

1998

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### Recommended Citation

Gregory A. Nussel, *Fifth Circuit: Study of Gender Bias*, 32 U. Rich. L. Rev. 723 (1998).

Available at: <http://scholarship.richmond.edu/lawreview/vol32/iss3/8>

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## FIFTH CIRCUIT: STUDY OF GENDER BIAS

*Gregory A. Nussel\**

In October 1993, in response to a recommendation in the *Report of the National Commission on Judicial Discipline and Removal*, Chief Judge Henry A. Politz appointed a Special Committee of the Fifth Circuit Judicial Council to consider and recommend whether a study of gender bias in the Fifth Circuit should be made. The Special Committee, composed of two circuit judges, two district judges, and one magistrate judge, reported its findings to the Judicial Council during a biannual meeting in June 1994.

Following extensive discussion and examination, the Committee decided against recommending that the Fifth Circuit conduct a study of gender bias similar to studies that recently had been completed by the Ninth Circuit and the State of Texas. Believing that results of a new study would not be radically different from earlier ones, the Committee found that the cost of such a study, both in dollars and in time expenditures by judges and staff, would be high. Furthermore, in view of the thorough studies conducted by other task forces in the country, the need to duplicate these efforts could not be reasonably justified. The Committee summarized by stating that appropriate recommendations could be predicated on the earlier studies, and it was unlikely those recommendations would be materially affected by a new study.

The Committee reported that the most consistent issue raised in the Ninth Circuit and the State of Texas gender bias studies was the significantly different views on the definition and prevalence of gender bias. Accordingly, the Committee recommended that educational programs designed to identify gender bias and to provide suggested remedies be presented to judges, their

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\* Circuit Executive and Secretary to the Judicial Council of the Fifth Circuit.

staffs, and other members of the court family. Also, the Committee recommended that the Federal Judicial Center, the research arm of the Federal Judiciary, include educational material on gender bias in all of its education programs, particularly during orientation programs for new judges. The Judicial Council unanimously accepted these recommendations.

The recommendations and restrained posture of the Judicial Council proved prophetic when, in the summer of 1995, during a floor colloquy over the judiciary's fiscal year 1996 appropriations bill, the Senate concluded that no funds were to be provided for race and gender bias studies. Later, the Executive Committee of the Judicial Conference approved the reprogramming of funds within the Judiciary's appropriations necessary to finance the completion of ongoing studies in several circuits.

In closing, the Judicial Council of the Fifth Circuit opted to build and learn from previous studies rather than conduct an additional costly and lengthy study, which likely would reach generally similar conclusions. The Council believed that through educational programs and workshops for judges and court support employees, issues concerning gender bias can be addressed and given the warranted attention.

## SEVENTH CIRCUIT: FAIRNESS IN THE FEDERAL COURTS

*Collins T. Fitzpatrick\**

Like any worthy goal, fairness in the courts is something that everyone desires. The judges and staff of the courts in the Seventh Circuit are no different. Bias—whether based on gender, race, or other similar category—is antithetical to justice. There is unanimous agreement that courts must be fair not only in results, but also in how the courts treat the parties, public, witnesses, jurors, counsel, and staff. The best way for accomplishing those objectives is how people differ.

Earlier in this decade, a movement started for courts to study whether they were biased based on gender. At its March 1993 meeting, the Judicial Conference of the United States encouraged circuit judicial councils to conduct studies with respect to gender bias in their respective circuits. The Ninth Circuit Gender Bias Task Force had filed its preliminary report. Legislation was pending in Congress which would encourage such studies by the circuit judicial councils.

Based on the national events, the Seventh Circuit Judicial Council discussed at its May, 1993 meeting whether to establish a committee to study gender bias issues. At that time the Ninth Circuit was the only federal circuit to have a report dealing with gender bias. Although the Ninth Circuit Report showed that its courts were relatively free of gender bias, that was not the flavor of the extensive press coverage of the report. Many newspaper articles reporting on the Ninth Circuit Report had headlines about biased courts and the articles emphasized isolated examples of improper behavior by some lawyers and judges. Some Seventh Circuit Council members were concerned that similar media coverage of a Seventh Circuit report would reduce public confidence in the federal courts as being fair. The

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council decided to postpone any action pending the resolution in Congress of what the statutory requirements for gender studies would be.

After a subsequent council discussion in October of 1993, Chief Judge Richard A. Posner appointed a committee on gender and other bias. The committee was composed of circuit and district judges and the circuit executive. One of the first things that the committee did was suggest that it be called the Race and Gender Fairness Committee. The members of the committee thought that both issues were equally important and deserved the attention of the courts. The word "fairness" was substituted for the word "bias" in the name of the committee as the committee members strongly believed that it was important to emphasize that the purpose was to promote fairness in the courts. The new name was meant to emphasize the positive goal of promoting fairness rather than the negative of rooting out bias. The committee also recommended an expansion of the membership to include magistrate and bankruptcy judges, court staff, and private lawyers. The judicial council agreed to all of the suggested changes.

Next on the agenda for the committee was a day-long seminar in which academics with social science backgrounds and persons involved in preparing both federal and state studies on gender bias made presentations and led discussions. The Federal Judicial Center was very helpful in planning the seminar. The committee considered conducting survey studies similar to those that had been done by other federal circuits as well as by a number of states. Some committee members questioned the spending of limited funds on studies which were not anticipated to be much different in results from studies that had already been done for other federal and state courts. Others responded that the survey instruments in themselves are an educational tool; the persons responding to the surveys learn what actions reflect bias or appear to reflect bias.

The committee and the judicial council were discussing how to proceed when Congress passed the Violent Crime Control and Law Enforcement Act of 1994. Section 40421(a) of the Act urged each judicial council to conduct gender bias studies. How-

ever, the November, 1994 elections brought new leadership to Congress and control of Congress switched from the Democratic Party to the Republican Party. The new Congress, through the appropriation process, let it be known that appropriated funds should not be used for such studies. There had also been strong criticism of the published gender bias studies issued by some of the other federal courts. The criticism came from outside and within the circuits that were doing the studies.

The judicial council members assumed that a study of the federal courts in the Seventh Circuit would find similar results to those of other courts and that efforts should be spent on education not replication of the studies of others. The council also determined that its jurisdiction was limited to the courts and the activities that occur within the courts. The council concluded that it was outside its jurisdiction to review gender and race fairness issues within private law firms and public law offices.

The Seventh Circuit Judicial Council decided that the courts of this circuit should continue with educational programs to make judges and court staff aware of actual biases as well as those actions which might be perceived as biased. The educational programs would also inform potential victims of their remedies with regard to actual biased activity.

In keeping with the idea that fairness is best promoted through education, the Seventh Circuit Judicial Conference, at two of its annual joint meetings with the Seventh Circuit Bar Association, presented programs dealing with gender and race fairness (in the employment context) and gender bias (in general). The circuit executive convened two meetings of the clerks and chief probation and pretrial services officers and their chief deputies to discuss race and gender fairness issues. Another conference to discuss the Seventh Circuit Model Employment Dispute Resolution and Equal Employment Opportunity Plan is scheduled for the Spring of 1998.

At its meeting of October 17, 1995, the Seventh Circuit Judicial Council adopted the following resolution to make sure that race and gender fairness is continuously addressed and not left as a one-time issue and that fairness be addressed locally at the court level:

**Gender Fairness Task Force Resolution  
adopted by the Seventh Circuit Judicial Council**

Recognizing that racial and gender bias and other forms of invidious discrimination have no place in the federal courts, the Seventh Circuit Judicial Council now strongly recommends the circuit court, each district court, and each bankruptcy court within the circuit to:

1. Create a gender and race fairness task force, including but not necessarily limited to, representatives from throughout the court to assess racial and gender issues within the court and the effect of such issues on persons using the court, including jurors, litigants, witnesses, and attorneys, as well as court employees. Judicial officers should be represented on the task force.
2. At least once a year, conduct specific educational programs for the court or carry out special projects addressing issues of gender and race bias.
  - a) enlisting, as necessary, the assistance of the Federal Judicial Center and the Administrative Office of the United States Courts in developing and conducting such programs; and
  - b) encouraging the participation of bar associations, law schools and other interested groups in designing, sponsoring, and presenting such programs.
3. Report annually to the Seventh Circuit Judicial Council on the activities of the race and gender fairness task force.
4. Devise and implement effective structures to receive, consider and process specific discrimination complaints or review and improve existing structures and procedures.
5. Direct the court security committee to determine whether there are any issues of gender and race fairness with respect to safety and security.

To assist the circuit council, the Gender Fairness Task Force will review the annual reports of the circuit, district and bankruptcy courts for compliance with this recommendation and make recommendations to the council for further action as appropriate.

In response to the resolution, most courts within the Seventh Circuit have created active committees, some of which are conducting their own surveys and studies. There are a few courts that have elected not to create any such committee. The requirement of annual reports ensures that race and gender fairness will continue to be addressed even by courts that have not appointed local committees.

