The role and effectiveness of large-scale employment discrimination litigation in combating workplace discrimination is a matter of ongoing dispute. In this paper we examine the remedies obtained by the U.S. Equal Employment Opportunity Commission (EEOC) in litigation filed over a ten-year period in order to compare actual outcomes in this important subset of employment discrimination litigation to extant theories about the use and significance of injunctive relief to reform discriminatory workplace practices. We find a notable disconnect.

Three visions of injunctive cases dominate the literature. Proponents of what we call the gladiator theory of structural reform litigation describe cases that last for years, even decades, and cost millions of dollars, that pose acute challenges to the managerial capacity of courts and that offer occasions for power grabs by plaintiffs. Others, whom we term collaboration theorists, point to a number of high-profile employment class actions as implementing flexible, context-specific remedies that create accountability processes and encourage experimentation and information-sharing; this approach, they suggest, is more likely to eradicate subtle forms of discriminatory bias than traditional rule-based and coercive remedies. The gladiator and the collaboration theories share the understanding that employment discrimination litigation—at least the large cases that prospectively target general practices—is about structural reform; the point of seeking injunctive relief in these cases is to transform the norms and practices of the large private and government institutions whose activities they challenge. A third approach, the private tort model, argues that structural reform has lost its preeminence as the goal of large-scale employment discrimination litigation. Instead, structural reform has been replaced by a purely private, tort-like dispute resolution system, in which the parties bringing suit primarily seek monetary compensation and have little interest in reforming the practices of the defendant. While injunctive relief may be part of a consent decree or settlement, these terms are not the primary goal of the litigation, and they do not fundamentally alter the defendant’s practices.

We test these competing accounts by systematically examining an entire category of cases, rather than just a salient few. We find that none of the three models adequately captures the EEOC’s litigation, which is far more routinized than the gladiator or collaboration theories would predict, and far more focused on reform than the private tort model allows. We collected data on the EEOC’s litigation activities from fiscal years 1997 through 2006, including detailed information on the types of injunctive relief actually achieved through settlement, consent decree or court judgment. Analyzing this data, we test the dominant theories of injunctive practices in employment discrimination litigation and find that none comfortably fit the actual practices of litigation and injunctive relief pursued by the EEOC, which are far more routinized than the gladiator or collaboration theories would predict, and far more focused on reform than the private tort model allows. The agency does pursue injunctive relief intended to implement structural reform, but its efforts are best understood not as intense battles seeking to transform
the heart and soul of complex organizations, nor as equally intense and equally transformative
partnerships, but as the application of largely bureaucratic responses to the challenge of
eradicating discriminatory employment practices. Required changes more often seem directed at
professionalizing a defendant firm’s human resources practices than transforming its culture.