

DiversityInc

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BIAS AND THE LAW

Protect Your

Reputation

BY C. STONE BROWN

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Major race- and gender-discrimination lawsuits over the past 10 years cost U.S. corporations \$974 million in settlements alone—and that's without attorney fees and other additional costs and decreased market capitalization caused by negative public relations. Most of these lawsuits could have been avoided through strategic diversity management.

Almost all of the companies that have been the subjects of high-profile discrimination litigation in recent years were in compliance with Equal Employment Opportunity work-force numbers required to bid for federal contracts. Their predicaments occurred because they failed to recognize, measure and eliminate bias within their corporate cultures, which is the essence of successful diversity management.

"Compliance is a limited concept," says Paul Thomas, partner, Holland & Knight. "The additional aspects of what's appropriate and what's necessary for the benefits of a diverse work force speak to ... what benefits can arise from having a workplace where people are comfortable and people feel invited."

"This really is more than just a compliance issue. It's about creating an atmosphere, a community within your ranks of employees and associates that will cause

them to feel part of the organization and thus be able to more effectively perform," says Martin R. Castro, partner, chair of corporate-diversity counseling group Sonnenschein Nath & Rosenthal.

The Real Costs

While racial-discrimination complaints overall are down 12.5 percent over the past decade, gender-discrimination complaints have remained steady. According to the U.S. Equal Employment Opportunities Commission (EEOC), racial-discrimination complaints dropped from 31,656 in 1994 to 27,696 in 2004, while gender-discrimination complaints are level at about 25,000 per year.

But only a few of those com-

"any publicity is good publicity" when *The New York Times* reported that a Texaco employee, Richard A. Lundwall, secretly taped conversations by Texaco executives making racial slurs about black employees and plotting to destroy documents that would expose the company's lack of racial diversity in a pending discrimination lawsuit. The ensuing publicity was relentless and clearly precipitated the stock decline.

There were other costs for Texaco as well. Besides attorney fees and lost market value, the company paid \$115 million in cash to 1,500 aggrieved employees; more than \$20 million in salary increases to aggrieved employees; and \$35 million for diversity training and the creation of an independent Equality

Stanley in 2004, \$54-million settlement with 340 plaintiffs.

These settlement figures, while staggering, do not even include much of the cost of hiring outside legal counsel and public-relations consultants or the loss of market capitalization.

And then there are the intangibles, the perceptions that suck up energy and effectiveness, especially at the top. "The biggest thing is the crisis cost of the time and energy of top management in dealing with that lawsuit ... dealing with the media, the threat of boycotts, not even formal boycotts, but [informal] boycotts," says Weldon Latham, chair, corporate-diversity counseling group, Davis Wright Tremaine. Latham was involved in helping both Texaco and

Coca-Cola deal with the fallout of their lawsuits and then in assisting them in re-evaluating diversity priorities.

"Both companies were faced with changes in the times. Employees were getting aggressive and expecting

"The smart companies say 'This is against our policy, this is something we won't tolerate. We will investigate ourselves and if we find out if anything of that nature is going on, we will eradicate it.'"

Weldon Latham, Jackson Lewis LLP

plaints are certified as class actions, representing all the workers in a class (and sometimes past employees as well). Those are the lawsuits that gain national prominence and can damage a company's reputation and, therefore, its stock price.

There are clear examples of this dramatic impact on market capitalization. Let's look at Texaco.

When Texaco's highly publicized racial-discrimination lawsuit was announced in November 1996, the company lost \$1 billion in stock value within 48 hours.

Texaco defied the old adage that

and Fairness Task Force committee designed to rectify alleged discriminatory practices.

There have been other high-profile, expensive lawsuits in recent years, including: The Coca-Cola Co. in 2000, \$192.5-million settlement plus more than \$20 million in attorney fees with 2,200 plaintiffs; MetLife in 2002, \$160 million with 1.8 million plaintiffs who were policyholders; Sodexho in 2005, \$80 million with 3,000 plaintiffs; Boeing in 2004, \$72.5 million plus \$15 million in attorney's fees with 29,000 plaintiffs; and Morgan

more from companies. The clashing of cultures caught them on the frontlines of these changes," he recalls.

Crisis Leads to Diversity Management

What have some companies that faced massive lawsuits done to turn around their diversity management and become national diversity leaders? Two of them, The Coca-Cola Co. and Wal-Mart, have made it on to The DiversityInc Top 50 Companies for Diversity list after their CEOs led a transformation of their corporate cultures.

Wal-Mart, No. 29 on The 2005 DiversityInc Top 50 Companies for Diversity list, has bounced back from the charges of discrimination and become a diversity leader after becoming the subject of the largest gender-discrimination class-action lawsuit in U.S. history.

On June 21, 2004, as headlines across the country announced, Wal-Mart, the country's largest private employer, had a record number of women employees certified in a class-action gender-discrimination claim against the company. The plaintiffs, who are expected to number more than a million female workers, allege women have been discriminated against in promotions, job assignments, training and pay throughout the United States.

Although the company still faces the gender-discrimination lawsuit, it has embarked on diversity initiatives that should shield it from future lawsuits, aggressively pushed by CEO Lee Scott. Those initiatives include requiring recruitment officers to hire a percentage of qualified applicants equal to the designated group that applies and penalizing managers who don't reach measurable diversity goals by cutting their pay.

What often comes out in discrimination lawsuits is a lack of developing talent for the future. Women and people of color often find themselves stuck in entry-level and non-management roles. Motivated to avoid that dilemma, Wal-Mart has instituted a mentorship program for its 55,000 managers, who are required to mentor at least three people not of their own gender, race and background.

Part of Coca-Cola's (No. 6 on The 2005 DiversityInc Top 50 Companies for Diversity list) turnaround has been court-mandated. As part of its settlement, the company agreed to invest \$36 million in

diversity programs. In addition, the company agreed to a seven-person independent review board, which would oversee its diversity practices and policies for five years. The review board also prepared annual reports on the bottler's compliance with the settlement.

However, it was the actions of Coca-Cola CEO Neville Isdell that demonstrated that leadership values diversity. In 2004, instead of allowing the court-ordered advisory panel to expire, Isdell asked the court to extend the panel's work through 2006.

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RACIAL-DISCRIMINATION LAWSUITS

Company	Year	No. of Plaintiffs	Settlement
Coca-Cola	2000	2,200	\$192.5 million
Texaco	1996	1,400	\$176 million
MetLife	2002	1.8 million*	\$160 million
Sodexo	2005	3,000	\$80 million
Abercrombie & Fitch	2003	17	\$40 million
Amtrak	2000	800	\$16 million
Ford Motor Co.	2005	3,400	\$11 million
Cracker Barrel	2004	42	\$8.7 million
Sunoco	2004	200	\$5.5 million

* Policyholders

SEX-DISCRIMINATION LAWSUITS

Company	Year	No. of Plaintiffs	Settlement
Home Depot	1997	25,000	\$104 million
Rent-A-Center	2002	5,000	\$47 million
Dial Corp.	2003	486	\$10 million
Boeing	2004	29,000	\$72.5 million
Morgan Stanley	2004	340	\$54 million

Sources: WageProject.org, FindLaw.com, EEOC, CBS News, Davis Wright Tremaine, The Washington Post, WorkplaceFairness.org.

"CEOs should be asking themselves, 'Is diversity important to me personally ... is this one of my priorities, is this one of my business imperatives?'" says Castro. "If it doesn't come from the top, then the other officers of the company, the mid-level associates and the line employees, won't have that as an imperative."

Fear Can't Be Prime Motivator

There are two kinds of companies when it comes to discrimination lawsuits. There are those that are in constant crisis-avoidance mode, and there are those that are unprepared and will have to "recover" from a serious allegation.

The unprepared companies often are the ones that react in a knee-jerk fashion to an allegation, denying the charges. Many lawyers say that's a big mistake and often the difference between winning and losing the case.

"The smart companies say 'This is against our policy, this is something we won't tolerate, we will investigate ourselves and if we find out anything of that nature is going on, we will eradicate it,'" says Latham, adding that senior management must recognize they don't have perfect people working inside the organization. "Any major company, it's like running a major city—there are all kinds of people,

good people, bad people, people that violate the law, racist people, the whole bit."

Another mistake companies often make is retaliating against the employee leveling the charges. "Now all of a sudden that company is in a worse position, even if the original complaint had no merit, because they have violated the law that prohibits retaliation against someone who has brought a good-faith complaint," says Allen Kato, attorney, Fenwick & West, whose expertise is litigation and preventive counseling.

This was a lesson that California-based Acadia Pharmaceutical apparently didn't follow when a San Diego jury awarded a female scientist nearly \$8 million (half in punitive damages) when the court determined she was terminated in retaliation for filing a sexual-harassment claim.

"Some companies react negatively and don't do the right thing in taking advantage of the opportunity," Kato says, adding that instead of covering up, companies should open up. "You don't want to hunker down and deny that it's happening, or worse, go backwards."

"Most companies are motivated by a number of complex factors from 'It's the right thing to do' to 'It's the right business thing to do,'" Castro says. "As we see the American market become more

diverse, the companies that get it realize that it's in their best interest to reflect diversity and to respond to diversity so they can better serve their customers. I think more than anything, that is the driver for diversity change in corporate America, versus fear of the EEOC."

It's also in the best interest of an organization to embrace diversity for business reasons, not out of fear. For example, companies often are sued for making defective products. But it would be bizarre for an organization to say it's motivated to make a safe product to protect itself from lawsuits. Most companies are motivated for business reasons to make a safe product, which is in the long-term interest of their employees and shareholders. The same has to hold true for diversity. If diversity is initiated out of fear, it's not a business imperative of the organization and, ultimately, won't protect the organization from litigation.

"The larger you get, the more proactive and focused management has to be to make sure that their supervisors and managers at every branch down to the lowest level know about what the law is, what the rules are and what the companies' policies are. The better you are at it, the less chance you have of encountering this type of litigation," says Kato. **DI**

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