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Eldredge v. Carpenters' 46 Northern California Counties Joint Apprenticeship Training Committee: The Ninth Circuit Finally Hammers the Carpenters' Union with an Affirmative Action Plan

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SUMMARY

ELDREDGE V. CARPENTERS' 46 NORTHERN CALIFORINA COUNTIES JOINT APPRENTICESHIP TRAINING COMMITTEE: THE NINTH CIRCUIT FINALLY *HAMMERS* THE CARPENTERS' UNION WITH AN AFFIRMATIVE ACTION PLAN

I. INTRODUCTION

In *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship Training Committee,*[1] the Ninth Circuit held that affirmative action[2] was the proper remedy for de-

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1. Eldredge v. Carpenters 46 No. Cal. Counties Joint Apprenticeship Training Committee, 94 F.3d 1366 (9th Cir. 1996) (per Fletcher, J., joined by Reinhardt, J., and Kozinski, J.) ("Eldredge VI").

2. The United States Department of Labor Guidelines define "affirmative action" as:

> Affirmative action is not mere passive nondiscrimination. It includes procedures, methods, and programs for the identification, positive recruitment, training, and motivation of present and potential minority and female (minority and nonminority) apprentices utilizing the establishment of goals and timetables. It is action which will equalize opportunity in apprenticeship as to allow full utilization of the work potential of minorities and women. The overall result to be sought is equal opportunity for all individuals participating in or seeking entrance to the Nation's labor force.

29 C.F.R. § 30.4(b) (1996). *See* David B. Oppenheimer, *Understanding Affirmative Action,* 23 HASTINGS CONST. L.Q. 921, 926 (1996). Affirmative action refers to "race- and gender-conscious practices[.]" *Id.*

cades[3] of Title VII violations by the Carpenters 46 Northern California Counties Joint Apprenticeship Training Committee (hereinafter "the JATC").[4] The court found that a plan which increased opportunities for women was necessary to dissipate the adverse effects of a selection process which had had a disparate impact on female applicants to the JATC's carpentry apprenticeship program.[5] Additionally, the Ninth Circuit instructed the district court to enjoin the JATC's further use of the so-called "hunting license"[6] system, discounting the JATC's arguments that the system was a business necessity.[7] The court pointed out that the JATC's own numerical referral list system was available as an alternative, less discriminatory, practice.[8] The Ninth Circuit concluded that the district court had abused its discretion in adopting a remedy which had simply eliminated the "first-job requirement" for female applicants.[9] The court found that such a remedy was both unlawful and inadequate since it could not rectify the JATC's past discrimination and had denied female applicants the skills necessary for success in the carpentry trade.[10]

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3. The affirmative action plan is the result of 21 years of litigation between the parties. *Eldredge VI,* 94 F.3d at 1367. Plaintiff Linda Eldredge filed her lawsuit against the JATC in September of 1975 in the United States District Court for the Northern District of California. Eldredge v. Carpenters 46 No. Cal. Counties JATC, 440 F. Supp. 506, 509 (N.D. Cal. 1977) ("Eldredge I"). The case has gone through two appeals and subsequent remands. *Eldredge VI,* 94 F.3d at 1367. The Plaintiff Class noticed its third appeal to the Ninth Circuit in 1993. Appellants' Opening Brief at 6, Eldredge v. Carpenters 46 No. Cal. Counties JATC, 94 F.3d 1366 (9th Cir. 1996) (93-16925). The Ninth Circuit issued its decision in September of 1996, 21 years after Plaintiff Linda Eldredge had filed her gender discrimination case. *Eldredge VI,* 94 F.3d at 1366-67. *See* discussion *infra* part II.B.

4. *Eldredge VI,* 94 F.3d at 1371.

5. *Id.*

6. A "hunting license" is a slang term for the letter of subscription issued by the JATC to its apprenticeship program applicants. The hunting license allowed the applicant to seek employment on his or her own. *Eldredge I,* 440 F. Supp. at 512.

7. *Eldredge VI,* 94 F.3d at 1370.

8. *Id.*

9. *Id.* at 1369.

10. *Id.*

II. FACTS AND PROCEDURAL HISTORY

Over the past two decades, a number of women have applied for admission to the JATC apprenticeship program but have found it difficult to meet the so-called "first-job requirement."[11] Previously, the Ninth Circuit had found that this inability to gain admission was due to the discriminatory procedures used by the JATC to select its apprentices.[12] Despite extensive litigation, however, the number of female applicants admitted to the program has remained relatively low in comparison to male applicants.[13]

A. THE JATC CARPENTRY APPRENTICESHIP PROGRAM

The JATC is a joint-labor-management committee created by a 1963 collective bargaining agreement (hereinafter the "Trust Agreement") between various Northern California carpentry contractors' associations[14] and local unions of the United Brotherhood of Carpenters and Joiners of America (commonly known as the "AFL-CIO").[15] The Trust Agreement required the JATC's Board of Trustees[16] to establish a carpen-

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11. Eldredge v. Carpenters 46 No. Cal. Counties JATC, 94 F.3d 1366, 1368 (9th Cir. 1996) ("Eldredge VI").

12. *Id.*

13. *Id.* at 1367. In August 1996, there were 191 female apprentices in the JATC's program. Appellee's Petition for Rehearing at Exh. 3, Eldredge v. Carpenters 46 No. Cal. Counties JATC, 94 F.3d 1366 (9th Cir. 1996) (93-16925). *See* discussion *infra* part III.A.

14. Signatory employer associations included the Building Industry Association of Northern California, the Sacramento Building Industry Association, the Engineering & Grading Contractors Association, the California Contractors Council, Inc., the Associated General Contractors of California, and the Bay Counties Area General Contractors Association. Appellee's Brief at i, Eldredge v. Carpenters 46 No. Cal. Counties JATC, 662 F.2d 534 (9th Cir. 1981) (No. 79-4482), *cert. denied,* 459 U.S. 917 (1982).

15. Eldredge v. Carpenters 46 No. Cal. Counties JATC, 440 F. Supp 506, 510 (N.D. Cal. 1977) ("Eldredge I").

16. The fourteen members of the Board of Trustees are selected as follows: the Carpenters 46 Northern California Counties' Conference Board appoints seven members, the Associated General Contractors of California (hereinafter "AGC") appoints three members, the Northern California Home Builders Conference (hereinafter "NCHBC") appoints three members, and the AGC and the NCHBC appoint one member at-large. Appellee's Brief at 5, Eldredge v. Carpenters 46 No. Cal. Counties JATC, 662 F.2d 534 (9th Cir. 1981) (No. 79-4482), *cert. denied,* 459 U.S. 917 (1982).

try apprentice training program in the various Northern California counties.[17] To fulfill its obligation, the JATC established a four-year carpentry apprenticeship program which allowed participants to attain journeyman status[18] after completing a classroom training program and gaining some on-the-job experience.[19] The development and coordination of the classroom instruction program to supplement the requisite job experience was the JATC's central focus.[20] To qualify for admission to the apprenticeship program, applicants had to meet minimal age and education requirements and had to find a "first job" in the carpentry trade.[21]

Applicants could satisfy the first-job requirement by utilizing either one or both of the following authorized means: (1) a numerical referral list system[22] and (2) a hunting license sys-

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17. *Eldredge I,* 440 F. Supp at 510. The Trust Agreement provides, in part, with respect to the JATC's duties:

> The Board of Trustees shall have the power and duty to administer the Fund, to establish, support or maintain Programs, and pay out the assets of the Fund for the purpose of educating and training persons as journeymen or apprentices in all classifications covered by any Collective Bargaining Agreement, to the end that there shall be an adequate supply of educated and skilled journeymen available to man the jobs of Individual Employers.

Appellee's Brief at 5, Eldredge v. Carpenters 46 No. Cal. Counties JATC, 662 F.2d 534 (9th Cir. 1981) (No. 79-4482), *cert. denied,* 459 U.S. 917 (1982). The Trust Agreement also states that the various parties are to be bound by the JATC's construction of the agreement. Brief of Appellants at 5, Eldredge v. Carpenters 46 No. Cal. Counties JATC, 662 F.2d 534 (9th Cir. 1981) (No. 79-4482), *cert. denied,* 459 U.S. 917 (1982).

18. A *journeyman* is defined as: "A workman who is thoroughly qualified in a trade, having passed through an *Apprenticeship,* and who earns the prevailing standard wage for the trade." ILLUSTRATED DICTIONARY OF BUILDING AND CONSTRUCTION TERMS 225 (1976) (Emphasis in original).

19. *Eldredge I,* 440 F. Supp at 510-11.

20. Appellee's Brief at 6, Eldredge v. Carpenters 46 No. Cal. Counties JATC, 662 F.2d 534 (9th Cir. 1981) (No. 79-4482), *cert. denied,* 459 U.S. 917 (1982). The four year program required apprentices to undergo 576 hours of classroom instruction and 6,200 hours of on-the-job experience. *Id.*

21. *Eldredge I,* 440 F. Supp. at 511. The applicants had to be at least 17 years old and have either a high school diploma or a general education diploma. *Id.*

22. Placement on the numerical referral list was accomplished by submitting an application to the local JATC office and receiving, in turn, an applicant number. The order of placement was determined according to the order applications were received. Appellants' Opening Brief at 9, Eldredge v. Carpenters 46 No. Cal. Counties JATC, 94 F.3d 1366 (9th Cir. 1996) (No. 93-16925).

tem.[23] Under the numerical referral list system, an applicant would simply await job referrals from the local JATC office distributed according to the applicant's ranking on a numerical referral list of applicants,[24] whereas under the hunting license system, the applicant was required to seek his or her own employment independently.[25]

Upon meeting the first-job requirement, the applicant was allowed to sign an indenture agreement with the local JATC office.[26] This indenture agreement also allowed the applicant to apply for membership with his or her local carpenters' union.[27] After executing the indenture agreement, the applicant became an indentured apprentice and was eligible to enter the classroom training program.[28]

B. ELDREDGE'S ALLEGATIONS OF DISCRIMINATION

Linda Eldredge brought this suit on behalf of all female applicants to the JATC program who had been denied admission because of the JATC's hunting license system.[29] Eldredge first became aware of a potential problem when she applied to the JATC's carpentry apprenticeship program in August of 1975.[30] Although Eldredge had waited outside the San Francisco JATC office hours ahead of time hoping to obtain a high

23. *Eldredge VI,* 94 F.3d at 1368.

24. *Id.* In this instance, the employer would call the union dispatcher to request an unspecified beginning apprentice. The union dispatcher would then contact the JATC and the JATC would dispatch the applicant ranked highest on the numerical referral list. *Eldredge I,* 440 F. Supp at 512.

25. *Eldredge VI,* 94 F.3d at 1368. Typically, the applicant would seek employment from potential employers, by presenting his or her hunting license. If the contractor decided to hire that applicant as a beginning apprentice for at least sixty days, the contractor would sign the hunting license which the applicant returned to the local JATC office. The employer would then contact the union dispatcher and request that applicant by name. *Eldredge I,* 440 F. Supp at 512.

26. *Eldredge I,* 440 F. Supp at 511.

27. *Id.* Even if the indentured apprentice should happen to lose his or her job only one day after signing the indenture agreement, his or her indenture status would remain intact. Appellants' Brief at 5-6, Eldredge v. Carpenters 46 No. Cal. Counties JATC, 833 F.2d 1334 (9th Cir. 1987) (No. 85-2846), *cert. denied,* 487 U.S. 1210 (1988).

28. *Eldredge I,* 440 F. Supp at 511.

29. *Id.* at 510 n.1.

30. *Id.* at 512.

placement on the JATC numerical referral list, she was yet unable to gain admission because of alleged discriminatory practices.[31] She had been under the impression that the JATC numerical referral list system was an easier way of fulfilling the first-job requirement than the hunting license system since "it did not require a new applicant to [already] have connections in the trade."[32] In reality, however, employers had only intermittently used the numerical referral list system, instead relying almost entirely upon the hunting license system.[33]

Although Eldredge had received her hunting license and had been given a place on the numerical referral list, initially she had believed that the JATC had discriminated against her and other female applicants because she had been denied equal placement on the referral list.[34] Consequently, Eldredge filed a claim with the Equal Employment Opportunity Commission (hereinafter "EEOC") charging the JATC with gender discrimination in violation of Title VII of the 1964 Civil Rights Act (hereinafter "Title VII").[35]

In support of her claim, Eldredge alleged two specific instances of gender discrimination.[36] First, she contended that, because she was a woman, the Apprenticeship Coordinator for the San Francisco JATC office had evaded answering her questions regarding placement on the numerical referral list and the process for receiving subsequent referrals.[37] Second, she

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31. *Id.* at 512-13.

32. Appellants' Brief at 7-8 n.2, Eldredge v. Carpenters 46 No. Cal. Counties JATC, 662 F.2d 534 (9th Cir. 1981) (No. 79-4482), *cert. denied,* 459 U.S. 917 (1982).

33. *Eldredge VI,* 94 F.3d at 1370.

34. *Eldredge I,* 440 F. Supp at 512-13.

35. *Id.* at 513. Title VII of the 1964 Civil Rights Act provides as follows:

> It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

42 U.S.C. § 2000e-2(d) (1995).

36. *Eldredge I,* 440 F. Supp at 513.

37. *Id.*

asserted that a JATC official had given a woman who had been first in line at the San Francisco JATC office the number two appointment slip[38] instead of the number one appointment slip.[39] Although the JATC official had later corrected the mistake at the woman's request, the official had also required the woman to sign on a long strip of tape placed over the number one spot.[40]

One month later, Eldredge requested and received a "right-to-sue" letter from the EEOC.[41] She immediately filed suit in the United States District Court for the Northern District of California alleging that her experience at the JATC's San Francisco office had constituted gender discrimination.[42] Initially, the district court had dismissed the action for nonjoinder of indispensable parties,[43] reasoning that the individu-

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38. An "appointment slip" is synonymous with an "applicant number." *See supra* note 22.

39. *Eldredge I,* 440 F. Supp at 513.

40. *Id.*

41. *Id.* Upon receipt of Eldredge's complaint, the EEOC initially referred Eldredge to the California Fair Employment Practice Commission (hereinafter "FEPC") recommending the issuance of a preliminary injunction against the JATC. The FEPC declined to process the charges, however, and sent the case back to the EEOC. The EEOC then issued Eldredge a right-to-sue letter stating that it was unable to "investigate, conciliate or file suit" within the 180 day period required by statute. *Id.*

Because Title VII prohibits an aggrieved party from suing an employer without the permission of the EEOC, a person must first obtain a "right-to-sue" letter from the EEOC. 42 U.S.C. § 2000e-5(f)(1) (1995). A "right-to-sue" letter is a written authorization by the EEOC that allows the complainant to commence a legal action against an employer. The EEOC will issue such a letter under any one of the following circumstances: (1) if the EEOC finds it does not have jurisdiction or other administrative reasons; (2) if the Plaintiff requests the letter before the administrative process is complete, and the EEOC, in its discretion, decides to issue the letter; (3) if the EEOC finds that there is no reasonable cause; or (4) if the EEOC finds that there is reasonable cause and no conciliation has been reached, and the EEOC has determined that it will not itself bring suit. 29 C.F.R. § 1601.28 (1996).

42. *Eldredge I,* 440 F. Supp. at 513. During the pendency of her legal action, Eldredge awaited job referrals from the JATC but had not attempted to use her hunting license to find a job on her own. After receiving information from the JATC that a large number of applicants had found their own jobs, however, Eldredge tried unsuccessfully to do the same. Consequently, Eldredge amended her complaint to allege that the JATC's hunting license system had had a disparate impact on female applicants. *Id.* at 514.

43. The Federal Rules of Civil Procedure rule 19 allows a court to dismiss an action for failure to join a party if

(1) in the person's absence complete relief cannot be ac-

al employers were indispensable parties that must be joined and that Eldredge had failed to comply with its earlier order to join the employers.[44] The Ninth Circuit reversed and remanded, finding that the absent employers' interests would not be impaired since the employers had ceded their interests in the apprenticeship program selection process to the JATC.[45] The court reasoned that interested employers could intervene if they so desired.[46]

On remand, Eldredge requested the district court to certify a class which included all female applicants who had unsuccessfully applied to the JATC's program (hereinafter "the Plaintiff Class").[47] Although the court certified the class, the court also granted summary judgment in the JATC's favor holding that the JATC could not be liable for the employers' discrimination as a matter of law.[48] Again, the Ninth Circuit reversed the district court's decision, holding that the JATC's hunting license system had had a disparate impact on female applicants to the program and therefore was a prima facie violation of Title VII.[49] In reaching its decision, the court reviewed statistical data which showed that a much smaller percentage of female applicants had been admitted to the pro-

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> corded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to substantial risks of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

FED. R. CIV. P. 19.

44. Eldredge v. Carpenters 46 No. Cal. Counties JATC, 83 F.R.D. 136 (N.D. Cal. 1979).

45. Eldredge v. Carpenters 46 No. Cal. Counties JATC, 662 F.2d 534 (9th Cir. 1981), *cert. denied,* 459 U.S. 917 (1982) ("Eldredge II"). *See supra* note 17.

46. *Id.*

47. Appellants' Opening Brief at 2, Eldredge v. Carpenters 46 No. Cal. Counties JATC, 833 F.2d 1334 (9th Cir. 1987) (No. 85-2846), *cert. denied,* 487 U.S. 1210 (1988).

48. Eldredge v. Carpenters 46 No. Cal. Counties JATC, 51 Fair Empl. Prac. Cas. (BNA) 149, 151 (N.D. Cal. 1985).

49. Eldredge v. Carpenters 46 No. Cal. Counties JATC, 833 F.2d 1334 (9th Cir. 1987), *cert. denied,* 487 U.S. 1210 (1988) ("Eldredge IV"). Because the JATC had failed to show that the system was a business necessity, the court determined that the Plaintiff Class was entitled to summary judgment as a matter of law. *Id.* at 1341.

gram than male applicants.[50] The Ninth Circuit instructed the district court to enter summary judgment in favor of the Plaintiff Class and to hold a trial to determine the appropriate remedy.[51] Unfortunately for the Plaintiff Class, the district court adopted a remedy which simply exempted women from the first-job requirement and did not impose any affirmative obligation on the JATC to admit women to the program.[52] The Plaintiff Class again appealed the district court's ruling to the Ninth Circuit.[53] This time, the appellate court not only reversed the court below but also issued an opinion which instructed the district court to adopt an affirmative action plan, to appoint a monitor to oversee its implementation, and to enjoin the further use of the hunting license system.[54] This third appellate decision is the subject of this article.

III. BACKGROUND

Women who have entered the carpentry trade and other male-dominated occupations have encountered discrimination from employers and labor unions.[55] Title VII of the 1964 Civil Rights Act creates a statutory framework which prohibits em-

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50. *Id.* at 1339.

51. *Id.* at 1341.

52. Eldredge v. Carpenters 46 No. Cal. Counties JATC, No. C-75-2062-JPV (N.D. Cal. Sept. 9, 1993) (order granting injunctive relief) ("Eldredge V"). The Plaintiff Class proposed (1) that the JATC eliminate the hunting license system and require the use of only the numerical referral list system; (2) an affirmative action plan that mandated the referral of one woman for every four men sent to job referrals from the numerical referral list; (3) the appointment of a monitor to oversee the implementation of the affirmative action plan; and (4) other specific relief to increase the success rate of women in the carpentry trade. *Id.* In contrast, the JATC proposed a two-track system in which female applicants no longer needed to meet the first-job requirement while male applicants were still required to secure employment prior to admission into the program. Thus, female applicants would be allowed to enter the JATC program without a confirmed job offer. Under this proposal, the JATC sought to avoid the complete elimination of the hunting license system. *Id.* Shortly after trial and before the issuance of the court's order, the JATC informed the court that it had unilaterally implemented its proposal. Appellants' Opening Brief at 5, Eldredge v. Carpenters 46 No. Cal. Counties JATC, 94 F.3d 1366 (9th Cir. 1996) (93-16925).

53. *Eldredge VI,* 94 F.3d at 1367.

54. *Id.* at 1369-72.

55. See JOB TRAINING FOR WOMEN: THE PROMISE AND LIMITS OF PUBLIC POLICIES 265-87 (Sharon L. Harlan and Ronnie J. Steinberg eds., 1989) (hereinafter "JOB TRAINING FOR WOMEN") for a discussion of the inequities that prevent women from obtaining nontraditional employment.

ployer practices that either classify or have a discriminatory effect on certain protected groups, including those based on gender, race, religion, color or national origin.[56] Title VII also provides a basis for evaluating and remedying certain discriminatory employment practices.[57] Once employment discrimination is shown, Title VII provides for such remedies as injunctions, back pay, reinstatement, attorney's fees and other relief which the district court may deem appropriate.[58]

A. WOMEN IN THE CARPENTRY TRADE

Traditionally, the carpentry trade, as with most construction industry jobs, has been closed to women.[59] This is apparent in the number of women actually employed in the trade.[60] In 1975, female carpenters comprised only 10 percent of carpenters nationwide.[61] A decade later, about another 8,700 female carpenters had entered the trade, increasing the percentage of women to about 12 percent.[62] By 1995, female carpenters still accounted for only 12 percent even though an additional 8,000 women had entered the trade.[63] The most recent figures available from the Bureau of Labor Statistics show that in November 1996 women accounted for only 11 percent of all carpenters despite the infiltration of the trade by another 2,000 women.[64] Thus, although the number of women enter-

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56. 42 U.S.C. § 2000e-2 (1995).

57. 42 U.S.C. § 2000e-2, et seq. (1995).

58. 42 U.S.C. § 2000e-5(g)(1) (1995).

59. MARY L. WALSHOK, BLUE-COLLAR WOMEN: PIONEERS ON THE MALE FRONTIER 5 (1981); JOB TRAINING FOR WOMEN, *supra* note 55, at 269.

60. *See* U.S. Dept. of Labor, *Nat'l Employment, Hours, and Earnings,* Bureau of Labor Statistics, <http://stats.bls.gov/cgi-bin/dsrv>. The number of women admitted to apprenticeship programs has also remained low. JOB TRAINING FOR WOMEN, *supra* note 55, at 277. In July 1968, the U.S. Bureau of Apprenticeship and Training reported that out of 77,151 total construction apprentices nationwide, there were only two female apprentices; three years later, there were only five. *Id.* That number increased to 3,198 by 1975 and again to 13,279 in 1979. *Id.* at 278 tbl. 11-2.

61. *See* U.S. Dept. of Labor, *Nat'l Employment, Hours, and Earnings,* Bureau of Labor Statistics, <http://stats.bls.gov/cgi-bin/dsrv>. There were a total of 102,500 carpenters nationwide; 10,300 women and 92,200 men. *Id.*

62. *See id.* Carpenters nationwide totaled 154,700; male carpenters numbered 135,700 and female carpenters, 19,900. *Id.*

63. *See id.* In 1995, there was 225,000 carpenters nationwide; 195,700 men and 27,300 women. *Id.*

64. *See* U.S. Dept. of Labor, *Nat'l Employment, Hours, and Earnings,* Bureau

ing the carpentry trade has more than tripled over the past two decades, their overall percentages still pale in comparison to the men's numbers.[65]

Contrary to the general trend in the trade, the actual number of women in the JATC's carpentry apprenticeship program has remained relatively low.[66] Between 1975 and 1984, while approximately 39 percent of male applicants had gained admission to the program, less than 21 percent of female applicants had also entered the program.[67] This resulted in women constituting less than 3 percent of the JATC's program participants.[68] Similarly, between 1985 and 1990, more than 56 percent of all male applicants were admitted to the JATC's program, as compared with less than 23 percent of female applicants.[69] Again, women accounted for less than 3 percent of the JATC's apprentices between 1985 and 1990.[70] According to the most recent figure available, in August 1996 the number of women in the JATC's program had decreased to 191.[71] Thus, the actual number of women in the JATC's program has steadily decreased in the past two decades.[72]

Despite the slow movement of women into the carpentry trade and other "nontraditional"[73] occupations, women contin-

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of Labor Statistics, <http://stats.bls.gov/cgi-bin/dsrv>. There were 227,900 male carpenters and 29,600 female carpenters, totaling 257,500 carpenters nationwide. *Id.*

65. *See id.*

66. Eldredge v. Carpenters 46 No. Cal. Counties JATC, 94 F.2d 1366, 1368 (9th Cir. 1996) ("Eldredge VI").

67. Appellants' Opening Brief at 10 n.8, Eldredge v. Carpenters 46 No. Cal. Counties JATC, 94 F.3d 1366 (9th Cir. 1996) (No. 93-16925).

68. *See id.* There had been 54,344 male applicants and 3,140 female applicants to the program between 1975 and 1984. The actual number of women admitted during this time period was 657. *Id.*

69. *Id.* at 11. A total of 1,333 women had applied to the program in addition to 19,655 men. *Id.* Note that the Ninth Circuit incorrectly stated the percentage of men admitted as 48 percent, however, that number should be 56 percent. *Id.*

70. *See id.* at 10. 306 women had successfully gained admission during this five year period, 1985-1990. *Id.*

71. Appellee's Petition for Rehearing at Exh. 3, Eldredge v. Carpenters 46 No. Cal. Counties JATC, 94 F.3d 1366 (9th Cir. 1996) (No. 93-16925). At the same time, male apprentices numbered 2,308. *Id.*

72. *Eldredge VI*, 94 F.3d at 1368.

73. "Nontraditional" jobs generally refer to fields or occupations traditionally held by men, such as plumber, carpenter, electrician and bricklayer. *See* JOB

ue to seek such jobs for two main reasons.[74] First, these jobs generally offer reasonable wages and benefits due to the high level of skill required.[75] Second, many women find working in traditionally male occupations both rewarding and well-suited to their talents.[76] However, gender discrimination in the form of employer practices remains a barrier for the women who desire to make carpentry, or other nontraditional jobs, their chosen occupation.[77]

B. GENDER DISCRIMINATION UNDER TITLE VII

Title VII of the Civil Rights Act of 1964[78] is one of the main statutory bases for remedying gender discrimination in employment.[79] Specifically, Title VII prohibits discriminatory acts, policies or practices by an employer against any person or group based on race, sex, color, national origin, or religion.[80]

TRAINING FOR WOMEN, *supra* note 55, at 265.

74. *See* Sylvia A. Law, *"Girls Can't Be Plumbers"—Affirmative Action for Women in Construction: Beyond Goals and Quotas,* 24 HARV. C.R.-C.L. L. REV. 45, 48 (1989).

75. Law, *supra* note 74, at 48. Professor Law surmises that most women enter the construction field because it pays more than female-dominated jobs such as secretarial work. *Id.* The following example illustrates this point. In 1992, a carpenter earned a median weekly income of approximately $425 per week, while female-dominated jobs such as secretary and hair dresser paid much less: $373 per week and $260 per week, respectively. Kathleen Green, *Should You Build a Future as a Construction Tradeswoman?,* 37 OCCUPATIONAL OUTLOOK QUARTERLY 2, 5 (1993).

76. Law, *supra* note 74, at 48-49; Green, *supra* note 75, at 3.

77. JOB TRAINING FOR WOMEN, *supra* note 55, at 270, 286. *See* Green, *supra* note 75, at 7.

78. 42 U.S.C. § 2000e, et seq. (1995).

79. BARBARA LINDEMANN SCHLEI AND PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1 (2d. ed., 1983).

80. Title VII provides:

> It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color,

Title VII applies to private employers with fifteen or more employees, public and private education institutions, labor organizations, and federal, state and local agencies.[81]

Under Title VII, a plaintiff may have two theories of liability upon which he or she may proceed against an employer.[82] First, a plaintiff may allege intentional disparate treatment by an employer.[83] In this instance, the employer intentionally mistreats the employee because of the employee's gender, or other protected classification.[84] The second theory, disparate impact, occurs when an employer practice adversely impacts a protected group.[85]

Briefly, both theories of liability have essentially the same framework, with the exception of a showing of discriminatory intent in disparate treatment cases.[86] In alleging disparate treatment, the plaintiff must initially make out a prima facie case.[87] The burden then shifts to the employer to show a legitimate or nondiscriminatory purpose for its actions.[88] If the employer meets this burden, the plaintiff must then show that the proffered legitimate reason is only a pretext for discrimination.[89]

Similarly, in cases alleging disparate impact, the plaintiff must also establish a prima facie case of discrimination.[90] Un-

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religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1995).

81. 42 U.S.C. § 2000e (1995).

82. 42 U.S.C. § 2000e-2(a), (k) (1995). "[Title VII] proscribes not only overt discrimination but also [employment] practices that are fair in form, but discriminatory in operation." Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (holding that company's facially neutral employment requirements disparately impacted African-American workers).

83. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) ("Teamsters") (holding that intentional discrimination by the union in treating minority workers less favorably than whites violated Title VII).

84. *Teamsters,* 431 U.S. at 335 n.15.

85. *Griggs,* 401 U.S. at 431.

86. *Teamsters,* 431 U.S. at 335 n.15.

87. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1972) (holding that a plaintiff in a disparate treatment case may rebut an employer's proffered legitimate reason by proving that it is but a pretext for intentional discrimination).

88. *Id.* at 802.

89. *Id.* at 804.

90. Dothard v. Rawlinson, 433 U.S. 321, 329 (1976) (holding that neutral

like disparate treatment cases, however, the plaintiff need not prove discriminatory intent.[91] Instead, the plaintiff is required to prove only that an employer practice adversely affected a protected classification.[92] The burden then shifts to the employer to justify the practice or policy as a business necessity.[93] Business necessity means only that an employer practice has a "manifest relationship to the employment in question"[94] or is "necessary to safe and efficient job performance."[95] If the employer successfully meets the business necessity burden, then the burden shifts back to the plaintiff to show that the employer's interests may still be met by an alternative practice that would not have such an adverse effect.[96] In either case, if the plaintiff prevails, he or she is entitled to the remedies provided by Title VII.[97]

C. COURT-ORDERED AFFIRMATIVE ACTION PLANS AS REMEDIES FOR TITLE VII VIOLATIONS

Title VII provides explicit remedial measures which the courts may impose on the employer in the event of proven violations.[98] Courts have further interpreted Title VII to grant district courts broad discretion in constructing the most comprehensive relief possible.[99] Thus, a wide range of relief is

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height and weight requirements are valid as bona fide occupational qualifications despite having had a disparate impact on female applicants).

91. *Id.* at 328.

92. *Id.* at 329. Title VII requires the removal of arbitrary and unnecessary barriers that operate to discriminate against a protected class. *Griggs,* 401 U.S. at 431.

93. *Dothard,* 433 U.S. at 329.

94. *Griggs,* 401 U.S. at 432.

95. *Dothard,* 433 U.S. at 331 n.14.

96. *Id.* at 329.

97. *See* 42 U.S.C. § 2000e-5(g) (1995).

98. Title VII provides:

> If the court finds that the respondent has intentionally engaged . . . in an unlawful employment practice . . . , the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but it is not limited to, reinstatement or hiring of employees, with or without backpay . . . , or any other equitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g)(1) (1995).

99. *Teamsters,* 431 U.S. at 364; Equal Employment Oppt'y Comm'n v. Ford,

available to plaintiffs under Title VII, which may include reinstatement, back pay, attorney's fees, injunctions or affirmative action plans.[100] The courts have held that injunctive relief may be appropriate where the discriminatory employer practice was not justified as a business necessity.[101] However, according to the United States Supreme Court, the issuance of affirmative action as a remedy requires, among other things, a finding of pervasive and long-standing discrimination by the employer.[102]

The Supreme Court initially reviewed the appropriateness of affirmative action as a Title VII remedy in *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC* (hereinafter "Sheet Metal Workers").[103] The Court upheld the *Sheet Metal Workers* plan which had established a numerical goal of 25 percent for minority union membership and had appointed a monitor to ensure the defendant unions' conformance with the plan.[104] The Court reasoned that the plan was necessary,[105] flexible,[106]

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645 F.2d 183, 200 (4th Cir. 1981) (holding that consideration by the district court of other remedies to which plaintiff may have been entitled was necessary).

100. 42 U.S.C. § 2000e-5(g) (1995).

101. Cox v. Chicago, 868 F.2d 217, 221 n.2 (7th Cir. 1989) (holding that injunction against a discriminatory practice not justified by a business necessity should apply to all potentially affected parties); Payne v. Travenol Laboratories, Inc., 565 F.2d 895, 899 (5th Cir. 1978) (holding that district court properly enjoined discriminatory employment practice not justified by a business necessity); Green v. Missouri Pac. R.R. Co., 523 F.2d 1290, 1298-99 (8th Cir. 1975) (holding that district court should enjoin employer practice found to have disparate impact on African-Americans); Head v. Timken Roller Bearing Co., 486 F.2d 870, 879 (6th Cir. 1973) (holding that discriminatory practice must be enjoined if it is not justified by a business necessity). *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 433 (1971).

102. Local 28 of Sheet Metal Workers' Int'l Ass'n v. Equal Employment Oppt'y Comm'n, 478 U.S. 421, 448-49 (1986) (holding that affirmative action is the proper remedy for an employer's egregious and pervasive discrimination in violation of Title VII).

103. 478 U.S. 421 (1986).

104. *Id.* at 433. The affirmative action plan, as originally adopted by the district court,

> required [the unions] to offer annual, nondiscriminatory journeyman and apprentice examinations, select members according to a white-nonwhite ratio to be negotiated by the parties, conduct extensive recruitment and publicity campaigns aimed at minorities, secure the administrator's consent before issuing temporary work permits, and maintain detailed membership records, including separate records for whites and nonwhites.

Id. at 432-33.

105. Initially, the Court noted that both lower courts had found affirmative

temporary[107] and it did not impair the interests of white workers.[108] In addition, the Supreme Court determined that the *Sheet Metal Workers* plan met the defendant unions' constitutional challenge because it survived strict scrutiny; the plan was narrowly tailored to promote the compelling government interest of remedy past discrimination.[109]

Similarly, in *United States v. Paradise,*[110] the Supreme Court addressed the constitutionality of a court-ordered affirmative action plan.[111] The *Paradise* plan mandated the Alabama Department of Public Safety to promote one African-American trooper for every white trooper promoted until the percentage of African-American troopers reached 25 percent.[112] In determining the validity of the plan, the Court articulated four factors similar to those used in *Sheet Metal Workers:*[113] (1) the plan's necessity and the effectiveness of other remedies,[114] (2) its flexibility and duration,[115] (3) the

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action necessary to cure the defendants' "pervasive and egregious discrimination." *Id.* at 476. Second, the Court stated that the district court had twice found the defendants in contempt for failing to comply with various parts of its remedial orders. *Id.* at 477. Moreover, as the district court had determined, the defendant union's reputation for discrimination dissuaded minorities from applying for union membership, thus an injunction would have been ineffective. Therefore, the Court concluded that affirmative action was necessary. *Id.*

106. The Court reasoned that the plan's flexibility was evidenced by the district court having twice granted deadline extensions and continually allowing for various changes to the membership goal. *Id.* at 478. More importantly, the Court found that the district court had constructed the plan as a means of ensuring the defendants' compliance with its orders rather than as a "strict racial quota." *Id.*

107. The numerical requirement that 25 percent of the union membership be minority workers terminated once that goal was reached, thus the Court determined that the plan was temporary in nature. *Id.* at 479.

108. *Sheet Metal Workers,* 478 U.S. at 479.

109. *Id.* at 479-81.

110. 480 U.S. 149 (1986). The National Association for the Advancement of Colored People initiated the action against the Alabama Department of Public Safety because African-Americans were excluded from the state troopers. *Id.* at 154.

111. *Id.* at 153.

112. *Id.* The district court had issued the plan after eleven years of departmental non-compliance with court orders. The district court had previously ordered the state to refrain from utilizing discriminatory practices against African-Americans and to establish a non-discriminatory promotion procedure. *Id.* at 154-55.

113. *See supra* notes 105-07 and accompanying text.

114. The Court noted that the district court had ordered the affirmative action plan to further three goals: First, to dissipate Alabama's discrimination against African-Americans; second, to ensure the state's compliance with the plan and third, to eliminate the effects of the state's prior delays. *Paradise,* 480 U.S. at

numerical goal's relation to the pertinent labor market,[116] and (4) the burden such a goal may have on the rights of third parties.[117] The Supreme Court upheld the *Paradise* plan, concluding that it not only met the above factors, but that it was also narrowly tailored to serve a compelling government purpose and therefore constitutional.[118]

Recently, the Supreme Court evaluated the constitutionality of federally imposed affirmative action plans in *Adarand Constructors, Inc. v. Pena.*[119] The *Adarand* petitioner challenged the constitutionality of federal set-aside provisions that are present in most federal contracts giving prime contractors a monetary incentive to hire subcontractors who had been certified socially or economically disadvantaged.[120] Without reviewing the merits of the case, the Court held that affirmative action plans or programs imposed by any government actor, federal, state, or local, must be narrowly tailored to serve a compelling governmental interest in order to survive a constitutional challenge.[121] Presently, therefore, all affirmative action plans imposed by the government must meet the *Adarand* standard.[122]

171-72.

115. The Court found that the plan was flexible because it could be waived if there were no qualified African-Americans available and it was only applicable at the time promotions were made. In addition, the plan was temporary because it terminated once the state came up with a new promotion procedure that did not adversely impact African-American troopers. *Id.* at 177-78.

116. The Court determined that since minority workers constituted 25 percent of the relevant labor force, the court-ordered 25 percent numerical goal properly reflected that figure. *Id.* at 179. Moreover, the Court noted that the district court had appropriately ordered this one-for-one requirement in light of the state's past conduct in failing to comply with the court's orders. *Id.* at 180-81.

117. *Paradise,* 480 U.S. at 171. The Court found that the one-for-one requirement did not burden white workers because it was used only at the corporal rank and it did not require the termination of any white workers. Although the plan may have denied some white workers future employment, the Court held this was not a substantial burden. *Id.* at 182-83.

118. *Id.* at 167.

119. 115 S. Ct. 2097 (1995).

120. *Id.* at 2102. For a brief discussion of the federal set-aside provisions at issue in *Adarand,* see David B. Oppenheimer, *Understanding Affirmative Action,* 23 HASTINGS CONST. L.Q. 921, 944 (1996).

121. *Adarand,* 115 S. Ct. 2113.

122. *Id.* Professor Oppenheimer suggests that post-*Adarand* affirmative action plans must be remedial, flexible, waivable, temporary, and not burden the interests of white employees in order to meet the *Adarand* standard. Oppenheimer,

IV. COURT'S ANALYSIS

In *Eldredge v. Carpenters 46 Northern California Counties JATC,* the Ninth Circuit reviewed a district court's Title VII remedial order for abuse of discretion.[123] The order had established a gender-based selection system to the JATC's carpentry apprenticeship program.[124] The court reversed the district court's ruling, holding that the court below had abused its discretion in adopting a remedy which was not only unlawful, but also insufficient to remedy the JATC's past discrimination against female applicants.[125] Instead, the Circuit instructed the district court to adopt an affirmative action plan designed to repair the JATC's long-standing and systemic discrimination, after determining that the plan was permissible.[126]

A. THE DISTRICT COURT'S PRESCRIBED REMEDY WAS NEITHER NECESSARY NOR NARROWLY TAILORED TO REMEDY THE JATC'S PAST DISCRIMINATION

The Ninth Circuit first considered whether the district court had erred in adopting a two-track system that imposed separate gender-based standards on apprenticeship program applicants.[127] The two-track system had allowed female applicants to enter the JATC's program without fulfilling the first-job requirement, while male applicants were still required to obtain initial employment in the trade prior to admission.[128] The Ninth Circuit noted that pursuant to *Sheet Metal Workers,*[129] Title VII remedies, at a minimum, must be narrowly tailored to remedy past discrimination.[130]

In determining the necessity of the two-track system, the

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supra note 120, at 946 (1996).

123. Eldredge v. Carpenters 46 No. Cal. Counties JATC, 94 F.3d 1366 (9th Cir. 1996) ("Eldredge VI").

124. *Id.* at 1369.

125. *Id.* at 1372.

126. *Id.*

127. *Id.* at 1369.

128. *Eldredge VI,* 94 F.2d at 1369.

129. Local 28 of Sheet Metal Workers' Int'l Ass'n v. Equal Employment Oppt'y Comm'n, 478 U.S. 421 (1986). *See* discussion *supra* part III.C.

130. *Id.*

court reviewed an opinion it had issued in a prior appeal.[131] The court emphasized that it had clearly articulated that the principal problem with the JATC's admission process was the hunting license system because of the disparate impact it had on female applicants.[132] Therefore, the most reasonable solution, the court, noted would be to eliminate the hunting license system and to utilize the gender-neutral system that was already in place: the numerical referral list system.[133] Thus, in the court's opinion, the adoption of the JATC's "mutilated version" of the hunting license system was unnecessary.[134]

Furthermore, the court found that the JATC's proposed system was not narrowly tailored to remedy past discrimination by the JATC.[135] The court reasoned that, in fact, the JATC's plan worsened the situation for women in two ways.[136] First, the plan denied female applicants on-the-job experience, the most important tool for their success in the carpentry trade.[137] Second, the plan discouraged the JATC from actively recruiting and selecting female applicants because a major portion of the JATC's funding came from employer contributions made according to the hours worked by the JATC apprentices.[138] Therefore, the Ninth Circuit concluded that the plan did not meet the minimal requirements of *Sheet Metal Workers* because it was neither necessary nor narrowly tailored to rectify the JATC's past discrimination.[139]

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131. *Id.* The court reviewed its opinion issued in Eldredge v. Carpenters 46 No. Cal. Counties JATC, 833 F.2d 1334 (9th Cir. 1987), *cert. denied,* 487 U.S. 1210 (1988) ("Eldredge IV").

132. *Eldredge VI,* 94 F.3d at 1369. In *Eldredge IV,* the Ninth Circuit found that the hunting license system had had a disparate impact on female applicants and remanded the case for entry of summary judgment in favor of the Plaintiff Class based on the JATC's use of the system. *Eldredge IV,* 833 F.2d at 1341.

133. *Eldredge VI,* 94 F.3d at 1369.

134. *Id.* at 1369.

135. *Id.*

136. *Id.*

137. *Id.* The Plaintiff Class alleged that the plan adopted by the district court had, in fact, disadvantaged female applicants by not providing them with the legitimacy that the hunting license communicates to potential employers. The Plaintiff Class claimed that the hunting license impliedly certified that its holder has been deemed qualified by the JATC. Appellants' Opening Brief at 24, n.28, Eldredge v. Carpenters 46 No. Cal. Counties JATC, 94 F.3d 1366 (9th Cir. 1996) (No. 93-16925).

138. *Eldredge VI,* 94 F.3d at 1369.

139. *Id.*

More importantly, the court found that the plan was "unlawful, inadequate and contrary" to the principles it had set forth in its prior opinion.[140] The Ninth Circuit held, therefore, that the district court had abused its discretion in adopting the JATC's proposal.[141]

B. THE DISTRICT COURT HAD ABUSED ITS DISCRETION IN REFUSING TO ADOPT AN ALTERNATIVE PLAN PROPOSED BY THE PLAINTIFF CLASS

The Ninth Circuit next determined the validity of the remedies proposed by the Plaintiff Class, including an affirmative action plan.[142] The court reviewed the three major components of the proposal submitted by the Plaintiff Class to determine whether the district court had abused its discretion in refusing to adopt it instead of the JATC's two-track system.[143] Subsequent to its review, the court concluded that the district court had erred in not requiring, among other things, an affirmative action plan to dissipate the effects of discrimination.[144]

1. The District Court Had Abused Its Discretion in Refusing to Enjoin Use of the Hunting License System and in Refusing to Order Use of the Numerical Referral List System

The Ninth Circuit held that the district court had erred in refusing to enjoin further use of the hunting license system since this system had been the primary cause of the disparate impact against women.[145] Again referring to its earlier opinion, the court noted that it could not have been "more explicit" in pointing out the disparities caused by this system.[146] Thus, the court held that elimination of the hunting license system

140. *Id.* at 1367. Again, the court was referring to its opinion in *Eldredge IV,* discussed *supra* notes 132-33 and accompanying text.

141. *Eldredge VI,* 94 F.3d at 1369.

142. *Id.* at 1369-72.

143. *Id.*

144. *Id.* at 1369-72.

145. *Id.* at 1369.

146. *Eldredge VI,* 94 F.3d at 1370. The court was again referring to its earlier decision in *Eldredge IV. See supra* notes 132-33 and accompanying text.

was required because the JATC had not shown that the system was justified by a business necessity.[147]

Next, the court considered whether the district court should have ordered the JATC to use only the numerical referral list system in assigning all applicants to their first job.[148] The Ninth Circuit noted that the district was both authorized and obligated to issue an order that would eliminate the effects of past discrimination and prevent discrimination in the future.[149] The issue before the court, therefore, was whether it was within the discretionary authority of the district court to order the JATC to use only the numerical referral list system.[150]

In addressing this issue, the Ninth Circuit emphasized the gender-neutral nature of the numerical referral list system, noting that job referrals are made according to the applicant's rank on the list rather than according to gender.[151] Moreover, the court found that the numerical referral list system allowed female applicants to compete on equal footing with male applicants because employers would no longer be able to pick only male applicants as had been the case under the hunting license system.[152]

The Ninth Circuit also addressed the JATC's contention that the limitations on employers' discretion in the selection of its apprentices would result in employers refraining from re-

147. *Eldredge VI,* 94 F.3d at 1370.

148. *Id.* The district court had characterized the adoption of the numerical referral list system without the hunting license system as a completely new procedure that would impinge on the employers' discretion to hire its own apprentices. The district court had also stated that formulation of a remedy to facilitate female applicants' admission to the JATC's program should not create havoc for 4,500 potential employers and 60 unions. Order Granting Injunctive Relief at 11, Eldredge v. Carpenters 46 No. Cal. Counties JATC, No. C-75-2062-JPV (N.D. Cal. Sept. 9, 1993).

149. *Eldredge VI,* 94 F.3d at 1370. The court stated that to remedy a Title VII violation the district court "has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Id.* (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)).

150. *Eldredge VI,* 94 F.3d at 1370.

151. *Id.*

152. *Id.*

questing JATC apprentices.[153] The court responded that the numerical referral list system had been used intermittently by employers without objection during the score of years that it had existed.[154] Despite the JATC's assertion that the numerical referral list system would burden employers, JATC's own board member admitted that he had never spoken with an employer who had hired an apprentice through the numerical referral list system.[155] The court stated that employers would still have the option of not employing an apprentice for any legitimate reason.[156] Moreover, the court noted that there was an economic incentive for employers to use the JATC's beginning apprentices since they are paid substantially less than journeymen carpenters.[157] The court concluded that the district court had abused its discretion in failing to order the JATC to use only the numerical referral list system in its apprenticeship program.[158]

2. Adoption of Affirmative Action Would Remedy Past Discrimination

The Ninth Circuit determined that the district court had abused its discretion in refusing to adopt the affirmative action plan proposed by the Plaintiff Class.[159] The affirmative action plan set a twenty percent admission rate for female applicants which would terminate once female apprentices constitute twenty percent of all apprentices in the JATC's program.[160] Referring to *Sheet Metal Workers,* the court stated that an affirmative action plan may be "appropriate where an employer or labor union has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering ef-

153. *Id.* The district court had stated that use of the numerical referral list system would deprive employers of any discretion in choosing their own employees and it presupposed that employers would call in blind for untrained and inexperienced apprentices. Order Granting Injunctive Relief at 11, Eldredge v. Carpenters 46 No. Cal. Counties JATC, No. C-75-2062-JPV (N.D. Cal. Sept. 9, 1993.

154. *Eldredge VI,* 94 F.3d at 1370.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Eldredge VI,* 94 F.3d at 1370-72.

160. *Id.* at 1370.

fects of pervasive discrimination."[161] Similarly, with reference to *Adarand Constructors, Inc. v. Pena,*[162] the Ninth Circuit noted that federal courts may require remedial affirmative action plans where an employer's conduct has been "pervasive, systematic, and obstinate."[163]

The court then reviewed the JATC's conduct over the course of the litigation.[164] Initially, noting that the JATC's reliance on the hunting license system had effectively excluded women from the carpentry trade during the life of the case, the court was not surprised that women accounted for only five percent of the JATC's applicant pool.[165] The court found that female applicants had consistently represented less than three percent of all applicants admitted and that male applicants had had a significant advantage over female applicants.[166] Thus, the court concluded that the JATC's conduct had been both obstinate and egregious because the JATC had, in the court's opinion, continued its legal battle to preserve the status quo.[167]

Next, the court examined the appropriateness of the affirmative action plan under the standards set forth by the Supreme Court in *United States v. Paradise.*[168] Under *Paradise,* a court-ordered affirmative action plan must be analyzed under four factors: its necessity and the efficacy of alternative remedies, its flexibility and temporary nature, including waiver provisions, the propriety of the numerical goal's relationship to the relevant labor market, and the its incidental burden on the

161. *Id.* (quoting *Sheet Metal Workers,* 478 U.S. at 445).

162. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995). *See* discussion *supra* part III.C.

163. *Eldredge VI,* 94 F.3d at 1370 (quoting *Adarand,* 115 S. Ct. at 2117).

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* Specifically, the court stated, "[t]he bottom line is that women historically have been systematically excluded from carpentry work and for more than two decades have sought relief through the courts while the JATC, the craft's gatekeeping organization, has waged a relentless battle to preserve the status quo." *Id.*

168. *Eldredge VI,* 94 F.3d at 1370. The court referred to the Supreme Court's opinion in United States v. Paradise, 480 U.S. 149 (1987) discussed *supra* part III.C.

rights of third parties.[169]

To determine the necessity of the affirmative action plan, the court reviewed the JATC's past conduct.[170] Citing to statistics as well as the JATC's own failure to facilitate female applicants' admission into the apprenticeship program, the court concluded that the plan was necessary to remedy the JATC's past discrimination against women.[171] In so concluding, the Ninth Circuit characterized the JATC's conduct as recalcitrant foot-dragging.[172]

The court then considered whether the proposed plan was flexible and temporary as required by *Sheet Metal Workers.*[173] First, the court noted that the plan terminated on its own terms once women comprised twenty percent of the program's indentured apprentices.[174] Second, the court stated that the JATC need only make reasonable efforts to recruit more female applicants should the JATC's present applicant pool prove insufficient to satisfy the numerical goal.[175] More importantly, the court noted that the numerical goal met the *Sheet Metal Workers* standard because it only set a benchmark against which the court could gauge the JATC's efforts.[176]

In addition, the Ninth Circuit questioned whether there was a proper nexus between the numerical goal and the carpentry labor market.[177] Referring to the guidelines issued by the United States Department of Labor,[178] the court found

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169. *Eldredge VI,* 94 F.3d at 1371.
170. *Id.* at 1371-72.
171. *Id.* at 1372.
172. *Id.*
173. *Id.* at 1371.
174. *Eldredge VI,* 94 F.3d at 1372.
175. *Id.*
176. *Id.*
177. *Id.*
178. With respect to equal opportunities in apprenticeship and training programs, the United States Dept. of Labor Guidelines provides:

> [I]n order to deal fairly with program sponsors, and with women who are entitled to protection under the goals and timetables requirements, during the first 12 months after the effective date of these regulations, the program sponsor would generally be expected to set a goal for women for the entering year class at a rate which is not less

that the numerical goal proposed by the Plaintiff Class was proper since it was a conservative estimate.[179] Thereafter, the court determined that the numerical goal would not unduly burden male applicants (as third parties) since both male and female applicants still had to meet minimal admission requirements.[180] So, qualified men would not be passed over for unqualified women.[181] Moreover, the numerical goal did not require the expulsion of any male apprentices already in the program, although it may delay the admittance of potential male apprentices.[182] The court concluded that the affirmative action plan, with its numerical goal, was permissible and held that the district court had abused its discretion in refusing to adopt it.[183]

3. Egregious and Obstinate Conduct Necessitated a Court-appointed Monitor

The Ninth Circuit briefly addressed the district court's refusal to appoint a monitor.[184] The court alluded to the JATC's persistence in refusing to facilitate the admission of women to its apprenticeship program, specifically, that throughout the litigation, the JATC had done everything in its power to exclude women from the program.[185] Under the circumstances, the court concluded that a monitor was necessary and the district court had abused its discretion in declining to appoint one.[186]

> than 50 percent of the proportion women are of the workforce in the program sponsor's labor market area and set a percentage goal for women in each class beyond the entering class which is not less than the participation rate of women currently in the preceding class.

29 C.F.R. § 30.4(f) (1996).

179. *Eldredge VI*, 94 F.3d at 1372.
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Eldredge VI*, 94 F.3d at 1372.
185. *Id.*
186. *Id.*

V. CONCLUSION

In *Eldredge v. Carpenters 46 No. Cal. Counties JATC,* the Ninth Circuit reversed the district court's adoption of a gender-based remedy as illegal and insufficient to remedy the JATC's past discrimination against women.[187] The court held that the proper remedy in the case of long-standing and egregious discrimination was an affirmative action plan to encourage and expedite the admission of women into the JATC's apprenticeship program.[188] In addition, the court determined that elimination of the discriminatory practice was required since it was not necessary to job performance.[189] Moreover, the court determined that a court-appointed monitor was necessary to administer the plan and ensure the JATC's compliance.[190] In so doing, the Ninth Circuit issued a ruling which endorsed a gender-conscious selection process amidst growing opposition to affirmative action plans[191] and pounded what may be the last nail into over two decades of litigation between the parties.

Unaloto-ki-Vahanoa Halamehi Aholelei-Aonga[*]

187. *Id.*

188. *Id.* at 1369-72.

189. *Eldredge VI,* 94 F.3d at 1370.

190. *Id.* at 1372.

191. *See* Rinat Fried, *Preference Plan Carved Out for Union's Hiring,* THE RECORDER, Sept. 10, 1996, at 1.

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