15.

changed first and then they changed the laws; the laws were a response to women's situations rather than the reverse.⁷⁸ In sum, Baker said,

whether women who entered the work force changed their attitudes is not at issue here. This is a case about women who do work and are working and their attitudes . . . regarding work. They have the same motivations as do men. . . . They work to maximize their ability to receive income in the limited number of hours that are available every week for all of us to work. . . . Ideally the best commission sales person is not an individual who is stereotypically masculine, nor . . . stereotypically feminine, but rather an individual who can be assertive and be a good listener. . . . Our evidence shows, and it is uncontested by Sears and actually agreed to by Dr. Rosenberg, that among those kinds of individuals there is absolutely no difference between men and women.⁷⁹

After ten months, the trial was over. The EEOC attorneys were exhausted but somehow felt stronger, buoyed by what they had endured. Camille Morgan believed that Morgan's team was "very proud of the job they did."⁸⁰ At the end of June the attorneys, who had been living in Chicago since Labor Day the year before, returned home to Washington, DC to await the final decision.⁸¹

"Fight among Feminists"

In the meantime, women's historians, feminists, and the media began to take notice of the case. Although the investigation and litigation had been going on for almost twelve years before Rosenberg and Kessler-Harris testified, the media had paid relatively little attention. At that point, however, coverage expanded and became increasingly mainstream, moving from the business section to magazines such as Time and Esquire, and escalating after the final decision in January 1986. Articles set up the story as an

⁷⁸ Transcript, June 28, 1985, 19010, NARA, Sears Case Records, Box 15.

⁷⁹ Transcript, June 28, 1985, 19011-12, NARA, Sears Case Records, Box 15.

⁸⁰ Morgan to author, by e-mail, 23 June 2007.

⁸¹ Gerald Letwin, interview by author, 9 July 2004, Washington, DC.

angry debate, pitting Kessler-Harris against Rosenberg as two distinctly opposite sides of the issue. The headlines used embattled terms to describe the debate and picked up on the theme of being “on trial,” for example, “Women’s History on Trial;” “Of History and Politics: Bitter Feminist Debate;” and “When Scholarship and the Cause Collide.”⁸² In June 1986, the New York Times ran an article featuring separate pictures of Kessler-Harris and Rosenberg. It set up distinct camps in a debate that “virtually isolated” Rosenberg from “fellow feminists and historians” and described “vituperative private dialogue among women’s historians.” It cited Rosenberg as conceding that she was considered “a kind of traitor to the cause” and another historian calling Rosenberg’s testimony “an immoral act.” Finally, in case the “bitter feminist debate” was not completely clear, the article provided details of various insults issued by the historians themselves.⁸³ The media seemed to delight in presenting the debate as a catfight, enjoying the image of two refined professional women slugging it out and getting dirty.

The media also linked the split between the expert witnesses to the equality/difference dilemma that had plagued feminists for years. In the early twentieth century, reformers helping working-class women sought special protections from employers such as minimum wages and pregnancy benefits. They criticized middle-class feminists for pressing for “equal rights” at the expense of practical needs of working women. Equal rights feminists argued that treating women differently, even for the sake of providing benefits, could be used to deny women equality in other ways. They argued

⁸² See Jon Wiener, “Women’s History on Trial,” The Nation, 7 September 1985, 161, 176-80; Samuel G. Freedman, “Of History and Politics: Bitter Feminist Debate,” The New York Times, 6 June 1986, 1, 4; and Jonathan Yardley, “When Scholarship & the Cause Collide,” The Washington Post, 16 June 1986, C2.

⁸³ Freedman, “Of History and Politics,” 1, 4; see also John Leo, “Are Women ‘Male Clones’?,” TIME, 18 August 1986, 63-64.

against taking any “differences” between men and women into account when devising legal standards. These issues continued to plague the movement into the 1970s and 1980s. Feminists on both sides spent a lot of energy trying to resolve what eventually came to be seen as a fundamentally unworkable dichotomy.⁸⁴

An August 1986 article in Time reflected this association of the Sears debate with the sameness/difference dilemma. The author juxtaposed the Sears debate with a dispute between Betty Friedan and 9 to 5 on one side and NOW on the other, over California legislation that required up to four months unpaid maternity leave, an extra benefit above the federal requirement. The author claimed that both disputes turned on the question of whether feminists should “admit significant differences between the sexes.” While reveling in the hopelessness of this debate, Time only allowed for a bit of complexity at the end of the article,

like many women, Rosenberg admits to great ambivalence on the issue. “If women as a group are allowed special benefits, you open up the group to charges that it is inferior. But if we deny all differences, as the women’s movement has so often done, you deflect attention from the disadvantages women labor under.” Either way, she says, women can lose: “I’m a historian, and I know the disadvantages of both sides.”⁸⁵

Academic scholars quickly joined the debate. Eschewing their usual delayed response, historians reacted in a polarized manner, choosing sides, writing letters, and organizing conferences. In December 1985, Columbia University devoted its Women and Society Seminar to the Sears case, at which Kessler-Harris and Rosenberg each presented their views and participants discussed “the issues of feminist scholarship and

⁸⁴ See for example, Joan Wallach Scott, “The Sears Case,” chap. in Gender and the Politics of History (New York: Columbia University Press, 1999); Joan C. Williams, “Deconstructing Gender,” Michigan Law Review 87 (1989): 797.

⁸⁵ Leo, “Are Women ‘Male Clones’?,” 64.

public policy.”⁸⁶ The same month, the Coordinating Committee on Women in the Historical Profession passed a resolution warning each other to be careful of the ways in which their scholarship could be used, and in April 1986 the Organization of American Historians (OAH) meeting included a session on expert witnesses.

Historians of all types were disturbed by Sears because it reflected how subtle historical arguments could be crudely reduced to rigid legal ones. They feared testifying as expert witnesses on the history of social injustice and being discredited on cross-examination or having their complex scholarship distorted or used to support a political position.⁸⁷ It cast doubt on what role history could play in bringing about social change through an adversarial legal process.⁸⁸ In retrospect, Kessler-Harris still believed the historical experience could suggest trends and shifts in public assumptions, but not with

⁸⁶ Barbara Harris and Susan Sacks, Cochairs for the Women and Society Executive Committee, Columbia University, to Members, 2 December 1985, Barnard Women’s Center Library, Sears case records. See also Ruth Milkman, “Women’s History and the Sears Case,” Feminist Studies 12(2) (1986): 375-400.

⁸⁷ Historians have long debated what role they should play in politics, arguing alternatively that they have an obligation to use their intellect for good and not remain cloistered, and that their work and organizations may be co-opted and politicized. See for example, William E. Leuchtenburg, “The Historian and the Public Realm,” (Presidential Address to the American Historical Association, December 28, 1991, Chicago, Illinois), American Historical Review 97(1) (February 1992): 1-18. One aspect of this broader debate is whether historians should testify in court as expert witnesses. Done most notably in Brown v. Board of Education, the practice gained in popularity during civil rights and voting rights cases in the 1960s. Doing so raised questions over whether historians are truly able to tell the “truth” rather than being used to support a position, and whether a historian can be said to have objective knowledge of the “facts” when they testify, as in Sears, against each other on opposite sides of a case. See for example, J. Morgan Kousser, “Are Expert Witnesses Whores? Reflections on Objectivity in Scholarship and Expert Witnessing,” Public Historian 6 (Winter 1984): 11; Peyton McCrary and J. Gerald Hebert, “Keeping the Courts Honest: The Role of Historians as Expert Witnesses in Southern Voting Rights Cases,” Southern University Law Review 16 (Spring 1989): 101; Peter Novick, That Noble Dream: The “Objectivity Question” and the American Historical Profession (Cambridge: Cambridge University Press, 1988), 502-10.

⁸⁸ See for example, Rosenberg Papers; Helene Foley to Rosalind Rosenberg, 2 January 1986, 1. Schlesinger; Rosenberg Papers; Joyce [no last name] to Rosalind Rosenberg, 22 November 22, 1985. Schlesinger; Rosenberg Papers; Rosalind Rosenberg to Helene Foley, 9 January 1986, 1. Schlesinger; and Rosenberg Papers; Mary Beth Norton to Rosalind Rosenberg, 4 December 1985, 1. Schlesinger.

the precision that a courtroom requires.⁸⁹ Others were disturbed by the implication that Rosenberg should have subverted her scholarship to a broader feminist cause, or were concerned that the intensity of the attacks on her undermined academic freedom and the right to scholarly dissent.⁹⁰

As feminists and historians became preoccupied with drawing their own battle lines, non-feminists began using the debate to undermine women's causes. Conservatives praised Rosenberg for her bravery in testifying for Sears, for reaffirming the right of free speech, and for resisting the pressure to toe the feminist party line.⁹¹ The Washington Post ran a scathing attack on feminists who criticized her: "The case of the women's movement against Rosalind Rosenberg is a deeply disturbing example of what can happen when ideological orthodoxy is allowed to take priority over scholarly integrity." The language was extremely harsh:

Rosenberg . . . is being widely and quite maliciously vilified among feminist scholars for having the effrontery to take a public position that they regard as injurious to women's interests; their attack is proof positive that they have their priorities wildly out of whack. . . . One can only wonder how well these people sleep at night.⁹²

The author accused the "feminist thought-control wardens" of requiring Rosenberg to keep quiet about the historical truth if it might harm the "feminist cause." He accused them of "openly and flagrantly" abandoning "scholarly principles," disregarding the truth and free speech, and letting politics determine their scholarship, and then likened this

⁸⁹ Alice Kessler-Harris, interview by author, 12 November 2003, New York, NY.

⁹⁰ Thomas Haskell and Sanford Levinson, "Academic Freedom and Expert Witnessing: Historians and the *Sears* Case," Texas Law Review 66 (June 1988): 1629-59, 1630-32.

⁹¹ See "Misusing History," The Washington Post, 9 June 1986, A20.

⁹² Yardley, "When Scholarship & the Cause Collide," C2.

kind of feminism to totalitarianism.⁹³ Many feminists were aware that conservatives might use Rosenberg's position, but may have been less conscious of how their own critiques of her could be used in a similar way.⁹⁴ Conservatives seemed to enjoy watching feminists attack each other, taking the opportunity to criticize them under the guise of more noble pursuits such as truth and free speech. Whatever one's feminist perspective, however – sameness or difference; a supporter of Rosenberg or Kessler-Harris – it was clear that conservatives co-opted the debate in a decidedly anti-feminist way.

Feminists themselves had trouble rising above the fray and reaching a more productive place. Their publications also characterized the debate as a battle, with headlines echoing the adversarial legal process, such as: "Women's Work on Trial"; "Life in the Mainstream: What Happens When Feminists Turn up on Both Sides of the Courtroom?"; and "Scholarship vs. Politics: A Feminist Battleground."⁹⁵ Many feminists accepted the polarized terms of the debate and quickly chose sides, rather than re-defining it in their own way. Each witness was forced to defend her scholarship in a prolonged back-and-forth debate about the minute details of her testimony, through letters to the editor, at conferences, and through the media, each citing specific transcript

⁹³ "The concern of these 'scholars' is not with studying the past in hopes of understanding it, but with selectively mining that past in order to trump up what passes for 'evidence' of grievances and wrongs against women; if what they find does not suit their purposes, they quietly, and guiltlessly, set it aside." Yardley, "When Scholarship & the Cause Collide," C2.

⁹⁴ See Rosenberg Papers; Helene Foley to Rosalind Rosenberg, 2 January 1986, 2. Schlesinger; and Rosenberg Papers; Sandi E. Cooper to Catherine Clinton, 24 February 1986, 1. Schlesinger.

⁹⁵ See Sandi E. Cooper, "Women's Work on Trial," New Directions for Women 14(6) (Nov./Dec. 1985): 1; Carol Sternhell, "Life in the Mainstream: What Happens When Feminists Turn up on Both Sides of the Courtroom?," Ms., July 1986, 48; and Rosalind Rosenberg, "Scholarship vs. Politics: A Feminist Battleground," Barnard Alumnae (Fall 1986): 9. Other titles included Alice Kessler-Harris, "Use of History Was on Trial in Sears Sex-Bias Case," The New York Times, 28 June 1986, 26; and Jacquelyn Dowd Hall, Preface, "Women's History Goes to Trial: EEOC v. Sears, Roebuck and Company," Signs 11(4) (Summer 1986): 751.

page numbers as proof that the other had misrepresented her.⁹⁶ From a broader perspective they played only a very small role in a much bigger case, and neither one's testimony determined the outcome, but this overall focus on the details of the debate distracted attention away from the problems faced by working women at Sears that the case was meant to address.

One explosive undercurrent was the issue of class. The language of class difference was present but not often acknowledged, leading some to lose sight of the goal of remedying sex discrimination for working women. As one historian responded to another's call for restraint,

we are not in a tea party or a ladies afternoon club -- we are in a struggle for the conscience and consciousness of a new generation. We are also in a struggle to alter the miserable disposition and deployment of wealth in the world's richest society. I am afraid that white gloves will get dirty.⁹⁷

Moreover, attacks against Rosenberg regularly mentioned money. Her critics claimed that she agreed to testify for the money (purportedly \$29,000), that she lived on Park Avenue, that her ex-husband was a lawyer, and that her specialty was intellectual (implied: elite) history, not labor history.⁹⁸ The sheer disbelief that Rosenberg would testify for the "big bad corporation" and the bewilderment over her true motivations

⁹⁶ Kessler-Harris was accused of putting political goals ahead of truthful scholarship, which forced her to defend her arguments by focusing closely on the evidence. In response, she claimed that Rosenberg's testimony "was not based on research in primary sources" and was constructed only by "omitting important information and by misrepresenting and misusing the work of other historians." She charged Rosenberg with inaccuracy and political motive: "to suggest, . . . that it was the reaction of women historians that politicized the debate, ignores the way in which the original argument was formulated to serve the position of the Sears's attorneys that women did not want higher-paying commission-sales jobs." Kessler-Harris, "Use of History Was on Trial in Sears Sex-Bias Case," 26.

⁹⁷ Rosenberg Papers; Sandi E. Cooper to Catherine Clinton, 24 February 1986, 2. Schlesinger.

⁹⁸ Other academics acknowledged this stigma. One wrote to Rosenberg, "those people have already written me off as an elitist, too (writing about intellectuals is dangerous business these days)." Rosenberg Papers; Dorothy [no last name] to Rosalind Rosenberg, 15 November 1985. Schlesinger.

made many women's historians assume that she was a hired gun. There was even a thinly-veiled contempt of lawyers, whose alleged financial motivations automatically made all of their arguments suspect. Living comparatively modest lifestyles, academics guarded a sense of moral superiority over lawyers, and the attacks against Rosenberg took on a tone of both jealousy and righteous indignation. Rosenberg's "crime," perhaps, was that she strayed too close to the line between lawyer and intellectual. She was married to a lawyer, perhaps lived a more affluent lifestyle than most academics, had taught legal history for six years, and even attended law school for awhile at Columbia University.⁹⁹ These factors made it possible for other feminists and historians to distinguish themselves from her and to reassure themselves that they would not "sell out" the way she had.¹⁰⁰ They often noted that other historians had been approached by Sears but refused to testify.¹⁰¹ Nor was the use of class one-sided. For her part, Rosenberg allegedly "red-baited" Kessler-Harris by characterizing as "hopeful" her statement that women "harbor values, attitudes, and behavior patterns potentially subversive to capitalism" in order to undermine her testimony "that women are as likely as men to want Sears's most highly competitive jobs."¹⁰² These attacks, and the arguments they engendered, drew attention farther and farther away from the issues at hand.

⁹⁹ Rosenberg Papers; Rosalind Rosenberg to Mary Beth Norton, 26 December 1985, 1. Schlesinger. While teaching in a non-tenure track job at Columbia, Rosenberg attempted to prolong her stay by sitting in on two years of law school classes in order to take over a retired colleague's popular legal history classes. Rosenberg to author, by e-mail, 10 July 2008.

¹⁰⁰ Historian Sandi Cooper put it most bluntly, "Most of the women present at [the] Columbia [seminar] are convinced that she did it because either the money was too good to resist -- or worse, because she is a rich bitch defending her class." Rosenberg Papers; Sandi E. Cooper to Catherine Clinton, 24 February 1986, 2. Schlesinger.

¹⁰¹ Most notably, Kathryn Kish Sklar and Carl Degler. See also Alice Kessler-Harris, interview by author, 12 November 2003, New York, NY.

¹⁰² Rosalind Rosenberg, "Reply on the Sears Case: 'a Distortion of the Record'", The Chronicle of Higher Education 22 (July 2, 1986). See also Cooper, "Women's Work on Trial," 11. Rosenberg also

The less obvious, but ultimately more important, counterpoint to these attacks was that, in comparison to the working women at Sears, women's historians were relatively affluent and solidly middle-class. Some noted the irony that two professional women with tenured positions at prestigious universities were debating what was best for the working women who sold clothing at Sears. Ironically, despite their refinement, the two historians were fighting it out in a rather un-ladylike manner, more stereotypically associated with the working class.

Finally, the sense that working women were absent was exacerbated by doubts about whether Kessler-Harris' testimony fully represented their experiences. It appeared that some women at Sears *did* take their families into consideration in making job decisions. Some feminists and historians acknowledged this complexity, claiming they did not have so much of a problem with *what* Rosenberg said as *where* she said it, in a courtroom for purposes that did not empower women. Moreover, few would argue with her statement that employment discrimination existed alongside social and cultural barriers to women's equality. Considering these commonalities, feminists might have decided to forgive Rosenberg and together decry a society that assumes women have the same opportunity to "choose" their jobs as do men, a legal system that rewards the defendant with the most manpower and money, and a labor system that transfers the moral burden of integrating the workplace to women themselves.¹⁰³ It was perhaps easier

alleged that Kessler-Harris "formed the view that employers are generally a bad lot and that they all discriminate before she ever came to this case. . . . I objected to . . . the fact that her anti-employer bias shaped her testimony to such an extent that she ended up saying things at trial that directly contradict what she has said in her published work." Rosenberg Papers; Rosalind Rosenberg to Joan Hoff-Wilson, 27 November 1985. Schlesinger.

¹⁰³ By claiming that a woman "chooses" her job freely, employers can avoid responsibility for structuring opportunity so that women will enter traditionally male jobs, while society can ignore the barriers to a working woman's free "choice," namely, their family obligations.

for observers to blame Rosenberg and distance themselves from her than to address the greater number of things they had in common.

The Decision

Seven months after the trial ended, Judge Nordberg finally issued his ruling in the Sears case on January 31, 1986. In a 76-page opinion he examined the EEOC's two claims, that Sears intentionally discriminated against women in hiring and promotion into commission sales from 1973 to 1980, and that it had a nationwide pattern and practice of discrimination against women by paying them less than men in 51 specific checklist jobs.¹⁰⁴ The Court examined the EEOC's statistical analyses in detail and found them lacking. It generally found Sears' witnesses to be "highly credible" and relied on the "EEOC's total failure to produce any alleged victim of discrimination" to support its finding that Sears did not discriminate in hiring into commission sales.¹⁰⁵ The Court entered judgment in favor of Sears "on all claims at issue in the trial of [the] case" and denied the EEOC's claim for relief.¹⁰⁶

The EEOC was disappointed and shocked by the decision. Twenty years later Letwin still believed the EEOC had done a good job and had a strong chance of winning had they been before a different court. His tone was neither arrogant nor bitter, but quietly confident, almost touching. He remembered the judge mentioning in one early hearing that another company did not think it had discriminated until it was all laid out for it and could see it. He hoped that comment would have resonance later, but it did

¹⁰⁴ Equal Employment Opportunity Commission v. Sears, Roebuck and Co., 628 F. Supp. 1264, 1288, 1328 (N.D. Ill. 1986).

¹⁰⁵ See, for example, discussion of Joan Haworth's testimony, Equal Employment Opportunity Commission v. Sears, Roebuck and Co., 628 F. Supp. 1264, 1313 n. 57, 1325 (N.D. Ill. 1986).

¹⁰⁶ Equal Employment Opportunity Commission v. Sears, Roebuck and Co., 628 F. Supp. 1264, 1353 (N.D. Ill. 1986).

not.¹⁰⁷ Scanlan was more ambivalent about the case, but thought Nordberg's final opinion was dishonest.¹⁰⁸ Some criticized Nordberg for displaying his own bias during the trial.¹⁰⁹ Others argued that the main reason a plaintiff wins or loses a statistical case like Sears is due to the judge it gets. Judge Grady, who had the case before Nordberg and handled some of the conflict of interest issues, such as the EEOC's motion for a protective order to prevent Sears' attorneys from asking staff members whether they belonged to NOW, was more liberal; had he remained the judge on the case, they speculated, there might have been a different outcome. Others regretted the EEOC's decision to try such a broad-based nationwide case in Chicago. Sears had been headquartered there for almost a century, and Nordberg came from the state court system. Arguably it would have been very difficult for him to find on a monumental scale against such an institution in its home town.

Sears, of course, was thrilled. Just before the final decision, on January 1, 1986, Edward A. Brennan took over Ed Telling's position as CEO and Chairman of the Board. Sears announced in its annual report that "On January 31, 1986, the long-standing case of *EEOC v. Sears* was resolved by a federal court decision in favor of Sears on all claims at issue." It followed with a chart of affirmative action information like the one Sears published in 1974, which it claimed reflected its "commitment to the principle that our

¹⁰⁷ Gerald Letwin, interview by author, 9 July 2004, Washington, DC. Former EEOC supervisor Jane Dolkart agreed there was no reason to walk away from the case and the attorneys did not expect the hostility they felt they received from the judge and the reasoning for his decision. Jane Dolkart, interview by author, 16 July 2004, Dallas, Texas. Letwin was surprised to lose the pay case. It involved technical issues concerning a Sears consultant instituting a pay system and mapping old job categories to new ones. This process was done often, and small mapping problems were corrected. Sears, however, argued there was no relationship between the categories, that the mapping could not be done at all. Letwin saw this as a ridiculous argument and the EEOC's theory as "totally viable" but the court simply did not accept it. Gerald Letwin, interview by author, 9 July 2004, Washington, DC.

¹⁰⁸ James Scanlan, telephone interview by author, 22 June 2004.

¹⁰⁹ See, for example, Williams, "Deconstructing Gender," 797.

business will be most successful if women and minorities fully participate in it.”¹¹⁰ In his Message to Shareholders, Brennan wrote,

Management has pledged to . . . employees equal opportunities for employment and advancement. Sears leadership on these issues was recently recognized when a U.S. district court in Chicago concluded that a costly 12-year investigation and lawsuit by the [EEOC] had failed to prove a single discriminatory act on the company’s part. The decision was a gratifying affirmation of our belief that equal employment is not only the right social policy, but also sound business policy.¹¹¹

For Morgan’s team, “[i]t was an enormous victory--to be sued for 600,000,000 or 800,000,000 million . . . and to . . . win every aspect of the case.”¹¹²

The Appeal and Costs Proceedings

Despite Nordberg’s decision, the case was far from over. Both Sears and the EEOC appealed parts of the decision, and Sears almost immediately sought an order requiring the EEOC to pay its costs and attorneys fees. The costs and fees proceeding was a complicated process in itself, lasting almost another ten years and involving a separate discovery process and numerous court decisions. Less than six months after his decision in the case, Nordberg set limits on the scope of discovery, a discovery cut-off date, and dates for the parties to file their briefs on the costs and fees issues.¹¹³ In January 1987, Nordberg awarded some costs and fees to Sears but limited them

¹¹⁰ Sears, Roebuck and Co., 1985 Annual Report, 68. Nevertheless, the chart reflected mostly minor changes, including some decreases, in the percentage of women employed in each category between 1984 and 1985.

¹¹¹ Edward A. Brennan, Chairman’s Message to Shareholders, Sears Roebuck and Co., 1985 Annual Report, 4-5.

¹¹² Morgan to author, by e-mail, 23 June 2007.

¹¹³ Equal Employment Opportunity Commission v. Sears, Roebuck and Co., 111 F.R.D. 385 (N.D. Ill. 1986).

significantly. For once, he made a significant finding for the EEOC, holding clearly that its lawsuit had not been frivolous or unreasonable.¹¹⁴

The conflict of interest issue also returned. Sears claimed it was entitled to fees and expenses because the conflicts of interest demonstrated the EEOC's claims were frivolous and its lawsuit brought in bad faith.¹¹⁵ It tried to determine who at the EEOC was responsible for dropping many key claims, including that "Sears discriminated in the promotion of women into and within" and "on the basis of pay" in various job categories, when the agency was narrowing its case down for trial. Sears argued that delegating such important decisions to a "hodgepodge" of employees demonstrated a lack of direction and explained "why [the company] was faced with a 'moving target'" throughout the case.¹¹⁶ Nevertheless, the court held for the EEOC again on the conflict of interest issue, finding it did not bring its lawsuit in bad faith. Although Copus was a "key figure" in the Sears investigation, he had left the EEOC two years before it filed suit and "[a]ny effect [his] conflicts of interest may have had on . . . policy dissipated in the EEOC's necessary reexamination of its policy at several levels in the many decisions made before and after [he] departed . . . , including the decision to file this suit." Nordberg referred back to Judge Grady's 1980 comment that Copus demonstrated "extremely poor judgment" but agreed it did not "mandate a finding of bad faith [and] award of fees and expenses" or "warrant the extreme sanction of dismissal" because it was "not one man's vendetta, but

¹¹⁴ Equal Employment Opportunity Commission v. Sears, Roebuck and Co., 114 F.R.D. 615 (N.D. Ill. 1987).

¹¹⁵ Equal Employment Opportunity Commission v. Sears, Roebuck and Co., 114 F.R.D. 615 (N.D. Ill. 1987).

¹¹⁶ Supplemental Memorandum in Support of Sears, Roebuck and Co.'s Entitlement to Attorneys' Fees and Expenses, ND IL, filed Sept. 29, 1986 [document 1162], 15-16, n. 3, 17, NARA, Sears Case Records, Box 1. Sears claimed that when Copus learned that executive Ray Graham was going over his head to make a presentation to the Commissioners he said, "it doesn't really bother me because for your information, commissioners come and commissioners go, but staff goes on forever." Ibid. at 17-18.

an agency's reasoned investigation and lawsuit."¹¹⁷ Although Morgan won the case, he lost his longest-running and most deeply-held argument. However, for as much as Copus and the women's groups helped the EEOC in the AT&T case, on some level their presence made the Sears litigation more difficult for the EEOC.

The attorneys stayed very busy on the case for years after the trial court decision, as all of the appeals "required briefs and hearings."¹¹⁸ In January 1988, a three-judge panel of the United States Court of Appeals for the Seventh Circuit affirmed the trial court decision 2 to 1, with Judges Espagh and Wood agreeing with Sears, and Cudahy dissenting. The court found "very damaging to [the EEOC's] position" that it did not come forward with any "direct or anecdotal evidence of discriminatory employment practices by [Sears]" and deferred to the lower court's judgment of the credibility of witnesses it heard.¹¹⁹ The court also found the conflict of interest issue the most interesting part of the "otherwise statistical case."¹²⁰ It claimed the case might have ended much earlier "[h]ad it not been for the unfortunate Copus bias in the early stages," but that even when "each party . . . had the chance to offer up at trial whatever it had, [the] EEOC has been found lacking."¹²¹

The dissent also criticized the conflict of interest and lack of witnesses, but argued the majority should not have accepted women's alleged lack of interest and qualifications

¹¹⁷ Equal Employment Opportunity Commission v. Sears, Roebuck and Co., 114 F.R.D. 615, 630-31 (N.D. Ill. 1987) (citing EEOC v. Sears, 504 F. Supp. 241, 249-51, 268 (N.D. Ill. 1980)).

¹¹⁸ Morgan to author, by e-mail, 23 June 2007.

¹¹⁹ EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 311, 360 (7th Cir. 1988).

¹²⁰ *Ibid.* at 307, n. 1.

¹²¹ *Ibid.* at 360.

so uncritically.¹²² Even after taking into account societal prescriptions and “interest,” the statistical disparities presented by the EEOC were still “enormous.”¹²³ The majority described women as having the “very same stereotypical qualities for which they have been assigned low-status positions throughout history,” the type of stereotypes that “the sex discrimination laws were intended to address.”¹²⁴ Although the EEOC’s case would have been stronger with individual witnesses, “even absent flesh and blood victims” the dissent found “the willingness of the district court and the majority to accept the interest defense uncritically, and without recognition of its close parallel to the stereotypes that Title VII seeks to eradicate, perplexing and unacceptable.”¹²⁵ The dissent also took issue with the majority’s refusal to consider the early years separate from the years after Sears instituted its MAG affirmative action plan, noting that a sharp decrease in gender-based disparities around that time could indicate the plan “removed barriers to women in Sears’ hiring practices.”¹²⁶ The dissent concluded, “this case was tainted in its origins and was tried without recourse to flesh and blood victims. The statistical evidence is nonetheless quite strong and the majority has misconstrued and grossly overstated its frailties.”¹²⁷

Despite the end of the appeal, the costs and fees proceedings continued. The parties argued over questions such as how much copies should have cost per page and

¹²² Ibid. at 360-61.

¹²³ Ibid. at 361-63. See also, Jane Dolkart, interview by author, 16 July 2004, Dallas, Texas.

¹²⁴ EEOC v. Sears, Roebuck & Co., 839 F.2d at 361. See also, Alice Kessler-Harris, interview by author, New York, NY, 12 November 2003.

¹²⁵ EEOC v. Sears, Roebuck & Co., 839 F.2d at 362.

¹²⁶ Ibid. at 363-65. Scanlan believed this was the Court of Appeals’ most crucial error. James Scanlan, telephone interview by author, 22 June 2004. The dissent on several occasions also noted the absurdity of the EEOC being required to prove things Sears should instead: “The majority’s insistence that the EEOC prove that Sears implemented its official written [leave] policies [which discriminated against pregnant women] illustrates how the majority heightens its demands on the EEOC beyond reason and common sense.” EEOC v. Sears, Roebuck & Co., 839 F.2d at 366.

¹²⁷ Ibid. at 366.

how many attorneys should have attended depositions.¹²⁸ In August 1991 Nordberg again declined to find the EEOC's suit was brought in bad faith. He held, "That the Seventh Circuit found the 'performance of EEOC . . . disappointing and . . . a disservice not only to Sears, but also to the public and even to NOW and its causes,' among other things, reveals the depth of EEOC's misjudgments. . . . It does not amount to a finding of frivolousness." He continued to find that the EEOC's case was legitimate, and affirmed the decision not to order attorneys fees. However, the court did order the EEOC to pay some of Sears' costs and expenses, including \$85,000 for witness fees and other expenses, and ordered more briefing from the parties on additional costs issues.¹²⁹ At the end of 1992 the Court made its final costs and fees award, including almost \$73,000 in attorneys' fees and a total of almost \$600,000. The parties "[t]hankfully" agreed to absorb their own costs for expert witness fees.¹³⁰ It was unusual for a judge to order the government to pay an opposing side's costs, and not surprisingly, Sears' attorneys thought the judge was fair and very balanced.¹³¹ It added to Morgan's "enormous victory," that "the EEOC even had to reimburse Sears for some of the costs of the trial."¹³² In 1994 Scanlan dropped off a check for about \$450,000 to Horowitz' firm and left the commission the next year. Almost twenty years after it began, the Sears case was finally over.¹³³

¹²⁸ Opposition of Sears, Roebuck and Co. to Plaintiff's Motion for Reconsideration of Costs Rulings of January 26, 1987 and May 20, 1987 (Jan. 11, 1991) [document 1184], NARA, Sears Case Records, Box 1.

¹²⁹ EEOC v. Sears, 138 F.R.D. 523, 529 (N.D. Ill. 1991) (citations omitted).

¹³⁰ EEOC v. Sears, No. 79 C 4373, 1992 U.S. Dist. LEXIS 20046, at *3-7 (N.D. Ill. Dec. 14, 1992).

¹³¹ Hope Eastman, interview by author, 8 July 2004, Bethesda, MD.

¹³² Morgan to author, by e-mail, 23 June 2007.

¹³³ James Scanlan, interview by author, 8 July 2004, Washington, DC.

Individual Witnesses

The EEOC's decision not to call any individual female Sears employees to testify at trial that they were interested in commission sales positions drew much criticism and speculation about its reasoning.¹³⁴ This was one criticism on which it seemed everyone could agree. Conservatives used it as an example of how statistical evidence could be abused in employment discrimination cases and called for the EEOC to move away from broad nationwide cases based on statistical evidence. The judge mentioned it on several occasions and said he had to scrutinize carefully the EEOC's statistical evidence because there was no individual testimony.¹³⁵ Women's organizations such as NOW and WE believed that individual voices were needed to win the case, and that where Sears chose to argue about what individual women wanted, the EEOC had no choice but to respond in kind.¹³⁶ Feminists were also angry about the EEOC's decision to drop the individual charges from the case, and Sears wasted no time taking advantage of this judgment call. Historians took it as a sign of elitism and lack of connection to working women at Sears.¹³⁷ Kessler-Harris thought the EEOC did not call individuals in part because it did not have the means to find and depose numerous witnesses and thus statistics were the best use of its resources.¹³⁸ Although Appelbaum acknowledged that the story of an

¹³⁴ For example, see Thomas L. Haskell, "The Voice of Reason," The Nation, 26 October 1985, 410.

¹³⁵ EEOC v. Sears Roebuck & Co., 628 F. Supp. at 1294, 1300.

¹³⁶ Anne Ladky, telephone interview by author, 20 March 2002.

¹³⁷ Criticizing the EEOC for not introducing individual witnesses made historians strange bedfellows with the Reagan administration, which was using this argument to limit discrimination remedies, not expand them.

¹³⁸ Alice Kessler-Harris, interview by author, 12 November 2003, New York, NY. In actuality, the original charging parties had already been deposed, prompting some to argue that if the EEOC had to find different witnesses to support its case then the testimony of the original charging parties must not have reflected what was claimed.

actual person is often needed to understand the issues, she was skeptical that calling individual witnesses would have affected the case.¹³⁹ Ironically, Rosenberg criticized the absence of working women most vocally, indicating that the absence of individual witnesses had a significant impact on her decision to testify.¹⁴⁰

Although historians assumed the EEOC's failure to call individual witnesses reflected a lack of concern for, or understanding of, the working women involved, from a legal perspective, the decision could have many different meanings. The EEOC had relied with great success on a statistical case in AT&T. Statistical cases had until then been widely accepted as a valid and full basis for finding liability; there was no need to call individual women to testify in order to win. Moreover, it was hard to track down women who had applied for jobs at Sears. Instead the EEOC relied on job applications, and the two sides argued over whether the women applicants were truly interested in commission sales jobs.¹⁴¹

Scanlan, who was mainly responsible for the decision not to call individual witnesses, was happy to defend it. He acknowledged that limited resources played some role, and the lapse of time since the beginning of the case also made bringing individual witnesses extremely difficult. However, he believed that in such a large case discrimination could best be proven through the vast statistical imbalance in the workforce. Calling even dozens of women to testify would have been seen as irrelevant

¹³⁹ Eileen Appelbaum, interview by author, 23 August 2004, New Brunswick, NJ.

¹⁴⁰ Rosenberg stated, "I told the lawyers in the beginning that it made a great difference to me that there were no complainants in the case. . . . I said one would be enough to deter me. If there were evidence of particular discriminatory practices, if I felt that the company on whose behalf I was testifying was in fact guilty as charged, I couldn't myself testify." David Tell, "Disparity or Discrimination? Rosalind Rosenberg; Interviewed by David Tell." Society 24(6) (1987): 8. See also Wiener, "Women's History on Trial," 179; and Rosalind Rosenberg, "A Feminist for Sears," The Nation, 26 October 1985.

¹⁴¹ Eileen Appelbaum, interview by author, 23 August 2004, New Brunswick, NJ.

given the thousands of women who had worked at or applied to Sears since 1973. If the EEOC put twenty women with plausible cases on the stand, Sears could dismiss them as only twenty out of several hundred thousand. Scanlan believed that statistics were enough, and that they could not have both individuals and that type of evidence in these big cases.¹⁴² Moreover, he argued there was no demonstrable case of discrimination because Sears was not telling anyone directly “we don’t hire women here.” The Teamsters case referred to what would have been discriminatory statements made in the 1960s. By the mid-1980s employers knew better than to make such blatant remarks; instead the individual often did not really know she was being discriminated against. Scanlan also thought that if he put a woman on the stand who did not get a job, he also would have to put on a man who did. Then the EEOC would have the difficult task of addressing how each applicant would have come across as a potential commission salesperson to an interviewer ten years earlier, for example, when the applicant was twenty years old rather than thirty.¹⁴³

Letwin agreed that from an academic standpoint it was possible to succeed with a statistical case alone; a party did not need an individual to testify in order to prove its case. In a large company, having fifty people testify to their individual stories did not prove anything about discrimination. However, he acknowledged that such testimony could be helpful because of how people, namely the judge, reacted to that evidence.

¹⁴² James Scanlan, telephone interview by author, 22 June 2004; Jon Wiener, “Wiener Replies,” The Nation, 26 October 1985, 411.

¹⁴³ James Scanlan, telephone interview by author, 22 June 2004. There also appeared to be a real question as to whether the individual charging parties’ claims actually supported the EEOC’s claims. The EEOC initially brought individual charges into its investigation to bolster any attacks against the Commissioner’s Charge. After it filed its lawsuits against Sears, the company swamped the commission with depositions of the charging parties in 1979 and 1980, creating a significant burden to cover them. Not many of their stories concerned commission sales, and including them would have meant having to address many narrow individual issues, such as one person’s disciplinary action claim, in a broad nationwide case.

Because the scope of the case was so broad and it was an extremely complicated statistical case with difficult issues, it was hard for the EEOC to do everything. It thought the most important thing was to present the evidence and that individual witnesses would not have added much to the case. Moreover, in a hiring case it is more difficult to develop a statistical case and then have claimants that reflect it, because applicants do not have a huge story to testify about. All they can say is they wanted the job; they did not know much about the job or the company, but simply applied and were rejected. On the contrary, it is easier to develop such a case with an employee denied a promotion who knows something about the company.¹⁴⁴ In the end, the EEOC did bring three individual witnesses to rebut Sears' lack of interest argument, but to little avail.¹⁴⁵

Aside from the effect on women working at Sears in the future, the EEOC's decision to drop the thirty-five original charging parties left those individuals without a remedy. As some small consolation, they had the right to bring their own lawsuit, and some did, first trying to be brought back into the EEOC's case and later settling directly with Sears. Many, like Marilyn Fumagalli, had moved on in the intervening decade and were not waiting around for a certain job at Sears. Of course, even if these charging parties' claims did not support the case, presumably there were other Sears women who would have benefited from a positive outcome in a nationwide case trying to impact women broadly throughout the company. The company changed its policies in the 1970s, and thus, conditions were better for women working there at the time of the trial

¹⁴⁴ Gerald Letwin, interview by author, 9 July 2004, Washington, DC.

¹⁴⁵ The witnesses did not appear to be much help. One thought she did not get the job because she was a victim of discrimination, but really had no way of knowing. Kessler-Harris thought the judge did not understand that one witness had been refused a job; instead he thought Sears did not have jobs available. James Scanlan, telephone interview by author, 22 June 2004; Alice Kessler-Harris, interview by author, New York, NY, 12 November 2003; Eileen Appelbaum, interview by author, 23 August 2004, New Brunswick, NJ.

than they had been ten years earlier. Although they may have sacrificed the individual charging parties for what they saw as the greater good, the EEOC attorneys did maintain their focus on helping the working women of Sears.

Although it would be nice to believe that legal arguments reflect what is most important to the complaining party, in reality a lawyer will often argue what will help win the case, as a means to a greater end. In Sears we cannot assume that the EEOC's decisions or arguments, though designed to help the women of Sears, were necessarily consistent with the concerns of the original charging parties.¹⁴⁶ Nevertheless, the absence of individual witnesses did not necessarily mean the EEOC lawyers were insensitive to the needs of working women. By the time the case came to trial after twelve years, most

¹⁴⁶ In order to understand the decision not to call individual witnesses, it helps to look not just at the role of history in law, which historians focused on, but also at how – or whether – law fits into history. Those seeking to use legal cases as historical sources may be initially pleased with their accessibility. Compared to many other sources, they are written down, abundant, well-preserved in government depositories, and provide a clear narrative. However, as trained legal historians know, they have significant limitations as sources and individual legal narratives are, at best, unreliable. When used to tell about the lives of the litigants, they provide a filtered story shaped by the legal arguments that are most likely to win. In fact, numerous other factors go into shaping legal briefs, decisions, and testimony, including the amount of resources, availability of witnesses, and receptiveness of the court to certain arguments. In Recasting American Liberty, Barbara Young Welke illustrates this issue in another context. She argues that courts became more receptive to individuals' injury claims against railroads as a result of increased claims brought on behalf of pregnant women. Prior to this, the concept of liberty in the U.S. would not allow for recovery of such injuries. Barbara Young Welke, Recasting American Liberty Gender, Race, Law, and the Railroad Revolution, 1865-1920 (Cambridge: Cambridge University Press, Cambridge, 2001).

Legal sources are also used to tell a different kind of history, in which a series of cases are viewed together to illustrate change over time in how the law is applied. Again, this does not focus on the individual complainant, but rather constructs a composite aggrieved person whose life has improved over time. However, the individuals in the cases were not necessarily successful, that is, most of them *lost* their cases in order for the law to change overall. In Recasting American Liberty Welke argues that the rise of the railroads led to a change in the notion of liberty, from an individualistic view where there was no recourse for "accidents" to a consensus that individuals had a right to be compensated for injuries suffered on the railroads. Her analysis reflects the story of a composite American, constructed from many individual cases, whose life was changed over time; he or she was finally able to receive compensation where it was not available before. However, most of the individuals in her legal sources never benefited from this change. In fact, it was their deaths and injuries, with no redress from the courts, that finally led to the changes. The individuals matter mainly as pieces of the larger story they tell. We also view each case in a condensed version, as if it was decided at the same time it started, without regard to other factors that may have influenced the decision. The change in the political climate between 1973 and 1986 in Sears illustrates the risk of doing so without more critical awareness.

of the women at Sears had long since “moved on.” Many never intended to make their careers with Sears, some may have worked for Sears temporarily, some moved on to other jobs, and most importantly, once the action began, Sears changed its policies to make it easier for women to gain better jobs.¹⁴⁷ The goal of NOW and WE had been to force Sears to change its workplace practices. There was no woman waiting around for the Sears decision so that she could finally get her job. The biggest loss was of potential back pay, which AT&T had been required to pay. Although it may have been possible to keep in contact with the women from Sears, preserving their memories for the chance to testify, the delay ensured that few of them would be affected by the decision. NOW and WE, which initially brought the case to the EEOC on the basis of their contacts with the women at Sears, dropped out soon after it became a legal action. Although working women (or at least their advocates) had started the case, it eventually moved away from them, into a legal process that only lawyers could navigate. Thus, the absence of working women from the Sears case may not indicate a lack of understanding of their needs. The decision was likely a strategic one and a practical one, a legal decision based on what would win the (nationwide) case and what was possible given the circumstances.

The Aftermath

After Sears the attorneys went on to a variety of endeavors. Although Camille Morgan believed “it was an enormous victory” and “they were very proud of the job they did,” after all the work on the appeals, her husband “announced that he would never take on a case so large again.” The lawyers “who had worked so hard for so long began to leave” his firm, which “stayed open until all employees found good jobs.” Morgan and

¹⁴⁷ Anne Ladky, telephone interview by author, 20 March 2002.

his wife “slowly closed the office,” and in April 1992 moved to Destin, Florida. Morgan retired except for a couple of arbitration cases he had been handling since leaving Birmingham. Although there had been signs for awhile, in 1995 he was diagnosed with Alzheimer’s disease at a relatively young age (mid-60’s).¹⁴⁸ Both Scanlan and Morgan had careers that were about much more than Sears, but it was the largest and longest case they had ever worked on and occupied an important psychic space for each. Despite his win, the case was the beginning of the end of Morgan’s firm and career.

Hope Eastman left Morgan and Associates soon after the trial court decision in 1986, before the fees issues. She became a prominent management employment lawyer and partner at a mid-sized law firm just outside Washington, DC. Eastman had felt the vitriol of some very famous feminists and women’s legal activists when her firm was hired by Sears, and acknowledged that twenty-five years later there were still some people not as close to her because of it. However, she believed that the people who criticized her representation of Sears made judgments without the facts and that she did a lot of good in a preventative fashion, helping companies “do the right thing” from within.¹⁴⁹ Pam Horowitz moved to Advocates at Law, a firm in Washington, DC. In 1990 she married civil rights leader Julian Bond and they remained close friends with Chuck and Camille Morgan. Fifteen years after their firm closed the Morgans still kept in touch with almost all of its lawyers and support staff, and many traveled to Destin to visit him.¹⁵⁰

¹⁴⁸ Morgan to author, by e-mail, 23 June 2007.

¹⁴⁹ Hope Eastman, interview by author, 8 July 2004, Bethesda, MD.

¹⁵⁰ Morgan to author, by e-mail, 23 June 2007.

Jim Scanlan remained at the EEOC for almost a decade after the Sears decision, handling the fees cases. He did other work, such as recommending whether the EEOC should sue in a particular case, but nothing on the same scale as Sears. Scanlan left the commission in 1995 and the next year joined the practice group of a former EEOC attorney at a large management law firm in Washington, DC, and then continued to do some work for them after he left there in 2002. The case remained very important to him, particularly with respect to how many years of his life he had spent on it.¹⁵¹ Twenty years after the trial, Gerry Letwin was still an attorney for the EEOC, and Karen Baker was an Administrative Law Judge for the Social Security Administration in South Carolina. Having spent virtually every year of his tenure on the federal bench on the Sears case, Judge Nordberg became a senior district judge in 1995.

As for the women of NOW and the other advocacy groups that worked on the Sears action, their story is a well-known one, told in many books and memoirs on second-wave feminism and the women's liberation movement.¹⁵² After leaving NOW's Board of Directors in the mid-1970s Mary Jean Collins worked for organizations such as Catholics for Choice and later returned to NOW as its National Action Vice President in the 1980s. Twenty years later she was Senior Vice President and National Political Director for People for the American Way in Washington, DC. Anne Ladky remained at Women Employed, eventually becoming its Executive Director and presiding over its re-commitment to the needs of poor and working-class women in 2000.¹⁵³ For Collins and

¹⁵¹ James Scanlan, telephone interview by author, June 22, 2004.

¹⁵² See, for example, Rosen, The World Split Open; Evans, Tidal Wave. One surprising omission is a history of NOW, which Rebecca Davison is writing now.

¹⁵³ See proceedings of "Equal Pay and Job Opportunities: A Conference Celebrating 40 Years of Title VII of the Civil Rights Act of 1964," Veteran Feminists of America (Newton, MA, May 1-2, 2004).

Ladky, the case was just one in a long line of direct actions before and since, as both remained, thirty years later, consumed by activism on behalf of women and others in need.

Testifying in the Sears case was a defining experience for some expert witnesses, but not for others. For Eileen Appelbaum, whose testimony did not draw much controversy and thus was not generally remembered, the experience was so disconcerting that it was the first and last time she testified. It made her believe that litigation would not bring about change; instead, she thought there was a better chance through legislation and informing the public, and dedicated herself to research and policy debates. As Director of the Center for Women and Work at Rutgers University she spent much of her time looking for companies committed to advancing women in the workplace and serving as role models for other companies.¹⁵⁴ The case had a more public effect on the lives and careers of the two historians. Despite testifying for the losing side, Kessler-Harris' career flourished. The year after the decision, she was the keynote speaker at the most important conference for women's historians, the Berkshire Conference on the History of Women.¹⁵⁵ Years later, Kessler-Harris maintained her belief that history can show trends and shifts in public assumptions, though not with the precision a courtroom needs.¹⁵⁶ After many years teaching at Rutgers University, she moved to Columbia University, where, ironically, she found herself at the same institution as Rosenberg, a professor at Barnard College. As for Rosenberg, she "lost many friends over the case, which distressed [her] at the time," and working on the case delayed her next book "by several

¹⁵⁴ Eileen Appelbaum, interview by author, 23 August 2004, New Brunswick, NJ.

¹⁵⁵ Kessler-Harris, A Woman's Wage, 158.

¹⁵⁶ Alice Kessler-Harris, interview by author, 12 November 2003, New York, NY.

years.”¹⁵⁷ The case was a defining moment in both Kessler-Harris’ and Rosenberg’s careers.

As for the women of Sears, just as during the trial, thirty years after filing their charges of discrimination they remained the hardest to find. Some probably were happy to remain anonymous, fearing retaliation from the company for filing complaints. Many were young at the time, and may have gotten married, changed their names, or moved away. Without high-profile careers like the attorneys, they were harder to trace through methods such as the Internet. Thus, the invisibility that plagued the Sears women through the trial continued. After several years as a member of NOW, Marilyn Fumagalli became disenchanted with the political process. She believed she had gone as far as she could and then turned inward, deciding to become very personal in how she tried to change the world. She believed it had to be changed “one cell at a time,” through meditation and creating peace within a person in order to radiate it outward. Thirty years later she was working as a massage therapist in Chicago. She tried to follow the case a bit after her charge was dropped by reading an occasional newspaper article, but did not know how to find that information in a pre-Internet age. In fact, more than twenty years after her deposition she still did not know how the case had turned out, that Sears had won, or that it had become part of feminist history. She had personally boycotted Sears after her experience, and only thirty years later returned to shop there. Upon hearing about the case she felt validated that her own “small, personal feeling of injustice” had come to mean something more, “part of feminist history.” The experience had a profound effect on her life: “having the door shut by Sears was my initiation into the

¹⁵⁷ Rosenberg to author, by e-mail, 9 July 2008.

limitations women faced in the workplace. It was an astonishing reality check and part of me has been grimly disturbed ever since.” In fact, Fumagalli believed it did not matter whether the case was won or lost because it was more important to view it in the context of feminist history. It gave meaning to and validated something that felt chaotic and abusive at the time.¹⁵⁸ Thus, even though the women of Sears may have moved on or not been aware of any meaning beyond their own small part, the case may have been part of a consciousness-raising they carried with them throughout their lives.

¹⁵⁸ Marilyn Fumagalli, telephone interview by author, 16 June 2005; Marilyn Fumagalli to author, by e-mail, 8 June 2005. It is hard to believe, and actually sad, that Fumagalli did not know how the case turned out. She was in some way the mirror image of today’s historians: the women who started it do not know how it ended, and historians do not know how it started.

Chapter 8

Conclusion: The Meaning of *Sears*

The Sears case is remembered by only a small percentage of people, and by those who do, for its fight among feminists. All we know about the case is how women's labor history was being represented at the time and how historians were treated by the legal system. The case holds much intrigue among feminist scholars because of women's historians' experience testifying in court, but is virtually unknown outside of history and women's studies. High school students do not learn about it the way they do major cases such as Brown v. Board of Education. Nor is there any discussion of the case in law schools. Sears was not a Supreme Court case, just a district court case affirmed by the Court of Appeals. The case is largely irrelevant to labor and employment lawyers. It set no new legal standards or rights; it was simply one of many cases decided for the employer.¹

However, the Sears case meant very different things to the people involved than it did to historians and feminists. For women's groups in Chicago, it was one aspect of a broad assault on economic inequity. For the women of Sears, it was a way of expressing their frustrations with the company, and perhaps part of a consciousness-raising they carried with them even as they moved on and the case receded from their lives. For the attorneys it took over a significant part of their lives and represented a large chunk of their careers, entailing personal sacrifice regardless of whether they won or lost. For Sears it was a major victory on principle, affirming its claim that it was trying to integrate

¹ By comparison, a case such as McDonnell Douglas v. Green, 411 U.S. 792 (1973) established a plaintiff's burdens of proof in proving discrimination under Title VII and is cited routinely by employment lawyers in legal briefs. Similarly, a case such as Roe v. Wade, 410 U.S. 113 (1973) became well-known because it carved a new right to abortion out of an existing right to privacy.

women and minorities into its workforce, but also the beginning of a decline from which the company never fully recovered. Upon closer review the story of this case is quite different from what is normally remembered about Sears.

The case should be remembered for many other reasons. Viewing it more closely provides insight into why the EEOC lost and even the assumption that it did. The case reflected a waning of attention to affirmative action and women's economic harm in general, as issues such as sexual harassment received more attention in the late 1970s and 1980s. It draws attention to debates over what working women wanted and whether that could be generalized. There was a missed opportunity for a legal remedy for working women and for a better understanding by middle- and working-class women of each other's needs in the workplace. Such debates reflected the state of feminist debates at the time and how enmeshed they were in the equality/difference dilemma. The case and its aftermath represented a turning point, a new recognition that although obtaining access to traditionally male jobs was an important step, anti-discrimination laws could not alone solve the problems of working women. Since these concerns were intertwined with family concerns, women had to insist on a more comprehensive solution to workplace issues. As a result, scholars and activists have begun to re-conceive their demands for the workplace to account for women's (and men's) family lives. Recovering the women of Sears highlights a need for contemporary feminists to consider broadly the interests of women of all socio-economic groups if they are to find solutions to the problems of working women that take into consideration their families as well as their working lives.

Why (and Whether) Sears Won

Debate following the Sears case focused on why the EEOC lost what seemed to be a clear-cut case. Speculation focused on legal factors such as bad lawyering, bad facts, the failure to call individual witnesses, and the EEOC's perceived abandonment of the case. However, historical factors played a crucial role, including women's groups' shift in focus toward the ERA, the increasingly conservative national political climate, Sears' resistance, the difference in resources between the two sides, and a protracted litigation which enabled the company to take advantage of changing political times and waning activist interest in the case. Although the uproar over the historians' testimony distracted attention away from the issues at hand and ultimately shaped future feminist debate, it had virtually no impact on the outcome of the case or the result for individual women of Sears.² Beyond trying to determine why the EEOC lost and Sears won, it is more important to question these assumptions by examining the case's impact on Sears.

Aside from the players involved, the EEOC case had a significant impact on Sears as a corporation. Journalist Donald R. Katz portrayed the company as brought to "its knees" in the 1970s by sinking corporate profits and stock prices, internal conflicts

² In discussing the Sears case, people are always eager to determine who was responsible for silencing the voices of working women. However, blame is largely beside the point in a much more complex case. Sears resisted the EEOC for many years and fought union organizing efforts, and thus its workers had little opportunity to challenge working conditions. Women's organizations tried to involve the women of Sears by interviewing them and filing charges of discrimination on their behalf, but unlike in AT&T, Sears women overall did not work together for change from within the company. Using the charges filed by Sears women, the EEOC issued a Commissioner's Charge in 1973. In 1979 the agency filed a lawsuit against the company but dropped the original charging parties from its case several years later for a variety of reasons discussed in more detail in Chapter 6. The women were permitted to bring their own lawsuits, and Sears settled with the few that did. However, the lapse of time meant that most of the individual women had moved on; they were not waiting around for the promotion or job. The media sensationalized the debate between the expert witnesses and was not interested in following a longer more complex story about the case. Conservatives asserted academic freedom of speech and thinly-veiled anti-feminism. Feminists and historians were distracted by the details of the dispute, though certainly not all were blind to class concerns. The legal system had its own limits: discrimination laws failed to reach many crucial issues, litigation delayed relief so long that most women were no longer interested, and using litigation for social change reduced nuanced arguments to black and white.

between the powerful Chicago buyers and the field employees, and major lawsuits for discrimination, customs fraud, and breach of contract.³ The New York Times reported that senior marketing executives traced the company's problems to pricing and marketing practices in the mid-1960s and efforts to "widen its clientele, reaching upward with little success to attract high-fashion customers from department stores and specialty shops and downward toward bargain-priced merchandise that returned little profit."⁴

When Edward Telling became Chairman around 1978 he "set . . . top supervisory staff to a self-examination that . . . led to . . . five-year plans . . . for merchandising, . . . store and distribution operations and . . . support services." The study marked a break with the company's "traditional . . . approach" and helped turn around steep losses. Although executives were positive about the changes, one analyst said, "Sears's stability is not questioned; its growth is." Although the company still held a major "place in the national economy," with over 17 billion in annual sales, revenues equal to 1 percent of the gross national product, and almost 900 stores, by 1979 sales and profit figures were "unexciting at best." The Times reported that "long cited as a textbook example of the well-managed enterprise," Sears "had lost its leanness and blurred its focus." Despite societal changes the company still looked much like it did in 1939. Management planned to return to its philosophy "as a merchant serving primarily the needs and tastes of

³ Katz, The Big Store, book flap.

⁴ Outsiders also blamed a 1977 "price-slashing promotional binge [that] increased sales but cut profits," and "deliberate restraints on promotions [in 1978 which] led to sales declines without doing much . . . for the profit picture," leaving Sears "wallowing in its own wake." William Robbins, "Sears: New Chiefs, Old Course; Promotional Binge Ended By Remolding," The New York Times, 8 February 1979, D1; Katz, 362.

middle-class America,” and shift to more centralized control.⁵ Between 1979 and 1984 Sears’ workforce declined by more than 8 percent.⁶

Under pressure from Sears’ personnel department, Telling allowed consultants in to address grievances of women and African-American employees. He attended one or two sessions, “but, as with so much of the nation and its working institutions during the era of Ronald Reagan, [company] leaders . . . were no longer interested in the particular problems of minorities or women much beyond the limits of the law.” Telling brought more women and blacks onto the board of directors, but there were still no women officers and only one African-American. Even the company’s historian admitted that “the official attitude toward hiring,” which “retrogressed under the cover of statistics,” was not the only thing that suffered. Attitudes toward customers, particularly “minorities and poor people . . . bore all the absence of logic and evidence of psychological avoidance entailed in classical scapegoating.” Although Telling claimed “[w]e never leave a market; a market leaves us,” some “younger employees . . . believed Sears had repudiated its tradition of drawing power from . . . serving shoppers of humble means . . . because the lives of humble shoppers in America no longer resembled the childhoods of the men of once-humble means who ran the corporation. Most people of modest means just weren’t white anymore.” Those who pushed for minority neighborhood stores often were ignored, and senior managers were out of touch with reality, believing that all Sears people were the same everywhere.⁷

⁵ Robbins, “Sears: New Chiefs, Old Course,” D1.

⁶ Sears, Roebuck and Co., 1984 Annual Report (LexisNexis Academic, Dec. 31, 1984), [page uncertain] [Sears own history, timeline].

⁷ Katz, 362-364.

On January 1, 1986, just before Judge Nordberg's decision, Telling retired and was replaced by Edward A. Brennan. The court decision was one of few highlights for the company in a year of great change. In June Sears closed its four territorial headquarters, planning to administer the field offices from the Sears Tower in Chicago. The territorial headquarters offices in California became a Los Angeles County detention center. At the end of October, Sears announced it was closing the domestic operation of its Sears World Trade unit. Brennan began making major changes in the workforce through a "program of attrition and monitoring by personnel department." Since the late 1960s the number of African-American and Hispanic employees and women "officials and managers" had significantly increased. White middle managers complained that "none of their male children would ever stand a chance at Sears these days."⁸ Despite changes deemed necessary, corporate attitudes had not changed much.

By 1987 Donald Katz claimed that Sears had made a remarkable turnaround, rising out of a slump to transform itself back into a dynamic corporation.⁹ Despite his optimistic outlook, however, financial problems continued to plague Sears. By the beginning of the twenty-first century Sears was "[m]ired in a retail slump, [and had] long 'fallen out of favor' on Wall Street after 'losing ground to competitors and enduring sluggish sales for years.'"¹⁰ Sales had fallen for four consecutive years and its \$1.9 billion acquisition of Lands' End had not "worked out."¹¹ In a surprise announcement in November 2004, the board approved a deal for Kmart to acquire Sears for \$11 billion.

⁸ Katz, 362, 585 (Chronology), 586.

⁹ Katz, book flap.

¹⁰ Megan Reichgott, Associated Press, "Kmart Buying Sears in \$11 Billion Deal," 17 November 2004, http://story.news.yahoo.com/news?tmpl=story&u=/ap/20041117/ap_on_bi_ge/kmart_sears_merger.

¹¹ Dave Carpenter, Associated Press, "Shareholders Approve Sears-Kmart Merger," 24 March 2005, http://story.news.yahoo.com/news?tmpl=story&u=/ap/20050324/ap_on_bi_ge/sears_kmart_merger.

The news was hailed as a “remarkable comeback” for Kmart, which had been recovering from bankruptcy since 2002, and Sears was expected to adopt Kmart’s strategy of shedding underperforming stores.¹² In 2005 shareholders approved the acquisition, “clearing the way for the two struggling rivals to combine into the nation’s third-biggest retailer.” The merger furthered Sears’ strategy “of moving away from shopping malls to the more profitable off-mall sites” and was expected to save \$500 million over three years, which meant “widespread store closings and staff cuts.” The CEO who brought Kmart out of bankruptcy was expected to use the same strategy with Sears, “sell assets, cut costs, reduce inventory and raise prices He recognized Kmart was a cadaver and he monetized it.” With a long term “bleak outlook,” the news of the merger demonstrated how far Sears had fallen since the EEOC trial.¹³

Sears’ overall business decline, though due to more complicated reasons, raises the question of how much the company gained in its victory over the EEOC. On some level, the mere fact that the case ever got to trial was a triumph for the EEOC and the women of Sears, as the EEOC only took on the strongest cases to sue on behalf of employees and rarely went to trial.¹⁴ Furthermore, the vast majority of employment discrimination cases are dismissed on summary judgment. It was alone a success for the EEOC to survive Sears’ motion to dismiss, which meant the judge believed it necessary to weigh all the evidence and facts of the case. The EEOC kept pressure on Sears and forced it to go through extensive and costly preparations to show it did not discriminate.

¹² Reichgott, “Kmart Buying Sears in \$11 Billion Deal.”

¹³ Carpenter, “Shareholders Approve Sears-Kmart Merger.”

¹⁴ James Scanlan, interview by author, 8 July 2004, Washington, DC.

Moreover, despite the EEOC's loss at trial, some women did "win" against Sears. After being dropped from the EEOC's case several of the original charging parties hired their own attorneys to try to intervene in the EEOC's case and eventually settled with Sears. Being dropped from the EEOC case may have turned out to be a good thing for Sheelagh Feigel, as in the end a private attorney did a better job than the EEOC in obtaining redress for her, settling her case for just under \$10,000. One Sears attorney recalled that the company may have decided to settle with those women so they would not testify against it at trial.¹⁵ Nevertheless, Feigel's attorney considered himself lucky not to be involved in the EEOC's case – that his motion to intervene was denied – because it went on "forever."¹⁶ Although it was a far cry from a nationwide settlement, Sears' victory was not absolute; in some ways it lost and was forced to pay money to some of the women it discriminated against.

Furthermore, even those on the losing end of the Sears case thought it had many positive effects. Despite not receiving any settlement, Marilyn Fumagalli felt that becoming a part of feminist history – regardless of whether the EEOC won or lost – validated her entire experience. For those concerned with remedying workplace discrimination, such as Eileen Appelbaum, Sears was part of a series of cases that emphasized that equal employment opportunity was the law and reinforced access to opportunities, particularly for women unencumbered by family responsibilities.¹⁷ Those trying to change the retail industry and open up traditionally-male jobs, such as NOW

¹⁵ Hymen Bear, telephone interview by author, 27 June 2005.

¹⁶ Paul Brayman, telephone interview by author, 23 June 2005.

¹⁷ For example, the insurance industry subsequently opened professional rating positions to women, but it was a short-lived victory as the jobs quickly became feminized. Eileen Appelbaum, interview by author, 23 August 2004, New Brunswick, New Jersey.

Chicago and WE, also saw an early impact of the case. In response to their pressure and the EEOC investigation, Sears changed its practices in the mid-1970s, ensuring that by the time of the trial women workers did not face the same obstacles as when the case began.¹⁸ Even if the EEOC was defeated in court, these efforts helped force the company to change, thereby “losing the battle but winning the war.”¹⁹ In the end these groups achieved their goals of helping future women workers at Sears.

There is also some evidence that even though Sears won, the case had a deterrent effect on other companies that considered defying the EEOC. The negative publicity Sears received as a result of the case placed other large companies on notice. It was hard to ignore the fact that Sears was forced to make an enormous financial investment in the litigation, which coincided with an overall business decline from which the company never fully recovered.²⁰ Letwin recalled that one company dealing with the EEOC told him it did not want to get into a “Sears situation.” He took that as a good sign.²¹

This view of Sears’ victory calls into question the search for explanations of why Sears won, which hovers over every analysis of the case. It also raises the issue of why the case is remembered as such a defeat for the women’s movement. Recovering those whose stories have not yet been told makes clear that not all was lost in the Reagan era. Although the case was lost in court, Sears was just one part of a much longer story about

¹⁸ Jane Dolkart, interview by author, 16 July 2004, Dallas, Texas.

¹⁹ Anne Ladky, interview by author, March 12, 2003, Chicago, Illinois.

²⁰ Even anecdotally, baby boomers generally recall the prominent flagship Sears store in their childhood city, or it being the first (and only) place that would give them a credit card, but then invariably realize that store is no longer there.

²¹ Gerald Letwin, interview by author, 9 July 2004, Washington, DC. As for Sears’ moral victory, even if the company did not prevent the EEOC from suing other “good” employers, it arguably made the government and plaintiffs’ attorneys more careful about the class-action cases they bring, both to ensure they are narrowly-tailored and strong and that there are adequate resources to win them.

efforts to improve the workplace for women that on balance, has steadily though slowly improved over the past forty years.²² Even more broadly, its failings revealed the urgent need for a more inclusive framework and a workplace that takes into consideration workers' family lives, a success in itself.

Who Could Be Considered a Feminist

The Sears case and the attacks on Rosenberg also raised the complicated question of who could be considered a feminist. Advocates for women have long differed in their approaches to social change, with some working through the state and its institutions and others working against or outside of it. Seeking social change through state institutions brings a certain measure of legitimacy and may achieve more concrete results that are harder to take away.²³ Nevertheless, activists working within the system and dependent on institutionalized power risk their work being co-opted by the state or their progress stalled if their resources dry up.²⁴ Moreover, such tactics inevitably require compromises to achieve legislative success, which often leads to legislation that helps only some women, helps them for the wrong reasons, or simultaneously institutionalizes their

²² See MacLean, Freedom is Not Enough.

²³ For example, gaining the status of a constitutional amendment made women's suffrage a more solid and presumably long-lasting right. Robin Muncy describes Progressive women working within the government who accessed its legitimacy and used it for positive, as well as questionable good, creating opportunity for women in the government and giving women's needs a more prominent place on the social agenda. They were motivated largely by personal ambition, reaching higher positions in the government and in the professions than almost any women before. They were also motivated by improving the welfare of ordinary Americans, in order to combat the social ills brought on by industrialization and urbanization. Robin Muncy, Creating a Female Dominion in American Reform, 1890-1935 (New York: Oxford University Press, 1991).

²⁴ Muncy's Progressive women found that their work was subsumed into New Deal reforms. Muncy, Creating a Female Dominion in American Reform. In Rochester, New York, benevolent women's work trying to expand women's public roles from within the separate spheres ideology was largely subsidized by their husbands and other sources of local wealth and power, and thus, virtually disappeared with economic downturns. On the other hand, ultraist/radical women more on the social fringe of Rochester were able to continue their national work for total racial and sexual equality because it did not depend on support from any sources of institutional power. Hewitt, Women's Activism and Social Change.

inferior position in society.²⁵ The best solution for social change is a form of activism that takes both methods into account and strategically uses the best of each. Successfully wielding state resources for social change requires a healthy skepticism about what the state can do and resisting the trappings of power once initial goals are reached.²⁶

So where do the women discussed in the previous chapters fall? To begin with, it is not so simple to determine who worked within and outside the system. Government attorneys such as Mary Eastwood, Marguerite Rawalt, and Caruthers Berger certainly worked within the system, enjoying connections that most women did not have and deriving their authority from professional advancement at a time when few women were able to do so. However, they also used their legal skills, access to power, and knowledge of the federal government to help other women, bringing lawsuits on their own time and risking conflicts of interest and possibly their jobs. Unlike many feminists who sought publicity for their causes, they preferred to work behind-the-scenes, in part to protect their jobs and insider status, and are therefore less well-known.²⁷ NOW also used the

²⁵ For example, protective legislation curbed exploitation of working women by labeling them as weaker than men, and institutionalized their subordinate position in society. Kessler-Harris, *Out to Work*, chap. 7. *Roe v. Wade* granted women the right to abortion but justified it under an amorphous and unstable right to privacy rather than a woman's right to control her own body.

²⁶ Temma Kaplan describes Lois Gibbs' work in cleaning up Love Canal as an important model. Although Gibbs worked with the state in trying to gain recourse for the effects of toxic waste in her neighborhood, she never fully trusted the state to help. This uneasy relationship was perhaps the best. The activists most successful in working with the state are those able to resist being co-opted or taking on the trappings of power once they achieve some success. Gibbs created the Consumers Clearinghouse on Hazardous Waste in Washington but it remained a decentralized organization that provided support for community activism, rather than sending experts to advise them on how to solve a problem that community members understood best. Kaplan argues for redefining what constitutes political action to include such community-based activism and for recognizing a third sphere that is neither public nor private. Temma Kaplan, *Crazy for Democracy: Women in Grassroots Movements* (New York: Routledge, 1997).

²⁷ Eastwood, Rawalt, and Berger handled several large cases, including one against Colgate, during their free time, working long hours into the night after leaving their offices and doing their own typing (which they insisted they share). Tully-Crenshaw Feminist Oral History Project Records, 1961-2001; Interview with Mary Eastwood by Muriel Fox, March 7, 1992, 43-46, 80. MC 548, Series I, Subseries A, 3.4-3.7. Schlesinger. They were not immune from focusing on their own interests. Eastwood could not identify with issues that NOW was involved in by 1992, for example, she could not "get real

legal system, to push the EEOC to enforce Title VII on behalf of women and to bring about change for women in the workplace. To this end, NOW Chicago and WE interviewed Sears women in order to file charges of discrimination with the government on their behalf. Nevertheless, NOW also used a healthy dose of direct action to pressure Sears to change its policies, including leafleting, boycotts, and public relations tactics. Nor did it wholly accept the legal system as offering a workable solution. It spent a great deal of time monitoring and pressuring the EEOC to improve its procedures and enforcement. Its downfall perhaps – though not necessarily through its own fault – was that fewer Sears women were involved on their own behalf than had been in cases such as AT&T.

Since feminists can be found in many different places and roles, it is impossible to speak of one type of woman or feminist. Despite the well-worn narratives of first- and second-wave feminism, there are, at any given time, many competing agendas for social change based on differences of class, ethnicity, and race that are as important as connections based on gender.²⁸ The NOW women were known as middle-class liberal feminists, focused on equal legal rights for women. However, the Sears case showed that even within NOW there were many different kinds of feminists, with different concerns.

excited about child care or retraining women who've been out of the work force for years; because that wasn't my life. For the same reason, I can't get real excited about the gay issues. I mean I think it's important but – and I think child care is important too, but it doesn't affect me personally." Ibid. at 83.

²⁸ See Nancy A. Hewitt, "Re-rooting American Women's Activism: Global Perspectives on 1848," in Patricia Grimshaw, et al, eds., Women's Rights and Human Rights: International Historical Perspectives (Palgrave, 2001), contextualizing the notion of Seneca Falls as the main women's rights event leading directly to suffrage in 1920 in a broader equality and justice movement for all, and noting the importance of recognizing 10 or 12 different concurrent narratives for any given period. See also, Nancy A. Hewitt, Southern Discomfort: Women's Activism in Tampa, Florida, 1880s-1920s (Urbana and Chicago: University of Illinois Press, 2001), 275, recovering overlapping groups of activist women in Tampa at the turn of the twentieth century organized for social causes along racial, ethnic, class lines more than gender, "disrupting the notion" that gender itself is enough to sustain commonality and cautioning against "the dangers of studying any group isolated from the larger context that gave meaning to their politics."

Chicago NOW women from the early 1970s, such as Mary Jean Collins, had more in common with labor women like Catherine Conroy and Dorothy Haener and the founders of CLUW, with whom they corresponded and cooperated, than with East Coast members of NOW such as Karen DeCrow and Eleanor Smeal. This helps explain why the labor women left NOW early on, and why the Sears campaign lost support when Collins lost the presidency.

What about the other players in the Sears case? Rosenberg was an early pioneer of women's history but later was vilified for testifying against the EEOC; despite the criticism that she did the easy thing, in retrospect her position was personally the harder one to take. Her experience echoed the treatment of other women involved in the Sears case. Hope Eastman helped found the Women's Legal Defense Fund but faced hostility for representing Sears against the EEOC.²⁹ Lois Herr, an AT&T employee, was instrumental in developing women's caucuses and bringing about change within the company, in part because she wanted to move up in its management ranks.³⁰ Aileen Hernandez was president of NOW but later criticized for working as a consultant for Sears on affirmative action issues. Even Collins pressed the Sears campaign in part to help her win the presidency of NOW.³¹ A graduate of Vassar College and advocate for working women and families, Juliet Brudney spent three years during World War II helping to organize the National Farmers' Union in Iowa and Oklahoma. During the 1950s and 1960s she raised four children while "work[ing] toward social justice" in New

²⁹ Men in the same position did not face the same criticisms. David Copus, the EEOC attorney in the AT&T case and an early NOW member, later worked as a management-side labor and employment attorney, with little fanfare. Charles Morgan, an ACLU civil rights attorney in the Deep South, faced some derision, but not career suicide, for later representing Sears against the EEOC.

³⁰ Herr, Women, Power, and AT&T.

³¹ Anne Ladky, interview by author, 12 March 2003, Chicago, Illinois.

York, “helping low-income tenants” and as “the director of Settlement House Employment Development.” During the 1970s she “served as [executive] director of the Boston YWCA, helping women secure federal job training grants.” There she helped arrange training programs for low-income women in non-traditional jobs such as auto repair, with equipment and instructors donated by Sears. In the 1980s Brudney wrote a column for The Boston Globe called “Women and Work” and later “Living with Work,” with stories ranging from “workers facing age discrimination to those struggling to balance jobs with parenthood.”³² However, during the EEOC trial, Brudney conducted a study for Sears that confirmed that many women preferred non-commission sales positions because they were more enjoyable and friendly, they feared being unsuccessful in commission sales, and they thought it was not worth the increased pressure and risk. Her results were supported by Rosenberg’s testimony, and the judge found that although not based on a scientific study, Brudney’s testimony reflected actual views of the women at Sears.³³ She dedicated her long career to helping working women but also supported Sears against the EEOC.

Interestingly, only the historians were subject to attacks from within their profession. Although academic battles were nothing new, it had such a vicious tone that even twenty years later historians on both sides visibly wince when reminded of the

³² Heather Allen, “Juliet Brudney, 81, Advocate for Poor, Globe Columnist,” The Boston Globe, 26 January 2003, D19. Her obituary touted her ability to do all this and still be a devoted mother. Her son said summer meant family: “We were always together as a unit.” He described her as an “inspiration” to her children: “She made us understand that not only was it appropriate, but necessary for women to have careers and families. . . . It was an essential part of living, to nurture and prosper and be a professional yourself.” See also, Boston YWCA Records, 1858-1988; Juliet F. Brudney, Executive Director, Boston YWCA to Charles Worcester, attaching first draft of the “How To Manual,” 23 December 1976. 89-M3. Schlesinger.

³³ Equal Employment Opportunity Commission v. Sears, Roebuck and Co., 628 F. Supp. 1264, 1307-08 (N.D. Ill. 1986). The court did not like generalizations about women, unless they came from Brudney and Rosenberg; it crucified one EEOC witness for his scientific studies.

debate. The other women expert witnesses, also academics, were not embroiled in the same type of controversy as Rosenberg and Kessler-Harris. Appelbaum said she was not questioned because there was nothing controversial about her testimony. She testified about how statistical discrimination works, whether it is an accepted theory in economics, and how economists look at discrimination, which was something that nearly all economists agreed on. She also testified as to whether the EEOC had evaluated data in a valid manner and whether it supported their conclusions. She had used the most standard techniques, and thus, there was little to attack. Her job was easier than Kessler-Harris'; it would have been more complicated if Sears was actually making the jobs available.³⁴ Other women who testified for Sears – albeit not academics – also avoided the kinds of attacks the historians faced. Juliet Brudney and economist Joan Haworth testified for Sears without facing the public wrath of their colleagues or of feminists, and Haworth acted as an expert witness on behalf of Wal-Mart in discrimination lawsuits years later.

What should be made of the complicated relationship between these individuals and the women's movement? Each one significantly improved the lives of women in some way. Do their later actions nullify their important contributions? Is it foolish to believe you can do good work from within the system?³⁵ It is not so simple to dismiss them as anti-feminist. Nancy MacLean suggests that the increased presence of women within the system who cared about these issues was a sign of progress and another way to help bring about change. They were also a resource for women workers and EEOC

³⁴ Eileen Appelbaum, interview by author, 23 August 2004, New Brunswick, New Jersey.

³⁵ The case also draws attention to how someone can, through the media, become completely defined by one event. In 2007 the district attorney in North Carolina, in seeking justice for an alleged victim, brought rape charges against several Duke University lacrosse players and was brought up on ethics charges and disbarred for mishandling the case. Should anyone be known for only one thing they did – whether consciously or by accident – as part of a long complex life that included many good and bad deeds?

staffers seeking information, and another voice for change within the companies.³⁶

Certainly the fact that Sears felt the need to hire an outside consultant, Hernandez, to assist with EEO issues demonstrated a new awareness that it had to take women and minority issues seriously.

The case also shed some light on attitudes about the 1960s and 1970s. Many feminists of that generation believed that you betrayed your principles by representing a company.³⁷ For some, this changed as they settled down and achieved financial success, even if they did not embrace the rising conservatism brought in by Ronald Reagan. Lawyers are often attacked as being willing to represent either side of an issue regardless of their principles. Although many lawyers have strong convictions, virtually all accept the legal system's presumption that each side deserves fair representation. And in fact, Morgan believed that regardless of the company's status, "Sears deserved strong representation."³⁸ In addition, it is a tenet of private legal practice to provide some *pro bono* assistance to those who cannot afford it. Management attorneys, many of whom are very skilled, often have more time and resources to dedicate to *pro bono* causes, as, in a Robin Hood-scenario, they can use the vast resources they gain from representing corporations. Does this negate the good they do? Are attorneys just hired guns with no principles? Morgan spent years handling civil rights cases and working for the ACLU but was accused of opportunism for helping Sears vigorously fight the EEOC.³⁹ David Copus came from the Peace Corps to the EEOC and eventually worked for at least two

³⁶ MacLean, Freedom Is Not Enough, 143.

³⁷ Hope Eastman, interview by author, 8 July 2004, Bethesda, Maryland.

³⁸ Camille Morgan to author, by e-mail, 21 June 2007 (#1).

³⁹ Charles Morgan, Jr., A Time to Speak, chaps. III, IV.

management law firms. After more than twenty years with the EEOC, Scanlan also went to a primarily defense law firm.⁴⁰ Eastman worked for the ACLU but became a management attorney who believed she did a lot of good from within the company. Horowitz also worked for the ACLU, represented Sears, and later married civil rights leader Julian Bond. Attorneys are generally more forgiving of representing different sides of the same issue and more flexible about who can claim a commitment to social justice, always finding something that will help their next client.

What (Working) Women Want

The debate surrounding the Sears case also raised complexities about what working women needed and wanted, and illustrated the limitations of the women's movement, the government, and employers to address the issue fully. Many middle-class feminists focused their efforts on gaining access to the workplace and promotions and believed that women should and wanted to put their careers first. Since middle-class women had not previously had the opportunity to work outside the home in traditionally male occupations, their goal was to get into those jobs. Perhaps not having worked before, they did not fully appreciate that getting into the labor force would not solve all of their problems since it did nothing to alleviate the pressures of their domestic obligations. They believed, perhaps, that they would first get a critical mass of women into positions of power and then they would be able to make further changes.

Other middle-class feminists were keenly aware of the need to address family responsibilities and their agenda did include issues such as childcare.⁴¹ However, the law

⁴⁰ James Scanlan, interview by author, 8 July 2004, Washington, DC.

⁴¹ NOW's information sheet giving action advice regarding a 1970 FCC order for common carriers to file affirmative action plans said: "An affirmative action program for women should logically include the establishment of child care centers on a 24 hour basis." Lucy Komisar, NOW Federal Compliance

already prohibited discrimination in hiring and promotion and African Americans had just used it successfully to open up jobs traditionally dominated by whites. Thus, it may have been easier to seek direct legal victories as a first step and leave the more intractable problems for later. Anti-discrimination efforts under existing laws were better-received than attempts to implement new policy. For example, President Nixon vetoed a major child care bill and a family medical leave bill was not enacted until the 1990s.⁴² Issues such as child care met with more resistance because they were seen as more threatening to the traditional family and the free-market economy (the capitalist system) than simply providing equal opportunity to individuals.⁴³

Finally, many middle-class feminists, entering the workplace for the first time around the time the Sears case began, feared losing their tenuous gains and did not want to ask for special benefits that would give men an excuse to limit their progress.⁴⁴ They emphasized the notion that women had the individual choice of whether to work, thereby accepting that they had to act like men in order to work in their jobs. Under such a framework, childcare was an individual problem, to be resolved by each woman before she showed up at work. They did not argue that the jobs or hours or expectations would

Committee, The N.O.W. Phone Company Anti-Discrimination Affirmative Action Kit, 4, UIC, NOW Chicago, 78-34, Box 2, Folder 8.

⁴² Nixon vetoed the childcare act and conservatives lobbied against overriding it. He thought it was too radical and would “commit the vast moral authority of the national government to the side of communal approaches to child-rearing” and “would lead to “the Sovietization of American children.” Rosen, The World Split Open, 90-91 (citing Flora Davis, Moving the Mountain: The Women’s Movement in America Since 1960 (New York: Simon & Schuster, 1991) for a fuller description of child care legislation).

⁴³ Childcare advocates faced strong conservative opposition, and in the 1980s CLUW and other women’s groups scaled back their work and family agenda. They agreed to work for unpaid family leave but the first President Bush vetoed it twice before President Clinton finally signed it, and the FMLA still left class inequities intact since low-income women could not use it. Cobble, The Other Women’s Movement, 219.

⁴⁴ See, for example, footnote 25.

have to be restructured. The claim that some women might put family first or demand special consideration based on domestic responsibilities was threatening.⁴⁵

However, there were limitations to seeking access to the exclusion of other workplace concerns. First of all, it did not reflect the needs of working-class women, who had always done wage work to support their families. For them, having a “choice” would mean being able to stay home with their families. Where they could not, they wanted jobs that accommodated their family responsibilities and maximized their earnings while they were away from home. Labor feminists had been keenly aware throughout the twentieth century of the problems faced by women in the workplace. The fact was that Rosenberg’s testimony was not completely wrong. Working women clearly made job choices with family obligations, as well as countless other factors, in mind. Moreover, the assumption that women wanted to take over traditionally male jobs was generally more true for white-collar than blue-collar women, who often cared more about pay equity and improving the conditions of the jobs they already held.⁴⁶

The mainstream women’s movement at the time of the Sears case was addressing these issues in only a limited manner. A 1985 profile of EEOC attorney Karen Baker published in New Directions for Women missed the point that Baker – a single mother working long hours on the case and spending a huge percentage of her salary on child care – embodied some of the same problems she was addressing. Instead, the author

⁴⁵ Indeed, the fact that we do not even remember the wage discrimination part of the case against Sears, but only the hiring/promotion component, illustrates the extent to which feminists talking about this case were focused on moving into men’s jobs rather than upgrading women’s jobs or addressing work-family issues, which had long been the focus of working-class women. Of course, the commission sales claim also received more attention because Sears’ arguments – that women simply were not interested in those jobs – seemed so outrageous.

⁴⁶ See, for example, Cobble, The Other Women’s Movement, 223, noting they did not necessarily see men’s work as better than theirs or want to “aspire” to it.

pointed to her as “living proof that Sears was wrong in saying that women would not work long hours or seek stressful jobs, that home responsibilities made it impossible for many women to work.” With little critical awareness about the obstacles placed before her, the author portrayed Baker as an example that women *can* do it all. Even Baker appeared to be ambivalent about where the problem lay. She acknowledged that “offices could be more supportive of families,” but noted, “having a family should not be used as a reason to avoid responsibility.”⁴⁷ For a feminist publication, there was little recognition that many professional women were faced with two bad choices, working in dead-end jobs in order to spend time with their families or working incessantly and learning to “grab moments” with their children – both of which entailed financial hardship. Nor was there any suggestion that perhaps part of the burden lay on employers or the government to change the terms of work for women, or anyone with a family or a life outside of work.

Moreover, the article demonstrated the reach of issues regarding family responsibilities. In this instance, commonalities of gender trumped differences of class; the demands of the job Baker shared with her (male) attorney colleagues ensured that her professional salary could not shield her from the child-care concerns she shared with the working women at Sears.⁴⁸ Nor were the women representing Sears, though possibly more affluent, immune from family concerns. Eastman took a supporting role during the trial, even though she had worked on the case for years, doing most of the depositions, settlement negotiations, and pre-trial litigation, because she had young children and could

⁴⁷ Maureen Murray, “Karen Baker - Joan of Arc in Chicago.” New Directions for Women 14(6) (Nov./Dec. 1985): 11.

⁴⁸ Society’s complete failure to address childcare concerns, and the resulting burden on individual women, was memorialized in Zoe Baird’s failed nomination as President Clinton’s Attorney General in 1993 amidst the revelation that she had employed an illegal immigrant as a nanny.

not move to Chicago for ten months. Even Camille Morgan went to work for her husband as his secretary in Washington, DC in part because their “only child, a son, had just entered college at Sewanee, TN, and we needed the money.”⁴⁹ For that matter, concern about how their jobs affected their families was not unique to women. Surely working as hard as they did on the case did no favors for any of the attorneys’ family lives, whether they were men or women. Although they had more financial resources than the women of Sears, this could not buy more time with their families when they had to work constantly. Even Chuck Morgan – known as someone who was “very hard to work (sic) for because he worked all the time and so did allox (sic) the people in his office” – had to find a way around this. Having his wife work as his secretary enabled her to “travel with him--which he did constantly.”⁵⁰ His relative power at that point in his career enabled him to protect his family life, likely making the burden of living in Chicago for ten months easier for him than for the others.

Thus, it was clear that no one had found a solution to work-family issues at the time of this case. As Nixon’s veto of the child care bill showed, even if the women’s movement had proposed the perfect policy, the government was not open to legislation that would address these issues in a substantive way. In an increasingly conservative political climate, it offered only what it had given to African Americans in fighting race discrimination, the right to equal opportunity (or access) for individuals. Moreover, despite its efforts to address gender in its workplace policies, Sears also failed to meet the family needs of its women workers. It truly believed it was a good employer for families because it offered well-paying stable jobs to male breadwinners to support their families.

⁴⁹ Camille Morgan to author, by e-mail, 20 June 2007.

⁵⁰ Camille Morgan to author, by e-mail, 20 June 2007.

However, its wing of corporate capitalism, as well as the state, failed to offer a model that adequately addressed the work-family dilemma.

The Sears case showed how the mainstream women's movement, the government, and employers such as Sears had not yet been able to adequately address what working women needed or incorporate family responsibilities into a comprehensive solution to their workplace problems. Sears and its attorneys recognized this as a sore (and unresolved) spot and exploited it. They argued that women did not want commission sales positions because they were not compatible with their family lives, forcing Kessler-Harris and Rosenberg to argue and generalize about what most women wanted and touching a raw nerve for all working women, regardless of class.

Stuck on Equality v. Difference and the “Choice” Framework

As a result of the inability to synthesize what women wanted in the workplace, the debate over the Sears case was quickly distorted and reduced to an “equality v. difference” framework. Sears recognized the power of this issue and the existing battle among feminists and used it to its advantage. Rosenberg's position was used to represent the “difference” side, that women allegedly had special needs such as flexibility to fulfill their family responsibilities. Kessler-Harris' position was taken to embody the “equality” side, that unless women showed they would work as hard and as many hours as men, their differences would be used against them and they would be discriminated against in the workplace. As feminists and historians chose sides, it was difficult to see that the terms of the debate were faulty. They did not create this dilemma, but were simply the latest manifestation of it, distracting attention from the central issues in the case.

The case also revealed the limitations of the rhetoric of “choice” surrounding women and the workplace. In insisting on equal treatment, middle-class feminists had been eager to accept the notion that they had the same right to choose their jobs as men. By arguing that women “were not interested” in commission sales jobs, Sears turned responsibility for its hiring practices back onto the alleged victims, placing the burden on women for their inferior position. The case also played into the fallacy that the feminist movement had given women the choice whether to work for wages or not. While that might be true for middle-class women, the women of Sears were working-class. Even labeling middle-class women as having the choice to stay home or work was misleading. Although they had that option financially, they were presented as two mutually exclusive and unsatisfactory options: working long hours and relying heavily on others to care for their children or working in a job with no opportunity for advancement in order to spend time with their families or giving up their work to stay home with their families. Would it be more of a true choice if regulated subsidized childcare was available that offered a woman affordable quality childcare while she worked? Should the government or employers be expected to structure the workplace to attract more women? Would women make the same decision if they were presented with different “choices”? It put the burden on each woman to resolve this unworkable dichotomy rather than question the framework as a whole – what kind of choice was it if all the options were bad?

Feminists debating Rosenberg’s decision to testify fell into this false choice paradigm. Rather than turn against the adversarial legal system or the gendered structure of labor, as the debate spun out of control, they turned on each other. They allowed Rosenberg to take the fall rather than more closely examine the complexities about

working women raised by the case. Certainly, some recognized the counterproductive nature of the debate and warned feminists to move beyond it. One colleague urged Rosenberg to “rise above” the vicious debate and focus on the “larger and very complex issues.” She hoped that feminists would not view the debate as right or wrong but as a complicated one “to be explored as a group.” Instead of focusing on revenge against each other, they should focus on the problems of working women, particularly “those in the lower classes who have little choice.”⁵¹ Even Rosenberg recognized her role in distracting attention from the issues but showed how difficult it was to avoid the quagmire: “I am sorry that I have added to the personal dimension of the debate and have thereby helped deflect attention from the issues I would like to be at the center of discussion. But I felt personally attacked and needed to respond.”⁵²

Nevertheless, feminists and historians seem to have feared that the outcome of the Sears case rested on the shoulders of Rosenberg and Kessler-Harris and their debate. In truth, their testimony was only one small component of a much more complicated decision, and the ensuing debate had no impact on the case itself, but only served to embitter and shape feminist debate on the issue. Had this been clear at the time, feminists may have been more forgiving of each other, recognizing that women’s position in society gave both historians bad choices. The two witnesses perhaps had more in common than not; both were white professional women, pioneers in women’s history, at

⁵¹ Rosenberg Papers, 1979-1987; Helene Foley to Rosalind Rosenberg, 2 January 1986, 2. 87-M143--87-M171. Schlesinger.

⁵² Rosenberg Papers, 1979-1987; Rosalind Rosenberg to Helene Foley, 9 January 1986, 1. 87-M143--87-M171. Schlesinger.

the mercy of the legal system, and deeply concerned with the needs of working women.⁵³ From the perspective of 2008, however, the Sears case reveals the depths of a long and often rancorous argument over “equality” vs. “difference” within the feminist community, and just how deep and bitter the divide still was in the 1980s. Indeed, the equality/difference framework is still central to how the Sears case is remembered today.

Despite the promise of the women’s movement, the problems of working women were not easily resolved. After entering the workplace in large numbers, middle-class feminists who assumed that women would gain a critical mass in positions of power were disappointed. By the mid-1980s it was clear – and even clearer after another two decades – that simply gaining access to the workplace was not enough.⁵⁴ It did not solve problems that kept women from fully participating in jobs, such as childcare or long hours.⁵⁵ Even more pointedly, it was these very family-related issues that prevented women from reaching the critical mass they hoped for. For professional women, they created a revolving door through which they entered and left high-paying jobs because of the pressures of family responsibilities. Those who remained could “choose” between

⁵³ Indeed Rosenberg considers Kessler-Harris a friend now and notes that they did not disagree “about the core historical issues in the case” but rather “what the history demonstrated.” Rosenberg to author, by e-mail, 9 July 2008.

⁵⁴ Labor feminists recognized that the “removal of barriers to market entry . . . was insufficient to achieve economic equality” because the market “penalized those with outside commitments to family and community” and gave an “unfair advantage to those who entered it with accumulated capital.” Instead, they wanted “to challenge ideologies that valued male activities over female or that granted rights and privileges only to men or those who acted like them.” Cobble, The Other Women’s Movement, 223-24.

⁵⁵ Although the case revealed much more, Appelbaum claimed the Sears case actually was about access to traditionally male jobs. The EEOC had a strong case arguing, for example, that interviewers blocked access to commission sales jobs. Its evidence included testimony that interviewers were taught gendered tactics for judging an applicant’s potential for commission sales, such as noting how low the applicant’s voice was and asking what contact sports he or she had played. The idea that women could not sell vacuum cleaners even though they used them was absurd; instead Sears thought it was inappropriate for women to be in customers’ homes in the evenings as required to take measurements for and install appliances and custom furniture. Saying that women did not want the jobs was just a “red herring.” Eileen Appelbaum, interview by author, 23 August 2004, New Brunswick, New Jersey.

being marginalized in low-pressure roles with fewer benefits or remain in demanding positions by acting like men – unencumbered by family responsibilities – by neglecting their families or outsourcing domestic work. Other women entered female-dominated flexible occupations such as teaching, which remained low-paid and low-status.

Working-class women resented being paid less than men in comparable positions. The lowest-paid women were often illegal immigrants who left their own families in their home countries to do the domestic work of highly-paid professional women.⁵⁶ These were all bad options. None carried the benefits, in compensation or job satisfaction, that men enjoyed. None satisfactorily addressed the dual concerns of women, regardless of social class, to support their families financially and care for them at home. Thus, the Sears case drew attention to the inadequate way that the women's movement, the state, and corporate America were addressing these issues at the time.

As a result, the Sears case drew attention to the need to conceive the problems of the workplace in a new way. It pointed out to feminists the need to transcend the equality/difference frame and the rhetoric of “choice” surrounding the workplace and to address caregiving if they were ever going to fulfill the promises of the women's movement with regard to women and work. The Sears case represented a moment when many feminists recognized what labor feminists had known for a long time, that they would not be able to find a lasting place within the workplace unless they considered the

⁵⁶ See Cobble, *The Other Women's Movement*, 227 on the “‘class’ problem” of the women's movement; without “a class-conscious approach, the problems of one group of women end up being solved at the expense of another,” and that work-family policy for low-income women depends on economic power, as they need wages to get the flexibility over their hours “that a family life requires.” Ibid. at 228.

interests of different women and took into consideration their families as well as their work lives.⁵⁷

Re-conceiving the Problem

In part as a result of the failings of the Sears case, which drew attention to these issues, feminists are able to re-conceive the problem. Scholars have recognized the futility of the equality/difference dilemma and offered more productive approaches.⁵⁸ Despite the strong hold it had in the 1980s, the issue has receded over the past twenty years as a locus of feminist debate and seems to have been finally put to rest among humanities scholars if not yet legal scholars. The Sears case, perhaps, helped hasten that change, revealing in stark fashion how stuck the debate had become and helping to set feminists down a path toward imagining the workplace in a new way.⁵⁹

The choice framework has also been de-constructed to reveal its flaws.⁶⁰ Seeing how mere access to the workplace failed to fulfill the promises of the women's movement for working women, even liberal feminists have largely moved away from the

⁵⁷ Cobble notes that "The current women's movement has now embraced much of the labor feminist agenda as its own. The burdens that once bore down largely on working-class women—long hours, the incompatibility of parenting and employment, the lack of societal support for caring labor—are increasingly the problems of everyone, and the women's movement has given these issues top priority." Cobble, The Other Women's Movement, 227. Moreover, "the question of the quality of jobs and the distribution of income needs to be inseparable from the quest for access." Ibid. at 228.

⁵⁸ The paradox of "difference-equality" only exists if one assumes men as the universal. Labor feminists did not see anything "contradictory in asking for 'equal rights' and 'special benefits'"; they wanted "the rights of men and more." Cobble, The Other Women's Movement, 223.

⁵⁹ Scott, "The Sears Case," chap. in Gender and the Politics of History.

⁶⁰ Joan Williams used MacKinnon's power structure to analyze wage labor and deconstruct the idea that women "choose" to marginalize themselves economically in order to care for their families. The choice is limited to two unacceptable ones: men's traditional life patterns or economic marginality. The only real option is to challenge the structure of wage labor. Williams, "Deconstructing Gender," 828-29, 832. Labor feminists also recognized that the "vaunted 'liberty of contract' so celebrated by many equal rights feminists was a myth. There was no 'freedom' to contract without a viable choice of alternative work; in addition, the power of corporations and of combined capital vitiated individual bargaining, rendering it meaningless." Cobble, The Other Women's Movement, 224. See also, Rosanna Hertz, "The Contemporary Myth of Choice," The Annals of The American Academy of Political and Social Science 596 (1) (November 2004): 232-244.

concept that women freely choose whether, and in what occupations, to work. Few would argue now with the fact that many other factors – including family responsibilities and discrimination – play a role in determining the jobs that women do in the workplace.

Nevertheless, the “choice” debate largely persists today in a new mainstream form called the “mommy wars.” A cultural battle presumably between stay-at-home and working mothers over which choice is best for their children, this new debate had roots in the recent backlash against women and has the same fury and power as the equality-difference dilemma. Books and articles follow a formulaic pattern. Women who work are selfish and neglect their children to fulfill their own needs, and are punished with fertility problems, missing the opportunity to have children altogether, and research saying that children in day care have more problems than those raised by a parent. Women who stay at home to raise their children are personally unsatisfied, ignore their own needs, have no power in their marriages, and face financial ruin if their husbands leave them or die. Like the equality-difference dilemma – and the debate between Rosenberg and Kessler-Harris – the media presents it as two sides with mutually exclusive interests. Women can do one or the other, but they are two choices that no one wants. Like those earlier debates, it offers much agonizing without any resolution and leaves out many women and many subtleties. Poor, working-class, and single women are still invisible as it is assumed that all women can afford not to work. The burdens of working remain fully on the individual woman; childcare is her concern alone and any progress is the result of a few enlightened companies rather than government or societal involvement. Indeed, the double standard is apparent in the growing number of fathers with an increased role in raising their families; they do not face the same attacks on their

parenting abilities and are not expected to see work and family as an either/or decision, often combining flexible careers with raising children. Finally, adding insult to injury, this debate again thrives on presenting itself as a divisive catfight between two groups of women, pitting working and stay-at-home mothers as enemies, resentful and judgmental of each other, and distracting attention from the true source of blame, a society that fails fifty percent of its adult population and all of its children, to adequately address this problem. It is the latest incarnation of pushing women back to the ideal of domesticity, criticizing their mothering to avoid facing structural changes needed in the workplace. On some level, it shows that we have not made much progress, as this argument has simply overtaken the equality/difference debate in the field of women's work issues.

This mommy wars then is a new challenge that we need to move beyond. We must recognize the false dichotomy of home and work because they are not mutually exclusive but part of every working person's lives; they demonize all mothers either way; and they do not reflect the reality of most women. We need to change the terms of the debate and Sears can be a cautionary tale. Any time something is called a dilemma or a war, it is something to be avoided rather than fall prey to, and Sears offers a history that shows the perils of getting so caught. For ordinary women, the formulaic terms of this new debate serves no purpose except to make them feel bad either way, fail to adequately represent their needs, and distract attention away from the real source of the problem. Although we again seem to be stuck in a hopeless debate that does not represent the needs of women, perhaps the lessons of Sears can help shorten that period of hopelessness. The dilemma of work-family is not yet resolved, and the Sears case helps us understand why.

And in fact, there are signs of change. In academia and more and more in mainstream publications if not yet policy, we now talk in a more comprehensive way about work-life balance. It is still a question for the individual – “how do you balance it?” – rather than how the employer or the government helps make it possible, but we now recognize that family and work are intertwined and one cannot be addressed without the other.⁶¹ With greater recognition of the issues, the struggle for economic equity has been reconceived to be not just about access but restructuring the workplace to accommodate those with caregiving responsibilities. This would not have been possible without the work of feminists who helped create a permanent place in the workplace for women that can be taken for granted by later generations. There is also an awareness that affirmative action is not enough, that caregiving responsibilities need to be valued and accommodated, and “difference” should not be avoided or denied.⁶² Since these ideas are no longer threatening to middle-class feminists, the conversation is easier to have and the possibilities of coalition work are more likely. Demographic changes also play a role. Even ten years ago it was less possible to talk about having flexible careers. Now a younger generation in demand by the workplace – including men who bring added power to the struggle – has begun to expect flexibility. As a result, there are groups such as

⁶¹ Work on work-family balance includes Jody Heymann, The Widening Gap: Why America's Working Families Are in Jeopardy and What Can Be Done About It (New York: Basic, 2000); Eileen Appelbaum, ed., Balancing Acts: Easing the Burdens and Improving the Options for Working Families (Washington, DC: Economic Policy Institute, 2000); and Joan Williams, Unbending Gender: Why Family and Work Conflict and What to Do About It (New York: Oxford University Press, 2000), chap. 5. Other scholars address challenges facing professional women. Stone, Opting Out?; Jacobs and Madden, eds., “Mommies and Daddies on the Fast Track: Success of Parents in Demanding Professions,” The Annals of The American Academy of Political and Social Science.

⁶² For example, labor feminists believed “that workplace justice is only achievable in tandem with social rights, and that the life and labor of the home and community are as much to be valued as those of the market.” Cobble, The Other Women's Movement, 228.

Third Path and articles talking about how couples can do shared parenting.⁶³ Even more broadly, it reminds us that these issues exist for all workers – women and men – and have only become more urgent with a subsequent generation of Internet-based jobs and telecommuting.

(Legal) Lessons Learned

As for what role the law can play in bringing about future change, the Sears case offers lessons for attorneys bringing employment discrimination lawsuits. Jim Scanlan initially thought it would be harder for plaintiffs after Sears, but twenty years later believes they actually have an advantage in large class action cases.⁶⁴ Attorneys continued to struggle with how to bring these lawsuits and analyze such broad data for large companies and became more careful about bringing them. Promotion cases were easier to prove and thus more likely to be settled than hiring cases because the pool of women clearly existed; there was no question of whether women wanted the jobs because they already had applied.⁶⁵

As for the EEOC's role in bringing class actions after Sears, some believe it waxed and waned in accordance with the administration in power.⁶⁶ One commission attorney believed it had shifted its emphasis back and forth between systemic and charge-driven cases, as there was always some political interest in resolving individual charges and some view of larger patterns of discrimination. In some cases the commission was able to meld the two successfully, as in a 1998 case in which Mitsubishi agreed to pay

⁶³ Lisa Belkin, "When Mom and Dad Share it All," New York Times, June 15, 2008.

⁶⁴ James Scanlan, telephone interview by author, 22 June 2004.

⁶⁵ Gerald Letwin, interview by author, 9 July 2004, Washington, DC; Eileen Appelbaum, interview by author, 23 August 2004, New Brunswick, New Jersey.

⁶⁶ Anne Ladky, telephone interview by author, March 20, 2002.

\$34 million to settle a sexual harassment case, the EEOC's largest settlement to date.⁶⁷

Others believed the EEOC turned away from large class-action cases, not even reinstituting them vigorously during the Clinton administration, which focused on targeted issue individual cases. One exception was a large but manageable case the commission's New York regional office brought against Morgan Stanley.⁶⁸ Regardless, EEOC staff members agreed that the agency should still be bringing major class action cases. Former supervisor Jane Dolkart noted that even if the Sears case was underfunded, the government still has many more resources at its disposal than private plaintiffs' firms.⁶⁹

Nevertheless, staff members also acknowledged the important role that private attorneys can play where the EEOC is not involved. Dolkart noted that the government's reluctance to bring class action lawsuits through her division during the Reagan years did not deter private lawyers.⁷⁰ Like Sears in its prime, Wal-Mart became the subject of much litigation at the turn of the twenty-first century, including one of the largest gender discrimination suits to date. Upon request, the EEOC issued right-to-sue letters to claimants filing charges of discrimination – its only involvement in the case – and private attorneys sued the company using lessons learned from Sears. They enlisted the help of litigation attorneys experienced in handling large complex cases and formed consortiums

⁶⁷ Gerald Letwin, interview by author, 9 July 2004, Washington, DC; Steven Wilmsen, "Mitsubishi to pay \$34m in harass suit," Boston Globe, June 12, 1998.

⁶⁸ Jane Dolkart, interview by author, 16 July 2004, Dallas, Texas.

⁶⁹ Jane Dolkart, interview by author, 16 July 2004, Dallas, Texas; see also Gerald Letwin, interview by author, 9 July 2004, Washington, DC.

⁷⁰ Jane Dolkart, interview by author, 16 July 2004, Dallas, Texas.

to pool resources and limit the risk to individual law firms.⁷¹ Public law firms such as Equal Rights Advocates in San Francisco recognized they could not do it alone and needed corporate partners or law firms to help.⁷² As a result, the lawyers taking on Wal-Mart had more resources.⁷³

Attorneys also sharpened their strategies. Although the EEOC gathered plenty of information on Sears and developed a sophisticated, well-supported statistical case, they did not take seriously enough Sears' ability to bring anecdotal evidence to counter the statistical case. Plaintiffs' attorneys suing Wal-Mart engaged very competent statisticians to compare the proportion of women managers to total women in the company, although observers differed on the significance of the disparities.⁷⁴ Attorneys also sued Wal-Mart in San Francisco rather than its home state of Arkansas, a decision comparable to the EEOC suing Sears in Washington, D.C. rather than Chicago. Knowing that the outcome of a case can depend largely on the judge they receive, attorneys suing Wal-Mart were also happy to have been assigned a relatively new African-American judge, who denied the company's Motion to Dismiss or transfer the case to Arkansas.⁷⁵ In February 2007, a federal appeals court in San Francisco ruled the case could continue as a class-action

⁷¹ Gerald Letwin, interview by author, 9 July 2004, Washington, DC; Jane Dolkart, interview by author, 16 July 2004, Dallas, Texas.

⁷² Debra Smith, Attorney, Equal Rights Advocates, "Wal-Mart and Current Cases," proceedings of "Equal Pay and Job Opportunities: A Conference Celebrating 40 Years of Title VII of the Civil Rights Act of 1964," Veteran Feminists of America (Newton, MA, May 1-2, 2004).

⁷³ James Scanlan, interview by author, 8 July 2004, Washington, DC.

⁷⁴ Jane Dolkart, interview by author, 16 July 2004, Dallas, Texas. Letwin thought the proportion of women managers to total women employees was strikingly below that of similar retailers. Gerald Letwin, interview by author, 9 July 2004, Washington, DC. Scanlan, on the other hand, did not see very large disparities, and viewed Wal-Mart more like Sears after it had corrected its practices. However, he acknowledged there could be more to the case, including direct statements such as "you don't want to work with guns, you are a woman." James Scanlan, interview by author, 8 July 2004, Washington, DC.

⁷⁵ "Wal-Mart and Current Cases," proceedings of "Equal Pay and Job Opportunities: A Conference Celebrating 40 Years of Title VII of the Civil Rights Act of 1964," Veteran Feminists of America (Newton, MA, May 1-2, 2004).

lawsuit involving close to two million women, the “largest such civil rights case in history.” Legal experts agreed the decision greatly increased the pressure on Wal-Mart to settle. One plaintiffs’ lawyer noted, “This ruling confirms that no company, no matter how big, is exempt from the civil rights law.”⁷⁶

Historians were particularly sensitive to perceived unfairness in the courtroom and the legal system. The EEOC attorneys did not complain about a lack of resources or the hostility of the judge, but the women witnesses were very angry about it. Historians also bristled at the idea that their subtle arguments may be distorted and picked apart on cross-examination if they testified as expert witnesses. However, for all of its limits, including not being able to appreciate the subtlety of historical research, the law has the potential to help bring about significant change. At times the way it does so is messy; the law is forced to be practical in dealing with an imperfect world. Although many disagree with an “ends justifies the means” argument, the law does have an important activist capability. It is practical at its core and fundamentally different than history, but not without value, and holds an important place in effecting social change.

For lawyers, the Sears case is instructive in creating future doctrine to improve the lives of working women. Scholars must recognize that the law should be just one part of a broader agenda to bring about a more comprehensive solution – one that includes grass-roots activism, labor organizing, and other things – if women are to find a successful

⁷⁶ Steven Greenhouse, “Court Approves Class-Action Suit Against Wal-Mart,” New York Times, 7 February 2007. Nevertheless, obstacles remain for an individual plaintiff. In a hiring or promotion case, she must prove she is more qualified for the job than a “similarly-situated” man, a difficult task because two employees rarely have the exact same qualifications and it ignores earlier discrimination that prevented her from obtaining a better education or job experience. Discrimination also takes more subtle forms than before. Employers rarely have overtly discriminatory policies or make obvious comments. It is now less visible and harder to fight; new strategies are needed to address the next layer. Ellen Zucker, Attorney and former President of Boston NOW, “Wal-Mart and Current Cases,” proceedings of “Equal Pay and Job Opportunities: A Conference Celebrating 40 Years of Title VII of the Civil Rights Act of 1964,” Veteran Feminists of America (Newton, MA, May 1-2, 2004).

place in the workplace. Supporters of the EEOC blamed a lack of resources for the failure of the law to work in the Sears case. However, all public interest litigation generally involves an imbalance between the two sides, but change is made nonetheless. This is likely because they do not rely on litigation completely; it is just one tool in the arsenal, and often used as much as a pressure tactic as because they expect to win and gain change through a court decision. The law cannot alone be a fully effective tool for social change because public interest groups always have fewer resources than the legal system demands. Although the law failed as an instrument for social change in Sears, the litigation process helped force the company to change nonetheless, an important step forward benefiting women workers to come.

Legislators and attorneys also must recognize that the law affects working-class and professional women in different ways, and different laws may be needed to address their needs. Lawmakers also must focus on family responsibilities rather than gender alone. Protective legislation in the early twentieth century was designed to protect women based on their sex, a compromise because reformers could not obtain the same protections from exploitation for male workers. The new generation of working fathers (Generation X) are more involved than ever with family responsibilities, and the new generation of young working men (Generation Y; Millennials) are more demanding of a work/life balance. New legal theories have emerged to address these problems. Joan Williams has carved out a cause of action for discrimination based on caregiving responsibilities, leading the EEOC in 2007 to issue guidelines to help identify when an

employer engages in sex, race, or disability discrimination based on caregiving responsibilities.⁷⁷

Title VII and other anti-discrimination laws have undoubtedly had a significant impact on the workplace. They have helped move women and minorities into positions previously not open to them. Large class-action cases have forced major corporations to pay back pay and institute affirmative action policies. Companies have eliminated overtly discriminatory policies that discriminate based on race, sex, disability, age, and other protected classifications. The risk of liability has forced them to train managers on how to handle complaints and prevent retaliation. Amendments to the Civil Rights Act granted the EEOC the right to sue employers directly, and granted employees increased rights to damages and the right to a jury trial.⁷⁸ Discrimination laws have made a major contribution to raising awareness about sexual harassment such that no employer would be without a discrimination, harassment, or complaint policy anymore.

Nevertheless, the limits of discrimination litigation, on which most employment law has been based since Title VII was passed in the mid-1960s, are clear. In the absence of alternative tools, it is used and overused to address any manner of workplace concerns, whether or not they lend themselves to a discrimination framework. The result is a revolving door of discrimination cases and a burgeoning employment litigation bar, now comparable to the personal injury field, in which the vast majority of cases are dismissed on summary judgment or far short of relief. Since discrimination is rarely overt anymore, but rather the result of more subtle exclusionary practices, it is harder to prove and even a

⁷⁷ See Williams, *Unbending Gender*; EEOC, Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, Notice No. 915.002, May 23, 2007.

⁷⁸ Debra Smith, “Wal-Mart and Current Cases,” proceedings of “Equal Pay and Job Opportunities” conference.

win comes at much personal cost.⁷⁹ Title VII is still needed for discrimination cases, but new tools are needed to bring about true systemic change in the workplace. As one employment attorney noted, if plaintiffs cannot go after the largest employers committing the most egregious discrimination, what does that say about Title VII?⁸⁰

Pushing for access to male-dominated jobs, while important, does not bring about lasting change if women cannot remain and prosper in those jobs. Even middle-class and professional women, the primary beneficiaries of anti-discrimination laws, cannot deny these limitations. As they entered the workplace in large numbers in the 1970s, many argued it was “only a matter of time” until they moved up the pipeline and were represented in the upper levels of management in every field. More than thirty years later, however, it is clear that their progress has stalled, with women still representing only a small percentage of the top positions in any field. Once they gained access to male-dominated jobs, they met the same challenges that labor feminists have known about all along, that the structure of the workplace is often incompatible with family responsibilities. The work of Williams and others has helped begin to change the workplace rhetoric, recognizing that it accommodates only those who can act as “ideal” workers unencumbered by family responsibilities, such as a husband with a wife who takes care of the household so he can dedicate himself completely to his job.⁸¹

Discrimination laws, while important, do not do enough even for middle-class and professional women. It gets them in the door, but does little to prevent those who can

⁷⁹ See, for example, Susan Sturm, “Second Generation Employment Discrimination: A Structural Approach,” Columbia Law Review 101 (2001): 458.

⁸⁰ Zucker, “Wal-Mart and Current Cases,” proceedings of “Equal Pay and Job Opportunities” conference.

⁸¹ See Williams, Unbending Gender.

afford to from leaving when working conditions are incompatible with their lives, creating a revolving door of women workers. Laws such as the Family Medical Leave Act, while a step in the right direction, are simply not broad enough. It is time to hasten the shift from using discrimination law as the focus of employment law policy and litigation to devising laws and policies that address the next generation of issues, and take into consideration family responsibilities that prevent women (and many men) from acting as unencumbered workers. It is these changes that will complete the stalled revolution exemplified by the Sears case.

Appendix A

Abbreviations in Notes

9 to 5 Papers	Papers of 9 to 5, National Association of Working Women/Organization for Women Office Workers, Schlesinger
Barnard Women's Center Library	The Women's Center Library, Barnard College, New York, New York
Boston YWCA	Boston Young Women's Christian Association (Massachusetts) Records, 1858-1988; 89-M3, Schlesinger
Collins Papers	Mary Jean Collins, 1939- , Papers of NOW Officers, 1968-1988, MC 493, Schlesinger
Darcy Papers	Lynne Darcy, Papers of NOW Officers, 1971-1976, MC 494, Schlesinger
EEOC	Equal Employment Opportunity Commission, Washington, DC
Lerner Papers	Gerda Lerner Papers, 1941-2001, MC 498, Schlesinger
Lightfoot Papers	Judith Lightfoot, Papers of NOW Officers, 1971-1977, MC 485, Schlesinger
NARA	Sears Case Records, National Archives Records Administration, Great Lakes Region, Case No. 79 C 4373, Accession No. 21 91 0239, Records Center Location No. 339296, Chicago, Illinois
NOW Chicago	Papers of NOW Chicago, Accessions 78-034, 81-18, 83-27, UIC
NOW Papers	NOW Papers, MC493, MC 496, Schlesinger
NOW LDEF Papers	NOW Legal Defense and Education Fund Papers, Schlesinger
Rosenberg Papers	Rosalind Rosenberg Papers, 1979-1987, 87-M143--87-M171, Schlesinger

Rosenwald Papers	Julius Rosenwald Papers, 1905-1963, University of Chicago Library, Special Collections Research Center, Chicago, Illinois
Schlesinger	Schlesinger Library, Radcliffe Institute, Harvard University, Cambridge, Massachusetts
Sears case records	Sears case records, Barnard Women's Center Library
Transcript	Transcript of proceedings before the Honorable John A. Nordberg, Judge, U.S. District Court for the Northern District of Illinois, Chicago, Illinois
UIC	University of Illinois-Chicago Special Collections, Chicago, Illinois
WE	Women Employed Papers, Accession 2000-16, UIC

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 - NOW Papers, MC493, MC 496
 - NOW Legal Defense and Education Fund Papers
 - Rosalind Rosenberg Papers, 1979-1987, 87-M143--87-M171
 - Tully-Crenshaw Feminist Oral History Project Records, MC548

Chicago, Illinois

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 - Women Employed Papers, Accession 2000-16
- Women Employed office
 - Women Employed Papers
- University of Chicago Library, Special Collections Research Center
 - Julius Rosenwald Papers, 1905-1963
- National Archives Records Administration, Great Lakes Region
 - Records, Case No. 79 C 4373, Accession No. 21 91 0239, Records Center Location No. 339296

Madison, Wisconsin

- Wisconsin Historical Society Archives
 - Documenting the Midwestern Origins of the Twentieth-Century Women's Movement, 1987-1992

New York, New York

- Barnard College, The Women's Center Library
 - Sears papers

Washington, DC

- Equal Employment Opportunity Commission Library
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