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1992

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### Recommended Citation

Marshall J. Breger, *The Department of Labor's Glass Ceiling Initiative: A New Approach to an Old Problem*, 43 LAB. L. J. 421 (1992).

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# The Department of Labor's Glass Ceiling Initiative: A New Approach to an Old Problem

By Marshall J. Breger\*

Mr. Breger is Solicitor of Labor at the U.S. Department of Labor.

The concept of a "glass ceiling" is not a new one. At the turn of the century, Marie Curie almost singlehandedly created the field of nuclear chemistry and forever changed the course of science and society. But even the ultimate scientific creativity award did not help her to crack the barrier of the science establishment. She received the Nobel Prize but was denied membership in the French Academie des Sciences because of her gender. It was only after her second Nobel Prize that the all male Academie reluctantly admitted her to the club. The problem that I have with this story is that a woman should not have to win a Nobel Prize to become a partner in law firm or an executive in a corporation.

The development of glass ceiling issues at the Department of Labor did not require a radioactive discovery. Rather, the groundwork was laid several years ago, when we commissioned studies by the Hudson Institute on the demographics of the American work force in the year 2000. Those studies, and the reports that followed, demonstrated that a profound demographic change is taking place. By the year 2000, the overwhelming majority of new entrants into the work force will be minorities, women, and immigrants—white males will make up only 15 percent

of this work force increase. So it is clear that to remain competitive corporate America will have to pick the best people from both the male and female graduates of our best universities. The companies that do not will not be around long.

Future trends do not address present problems, because it has also become clear that despite their dramatically increasing presence in the workplace, there is a dearth of women and minorities in the upper ranks of that work force. To put it another way, it has been said that the problem of the 1970s was bringing women and minorities into the corporation. The problem of the 1980s was keeping them there, and the challenge of the 1990s and beyond is to remove any artificial barriers impeding their upward mobility. Secretary of Labor Lynn Martin has made this one of her top priorities.

The Office of Federal Contract Compliance Programs at the Department of Labor (OFCCP) recently analyzed data from a sampling of 94 compliance reviews from Fortune 1000 companies (representing a total of 147,179 employees). It found that while women represented 37.2 percent of all companies' combined work force, only 16.9 percent of "officials and managers" working for these companies were women. And while minorities represented 15.5

\* This article is derived from a recent presentation made Mr. Breger before the Association of the Bar of the City of New York, Special Committee on Women in the Profession.

percent of the companies' work force, only 6 percent of the companies' officials and managers were minorities.<sup>1</sup> Furthermore, these numbers significantly overstate the percentage of women and minorities at executive-level, decision-making positions, since the category "officials and managers" includes people like the "head" of the janitorial staff and the "manager" of the clerical pool.

In terms of senior management (i.e., those at the level of assistant vice president and above), the compliance review pointed out that only 6.6 percent of those in senior management were women and 2.6 percent were minorities. Most of the individuals represented in these percentages, however, are in "velvet ghetto" staff jobs, such as human resources and public relations. These types of jobs usually do not put minorities or women on the fast track. So after moving up the ladder a few rungs, many women and minorities stop short and simply mark time.

There can, of course, be different reasons behind the relative scarcity of women and minorities in senior management positions. These reasons may include their relatively recent entry into the work force, coupled with the length of time necessary to reach senior management levels (estimated to be 20 years for a general manager and 35 years for a CEO); the low turnover rate at the management level; and, to a certain extent, personal choice, if not the—dare I say it—"Mommy Track." Yet it cannot be ignored that one of the most pervasive barriers to advancement is cultural attitudes toward women and minorities. Indeed, a recent poll of Fortune 1000 CEOs found that 81 percent believed "preconceptions by men" were major blocks to women reaching top levels of management.<sup>2</sup>

Clearly, one reason for the scarcity of women and minorities at high levels can

be actual discrimination. It is often a more subtle form of discrimination, referred to as sex stereotyping and recognized by the Supreme Court in the now famous case of *Price Waterhouse v. Hopkins*, where Justice Brennan stated: "In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender . . . . An employer who objects to aggressiveness in women but whose positions require this trait, places women in an intolerable Catch 22: out of a job if they behave aggressively and out of a job if they don't."<sup>3</sup> It is precisely this corporate attitude or culture that the Glass Ceiling Initiative is designed to detect and eliminate.

### Laying the Groundwork

One of the primary responsibilities of the OFCCP is to enforce Executive Order 11246. The Order and its implementing regulations prohibit government contractors and subcontractors from discriminating against any employee or applicant for employment, and it also requires such contractors to take affirmative action towards ensuring that employees and applicants are treated without regard to their race, color, religion, sex, or national origin. Traditionally, OFCCP's reviews of these contractors have tended to focus on entry-level positions. With the Glass Ceiling Initiative, we have begun to widen the scope of our attention to include barriers to advancement at all ranks of the work force, including its senior levels.

In 1988, OFCCP issued a policy directive entitled the Corporate Initiative. This initiative constituted a major new effort to encourage government contractors to increase their efforts in placing women and minorities in senior-level and executive-level positions. For the first

<sup>1</sup> "A Report On The Glass Ceiling Initiative", U.S. Department of Labor, 1991, at 6.

<sup>2</sup> Catalyst, *Study of Women in Corporate Management*, New York 1990.

<sup>3</sup> 109 US Ct 1775 (1989), 49 EPD ¶ 38,936.

time, corporations with multiple establishments were required to list and set goals in the headquarters affirmative action program for all positions filled by decision makers at the corporate level. So if the manager of the San Francisco plant is not selected in San Francisco but at the corporate headquarters in New York, the position would have to be included in the affirmative action plan at the location responsible for making the selection, rather than at the subordinate San Francisco establishment.

This directive laid the groundwork for The Glass Ceiling Initiative, which began with nine specially focused "pilot" corporate compliance reviews. In deciding which companies to review, a number of criteria were employed. First, they had to be among the Fortune 500. Next, they had to be from different regions of the country and provide a cross-section of industry groups. Then we compared numbers within industry groups on the representation of women and minorities in certain job categories, flagging and targeting companies that were 20 percent below the mean of their peers. The companies were randomly selected and represented seven broad industry groups from five different regions of the country. They varied in size from fewer than 8,000 employees to more than 300,000 employees, with most having international operations. Three were located in the New York region. The reviews focused primarily on corporate positions with the titles of Director or above.

The pilot reviews differed from standard compliance reviews in their emphasis and, to some extent, in their technique. For example:

(1) The compliance review team spent significant amounts of time not merely with the vice-president for human resources but with other senior executives, including the CEO, to understand the history and particular culture of the corporation under review and to determine how

potential managers come to the attention of persons in promotional authority.

(2) The Department examined the succession plan of the corporation which identifies the replacements for key executives who leave or retire. These plans generally outline where an employee will be in five years if vacancies occur. So, while several individuals may be on the same rung of the ladder, some are being groomed for advancement while others are not. "Glass ceiling" review of succession plans is perhaps the most significant technical difference from the standard compliance review process. Succession plans are the blueprint for future advancement at high corporate levels. Scrutiny of these plans can result in changes in the future.

(3) Similarly, the Department examined the complex system of compensation and benefits that are used as "signals" by the corporate hierarchy to employees who are deemed to be key contributors. Because the retention of these so-called "high potential" employees, or "hi-pots" as they are known in the trade, is given top priority by corporate officers, we examined the corporate compensation structure to determine its application on a nondiscriminatory basis.

(4) The executive recruitment policy of the company was examined, particularly with regard to the use of executive search firms. This was done to ascertain whether the company monitored the candidates sent by the search firm, in order to assure itself that it was fulfilling its affirmative action obligations.

### **The "Glass Ceiling" Is Confirmed**

The major findings of these pilot reviews were summarized in the Secretary of Labor's Glass Ceiling Report, which was released in August 1991. The findings in this report confirmed what the studies had indicated. (1) There was definitely a level beyond which few minorities and women in each corporation had advanced. (2) We did not find that a hard line ran

across each department, but the ceiling acted more like an undulating inversion layer. (3) The placement of the barrier varied according to function and salary level. Furthermore, the glass ceiling was at a level lower than anticipated. Indeed, the pilot reviews revealed much of the investigative questioning and many areas of prospective analysis to be irrelevant because there were no women or minorities at glass ceiling levels. Furthermore, minorities plateaued at a lower level than women. Generally, the highest-placed woman was at a higher reporting level to the CEO than the highest-placed minority.

The few women and minorities found at the highest levels tended to be in staff positions, such as human resources, research, or administration, rather than line positions, such as sales and production. Since line positions directly affect a company's bottom line, these positions are generally considered the path to the executive suite. This perception has been validated by a new study funded by the Women's Bureau of the Department of Labor entitled "Breaking the Glass Ceiling in the 1990s." This study analyzed the internal career paths of female executives. The results of the research indicated that most of the women executives who broke through the glass ceiling were in line rather than staff positions.

The pilot reviews also revealed that organizations did not perceive equal opportunity and access principles as a broad-based corporate responsibility to be integrated throughout every level and area of the organization, but rather as the responsibility of one individual or division. Furthermore, there was generally no centralized means to monitor or track developmental opportunities and credential building experiences, such as training programs, developmental job rotations, and committee assignments, to ensure that all qualified employees were given consideration. For example, one company had a requirement that in order to become CEO, a candidate would need to have

overseas experience. In that same company, however, there was also a guideline precluding women from being given overseas assignments.

The reviews also indicated that the companies in the pilot study were not reviewing their *total* compensation packages to ensure nondiscrimination. The companies were aware that they had to monitor salary data; however, there was a lack of oversight for other forms of reward and compensation, which play a significant role at the highest corporate levels.

Finally, the pilot reviews revealed that although a company that contracts with the government assumes an obligation to monitor its employment activities to ensure all employees and applicants are treated in a nondiscriminatory manner, many of the companies in the study did not have adequate EEO/affirmative action records concerning recruitment, employment, and developmental activities for management-type positions. Such records are essential for adequate monitoring of a company's fulfillment of its affirmative action responsibilities.

None of the nine companies in the pilot study was cited for discrimination. This does not mean that no violations were detected. Six of the companies entered into Conciliation Agreements for violation of recordkeeping requirements involving applicant flow, referrals, and placements. Two companies signed Letters of Commitment, also with regard to monitoring their recordkeeping and placement procedures. One company received a Letter of Compliance after addressing a problem in its pipeline leading to the executive suite. In addition, follow up to the original pilot study is now going on, since we are not only interested in what the companies accomplished in response to their regulatory requirements, but more importantly, what has been achieved through voluntary efforts since the reviews were conducted.

Currently, a new round of corporate management reviews are also in progress, although none has yet been completed. At least twelve reviews are planned for this fiscal year. Nine companies have already been identified and scheduled. The nine current corporations cover such diverse industries as the chemical, food, education, fiber glass, energy, insurance, utilities, electronics and aerospace. The companies range in size from approximately \$1 billion in sales to over \$20 billion. The corporations have been in existence from 24 to 100 years and employ an average of 13,000 people.

I cannot underscore how important direct CEO involvement has been in the success of this initiative. What the pilot study showed was not some form of overt discrimination, but an attitude that led to minorities and women being overlooked for certain positions. When CEOs themselves became aware of this problem they responded. Indeed, we found one CEO who, on his own initiative, voluntarily established an EEO overview committee to "provide ongoing review of the corporate EEO program and efforts, as well as to develop future plans and encourage their enthusiastic acceptance." Another firm initiated a number of innovative programs, such as setting up scholarship funds and internship programs for minority and female students in communities where its plants are located.

Thus, while corporations cannot manage attitudes, they can manage behavior with accountability, rewards, and punishment. As in all other important areas of concern, what gets measured in business gets done, what is not measured is ignored. The Glass Ceiling Initiative has brought the issue to the forefront and has demonstrated to business the importance of shattering the barrier, so that it can no longer be ignored. And to assure that the issue remains on the front burner, the Civil Rights Act of 1991 established the

Glass Ceiling Commission, which is to be chaired by the Secretary of Labor.

The Commission, composed of 21 members appointed by the President and congressional leaders, is charged with conducting a study of opportunities for, and artificial barriers to, the advancement of women and minorities to management positions in business. The Solicitor of Labor will serve as Counsel to the Commission, whose findings are to be reported to both the President and Congress in early 1993.

### **Some Legal Issues Raised by the Glass Ceiling Project**

We recognize that by their very nature, corporate management reviews delve into the heart of the corporate decision-making process. Thus, employers are understandably concerned about the confidentiality of sensitive personnel data, such as succession plans and total compensation packages that might become available to competitors or others under the Freedom of Information Act. Because of its sensitivity to these concerns, OFCCP requests only data relevant to the issues being reviewed, and, where possible, examines such data onsite. This was, in fact, the case with the nine companies in the pilot program. DOL regulations, consistent with applicable exemptions under FOIA, provide that notice shall be provided to the submitter regarding a FOIA request if disclosure could reasonably be expected to cause substantial competitive harm, and that the submitter shall have a reasonable period to make an objection to the disclosure.<sup>4</sup>

Both the Trade Secrets Act and the trade secrets and personnel files exemptions under the Freedom of Information Act limit the release of confidential commercial and financial information, as well as any personal information deemed to be an invasion of privacy. Even so, these provisions are not likely to protect the

<sup>4</sup> See *CNA v. Donovan*, 830 F2d 1132 (CA-DC 1987); cert. den., 108 US SCt 1270 (1987).

identity of a company that has been the subject of a compliance review once the investigation has been closed. I reluctantly say this because I recognize that the Glass Ceiling Initiative was initially trumpeted as absolutely and totally confidential. Legally, this position may not be sustainable. The question of the various documents is less clear. While the Department is seeking to be sensitive to confidentiality concerns, certainly *Chrysler Corp. v. EEOC*<sup>5</sup> stands for the proposition that affirmative action plans are discoverable and can be used against the drafter. This being so, the FOIA exemptions become more problematic.

Other questions likely to arise with respect to the Glass Ceiling Initiative concern problems of proof. For example, how will OFCCP and the Office of the Solicitor make out a case under the Executive Order? OFCCP policy is to apply Title VII principles when interpreting parallel provisions under the Executive Order. Therefore, glass ceiling discrimination cases could be brought under either a disparate treatment or disparate impact theory or both.

In a 1990 federal court decision from Minnesota, *Daines v. City of Mankato*, the plaintiff was a female city planner who had applied for and been denied the position of Housing Director for the City. She brought suit under Title VII and the applicable Minnesota nondiscrimination statute, using both disparate treatment and disparate impact theories. The court found that the plaintiff had successfully made out a claim of disparate treatment on the basis of sex and did not therefore go on to consider the plaintiff's claim of disparate impact. In addition to the other evidence supporting the plaintiff's claim of disparate treatment, the court found that the statistical evidence, particularly the fact that no women had been appointed officials and administrators with the City despite the availability of quali-

fied women, supported an inference of discrimination. The court observed that such "evidence leads to a conclusion that a glass ceiling of gender discrimination prevented Daines from making the step up with the City to an officials and administrators position."<sup>6</sup>

While statistical tools may be invaluable in making out or supporting a case of discrimination, I want to emphasize that the Glass Ceiling Initiative is not a numbers game, and it is definitely not about quotas or preferential treatment. When you come right down to it, numbers are legally less significant the higher up the corporate ladder you go. After all, we are talking about the upper reaches of the corporate structure, and there is only one CEO. Thus, the normal use of statistical information that informs the standard compliance review becomes methodologically problematic. Can you put so much freight on "disparate impact" when you are dealing with such small numbers comparing availability to incumbency?

Having reviewed the work of DOL to date, I see the problem from a different perspective. It is extremely important that the Department not fall into the trap of handing out "good conduct" badges for isolated results. Our concern is for process. And by process I mean to ensure that that the systems of promotion and recruitment for top positions allow minorities and women to gain the credentials to put themselves into play for the top spots when they become available, and to be selected or rejected on their merits.

### **Selection Criteria at the Highest Levels**

Selection criteria at the highest levels of management are often subjective, at least in part. A company may select people for certain managerial positions because of their "leadership qualities," however, that is defined and determined. While courts have generally accepted the use of objec-

<sup>5</sup> 441 US SCt 281 (1979).

<sup>6</sup> 754 F. Supp. 681 (D. Minn. 1980).

tive criteria in the context of professional and managerial positions, they have found liability where the subjective criteria were not used fairly or with adequate procedural safeguards.

In *Adair v. Beech Aircraft Corp.*, the court found that the plaintiff, a long-time female employee who had applied for and been denied a promotion to a supervisory position, had indeed been discriminated against on the basis of sex and ordered her promoted to the supervisory position and awarded back pay. The judge expressly criticized the employer's decision-making process as a "wholly subjective judgment call," which "put in place a classic prima facie case of discriminatory conduct in the workplace."<sup>7</sup>

In *Ezold v. Wolf, Block, Schorr, & Solis-Cohen*, Nancy Ezold was the only woman associate vying for a partnership in the litigation department of her law firm. The partners' written evaluations of her competitors were unsparing. One candidate's evaluation stated, "disappears without notice." One partner, referring to another another associate, wrote "I don't know how he has lasted this long." In contrast, her evaluations were almost all positive, yet she was passed over for partnership while her male competitors were promoted.

The federal court in Philadelphia recently ruled that she was a victim of discrimination due to the improper application of subjective criteria. OFCCP and the Solicitor's office will carefully scrutinize the use of such criteria to determine if they are being used intentionally to exclude qualified women and minority candidates from consideration for managerial positions (i.e. disparate treatment), or when such criteria has that effect in practice (i.e. disparate impact). This includes the process by which associates are selected for partnerships in law firms. Once you become a partner, however, you are removed from OFCCP's protective

custody. As one of my associates remarked, OFCCP's mission is to protect human beings, not partners.

A related issue involves the common and extensive use of executive search firms to recruit and screen applicants. One provision of OFCCP Compliance Manual deals specifically with the use of search firms. The provision makes clear that it is a contractor's responsibility to notify a search firm that the search firm, in seeking candidates on its behalf, should actively seek to include qualified minorities, women, individuals with disabilities, and covered veterans among those recruited and referred for jobs. Such an obligation stems from the contractor's own affirmative action obligations under the Executive Order and the two other laws to which it is subject as a government contractor, the Vietnam Era Veterans' Readjustment Assistance Act of 1973, and Section 503 of the Rehabilitation Act of 1973.

Under the equal employment opportunity (EEO) clause in its contracts, the contractor retains responsibility for solicitations for employees placed on its behalf by a search firm or any other referral source. Furthermore, a contractor that uses a search firm is obligated to monitor referrals received both by sex and minority group status, as part of its required internal auditing and reporting systems. Clearly, a company that gives discriminatory instructions to a search firm would be liable for a violation of the Executive Order. This principle has long been established in cases involving employment agencies, but a contractor will also not be meeting its affirmative action requirements if it persists in using a search firm that continually refers, for example, only white males to the contractor.

There also may be instances in which OFCCP would seek to hold the search firm itself liable for acts of discrimination, by referring the matter to the EEOC for in-

<sup>7</sup> - F. Supp.- (DC Kan. January 28, 1992).



vestigation under Title VII, or, where a proper basis exists, asserting Executive Order jurisdiction (e.g., the search firm is a subcontractor of the prime).

Traditionally, the remedy for employment discrimination is to make the victim of discrimination whole, through back pay, job placement, and/or front pay, where appropriate. But jobs at the management level tend to be unique. This fact affects the availability of remedies for persons who have been illegally denied positions or opportunities because of race or gender. "Bumping" an incumbent employee has been sanctioned by the courts in limited instances where a careful balancing of the equities indicated that absent such "bumping," the plaintiff's relief would be unjustly inadequate.

In a recent decision by the United States District Court for the District of Columbia, *Underwood v. District of Columbia Armory Board*, the court ordered the plaintiff to be placed in the position of armory manager, which she had been discriminatorily denied to her. The court reasoned that the position of armory manager was "one-of-a-kind," "involving a unique, top-level job, one for which no equivalent vacancy could be projected."<sup>8</sup>

Similarly, in a 1986 Eleventh Circuit decision, *Walters v. City of Atlanta*, the court affirmed the district court's decision ordering that the plaintiff be elevated to the position of Director of the Atlanta Cyclorama, thereby "bumping" the incumbent Director. The court noted that while "bumping" is an extraordinary remedy to be used sparingly, not to "allow the bumping of a direct beneficiary of repeated discrimination by the direct victim of the same acts of discrimination would penalize the plaintiff who won his suit but lost the race to fill the position he had been unlawfully denied."<sup>9</sup>

Individuals may also may file glass ceiling suits in state courts. In the recent *Martin v. Texaco Refining and Market-*

*ing, Inc.*, decision from the Los Angeles County Superior Court, the plaintiff claimed she had not been promoted to the manager of credit position because of her sex. The court agreed, affirming the jury's \$20.3 million dollar damage award and ordering the plaintiff promoted to an executive position.

Although I have touched mainly on litigation-related legal issues, I would like to emphasize that the Civil Rights Act of 1991 expressly encourages the use of alternative means of dispute resolution, such as settlement negotiations and conciliation to resolve disputes arising under the Act. In addition, the Administrative Dispute Resolution Act of 1991 requires that every agency designate a dispute resolution officer and that it develop an agency ADR plan. The Department has responded to the challenge by developing an ADR pilot project in our Philadelphia region, which at this time is limited to the use of mediation. While it is premature to predict the extent to which ADR will be used in OFCCP cases, OFCCP is one of the agencies participating in the pilot project. We hope that ADR will prove useful in the OFCCP context.

## Conclusion

Voluntary efforts play an important role in the glass ceiling endeavor. The heart of the Glass Ceiling Initiative is the promotion of equal opportunity, not mandated results. We encourage the promotion of good corporate conduct through an emphasis on cooperative, not just corrective, problem solving. We also believe in recognizing and rewarding those companies that are independently removing their own glass ceilings. Indeed, one of the most important benefits of the widespread publicity surrounding the Glass Ceiling Initiative has been the increasing corporate awareness of glass ceiling issues.

Since the release of the Report, many corporate executives have come forward

<sup>8</sup> - F. Supp.- (DC DofC February 10, 1992).

<sup>9</sup> 803 F2d 1135 (CA-11 1986).

to let the Department of Labor know what they are doing to remove their barriers. For example, some CEOs are making affirmative action a line item and holding managers personally responsible during the yearly appraisal process for affirmative action in their divisions. This is an example of managing behavior to produce positive results.

Voluntary compliance is also key for other reasons. Each corporate culture is distinct, and every company has its own approach to the development of a management team; therefore, businesses, not OFCCP, are best situated to determine the optimum means of ensuring that qualified women and minorities are being given the opportunity to advance. Businesses, not OFCCP, are best equipped to change the attitudes of managers who would cut short a person's career because he or she does not fit the manager's mold. And the ideal way to guarantee that this change in attitude happens is with a commitment from the CEO and other senior-level officers to make equal opportunity a key corporate objective toward becoming a premier employer.

Companies also need to recognize, especially given the changing demographics of the work force, that recruiting and developing well-trained women and minorities are essential if such companies are to remain competitive into the next century. Businesses with their eyes on the future understand the necessity of building a skilled and diverse work force throughout every level of the company. These businesses also know that a glass ceiling does not just prevent qualified women and minorities from reaching their full potential, it can also stunt the company's growth.

If the glass ceiling is allowed to remain, it effectively cuts the pool of potential corporate leaders by eliminating more than one half of the work force. It deprives business of new leaders, new sources of creativity, and would-be pioneers with entrepreneurial spirit. Personally, I believe the ceiling will be shattered, and I am pleased to be assisting Secretary Lynn Martin in wielding a hammer to that end.

[The End]

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