

## **Tale of the Tapes**

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Bari-Ellen Roberts was surprised: What was Richard Lundwall doing at her door? And what did he have in his pocket? Lundwall seemed to be fingering something on the day he suddenly showed up in Roberts's office at Texaco Inc. headquarters last July. She had no idea what it was, couldn't even imagine what Lundwall wanted to talk to her about. She and Lundwall knew each other -- they had both worked in Texaco's finance department, and for six years they'd sat within 20 feet of each other -- but they weren't especially friendly. Lundwall was a Texaco lifer, an ex-Marine who'd worked his way up from pumping gas to hobnobbing with senior executives as a trusted personnel manager; Roberts, an African-American who was recruited to Texaco's pension department in 1990, was so disgusted with the oil giant's corporate culture that, at the time of Lundwall's visit, she was a name plaintiff in a class action race discrimination suit against the company.

Lundwall came into Roberts's office and closed the door behind him. "I have something that could be really helpful to your case," Roberts recalls him saying. He was surprisingly calm, Roberts says, for a man making such an apparently momentous reversal of allegiance. "He was really, like, da-da-da-da-dah, very matter-of-fact. That's the Texaco environment -- no show of emotion." Roberts was wary; she recalls telling Lundwall that she didn't know what he could be talking about, but that whatever it was, he shouldn't be telling her. She reached down for her pocketbook, found her lawyer's card, and told Lundwall to call her lawyer in the discrimination case, Cyrus Mehri, a 35-year-old associate at Washington, D.C.'s Cohen, Milstein, Hausfeld & Toll.

Lundwall called Mehri on August 1, 1996. The Texaco loyalist, it seemed, felt betrayed. Lundwall told Mehri that he had been downsized by Texaco, and that he wanted Mehri to represent him. Mehri said he couldn't because of the race discrimination case, and referred Lundwall to an employment lawyer in Manhattan. Then Lundwall told Mehri, in Mehri's account, what he had already told Roberts: that he had information that would "break the discrimination case wide open." A week later, Lundwall called Mehri again, and this time he told the lawyer what his evidence was. As Mehri later learned, Lundwall, with a microcassette recorder hidden in his shirt pocket, had surreptitiously taped some Texaco business meetings, including some at which the race discrimination case was discussed.

By October Mehri and his co-counsel -- Michael Hausfeld from Cohen, Milstein; and Daniel Berger, Max Berger, and Steven Singer of New York's Bernstein Litowitz Berger & Grossman -- had been given copies of Lundwall's tapes and had had them enhanced and transcribed. The plaintiffs lawyers then filed a motion for sanctions against Texaco with Charles Brieant, the federal district judge overseeing the discrimination case, on October 28. That filing was in turn leaked by the lawyers at Cohen, Milstein to Kurt Eichenwald of The New York Times, who several days later wrote the now infamous story that appeared on the front page of the Times on November 4. Not only did the tapes contain evidence of document tampering, Eichenwald wrote, but on them, "executives are heard referring to black employees as 'black jelly beans' and 'niggers.'"

Suddenly, a lawsuit that for two years had slogged along in the obscurity of a federal courtroom in White Plains was everybody's business. Civil rights groups, which had until then ignored the case, leaped into the fray. The U.S. attorney for the Southern District of New York launched an investigation of the evidence tampering allegedly discussed on the tapes; Lundwall was subpoenaed to testify. Excerpts from the plaintiffs' tapes were broadcast on Nightline, Good Morning America, and PBS's Newshour. Texaco hired Michael Armstrong of the New York office of Pittsburgh's Kirkpatrick & Lockhart to conduct an internal investigation, and Texaco defense counsel Milton Schubin of New York's Kaye, Scholer, Fierman, Hays & Handler began negotiating a settlement with the plaintiffs lawyers.

Then, one week after his first story, Eichenwald was back on the front page of the Times with another exclusive, this one supplied by Texaco: The tapes didn't contain the word "nigger" after all. Texaco's investigator, Armstrong, had hired an audio expert to enhance the tapes, and in the enhanced version, instead of "fucking niggers," Texaco's then-treasurer Robert Ulrich clearly said "poor St. Nicholas." Moreover,

Armstrong explained in an interim report that Texaco released publicly, the "black jelly beans" remark was in fact a reference to a term used in a diversity training session. "There is nothing inherently derogatory," Armstrong asserted in his report, "in any of the references to jelly beans on the enhanced tape."

Revisionists rejoiced. By the time Texaco reached a settlement with the plaintiffs lawyers, 11 days after the initial Times article, second-guessing had set in. To the frustration of civil rights leaders, debate hinged on whether The New York Times had been duped by plaintiffs lawyers, and whether, since no one actually said "fucking niggers" on the tapes, the transcripts showed high-level racism at all. Wall Street Journal columnist Holman Jenkins, Jr., accused Texaco chairman Peter Bijur of succumbing to racial extortion. Michael Kelly of The New Republic, clucking about "the script" that governs accusations of racism, attacked Eichenwald's reporting and asserted that "while the tape does catch Texaco executives talking about destroying damaging papers in the discrimination case, it simply did not demonstrate racism."

Somehow, in some quarters, Texaco had become the victim of the biggest race-fed corporate conflagration of 1996. Could it be that the company was forced into a settlement just because The New York Times printed a story containing the word "niggers" on its front page -- even though, as it turned out, no one at Texaco was actually caught on tape saying the word? Had the plaintiffs lawyers hoodwinked everyone, manufacturing a wrong where none existed?

It is beyond question that without the tapes, and without the publicity orchestrated so masterfully by the plaintiffs lawyers in the case, Texaco never would have agreed to shell out \$141 million in back pay and raises -- in fact, according to defense documents, before the tapes, plaintiffs were only asking for \$71 million, and Texaco had shown no willingness to pay that amount. Nor would Texaco have agreed to make sweeping changes in its human resources department, far beyond the scope of what the plaintiffs were asking for before the release of the tapes.

Yet it is also true that the record of this case does not consist of just a few minutes of racially offensive language caught on tape, or of just the document tampering that was discussed on the tapes. Texaco was a company with a race problem, as the depositions, declarations, and expert witness reports from the suit show. The problem wasn't as unequivocal as the plaintiffs' more lurid accounts suggest, and Texaco's lawyers might even have been able to slice it into defensible pieces in the class action. Indeed, it is the very subtlety of the issues in the class action that makes it obvious: To reduce the question of race discrimination at Texaco to whether its former treasurer said "nigger" or "Nicholas" is absurd. The tapes, by themselves, don't prove or disprove anything about race discrimination at the company.

The story of the Texaco tapes is irresistible, with its ironies of corporate betrayal, its media games, and its sad, O. Henry ending for Lundwall, the only Texaco official as yet charged with a crime. But what that story misses is how willingly we sidestepped a discussion of the merits of the suit. When this case was just about African-Americans making serious claims of discrimination at one of the biggest companies in the country, no one paid much attention, not Texaco's executives, not civil rights groups, not the media. Only when the tapes surfaced did the world take notice -- and then, only of what was on the tapes. Certainly, Texaco's African-American employees can't complain about the resolution of this case, which, if the settlement is approved, will bring them far more than their lawyers had originally asked for. The plaintiffs lawyers even talk about changing civil rights enforcement with their "historic" settlement.

But if there's no tape in the next case, will anyone care?

### **A Worrisome Racial Atmosphere**

Bari-Ellen Roberts and Silvanus Chambers, the two Texaco employees who started the race discrimination suit, both came to Texaco in 1990, at a time when the company was in the midst of an effort to increase its number of minority employees. Chambers, who received an MBA from New York University in 1979 and has more than a dozen years of Wall Street experience, applied for a job at Texaco, according to his deposition, after he was advised by his sales manager at Prudential-Bache Securities that he wasn't producing enough as an institutional account executive. Texaco hired him as a trader, with the promise, he says, that he would eventually get to run the trading room. Roberts, who was a vice-president in Chase Manhattan Bank N.A.'s corporate trust department before coming to Texaco, was courted determinedly by then-assistant treasurer J. David Keough, a client of hers since the early 1980s. She began as a senior financial analyst in Texaco's pension division. With starting salaries of about \$65,000 a year, Chambers and

Roberts were among the highest- ranking African-Americans at Texaco's headquarters in Harrison, New York.

At first, both seemed to do well. Chambers received solid reviews in the trading room, and in 1992 was transferred to the high- prestige corporate finance division. Roberts won some notable Texaco awards, and her reviews were good enough that she says she was put on the semisecret "high potential" list, an internal list of fast-track employees.

Both say, however, that they worried about the racial atmosphere at Texaco. There weren't many African-Americans working at headquarters -- Roberts claims that when she joined the pension department, her boss said, " 'This place was lily-white until you came' " -- and the company didn't have any programs to ease the isolation they say that they and other blacks felt. "We thought these people were dinosaurs, their way of being in the workplace was so outdated," says Roberts. Racial digs were not uncommon, they say; Chambers, for instance, claims that one trader told him, " 'We hired you because we knew you could play basketball.' "

In early 1992 Chambers, Roberts, and another African-American had a meeting with Texaco's then-director of human resources, John Ambler. Texaco had been socked with a \$17 million jury verdict in the fall of 1991, in a California sex discrimination case brought by a woman named Janella Martin. (The verdict was later vacated by the trial judge, and the case eventually settled for a confidential amount.) After the verdict, Ambler, according to Chambers and Roberts, invited them to a lunch meeting to discuss Texaco's relations with black employees. Roberts, a confident and ebullient woman, says she was thrilled. "I thought, 'Maybe they don't know what to do. Great, a meeting.' Instead of being a complainer, we could go in and say, 'This is what some other people do, take a look at what works.' " Chambers says that he and Roberts researched other companies' black focus groups and mentoring programs, gathered articles from Black Enterprise magazine, and prepared a presentation.

It didn't go well. " Ambler attacked us," says Roberts. Adds Chambers: "He said, 'This is ridiculous. You guys are a bunch of militants. . . . The next thing you know, there will be Black Panthers parking in the Texaco Circle at headquarters .' " (In a written response, Texaco says that it "does not comment on human resources meetings with employees. . . . However, Texaco takes exception to the characterization of the meeting as provided by The American Lawyer.")

By 1993, both Roberts and Chambers claim, their careers had stalled. Chambers was struggling in the corporate finance division, and received negative reviews in 1992 and 1993. Roberts says that in her oral review in early 1993 she was told she'd received the second-highest grade on her written evaluation, but that the rating was inexplicably lowered the next day. When she asked why, she says, she was told that one of the assistant treasurers, who she claims had previously admonished her for speaking up too much in finance department committee meetings, had called her "uppity."

Frustrated, Chambers and Roberts began meeting at lunchtime with an African-American in-house lawyer named Jerry Leaphart, who had recently transferred back to Texaco headquarters after a few years in the company's Angola office. A 17-year Texaco veteran, Leaphart was also disenchanted with his career progress. At around the time Chambers and Roberts began meeting with him, Leaphart filed a complaint with the Equal Employment Opportunity Commission -- and began agitating for Roberts, Chambers, and other African-American Texaco co-workers to join him in a class action race discrimination suit. Says Roberts: "He said we needed to start fighting for ourselves."

Leaphart solicited contributions to a litigation fund, and set up a meeting with a Manhattan employment lawyer he knew. On a Saturday morning in May 1993, he and about eight black co- workers, from a range of pay grades, met with the lawyer at her office. The meeting was not a success, says Roberts. The lawyer - - who, says Roberts, seemed interested only in representing the upper-income employees -- told the group that they'd have to fund the litigation themselves. Roberts says she left the meeting convinced that if blacks wanted to make real changes at Texaco, this lawyer wasn't the one to help them do it.

Leaphart, however, continued to push. "Jerry really campaigned," says Roberts. "I was uncomfortable with his approach. He went around Harrison saying, 'What are you feeling? Would you explore a suit?' " After the meeting with the lawyer, Roberts continues, "Jerry committed a cardinal sin. He started calling around and talking to African-American employees . The next week, Jerry got fired."

"You should have seen the place that day," says Chambers. "Everyone was saying, 'They fired Jerry, they fired Jerry.' Within an hour, the 108 African-Americans in the building all knew Jerry was fired."

After Leaphart was fired, says Chambers, talk of a suit tapered off. People were scared, he says, and felt that Leaphart had made mistakes. But he and Roberts weren't ready to abandon the idea. In the fall of 1993 they talked to Gary Brouse, the director of the Interfaith Center on Corporate Responsibility, a group that monitors corporate diversity, investment, and environmental policies on behalf of an interdenominational group of religious investors. Interfaith had been pestering Texaco for decades, sending nuns to shareholder meetings and proposing shareholder resolutions promoting diversity. Brouse says that even among oil companies, which are uniformly closemouthed about corporate diversity, Texaco stood out. "Texaco had a reputation in the industry as being the worst," Brouse asserts. "Employees were coming to us in large numbers -- over fifty people during 1990 and 1991 . . . . That told us there was something wrong."

Chambers and Roberts say that Brouse suggested they talk to a lawyer named Cyrus Mehri. Although Mehri, who had worked as a field organizer for the Ralph Nader-founded group Public Citizen before going to law school, had never handled a major employment case, he had a reputation in the public interest world. His firm, Cohen, Milstein, specializes in plaintiffs class actions, most notably in its representation of Alaskan natives in the Exxon Valdez case. And Cohen, Milstein name partner Michael Hausfeld had even sued Texaco before, winning what he says was a \$200 million settlement in a 1990 environmental case. (A Texaco spokesman says that Hausfeld overstates the settlement's value, but, citing confidentiality provisions, declines to be more specific.)

Roberts and Chambers called Mehri in the fall of 1993. Right away, they say, they felt confident in him and his firm. "He listened to us," says Chambers, ticking off the reasons why he and Roberts liked Mehri. "He seemed sympathetic. He was willing to take the case on contingency. He took our concerns about retaliation seriously." Roberts and Chambers told Mehri about their experiences, and about Leaphart. They also gave Mehri a document that had been circulating among Texaco's African-Americans in Harrison: a 1993 salary survey conducted by the Mobil Corporation, which showed Texaco's minority employees lagging behind those of the other oil companies in pay. Mehri began to work on a complaint.

In March of 1994 Mehri and the co-counsel he had enlisted from New York's Bernstein Litowitz filed a nationwide race discrimination suit against Texaco in federal district court in White Plains, purporting to represent the company's 1,400 or so black employees. Roberts and Chambers were the name plaintiffs.

### **Going National**

Class action employment discrimination suits are notoriously hard for plaintiffs to win, no matter how convincing their anecdotal evidence. Just to get a class certified, Mehri and his co-counsel would have to establish through a statistical analysis that Texaco's employment policies -- which, at least on their face, were not discriminatory -- had a disparate impact on the company's African-American employees, and that the reason for the disparate impact, all across the far-flung company, was race discrimination. It wouldn't be enough just to prove that Roberts and Chambers were discriminated against, or even that a dozen black Texaco employees were. The plaintiffs would have to show that Texaco's evaluation process and promotion practices systematically discriminated against blacks throughout the behemoth of a company. "We knew this was an enormous commitment," says plaintiffs lawyer Max Berger of Bernstein Litowitz. "We felt that clearly there was a pattern of discrimination, but it was going to be extraordinarily difficult to prove. This was going to be in the nature of a pro bono case for us. If it didn't work out, we could at least feel good about it."

Mehri and the Bernstein Litowitz lawyers didn't have to look far to see how tough the case might be: Six months before they filed suit, in September 1993, White Plains federal district court judge Gerard Goettel denied class certification in a nationwide class action sex discrimination suit against Texaco. The case had been brought by a woman named Charlene McGowan, who had briefly worked as an analyst in Texaco's Beacon, New York, environmental health and safety division. McGowan's claims sound a lot like Chambers and Roberts's. She asserted that she didn't get the same training as the men in her department, that she didn't get assigned to high-profile work, that her complaints of discrimination were met with both threats of retaliation and inducements to stop talking. She was eventually fired. McGowan's lawyer, Kevin Barry of Poughkeepsie, New York, collected affidavits from six other Texaco women and moved for class action certification in August 1993.

Texaco, represented by New York's Kaye, Scholer, Fierman, Hays & Handler, squashed Barry and McGowan like a tank rolling over a tin can. This was Kaye, Scholer's first significant employment case for longtime litigation client Texaco, and it was handled by the firm's litigation chief, Randolph Sherman, and employment litigator Andrea Christiansen. The Kaye, Scholer lawyers answered Barry's nine-page class certification brief with 50 pages that demolished every argument the plaintiffs lawyer made. Not only had McGowan failed to show that Texaco had any employment practice that impacted women unfairly, Kaye, Scholer argued, but the specifics of McGowan's case -- including a very spotty employment history and alleged resume fraud -- made her individual claims suspect. The six supporting affidavits, Kaye, Scholer contended, were either irrelevant because they alleged sexual harassment, not discrimination; worthless, in the case of a woman who had already litigated and lost her sex discrimination claims; or so fact-specific that they supported Texaco's argument that no companywide policy impacted all of Texaco's women.

Judge Goettel refused to certify a nationwide class or a smaller statewide class. He also warned McGowan and Barry to think hard about the oil company's defenses before attempting to revive their class claims. For Texaco it was an unmitigated victory.

Mehri and the plaintiffs attorneys in the race discrimination suit, however, with their vast experience in class actions, were constructing a far more formidable case than had McGowan and Barry. After the original complaint was filed by Mehri in March 1994, Chambers and Roberts began to get calls from African-Americans all over Texaco. "One Harrison woman came into my office crying," says Chambers. "Bari got calls from California, we got calls from people on oil rigs! Thirty-five or forty people called us. We told them all to call our lawyers."

Everyone who called was interviewed by a Cohen, Milstein lawyer. Mehri and the other plaintiffs lawyers focused on a few key points -- evaluations, promotions, and salaries -- as they considered the claims of potential name plaintiffs whose stories would show that Texaco's race problem wasn't limited to the finance department in Harrison, where both Roberts and Chambers worked. On June 30, 1994, the plaintiffs lawyers filed an amended complaint, adding four new plaintiffs: Janet Williams, a marketing consultant at a California Texaco subsidiary who claimed that, despite a stellar record, she was paid less than white co-workers; Marsha Harris, who complained that in her 19 years in the Houston comptroller's office she was denied promotions and high-profile assignments; Beatrice Hester, a California office assistant whose repeated attempts at a promotion were unsuccessful; and Veronica Shinault, an assistant in the Harrison human resources department, who, instead of getting a promotion she claimed she was promised, got a new job title at the same salary.

What the experiences of the six name plaintiffs represented, their lawyers argued in the amended complaint, was Texaco's nationwide pattern of discrimination -- denying qualified African-American employees deserved promotions; paying them inequitably; failing to provide them with the training and high-profile assignments that would lead to promotions; and retaliating against those who complained. Texaco's employee evaluation process, called the "Performance Management Program," was "entirely arbitrary," the amended complaint alleged. "It has been used as a pretext for denying qualified minority employees promotions to which they are otherwise entitled."

### **"Scorched-Earth, Litigate Every Inch"**

It's strange to consider, after the front-page headlines of last November, that this case crawled along virtually unnoticed for two-and-a-half years. The lawyers on both sides danced the inevitable civil discovery tango, each accusing the other of failing to produce relevant material. The plaintiffs lawyers insist, however, that the Texaco defense, led by the fierce and fiercely successful Andrea Christiansen of Kaye, Scholer, seemed particularly determined to surrender nothing. In a written response to *The American Lawyer*, Texaco says that as a matter of policy it does not comment on litigation. "Furthermore," the statement adds, "Texaco believes in light of the pending investigation of the office of U.S. attorney and Texaco's interest in cooperating with that investigation, it would be inappropriate for the company or its counsel to comment."

Max Berger, however, asserts that Texaco wasn't "treating us well. We felt throughout the litigation that they should have been a lot more responsive. . . . We were pretty upset with how they dealt with us." Adds Hausfeld: "It was scorched-earth, litigate every inch."

According to Hausfeld, for instance, Texaco refused to admit the existence of the "high potential" lists of employees deemed particularly promising -- even after one of the name plaintiffs, a former human resources secretary, gave printouts of such lists to the plaintiffs lawyers. Texaco's production of information from its extensive employee database also excited the plaintiffs' ire: Instead of turning over the information in its entirety, the plaintiffs lawyers asserted, Texaco selected data it unilaterally deemed relevant -- which included no information on employees in Texaco's highest pay grades, perhaps because, they later contended, there were no African-Americans who had reached those levels at Texaco. (In 1993, of the 873 Texaco employees with salaries of \$106,000 or more, only six were black.) Moreover, the plaintiffs lawyers alleged, Texaco seemed to have presented the computer files to them in a deliberately hard-to-use format. ("They took information that was very well organized," says the plaintiffs' statistician, Charles Mann, "and made it much more difficult to use.") The Kaye, Scholer lawyers responded in a brief to the plaintiffs' assertions, arguing that Texaco provided the plaintiffs with all relevant information, and that complaints about the database were a ploy to distract attention from deficiencies in the plaintiffs' case.

The discovery disputes were put on hold briefly when Texaco and the plaintiffs lawyers went to mediation in October 1994. The mediation lasted three months and accomplished nothing. "It was a big bust," says Hausfeld. "The mediator said to make a list of the items to discuss. There were twenty items. The first on our list was what they'd pay with regard to the salary disparity. Three-and-a-half months later, we had nothing to talk about but money. Their response was, 'Nothing.' They never had any intention of paying anything." Texaco, in a written response, says that the mediation ground rules make it "unable to comment, except to state that Texaco takes exception to the characterization of the matter as provided by The American Lawyer."

At that point, a year after it was filed, the race discrimination case came down to the question of class certification: If the plaintiffs could get a nationwide class certified, Texaco would have to talk more seriously about settlement than it had in mediation. On the other hand, if the Kaye, Scholer lawyers convinced Judge Brieant to deny the class, the suit was over. In hindsight one could argue that Texaco was taking a big risk by permitting the case to proceed to a ruling on class certification, but considering the victory that Kaye, Scholer had won in the McGowan case, it's not hard to understand why the company was willing to gamble.

The plaintiffs' papers, filed in May 1995, show the magnitude of the gamble. The papers are compelling. The strategy the plaintiffs lawyers used was to establish through experts that Texaco's employment policies, in the aggregate, impacted African-Americans unfairly, and that Texaco didn't take adequate steps to monitor its supervisors to prevent such disparate impact. Then, through a collection of declarations from Texaco employees, the plaintiffs lawyers tried to show the court that the reason for the disparate impact was racial discrimination.

Mann, the plaintiffs' statistician, concluded in his expert witness report that Texaco's African-Americans were paid \$71 million less than comparable nonminority employees, and that the company exhibited a "pattern of disparity against African-American employees" in its performance evaluation system. An industrial psychologist hired by the plaintiffs explained why: Texaco's supervisors and managers, he wrote in his expert report, had too much leeway in their evaluation of employees, and Texaco's central human resources department failed entirely to monitor the implementation of its evaluation and promotion processes.

The accompanying 30 declarations from men and women throughout Texaco, intended to humanize the statistics and show the company's discriminatory intent, are well-rehearsed. Witnesses worked with plaintiffs lawyers to draft their statements, which are careful to emphasize certain points key to the class action -- Texaco's "good old boy" network of job promotions, unfair job evaluations, underpayment, and supervisors who didn't respond to allegations of discrimination. But the details of humiliation and degradation make the statements credible. Johnny Berry, a senior account manager in the Houston marketing department, told of how his division vice-president -- who had once told him that "it is only human nature" to promote a white person over an African-American -- had dressed up as Black Sambo for a Halloween party attended by Texaco co-workers. Kevin Brooks, a staff auditor in Denver, said that after he was sent to a training class in California, his expense accounts were subjected to unusual scrutiny. Eleanor Hunt, of the Houston public affairs office of a Texaco subsidiary, claimed that after she complained about race discrimination, her boss told her to see a psychologist and take a drug test. Michael Moccio, a white man who was a manager at Texaco until 1994, claimed that he was ordered to fire a black woman in his office who had filed a complaint

with the Equal Employment Opportunity Commission (EEOC). His Houston-based boss, he said, "told me to 'fire her black ass,' and 'we treat niggers differently down here.' "

In perhaps the most moving declaration, Jimmy Porter, a terminal supervisor in Wilmington, California, wrote of his ongoing problems with his boss, the plant manager. In 1993, he alleged, his boss called him an "orangutan." After he complained to the human resources department, he said, his boss threatened him. Porter said that the racial abuse in his plant was incessant -- his tires were slashed, "KKK" was written on his car, another African-American was called a "porch monkey" -- and that this abuse was not only tolerated, but even encouraged, by his boss, who, he said, once told another African-American, in Porter's presence, that he was " 'a nigger, he is nothing but a nigger.' "

"At Texaco," the plaintiffs lawyers claimed in their class certification brief, "your promotion, job opportunities, salary, and bonus depend not on your skills, but on who you know; not on your performance, but who you make friends with." Expert witness Mann's statistical analysis showed the disparate impact of Texaco's employee evaluation and promotions systems, the lawyers argued. The company was to blame, the plaintiffs lawyers continued, "because Texaco has adopted a policy of 'willful blindness' toward its discriminatory employment practices and a reckless indifference to the federally protected rights of its African-American employees."

### **Texaco Bites Back**

If there was ever any doubt that race discrimination is hard to prove, Kaye, Scholer's response to the plaintiffs puts it to rest. Their brief marshals technical and factual arguments, making no sweeping defense of the company's race record, but instead chopping down the plaintiffs' arguments, as if to suggest that there can be no forest when there are no trees left standing. First, Kaye, Scholer argued, the plaintiffs had failed to prove disparate impact: Their own expert, Mann, had admitted in his deposition that he had found no statistically significant shortfall in promotions or training of African-Americans. Texaco's statistician, Judith Stoikov, recast the salary question, in which Mann had found a \$71 million disparity between blacks and nonminorities. Stoikov found no statistical difference between the starting salaries of blacks and comparable nonminorities; and only seven African-Americans between 1990 and 1993, she concluded, had received salary advances significantly lower than nonminority counterparts, while 17 blacks received higher-than-expected salary advances. Texaco's outside human resources expert, Harold Brull, countered the assertions of the plaintiffs' industrial psychologist, concluding that Texaco's employee evaluation system met all the appropriate standards.

What the plaintiffs were really arguing, Kaye, Scholer wrote, was not disparate impact, but disparate treatment, which raised individual, fact-specific issues that could not be the basis of a class action -- particularly, the defense argued, when the accounts of discrimination by the name plaintiffs withered under scrutiny. Bari Roberts, the defense lawyers asserted, had not only increased her salary by over 20 percent in four years at Texaco, but was also offered the opportunity to learn the technical aspects of pension work -- skills she hadn't brought with her from Chase. Roberts claimed that she should have gotten a 1994 promotion that went to a white man, but, Kaye, Scholer argued, the man who got the job transferred laterally after holding the same job grade for eight years; Roberts had only been with the company for four. Moreover, he held a B.S. in computer science and an MBA; Roberts, the defense lawyers noted, somewhat gratuitously, "holds only a bachelor's degree, and received that degree only after attending three separate colleges over a seven- year period."

Chambers had gotten pay increases totaling 27 percent in his years at Texaco, Kaye, Scholer wrote. If he got bad reviews when he was transferred to corporate finance, the question was whether it was discrimination, "or . . . the result of Mr. Chambers's own poor work performance and lack of corporate finance experience." Kaye, Scholer also called Chambers's educational background "a mystery," asserting that the University of Michigan, where Chambers said he had completed the public finance institute program, claimed it had no record of him; and that his lawyers had urged NYU, where he received his undergraduate and MBA degrees, not to produce Chambers's records. (Chambers says he was hoping Texaco would make an issue of his education in court, so he could then produce the diplomas that Kaye, Scholer was questioning.)

Of the other name plaintiffs, the defense contended, Janet Williams, who claimed to be paid less than white colleagues, was actually paid more than the one white co-worker she mentioned at her deposition; Marsha Harris, who complained that she didn't get high-profile assignments, admitted to being difficult to

work with, and had less experience or education than the men who got the assignments; Beatrice Hester was less qualified than the man who got the job she felt she deserved; and Veronica Shinault not only didn't have the posted minimum qualifications for the job she wanted, but had violated company policy by misrepresenting her employment history and misappropriating confidential Texaco documents.

What the plaintiffs had was not a class action, the defense concluded, but a set of unique -- and defensible -- cases. "Plaintiffs' alleged 'classwide' issues are largely irrelevant," Kaye, Scholer wrote. "Whether or not plaintiffs prove their 'common issues' of 'subjectivity' and 'disparate impact,' this court will have to adjudicate the issues of intent, causation, and damages on a case-by-case basis. Under these circumstances, individual issues clearly predominate over any alleged 'classwide' issue, and the prospect of 1,500 or more mini-trials renders class treatment an inferior method of adjudication."

Kaye, Scholer filed Texaco's papers in June 1995 -- then both sides waited. Two months earlier, at Kaye, Scholer's instigation, Judge Brieant had told the plaintiffs to ask the EEOC to conduct an investigation of the classwide claims. Brieant put off a ruling on class certification until the EEOC had weighed in. The commission, says EEOC trial attorney Elizabeth Grossman, considered the reports of both sides' expert witnesses, and, after an evidentiary struggle with Kaye, Scholer that ended with a court order directing Texaco to comply with the EEOC's subpoena for employment records, conducted its own statistical analysis as well.

Finally, in June 1996, the EEOC issued its determination: African-Americans at Texaco in pay grades 7 to 14 were not promoted at the same rates as their nonblack counterparts. The commission also found that Texaco's employee evaluation system -- which the company relied on in making promotions -- did not meet its standards, and thus "there is reasonable cause to believe that Texaco failed to promote blacks in grades 7 to 14 as a class throughout its facilities because of their race."

The EEOC made no finding with respect to African-Americans at higher pay grades (including name plaintiffs Roberts and Chambers, both grade 16), and Kaye, Scholer could have argued that the agency findings were irrelevant to the class action because the other name plaintiffs had not challenged the validity of the employee evaluation system. But the plaintiffs lawyers regarded the report as a boon. "They confirmed a systemic fact," says Hausfeld. "The promotion plan at the company was invalid."

Judge Brieant apparently agreed with the plaintiffs about the significance of the EEOC findings: "It would seem to me that you have achieved a victory out of the commission," he said to plaintiffs lawyer Daniel Berger at a September 27, 1996, hearing. "It's quite clear that the commission has given a right-to-sue letter authorizing these plaintiffs to sue in a major, nationwide class action." Brieant, informed by Kaye, Scholer's Andrea Christiansen that Texaco had asked the EEOC to reconsider its findings, did not rule on the class certification motion at the September hearing, but he did issue a warning to Christiansen: "You have the risk somewhere along the road that this case may either be lost by the defendant or settled in behalf of the class. Those are two great possibilities. . . . I think it would be very helpful if the matter could be conciliated by the commission. That's what they're supposed to do."

"We were going to win on class certification," asserts Mehri, recalling the hearing. "Then we would be in the driver's seat. We were gaining momentum. Then, when we got the tapes, it turned into a rout."

### **The Strange Case Of Richard Lundwall**

Until early 1996, Richard Lundwall was a living emblem of the Texaco corporate culture. His career at the company began when he got out of the Marines in 1965 and took a job at a Texaco gas station in New York City. He diligently worked his way up into the white-collar ranks of the company, going to college at night. By 1994 he had climbed all the way to a grade 16 job -- senior personnel coordinator of the finance department. He was making about \$85,000 a year, and if he wasn't particularly powerful himself, he had access to powerful people at Texaco and knew plenty of secrets. He met regularly with then-treasurer Robert Ulrich, then-senior assistant treasurer J. David Keough, and several division heads for personnel discussions. His lawyer Peter Gass compares him to a corporal in the army. He laughed at his bosses' jokes and executed their orders.

In 1995 Lundwall turned 55. He knew, according to Gass, what that meant. "He'd heard that the chairman a year before had said that Texaco had the oldest workforce in the industry," Gass says. "He had been in conversations with managers who said, 'When you hit 55, your productivity goes downhill.'" At one

meeting Lundwall attended, according to transcripts prepared by Texaco of the tapes Lundwall secretly recorded, he sat through a discussion of downsizing that included references to "the over-55 group," and to pushing out a person in that group. Sure enough, in December 1995, says Gass, Lundwall was told that he would be let go in 1996. He was transferred out of the finance department at the beginning of 1996, and went on an extended medical leave in February.

Something happened to Richard Lundwall, Texaco loyalist, during that leave. While he was at home, Lundwall later told Mehri, he started listening to his secret tapes, over and over and over again. Was he inspired by vengeance against the company he believed had betrayed him, or did he experience some sort of moral epiphany? Lundwall, whose lawyer would not permit him to comment because of the criminal charges against him, remains something of an enigma. No one seems to know exactly why he came forward with his tapes -- in fact, it's not even entirely clear why he had tapes. Mehri says Lundwall told him he made the tapes to help him prepare minutes of the meetings, which doesn't explain why he was so secretive about it; Gass, Lundwall's lawyer, won't say why his client taped meetings, but maintains that it wasn't with the intention of blackmailing Texaco. Lundwall has never made any public statement about his motives. The publicly available transcripts of the tapes show Lundwall to be the initiator of talk about evidence destruction, as well as the meeting participant who is most dismissive of black culture. Yet he was evidently so deeply disturbed by what he heard during that February sick leave that he eventually made his own transcripts.

In March or April of 1996, Lundwall came back to work at Texaco, apparently willing to give the company a chance to redeem itself before he did anything with the tapes. He responded to several different internal job postings, says Gass, but didn't get any offers. At the end of May Lundwall worked his last day at the company, though he stayed on the Texaco payroll until August, using up accumulated vacation time.

In July Lundwall went for the first time to see Peter Gass, a White Plains civil practitioner. He told Gass he wanted to sue Texaco for age discrimination, explaining what had happened to him. He didn't tell the lawyer at that time, according to Gass, that he had tapes of personnel meetings. "He and I and one other lawyer looked at it seventeen ways to Sunday," Gass says. "They'd set him up, but we couldn't take the case on contingency."

It was later that month that Lundwall suddenly showed up at Bari Roberts's office and announced that he had evidence that would help her in the discrimination case. He'd given Texaco a chance, and Texaco had failed him. Now Lundwall, apparently, was ready to turn on the company. Roberts gave him Mehri's card, and Lundwall called the plaintiffs lawyer. In that first call, on August 1, Lundwall told Mehri he wanted to sue Texaco. Mehri referred him to an employment lawyer in New York. "He also said he had information that would be helpful to the race discrimination case," says Mehri. "He didn't say what it was, and I didn't ask him. I had to be extremely cautious." Lundwall met with the New York employment lawyer, says Gass, and again was turned down on his age discrimination case.

On August 9 Lundwall seems to have embarked on a mission of vengeance. He wrote a letter that day to a senior investigator at the EEOC who had apparently looked into allegations of age discrimination at Texaco, asserting that Texaco had changed codes in its database to obstruct the EEOC investigation. (Texaco says in a written statement that when it created a list of terminated employees as required by the EEOC in 1995, it corrected errors resulting from incorrect code inputs. The company says the EEOC took no action against it; the EEOC declines to comment.)

That same day Lundwall also called Mehri for the second time.

"He said, 'I have something I want you to hear,' " says Mehri. "I said, 'That must mean tapes.' He said, 'Yes.' I told him that if there was counsel on the tapes, I didn't want to hear them." Lundwall said there were no lawyers on the tapes. He and Mehri agreed to meet in Lundwall's hometown of Danbury, Connecticut -- Mehri, by coincidence, was headed there to visit his parents -- on August 12. They were to discuss what to do with the tapes.

At their August 12 meeting in Danbury, says Mehri, Lundwall seemed calm and matter-of-fact, but "very upset about the conduct on the tapes." He told the plaintiffs lawyer that he had recorded meetings that occurred after the race discrimination litigation had begun, and that the tapes contained evidence of senior Texaco officials tampering with documents that, Mehri says Lundwall told him, " 'were at the crux of the case.' "

Lundwall didn't show Mehri the tapes, and certainly didn't give them to him. But Mehri was persuaded he was telling the truth. He says he advised Lundwall to get a lawyer, as he says he had in all of their conversations, and left town.

Lundwall went back to Gass, the White Plains, New York, lawyer who had first told him he wouldn't take his age discrimination case. "This," says Gass, "was the first time I had heard about the tapes -- at the end of August. Lundwall said he thought the plaintiffs lawyers were interested, and asked what should he do. I told him that since he'd given the plaintiffs lawyers a full description of them -- enough for the plaintiffs lawyers to lay their hands on them through a subpoena -- that it was only a matter of time. . . . The head of the cat was out of the bag."

Lundwall gave Gass two microcassettes, one labeled "August 14, 1994," as well as his partial transcripts of the recordings. Gass never listened to the tapes, but he did read the transcripts, noticing what they said about "purging" documents. Gass also noticed that Lundwall's transcript of his conversation with Ulrich and Keough about Kwanzaa included, in parentheses that are supposed to indicate that Lundwall couldn't be sure what he was hearing, the words, "(niggers/niglas)."

Should Gass have marched his client straight to the U.S. attorney to arrange a grant of immunity in exchange for his evidence and cooperation? In hindsight, it certainly seems like that would have been a good idea, but Gass claims that it never occurred to him that the transcripts showed any criminal behavior, just document squabbling in a civil lawsuit. On the basis of what Lundwall told him he'd already said to Mehri, Gass says he considered himself just a conduit between his client and the plaintiffs lawyers.

Gass called Mehri at the end of August to tell him that he represented Lundwall, and that he had the tapes. "It seemed to me that if the tapes had utility to the plaintiffs, it was in the area of people being less than forthcoming on discovery demands," says Gass. "These things were going to be divulged, either formally in the first instance or informally. How much trouble does one want to go through?"

Two weeks later, in mid-September, Gass told Mehri that Lundwall was willing to give the plaintiffs copies of the tapes. He told Mehri about the apparently racist language -- Mehri says Gass told him the word "nigger" was used -- and about the discussion of evidence tampering. Gass himself made copies of the tapes -- accidentally neglecting, as it turned out, to copy one whole side -- and gave them to plaintiffs lawyer Steven Singer of Bernstein Litowitz, who drove up from Manhattan to take possession of the tapes in person. Gass also gave Singer a copy of Lundwall's transcript. Singer brought the tapes back to Manhattan, and he and paralegal Ava Thorin sat in his office and listened to them. "Steve kept coming out and saying, 'Oh my God,'" recalls Max Berger.

Daniel Berger says the plaintiffs lawyers then sent their tapes out for enhancement. "We wanted to be careful," he says, "that whatever we said about the tapes and what was on them was accurate." The Bernstein Litowitz lawyers and the audio service they used created a second transcript, not relying on Lundwall's.

### **"We're Gonna Purge The Shit Out Of These Books"**

What particularly disturbed the plaintiffs lawyers -- or so they said after the November donnybrook over the racial language -- was the discussion of evidence tampering that turned up on the tapes. For the plaintiffs lawyers believed they knew what evidence Richard Lundwall, Robert Ulrich, and David Keough seemed to be discussing on the tape labeled "August 14, 1994."

As it happens, that date was a little more than a week after Lundwall had been deposed by Mehri at the beginning of the race discrimination case. Lundwall had been produced by Texaco as the witness best qualified to testify about the employment-related documents maintained by the finance department, and in the course of his deposition, he said that at least twice a year he met with Ulrich, Keough, and several division heads to discuss the women and minorities in the department. Lundwall testified that "masterbooks" of relevant documents, charts, and previous meeting minutes were prepared and distributed to participants before each meeting. The plaintiffs lawyers made repeated formal requests, during and after the deposition, for the documents Lundwall testified about. None, they say, were produced until March of 1995.

When they got the tapes, Mehri and the other plaintiffs lawyers realized that in one of the recorded meetings, the Texaco executives seemed to be talking about tampering with the documents that Lundwall had mentioned in his deposition.

A caveat: What follows is based on the plaintiffs' transcripts, as excerpted in the court records. A transcript of the tapes, as they were enhanced by Texaco's audiologists, exists, but has not been made public. Texaco, and Texaco's independent investigators, Michael Armstrong of Kirkpatrick & Lockhart and Bart Schwartz of Decision Strategies, Inc., say they cannot comment on the enhanced transcript. Ulrich's lawyer, Jonathan Rosner of New York's Rosner Bresler Goodman & Bucholz, who has seen the transcript of the enhanced tapes, claims that the plaintiffs "recklessly and intentionally distorted what was on the tapes," but says he cannot discuss the enhanced transcript. Nevertheless, Rosner says, "Mr. Ulrich denies tampering with documents and denies obstruction or intending to obstruct the production of documents requested by plaintiffs counsel."

According to the plaintiffs' transcripts, during the meeting recorded on the tape labeled "August 14, 1994," Lundwall, Keough, and Ulrich are heard complaining about the search for the masterbooks requested by the plaintiffs lawyers. Lundwall refers to a chart, which he says is not mentioned in the meeting agenda that is presumably part of the masterbook. "They'll find it when they look through it," Keough says. Lundwall responds, "Not if I take it out, they won't."

Later, in a discussion of whether Texaco had to disclose that everyone at the meetings got briefing books, Ulrich muses about people who "keep shit going back to the dark ages. If they come after guys like that, we'll just tell them at this time we don't have them. . . . We're gonna purge the shit out of these books, though. We're not going to have any damn thing that . . . we don't need to be in them."

More talk of evidence tampering followed, according to the plaintiffs' transcripts. Lundwall apparently kept "restricted" versions of meeting minutes, which presumably were seen by only a few high-ranking people. Ulrich, according to the plaintiffs' transcript, advises Lundwall that "nobody else ought to have copies of one document . . . . You have that someplace and it doesn't exist." Lundwall agrees, and Ulrich says, "You know, there is no point in even keeping the restricted version anymore. All it could do is get us in trouble. That's the way I feel. I would not keep anything."

"Let me shred this thing and any other restricted version like it," Lundwall responds.

"Why do we have to keep the minutes of the meeting anymore?" Ulrich asks.

"You don't," says Lundwall. "You don't."

"We don't?" says Ulrich.

"Because we don't," says Lundwall. "No, we don't. Because it could come back to haunt us, like right now."

### **A Green Light In Danbury**

The evidence of document tampering, say plaintiffs lawyers Mehri and Daniel Berger, meant that the tapes would have to be disclosed to Judge Brieant. But before they took their transcripts to court, the plaintiffs lawyers say, they agreed that they needed to talk to Lundwall, to verify the authenticity of the tapes, to identify voices, and to check their transcripts against his memory. Gass agreed to make his client available, so on October 25, plaintiffs lawyers Mehri, Singer, and Daniel Berger went to Danbury to see Lundwall. The four met in a small, hot room at the Danbury Hilton. It was at this session, according to Mehri's account, that Lundwall told the plaintiffs lawyers that only he knew about the tapes, and that he'd listened to them while he was out on sick leave. In Mehri's account, he also told Mehri, Singer, and Berger that portions of the masterbooks discussed at one of the meetings had been shredded, that people who had masterbooks were told to say they didn't keep them, and that handwritten notes were deleted from documents before they were turned over to the plaintiffs lawyers.

Mehri, Singer, and Berger also played for Lundwall the portions of the tapes that apparently contained racial slurs. In one snippet, according to the plaintiffs' transcript, Ulrich, Lundwall, and finance department director of cash management Peter Meade discussed the racially charged atmosphere in the department. Lundwall complained about "two friggin' national anthems," and the plaintiffs lawyers' transcript, which they

showed Lundwall at the meeting, quoted Ulrich as responding, "I'm still having trouble with Hanukkah. Now we have Kwanzaa. . . . Fucking niggers, they shitted all over us with this." Lundwall didn't object to their transcript, say Mehri and Berger; indeed, the phrase "(niggers/niglas)" had already appeared in his own transcript, according to his lawyer, Gass. Gass says Lundwall didn't specifically recall Ulrich using the racial epithet, but didn't remember him saying anything else, either.

Lundwall remained unruffled during the meeting at the Danbury Hilton. "He was very matter-of-fact," says Berger. "Completely calm. He said, 'Yeah, that's what I said.' . . . Steve Singer and I drove back to Manhattan saying, 'Can you believe this?'"

Since Lundwall had vouched for the tapes' authenticity and had okayed their transcript, the plaintiffs lawyers regarded the October meeting in Danbury as "a green light," says Berger; they could now bring the evidence on the tapes to Judge Brieant. Why not to the U.S. attorney, if they were so concerned about document destruction? That option was never discussed, says Mehri. "We felt, as officers of the court, that this should go to the court," he says. "Our duty was to get this to the court and get the court's permission to do an investigation. We didn't present this as definitive. We presented this as something that needed to be investigated."

On October 28, 1996, the plaintiffs filed two documents with Judge Brieant: a motion for sanctions against Texaco and a supplemental brief on the motion for class certification. In both filings the plaintiffs lawyers made sure to mention not only the document destruction evidence on the tapes, but also the far more inflammatory racial slurs they said the tapes contained. The supplemental brief on class certification argues that if there was any question about certification before, there shouldn't be anymore, in light of the EEOC ruling in June -- and the "recently obtained evidence that Texaco deliberately withheld and, indeed, very likely destroyed documents that were expressly requested in discovery ." The tapes also, the brief continues, "provide substantive evidence of Texaco's discriminatory animus towards its African-American employees." Citing the "niggers" and "black jelly beans" comments, the plaintiffs lawyers wrote, "Such overtly racist remarks are probative of the state of mind of the managers at Texaco responsible for making employment decisions."

Accompanying the other filing, the motion for sanctions against Texaco, was an affidavit from Mehri, in which he laid out for the court the story of how the plaintiffs got the tapes, and the evidence of document tampering they contained. In a non sequitur of a final paragraph, Mehri drew attention to the racial slurs, noting that "Mr. Lundwall also identified Mr. Ulrich as the speaker on the tapes who is heard describing African-Americans as 'black jelly beans' and stating, 'I'm still having trouble with Hanukkah. Now we have Kwanzaa. . . . Fucking niggers, they shitted all over us with this.' "

Judge Brieant responded quickly to the filings, scheduling a hearing on the tapes before Magistrate David Fox for Friday, November 1.

### **The Times Springs A Leak**

Mehri and Hausfeld are both media-savvy lawyers who say there's nothing wrong with stirring up attention in a case. "Why should there be anything wrong with it?" demands Hausfeld. "For every case that gets attention, there are maybe fifty that are just as egregious that don't. Contrary to popular belief, we don't control the newspapers." Before the tapes surfaced, the Texaco race discrimination case had received a small amount of press coverage: a few stories had appeared when the case was first filed, as well as a longer, December 1994 New York Times article about the suit. The Westchester Gannett newspaper chain covered the progress of the litigation, and, after the EEOC ruling, the Times ran a sympathetic story in its Sunday Westchester section. But it didn't take a public relations genius to know that the tapes changed the news value of the case.

Soon after the plaintiffs' supplemental brief and motion for sanctions against Texaco were filed with the court on October 28, someone leaked a copy of Mehri's affidavit and the accompanying tape excerpts to business reporter Kurt Eichenwald of The New York Times. The leaker was almost certainly someone at Cohen, Milstein (Mehri's firm); the Bernstein Litowitz lawyers were not particularly fond of Eichenwald, who had written a 1993 piece that cast the firm in an unflattering light; they contend, moreover, that they didn't leak the documents. Mehri and Eichenwald decline to comment on the question. (Eichenwald, who declines to comment on what he calls "the reporting process," referred questions to his editor.) "We personally did not

call Eichenwald," says Max Berger of Bernstein Litowitz. "But the fact of the matter is, we're delighted he found out about the tapes. The public has a right to know. This is a public corporation."

Eichenwald's editor at the Times, acting business editor Glenn Kramon, says the reporter was frustrated for several days after getting the documents: He had a tantalizing tip, but couldn't write anything until he heard the tapes for himself. And, says Kramon, he couldn't hear the tapes at first because the plaintiffs lawyers wouldn't cooperate. "We wanted to hear the tapes in their entirety for context," Kramon says. "He had to hear the tapes before we could do anything."

Eichenwald eventually managed, before the November 1 hearing, both to listen to the tapes and to get a copy of the entire plaintiffs' transcript, not just the excerpts included in the court record. After Texaco didn't deny the tapes' legitimacy at the November 1 hearing, Eichenwald and his editors proceeded. The reporter contacted Lundwall's lawyer, Gass, and former Texaco treasurer Ulrich, who reportedly responded, "I don't know about that. I can't talk about that." Though Eichenwald's reporting was later questioned by some columnists, it is hard to imagine how he could have been more thorough at the time.

His Monday, November 4, piece, headlined "Texaco Executives, on Tape, Discussed an Impending Bias Suit," referred to both the document destruction and the racial epithets in its lead paragraph. Half of the word "niggers" appeared on the front page; the other half jumped to the story's continuation in the business section, where long excerpts from the plaintiffs' transcripts appeared in a box (without any indication that they were plaintiffs' transcripts). "The thing that landed the story on the front page," insists editor Kramon, "despite what our critics say, was the document destruction. It wasn't just the inflammatory language. . . . Someone said to me that this was the business world's equivalent of the Rodney King tapes -- you were actually hearing them conspire to destroy documents."

But would the story have set off fireworks outside of the Times had it not been for the racial epithet? "Good question," says Kramon, who maintains that this would have been a major story even if the word "nigger" hadn't been in it. Perhaps, but there have been plenty of evidence tampering stories that haven't ended up on Good Morning America. This one, at least in that first week, had the word "nigger" as well, and ended up getting widespread play -- unlike, say, DuPont's \$100 million 1995 sanction for concealing documents in the Benlate case (later reversed).

The Times story, in fact, had a bigger impact than even Cyrus Mehri -- who is alternately cocky about the case's press attention and awed by it -- could have dreamed. Offices around the country buzzed with talk of the tapes, which even found their way into late-night talk show monologues. A bevy of civil rights leaders, who hadn't previously involved themselves in the case, demanded a hearing with CEO Peter Bijur and began talking about divestiture and boycotts. "The release of the tapes," says Theodore Shaw, assistant director-counsel of the NAACP Legal Defense and Educational Fund, Inc., one of the few people in the civil rights community who had been following the case, "set off an explosion of public awareness."

Texaco reacted quickly to the revelation of the tapes, in ways both predictable and not. On November 4, the day of the first Times story, Bijur, who took over Texaco's top job in July 1996, released a statement to Texaco employees, pledging to investigate the allegations in Eichenwald's article and to take "immediate disciplinary action" if they proved true. Two days later, on November 6, Bijur appeared at a press conference. He had just listened to the tapes, he said, and he told reporters that "the statements on the tapes arouse a deep sense of shock and anger among all the members of the Texaco family and decent people everywhere. . . . They are statements that represent a profound contempt not only for the law, not only for Texaco's explicitly clear values and policies, but, even more importantly, for the most fundamental standards of fairness, of mutual respect, and of human decency." The CEO closed with an apology for the incident.

Kaye, Scholer senior partner Milton Schubin spent the week after the Times story in settlement talks with plaintiffs lawyer Michael Hausfeld. "The mere fact that Milt was there was an indication that the company was serious," says Hausfeld, who says that Schubin never mentioned the tapes to him. "The tapes weren't the issue when he came in. The issue was how to get it done. . . . His tone was, 'Let's see what needs to be done and let's see if we can do it.'" Even as Hausfeld and Schubin talked, other Kaye, Scholer lawyers drafted a never-filed response to the plaintiffs' allegations.

## What The Audiologist Heard

Texaco, meanwhile, had agreed to waive the protective order over key portions of the class action case file for Kurt Eichenwald. Reporters from The New York Times, The Washington Post, and The Wall Street Journal, says Mehri, approached him in the week after Eichenwald's November 4 story to ask about access to the case file for more in-depth pieces. There was one problem: The record of the Roberts case was under a protective order. Mehri says he told reporters, Eichenwald included, that they'd have to go to court to get it lifted. Eichenwald, however, managed to persuade both sides to sign letters waiving confidentiality. Then Texaco gave him access to its complete case file. (Texaco says in a statement that it "declines to speculate as to the source of reporters' information.")

Eichenwald's 3,900-word Sunday piece, headlined "The Two Faces of Texaco," was the only story written at the time that actually considered the evidence from the two-year-old discrimination suit. The Times reporter was apparently unimpressed by the intricacies of Kaye, Scholer's class certification opposition. According to the case record, he concluded, Texaco was "a company that says all the right things but that has done far too little to ensure that they have meaning." Taking examples from the plaintiffs' filings, the piece included evidence of Texaco's lapses in compliance with its own policies, including, for instance, Michael Mocchio's assertion that he had been instructed to fire a black subordinate who had complained of race discrimination.

But the Sunday story was eclipsed by Eichenwald's piece the next day. Texaco's independent investigator, Michael Armstrong, had gotten the original Lundwall tapes from the FBI (which had gotten them from Gass) and had sent the tapes out for enhancement to an eminent audiologist. On Saturday, November 9, Armstrong reported to Texaco that on the enhanced tapes, the word "nigger" did not appear. "The enhanced tapes," Armstrong wrote in his interim report, "reveal that plaintiffs' transcript is in error. The actual words on the tape are, 'I'm still struggling with Hanukkah, and now we have Kwanzaa. I mean, I lost Christmas, poor St. Nicholas, they shitted all over his beard.'" Texaco invited Eichenwald to hear the enhanced tapes that weekend, giving him exclusive access to the interim Armstrong report. On Monday, Eichenwald reported the story.

CEO Bijur was unwilling to let his own company off the hook. In the statement Texaco released along with the Armstrong report, Bijur insisted that the change in language did not alter "the categorically unacceptable context and tone of these conversations. . . . We remain unalterably committed to using this agonizing glare of the spotlight as a catalyst to make Texaco a model in creating . . . a tolerant workplace." (Bijur is right about the critical portion of the tapes: In Texaco's enhanced version, which the company eventually released publicly, the derisive tone of the conversation is abundantly evident; these men were not discussing diversity training.) Bijur seemed determined to contain the damage, meeting with a big group of civil rights leaders on November 12. Jesse Jackson, who was at the meeting, says Bijur seemed sincerely to believe that Texaco needed to change. "He had more problems than he realized," says Jackson. "He had been meeting with other Texaco officials, and he found the problem was much deeper." Indeed, neither Bijur nor anyone else who spoke publicly for Texaco after the tapes came out ever defended the company on the merits of the race discrimination case.

But at the same time Bijur was making his reconciliatory overtures, there were dark mutterings from Texaco -- and some sympathetic press -- about how the company was being crucified for a word that, as it turned out, no one had even used. Some blamed The New York Times for printing the word (even though an untold number of people -- including CEO Bijur and the entire listening audiences of Nightline and Good Morning America -- had heard the same tapes Eichenwald did, and didn't raise objections to the plaintiffs' transcripts). Some questioned whether the plaintiffs had strategically inserted the racial epithet into their transcripts, even though Lundwall -- who had been a participant in the conversation -- was the first to assert that that's what the sentence said.

Amid the uproar, Hausfeld and Kaye, Scholer's Schubert continued to negotiate a settlement. On November 15 -- the Friday before the scheduled hearing on document tampering before Magistrate David Fox -- Texaco and the plaintiffs reached an agreement. The company would set aside \$115 million in a fund for damages, and would provide \$26.1 million in pay raises to African-American employees over the next five years. Texaco also agreed to submit, as part of the settlement, to vast programmatic changes in its human resources department, including a seven-member task force -- with three representatives to be appointed by

the plaintiffs and one jointly by them and Texaco -- to monitor the department for five years. "We have become a symbol . . . a symbol of the broader issue of workplace fairness and equal opportunity in America today," CEO Bijur said in the November 15 press release explaining why Texaco settled. "The moment is now and the responsibility is ours to demonstrate to the nation that discrimination can be eradicated."

### **Victors, Victims, And The Fate Of Richard Lundwall**

The fallout from the suit continues. Texaco has told the African- American employees who submitted declarations alleging racism in the case that the company is willing to initiate internal investigations of their claims. The company settled a me-too intervention by the EEOC in December, agreeing to submit a plan for assuring the fairness of its evaluation program and to report its promotion decisions to the EEOC for the next five years. A shareholder suit against Texaco is pending, as is a new nationwide class action sex discrimination suit filed by Kevin Barry, the lawyer who lost the McGowan case in 1993; Texaco tapped Jackson, Lewis, Schnitzler & Krupman to defend the new suit but says the switch in counsel shouldn't be regarded as a slap at Kaye, Scholer, which, Texaco says in a statement, will continue to be retained by the company. Texaco, meanwhile, is cooperating in the ongoing grand jury investigation of the document tampering apparently captured on the tapes. The report on evidence tampering, prepared by its independent investigators Armstrong and Schwartz, was turned over to the U.S. attorney's office; the report, said to be hundreds of pages long, was not made public. New York's Davis Polk & Wardwell is now representing Texaco in the criminal investigation.

For Richard Lundwall, a criminal conviction may await. Lundwall and his civil lawyer, Gass, never seemed to the plaintiffs lawyers to have a sense of the implications of disclosing the tapes; to this day, Gass says he regards the discussion of apparent evidence tampering on the tapes as nothing more than a civil discovery dispute. But when the subpoenas began arriving from the U.S. attorney after the first Times story, Gass realized that Lundwall needed a criminal lawyer, so he brought his office- mate, Christopher Riley, into the case.

Gass and Riley say they tried to persuade assistant U.S. attorney Stanley Okula to grant Lundwall immunity in exchange for his testimony before the grand jury, but he refused. "Then Okula said, 'Forget the grand jury. We're going to charge him,' " says Gass. (A spokesperson for the U.S. attorney's office declines comment.) The next day, November 19, Gass and Riley brought Lundwall to the federal courthouse in White Plains, where he was arrested and charged with obstruction of justice. Dozens of reporters covered the event. Lundwall's lawyers have negotiated sporadically with the U.S. attorney's office since then; a preliminary hearing in his case is scheduled for February 13.

In January, after Texaco received the report of investigator Armstrong, Lundwall was stripped of his retirement benefits, as was former treasurer Ulrich. Former assistant treasurer Keough, who had still been employed by the company, lost his job; and former finance department division head Peter Meade was suspended for two weeks. Ulrich's lawyer, Rosner, says his client -- whose reputation, he says, was stained by the initial and erroneous report that he had used the racial epithet -- is appealing Texaco's decision. Lundwall, who did not cooperate with the Armstrong investigation, never saw the report, and learned he was losing his benefits in a letter from Texaco's human resources head. For Lundwall, says Gass, it was a bitter end: "It's scandalous. You know, if the corporate policy is to tell the truth, then how come the guy who tells the truth gets shot?"

Roberts and Chambers, meanwhile, have become mini-celebrities. Roberts has a book contract, and even Leaphart, the African- American in-house lawyer who tried to get a class action launched but was then fired, claims he's been approached with offers to buy his story. To Roberts, what's remarkable is how uncannily the tapes -- even the enhanced tapes -- bear out what she and the other plaintiffs had been saying about Texaco. "The 'black jelly bean' stuff -- when I heard that I felt validated," she says. "The things they said about the us-them atmosphere -- that's the same thing we've been saying all along."

The plaintiffs lawyers in the race discrimination suit, who have since applied for \$29 million in fees, say the settlement could change the way civil rights laws are enforced in this country, with private lawyers stepping in where government investigators have failed. The Texaco case, by this way of thinking, has raised awareness among big employers of the risks they face, and has reminded plaintiffs firms that nationwide class actions can be lucrative. The mere size of the settlement could set a new standard for the value of a class action employment claim.

Wall Street Journal columnist Holman Jenkins, Jr., took a dimmer view of the case's implications, writing on November 26 that by settling, Texaco had actually precluded what could have been an honest discussion about race in corporate America. Jenkins's assessment of the long-term impact is probably closer to the truth, but for the wrong reasons. He asserted that Texaco shouldn't have settled because "the truly inflammatory comments reported in the media . . . were purely a fabrication by opposing lawyers."

It's an unfair charge that misses the point. The Texaco case will likely stand as an anomaly, not a landmark, in civil rights litigation because there were tapes at all. And because, like Jenkins, so many people decided what to think about the claims of racial discrimination in the case on the basis of a five-minute snippet of conversation..

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