

2005

Why the EEOC (Still) Matters

Anne Noel Occhialino

Daniel Vail

Follow this and additional works at: <http://scholarlycommons.law.hofstra.edu/hlelj>



Part of the [Law Commons](#)

Recommended Citation

Occhialino, Anne Noel and Vail, Daniel (2005) "Why the EEOC (Still) Matters," *Hofstra Labor and Employment Law Journal*: Vol. 22: Iss. 2, Article 11.

Available at: <http://scholarlycommons.law.hofstra.edu/hlelj/vol22/iss2/11>

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Labor and Employment Law Journal by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

WHY THE EEOC (STILL) MATTERS

Anne Noel Occhialino and Daniel Vail***

Since the Equal Employment Opportunity Commission's ("EEOC") creation in 1964, the Commission has had a unique role in enforcing Title VII and other civil rights statutes. In addition to receiving and investigating charges of discrimination, the EEOC enforces the employment civil rights statutes through Commission-initiated litigation. The Supreme Court has repeatedly emphasized that when the EEOC brings an enforcement action, the EEOC does not merely stand in the shoes of employees.¹ Instead, the EEOC is the "master of its own case."²

This article first traces the history of the EEOC, which shares the same birthday as Title VII, with a focus on the Commission's charge processing, investigation, conciliation and litigation practices against

* Anne Noel Occhialino is an attorney in the Office of General Counsel at the Equal Employment Opportunity Commission. Ms. Occhialino litigates on behalf of the EEOC in the United States Courts of Appeals. She is also an adjunct professor of Legal Writing and Research at The George Washington University Law School. She is a graduate of Wesleyan University in Middletown, Connecticut and the University of New Mexico School of Law. Following law school, she completed a two-year clerkship with the Honorable James A. Parker of the United States District Court for the District of New Mexico. After her clerkship, she was accepted into the Equal Employment Opportunity-National Labor Relations Board Joint Honor Program. As part of that program, she completed a three-month detail to the NLRB's Contempt Litigation Branch in the Division of Enforcement Litigation.

** Daniel Vail is an attorney with the U.S. Equal Employment Opportunity Commission. Mr. Vail works in the Appellate Services Division of the EEOC's Office of General Counsel, where he litigates on behalf of the EEOC in the U.S. Courts of Appeals. Mr. Vail previously worked in the EEOC's Office of Federal Operations adjudicating EEOC federal sector appellate decisions. Mr. Vail is the Chair of the D.C. Bar's EEO and Individual Rights Committee (a component of the D.C. Bar Labor and Employment Law Section). Mr. Vail is a graduate of Harvard Law School and of Hamilton College.

The views expressed in this article are solely those of the authors and do not express the views of the EEOC, the United States, or The George Washington University Law School.

1. See, e.g., *Gen. Tel. Co. of the N.W., Inc. v. EEOC*, 446 U.S. 318, 326 (1980) ("[T]he EEOC is not merely a proxy for the victims of discrimination . . ."); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977) ("[U]nder the procedural structure created by the 1972 amendments, the EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties; it is a federal administrative agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion.").

2. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291 (2002).

private employers. Next, this article describes the Commission's current charge-processing system and litigation practice. Finally, this article explores the question of whether the EEOC still matters forty years after Title VII's enactment.

I. FROM "TOOTHLESS TIGER"³ TO PRIMARY ENFORCEMENT AGENCY:
A BRIEF HISTORY OF THE EEOC

On July 2, 1964, Congress at long last passed the Civil Rights Act of 1964, an omnibus bill directed at discrimination in employment, voting, education, and public accommodation.⁴ Title VII of the Civil Rights Act of 1964⁵ prohibited private employers (excluding state and local governments) from discriminating based on race, color, religion, sex, or national origin.⁶ Title VII also provided for the creation of the EEOC.⁷ Exactly one year after Congress passed Title VII, the EEOC opened its doors for business. Since then, the EEOC has been pursuing its congressionally-mandated mission to eliminate unlawful employment discrimination. Although the Commission has made great strides in accomplishing this mission, the EEOC is a long way from declaring "mission accomplished."

A. 1965-1972

The EEOC's beginnings were less than auspicious. The EEOC opened its doors on July 2, 1965,⁸ at which time the Commission resided in space borrowed from the Department of Commerce,⁹ and had no authority to enforce Title VII of the Civil Rights Act of 1964. The legislative battles that led up to the enactment of the Civil Rights Act had culminated in a compromise that gave the EEOC the authority to receive, investigate, and conciliate charges of discrimination, to make technical

3. EEOC, EEOC History: 35th Anniversary: 1965-2000, 1965-1971: A "Toothless Tiger" Helps Shape the Law and Educate the Public, at <http://www.eeoc.gov/abouteeoc/35th/1965-71/index.html> (last visited Apr. 15, 2005).

4. EEOC, EEOC History: 35th Anniversary: 1965-2000, Pre-1965: Events Leading to the Creation of EEOC, at <http://www.eeoc.gov/abouteeoc/35th/pre1965/index.html> (last visited Apr. 15, 2005).

5. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17(b) (2000).

6. *Id.* §§ 2000e-2(a)(1), e(b).

7. *Id.* § 2000e-4(a).

8. "Toothless Tiger" Helps Shape the Law, *supra* note 3.

9. EEOC, EEOC History: 35th Anniversary: 1965-2000, Franklin D. Roosevelt, Jr., First Chairman of the EEOC, May 26, 1965 - May 11, 1966, at <http://www.eeoc.gov/abouteeoc/35th/bios/roosevelt.html> (last visited Apr. 17, 2005).

studies and provide technical assistance to employers,¹⁰ but not the authority to sue employers who failed to comply with Title VII.¹¹ The EEOC did have the authority to refer charges to the Attorney General.¹² It was the Attorney General who had the authority to intervene in civil actions brought by private individuals under section 706¹³ and to bring an action under section 707 against employers who engaged in a pattern or practice of discrimination.¹⁴

As for the Commission itself, Title VII provided that it would consist of five members appointed by the President and confirmed by the Senate, with no more than three Commissioners to be appointed from the same political party.¹⁵ One member was to be designated the Chairman and another the Vice Chairman.¹⁶ After the Commission's initial start-up, each Commissioner was to be appointed for a five-year term.¹⁷

The first five Commissioners took office just a month before the EEOC began operating.¹⁸ At that time, the EEOC was not yet set up to deal with the backlog of over one thousand charges of discrimination that had previously been filed.¹⁹ Three weeks after the Commission opened its doors, it had just forty-eight employees,²⁰ only seven of which were full-time investigators,²¹ with another twenty-four on detail from other federal agencies.²² None of the investigators were properly trained to investigate employment discrimination,²³ and they faced open hostility from employers and the public. In the late 1960s, for instance, "de-

10. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 705(g)(3), (5), 78 Stat. 241, 258-59 (amended 1972, current version at 42 U.S.C. §§ 2000e-4(g)(3), (5) (2000)).

11. *Id.* § 706(a), 78 Stat. at 259 (current version at 42 U.S.C. § 2000e-5(b)) (setting forth EEOC's duties of investigation and conciliation).

12. *Id.* § 705(g)(6), 78 Stat. at 259 (current version at 42 U.S.C. § 2000e-4(g)(6)) (authorizing EEOC to "refer matters to the Attorney General with recommendations for intervention in a civil action brought by an aggrieved party under section 706, or for the institution of a civil action by the Attorney General under section 707").

13. *Id.* § 902, 78 Stat. at 266-67 (current version at 42 U.S.C. § 2000e-5(f)) (stating that courts may authorize the Attorney General to intervene in civil actions "of general public importance").

14. *Id.* § 707(a), 78 Stat. at 261 (current version at 42 U.S.C. § 2000e-6(a)) (stating that Attorney General may file a "pattern or practice" case).

15. 42 U.S.C. § 2000e-4(a).

16. *Id.*

17. *Id.*

18. JOHN ROSS, EEOC, A HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION 1965-1984, at 12 (2000).

19. "Toothless Tiger" Helps Shape the Law, *supra* note 3.

20. ROSS, *supra* note 18, at 13.

21. *Id.*

22. *Id.*

23. *Id.* at 20.

rogatory remarks” were scrawled on investigators’ cars in Houston.²⁴ Other investigators were arrested, and one investigator was even “gently urged out of town by a pickup truck loaded with guys and their shot-guns.”²⁵

In its early years, the EEOC struggled with high turnover of its Commissioners and Chairmen.²⁶ In its first seven years, the Commission had thirteen different members.²⁷ By its fourth year, the EEOC was already on its fourth Chairman.²⁸ Not surprisingly, an internal report from 1967 revealed that the EEOC lacked clear guidance, uniformity in its operation, and good management.²⁹

While the Commissioners were using a revolving door, the agency struggled to set up field offices. At first, the EEOC ran all of its investigations out of its headquarters in Washington, D.C.³⁰ Later, the agency set up regional offices spread out across the country.³¹ The location of the offices, and the assignment of staff, largely correlated with the geographic distribution of the charges the EEOC received.³² Perhaps not surprisingly for the 1960s, two-thirds of the EEOC’s charges were filed in the South.³³ Another 25% of charges came from the industrial Midwest.³⁴ Accordingly, the EEOC set up many of its first field offices in these areas.³⁵

Even with its new field offices, however, the EEOC could not keep up with the deluge of charges it was receiving.³⁶ The number of charges the EEOC was expected to receive had been vastly underestimated; it was predicted to receive about two thousand charges in its first year, but the actual figure was 8,852.³⁷ By 1969, that number had more than dou-

24. EEOC, MAKING A RIGHT A REALITY: AN ORAL HISTORY OF THE EARLY YEARS OF THE EEOC 1965-1972, at 19 (Sylvia Eisner Danovitch, ed. 1990) (statement of Edith Morgan).

25. *Id.* at 18 (statement of Everett Crosson).

26. ROSS, *supra* note 18, at 13.

27. *Id.*

28. *Id.*

29. *Id.* at 20.

30. *Id.* at 13, 15.

31. *Id.* at 15.

32. *Id.*

33. *Id.*

34. *Id.*

35. *See id.* The EEOC opened its first field office in Dallas, Texas in 1966 and subsequently opened additional offices in Atlanta, Chicago, Cleveland, Los Angeles, New York, New Orleans, Albuquerque, Kansas City, Washington, D.C., Birmingham, Ala. and San Francisco. *Id.*

36. *Id.* at 22. Paradoxically, the opening of the field offices themselves, which created greater public awareness of the EEOC and made it easier to file charges, contributed to the dramatic increase in charges filed. *See id.*

37. *Id.* at 18.

bled.³⁸ Unfortunately, the EEOC could not keep up with the influx of new cases, and by 1968, the average time it took to process a charge was sixteen months (and growing).³⁹ The majority of the charges involved race discrimination (one-third were initiated by the NAACP)⁴⁰ and were filed on behalf of black employees and applicants who alleged race discrimination in hiring and promotion, selection and testing practices, and the maintenance of segregated seniority systems.⁴¹ These charges alleged both “disparate treatment” (i.e., that individuals had been the target of purposeful unlawful employment actions) and “disparate impact” discrimination (i.e., that facially neutral policies or practices had a disproportionate impact based on race).⁴²

The EEOC issued guidelines on sex discrimination in 1965 in order to better address the unexpectedly high number of sexual discrimination charges filed in the first year.⁴³ Among other things, these guidelines stated that refusing to hire or promote women because they were married or had children constituted sex discrimination, unless men were treated equally in similar situations.⁴⁴ The Supreme Court later embraced the Commission’s interpretation on this issue in *Phillips v. Martin Marietta Corp.*⁴⁵

The EEOC used conciliation agreements to resolve some of the tens of thousands of charges received its first few years.⁴⁶ In its first year alone, the EEOC reached conciliation agreements with 111 employers,⁴⁷ many of which desegregated workplace facilities, including bathrooms and cafeterias.⁴⁸ In one highly publicized agreement, which was negotiated with other federal agencies, the Newport News Shipbuilding and Drydock Company agreed to desegregate its workplace, give equal pay to black workers, and provide black workers with equal opportunities to

38. See *id.* at 19 (Figure 5).

39. *Id.* at 22.

40. *Id.* at 21; “Toothless Tiger” Helps Shape the Law, *supra* note 3.

41. EEOC, EEOC History: 35th Anniversary: 1965-2000, 1965-1971: Shaping Employment Discrimination Law, at <http://www.eeoc.gov/abouteeoc/35th/1965-71/shaping.html> (last visited April 13, 2005).

42. See *id.* The EEOC interpreted Title VII to prohibit disparate impact discrimination as well as disparate treatment, a position later adopted by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). *Id.*

43. *Id.* The EEOC expanded these guidelines in 1966, 1968 and 1972. *Id.*

44. *Id.*

45. 400 U.S. 542 (1971).

46. See discussion of EEOC’s conciliation process *infra* Section II.A.2.

47. EEOC, EEOC History: 35th Anniversary: 1965-2000, 1965-1971: Early Enforcement Efforts, at http://www.eeoc.gov/abouteeoc/35th/1965-71/early_enforcement.html (Apr. 13, 2005).

48. *Id.*

participate in apprenticeship programs and to compete for supervisory and craft jobs.⁴⁹

In addition to effectuating the purpose of Title VII through conciliation and the issuance of guidelines interpreting the Act,⁵⁰ the EEOC filed amicus curiae briefs and even intervened in some cases.⁵¹ In 1971,⁵² for example, the EEOC participated in more than 500 cases.⁵³ The EEOC also contributed to the enforcement of Title VII by referring “pattern or practice” cases to the Department of Justice for litigation.⁵⁴ Initially, this referral process proceeded at a snail’s pace. During the EEOC’s first ten months, it referred only one pattern or practice case to the Attorney General.⁵⁵ By July of 1968, however, the EEOC had referred sixty-eight such cases to the Attorney General, who had taken action in just twelve of them and had filed a mere nine pattern or practice cases.⁵⁶ By 1972, the Attorney General had filed fewer than one hundred pattern or practice cases.⁵⁷

Accordingly, from 1965-1972, the EEOC had mixed results in effectuating Title VII’s purpose of eliminating unlawful employment discrimination,⁵⁸ and the enthusiasm that initially greeted the enactment of Title VII and the creation of the EEOC waned. There was a sense in some quarters that “people were not getting what they thought they would get out of it, and that was instant results.”⁵⁹ Fortunately, Congress soon addressed Title VII’s limitations by increasing the EEOC’s role in enforcing it.

49. *See id.*

50. The EEOC issued *Guidelines on Religious Discrimination* in 1966, and *Guidelines on National Origin Discrimination* in 1970. Shaping Employment Discrimination Law, *supra* note 41. The EEOC has continued to issue numerous guidelines and other policy statements throughout the years. *See, e.g.*, Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604 (2005); Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, as Amended, 29 C.F.R. § 1608; EEOC, NOTICE NO. 915.002, “ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS” (June 18, 1999), available at <http://www.eeoc.gov/policy/docs/harassment.html> (last visited Apr. 13, 2005).

51. ROSS, *supra* note 18, at 23.

52. All references to EEOC statistics are measured by fiscal year, not by calendar year.

53. ROSS, *supra* note 18, at 23.

54. *Id.* Section 707 of the Civil Rights Act refers to “pattern or practice” cases, as amended at 42 U.S.C. § 2000e-6(a) (2000).

55. ROSS, *supra* note 18, at 23.

56. *Id.*

57. *Id.*

58. *See id.*

59. MAKING A RIGHT A REALITY, *supra* note 24, at 15 (statement of Willie King).

B. 1972-1980

The most dramatic change in the history of the EEOC occurred when Congress passed the Equal Employment Opportunity Act of 1972,⁶⁰ which amended Title VII. Congress recognized that Title VII's failure to imbue the EEOC with enforcement authority was a "serious defect,"⁶¹ effectively making the Commission a "toothless tiger." To give the EEOC some bite, Congress provided the agency the authority to enforce Title VII against private employers either by filing suit under section 706 or by filing a pattern or practice case under section 707.⁶² Congress also expanded the reach of Title VII to cover discrimination by state and local governments, although the Attorney General was given (and retains) the authority to sue these employers.⁶³ As a result, the focus of the EEOC's mission shifted from mere investigation and conciliation to *litigation* against private employers.

The agency's litigation efforts, however, were hampered by its struggle to keep its head above a rising sea of charges. Due in part to the 1972 amendments' expansion of Title VII's coverage to state and local governments, the EEOC received more charges than ever before. In 1972, the EEOC received 32,840 charges.⁶⁴ The next year, that number increased by 50% to 48,849.⁶⁵ The time it took for the EEOC to process

60. EEOC, EEOC History: 35th Anniversary: 1965-2000, The 1970s: The "Toothless Tiger" Gets Its Teeth — A New Era of Enforcement, at <http://www.eeoc.gov/abouteeoc/35th/1970s/index.html> (last visited Apr. 13, 2005).

61. Harrison A. Williams, Jr., Foreword, in SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92ND CONG., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 (Comm. Print 1972) (providing complete history of the 1972 amendments).

62. See 42 U.S.C. § 2000e-5(f)(1) (2000) (stating that following the failure of conciliation, "the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge"); *id.* § 2000e-6(a) (authorizing Attorney General to bring "pattern or practice" cases in appropriate federal district courts); *id.* § 2000e-6(c) (transferring Attorney General's power to bring pattern or practice suits to the EEOC).

63. See *id.* § 2000e-(b) (defining "employer" as a person "engaged in an industry affecting commerce"); *id.* § 2000e-(a) (defining "person" to include, inter alia, "governments, governmental agencies, [and] political subdivisions"); see also *id.* § 2000e-5(f)(1). Section 5(f)(1) states that in the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action

Id.

64. ROSS, *supra* note 18, at 110.

65. *Id.*

a charge by mid-1975 had risen to an average of thirty-two months.⁶⁶ By 1977, the EEOC had a backlog of 94,700 unresolved charges.⁶⁷

This backlog persisted despite the EEOC's October 1972 implementation of a critical change in its charge-processing system. Previously, the Commissioners had personally decided whether to make a finding of reasonable cause for each charge,⁶⁸ which had considerably slowed charge processing. At the end of 1972, however, the Commission delegated to the directors of the EEOC's district offices the authority to issue letters of determination in cases in which where there was Commission precedent. Only cases presenting novel or unsettled issues went to the Commissioners for decision.⁶⁹

Besides facing a sizeable charge backlog in the 1970s, the EEOC found itself confronting organizational challenges. Most significantly, the EEOC had to develop in-house litigation capacity to implement its new enforcement authority.⁷⁰ To accomplish this task, the EEOC created five regional litigation centers that evaluated cases and then forwarded litigation recommendations to Headquarters for review.⁷¹ Initially, the EEOC's litigation machinery operated slowly. In 1972, 1,319 cases were referred to the litigation centers,⁷² but only 124 were approved for filing and only five lawsuits were filed.⁷³ However, the pace picked up dramatically the next year, when the EEOC filed 116 lawsuits (although that figure dipped to just ninety-four the next year).⁷⁴

According to external studies, three factors hindered the EEOC's enforcement efforts in the early to mid-1970s.⁷⁵ First, the EEOC's organizational problems resulted in confusion over the roles and authority of key policy-making and management personnel.⁷⁶ Second, the EEOC continued to suffer from vastly inadequate staffing.⁷⁷ Third, the EEOC had relatively poor management.⁷⁸ The Commission did not

66. *Id.* at 114.

67. "Toothless Tiger" Gets Its Teeth, *supra* note 60. Ironically, another cause of the surge in charges was the EEOC's own success. For example, after the entry of a consent decree against AT&T, charge filing against the company and its affiliates rose by 60%. ROSS, *supra* note 18, at 114.

68. ROSS, *supra* note 18, at 110.

69. *Id.*

70. *Id.* at 122.

71. *Id.* The litigation centers were located in Atlanta, San Francisco, Denver, Philadelphia, and Chicago. *Id.*

72. *Id.* at 123.

73. *Id.*

74. *Id.* at 125.

75. *Id.* at 96.

76. *Id.*

77. *Id.* During the year after the 1972 amendments, the Office of General Counsel had 105

had relatively poor management.⁷⁸ The Commission did not have a central office that was responsible for internal policy decisions,⁷⁹ no central training office, and no comprehensive manuals for investigators, conciliators, or litigators.⁸⁰ Other factors that contributed to the Commission's ineffectiveness in instituting section 706 cases included inadequate investigations and, because of the lengthy charge-processing time, evidence that grew stale before trial.⁸¹

The EEOC was also slow to initiate section 707 pattern or practice cases. During the two years following the 1972 amendments, the EEOC and the Attorney General had concurrent jurisdiction to bring pattern or practice cases, but the EEOC did not bring any at all.⁸² When responsibility for bringing such suits against private employers shifted from the Attorney General to the EEOC in March of 1974, the Commission inherited eighty such cases.⁸³ Having failed to bring any pattern or practice cases in the previous two years, however, the EEOC was ill-equipped to deal with them.⁸⁴ The Commission also had no coordinated mechanism for selecting these cases from its charge inventory or from data it gathered from employers.⁸⁵

Despite the EEOC's rocky transition from a strictly administrative agency to an administrative and enforcement agency, the Commission did enjoy some success. Even before the 1972 amendments, the EEOC had targeted systemic discrimination at AT&T after receiving more than 1,500 charges against the company.⁸⁶ In 1973, along with the Departments of Justice and Labor, the EEOC entered into a settlement agreement with AT&T in which the company agreed to end sex-segregated job categories, institute goals for the hiring, training, and promotion of women and minorities, and pay \$45 million in back pay and wage adjustments for women and other minority employees.⁸⁷ Also in 1973, the

vacancies out of 270 spots. *Id.* The Regional Litigation Centers had a 35% vacancy rate. *Id.* at 101.

78. *Id.* at 96.

79. *Id.* at 102.

80. *See id.* at 103.

81. *Id.* at 123-24.

82. *Id.* at 124; *see also* 42 U.S.C. § 2000e-6(c) (2000) (stating that on March 24, 1974, the Attorney General was to transfer to the EEOC the function of bringing pattern or practice cases under section 707); *id.* § 2000e-6(e) (stating that after March 24, 1972, the EEOC "shall have authority to investigate and act on a charge of a pattern or practice of discrimination").

83. ROSS, *supra* note 18, at 124.

84. *Id.*

85. *Id.*

86. *Id.* at 125.

87. *See id.* at 125-26. In another agreement reached the following year, AT&T agreed to pay another \$30 million to 25,000 female and minority management-level employees. *Id.*

EEOC set up investigative task forces for some of the nation's largest employers — General Electric, General Motors, Ford, and Sears.⁸⁸ Five years later, the EEOC entered into a conciliation agreement with General Electric that provided \$29.4 million for minorities and women, and set hiring and promotion goals.⁸⁹ The EEOC also filed suit in 1974 against the nine largest steel producers in the country and the major steelworkers union.⁹⁰ Within six months, the EEOC had a consent decree in hand that provided nearly \$31 million in back pay to 40,000 female and other minority employees, and set hiring goals and timetables.⁹¹

Within a few years of the 1972 amendments, the EEOC also began to address some of the obstacles impeding its effectiveness. Responding to a lack of guidance for attorneys and investigators, in 1973 the Commission issued its "Compliance Manual," which contained "guidelines and procedures for conducting investigations, conciliation proceedings, and compliance reviews."⁹² A few years later, the EEOC also issued a "General Counsel's Manual," which offered guidance on how to select and litigate cases.⁹³ The EEOC also made headway in addressing its inadequate staffing.⁹⁴

The Commission's enforcement of Title VII also began to pick up in the mid-1970s. In 1975, the agency filed thirty-nine pattern or practice lawsuits.⁹⁵ In 1976, the EEOC filed lawsuits or intervened in 484 cases.⁹⁶ The agency also continued to do brisk business at the appellate level, both as a litigant, and through submission of *amicus curiae* briefs.⁹⁷ De-

88. EEOC, EEOC History: 35th Anniversary: 1965-2000, The 1970s: Focusing Enforcement Efforts on Systemic Discrimination, at <http://www.eeoc.gov/abouteeoc/35th/1970s/focusing.html> (last visited Apr. 15, 2005).

89. *Id.*

90. *Id.*

91. *Id.* Some criticized the settlement, however, because it required employees to waive their right to sue, it capped back pay awards at only \$1,000, and it awarded most minorities a trifling \$250. ROSS, *supra* note 18, at 127.

92. ROSS, *supra* note 18, at 103.

93. *Id.*

94. *Id.* Although the number of vacancies in the Office of General Counsel and in regional litigation centers stayed above average, by February 1975, the Commission's overall vacancy rate had decreased to 7.6%. *Id.*

95. *Id.*

96. *Id.* at 125.

97. *Id.*

spite these improvements, the EEOC had an “urgent” need for reform.⁹⁸ Indeed, by 1977, the EEOC had 130,000 pending charges.⁹⁹

The need for reform was met, in part, by the EEOC’s 1977 reorganization plan.¹⁰⁰ The plan called for a major reorganization of the EEOC’s functions, structure, and procedures, in order to “improve the enforcement of Title VII” by improving problem areas such as “case processing, litigation of significant cases, [and] internal management and information systems”¹⁰¹ One significant structural reform moved enforcement attorneys from the five regional litigation centers to district offices, where the attorneys could work hand-in-hand with investigators to cultivate more “litigation worthy” cases.¹⁰² Another change was the adoption of the “Rapid Charge-Processing System” (“RCP system”) to speed “the resolution of new charges.”¹⁰³ Under this system, trained investigators (not clerical staff)¹⁰⁴ conducted initial intake interviews and counseled individuals about their charges. This allowed allegations falling outside the Commission’s jurisdiction to be re-directed to an “appropriate agency or organization” according to the circumstances or subject matter.¹⁰⁵ Intake officers also conducted fact-finding conferences with charging parties, which became the primary investigatory tool in individual cases.¹⁰⁶ Because long delays in charge processing had created potentially large back pay awards, which in turn deterred employers from settling cases, the RCP system also emphasized the early resolution of charges to promote settlement.¹⁰⁷ The reorganization was largely successful: between 1978 and 1981, the number of pending charges dropped from 95,000 to less than 50,000.¹⁰⁸

As part of the reorganization, and to address concerns that the EEOC was overlooking cases of systemic discrimination, the EEOC im-

98. *Id.* at 104 (attributing need for reform to mounting criticism of the Commission, as well as the possibility of increased authority and responsibility for the Commission created by a task force appointed by President Carter in 1977 to examine the government’s progress in equal employment).

99. *Id.* at 107.

100. *Id.* at 104.

101. *Id.* at 104-05.

102. *Id.*

103. *Id.* at 107, 114.

104. EEOC, EEOC History: 35th Anniversary: 1965-2000, The 1970s: Prelude to the 1980s — Reorganization and Expanded Authority, *at* <http://www.eeoc.gov/abouteeoc/35th/1970s/prelude.html> (last visited Apr. 15, 2005).

105. ROSS, *supra* note 18, at 114.

106. *Id.*

107. *Id.* at 115.

108. Prelude to the 1980s — Reorganization and Expanded Authority, *supra* note 104.

plemented the Systemic Charge Processing system.¹⁰⁹ As part of this system, the EEOC created the Office of Systemic Programs.¹¹⁰ The new office, which was housed in the EEOC's headquarters, used information from "EEO-1" reports — annual reports that large employers are required to file with the EEOC reporting employee data by race/ethnicity, gender, and job category — to target specific employers engaging in systemic discrimination.¹¹¹ This office also helped to implement systemic programs in the district offices by providing the extensive technical assistance needed to litigate systemic discrimination cases, establishing criteria to use for screening companies for systemic charges, and developing procedures for targeting employers for pattern or practice cases.¹¹²

One year after the EEOC devised this reorganization plan, President Carter did some of his own reorganizing. Through two presidential initiatives, the responsibility for enforcing the Equal Pay Act of 1963 (the "EPA")¹¹³ and the Age Discrimination in Employment Act of 1967 (the "ADEA")¹¹⁴ was transferred from the Labor Department to the EEOC.¹¹⁵ The EEOC gained even more responsibility when Congress amended Title VII by enacting the Pregnancy Discrimination Act of 1978.¹¹⁶ Consequently, the EEOC's authority and responsibilities increased significantly as the agency entered its next decade.

C. 1980s

The 1980s era was "a time of change and reassessment for the Commission."¹¹⁷ The agency continued to make significant progress towards achieving its mission of eradicating employment discrimination by litigating systemic and individual cases of discrimination and by entering into numerous settlements with employers. However, the EEOC

109. ROSS, *supra* note 18, at 120.

110. *Id.*

111. *Id.* at 129; 29 C.F.R. §§ 1602.7-14 (2004) (regulations requiring employers covered under Title VII to file EEO-1 reports annually).

112. ROSS, *supra* note 18, at 120-21.

113. 29 U.S.C. § 206(d) (2000).

114. *Id.* §§ 621-34.

115. Prelude to the 1980s — Reorganization and Expanded Authority, *supra* note 104. President Carter also transferred to the EEOC the responsibility for all federal equal employment opportunity requirements, including section 717 of Title VII, the EPA, the ADEA, and sections 501 and 505 of the Rehabilitation Act of 1973. *See id.*

116. *See* 42 U.S.C. § 2000e(k) (2000).

117. EEOC, EEOC History: 35th Anniversary: 1965-2000, The 1980s: A Period of Change and Reassessment, at <http://www.eeoc.gov/abouteeoc/35th/1980s/index.html> (last visited Apr. 12, 2005).

faced a number of obstacles in the 1980s that hindered its ability to fully achieve its mission, including: (1) a further explosion in the number of charges it received (2) staff reduction and (3) changes in its charge-filing system.¹¹⁸

The first significant hurdle the EEOC had to overcome in the 1980s was the massive influx of new charges it received. Although the EEOC had received an astounding 446,000 charges in the 1970s, the agency was inundated with 683,000 charges.¹¹⁹ The agency's assumption of authority to enforce the ADEA and the EPA contributed to the increase.¹²⁰ In the beginning of the 1980s, age discrimination was the EEOC's fastest-growing enforcement area.¹²¹ The explosion in charges was not, however, entirely attributable to the ADEA and the EPA. The Commission also experienced an increase in the number of sex discrimination charges, with the number of individuals charges filed rising to 180,000 by the end of the decade.¹²²

Unfortunately — and unfairly — Congress failed to increase the EEOC's funding commensurate with its increased enforcement authority. This deficiency in funding was a major obstacle the EEOC faced in the 1980s.¹²³ As a result of budget shortfalls and inflation, the EEOC actually had to reduce its staff — just as the numbers of charges it was receiving skyrocketed.¹²⁴ While the EEOC had 3,752 authorized positions in 1979, eight years later, that number had shrunk to 2,941.¹²⁵

A third hurdle the EEOC encountered in the 1980s was the adoption of a new enforcement philosophy that “focused on obtaining effective redress for every individual victim of discrimination.”¹²⁶ This shift in enforcement philosophy came about in the early part of the decade

118. See *id.*; see also EEOC, EEOC History: 35th Anniversary: 1965-2000, The 1980s: End of the 1980s Leaves EEOC to Face New Challenges, at <http://www.eeoc.gov/abouteeoc/35th/1980s/end.html> (last visited Apr. 12, 2005).

119. End of the 1980s Leaves EEOC to Face New Challenges, *supra* note 118.

120. EEOC, EEOC History: 35th Anniversary: 1965-2000, The 1980s: Enforcement Efforts in the 1980s, at <http://www.eeoc.gov/abouteeoc/35th/1980s/enforcement.html> (last visited Apr. 12, 2005).

121. See *id.* For instance, in 1979, the EEOC received about 1,600 ADEA charges; the next year that figure jumped more than 300% to 6,700. *Id.* This increase continued unabated throughout the decade as corporate America downsized its workforce. *Id.* In 1986, Congress also lowered the age cap under the ADEA from seventy years of age to just forty, thereby substantially increasing the number of workers who fell under the ADEA's protection. *Id.*; see also 29 U.S.C. § 631(a) (2000) (stating that the ADEA protects “individuals who are at least 40 years of age”).

122. Enforcement Efforts in the 1980s, *supra* note 120.

123. End of the 1980s Leaves EEOC to Face New Challenges, *supra* note 118.

124. *Id.*

125. *Id.*

126. *Id.*

when a Republican administration replaced a Democratic one.¹²⁷ While the EEOC had been focusing on systemic discrimination, the new administration redirected the agency's focus to the enforcement of individual claims of discrimination.¹²⁸ As a practical matter, this philosophical shift meant retooling the agency's charge-processing system. Although the RCP system of the 1970s had largely succeeded in expediting the resolution of new charges,¹²⁹ an internal study concluded that "in an effort to reduce the charge backlog, the pendulum of the Commission had swung too far in the direction of early settlement through RCP, and both the quality and thoroughness of investigations suffered."¹³⁰

The new Commission therefore abandoned the RCP system in favor of a policy that required a full investigation of each charge.¹³¹ The policy also stated that all cases in which the EEOC had found cause to believe discrimination occurred would presumptively be litigated if conciliation failed and that the Commission would undertake a review of each conciliation failure to determine whether to file a lawsuit.¹³² Parties alleging discrimination were also allowed to seek review if the Commission found that none had occurred.¹³³ These policies, exacerbated by the EEOC's increased enforcement authority and inadequate Congressional funding, exhausted a substantial amount of the Commission's time and resources.¹³⁴

Despite these three obstacles, the agency continued to make some inroads in its battle against employment discrimination. In the early 1980s, the EEOC resolved a number of systemic discrimination cases it had initiated in the 1970s, most of which concerned discrimination against racial and ethnic minorities and women.¹³⁵ In 1981, the EEOC filed 364 lawsuits — an increase of almost 150 from the preceding

127. The 1980s: A Period of Change and Reassessment, *supra* note 117.

128. *Id.*

129. *Id.*; see also ROSS, *supra* note 18, at 179 ("The substantial changes made in the Commission's operations and programs achieved one of the primary goals — reduction of the charge backlog.").

130. ROSS, *supra* note 18, at 185-86.

131. End of the 1980s Leaves EEOC to Face New Challenges, *supra* note 118.

132. *Id.*

133. *Id.*

134. *Id.* The EEOC had 3,752 staff positions in 1979, but had only 2,941 positions in 1987. *Id.*

135. Enforcement Efforts of the 1980s, *supra* note 120. For instance, in 1980 the EEOC entered into a conciliation agreement with Ford Motor Company that awarded \$23 million to minorities and women for discrimination in hiring and promotion practices, among other affirmative relief. *Id.* A settlement between EEOC and the Associated Press awarded affirmative relief of \$2 million to minorities and women. *Id.*

year.¹³⁶ The agency's decision in the 1970s to integrate its attorneys with its investigative staff also enhanced the quantity and quality of the EEOC's litigation.¹³⁷ Another factor that contributed to the EEOC's improved litigation practice was the adoption in 1979 of the "Early Litigation Identification" program.¹³⁸ This program identified both old and new charges that required more than the usual level of attorney involvement.¹³⁹ Attorneys and investigators worked together on these cases, many of which were class charges.¹⁴⁰

The EEOC also achieved significant victories in court, one of which strengthened the EEOC's role as an enforcement agency. Early in the decade, the Supreme Court affirmed that the EEOC has a unique and important role in enforcing Title VII in *General Telephone Co. v. EEOC*.¹⁴¹ In that case, the Supreme Court held that the EEOC could seek class-wide relief without complying with the requirements of Rule 23 of the Federal Rules of Civil Procedures for class actions.¹⁴² The Court emphasized that "the EEOC is not merely a proxy for the victims of discrimination" and that "[w]hen the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination."¹⁴³

Nevertheless, at the end of the decade, the EEOC continued to struggle with its unique role in enforcing Title VII, and, more specifically, with how to balance a burgeoning docket of charges with its litigation effort.

D. 1990s

As it had in the 1980s, the EEOC gained additional enforcement responsibilities during the 1990s and saw a record-breaking increase in the number of charges it received.¹⁴⁴ Following the same pattern that had plagued the agency since its inception, Congress failed to give the EEOC adequate funding to keep up with its expanded enforcement authority,¹⁴⁵

136. See ROSS, *supra* note 18, at 198. However, the number of lawsuits filed dropped to 164 in 1982. *Id.*

137. *Id.* at 197.

138. *Id.*

139. *Id.*

140. *Id.*

141. 446 U.S. 318 (1980).

142. *Id.* at 320.

143. *Id.* at 326.

144. See End of the 1980s Leaves EEOC to Face New Challenges, *supra* note 118.

145. EEOC, EEOC History: 35th Anniversary: 1965-2000, The 1990s: New Enforcement

making it necessary for the agency to devise “more strategic and systematic” ways to keep up with its charge backlog.¹⁴⁶ Many of the innovative approaches undertaken as a result remain core components of the Commission’s practices today.

During the 1990s, Congress enacted three civil rights statutes that increased the EEOC’s oversight. First, in 1990 Congress passed the Americans with Disabilities Act (the “ADA”), which prohibits discrimination against individuals who currently have, previously had, or are regarded as having, a disability.¹⁴⁷ In addition to shaping the new law by enacting ADA regulations and policy guidance,¹⁴⁸ the EEOC advanced its interpretation of the ADA through litigation against private employers. By July 2000, the EEOC had filed 375 ADA lawsuits and filed amicus curiae briefs in another eighty-seven cases concerning the ADA, the Rehabilitation Act (the ADA’s precursor for federal employees), and various other state disability laws.¹⁴⁹ The EEOC’s litigation efforts were largely successful. The Commission favorably resolved 91% of the cases through settlement or jury verdict.¹⁵⁰

The second statute Congress enacted was the Older Workers Benefit Protection Act of 1990 (the “OWBPA”),¹⁵¹ which amended the ADEA. Among other things, the statute adopted the EEOC’s “equal cost rule,” which stated that employers had to either provide equal benefits or incur equal costs for the benefits given to younger and older workers.¹⁵²

In 1999, Congress enacted a third statute that impacted the EEOC’s enforcement efforts — the Civil Rights Act of 1991 (the “CRA”).¹⁵³ The CRA provided that, for the first time, plaintiffs in Title VII and ADA

Strategies to Address Discrimination in the Changing Workplace, at <http://www.eeoc.gov/abouteeoc/35th/1990s/newenforcement.html> (last visited Apr. 15, 2005).

146. *See id.*

147. The Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213, § 12102(2) (2000).

148. EEOC, EEOC History: 35th Anniversary: 1965-2000, The 1990s: The Americans with Disabilities Act of 1990, at <http://www.eeoc.gov/abouteeoc/35th/1990s/ada.html> (last visited Apr. 15, 2005); 29 C.F.R. §§ 1630, 1641 (2004).

149. EEOC History, The Americans with Disabilities Act of 1990, *supra* note 148.

150. *Id.* For instance, in 1993 the EEOC entered into a consent decree resolving a claim that a union’s health insurance plan violated the ADA because it limited lifetime benefits for AIDS to \$50,000, while the limit for other catastrophic conditions was \$500,000. *Id.* The EEOC also won a 1997 jury verdict against Wal-Mart after it refused to hire an individual who used a wheelchair. *Id.*

151. Pub. L. No. 101-433, 104 Stat. 978 (codified as amended at 29 U.S.C. §§ 621-626 (2000)).

152. *See* 29 U.S.C. § 623(f)(2)(B)(i) (2000); *see also* 29 C.F.R. § 1625.10 (2004) (entitled “Costs and Benefits under Employee Benefit Plans”).

153. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C., 29 U.S.C. and 2 U.S.C.).

cases had the right to a jury trial and to recover compensatory and punitive damages in cases in which an employer had intentionally discriminated.¹⁵⁴ The CRA provided caps, however, on the amount of such damages that could be recovered.¹⁵⁵ The CRA also responded to a series of Supreme Court decisions, some of which had made it more difficult for plaintiffs to win employment discrimination cases.¹⁵⁶

As in other decades, new statutes brought more charges. During the 1990s, the Commission faced the largest increase in charges in its history.¹⁵⁷ The agency received almost 170,000 charges of age discrimination¹⁵⁸ and received a significant number of disability-related charges.¹⁵⁹ Nevertheless, race discrimination continued to make up 38% of all charges,¹⁶⁰ followed closely by sex discrimination charges at 30%.¹⁶¹ Although the charge-filing increase was clearly attributable in part to the new statutes, public awareness of discrimination and harassment also appeared to contribute to the increase.¹⁶²

In the mid-1990s, the EEOC adopted Priority Charge Handling Procedures ("PCHP") to improve charge-processing in the private sector due to the agency's increasingly heavy workload.¹⁶³ The PCHP had dramatic and immediate results. In the span of two years, from 1996 to 1998, the number of pending charges dropped 47%, from 98,269 to

154. EEOC, EEOC History: 35th Anniversary: 1965-2000, The 1990s: The Civil Rights Act of 1991, at <http://www.eeoc.gov/abouteeoc/35th/1990s/civilrights.html> (last visited Apr. 14, 2005); see 42 U.S.C. § 1981a(c) (2000) (right to a jury trial); *id.* §§ 1981a(a)(1), (3) (plaintiff may recover compensatory and punitive damages from employer for intentional discrimination, subject to caps based on number of employees in subject workplace).

155. EEOC History, The Civil Rights Act of 1991, *supra* note 154; see 42 U.S.C. § 1981a(b)(3).

156. EEOC History, The Civil Rights Act of 1991, *supra* note 154. Two of the cases addressed by the CRA were *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989). *Id.*

157. New Enforcement Strategies to Address Discrimination in the Changing Workplace, *supra* note 145. Charge receipts grew from 59,000 in 1989 to 91,000 in 1994. *Id.*

158. *Id.*

159. EEOC, EEOC History: 35th Anniversary: 1965-2000, The 1990s: Supreme Court in the 1990s, at <http://www.eeoc.gov/abouteeoc/35th/1990s/supremecourt.html> (last visited Apr. 15, 2005).

160. EEOC, EEOC History: 35th Anniversary: 1965-2000, The 1990s: Furthering the Protection Against Workplace Discrimination and Harassment, at <http://www.eeoc.gov/abouteeoc/35th/1990s/furthering.html> (last visited Apr. 15, 2005).

161. *Id.*

162. See *id.* Two popular movies — *Philadelphia* and *Disclosure* — made employment discrimination a hot topic even at the box office. *Id.*

163. EEOC, EEOC Combined Annual Reports Fiscal Years 1996-1998, § IV, at http://www.eeoc.gov/abouteeoc/annual_reports/annrep96-98.html (April 12, 2005); see also PCHP discussion *infra* at section II.A.1.

52,011.¹⁶⁴ Also in 1995, the agency “adopted resolutions recommended by an internal task force on Alternative Dispute Resolution (ADR) . . . to implement a mediation-based ADR program to supplement [the agency’s] investigative process.”¹⁶⁵

In 1995, the Commission adopted a National Enforcement Plan (“NEP”) to improve its enforcement efforts throughout the agency.¹⁶⁶ The NEP reflects the agency’s recognition of its persistent budget constraints and the fact that the policies of the 1980s, which had been built on the principle of “full investigation and enforcement,” had actually hindered the Commission’s ability to pursue its mission of eradicating employment discrimination.¹⁶⁷ Accordingly, the NEP purports to maximize “strategic enforcement” — that is, to ensure “the most effective use of the Commission’s resources by assuring that available funds are devoted to efforts which have the potential to yield the greatest dividends in achieving equal employment opportunity.”¹⁶⁸ The NEP articulates the general principles governing the Commissions’ enforcement efforts, establishes national enforcement priorities, sets general parameters for the development of the Local Enforcement Plans, and delegates significant litigation authority to the Office of General Counsel so that the Commission can most effectively and efficiently accomplish its enforcement objectives.¹⁶⁹

More specifically, the NEP articulates the EEOC’s “three-pronged approach to eliminate discrimination in the workplace: (1) prevention through education and outreach; (2) voluntary resolution of disputes; and (3) when voluntary resolution fails, strong and fair enforcement.”¹⁷⁰

As a result of the NEP and other agency efforts, the EEOC’s efficiency increased in the late 1990s. In addition to significantly reducing its charge backlog, the EEOC was able to decrease the average charge-processing time from 379 days in 1996 to 310 days in 1998.¹⁷¹ The agency also increased the monetary benefits it recovered on behalf of

164. *Id.*

165. *Id.*; see discussion of EEOC’s mediation program *infra* sections I.E. and II.A.3.

166. EEOC, National Enforcement Plan, § I, at <http://www.eeoc.gov/abouteeoc/plan/nep.html> (last modified Jan. 15, 1997).

167. *Id.*

168. *Id.* § II.

169. *Id.* § I. The NEP requires leaders in local EEOC offices to create local enforcement plans consistent with the NEP, but to tailor them to reflect issues faced by relevant local communities and constituencies. *Id.* § IV.

170. *Id.* § II.

171. Combined Annual Reports, *supra* note 163, § IV. The “reasonable cause rate,” the percentage of charges in which the EEOC finds cause to believe unlawful discrimination occurred, rose from 2.2% in 1996 to 4.6% in 1998. *Id.*

charging parties through conciliation and settlement. Between 1996 and 1998, that figure grew from \$145.2 million to \$169.2 million.¹⁷²

Not all cases, of course, were resolved through conciliation, mediation, or settlement. As it had before, the EEOC continued to make inroads in the fight against employment discrimination through litigation. The agency was again criticized for improperly balancing its dual goals of combating individual and systemic discrimination.¹⁷³ The amount of money the EEOC secured for individuals in cases of systemic discrimination varied widely in the 1990s. In 1996, the EEOC recovered \$1,934,412, in 1997 the agency recovered \$14,126,937, but then in 1998, that figure fell substantially to \$ 2,104,323.¹⁷⁴ Still, the Commission undoubtedly helped a significant number of victims of systemic discrimination. For instance, in the landmark case *EEOC v. Mitsubishi Motor Manufacturing*,¹⁷⁵ a district court held for the first time that Title VII authorized the EEOC to bring pattern or practice actions on behalf of victims alleging sexual harassment.¹⁷⁶ The Commission later settled the case through a consent decree providing that Mitsubishi would pay \$34 million to a class of victims, implement procedures to deal effectively with any future harassment, and appoint a monitor for three years to ensure the company made all required changes.¹⁷⁷ Despite this and other successes, by the end of the 1990s the agency realized that it had to come up with creative solutions to handle its staggering workload.

To effectuate these creative solutions, the EEOC launched a private sector mediation program in 1999.¹⁷⁸ The program called for the voluntary and confidential mediation of discrimination complaints even before the EEOC investigated the underlying charge. The mediation program proved extremely popular with employers and charging parties; in the first four years of the plan's existence, the EEOC resolved more than

172. *Id.*

173. EEOC, EEOC History: 35th Anniversary: 1965-2000, The 1990s: New Laws, New Strategies, at <http://www.eeoc.gov/abouteeoc/35th/1990s/index.html> (last visited Apr. 15, 2005).

174. Combined Annual Reports, *supra* note 163, § IV.

175. 990 F. Supp. 1059 (C.D. Ill. 1998).

176. *Id.* at 1071.

177. Furthering the Protection Against Workplace Discrimination and Harassment, *supra* note 160. In other noteworthy cases, the EEOC attacked male-on-male harassment and disability discrimination in a pattern or practice suit against Long Prairie Packing Company, which resulted in a \$1.9 million settlement for the victims in 1999. *Id.* The EEOC also continued to challenge systemic race discrimination. In 1999, the EEOC settled a case with Woodbine Healthcare Center for \$2.1 million, which was distributed to sixty-five Filipino class members. *Id.*

178. EEOC, FY 2003 Performance and Accountability Report, Management's Discussion and Analysis: Strategic Goal #1, Mediation Statistics, at <http://www.eeoc.gov/abouteeoc/plan/par/2003/index.html> (last modified October 27, 2004).

35,000 charges through mediation.¹⁷⁹ The Commission's new emphasis on mediation continued into the next millennium.

E. 2000 and Beyond

In the current decade, mediation and alternative dispute resolution have become central to the agency's enforcement efforts — perhaps not surprising, since the EEOC's charge load continues to grow.¹⁸⁰ Current Chairwoman Cari M. Dominguez, whose five-year term expires in July 2006, has implemented a "Five Point Plan" to guide the agency's operations during her tenure.¹⁸¹ The most emphasized of these "Five Points" is "Promoting and Expanding Mediation/Alternative Dispute Resolution."¹⁸² As a recent agency report notes,

[p]romoting and expanding mediation and other types of ADR is the centerpiece of the EEOC's Five-Point Plan. Our private sector mediation program has demonstrated that disputes can be settled quickly, amicably and cost-effectively through ADR techniques.¹⁸³ We will build on earlier successes through the continued development of a

179. *Id.*

180. The EEOC received an average of 81,180 charges each year from 2000-2004. EEOC, Charge Statistics FY 1992 through FY 2004, at <http://www.eeoc.gov/stats/charges.html> (last visited Apr. 12, 2005). During 2004 (the most recent period for which charge data is available), the EEOC received 79,432 charges. *Id.* Of these charges, 58,328 alleged Title VII violations. EEOC, Title VII of the Civil Rights Act of 1964 Charges: FY 1992 Through FY 2004, at <http://www.eeoc.gov/stats/vii.html> (last visited Apr. 17, 2005).

181. See EEOC, Strategic Plan for Fiscal Years 2004-2009, at http://www.eeoc.gov/abouteeoc/plan/strategic_plan_04to09.html (last visited Apr. 17, 2005).

182. See *id.* The other elements of Dominguez's "Five Point Plan" are (1) "Proactive Prevention" (e.g., "work[ing] to proactively prevent discrimination by providing information and solutions to members of the public that will help them identify and solve problems before they escalate"); (2) "Proficient Resolution" (e.g., "evaluat[ing] and improv[ing] every stage of the private sector charge process and . . . collaborat[ing] with other federal agencies in our effort to make the federal complaint process more efficient"); (3) "Strategic Enforcement and Litigation" (e.g., "examin[ing] emerging workplace trends and issues in both the private and federal sectors and us[ing] this information to make reasoned and calculated decisions about what issues merit our attention and how we can better integrate our policy guidance, investigative, litigation and federal coordination functions"); and (4) "EEOC As a Model Workplace" (e.g., "build[ing] a model workplace where we can effectively and efficiently accomplish our goals in an environment conducive to good employment practices"). *Id.*

183. *Id.* Between 1999 and 2003, the EEOC conducted over 52,400 mediations resolving more than 35,100 charges (69%). EEOC, Equal Employment Opportunity Commission, History of the EEOC Mediation Program, at <http://www.eeoc.gov/mediate/history.html> (last visited Apr. 17, 2005). Almost all respondent employers (96%) and charging parties (91%) questioned indicated they would use the EEOC's mediation program again. EEOC, Studies of the Mediation Program, at <http://www.eeoc.gov/mediate/mcd-intro.html> (last visited Apr. 12, 2005).

comprehensive agency-wide ADR program. We will review the pool of private sector charges eligible for mediation and offer mediation at various stages of the private sector charge process. We also will work to expand the number of private employers participating in Universal Agreements to Mediate, which allow EEOC to attempt mediation in all cases involving an employer so long as the charging party consents.¹⁸⁴

In addition to strengthening the EEOC's successful mediation program, Chair Dominguez and the EEOC have launched several important new and creative initiatives. These include the agency's "Freedom to Compete" initiative — an "outreach, education, and coalition-building strategy designed to complement the agency's enforcement and litigation programs"¹⁸⁵ — and its "Youth@Work" project — an "innovative national outreach and education campaign . . . designed to educate young workers about their workplace rights and responsibilities."¹⁸⁶ In March 2005, the Commission launched a pilot "National Contact Center," which, if and when fully operational, will purportedly enable members of the public to call a central number to get answers to EEOC-related questions, (such as how to file a charge or to contact or find a local EEOC office).¹⁸⁷

Meanwhile, the EEOC's litigation efforts continue to garner significant relief for aggrieved individuals. In 2004, the EEOC filed 414 lawsuits against private employers.¹⁸⁸ Of these lawsuits, 279 alleged Ti-

184. Strategic Plan for Fiscal Years 2004-2009, *supra* note 181. A universal agreement to mediate ("UAM") "is an agreement between the EEOC and an employer to mediate all eligible charges filed against the employer, prior to an agency investigation or litigation." EEOC, Questions and Answers: Universal Agreements to Mediate (UAMs), at <http://www.eeoc.gov/mediate/uam.html> (last visited Apr. 12, 2005). As of September 2003, there were "over four hundred UAMs with local employers and sixteen UAMs with regional or national companies." History of the EEOC Mediation Program, *supra* note 183.

185. See EEOC, Facts About the Freedom to Compete Initiative, at <http://www.eeoc.gov/initiatives/compete/index.html> (last visited Apr. 13, 2005).

Ensuring America's workers the freedom to compete on a level playing field is the essence of EEOC's mission. Shifting demographics and changing business environments have reshaped today's workplace, requiring the Commission to adopt strategies that are more responsive to current trends and complexities. [Freedom to Compete] is designed to build a web of partnerships, liaisons, and alliances that will serve to educate as deterrents to potential discrimination and promoters of compliance and sound employment practices.

Id.

186. EEOC, Youth@Work, at <http://www.eeoc.gov/initiatives/youth/index.html> (last visited Apr. 15, 2005).

187. EEOC, EEOC Launches National Contact Center Pilot to Enhance Customer Service, Improve Efficiency, at <http://www.eeoc.gov/press/3-21-05.html> (last visited Apr. 15, 2005).

188. EEOC, EEOC Litigation Statistics, FY 1992 Through 2004, at <http://www.eeoc.gov/stats/litigation.html> (last visited Apr. 15, 2005).

tle VII violations.¹⁸⁹ In 2004, the EEOC secured a record \$168.3 million in monetary benefits for private parties,¹⁹⁰ of which \$133 million was from Title VII suits. During 2004, the EEOC also brought or settled numerous high-profile class cases — including securing a \$54 million settlement in a Title VII case against Morgan Stanley, alleging that this investment bank and brokerage firm committed widespread discrimination against women with respect to pay, promotion, and other terms, conditions, and privileges of employment.¹⁹¹ In short, not surprisingly, the EEOC still has enough work to keep it busy.

II. WHAT THE EEOC DOES

Today, the EEOC carries out its enforcement responsibilities in a myriad of ways. The most important EEOC functions are described below.

A. EEOC's Administrative Processes

A core EEOC role is its non-litigation enforcement — its charge-processing duties. This administrative process puts the EEOC on notice that discrimination has occurred (or is occurring), giving it a chance to remedy the discrimination without resorting to litigation. This administrative process thus at once enables aggrieved individuals to seek redress for harms suffered, allows employers to resolve workplace disputes earlier and through more informal means, and helps to reduce the federal court dockets.

1. Charge Filing and Investigation

The administrative process in a Title VII action begins when the EEOC receives a charge of discrimination¹⁹² alleging that an individual or class was discriminated against because of race, national origin, color,

189. *Id.*

190. *Id.*

191. EEOC, EEOC and Morgan Stanley Announce Settlement of Sex Discrimination Lawsuit, at <http://www.eeoc.gov/press/7-12-04.html> (last visited Apr. 15, 2005).

192. See 29 C.F.R. § 1601.6 (2004). Charges generally must be filed within 180 days of the alleged Title VII violation. *Id.* § 1601.13(a)(1). This deadline is extended to 300 days for charges arising in jurisdictions with state or local laws outlawing the practice, and a “fair employment practices” agency with subject matter jurisdiction over the charge. *Id.* §§ 1601.13(a)(3), (a)(4)(ii)(A); see also 42 U.S.C. § 2000e-5(e)(1) (2000).

religion, or sex (or in retaliation for engaging in protected activity).¹⁹³ As the Supreme Court noted in *EEOC v. Shell Oil Co.*,¹⁹⁴ the filing of a charge facilitates the EEOC's ability to vindicate the public's interest in eradicating employment discrimination by "plac[ing] the EEOC on notice that someone . . . believes that an employer has violated . . . [T]itle [VII]."¹⁹⁵ A charge can be filed by any person "claiming to be aggrieved" or by another person, agency, or organization, on behalf of an aggrieved person.¹⁹⁶ In addition, any member of the Commission may file a charge with the Commission,¹⁹⁷ and "[a]ny person or organization may request the issuance of a Commissioner charge for an inquiry into individual or systematic discrimination."¹⁹⁸

Charges can be filed at EEOC field offices or by mail.¹⁹⁹ Although the EEOC typically uses a special form for charges, the no specific form is required. The only mandatory requirements for a charge are that it "shall be in writing and signed and . . . verified"²⁰⁰ and contain "a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of."²⁰¹ Beyond that, regulations merely suggest what a charge *should* contain — including, among other things, the name, address and telephone number of the employer and the person making the charge, a "clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful em-

193. 42 U.S.C. §§ 2000e-2, 2000e-3 (2000).

194. 466 U.S. 54 (1984).

195. *Id.* at 68. Given the critical importance of charges, the EEOC has taken the position that an employee may never waive his or her right to file a charge with the EEOC (e.g., as part of a mediation or arbitration, non-compete, severance or other type of employment agreement). EEOC, NOTICE NO. 915.002, ENFORCEMENT GUIDANCE ON NON-WAIVABLE EMPLOYEE RIGHTS UNDER EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) ENFORCED STATUTES (Apr. 10, 1997), available at <http://www.eeoc.gov/policy/docs/waiver.html> (last visited Apr. 15, 2005).

196. 29 C.F.R. § 1601.7 (2004). A charge can only be withdrawn by the claimant, with the consent of the Commission. *Id.* § 1601.10.

197. *Id.* § 1601.11 (a).

198. *Id.* § 1601.6(a). Commissioner Charges

are integral to EEOC's law enforcement mission and are an important complement to the enforcement of the law through individually initiated charges. They recognize that some types and incidents of illegal discrimination will not be the subject of individual charges but, nonetheless, constitute serious violations of the laws that should be the subject of enforcement action.

EEOC, PRIORITY CHARGE HANDLING PROCEDURES § III.B (Bureau of Nat'l Affairs 2003). Commissioner charges may involve systemic or individualized discrimination. They may also be either broad or narrow in scope, but will typically involve priority or other novel issues. *Id.* § III.C.1.

199. 29 C.F.R. § 1601.8 (2004).

200. *Id.* §§ 1601.11(a), 1601.9. "Verified" means sworn to or affirmed before a notary public or a designated EEOC representative or other authorized person. *See id.* § 1601.3.

201. *Id.* § 1601.12(b).

ployment practices,” and the approximate number of employer’s employees (information which allows the Commission to determine if the employer is covered by the statutes).²⁰² Charges “may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify the allegations”²⁰³ Any amendments — and any new allegations of unlawful employment practices related to or growing out of the subject of the original charge — will “re-late back to the date the charge was first received.”²⁰⁴ Within ten days of receiving a charge, the EEOC must serve a copy of it on the employer, unless doing so “would impede the law enforcement functions of the Commission.”²⁰⁵

The EEOC triages charges using guidelines established in its 1995 “Priority Charge Handling Procedures” (“PCHP”).²⁰⁶ Under the PCHP, charges are sorted into “A,” “B,” and “C” categories.²⁰⁷ When an initial review of a charge reveals that it is “more likely than not” that discrimination has occurred, the charge is classified as Category A.²⁰⁸ These Category A charges receive priority treatment and are investigated promptly.²⁰⁹ If, after the initial charge review, it appears that the EEOC will need additional evidence to determine whether the employer has violated Title VII, the charge is classified as Category B.²¹⁰ Category B charges are investigated if the EEOC’s resources permit.²¹¹ Finally, if a charge reflects an obviously meritless case, or one outside the EEOC’s jurisdiction, it is classified as Category C.²¹² These charges are not investigated and are promptly dismissed.²¹³

Trained investigators in EEOC field offices investigate Category A and Category B charges.²¹⁴ The nature of each investigation depends on the particulars of the charge. In general, an appropriate investigation is one that gathers enough information to enable the EEOC field office to determine whether “a statute has been violated or that . . . further inves-

202. *Id.* § 1601.12 (a).

203. *Id.* § 1601.12(b).

204. *Id.* This “relation back” provision is critical when the timeliness of a charge filing is at issue.

205. *Id.* § 1601.14(a).

206. See PRIORITY CHARGE HANDLING PROCEDURES, *supra* note 198.

207. *Id.* at Introduction.

208. *Id.*

209. *Id.* § II.A.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* § II.C..

tigation is not likely to result in a finding that there is reasonable cause to believe that a statute has been violated.”²¹⁵ Some investigations are completed as soon as an investigator reads a charge. In other cases, an investigator may request position statements or evidence from the alleged victim and employer and from the person or entity who made the charge, if it was not the victim.²¹⁶ On occasion, investigators hold fact-finding conferences with the parties.²¹⁷ The EEOC also has the authority to issue subpoenas requiring, as part of its charge investigations, “(1) [t]he attendance and testimony of witnesses, (2) [t]he production of evidence including but not limited to books, records, correspondence, or documents in the possession or under the control of the person subpoenaed and (3) [a]ccess to evidence for the purposes of examination and the right to copy.”²¹⁸

2. Charge Resolution and Conciliation

After the EEOC completes its investigation of a charge, it issues a “letter of determination” to the parties.²¹⁹ If the Commission cannot determine whether Title VII has been violated, the letter simply states that, based on the EEOC’s investigation, the Commission “is unable to conclude that the information obtained establishes violations” of Title VII.²²⁰ The Commission also gives the claimant a “notice of right to sue,” indicating that he or she has ninety days to file suit in federal district court.²²¹

215. *Id.* § II.D.1. As the PCHP note, field offices are charged with developing a flexible process under which investigators will seek only that amount of evidence needed to make an informed decision as to whether it is more likely than not that a violation of the statute may be found. This will avoid misapplying resources by over-investigating charges that could be resolved with less information, or by pursuing cases that are facially non-meritorious. At the same time, it will have the beneficial effect of shifting the agency’s limited resources to cases that are the most likely to fall within the enforcement plans and otherwise result in findings of violations.

Id.

216. 29 C.F.R. § 1601.15(a) (2004).

217. *Id.* § 1601.15(c). Fact finding conferences take place prior to “a determination on a charge of discrimination.” *Id.*

218. *Id.* § 1601.16(a).

219. *Id.* § 1601.19(a).

220. PRIORITY CHARGE HANDLING PROCEDURES, *supra* note 198, § II.F.1. This letter also states, however, that its “no cause” finding “does not certify that the respondent is in compliance” with Title VII. *Id.*

221. 29 C.F.R. § 1601.19(b) (2004). Any person claiming to be aggrieved can request that the EEOC issue a “notice of right to sue” 180 days after the underlying charge was filed (or earlier if the EEOC determines that it will not be able to complete its administrative processing of the charge

If, on the other hand, the EEOC does find “reasonable cause” to believe that an unlawful employment practice under Title VII has occurred, its letter of determination will state this.²²² The EEOC will then try to obtain affirmative relief and eliminate the unlawful employment practice, through informal methods, including conciliation.²²³ The Commission and the parties will sign a conciliation agreement if successful.²²⁴ The EEOC must then obtain proof that the employer is complying with Title VII in accordance with the agreement before closing the charge file.²²⁵ If, by contrast, conciliation fails, the EEOC may decide to litigate the matter on its own.²²⁶ If the Commission decides not to do so, a “notice of right to sue” is issued to the person claiming to be aggrieved.²²⁷ The steps the Commission takes when it has decided to pursue litigation are discussed, *infra* at II.B.3.

3. Mediation

At any point during the EEOC’s administrative process, the parties may voluntarily agree to have the EEOC attempt to mediate the charge. Indeed, the

EEOC offers mediation soon after the charge has been filed and prior to further investigation. EEOC evaluates each charge to see if it is appropriate for mediation. Charges which EEOC has determined to be without merit are not eligible for mediation. In most instances, charges which require additional investigation on the merits are eligible. The parties may request mediation, however, at any stage of the administrative process.²²⁸

within 180 days). *Id.* §§ 1601.28(a)(1)-(a)(2).

222. *Id.* § 1501.21(a).

223. *Id.* § 1601.24(a).

224. *Id.*

225. *Id.* § 1601.24(c).

226. *Id.* § 1601.27.

227. *Id.* § 1601.28(b).

228. History of the EEOC Mediation Program, *supra* note 183 and accompanying text.

B. EEOC Litigation

The EEOC as “Master of Its Own Case”

The EEOC is also committed to vigorous enforcement of the statutes over which it has jurisdiction, and “will not hesitate to seek appropriate legal remedies through litigation when warranted.”²²⁹ The EEOC’s general approach to litigation, not surprisingly, is a direct reflection of its unique enforcement mission. While it can and often does seek relief on behalf of specific victims of discrimination, the EEOC “does not function simply as a vehicle for conducting litigation on behalf of private parties”²³⁰ In other words, the agency “does not [simply] stand in the employee’s shoes.”²³¹ As the Supreme Court first explained in *General Telephone Co. v. EEOC*:

the EEOC is not merely a proxy for the victims of discrimination and [its] enforcement suits should not be considered representative actions Although the EEOC can secure specific relief . . . on behalf of discrimination victims, the agency is guided by “the overriding public interest in equal employment opportunity . . . asserted through direct Federal enforcement.” When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination.²³²

The Supreme Court recently reaffirmed these principles in *EEOC v. Waffle House, Inc.*²³³ Waffle House had required prospective employees to sign an application agreeing to submit employment disputes to binding arbitration.²³⁴ Charging party, Eric Baker, signed the agreement and went to work for Waffle House as a grill operator.²³⁵ When he suffered a seizure at work, Waffle House fired him.²³⁶ Baker then filed a charge with the EEOC alleging that his discharge constituted a violation of the ADA.²³⁷ The EEOC subsequently filed suit on Baker’s behalf.²³⁸ Waffle

229. EEOC, Alternative Dispute Resolution Policy Statement, at <http://www.eeoc.gov/policy/docs/adrstatement.html> (July 17, 1995).

230. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977).

231. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 297 (2002).

232. 446 U.S. 318, 326 (1980) (quoting 118 Cong. Rec. 4941 (1972)).

233. 534 U.S. 279 (2002).

234. *Id.* at 282-83.

235. *Id.*

236. *Id.* at 283.

237. *Id.*; 42 U.S.C. §§ 12101-12213 (2000).

House tried to block the suit,²³⁹ arguing that because Baker had agreed to submit to binding arbitration when he was hired, the EEOC could not seek relief on Baker's behalf.²⁴⁰

The Supreme Court granted certiorari on the question of whether an agreement between an employer and an employee to arbitrate employment-related disputes could preclude the EEOC from pursuing victim-specific judicial relief (such as backpay, reinstatement, and other damages) on the employee's behalf.²⁴¹ The Supreme Court held that it could not. The Court explained that under Title VII (and the ADA), once a charging party files a charge with the EEOC, then the "EEOC is in command of the process."²⁴² The EEOC essentially has a right of first refusal over a charging party's claim, and the charging party cannot file suit on his or her own behalf until he or she has requested and received a notice of right to sue from the EEOC.²⁴³ If the EEOC decides to litigate the case itself, however, the charging party "has no independent cause of action," although he or she may intervene in the EEOC's suit.²⁴⁴ In addition, the EEOC could decide to litigate cases on behalf of a charging party even after the charging party "has disavowed any desire to seek relief."²⁴⁵ Thus, the Supreme Court stated, Title VII

clearly makes the EEOC the master of its own case and confers on the agency the authority to evaluate the strength of the public interest at stake [I]t is the public agency's province . . . to determine whether public resources should be committed to the recovery of victim-specific relief. And if the agency makes that determination, the statutory text unambiguously authorizes it to proceed in a judicial forum.²⁴⁶

For these reasons, and because the EEOC was not a party to the arbitration agreement at issue, the Supreme Court held that the EEOC could not be required to relinquish its statutory authority to file a civil suit seeking victim-specific relief — notwithstanding the fact that the victim had waived the right to pursue relief in a judicial forum on his or her own behalf.²⁴⁷ "[W]henever the EEOC chooses from among the

238. *Waffle House*, 534 U.S. at 283.

239. *Id.* at 282-85.

240. *Id.* at 284.

241. *Id.* at 282.

242. *Id.* at 291.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* at 291-92.

247. *Id.* at 294.

many charges filed each year to bring an enforcement action in a particular case, the agency may be seeking to vindicate a public interest, not simply provide make-whole relief for the employee, even when it pursues entirely victim-specific relief.”²⁴⁸ Accordingly, the EEOC should and does have “the authority to pursue victim-specific relief regardless of the forum that the employer and employee have chosen to resolve their disputes.”²⁴⁹ The Supreme Court concluded that “[t]o hold otherwise would undermine the detailed enforcement scheme created by Congress simply to give greater effect to an agreement between private parties that does not even contemplate the EEOC’s statutory function.”²⁵⁰

C. The Office of General Counsel

The EEOC implements its statutory litigation function via the General Counsel, who is appointed by the President and confirmed by the Senate for a four-year term.²⁵¹ According to the EEOC, the mission of its Office of General Counsel “is to conduct litigation on behalf of the agency to obtain relief for victims of employment discrimination and to ensure compliance with statutes the EEOC is charged with enforcing.”²⁵² The Office of General Counsel contains legal staff who work at EEOC headquarters in Washington, D.C. (lawyers who are organized into specialized subcomponents, such as Systemic Litigation Services and Appellate Services), and legal units in 23 different EEOC District Offices (each of which is supervised by a Regional Attorney who oversees trial attorneys and paralegals).²⁵³

A recent EEOC report describes the operations and purpose of the Office of General Counsel this way:

We bring lawsuits on behalf of multiple victims of discrimination without having to meet class certification requirements applicable to private litigants. Through consent decrees we institute broad-based eq-

248. *Id.* at 296.

249. *Id.* at 295.

250. *Id.* at 296. The Supreme Court did state that because the only issue before it was “whether the fact that Baker has signed a mandatory arbitration agreement limits the remedies available to the EEOC,” there “is an open question whether a settlement or arbitration judgment would affect the validity of the EEOC’s claim or the character of relief the EEOC may seek.” *Id.* at 297.

251. See 42 U.S.C. § 2000e-4(b)(1) (2000).

252. EEOC, Office of General Counsel Fiscal Year 2003 Annual Report, § I.A, at <http://www.eeoc.gov/litigation/03annrpt/index.html> (last visited Apr. 14, 2005).

253. *Id.* §§ I.B., I.C.

uitable remedies calculated to prevent future discrimination that private litigants have less incentive to pursue. We bring cases that have the potential to develop the law in the public interest, and through our amicus curiae program offer our views and expertise to courts deciding issues of public importance in private litigation. We publicize the results of our litigation so that others can learn of their rights and obligations under the law and the potential consequences of noncompliance. We maintain a litigation presence in every region of the country. We seek to remove barriers to employees' access to redress for discrimination, such as predispute, compulsory arbitration agreements that deny discrimination victims the process afforded in the federal courts. We file suit on behalf of individuals who otherwise would be compelled to bring their claims to an arbitrator rather than a court. We obtain justice for individuals who could not afford representation by the private bar as the cost of litigation continues to rise.²⁵⁴

D. The EEOC's Litigation Priorities

In pursuit of its stated goals, the EEOC files suit each year in only a rather small percentage of the charges it receives. Over the past decade, for example, the EEOC filed an average of 335 suits on the merits per year,²⁵⁵ out of an average of 81,000 charges received.²⁵⁶ How, then, does the EEOC select these few cases?

The EEOC's National Enforcement Plan answers this question. It identifies the following three priority areas for enforcement:

- Cases involving violations of established anti-discrimination principles, whether on an individual or systemic basis . . . which by their nature could have a potential significant impact beyond the parties to a particular dispute.²⁵⁷

254. *Id.* § II.A.

255. EEOC, Litigation Statistics: FY 1992 Through 2004, at <http://www.eeoc.gov/stats/litigation.html> (last visited Apr. 14, 2005). On average, 233 of these suits involved a Title VII claim. *Id.*

256. Charge Statistics FY 1992 through FY 2004, *supra* note 180.

257. National Enforcement Plan, *supra* note 166, § III.A. These include (1) "[c]ases involving repeated and/or egregious discrimination, including harassment, or facially discriminatory policies;" and (2) "[c]hallenges to broad-based employment practices affecting many employees or applicants for employment, such as cases alleging patterns of discrimination in hiring, lay-offs, and job mobility, including 'glass-ceiling' cases, and/or pay, including claims under the Equal Pay Act." *Id.*

- Cases having the potential of promoting the development of law supporting the anti-discrimination purposes of the statutes enforced by the Commission²⁵⁸ and
- Cases involving the integrity or effectiveness of the Commission's enforcement process, particularly the investigation and conciliation of charges.²⁵⁹

In recent years, the EEOC's litigation program has continued to emphasize high-impact litigation. It routinely brings cases where "the defendant implemented policies or practices that systematically and intentionally discriminated against a large group of victims, numbering into the hundreds or even thousands."²⁶⁰ At the same time, the EEOC carefully selects individual claims that will help it ensure "justice prevails in all areas of the country," "strengthen ties to local communities," and garner "prospective, equitable relief geared towards preventing future discrimination."²⁶¹ The EEOC also targets cases where employers have threatened "unfettered access to civil rights enforcement mechanisms, including individuals' rights to report discriminatory practices to their employers, file charges of discrimination, and participation in Commission proceedings"²⁶²

In addition to filing its own suits against discriminating employers in district courts (and pursuing all necessary and appropriate related appeals), the EEOC also has a robust *amicus curiae* practice. The Appellate Services branch of the Office of General Counsel files numerous *amicus*

258. *Id.* § III.B. These include (1) "[c]laims presenting unresolved issues of statutory interpretation under one or more of the statutes enforced by the Commission;" and (2) "[c]ases involving legal issues where there is a conflict in the federal circuit courts on a Plan priority or in which the Commission is seeking Supreme Court resolution of such issue." *Id.*

259. *Id.* These include (1) "[c]ases involving allegations of retaliation against persons for participating in Commission proceedings or opposing unlawful employment discrimination, particularly cases where the scope of the statutory protection against retaliation is an issue;" (2) "[c]ases presenting challenges to Commission policy declarations, such as guidelines, regulations or policy guidance;" (3) "[c]ases protecting Commission access to information, including subpoena enforcement proceedings and proceedings to preserve or prevent the loss or destruction of evidence;" (4) "[c]ases involving allegations of a material breach of an agreement to which the Commission was a party settling an earlier proceeding" and (5) "[c]ases involving alleged violations of the Commission's recordkeeping and reporting requirements where there is reason to believe that there may be another violation of statutes enforced by the Commission." *Id.*

260. EEOC, Office of General Counsel Fiscal Year 2003 Annual Report, Summary of Fiscal Year 2003 Accomplishments, § II.C, at <http://www.eeoc.gov/litigation/03annrpt/index.html#IIC>.

261. *Id.* § II.E.

262. *Id.* § II.D.

briefs in the federal courts of appeals in cases brought initially by private litigants. The purpose of this practice, of course, is to help shape the judiciary's view of relevant employment discrimination statutes.²⁶³

E. EEOC's Other Functions

The EEOC does much more than simply process charges and pursue litigation. For example, the EEOC's Office of Legal Counsel (and the Commission in general) has formulated, and continues to release, a plethora of regulations and policy guidance, which interpret and enforce Title VII (and other federal employment laws).²⁶⁴ The EEOC makes representatives available at no cost to perform training and outreach to educate employees and employers about their rights and responsibilities under federal employment discrimination law.²⁶⁵ The EEOC also publishes numerous studies and reports analyzing charge-filing and other employment trends.²⁶⁶

III. WHY THE EEOC (STILL) MATTERS

Four decades after the enactment of Title VII and the creation of the EEOC, the question arises — does the agency still matter? As discussed below, we believe that despite all of the EEOC's shortcomings, the agency continues to play an irreplaceable role in the battle to eradicate

263. *See id.* § II.F.

The Office of General Counsel's litigation program is an important tool for shaping the growth of civil rights law. Whether through litigating enforcement suits or participating as *amicus curiae* in private litigation, we urge courts at all levels to accept our views on novel and complex legal issues of public importance.

Id.

264. EEOC, EEOC Regulations, at <http://www.eeoc.gov/policy/regs/index.html> (last visited Apr. 12, 2005); EEOC, Enforcement Guidances and Related Documents, at <http://www.eeoc.gov/policy/guidance.html> (last visited Apr. 12, 2005). Most notably, the EEOC is drafting a "New Compliance Manual" which, when completed, will replace EEOC's existing substantive guidelines. Some chapters from the New Compliance Manual have already been issued, including Employee Benefits, Retaliation, Compensation Discrimination, National Origin Discrimination. *See* EEOC, New Compliance Manual, at <http://www.eeoc.gov/policy/compliance.html> (last visited Apr. 12, 2005).

265. The EEOC performs both free and fee-based training and outreach. *See* EEOC, Outreach, Education, and Technical Assistance, at <http://www.eeoc.gov/outreach/index.html> (last visited Apr. 12, 2005); *see also* EEOC, No Cost Outreach Programs, at <http://www.eeoc.gov/outreach/nocost.html> (last visited Apr. 12, 2005).

266. *See, e.g.*, EEOC, Special Reports, at <http://www.eeoc.gov/stats/reports/index.html> (offering EEOC reports addressing a variety of topics, such as "Diversity in the Media" and "Women of Color: Their Employment in the Private Sector") (last visited Apr. 12, 2005).

employment discrimination. We briefly address below what we believe are some of the EEOC's most significant limitations and deficiencies. We then give the four reasons why, despite these failings, the EEOC still matters.

As our cursory review of the agency's history reveals, the agency's perennial struggle has been to determine how to most efficiently allocate its scarce resources given, the backbreaking number of charges it receives each year and its annual budget shortfalls. The EEOC has labored under a "hiring freeze" for the last three years.²⁶⁷ This has created numerous attorney vacancies in headquarters and field offices,²⁶⁸ which has hindered the agency's ability to investigate and bring cases. The agency's effectiveness has also been undermined by a lack of any kind of systematic training for its employees, which can be attributed, in part, to the agency's budget woes.²⁶⁹

In our view, the agency should continue to use innovative methods to deal with this chronic problem (e.g., the highly successful mediation program and Priority Charge Handling Procedures) but must also come up with new approaches for combating the constant fiscal crunch. For instance, given the agency's staffing and funding shortages, the EEOC ought to devote more of its resources to fighting systemic discrimination, even if doing so undermines the EEOC's ability to take on cases of individual discrimination. We believe that the EEOC should focus on systemic discrimination cases because the agency has the expertise and the resources to shoulder the burden of bringing these cases, which are complicated, expensive, and time consuming, and because these cases have the potential for the greatest impact on the public. We also believe that the agency should be more consistent in choosing high-quality meritorious cases to litigate. Although the agency has promulgated parameters (e.g., the National Enforcement Plan) for selecting cases to litigate, it is unclear whether the EEOC — with its many moving parts and myriad of field offices — is still following these guidelines. This may be one

267. Jeffrey A. Smith, EEOC, A Message From the Chief Financial Officer, at http://www.eeoc.gov/abouteeoc/plan/par/2004/cfo_message.html (Nov. 15, 2004).

268. General Counsel Fiscal Year 2003 Annual Report, *supra* note 260, § III.E.1 (stating that between 2001 and 2003, the Office of General Counsel's field staff decreased from 383 to 332 and the number of attorneys decreased from 248 to 210).

269. National Academy of Public Administration, Panel Report prepared for the EEOC, Equal Employment Opportunity Commission: Organizing for the Future, Staff Management and Realignment, at http://www.napawash.org/Pubs/EEOC_REPORT_New.htm (last visited Apr. 17, 2005) ("EEOC's training budget has varied from substantial (\$3.5 million for FY 1999 and \$2.7 million in FY 2001) to modest (\$745,347 in FY 2000 and \$1.3 million for FY 2002). Such variations make it difficult to develop and sustain an effective program.").

reason why the merits of the EEOC's cases seem to vary widely. Adhering more closely to the pre-defined critical litigation criteria adopted in the NEP should help the EEOC target its litigation efforts more effectively, whatever the fiscal climate.

While the agency, at times, operates at a frustratingly slow pace and could bring more systemic discrimination cases, we think that on balance it fulfills its statutory mandate remarkably well. Indeed, the EEOC today may be more necessary and relevant than ever before. In our view, there are four main reasons why the EEOC, flawed as it is, is an essential mechanism for the enforcement of Title VII and other employment discrimination statutes.

First, it is clear that employment discrimination still thrives in all sectors of the American workforce. Each year an overwhelming number of individuals in the private sector and those working for state and local governments — an average of 81,000 each year over the past decade — file charges of discrimination.²⁷⁰ The Commission continues to receive tens of thousands of charges of race and sex discrimination, some of which involve egregious acts of harassment, disparate treatment, and retaliation.²⁷¹ Although not all of these charges are meritorious, the sheer number of them provides evidence that employment discrimination remains a stubborn and intractable problem, even forty years after Title VII's enactment. The continued existence of discrimination in the workplace underscores the general need for a federal agency whose mission is to combat it.

Second, the Commission's administrative process — including charge intake, investigation, mediation, and conciliation — plays a critical role in the battle to eradicate discrimination. Significantly, the EEOC is the *only* federal agency responsible for receiving and processing charges of unlawful employment discrimination — and the only agency responsible for investigating these complaints and conciliating them.²⁷²

270. Charge Statistics FY 1992 Through FY 2004, *supra* note 180.

271. See, e.g., *EEOC v. Pemco Aeroplex, Inc.*, 383 F.3d 1280, 1283 (11th Cir. 2004) (alleging that two hundred African American workers were subjected in the workplace to hangman's nooses, racially inflammatory graffiti, and racial slurs); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797-98 (8th Cir. 2004) (Title VII hostile work environment case in which witnesses reported black dolls hung from nooses and invitations to Ku Klux Klan hunting trips where black employees were encouraged to come and be "hunted").

272. See, e.g., *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977).

[U]nder the procedural structure created by the 1972 amendments, the EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties; it is a federal administrative agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion. *Id.*

Accordingly, the Commission performs a critical public service by keeping track of the number of charges filed each year and by categorizing and analyzing them. This provides important information about the nature of discriminatory practices that persist — or are believed to persist — in the workplace. In addition, while the agency's charge investigatory process continues to take longer than anyone would like, the investigation itself plays a critical role, by allowing the agency to use its resources and trained investigators to make the initial attempt to uncover discrimination. Investigations also routinely uncover other forms and incidents of discrimination that may have gone unreported (especially in harassment cases).²⁷³ Even when the EEOC cannot conclude that discrimination has occurred and issues a finding of "no cause," the agency has arguably performed a service by allowing disgruntled individuals to tell their story and to find out whether the EEOC believes their cases have merit. The Commission also facilitates the early resolution of charges — even before an investigation begins — by offering a voluntary mediation program.

When the EEOC does find "cause," the agency provides the critical service of trying to conciliate the charge. For the individuals whose charges are resolved through conciliation, the Commission's efforts spare the litigants the time and expense involved in finding and hiring a private attorney. Conciliation also serves the interests of employers by resolving disputes before costly litigation begins and before any back pay awards accrue. Finally, conciliation — like mediation — assists the courts by resolving disputes before a civil complaint is filed. Because employment discrimination claims comprise almost 10% of the federal docket, this is no minor accomplishment.²⁷⁴ The Commission's conciliation and mediation efforts thus fulfill Congress' intention that employment discrimination claims be resolved, whenever possible, through informal means.²⁷⁵

273. General Counsel Fiscal Year 2003 Annual Report, *supra* note 260, § II; *see also* EEOC v. Dial Corp., 156 F. Supp. 2d 926, 930 (N.D. Ill. 2001) (alleging sexual harassment lawsuit on behalf of a class of women originated with a single charge alleging co-worker sexual harassment); EEOC v. Robert L. Reeves & Assoc., No. 00-10515, 2002 WL 1634013, at *1 (C.D. Cal. Feb 19, 2002) (alleging sexual harassment and pregnancy discrimination on behalf of a class of women which originated as a single charge of pregnancy discrimination), *rev'd*, Nos. 02-55928 & 02-56179, 2003 WL 21480317 (9th Cir. 2003). "Any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable." Gen. Tel. Co. v. EEOC, 446 U.S. 318, 331 (1980).

274. Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. OF EMPIRICAL LEGAL STUD. 429, 432 (2004). Seventy percent of the cases are brought under Title VII. *Id.* at 433.

275. 42 U.S.C. § 2000e-5(b) (2000) (stating that if the Commission finds "reasonable cause to

The third reason why the EEOC remains highly relevant today is that, unlike private litigants, the Commission litigates in the public interest. As the Supreme Court noted, “the EEOC is not merely a proxy for the victims of discrimination.”²⁷⁶ Instead, “[w]hen the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination.”²⁷⁷ Accordingly, when making litigation decisions, the Commission is guided by what is in the best interest of the public, which is not necessarily synonymous with what is in the best interest of particular individuals. What this means in a tangible sense is that Commission attorneys do not have to worry about attorneys’ fees or costs when deciding whether to pursue litigation or to settle a case. EEOC attorneys can also bring suit without having to worry about meeting the requirements for class certification that govern private litigations.²⁷⁸

Also, in the public interest, the Commission uses consent decrees to institute broad equitable remedies intended to prevent future discrimination against other employees, a remedy that private litigants have less incentive to pursue.²⁷⁹ In addition, by publicizing its litigation results, the Commission educates both employers and employees about the law and the EEOC’s role in enforcing it.²⁸⁰ Further, as the Supreme Court recognized in *Waffle House*, the EEOC is empowered to bring lawsuits to vindicate the public interest, regardless of whether parties have agreed to arbitrate their claims.²⁸¹ This power of protection over the public interest is underscored by the Commission’s position that it may pursue litigation even when an individual has disavowed any desire for relief.²⁸²

The EEOC represents the public interest mainly by bringing individual and systemic claims of discrimination. Although individuals can attempt to find an attorney to take their case, for many — especially those who have been terminated or denied employment — the costs associated with hiring an attorney and pursuing a lawsuit are often prohibitively expensive. This is especially true when, as frequently occurs in

believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practices by informal methods of conference, conciliation, and persuasion”).

276. *General Telephone*, 446 U.S. at 326.

277. *Id.*

278. General Counsel Fiscal Year 2003 Annual Report, *supra* note 260, § II.

279. *Id.* at Statement from the General Counsel.

280. *Id.* § II.A.

281. See *EEOC v. Waffle House*, 534 U.S. 279, 291-92 (2002) (noting that the EEOC is “master of its own case” and has “the authority to evaluate the strength of the public interest at stake” and to bring suit in a judicial forum).

282. See *id.* at 250.

ADA cases, the case requires costly expert testimony. In addition to being discouraged by the cost of litigation, many individuals — and private attorneys — may forego litigation because private litigants face such dismal odds in court.²⁸³ Unlike private litigants, the EEOC can more easily absorb the cost and risk of pursuing novel legal arguments.

The importance of the EEOC in vindicating the public interest is even more pronounced when bringing systemic discrimination cases. The EEOC is the only federal agency that gathers employment information (through EEO-1 reports). Consequently, only the EEOC has a birds-eye view of the workforce that enables the agency to identify and target employers that engage in systemic discrimination. Just as importantly, the EEOC has the expertise and resources to bring systemic discrimination cases, which are often expensive and complex.²⁸⁴

Finally, the EEOC remains vital because it is “a veritable repository of institutional knowledge and expertise”²⁸⁵ of employment discrimination. The EEOC shares its expertise through its significant outreach efforts. It studies employment discrimination trends and issues important policy guidance for interpreting federal employment discrimination laws. The Supreme Court itself has stated that the Commission’s sexual harassment guidelines interpreting Title VII “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”²⁸⁶ Through its appellate amicus program, the EEOC regularly offers its experienced views to the federal courts by filing briefs in novel and noteworthy cases.²⁸⁷ In all these ways, the EEOC acts and serves as a consistent and informed voice to which employers, employees, interest groups, and the courts can look for illumination.

283. See Cleremont & Schwab, *supra* note 274, at 441, 443-45, 448-51. Data shows that employment discrimination plaintiffs face long odds in court, at the pretrial stage, during or after trial, and on appeal. From 1998-2001, Title VII plaintiffs are shown to have prevailed only about 2% of the time before trial, roughly 36% of the time during or after a jury trial, and only about 25% of the time during or after a bench trial. *Id.*

284. See, e.g., Maurice E. R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 YALE L. & POL’Y REV. 219, 220 (1995) (“While sometimes these [systemic discrimination] practices are addressed by class action lawsuits, individuals do not usually have the information or resources to identify these practices and litigate against them.”).

285. *Dinkins v. Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1237, 1244 (M.D. Ala. 2001).

286. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986).

287. *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 349 (6th Cir. 2005) (agreeing with the Commission’s argument, as amicus curiae, that employer may be liable for supervisor harassment if a supervisor witnesses harassment but fails to report it, as required by company policy); see also *Emory v. Astrazeneca Pharm.*, 401 F.3d 174, 180 (3d Cir. 2005) (noting “that the EEOC has filed a 31-page amicus curiae brief in this case imploring us to recognize that conscientious application of the law demands reversal of the District Court’s conclusion” and concurring with the Commission’s position).

We therefore conclude that the EEOC still fulfills a singular, if imperfect, function in the enforcement of Title VII and the eradication of employment discrimination. Forty years after its birthday, the EEOC (still) matters.