U.S. Commission on Civil Rights

Overcoming the Past, Focusing on the Future

An Assessment of the U.S. Equal Employment Opportunity Commission's Enforcement Efforts

September 2000

U.S. Commission on Civil Rights

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- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices.

- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.

- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.

- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin.

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Overcoming the Past, Focusing on the Future

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Letter of Transmittal

The President
The President of the Senate
The Speaker of the House of Representatives

Sirs:

Pursuant to Public Law 103-419, the United States Commission on Civil Rights (Commission) transmits this report, *Overcoming the Past, Focusing on the Future: An Assessment of the U.S. Equal Employment Opportunity Commission's Enforcement Efforts.* With this report, the Commission examines the efforts of the U.S. Equal Employment Opportunity Commission (EEOC) in enforcing Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Equal Pay Act. In particular, the Commission's report focuses on the extent of EEOC's success in fulfilling its mandate as the lead agency charged with eradicating employment discrimination.

Because employment discrimination appears to remain widespread, the Commission has taken a close look at the operational objectives of EEOC and offers a series of recommendations designed to move the Agency closer to achieving its mission. EEOC has had a mixed record in its 35-year history and is trying to overcome the inadequacies that have hampered its effectiveness. In recent years, the Agency has implemented significant procedural initiatives, streamlined charge processing, and improved its leadership role in directing the evolution of civil rights laws. These accomplishments are to be commended. The road to achieving fairness in employment, however, is a long one, and the goal of eradicating discrimination has proven elusive.

If employment discrimination is to be eliminated, unified efforts of federal, state, and local governments, as well as private organizations, are needed. Congress and the President must make a commitment to providing EEOC with the tools it needs to be a strong and effective agency, and EEOC must recommit itself to carrying out its intended mission by putting the elimination of discrimination at the forefront of its goals.

Respectfully,
For the Commissioners,

Mary Frances Berry
Chairperson

Executive Summary

Overview

The U.S. Equal Employment Opportunity Commission (EEOC) is the federal agency charged with enforcing antidiscrimination in employment statutes and eradicating discrimination in the work force in both public and private sectors. EEOC has a past reputation to overcome, including a large backlog of charges, slow processing time, and poor customer service. This report examines the enforcement efforts of EEOC with respect to Title VII of the Civil Right Act of 1964, the Age Discrimination in Employment Act (ADEA), and the Equal Pay Act (EPA) in the private sector. The areas of focus include the Agency's organization and structure, policy development and dissemination, charge handling procedures and related enforcement activities, interaction with state, local, and tribal governments, and technical assistance and outreach.

The main objective of this report is to evaluate the Agency's progress between 1995 and 2000 given its recent procedural initiatives, such as the Priority Charge Handling Procedures and the Comprehensive Enforcement Program. This report examines whether the initiatives have helped the Agency reduce its backlog and process charges in a more efficient and acceptable manner and improve customer service. Another objective is to present a global evaluation of EEOC enforcement reflecting not only the views of EEOC staff, but also those of charging parties and respondents to determine strategies that are successful and areas in which improvement is needed.

EEOC's Role in Eliminating Discrimination

Since its inception, EEOC's responsibilities have changed and expanded significantly. As its responsibilities increased, the workload of the Agency also increased, and by the early 1990s EEOC had a backlog of more than 100,000 charges. Many obstacles, such as inefficient policies, the absence of leadership, and resources incongruent with responsibilities have prevented the Agency from accomplishing its mission in the past. As a result, EEOC faced an enormous amount of criticism. After an ambitious campaign to revitalize the Agency in 1995, the backlog of cases declined significantly and public outreach, education, and technical assistance activities moved to the forefront.

Today, EEOC has come closer to achieving many of its core performance measures than ever. Its inventory has been reduced to approximately 40,000 open charges, and the average charge resolution time and the age of pending inventory have both declined. However, Agency funding has not increased commensurate with responsibilities, and resources have fluctuated making it difficult for EEOC to continue to improve its operations consistently. Some of the major findings and recommendations of the Commission's study follow:

Policy Development

Pursuant to statute, EEOC has the authority to issue procedural regulations through a process of formal posting, notice, and public comment. Regulations under Title VII, while they have persuasive authority in court, are not necessarily binding. Regulations issued under the ADEA and the Americans with Disabilities Act are binding in some cases. EEOC also issues subregulatory guidance—which does not require formal comment and review—to advance policy positions of the Agency or provide interpretive statements for staff and the public.

EEOC's performance regarding policy development and interpretive guidance has been strong for several years, even in periods when its other enforcement activities have lagged. Outsiders have praised EEOC for its efforts in this area, and the Agency has produced commendable work on the ADEA and EPA. EEOC has promulgated more than 40 policy docu-

ments since 1990. However, despite this progress, there are areas of policy in which the Agency has not kept pace. EEOC has been criticized for failure to adequately use its formal rule-making authority. In particular, relatively few guidelines have been produced that support issues identified in the Agency's National Enforcement Plan.

EEOC uses an informal approach to developing policy that, while interactive to some degree, does not fully capitalize on the available input from stakeholder groups and outside experts. The public is not afforded enough opportunity to review subregulatory policies in draft form, even at an informal level. In addition, EEOC does not have regular intervals for the review, development, and issuance of subregulatory policy guidance. Such procedures would ensure that policies remain current with developments in case law and would allow EEOC staff to determine whether there are policy proposals that should be presented before the commissioners for action.

Enforcement Strategies and Procedures

Over the last decade, EEOC has experienced a period of significant operational change, including the implementation of strategies that have restructured its enforcement efforts. In 1995 the Agency instituted its most radical shift in recent history when it implemented the Priority Charge Handling Procedures (PCHP) which empowered EEOC staff to determine which cases should be dismissed early in the process and which should be investigated.[1]

At the time the PCHP was introduced, the Agency also established guidelines for national and local priority issues. The combination of these tactics allowed for a dramatic reduction in the Agency's charge inventory, quicker resolution of charges, and a more controlled approach to resource expenditure. Most recently, EEOC has implemented the Comprehensive Enforcement Program as a method for integrating the procedural guidelines of the PCHP and the conceptual framework of the National Enforcement Plan, emphasizing improved customer satisfaction and greater attorney-investigator interaction.

Charge Processing

EEOC's charge handling procedures consist of the following steps: initial intake, charge categorization and prioritization, mediation (when appropriate), investigation, and litigation (if a charge is deemed litigation worthy). Charge categorization has not only changed the types of charges that are investigated, but also the scope of investigations. Categorization allows enforcement staff to be more selective in the cases they pursue and to have greater discretion in deciding early on if a charge has potential merit. This procedure has been praised as a necessary inventory management tool, and criticized as a barrier to charges receiving adequate and unbiased treatment.

In recent years, there has also been a push to settle charges early in the charge handling process, partly due to limited resources and partly to compensate for increases in charge receipts. EEOC has, therefore, initiated an extensive mediation program designed to settle charges prior to investigation. EEOC's mediation program has proven successful thus far, as demonstrated by high resolution rates and increasing participation among both charging parties and respondents. Mediation saves time and money, resolves charges that might otherwise remain unresolved through other EEOC processes, and allows parties to be involved in the resolution of their own disputes. Despite its proven record, however, EEOC's mediation program is hindered by budget constraints that have forced the elimination of contracts with external mediators and limited the number of charges that the Agency can mediate.

Charges that are not referred to mediation, or for which mediation has failed, undergo some level of investigation. Decisions on how to investigate a charge may depend on the in-

[1] The PCHP instituted a mechanism whereby charges are placed in one of three general categories: A, B, or C. "A" charges are those that, on initial review, appear likely to result in a finding of a violation. "B" charges are those that require further investigation before a definitive assessment can be made. "C" charges are those that do not appear to have merit or are not within EEOC's jurisdiction.

formation collected at intake, the scope of the charge, or the nature of the allegations made. Although there are standard procedures for charge intake, mediation, and investigation, district offices have latitude to develop programs and procedures to carry out these functions based on community needs, staffing patterns, staff experience, and overall office environment. The result is wide variation between district offices in the way charges are processed, as well as in the use of informational materials, intake questionnaires, and methods of communicating with charging parties, which results in uneven implementation of Agency policy and different outcomes for similar charges.

Overall, many recurring themes emerged from the Commission's contact with charging parties and employers during the fact finding for this study. Charging parties expressed that they often felt discouraged from filing charges of discrimination by EEOC intake staff and that customer service is generally poor. While many employers and attorneys indicated that EEOC has improved its investigative process over the past five years, there is agreement that the quality of investigations varies between offices. In addition, both charging parties and employers have expressed concern that they are uninformed about the investigation phase of charge processing. Both groups indicated that they want to be more involved in the process, to have more interaction with EEOC investigators, and to be more informed about how outcomes are reached. Despite these concerns, and although it is too soon to assess the impact EEOC's most recent efforts will have, there is an overall sense that the Agency is moving in the direction of improved efficiency and has an increased awareness of its historical obstacles.

Litigation

In recent years, EEOC has made major strides toward using litigation as an enforcement tool. However, the Agency's limited resources and the amount of time required to litigate cases reduce the degree to which litigation can and should be used in enforcement. The volume of EEOC's litigation is surprisingly low given the number of Agency priority issues. In a move to improve the Agency's litigation efforts, there has been a headquarters-driven demand for strategic litigation in the district offices. This includes selecting cases for litigation that will affect large groups of individuals, developing areas of law that remain undeveloped, and addressing broad policy issues. To accomplish this goal, district offices are expected to identify "good" cases early on and foster greater attorney-investigator interaction.

Recognizing the important role the private bar can and should have in the litigation of charges, district office staff have been instructed to develop attorney referral lists and forge relationships with private attorneys who are available to litigate cases for which EEOC does not have the resources. While many employment attorneys agree that EEOC's targeted litigation strategy is necessary given limited resources, some have expressed concern that by focusing only on those cases that have broad impact, certain areas of law have been neglected, such as religious discrimination. Others have stated that obtaining relief for individuals is equally important as obtaining relief for classes of people, particularly those cases that the private bar is unwilling or unable to accept.

State, Local, and Tribal Employment Rights Agencies

Through contractual relationships, EEOC relies on the assistance of state, local, and tribal governments in handling charges of discrimination. Joint efforts with these agencies allow EEOC to cover more ground and reach more employers and employees than it could if it were operating alone. However, EEOC has not used these resources to their full potential. EEOC has underutilized tribal employment rights offices (TEROs) as a source in its charge processing and technical assistance efforts, and TEROs are virtually absent from EEOC documents. EEOC also spends little time monitoring TERO activities.

On the other hand, the mandated partnership between EEOC and state and local fair employment practices agencies (FEPAs) has become a visible, integral component of the

complaint process. Yet, some FEPAs have indicated that this relationship is not always treated as an equal partnership. Further, EEOC provides limited monetary supplements to FEPAs that investigate charges filed under dual jurisdiction. In addition, the level of EEOC oversight remains limited, and EEOC staff generally do not provide adequate direction to state and local agencies as they investigate and remedy charges of employment discrimination. For example, FEPAs are not required to conduct investigations in any particular manner, and most do not use EEOC's charge prioritization procedures, resulting in divergent charge processing and outcomes between offices.

Technical Assistance and Outreach

The importance of technical assistance and outreach for EEOC's enforcement mission is stressed in statutory requirements, in statements of the commissioners, in Agency planning documents, and in office missions and functions. Nonetheless, the resources devoted to technical assistance and outreach are minimal. EEOC's program of technical assistance and outreach is maturing, however slowly, within these budgetary constraints.

Two of EEOC's three types of technical assistance and outreach are supported by a Revolving Fund that Congress established. First, EEOC offers formal training seminars largely targeted to employers and held throughout the nation. Second, the Agency added customer-specific training to this base, giving employers the opportunity to have custom training that meets their specialized needs; so far, the number of customer-specific training sessions has been small. The third type of outreach, which is supported by appropriated funds, includes free outreach activities engaged in by EEOC staff on a regular basis. Free outreach includes making presentations, contacting stakeholders (i.e., community groups and employer organizations), seeking their input, and moving toward involving them more deeply in EEOC's enforcement efforts. Feedback from stakeholders has led to an increasing number of initiatives to reach underserved groups, such as small businesses, low-wage earners, farm workers, Hispanics, and Asian Americans. However, a lack of resources has hindered the implementation of these initiatives.

EEOC's technical assistance and outreach program, although improving, still must move forward to adopt the perspectives of its customers. Currently, it fails to provide the practical information that both small and large businesses need, for example, assistance in producing policy manuals to communicate fair employment principles or help in designing fair recruitment, interviewing, and selection procedures. EEOC struggles to build employee confidence in the Agency through outreach efforts and to communicate realistic expectations of what EEOC has to offer to them.

Summary of Major Recommendations

In recent years, EEOC has evolved from an Agency trying to investigate every charge of discrimination to focusing on the charges most likely to develop civil rights law or have a favorable litigation outcome. The Commission commends the Agency for streamlining its charge prioritization procedures and taking a leadership role in trying to direct the evolution of civil rights law in the courts. At the same time, however, there are areas in which improvement is needed, both with the assistance of additional resources and without. The Commission's primary recommendations are:

- Congress should allocate additional resources specifically for mediation, technical assistance and outreach, contracts with fair employment practices agencies and tribal employment rights offices, and staff training. EEOC should conduct an internal reassessment of its expenditures to determine if there are program areas in which funds should be focused. For example, the Agency may determine that staff training is needed in new or developing areas of law or that there is a need to hire additional mediators. The evaluation should include accountability factors for district offices—such as increased

charge receipts from underserved areas to justify outreach expenditures—to ensure that resources are used appropriately. EEOC should also increase efforts to utilize available community resources to reduce the Agency's workload.

- EEOC must involve more advocacy groups and community organizations in developing policies. The Agency should make provision for review of policies as they are developed so that they address areas of law that require clarification and are appropriate to the audience they are intended to serve. EEOC also must keep pace in the development of both regulatory and subregulatory guidelines, particularly with respect to those priority areas identified in its National Enforcement Plan.

- EEOC should continue to resolve as many charges as possible in a more expeditious manner, for example, through mediation when litigation outcomes are questionable. The Agency should explore alternative mechanisms for dispute resolution and should heighten its use of mediation, given its success.

- EEOC should continue to review its program to ensure that enforcement activities are efficiently and appropriately targeted. This can be achieved through regular and thorough self-assessment using multiple measures of effectiveness such as customer satisfaction surveys and localized community input. To assess its record over time, the Agency must conduct longitudinal studies of its enforcement activities coupled with more proactive use of the data already available, such as its Charge Data System or EEO-1 data. This assessment should be accompanied by closer monitoring of district office activities to ensure that the differences in processes across offices no longer result in inconsistencies in outcomes. EEOC must achieve a balance between field office autonomy and headquarters oversight.

- Although EEOC has recently placed greater emphasis on improving customer service, particularly through its Comprehensive Enforcement Program, the Agency must make substantial efforts to provide charging parties with as much assistance as possible in seeking and receiving resolutions to their charges either within EEOC or elsewhere. Greater customer satisfaction can be achieved through improved communication and full disclosure of the procedures involved in charge processing, and better counseling of charging parties at charge intake. Adopting and expanding a customer service approach will help the Agency overcome the negative attitudes that continue to shadow its efforts.

- EEOC should conduct more outreach to both charging parties and respondents so that they are aware of their rights and responsibilities and the services EEOC offers. This should include providing aid to employers and business representatives in developing nondiscriminatory policies and procedures, and providing additional outreach or assistance that helps prevent employment discrimination.

- EEOC should forge stronger relationships with state, local, and tribal agencies. There should be greater oversight and monitoring of the activities of the agencies with which EEOC has contractual relationships to ensure the processing of charges consistent with EEOC's standards. EEOC should also use these agencies as resources for outreach and education.

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*former Commission employee

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CHAPTER 1

Introduction

"Deliberate discrimination is but the tip of the iceberg. Racial and ethnic divisions in society have translated themselves into institutions which systematically deny equal opportunity to minority persons. Similarly, traditional and outmoded views of the role of women give rise to widespread patterns of employment discrimination on the basis of sex. One of the most pervasive forms of employment discrimination is "systemic discrimination"—discriminatory practices built into the systems and institutions which control access to employment opportunity."[1]

Equal employment opportunity is a concept that is difficult to define and often elusive. From disproportionate poverty rates to the glass ceiling phenomenon, considerable data has been amassed to describe observed income differentials and unemployment rates among various minority groups, religious groups, and ages, and between men and women. While the debate as to the causes of such poverty and disparities—education, geography, length of time in the work force, etc.—continues, few deny that discrimination plays an important role in the observed discrepancies. Not only is our nation under a moral and legal obligation to eliminate such discrimination, but also the growth of an increasingly diverse 21st century work force facing world competition demands the full utilization of all workers' talents. Government policy regarding job discrimination and effective mechanisms to eliminate it are critical to the economic well-being of all citizens.

With this report, the U.S. Commission on Civil Rights (Commission) evaluates the effectiveness of the enforcement of federal equal employment laws in the private sector. In analyzing the efforts of the U.S. Equal Employment Opportunity Commission (EEOC), the Commission explores several issues related to fair employment, analyzes EEOC policies and practices, reviews the organizational structure of EEOC, and describes the experiences of the nation's workers with regard to equal employment.

EEOC is the primary enforcer of federal civil rights laws pertaining to employment.[2] This report examines the operation of EEOC in enforcing the following civil rights laws related to fair employment practices: the Equal Pay Act of 1963 (EPA);[3] Title VII of the Civil Rights Act of 1964;[4] the Age Discrimination in Employment Act of

[1] U.S. Commission on Civil Rights (USCCR), *Equal Employment Opportunity Under Federal Law: A Guide to Federal Law Prohibiting Discrimination on Account of Race, Religion, Sex, or National Origin in Private and Public Employment*, clearinghouse publication 17, 1971, p. 1.

[2] 48 U.S.C. § 2000e-5 (1994). *See also* U.S. Equal Employment Opportunity Commission (EEOC), *A Proud Legacy—A Challenging Future: FY 2000 Budget Request*, February 1999, p. 13.

[3] 42 U.S. C. § 206(d) (1994). Enacted in 1963, the Equal Pay Act prohibits discrimination on the basis of sex in the payment of wages to men and women performing substantially equal work under similar working conditions in the same establishment. Equal Pay Act of 1963, Pub. L. No. 88-37, 77 Stat. 56 (1963) (codified as amended at 29 U.S.C. § 206 (1994)). EEOC did not have enforcement authority for the Equal Pay Act until 1978.

[4] Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on race, color, sex, religion, or national origin. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 2000e–2000e-17 (1994)).

1967 (ADEA);[5] the Pregnancy Discrimination Act of 1978;[6] and the Civil Rights Act of 1991.[7]

With this report, the Commission had several goals in mind:

- to determine whether EEOC has sufficient staff, resources, and training to carry out its responsibilities; whether its procedures and organization are effective; whether its policies and regulations comport with Congressional intent and existing case law; and whether its policies, regulations, or the law require revision or elaboration in order to decrease the incidence and impact of job discrimination;
- to determine whether enforcement measures (i.e., mediation, investigation, conciliation, and litigation) taken by the Agency adequately address systemic and individual complaints of discrimination;
- to determine whether the technical assistance, outreach, education, and enforcement measures taken by EEOC ensure compliance with the laws; and
- to determine whether charge processing by state and local fair employment agencies conforms to EEOC standards.

While not the scope of this report, it should be noted that the civil rights laws enforced by EEOC also apply to employment discrimination by the federal government and, therefore, EEOC has an active federal sector program to handle those charges filed against federal agencies.[8] However, the procedures for resolving complaints of federal employees differ from the procedures that govern private sector complaints.[9] EEOC adopted revised regulations on equal opportunity for federal employees, which went into effect in November 1999, in an attempt to improve the effectiveness of its federal sector operations,[10] and currently the Agency has employed an interagency task force with the National Partnership for Reinventing Government to improve the federal EEO process.[11] These initiatives have consumed a considerable amount of EEOC's limited resources in recent years.

EMPLOYMENT DISCRIMINATION IN THE U.S.

Despite the progress made by the civil rights movement and the women's movement, the nation continues to suffer from discrimination in the workplace. Americans of color, women, members of religious groups, individuals with disabilities, and others face obstacles to employment every day, from failure to hire to failure to promote, harassment, exclusion, and intimidation. Without equal employment opportunities, many of the United States' most talented and qualified workers are never given the opportunity to succeed. As a result, the nation's overall competitiveness in the international economy is threatened.

Recent employment figures released by the U.S. Department of Labor (DOL) indicate that 133 million people were employed in the United States in 1999.[12] Another 1.2 million persons were "marginally" attached to the labor force,

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[5] The Age Discrimination in Employment Act prohibits discrimination based on age against persons aged 40 years and over by employers, labor organizations, and employment agencies. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621–634 (1994 and Supp. IV 1998)).

[6] The Pregnancy Discrimination Act amended Title VII by clarifying that pregnancy discrimination was illegal. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (1994)).

[7] The Civil Rights Act of 1991 expanded the coverage of equal employment laws, which had been restricted through Supreme Court decisions. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. (1994)). *See* chap. 2 for a discussion of the Civil Rights Act of 1991. Note, that this report does not cover enforcement of the Americans with Disabilities Act, which is also under EEOC's jurisdiction, because the Commission produced an evaluation of ADA enforcement in 1998. *See* USCCR, *Helping Employers Comply with the ADA: An Assessment of How the United States Equal Employment Opportunity Commission is Enforcing Title I of the Americans with Disabilities Act*, September 1998.

[8] EEOC, "Questions and Answers: Final Federal Sector Complaint Processing Regulations (29 C.F.R. Part 614)," accessed at <http://www.eeoc.gov/federal/1614-quanda.html>.

[9] Ibid.

[10] Ibid. After a complaint has been filed with a federal agency and the matter has been investigated by the agency's equal employment opportunity (EEO) counselor, the charging party may request a hearing before an EEOC administrative judge who will then issue a decision and order relief when discrimination has been found. *See also* EEOC, "Facts about Federal Sector Equal Employment Opportunity Complaint Processing Regulations (29 C.F.R. Part 614)," accessed at <http://www.eeoc.gov/facts/fs-fed.html>.

[11] *See* < http://www.eeoc.gov/npr/index.html>.

[12] U.S. Department of Labor, Bureau of Labor Statistics (BLS), *Employment & Earnings*, April 1999, p. 1.

meaning that they wanted to work and had looked for a job, but were not considered active members of the labor force. DOL identified 295,000 of these workers as "discouraged" workers—workers not currently seeking employment because "they believed no jobs were available for them."[13]

Employment data for 1999 show that there are differences by race, ethnicity, and gender in unemployment rates. Approximately 3 percent of both white men and women were unemployed, compared with 6 percent of black men and 7 percent of black women. Almost 6 percent of Hispanics were unemployed.[14] Among those 16 to 19 years of age, only 11 percent of whites were unemployed, compared with 29 percent of blacks.[15] There are differences in occupational patterns by race, ethnicity, and gender as well. For example, women are more concentrated in the teaching, nursing, and health technician fields, while men are found in larger numbers in engineering, computer science, mechanic, and construction fields.[16]

In addition, there are differences not only in the types of jobs and occupations in which classes of individuals are concentrated, but there are also pay differences by sex, race, ethnicity, and national origin. For example, in 1998, women earned approximately three-quarters of what men earned: the median weekly earnings of female workers was $456, compared with $598 for men.[17] Further, the earnings of African American men fell short of those of white men—white men earnings of $615 per week were 31.4 percent higher than those of black men (who earned a median weekly salary of $468).[18]

Even within occupations, women continue to earn less than men. For example, among engineers and architects, the median weekly earnings of men is $1,007, compared with only $827 for women. Among elementary school teachers, where women outnumber men almost two to one, women earn about $677 per week, compared with men's salaries of $749 per week.[19] Only in food preparation and legal assistant occupations do women's earnings equal or slightly exceed men's earnings.[20] In some occupations, such as sales, precision production, and production inspection, women earn less than 65 percent of men's earnings.[21]

What the statistics do not reveal is whether racial, ethnic, and gender disparities and the inability to find employment have deeper causes than, for example, job choice or educational attainment, and are the result of employment discrimination. It is important to determine the nature of the inability of these persons to find jobs, why there are "discouraged" workers, why women and minorities continuously earn less than white men, and other causes and consequences of different employment outcomes. In addition, it is crucial to determine what role federal civil rights enforcement agencies can play to increase overall employment, remove barriers to employment, and ensure fair employment practices throughout the American labor force.

Many will argue, quite accurately, that since the enactment of employment discrimination laws, dramatic changes have taken place in the labor force, opening up jobs for all citizens. While it is true that the U.S. economy has grown and expanded during the 20th century, there are still racial, ethnic, and gender differences in labor force participation, employment rates, occupations, and wages. It is the responsibility of the federal government, particularly EEOC, to determine the extent to which such disparities are the result of discrimination and unfair employment practices—and to eliminate such practices.

ENFORCEMENT OF EQUAL EMPLOYMENT LAWS

From sexual harassment to denial of employment or promotion on the basis of a protected classification, discriminatory practices and policies that result in disparate outcomes are illegal. Employment discrimination takes several forms:

- On her first day of work, an employee is told by a co-worker that her supervisor favors employees who belong to his church. Over

[13] Ibid.

[14] Ibid., table A-4, pp. 8–9.

[15] Ibid.

[16] U.S. Department of Labor, Bureau of Labor Statistics, *Highlights of Women's Earnings in 1998*, report 928, April 1999, table 3, p. 5.

[17] Ibid., p. 1.

[18] Ibid.

[19] Ibid., table 3, p. 5.

[20] Ibid., pp. 5–9.

[21] Ibid., table 3, pp. 5–9.

the next year, that employee observes that promotions, raises, and preferred assignments are given only to employees belonging to a certain religious sect to which she does not belong. After her first year, the employee is denied a raise, despite her eligibility and excellent performance.[22]

- A male supervisor sometimes makes comments to his secretary about how attractive she is. When the secretary asks for a raise, the supervisor says he will consider her request, and suggests that they go for drinks and dinner after work so they can discuss it. The secretary states that she wants their relationship to remain purely professional and, therefore, would prefer not to go out with him. The supervisor says that he understands. Two weeks later, he informs his secretary that he has denied her request for a raise. When asked why, the supervisor states that if she would be more "cooperative" her chances for a raise would improve.[23]
- A company is hiring for an unskilled entry-level assembly line position. An individual who was born in Korea and is a U.S. citizen applies for the job. The selecting official does not hire the applicant on the basis that his accent makes it difficult to communicate with him.[24]
- A 30-year-old entrepreneur takes over a garment company and issues a corporate policy stating that persons without degrees in computer science will not be hired, although computers are not useful in this company which produces hand-woven woolen garments. A 55-year-old weaver with excellent qualifications applies for a job as head weaver but is denied the job based on her lack of computer experience.[25]

It is the responsibility of EEOC to thoroughly investigate charges of discrimination.[26] In the above examples, additional investigation is often required to determine if discrimination occurred. Over the years, however, EEOC has been both applauded and criticized for its efforts to end employment discrimination. The Commission has consistently noted EEOC's backlog of cases and ineffective management. However, the Commission has commended EEOC on its policy development in several areas, technical assistance efforts, and recent efforts to address its backlog of cases. Other agencies and organizations, such as the U.S. General Accounting Office and the Citizens' Commission on Civil Rights, also have been monitoring EEOC's performance over the years, the results of which are chronicled below.

The 1960s

The U.S. Commission on Civil Rights has long been concerned with equal protection of the laws and the elimination of discrimination in employment. Since its inception in 1957, one of the major topics examined by the Commission and its State Advisory Committees (SACs)[27] has been equal employment opportunity, covering numerous employment-related issues such as affirmative action; the economic status of minorities and women; the passage of employment discrimination legislation and regulations; unfair employment practices found within the public and private sectors as experienced by minorities, women and, more recently, older Americans and people with disabilities; and examinations and assessments of federal efforts to eliminate the unfair, discriminatory practices. Through its reports, consultations, and other initiatives, the Commission has examined these issues, as well as the legislative efforts of Congress, the policies

[22] EEOC, *Religious Discrimination: Employment Discrimination Prohibited by Title VII of the Civil Rights Act of 1964, as Amended*, May 1999 (revised), pp. A-6 to A-7.

[23] EEOC, *Sex Discrimination: Employment Discrimination Prohibited by Title VII of the Civil Rights Act of 1964, as Amended*, May 1999 (revised), p. A-1.

[24] EEOC, *National Origin Discrimination: Employment Discrimination Prohibited by Title VII of the Civil Rights Act of 1964, as Amended*, May 1999 (revised), p. A-1.

[25] EEOC, *Age Discrimination: Employment Discrimination Prohibited by the Age Discrimination in Employment Act of 1967, as Amended*, May 1999 (revised), p. A-8.

[26] A "charge" is a complaint filed with EEOC alleging discriminatory practices by an employer, employment agency, or labor organization in violation of Title VII, the Equal Pay Act, the Age Discrimination in Employment Act, or the Americans with Disabilities Act. 42 U.S.C. 2000e-5(b) (1994); EEOC, *Compliance Manual*, p. 0:3201. *See* chap. 5 for a full discussion of charge processing.

[27] An Advisory Committee to the U.S. Commission on Civil Rights has been established in each of the states and the District of Columbia pursuant to Section 105 (c) of the Civil Rights Act of 1957 as amended. Pub. L. No. 85-315, No. Stat. 634 (1957) (codified as amended at 42 U.S.C. § 1975a (1994)).

issued by Presidents through executive orders and presidential-appointed employment committees or offices, and the enforcement performance of EEOC in addressing and eliminating employment discrimination. In its reports, the Commission has identified the successes and failures of the federal agencies enforcing fair employment laws.

With the passage of Title VII of the Civil Rights Act of 1964,[28] the Commission believed that the enactment and enforcement of this and related laws would play an instrumental part in securing increased employment opportunities for minorities and women.[29] However, in a series of studies covering three decades, the Commission documented major shortcomings in the federal enforcement efforts to eliminate employment discrimination. In reports published during the 1960s, the Commission recommended that a federal agency be established solely to address employment discrimination and welcomed the establishment of the U.S. Equal Employment Opportunity Commission with high expectations that discrimination in the workplace would be adequately addressed by the federal government. The U.S. Commission on Civil Rights noted in its reports that, in order for the new federal agency to be effective, it would need strong enforcement mechanisms.[30] However, originally, EEOC had no administrative mechanisms other than negotiation and conciliation. The Commission reports after EEOC's creation in 1964 reiterated its previous recommendations that EEOC be given stronger enforcement mechanisms.[31]

The 1970s

When EEOC became operational in 1965, it required full field investigations and written reasonable cause findings before attempting conciliation.[32] Because of its aging charge inventory, EEOC developed a Pre-Determination Settlement procedure in 1970. With this procedure, district offices were allowed to attempt conciliation before issuing a determination concerning the merits of the charge.[33] Then, in a major move to empower the Agency to better enforce the employment statutes under its jurisdiction, Congress gave EEOC the authority to litigate charges against private employers, labor unions, and employment agencies in 1972.[34] EEOC, however, was slow to realize the potential power of effective charge litigation.

In the 1970s, the Commission issued reports on the enforcement effectiveness of EEOC. In its 1972 report on the federal civil rights enforcement effort, the Commission noted that although EEOC had increased its staff, developed a priority system for the allocation of resources, increased the use of commissioner charges, and increased its *amicus* participation, it still was deficient in several areas.[35] Of primary importance was the need for EEOC to adopt procedures to eliminate its increasing backlog of complaints and greater enforcement of conciliation agreements.[36] Slightly over a year later, the Commission reported "EEOC is just beginning to take a systematic approach to handling its responsibility."[37] Nonetheless, the Commission reported that EEOC suffered from inefficient management and continued to have an increasing complaints backlog.[38]

In a comprehensive review of all federal civil rights enforcement agencies in the early half of the 1970s, the Commission noted that EEOC's guidelines on sex, race, religion, and national origin, and its guidelines on testing and employee selection were "the most broad and complete set of guidelines issued by a federal agency."[39] However, the Commission found that

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[28] 42 U.S.C. § 2000e-2000e-17 (1994).

[29] USCCR, *State of Civil Rights: 1957–1983 The Final Report*, November 1983, p. 62.

[30] *See, e.g.*, USCCR, *The Federal Civil Rights Enforcement Effort, Seven Months Later*, May 1971, pp. 22–24.

[31] USCCR, *The Federal Civil Rights Enforcement Effort*, 1971, pp. 86–87.

[32] Alfred W. Blumrosen, *Modern Law: The Law Transmission System and Equal Employment Opportunity* (Madison, WI: University of Wisconsin Press, 1993), p. 161.

[33] EEOC, *Priority Charge Handling Task Force and Litigation Task Force Report*, March 1998, p. 3 (hereafter cited as EEOC, *Joint Task Force Report).*

[34] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified as amended at 42 U.S.C. § 2000e (1994)).

[35] *See generally* USCCR, *The Federal Civil Rights Enforcement Effort: One Year Later*, November 1971.

[36] Ibid., pp. 37–38.

[37] USCCR, *The Federal Civil Rights Enforcement Effort—A Reassessment*, January 1971, p. 78.

[38] Ibid., pp. 78–97.

[39] USCCR, *The Federal Civil Rights Enforcement Effort—1974: To Eliminate Employment Discrimination*, vol. V, July 1975, p. 643.

EEOC's organizational structure resulted in inefficient operations, and insufficient staff levels resulted in delays in filing lawsuits and a low number of suits. In addition, EEOC continued to have a backlog of complaints and had failed to successfully implement procedures to eliminate the backlog.[40]

In the mid-1970s, EEOC underwent a complete reorganization and consolidation of regional offices, district offices, and litigation centers in field offices. In addition, EEOC implemented procedures to increase Agency efficiency in its handling of charges of discrimination.[41] As its authority and scope of mission widened, EEOC had to find other ways to deal with the large number of charges of discrimination that it received. In 1975, the Agency initiated its Thirty Day Turn-Around Project.[42] Under this program, the Agency streamlined the investigative process and eliminated on-site investigations in order to reduce its backlog. To close charges quickly, EEOC relied on "minimally adequate" evidence.[43] Nonetheless, in 1977 the Commission observed:

> It is too early to judge whether EEOC's recent initiatives will prove effective in resolving the massive problems which have plagued the agency. However, drastic measures are clearly needed if EEOC is ever to become an agency which effectively combats employment discrimination, and the program which EEOC's new leadership is implementing has potential for revitalizing the agency.[44]

By the late 1970s, it became apparent that the previous methods used by the Agency were inadequate for dealing with its growing and aging caseload. In 1977, EEOC developed "Rapid Charge Processing," a strategy that provided both parties the opportunity to resolve the charge at an early stage through negotiating a no-fault settlement with minimal investigation.[45] Two years later, the Agency introduced its Early Litigation Identification Program, aimed at attorney-investigator coordination in identifying potential litigation vehicles.[46]

The 1980s

Despite EEOC's efforts, and some of the progress made in the 1970s, there appeared to be little change, and then ultimately a backslide in the 1980s. In 1983, the Commission reported that EEOC's limited budget had "contributed to limited progress or scaling back of functions such as complaint backlog elimination, litigation, and systemic investigations."[47] Believing that rapid charge processing reduced the Agency to the role of "claims adjuster," EEOC decided to return to the use of full investigations.[48] To more accurately gather evidence and identify discrimination, in 1983, EEOC launched its Full Investigation Policy in which it returned to the use of full investigations in fulfilling its mission.[49]

In 1987, the Commission released another comprehensive report on the enforcement of federal equal employment laws. Although the Commission found that EEOC had taken several positive steps to improve its equal employment enforcement efforts, many of the weaknesses found in the past were still apparent.[50] For example, the Commission noted that EEOC continued to have a "sluggish systemic program" and "questionable monitoring of cases."[51] The Commission also questioned whether the increase in the quantity of cases closed resulted in a decrease in the quality of investigations.[52]

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[40] Ibid., pp. 643–46.

[41] USCCR, *The Federal Civil Rights Enforcement Effort—1977: To Eliminate Employment Discrimination: A Sequel*, December 1977, p. 177.

[42] U.S. General Accounting Office (GAO), *Equal Employment Opportunity: EEOC and State Agencies Did Not Fully Investigate Discrimination Charges*, GAO/HRD-89-11, October 1988, p. 14.

[43] Ibid.

[44] USCCR, *The Federal Civil Rights Enforcement Effort—1977*, p. 177.

[45] EEOC, *Joint Task Force Report*, p. 4; GAO, *Equal Employment Opportunity*, pp. 15–16. *See also* Blumrosen, *Modern Law*, pp. 163–67; Women Employed Institute, *Reinventing the Equal Employment Opportunity Commission: Recommendations for Reform*, April 1995, p. 3.

[46] EEOC, *Joint Task Force Report*, p. 4.

[47] USCCR, *Federal Civil Rights Commitments: An Assessment of Enforcement Resources and Performance*, clearinghouse publication 82, November 1983, p. 137.

[48] GAO, *Equal Employment Opportunity*, p. 16.

[49] EEOC, *Joint Task Force Report*, p. 5; GAO, *Equal Employment Opportunity*, p. 16.

[50] USCCR, *Federal Enforcement of Equal Employment Requirements*, clearinghouse publication 93, July 1987, p. 99.

[51] Ibid.

[52] Ibid.

The 1990s

In 1995, the U.S. Commission on Civil Rights issued its first comprehensive assessment of the federal civil rights enforcement effort and budget since 1983. The report examined the jurisdiction and enforcement authority of the six principal agencies of the federal government charged with civil rights enforcement, including EEOC.[53] With respect to EEOC, the Commission noted that, beginning in 1978, when EEOC received enforcement authority under the EPA and the ADEA, the federal equal employment opportunity enforcement program was restructured, which significantly affected the already heavy workload of the Agency.[54] The report also examined the Agency's resources and the effectiveness of EEOC in meeting its responsibilities under additional laws: the Americans with Disabilities Act of 1990 (ADA)[55] and the Civil Rights Act of 1991.[56] The Commission concluded that EEOC did not receive sufficient resources to carry out its new responsibilities, as well as its other enforcement responsibilities under Title VII, the ADEA, and the EPA.[57]

In fact, the report found that the workloads of all of the six enforcement agencies had more than doubled since fiscal year 1981. Due primarily to the passage of new civil rights legislation, the resources available to deal with the demand lagged far behind.[58] Reduced staffing and budgetary constraints affected EEOC's ability to conduct effective litigation and investigations, and to reduce pending inventory of charges. Reduced resources also limited travel, training, and litigation support. The resource deficiencies also affected EEOC's ability to settle and conciliate cases.[59]

In 1995, EEOC implemented its current procedures for handling charges.[60] The Priority Charge Handling Procedures were designed to allow the Agency to identify cases quickly that could be dismissed and focus more time and resources on potential cause cases. The Agency also developed National and Local Enforcement Plans to further focus its investigations, litigation program, and resources.[61]

In 1998, the Commission released a report on EEOC's enforcement of Title I of the ADA.[62] Although in some ways it was too soon to determine the success of the Priority Charge Handling Procedures, in its assessment, the Commission's earlier predictions concerning the impact of budget constraints on enforcement at EEOC were supported.[63] The Commission found that EEOC had an overwhelming workload with insufficient resources to effectively carry out its responsibilities in implementing Title I provisions of the law.[64]

The report noted that with its limited budgetary and staff resources, EEOC undertook innovative steps to meet its responsibilities.[65] However, the report identified areas where EEOC has fallen short in implementing Title I, including insufficient outreach and education activities, especially in minority communities; the exclusion of people with disabilities and their advocacy groups from policy development and decision-making initiatives; minimal training of staff to enforce the law; and the failure of self-assessment of its overall ability to accept, investigate, and resolve all complaints expeditiously, regardless of the issue.[66]

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[53] USCCR, *Funding Federal Civil Rights Enforcement*, clearinghouse publication 98, July 1995, p. 1. The other five federal civil rights enforcement agencies are the Office for Civil Rights of the Department of Education, the Office for Civil Rights at the Department of Health and Human Services, the Civil Rights Division of the Department of Justice, the Office of Fair Housing and Equal Opportunity of the Department of Housing and Urban Development, and the Office of Federal Contract Compliance Programs of the Department of Labor. Ibid.

[54] Ibid., p. 4.

[55] American with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. § 1210 (1990)).

[56] 42 U.S.C. § 1981 note (4) (1991).

[57] USCCR, *Funding Federal Civil Rights Enforcement*, pp. 3–4.

[58] Ibid., p. 71.

[59] Ibid., pp. 41–42.

[60] EEOC, *Joint Task Force Report*, p. 7.

[61] *See* chap. 5.

[62] USCCR, *Helping Employers Comply with the ADA:* The report evaluates and analyzes EEOC's regulations and policies clarifying the language of the statute, processing of charges of discrimination based on disability, litigation activities under Title I of the act, and outreach, education, and technical assistance efforts relating to the act.

[63] *See* USCCR, *Helping Employers Comply with the ADA*, p. 247.

[64] Ibid.

[65] *See generally* ibid.

[66] Ibid.

The Development of EEOC's Procedures for Handling Charges of Discrimination

1965—Full field investigations and written reasonable cause findings
1970—Predetermination Settlement Procedure
1972—Litigation Authority
1975—Thirty Day Turn-Around Project
1977—Rapid Charge Processing
1979—Early Litigation Identification Program
1983—Full Investigation Policy
1995—Priority Charge Handling Procedures
1996—National Enforcement Plan
1999—National Mediation Program
1999—Comprehensive Enforcement Program

2000 and Beyond: The Present Report

With this report, the Commission will examine the progress EEOC has made in improving its operations, as well as the difficulties it still faces. Timely implementation of the recommendations of this report will enable EEOC to more effectively and efficiently reach its goals. It is the fervent hope of the Commission that, through a concerted federal effort, employment discrimination will be eliminated in the early part of the 21st century.

Chapter 2 provides a contextual overview of the current critical employment issues, particularly those that have had an adverse impact on members of protected groups. It examines the status of people of color, women, members of religious groups, and older Americans in the context of the laws designed to protect their interests in the work environment. This chapter sets the stage for a better understanding of the areas of law that EEOC is charged with enforcing and informs the subsequent analyses of areas in which the Agency must improve its enforcement efforts.

The chapter further provides an overview of how the workplace of the 21st century is drastically different from that of the past and demonstrates that, while the enforcement of federal fair employment laws has opened doors for many, evolving work environments will continue to test the strength of those laws. And as the work force becomes more and more diverse, it will become increasingly important to have strong, proactive enforcement of civil rights laws in the employment environment, as well as continued training and education on the rights and responsibilities of both employers and employees. It is the responsibility of EEOC to keep pace with changes in the workplace to ensure that fair employment laws will continue to ensure full parity for all Americans. Chapter 2 outlines issues of particular importance to members of racial and ethnic minorities, older workers, women, and religious minorities. Some of the issues discussed that are pertinent to these groups of individuals include the low numbers of charges filed by some racial and ethnic minorities due to lack of understanding about their rights or fear of retaliation; age discrimination in an era where older workers remain in the work force for longer periods of time; sexual harassment, both opposite sex and same sex; religious accommodation, including Sabbath observance and religious attire; and barriers to the advancement of women and minorities due to the glass ceiling phenomenon.

Not only is the workplace becoming diversified by race, ethnicity, gender, age, and other individual characteristics, it is also beginning to reflect new and innovative ways of organizing the way people work. Strategies to address the needs of both employers and employees will require new practices and policies, including policies aimed at ensuring equal opportunity in hiring, pay, and benefits. However, despite attempts to create new strategies, the narrowing of the wage gap, decreases in unemployment rates, and increases in educational attainment, inequalities remain. Workers continue to file charges of employment discrimination at an alarming rate, attesting to the continued need for proactive enforcement of fair employment laws. As the economy and labor force become more complex, employment discrimination becomes more subtle and more insidious. Issues of unfair workplace practices become intertwined with illegal discriminatory actions, often blurring the boundaries and leaving workers with no one else to turn to but the federal government.[67]

To set the stage for how EEOC operates, chapter 3 outlines the overall organization and structure of the Agency, including the functions of each of its major offices, describes the strategic planning tools used by the Agency, and analyzes the adequacy of its resources to carry out its mission. As was discussed earlier, since its inception, EEOC's responsibilities have changed

[67] *See generally* chap. 2.

and expanded significantly. As its responsibilities increased, the workload of the Agency also increased, and by the early 1990s EEOC had a backlog of charges of more than 111,000.[68] Many obstacles, such as policies instituted during the 1980s, the absence of new leadership, too much responsibility for too few resources, and lack of training, have prevented the Agency from accomplishing its mission in the past. As a result, the Agency has faced an enormous amount of criticism. After the ambitious campaign to revitalize the Agency in 1995, the backlog of cases declined significantly, the performance appraisal system was revamped, labor-management partnership agreements were instituted, and public outreach, education, and technical assistance activities were moved to the forefront.[69]

EEOC has now come closer to achieving many of its core performance measures. The inventory has been reduced to approximately 40,200 charges, both the average time to resolve charges and the age of pending inventory have declined, and the Agency did a significant amount of hiring during fiscal year 1999.[70] However, one of the main obstacles that the Agency still faces is that funding has not increased at rates commensurate with responsibilities, and in fact, resources have fluctuated making it difficult for EEOC to continue to improve its operations at acceptable rates.[71]

Chapter 4 reviews EEOC's interpretation of laws and development of policies and enforcement guidance over the last decade, which has been a period of significant policy-oriented change. The chapter examines the way EEOC develops, and then ultimately implements, policy.

Policy development and interpretive guidance have been EEOC's strong suit for several years, even in periods when its other enforcement activities have been lagging. Many outside the Agency have praised EEOC for its efforts in this area. EEOC has promulgated more than 40 policy documents since 1990. It would be impossible to do a just analysis of all the Agency's existing policies, so chapter 4 specifically details those related to and consistent with EEOC's National Enforcement Plan, including sex discrimination,[72] vicarious employer liability for unlawful harassment by supervisors, racial harassment and hostile work environment, national origin discrimination, and religious accommodation, as well as those pertaining to the Equal Pay Act and the Age Discrimination in Employment Act. Chapter 4 concludes with a general overview of the sufficiency of the Agency's policy-making procedures, how well it has promulgated policy, and whether the policies have effectively guided EEOC's mission to promote equal opportunity in employment.[73]

Chapter 5 provides a detailed look into EEOC's current charge handling procedures from initial intake to charge categorization and prioritization, mediation, investigation, and litigation. District offices have been given a fair amount of latitude to develop programs and procedures to carry out these functions, based on community needs, staffing patterns, staff experience, and overall office environments. Chapter 5 illustrates some of the methods that have been implemented to address each of these processes and provides comments on what has worked well and where improvement is needed.

In particular, the chapter examines the extent to which charge handling has changed as a result of the Agency's recent emphasis on "customer satisfaction" and the Priority Charge Handling Procedures that have been in effect now for five years. Charge categorization has not only changed the types of charges that are investigated, but also the scope of investigations. Enforcement staff can now be more selective in the cases they choose to pursue and have greater discretion to decide early on if a charge has potential merit. This, of course, has both been praised as a much-needed inventory management tool and criticized as a barrier to charges receiving adequate and unbiased treatment. Further, in recent years there has been a push to settle charges early in the charge handling process. EEOC has initiated an extensive mediation program designed to settle charges prior to investigation. Chapter 5 looks at the benefits and drawbacks of mediation in the employment discrimination context, as well as the success of various mediation programs.

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[68] *See* chap. 3, p. 66.

[69] *See generally* chap. 3.

[70] *See* chap. 3, p. 67.

[71] *See* chap. 3.

[72] Including a discussion of sexual harassment, gender harassment, wage discrimination, and pregnancy discrimination.

[73] *See generally* chap. 4.

In a move to improve the Agency's litigation efforts, there has been a headquarters-driven demand for strategic litigation in the district offices. This includes the selection of cases for litigation that will have an impact on large groups of individuals, develop areas of law that remain undeveloped, and address broad policy issues. Chapter 5 looks at the models some district offices have used and whether the Agency's docket actually reflects these litigation strategies.

Because the nature of EEOC's work is such that the relationship between parties involved is necessarily adversarial, there have been many complaints by charging parties and respondents alike that the Agency's charge handling processes are ineffective or unfair. Chapter 5 examines some of the most common criticisms and analyzes the measures EEOC has taken to remedy those concerns.

Chapter 6 deals with the efforts of fair employment practices agencies (FEPAs) and tribal employment rights offices (TEROs) to contribute to the eradication of employment discrimination. Through contractual relationships, EEOC relies on the assistance of state, local, and tribal governments in taking, mediating, and investigating charges of discrimination. Joint efforts with these agencies allow EEOC to cover more ground and reach more employers and employees than it could if it were operating by itself.

EEOC provides limited monetary supplements to FEPAs that investigate charges filed under dual jurisdiction and is responsible for monitoring and reviewing the work product of FEPAs to ensure quality standards that are similar to that of EEOC.[74] However, the level of oversight remains questionable and chapter 6 reviews the extent to which EEOC staff are providing adequate direction to state and local agencies as they investigate and remedy charges of employment discrimination.

Chapter 7 discusses EEOC's technical assistance and outreach efforts. The importance of technical assistance and outreach for EEOC's enforcement mission is stressed in statutory requirements, in statements of the commissioners, in Agency planning documents, and in office missions and functions.[75] Nonetheless, the chapter shows that the resources devoted to technical assistance and outreach are minimal. EEOC's program of technical assistance and outreach is maturing, but very slowly, within these constraints.

Two of EEOC's three types of technical assistance and outreach are supported by a Revolving Fund that Congress established. First, EEOC has formal training seminars largely targeted to employers and held throughout the nation. Second, the Agency added customer-specific training to this base, giving employers the opportunity to have custom training that meets their specialized needs; although, so far, the number of customer-specific training sessions has been small. The third type of outreach, which is supported by appropriated funds and not the Revolving Fund, includes the many outreach activities engaged in by EEOC staff on a regular basis that are free to the public.[76] Free outreach includes not only making presentations, but also contacting stakeholders (i.e., community groups and employer organizations), seeking their input, and moving toward involving them more deeply in enforcement efforts. Feedback from stakeholders has led to an increasing number of initiatives to reach underserved groups, such as small businesses, low-wage earners, farm workers, Hispanics, and Asian Americans. However, a lack of resources has impaired the implementation of these initiatives.[77]

EEOC's technical assistance and outreach programs fall short in adopting the perspectives of its customers. The Agency fails to provide the practical information that small or large businesses need, for example, in writing the policy manuals that will communicate fair employment principles, and in designing fair recruitment procedures, interviews, and selection procedures. Outreach efforts struggle to build confidence in EEOC and to communicate to employees realistic expectations of what EEOC has to offer.

Finally, chapter 8 summarizes the major findings of this evaluation and offers recommendations to EEOC, Congress, the President, and stakeholder groups. The recommendations are intended to provide constructive means through which the enforcement of fair employment statutes can be more effectively instituted, institu-

[74] *See* chap. 6.

[75] *See generally* chap. 7.

[76] *See* chap. 7, pp. 221–23, 231–35.

[77] *See* chap. 7, pp. 235–40, 245–54.

tional changes can be implemented, and results-oriented measures can be achieved.

METHODOLOGY

Overview

Research for this report was conducted during fiscal year 2000. Commission staff conducted extensive literature and legal reviews of employment issues and statistics, as well as literature reviews of analyses and commentaries on the state of the law. In addition to federal officials, the Commission interviewed representatives of advocacy groups, employment law firms, employers, mediation experts, and experts in the field of employment discrimination. Commission staff also contacted complainants who had been referred by the Commission to EEOC to ascertain their opinions of their contacts with EEOC. In addition, Commission staff interviewed several staff from state and local fair employment practices agencies and tribal employment rights offices.

The methodology chosen for this report was the result of months of planning and research. Staff followed many of the standard Commission processes for collecting information, but went beyond the traditional scope of fact finding to include an Internet questionnaire and field visits. The fact finding for this report was executed through five primary methods: literature review and background research, document review, interviews and field visits, primary data collection, and secondary data analysis.

The Commission also undertook a groundbreaking effort to reach more of the public than ever before. In one of the first attempts of a federal agency to obtain information on another agency using a broad-based customer satisfaction survey, the Commission received input from actual and alleged victims of discrimination and employment discrimination attorneys and mediators (for both plaintiffs and respondents). The use of such surveys—not for statistical purposes but to inform the findings of this report—can be a vital element of evaluating the effectiveness of civil rights enforcement.

Literature Review and Background Research

Fact finding for this project began with a literature review and background research. In the early stages of planning, Commission staff reviewed law and scholarly journal articles, advocacy group and organization publications, government reports, data from other federal agencies including the Census Bureau and the Bureau of Labor Statistics, EEOC's summaries of EEO-1 data, Congressional testimonies and committee reports, and pivotal court decisions. This background research served several purposes: to provide insight into the history of EEOC and its past obstacles, to inform Commission staff of the critical issues facing the Agency today, to further Commission staff's understanding of the civil rights statutes EEOC enforces, and to illustrate the dynamics of employment discrimination and the issues workers face in a changing economy.

Commission staff used the resources at the Library of Congress, other libraries, the Internet, and studies that were conducted by various organizations. Through the course of research, the Commission discovered many underserved groups that continue to be overlooked by the scholarly discourse on employment discrimination. In fact, several areas of study have been neglected in recent years. For example, much of the research on employment discrimination and workplace issues specifically of concern to various racial and ethnic groups was several years old and, as such, did not address the more contemporary issues addressed in this report. Groups such as American Indians and Asian Americans were found to be neglected altogether in the mainstream scholarly literature. This is a major oversight for which several recommendations were made to scholars and research groups. Nonetheless, a comprehensive review of the available literature enabled Commission staff to produce a background chapter that contextualizes the need for an evaluation of EEOC.

Document Review

The Commission's analysis also benefited from a comprehensive review of documents from both EEOC headquarters and field offices. These documents included EEOC-produced progress reports, budget requests, policy and procedural guidelines, internal memoranda, technical assistance and outreach materials, training modules, and the Compliance Manual. The Commission submitted document requests to EEOC for both headquarters and field office submissions. The document requests evolved during the course of fact finding as new documents were discovered,

and it was determined that others were unnecessary.

Interviews and Field Visits

A wide net was cast to obtain input from experts and stakeholders. The Commission contacted more than 120 organizations and experts, 500 employers, 150 attorneys, 200 charging parties, and approximately 15 state and local fair employment practices agencies and tribal employment rights offices. These external sources provided an understanding of the critical issues to be examined as the Commission embarked on research at EEOC. Ultimately, Commission staff conducted more than 140 interviews (69 of which were with EEOC staff members).

In an effort to cover the broad geographic range of the United States, Commission staff conducted field visits of EEOC district offices in Baltimore, Maryland; Dallas, Texas; St. Louis, Missouri; Birmingham, Alabama; and Phoenix, Arizona. Additionally, staff in EEOC offices in New York, New York; Chicago, Illinois; and Seattle, Washington, were interviewed via telephone.[78]

Primary Data Collection: Internet Survey

In an attempt to broaden the cross-section of sources to include those populations that had not been reached through other means, the Commission developed two questionnaires (one for actual and alleged victims of discrimination and one for employment attorneys and mediators) and posted them on the Commission's Web site.[79] The surveys, which included multiple-choice and open-ended questions, were designed to assess public opinion of various aspects of EEOC's charge handling procedures. EEOC and the Office of Management and Budget were involved in the development of the surveys at many stages. Several layers of review ensured that the questions accurately reflected EEOC's processes and were concisely worded and unbiased.

The surveys were neither intended to measure discrimination, nor for statistical analysis, and the data were not used to draw statistical conclusions. The Commission recognizes the limitation of a Web-based survey and acknowledges that it would be difficult to assess the validity and reliability of responses to such a survey. Given the limitations of the questionnaire results, the findings from the Web site surveys are not used to draw conclusions concerning the entire population of actual and alleged victims of discrimination or employment attorneys and mediators. Responses to the open-ended questions do, however, provide rich anecdotal evidence and highlight several areas of concern with EEOC's charge processing program, many of which were identified by other sources during the Commission's fact-finding efforts. The responses were immensely valuable because they confirmed assessments about EEOC's strengths and weaknesses and gave voice to a segment of the population that is seldom heard.

Secondary Data Analysis

Another method employed by Commission staff was the analysis of EEOC's Charge Data System, which is a comprehensive database of all EEOC charges and the actions taken with respect to each, including receipt, categorization, investigation, and resolution. Staff analyzed trends, reviewed differences across district offices, and looked at deficiencies in EEOC's tracking activities. Commission staff obtained the data for all charges received between fiscal years 1993 and 1999. Included were those filed directly with EEOC and those filed with contracting state and local fair employment practices agencies. By comparing charge processing data over time, the Commission was able to analyze trends in complaint receipts and closures both before and after implementation of the Priority Charge Handling Procedures. The data were used mainly for descriptive purposes and trends analysis and not to estimate relationships.

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[78] Commission staff had initially intended to interview staff from additional district offices, but as a result of time and resource constraints and negotiations with EEOC, the sample had to be narrowed.

[79] *See* chap. 5, p. 111 for technical information concerning the Web site questionnaires and questionnaire results. Pursuant to the terms of clearance by the Office of Management and Budget, the questionnaire responses were not used for statistical purposes, but to enhance the Commission's fact-finding activities.

CHAPTER 2

Background

The workplace of the 21st century is drastically different from the workplace of the past. While the enforcement of federal fair employment laws has opened doors for many, newer ways to organize work and evolving work environments will continue to test the strength of those laws. And as the work force becomes more and more diverse, it will become increasingly important to have strong, proactive enforcement of civil rights laws in the employment environment as well as continued training and education concerning the rights and responsibilities of both employers and employees.

As the U.S. Equal Employment Opportunity Commission (EEOC) enters its 35th year, the employment environment differs drastically from the one that existed in 1965, the year EEOC was created. The labor force has increased, and the structure of industry has changed significantly over the past three decades. The demographics of the labor force have changed as well, with women and minorities accounting for a greater proportion of the labor pool.

The challenges faced by workers have changed as well. The enforcement of civil rights laws, including the Equal Pay Act of 1963 (EPA),[1] Title VII of the Civil Rights Act of 1964,[2] and the Age Discrimination in Employment Act of 1967 (ADEA),[3] has improved employment opportunities for many individuals. However, as the structure of the economy has shifted, other forces have begun to affect the nature of employment. There has been a dramatic growth in part-time and temporary employment, changes in benefits offered, and family-friendly leave policies. Nonetheless, issues related to skilled versus unskilled labor, education and occupational attainment, occupational segregation, fair pay, and workplace violence and abuse remain in America's work force.

This chapter highlights several factors related to working men and women in the United States. The population and labor force are examined in detail, and several issues facing the workers of today are discussed. While not all of these issues are directly related to the work of EEOC, it is instructive to consider how these factors interact with discrimination and diminished opportunities in workplaces across the nation.

EMPLOYMENT DISCRIMINATION: AN HISTORICAL PERSPECTIVE

Before the passage of the Civil Rights Act of 1964, laws and policies, both de jure and de facto, aimed at segregation ensured that African Americans and other persons of color were denied equal opportunity in employment and other basic civil rights. Nowhere is this denial of equality more evident than in the differences between the employment conditions of white and minority Americans. Scholars and commentators have noted that employment discrimination at that time relegated minorities to lower paying jobs, poor treatment, and lower wages. The employment opportunities for African Americans in the southern United States are described by one sociologist:

> Economic oppression emerged in the fact that blacks were heavily concentrated in the lowest-paying and dirtiest jobs the cities had to offer. In a typical Southern city during the late 1950s at least 75 percent of

[1] Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206-213 (1994)).

[2] Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000e (1994)).

[3] Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634 (1994 and Supp. IV 1998)).

the black men in the labor force were employed in unskilled jobs. They were the janitors, porters, cooks, machine operators, and common laborers. By contrast, only about 25 percent of white males were employed in these menial occupations. In the typical Southern city approximately 50 percent of black women in the labor force were domestics, while slightly less than 1 percent of white women were employed as domestics. Another 20 percent of black women were lowly paid service workers, while less than 10 percent of white women were so employed. In 1950 social inequality in the workplace means that nonwhite families earned nationally only 54 percent of the median income of white families.[4]

A 1960 report of the U.S. Commission on Civil Rights and its State Advisory Committees (SACs) focused on several areas of discrimination in the United States. The Missouri SAC summed up the employment opportunities for blacks at that time in the state, as well as in the nation:

Widespread discrimination against Negro workers [remains] in Missouri. Nonwhite workers are not able to sell their labor freely on the open market. When employed, they are generally relegated to unskilled labor, domestic, or menial tasks. . . . Negro workers find it difficult to be upgraded on the job or to obtain white-collar-and-tie jobs. They are also the first to be discharged during slack times. They thus constitute a greater proportion of jobless persons.[5]

The California SAC quoted a study by the Council for Civil Unity of San Francisco, which described the employment situation for minorities in the late 1950s:

Our first general conclusion is that employment opportunity in private industry in San Francisco is still widely restricted. These restrictions are experienced most acutely by Negro members of the labor force, and less so by Orientals and other non-whites of Asian background. While the employment situation for Jewish persons is much more favorable than for non-whites, they still face certain inequalities, usually of the "gentleman's agreement" kind at relatively high position levels. Latin Americans—principally those of Mexican origin—also encounter certain limitations of job opportunity.[6]

Although some states reported little discrimination or improved job opportunities for minorities in 1959,[7] discrimination in occupations and wages persisted in many other areas for minorities and women. It was not until the mid-1960s that Congress began to address these disparities. Since that time, several civil rights laws have been enacted that address discrimination in employment.

1963: The Equal Pay Act

Historically, men have earned more than women, even when performing the same jobs. For example, in 1962, the year before the Equal Pay Act was signed into law, women working full time earned approximately 59.3 cents for each dollar earned by male workers.[8] In 1963, the Equal Pay Act was enacted as an amendment to the Fair Labor Standards Act of 1938[9] to provide equal pay for men and women who perform substantially equal work in the same establishment.[10] The Equal Pay Act was established to prohibit wage discrimination by employers on the basis of sex, stating:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . .[11]

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[4] Aldon D. Morris, *The Origins of the Civil Rights Movement: Black Communities Organizing for Change* (New York: The Free Press, 1984), p. 1.

[5] U.S. Commission on Civil Rights (USCCR), *The National Conference and the Reports of the State Advisory Committees to the U.S. Commission on Civil Rights: 1959*, 1960, Missouri Report, p. 216.

[6] USCCR, *The National Conference and SAC Reports: 1959*, California Report, p. 66.

[7] *See, e.g.*, USCCR, *The National Conference and SAC Reports: 1959*, Connecticut Report, p. 74, Hawaii Report, p. 102, Montana Report, p. 224, Utah Report, pp. 376–79. Several State Advisory Committees did not address employment in their 1959 reports.

[8] U.S. Department of Labor, Women's Bureau, "Median Annual Earnings for Year-Round Full-Time Workers by Sex in Current and Real Dollars, 1951–1967," Mar. 12, 1999, accessed at <http://www2.dol.gov/dol/wb/public/wb_pubs/achart.htm>.

[9] Fair Labor Standards Act of 1938, Ch. 676, 52 Stat. 1060 (1963) (codified as amended at 29 U.S.C. § 206 (1994)).

[10] *See* Equal Pay Act of 1963, H.R. REP. NO. 88-309 (1963), *reprinted in* 1963 U.S.C.C.A.N. 687. *See* app. B for further discussion of Equal Pay Act legislative history and case law.

[11] 29 U.S.C. § 206(d)(1) (1994).

Equal pay was not a new concept. Early on, the War Labor Board, created by executive order during World War II, had proclaimed an "equal pay for women" policy. Permanent legislation to eliminate wage discrimination based upon the sex of the employee was a recommendation by three successive administrations.[12] Members of the 87th Congress introduced and reintroduced several equal pay bills.[13] Ultimately, after much deliberation, the 88th Congress proposed bill H.R. 6060. This bill amended the Fair Labor Standards Act of 1938 adding one additional fair labor standard, Section 6(d), stating that employees doing equal work should be paid equal wages regardless of sex.[14] This was thought to be the most efficient and least difficult course of action.[15] The concept of equal pay for jobs demanding equal skill was expanded to require equal effort, responsibility, and similar work conditions, as these were thought to be at the core of all job classification systems and the bases for legitimate differences in pay.[16]

1964: Title VII of the Civil Rights Act

With the Equal Pay Act in place, Congress had taken a significant step toward protecting the right to earn equal pay for both men and women. This statute, however, did not provide the comprehensive protections needed to ensure the right of equal opportunity in all aspects of employment. This was a right long denied to many Americans, not only on the basis of sex, but also on the basis of other individual characteristics, such as race, national origin, and religion.

President John F. Kennedy sought to remedy this pervasive circumstance the year the Equal Pay Act was passed. In his February 28, 1963, speech to Congress on the need for enhanced civil rights legislation, President Kennedy described the state of employment discrimination for African Americans:

> The [black] baby born in America today . . . has about one-half as much chance of completing high school as a white baby born in the same place on the same day—one-third as much chance of completing college—one-third as much chance of becoming a professional man—twice as much chance of becoming unemployed— . . . a life expectancy which is seven years less—and the prospects of earning only half as much.[17]

The following year, legislation was introduced aimed at eliminating discrimination in the nation's workplaces, schools, and places of public accommodation. The stated purpose of the proposed law was

> to achieve a peaceful and voluntary settlement of the persistent problem of racial and religious discrimination or segregation by establishments doing business with the general public, and by labor unions and professional, business, and trade associations.[18]

In 1964, President Lyndon B. Johnson signed into law the Civil Rights Act of 1964.[19] Title VII of that law addresses equal employment opportunity:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[20]

As one of the most comprehensive and important pieces of legislation of the 20th century, the Civil

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[12] 29 U.S.C. § 206(b),(d)(3) § 3 (1994).

[13] *See* H.R. REP. NO. 88-309 (1963), *reprinted in* 1963 U.S.C.C.A.N. 687.

[14] 29 U.S.C. § 206(d)(1) (1994).

[15] *See* H.R. REP. NO. 88-309 (1963), *reprinted in* 1963 U.S.C.C.A.N. 687.

[16] Ibid.

[17] President's Speech to Congress on Civil Rights, H.R. DOC. NO. 88-75 (1963), *reprinted in* 1963 U.S.C.C.A.N. 1507, *cited in* Joseph L. Rauh, Jr., "The Role of the Leadership Conference on Civil Rights in the Civil Rights Struggle of 1963–1964," chap. 2 in Robert D. Levy, ed., *The Civil Rights Act of 1964: The Passage of the Law That Ended Racial Segregation* (Albany, NY: State University of New York Press, 1997), p. 50.

[18] Civil Rights Act of 1964, S. REP. NO. 88-872 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355.

[19] *See* app. A for further discussion of Title VII legislative history and case law.

[20] 42 U.S.C. § 2000e-2 (1994).

Rights Act of 1964 has had a profound impact on the nation. Nonetheless, it would take several years for the full effects of Title VII to be experienced. Segregation and discrimination, practiced for so many years before the civil rights movement, could not be eliminated overnight. Unequal educational opportunities further exacerbated the ability of some individuals to be fully qualified for certain jobs. Further, the EEOC could not fully enforce, or effectively handle, the onslaught of charges it received during its infancy.[21]

1967: The Age Discrimination in Employment Act

Although the 1964 law covered a lot of ground, its coverage did not extend to the discrimination faced by older Americans. In fact, there was little that could be done to combat age discrimination, before the enactment of the ADEA.[22] The ADEA had its origins in the Civil Rights Act of 1964, which directed the Secretary of Labor to study the problem of age discrimination in employment. That study, *The Older American Worker—Age Discrimination in Employment*, was issued in June 1965.[23] As a result of this report, the Fair Labor Standards Amendments of 1966[24] directed the Secretary of Labor to submit recommendations for legislation implementing the findings and recommendations contained in the report.[25]

In January 1967, the President recommended the Age Discrimination in Employment Act. In his Older Americans Message of January 23, 1967, President Johnson detailed the need for federal legislation aimed at "prohibiting arbitrary and unjust discrimination in employment because of a person's age."[26] In his message, the President noted that the increasing lifespan of Americans and the continued dependence of older Americans on public assistance made it necessary for the nation to take action by developing laws to protect the employment situation of older Americans.

The bill was transmitted to Congress that February, and enacted on December 15, 1967.[27] In enacting the ADEA, Congress agreed that older workers were at a disadvantage in the labor market, noting that

> arbitrary age limits and certain other practices may work to the disadvantage of older persons, that the incidence of unemployment is higher among older workers and their numbers are growing, and that arbitrary discrimination in employment in industries affecting commerce because of age, burdens commerce and the free flow of goods in commerce.[28]

The ADEA prohibits discrimination against employees or job applicants 40 years of age or older. The act applies to employers with 20 or more employees, labor organizations affecting commerce with 25 or more members, employment agencies serving at least one covered employer, and federal, state, and local governments.[29]

1972: The Equal Employment Opportunity Act

For the first few years of its existence, EEOC did not have the power to litigate cases. As it was first organized, EEOC's mandate was to use "informal means" to resolve issues of employment discrimination; only the U.S. Department of Justice had the authority to litigate employment discrimination cases.[30] Early on, the Commission recognized the difficulties EEOC faced in enforcing its mandate, despite its valiant efforts at identifying employment discrimination. In 1969, the Commission noted that EEOC

> offers an interesting case of what might be called vigorous enforcement of non-sanctions. [EEOC] has weak

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[21] From its introduction in 1965, EEOC experienced structural and operational problems "whereby its ability to operate efficiently and to fulfill its mandate under Title VII have been seriously impaired." USCCR, *Federal Civil Rights Enforcement Effort*, 1971, p. 88.

[22] 29 U.S.C. §§ 621–634 (1994).

[23] U.S. Department of Labor, *The Older American Worker—Age Discrimination in Employment*, June 1965.

[24] Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 830 (codified as amended at 29 U.S.C § 203 (1994)).

[25] 29 U.S.C. § 203 (1966).

[26] 113 CONG. REC. 1089 (1967) (Older Americans Message from the President of the United States).

[27] *See* Age Discrimination in Employment Act of 1967, H.R. REP. NO. 90-805 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2213.

[28] Ibid., p. 2220.

[29] U.S. Equal Employment Opportunity Commission (EEOC), *Compliance Manual*, p. 0:2301. *See* app. C for further discussion of the ADEA.

[30] USCCR, *Jobs & Civil Rights: The Role of the Federal Government in Promoting Equal Opportunity in Employment and Training*, clearinghouse publication 16, April 1969, p. 14.

enforcement powers, i.e., "informal methods of conference, conciliation, and persuasion" and referral to the Attorney General. Yet, it has tended to find reasonable cause on a liberal basis, that is, moving ahead on all cases in which there is ground for the supposition that a violation of Title VII may have occurred.[31]

Two years later, the Commission noted:

> In contrast to the wide jurisdiction assigned EEOC by the Civil Rights Act of 1964, it is provided only limited means to enforce the statute. The agency may attempt to eliminate job discrimination through the "informal methods" of conference, conciliation, and persuasion, but it has no enforcement powers with which to penalize those who violate the law.[32]

In the following year, the Equal Employment Opportunity Act of 1972[33] gave EEOC the power to file lawsuits against private employers, employment agencies, and unions when conciliation failed, and to file systemic suits against private employers. This amendment also extended EEOC's jurisdiction to all educational institutions and state and local governments and broadened Title VII coverage to include employers of 15 or more employees and unions with 15 or more members.[34]

1978: The Pregnancy Discrimination Act

The decade of the 1970s was a time of significant efforts by the women's movement to further the cause of equality of opportunity.[35] In part due to these efforts, Congress recognized the need to continue focusing on gender inequality. Title IX of the Education Amendments of 1972[36] sought to ensure equality for both men and women in education, including employment in education fields. In 1978, Congress passed the Pregnancy Discrimination Act,[37] as an amendment to Section 701 of Title VII. The law states:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .[38]

The act was meant to clarify Title VII, not add to it, by providing that pregnant women be treated no differently from other workers.[39] The Pregnancy Discrimination Act was passed in response to the Supreme Court decision in *General Electric Co. v. Gilbert.*[40] In *Gilbert*, the Supreme Court ruled that it was not discriminatory to exclude pregnancy-related conditions from insurance and disability plans. The Court held that the exclusion was based on pregnancy, not sex, and, therefore, was not precluded by Title VII.[41] The ruling was based on a 1974 decision in *Gedulig v. Aiello,*[42] in which it was held that differences between pregnancy-related disabilities and other disabilities were not sex discrimination.[43] However, Congress held that the Court had misinterpreted the purpose of Title VII in *Gilbert* and determined that pregnancy discrimination was equivalent to sex discrimination because the ability to bear children is limited to women.[44]

In 1977, another Supreme Court decision, *Nashville Gas Co. v. Satty,*[45] had an impact on pregnant workers. This time the Court ruled that pregnant workers were protected under Ti-

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[31] Ibid., p. 224.

[32] USCCR, *Federal Civil Rights Enforcement*, p. 86.

[33] Equal Employment Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified as amended at 42 U.S.C. § 2000e-5 (1994)).

[34] 42 U.S.C. § 2000e(b) (1994). *See* Bureau of National Affairs (BNA), *The Equal Employment Opportunity Act of 1972*, 1973, pp. 1–3.

[35] *See* USCCR, *Equal Educational Opportunity and Nondiscrimination for Girls in Advanced Mathematics, Science, and Technology Education: Federal Enforcement of Title IX*, July 2000, chap. 2.

[36] Education Amendments of 1972, Title IX, Pub. L. No. 92-318, 86 Stat. 373 (1972) (codified as amended at 20 U.S.C. §§ 1681–1688 (1994)).

[37] Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at Title VII, 42 U.S.C. § 2000e-(k) (1994)).

[38] 42 U.S.C. § 2000e-(k) (1994).

[39] Civil Rights Act of 1964—Pregnancy Discrimination, H.R. REP. No. 95-948 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4752–4753.

[40] General Electric Co. v. Gilbert, 429 U.S. 125 (1976).

[41] BNA, *Pregnancy Disability Amendment to Title VII of the Civil Rights Act of 1964*, 1978, p. 3.

[42] Gedulig v. Aiello, 417 U.S. 484 (1974).

[43] BNA, *Pregnancy Disability Amendment to Title VII*, p. 3.

[44] H.R. REP. No. 95-948 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4751.

[45] Nashville Gas Co. v. Satty, 434 U.S. 136 (1977).

tle VII in regard to job seniority. In *Satty*, the Supreme Court held that absence from work due to pregnancy could not affect job seniority.[46] The Court, however, failed to address the issue of denial of sick pay to pregnant workers.[47]

Because of these decisions, Congress saw the need to clarify Title VII. According to the House report, the clarification was necessary because

> the assumption that women will become pregnant and leave the labor force leads to the view of women as marginal workers, and is at the root of the discriminatory practices which keep women in low-paying and dead-end jobs. H.R. 6075 unmistakably reaffirms that sex discrimination includes discrimination based on pregnancy, and specifically defines standards which require that pregnant workers be treated the same as other employees on the basis of their ability or inability to work.[48]

Congress concluded, therefore, that pregnant women are to be treated the same as other employees.[49]

1990: The Americans with Disabilities Act

From the end of the 1970s through the 1980s, there were no major civil rights laws enacted relating to employment. During that time, however, a disability rights movement was brewing that culminated in the passage of the Americans with Disabilities Act (ADA)[50] in 1990, which is designed to eliminate discrimination against individuals with disabilities. Title I of the act focuses on discrimination in the employment context:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.[51]

An "individual with a disability" is someone who has a physical or mental disability that substantially limits one or more major life activities or has a record of having or is regarded as having such an impairment.[52] The act defines "qualified" individuals with a disability as those individuals "who, with or without a reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[53]

1991: The Civil Rights Act of 1991

In the late 1980s and early 1990s, Congress sought to reverse the effect of Supreme Court cases that raised the bar for plaintiffs in establishing cases of discrimination.[54] These cases essentially interpreted existing civil rights laws extremely narrowly such that the ambit of discriminatory practices was significantly lessened. The Civil Rights Act of 1990,[55] ultimately vetoed by President George Bush, was intended to negate five Supreme Court decisions that had the effect of "diluting" protections against employment discrimination under Title VII.[56] Thus, the

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[46] BNA, *Pregnancy Disability Amendment to Title VII*, p. 4.

[47] Ibid.

[48] H.R. REP. NO. 95-948 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4751, *reprinted in* BNA, *Pregnancy Disability Amendment to Title VII of the Civil Rights Act of 1964*, p. 103.

[49] 42 U.S.C. 2000e(k) (1994); *see* 123 CONG. REC. 29,385 (1977) (statement of Sen. Williams); 124 CONG. REC. 38,573 (July 18, 1978) (statement of Rep. Hawkins).

[50] Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101–12213 (1994)). The ADA is beyond the scope of this report. For further information on the enforcement of the ADA by EEOC, *see* USCCR, *Helping Employers Comply with the ADA: An Assessment of How the United States Equal Employment Opportunity Commission is Enforcing Title I of the Americans with Disabilities Act*, September 1998.

[51] 42 U.S.C. § 12112(a) (1994).

[52] 42 U.S.C. § 12102(2) (1994).

[53] 42 U.S.C. §§ 12111(8), 12112(b) (1994).

[54] USCCR, *Report of the United States Commission on Civil Rights On the Civil Rights Act of 1990*, July 1990. The legislation was intended to address several cases: Patterson v. McLean Credit Union, 491 U.S. 164 (1989); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Martin v. Wilks, 490 U.S. 755 (1989); Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989); Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642 (1989). After President Bush vetoed the 1990 bill, but before the 1991 act was passed, the Supreme Court handed down two other decisions affecting rights under Title VII. Those were West Virginia University Hospital v. Casey, 494 U.S. 936 (1991) and EEOC v. Arabian American Oil Company, 499 U.S. 244 (1991). The 1991 act modified or overruled all of these decisions in some respect.

[55] Civil Rights Act of 1990, S. Res. 2104, 101st Cong. (1990) (enacted).

[56] David A. Cathcart and Mark Snyderman, "The Civil Rights Act of 1991," pp. 1–92 in David A. Cathcart, Leon Friedman, Merrick T. Rossein, Mark Snydermann, and Steven H. Steinglass, *The Civil Rights Act of 1991* (Philadelphia: American Law Institute-American Bar Association, Committee on Continuing Professional Education, 1993), p.

intent of the law was to "restore" certain civil rights protections and strengthen existing civil rights laws.[57] After extended debates, the various issues resulted in the compromise law, the Civil Rights Act of 1991.[58]

As enacted, the law broadens and clarifies existing civil rights laws. It also offers additional protections against employment discrimination and harassment in the workplace.[59] Among its many provisions, the act

- provides for damages and jury trials in Title VII and ADA cases;
- shifts the burden of proof to employers in disparate impact cases to show that an employment practice is job related and consistent with business necessity;
- clarifies that consideration of race, color, religion, sex, or national origin in employment decisions is unlawful, even if lawful factors also influenced the decision;
- prohibits adjusting test scores, using different cutoff scores or otherwise altering the results of test scores on the basis of race, color, religion, sex, or national origin;
- requires EEOC to conduct educational and outreach activities; and
- authorizes fees for expert witnesses.[60]

Summary

As we enter the 21st century, we have a long history of jurisprudence aimed at ensuring the civil rights of Americans with regard to employment and other issues. We also have seen a struggle to both narrow and expand the ambit of these laws. The events of the 1960s and 1970s brought the realization that equal opportunity in many aspects of life had not been achieved. At the same time, as the years progressed, we could see that those laws had a real impact, when appropriately enforced. Obviously, other factors, such as economic and demographic changes, have played a role in shaping the nation's labor force. It is the responsibility of EEOC, however, to keep pace with such structural changes to ensure that these laws will continue to ensure full parity between white males and the many individuals who are members of minority groups, women, and older Americans.

THE CURRENT EMPLOYMENT ENVIRONMENT

Population Distribution of the U.S.

As the nation's population changes, so does its labor force. This growing diversity of the nation's population and labor force calls for stronger enforcement of civil rights laws related to employment. As minorities and women play a greater role in the work force, it is crucial that antidiscrimination laws related to employment are clearly understood by employers and workers.

TABLE 2-1

Civilian Noninstitutional Population, Percent by Sex, Race, and Hispanic Origin

Group	1978	1988	1998	2008
White	87.5%	85.7%	83.6%	81.6%
Black	10.5%	11.2%	11.9%	12.6%
Other	2.1%	3.1%	4.6%	5.8%
Hispanic	–	7.2%	10.3%	12.7%
Men	47.3%	47.6%	48.1%	48.1%
Women	52.7%	52.4%	51.9%	51.9%

SOURCE: Howard N. Fullerton, Jr., "Labor Force Projections to 2008: Steady Growth and Changing Composition," *Monthly Labor Review*, November 1999, pp. 19–32. Data on Hispanic origin not available before 1980. Ibid., p. 22.

In the years to come, the minority population will grow at a faster rate than the white population. Recent statistics from the Current Population Survey show that between 1998 and 2008 African Americans will experience an annual growth rate of 1.7 percent, while other minority groups will grow at a rate of 3.5 percent. The population of persons of Hispanic origin will grow by 3.2 percent; comparatively, the white population will grow less than 1 percent.[61]

1. *See also* USCCR, *Report of the United States Commission on Civil Rights On the Civil Rights Act of 1990.*

[57] USCCR, *Report of the United States Commission on Civil Rights On the Civil Rights Act of 1990*, p. 1.

[58] Civil Rights Act of 1991, Pub. L. No. 102-66, 105 Stat. 1071 (1991) (codified as amended at 42 U.S.C. §§ 1981, 2000 (1994)). *See* USCCR, *Report of the United States Commission on Civil Rights On the Civil Rights Act of 1990*, p. 1.

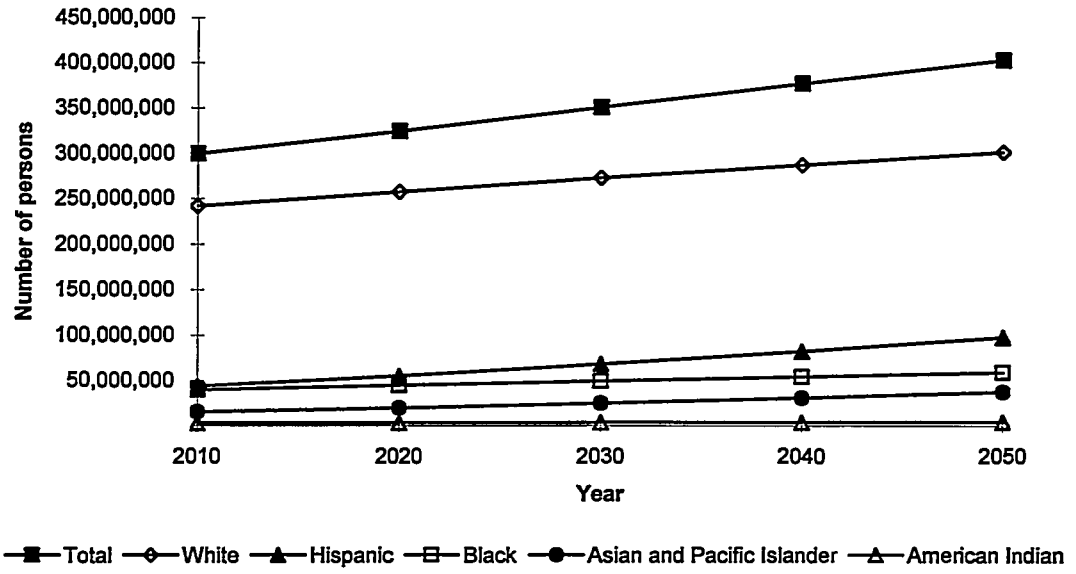
[59] EEOC, *Compliance Manual*, p. 0:2503.

[60] EEOC, *Compliance Manual*, p. 0:2503. *See* 42 U.S.C. 2000e-2(1) (1994).

[61] Howard N. Fullerton, Jr., "Labor Force Projections to 2008: Steady Growth and Changing Composition," *Monthly Labor Review*, November 1999, pp. 19–32. *See* table 2-1.

FIGURE 2-1

Civilian Population Projections by Race and Hispanic Origin, 2010 to 2050



SOURCES: U.S. Department of Commerce, Bureau of the Census, "Projections of the Total Resident Population by 5-Year Age Groups, Race, and Hispanic Origin with Special Age Categories: Middle Series, 2006 to 2010," Jan. 13, 2000, accessed at <http://www.census.gov/population/ projections/nation/summary/np-t4-c.txt>; "Projections of the Total Resident Population by 5-Year Age Groups, Race, and Hispanic Origin with Special Age Categories: Middle Series, 2016 to 2020," Jan. 13, 2000, accessed at <http://www.census.gov/population/projections/nation/summary/np-t4-e.txt>; "Projections of the Total Resident Population by 5-Year Age Groups, Race, and Hispanic Origin with Special Age Categories: Middle Series, 2025 to 2045," Jan. 13, 2000, accessed at <http://www.census.gov/population/projections/nation/summary/np-t4-f.txt>; "Projections of the Total Resident Population by 5-Year Age Groups, Race, and Hispanic Origin with Special Age Categories: Middle Series, 2050 to 2070," Jan. 13, 2000, accessed at <http://www.census.gov/population/projections/ nation/summary/np-t4-g.txt>.

The population will continue to shift over the next few decades. Population estimates from the Bureau of the Census show that the minority population will continue to grow as a percentage of the total U.S. population throughout the 21st century. By 2050, blacks will represent 15 percent of the population. Asian/Pacific Islanders and American Indians will account for 9 percent and 1 percent of the population, respectively. Twenty-four percent of the population will be persons of Hispanic origin.[62]

Profile of the U.S. Labor Force

"The statistics [on employment patterns], the [EEOC] believes, show that job discrimination is one of the major reasons why minorities generally have lower incomes than those fortunate enough to be born into the majority group, and therefore have less to spend on food, housing, education, clothing, travel and recreation—the goods and services needed to sustain and enrich life in the computer age."[63]

Many measures of labor force participation[64] differ by age, sex, race, and national origin. For

[62] Calculated from U.S. Department of Commerce, Bureau of the Census, "Projections of the Total Resident Population by 5-Year Age Groups, Race, and Hispanic Origin with Special Age Categories: Middle Series, 2050 to 2070," Jan. 13, 2000, accessed at <http://www.census.gov/population/projectins/ nation/summary/np-t4-g.txt>. *See* fig. 2-1. Note that persons of Hispanic origin may be of any race.

[63] EEOC, *Job Patterns for Minorities and Women in Private Industry: 1966*, report no. 1, 1966, p. 1.

[64] The civilian labor force comprises all persons in the noninstitutional population 16 years of age and over classified as employed or unemployed. The labor force participation rate represents the percentage of persons in the labor force

example, the percentage distribution of persons in the civilian labor force by educational attainment, sex, race, and Hispanic origin is uneven. While descriptive statistics do not show where discrimination occurs, they can be useful for understanding the employment environment and for pinpointing areas of potential concern. In the following sections, the Commission focuses on the changing structure of industry and the areas experiencing job growth, employment and unemployment estimates, and earnings. An understanding of the nature of the labor force, and differences by sex, race, and national origin, will provide insight into discrimination in employment and EEOC's enforcement efforts.[65]

The Labor Force

At the beginning of 2000, the total number of persons in the U.S. labor force was 141.2 million, and the labor force participation rate was at an all-time high at 67.6 percent.[66] At that time, the average employee earned around $13.50 an hour and worked approximately 34.5 hours per week; those employed in the manufacturing industry worked approximately 42 hours per week with an additional 4.8 hours of overtime.[67]

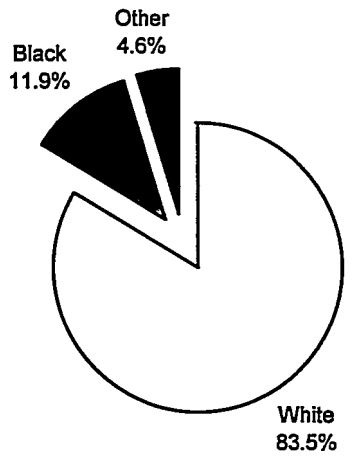
Race, Ethnicity, and Sex

As we enter the 21st century, the labor force is not evenly divided by the sexes. Male workers outnumber women by approximately 10 million.[68] Mirroring the population, white Americans compose almost 84 percent of the labor force, with black Americans representing about 12 percent of the labor force.[69] Persons of Hispanic origin account for almost 11 percent of the labor force.[70]

The percentage of the population employed varies by race and Hispanic origin. In 1997, 64.6 percent of the white population was employed, compared with only 58.2 percent of the black population. Comparatively, 62.6 percent of the Hispanic population was employed. However, there were within-group differences as well. For example, Mexicans, Puerto Ricans, and Cubans differed in their employment: 63.4 percent of Mexican Americans were employed, compared with 54.5 percent and 58.8 percent of Puerto Rican Americans and Cuban Americans, respectively.[71]

FIGURE 2-2

Labor Force by Race, February 2000



SOURCE: U.S. Department of Labor, Bureau of Labor Statistics (BLS), "The Employment Situation: February 2000," Mar. 3, 2000, table A-2.

EEOC data from 1966 to 1997 show several trends in employment participation rates in the private sector:

- More women were employed in the private sector in 1997 than in 1966.
- Asian Americans and Pacific Islanders have experienced rapid growth in their employment participation rates; while Native Americans and Alaska Natives have experienced little growth.

who are employed. U.S. Department of Commerce, Economics and Statistics Administration, Bureau of the Census, *Statistical Abstract of the United States: 1998*, 118th edition, p. 400.

[65] EEOC's enforcement efforts are discussed in detail in chap. 5.

[66] U.S. Department of Labor, Bureau of Labor Statistics (BLS), "The Employment Situation: February 2000," Mar. 3, 2000, p. 1.

[67] Ibid., table A.

[68] Ibid., table A-1.

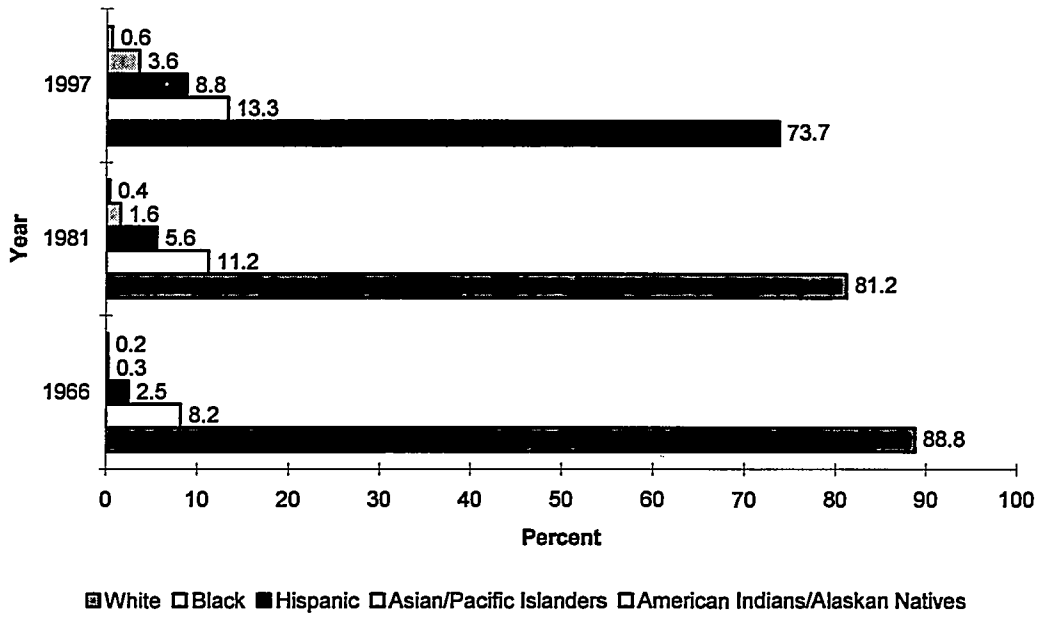
[69] Ibid., table A-2.

[70] Ibid. *See* fig. 2-2. Note that persons of Hispanic origin may be of any race. Numbers do not equal 100 percent due to rounding.

[71] Census, *Statistical Abstract of the United States: 1998*, p. 404, table 646.

FIGURE 2-3

Private Sector Employment Participation Rates by Race and Ethnicity, 1966 to 1977



SOURCE: EEOC, *Indicators of Equal Employment Opportunity—Status and Trends*, December 1998, p. 6.

- In 1997, minorities held one-quarter of all jobs in the private sector.[72]

In 1966, whites represented 89 percent of the labor force. Since then, blacks have increased their share of the private sector work force from 8.2 to 13.3 percent.[73] However, although black women have increased their private sector employment, black males have experienced little improvement. In 1966, black males accounted for 5.7 percent of the work force; by 1997 black males held 6.1 percent of the private sector jobs. During the same time, black females increased their participation from 2.4 to 7.2 percent.[74]

Hispanics, once occupying only 2.5 percent of the private sector jobs, represented 8.8 percent of private sector employment in 1997.[75] Asian Americans increased their participation 12 times, from 0.3 to 3.6 percent during the 30-year time span. Native Americans and Alaska Natives, however, have entered the private sector rather slowly, increasing their participation by only 0.4 percentage points from 1966 to 1997.[76] Within the Native American and Alaska Native populations, men and women have had identical private sector employment participation rates since EEOC began collecting data in 1966. Between 1966 and 1997, both male and female Native Americans and Alaska Natives increased their private sector employment participation rates from 0.1 to 0.3 percent.[77]

Sex and Age

Men compose slightly more than half of the labor force (54 percent); women account for 46

[72] EEOC, *Indicators of Equal Employment Opportunity—Status and Trends*, December 1998, pp. 6–7. Numbers are based on data from EEOC's annual Employer Information Report (EEO-1). Ibid., p. 6. *See* fig. 2-3.

[73] Ibid., p. 6. *See* fig. 2-3.

[74] Ibid. *See* table 2-2.

[75] Ibid. *See* fig. 2-3.

[76] Ibid. *See* fig. 2-3.

[77] Ibid. *See* table 2-2.

percent of the labor force.[78] Men and women show similar labor force participation rates at different ages, with the largest numbers of each sex working during the ages of 25 years to 54 years.[79] Approximately 93 percent of all men aged 25 to 44 are in the labor force, compared with 76 to 78 percent of the female population of the same ages.[80]

Workers above the age of 65 represent the smallest segment of the labor force. Men over the age of 65 account for 1.7 percent of the labor force; women over the age of 65 account for 1.2 percent of the labor force.[81] Among men, almost 17 percent remain in the work force after age 65. Only 8.6 percent of women are in the work force after age 65.[82]

TABLE 2-2

Private Sector Employment Participation Rates by Sex, Race, and Ethnicity, 1966 and 1997

	1966		1997	
Race/Ethnicity	**Men**	**Women**	**Men**	**Women**
White	60.9	27.8	39.1	34.6
Black	5.7	2.4	6.1	7.2
Hispanic	1.8	0.8	5.0	3.7
Asian American and Pacific Islander	0.2	0.1	1.9	1.8
American Indian and Alaskan Native	0.1	0.1	0.3	0.3

SOURCE: EEOC, *Indicators of Equal Employment Opportunity–Status and Trends*, December 1998, p. 6.

Workers between the ages of 16 and 19 also represent a small portion of the labor force, primarily because many Americans at these ages are in school and not in the labor force. About 51 to 52 percent of both men and women are working at these ages, representing approximately 3 percent of the total labor force.[83]

TABLE 2-3

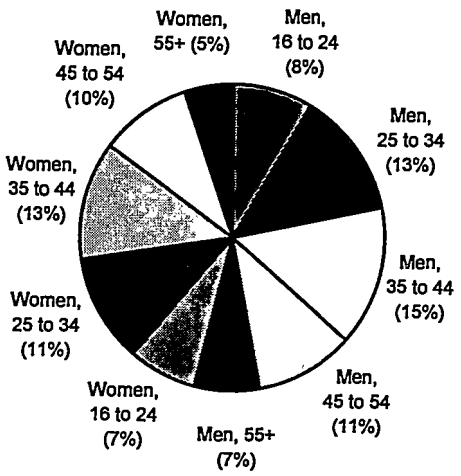
Civilian Labor Force by Sex and Age, 1997 (in millions)

Age	**Men**	**Women**
16 to 19 years	4.1	3.8
20 to 24 years	7.2	6.3
25 to 34 years	18.1	15.3
35 to 44 years	20.1	17.3
45 to 54 years	14.6	13.0
55 to 64 years	7.0	5.7
65 years and over	2.3	1.6
Total	73.3	63.0

SOURCE: U.S. Department of Commerce, Economics and Statistics Administration, Bureau of the Census, *Statistical Abstract of the United States: 1998*, 118th edition, p. 403, table 645.

FIGURE 2-4

Percent of the Total Labor Force by Sex and Age, 1997



SOURCE: Calculated from U.S. Department of Commerce, Economics and Statistics Administration, Bureau of the Census, Statistical Abstract of the United States: 1998, 118th edition, p. 403, table 645.

Educational Attainment

Educational attainment is a strong predictor of employment status. Since the 1960s, educational attainment has risen in the United States. In 1960, only 41 percent of the nation's population had completed high school. By 1997, this figure had doubled to 82 percent.[84]

[78] Census, *Statistical Abstract of the United States: 1998*, p. 403, table 645.

[79] Ibid. *See* table 2-3.

[80] Ibid.

[81] Calculated from Census, *Statistical Abstract of the United States: 1998*, p. 403, table 645. *See* fig. 2-4.

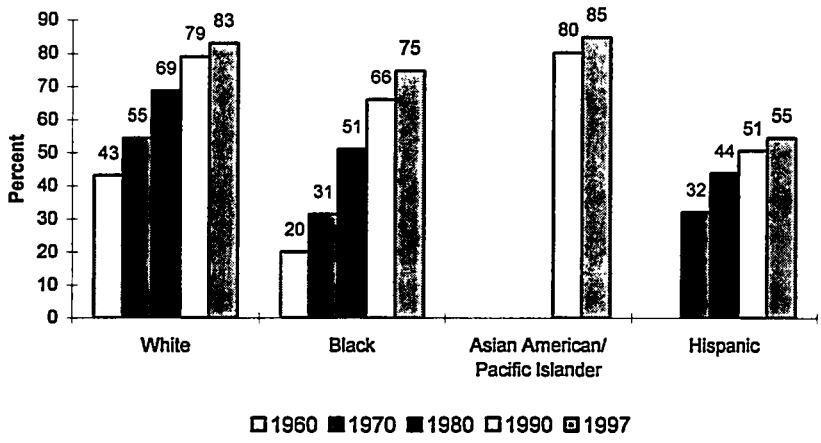
[82] Ibid.

[83] Ibid. *See* fig. 2-4.

[84] Ibid., p. 167, table 260.

FIGURE 2-5

Completion of High School or More Education by Race and Hispanic Origin, 1960 to 1997



SOURCE: U.S. Department of Commerce, Economics and Statistics Administration, Bureau of the Census, *Statistical Abstract of the United States: 1998,* 118th edition, p. 167, table 260. Data for Hispanics are not available prior to 1970; data for Asian Americans and Pacific Islanders are not available prior to 1990.

However, there are differences by sex, race, and ethnicity. For example, white Americans and Asian Americans and Pacific Islanders have the highest educational attainment, with 83 percent and 85 percent of each population, respectively, having attained at least a high school education. Comparatively, approximately 10 percent fewer blacks, and 30 percent fewer Hispanics, have completed high school.[85] In addition, among Hispanics, high school graduation rates differed by national origin. Forty-nine percent of Mexican Americans graduated from high school in 1997, compared with 61 percent of Puerto Rican Americans and 65 percent of Cuban Americans.[86]

Educational attainment varies little by sex at the high school level. Overall, 82 percent of both men and women have at least a high school education.[87] Seventy-six percent of black females have completed high school or more education, compared with 74 percent of black men. Among Asian Americans and Pacific Islanders, 86 percent of men compared with 81 percent of women graduated from high school in 1996.[88]

Differences appear, however, at higher levels of education. For example, within the white population, 27 percent of men and 22 percent of women have completed four or more years of college.[89] Asian Americans and Pacific Islanders have much higher educational attainment rates, with 46 percent of men and 37 percent of women receiving at least a bachelor's degree.[90]

Employment statistics demonstrate how education is related to employment. In 1997, the number of white workers was similarly distributed among those who had graduated high school, those who had some college education, and those who were college graduates. Among African Americans, however, the majority of workers were high school graduates or had completed some college.[91] Only 16.6 percent of African Americans in the labor force had completed college, compared with 29.5 percent of white

[85] Ibid. *See* fig. 2-5.

[86] Ibid.

[87] Ibid.

[88] Ibid.

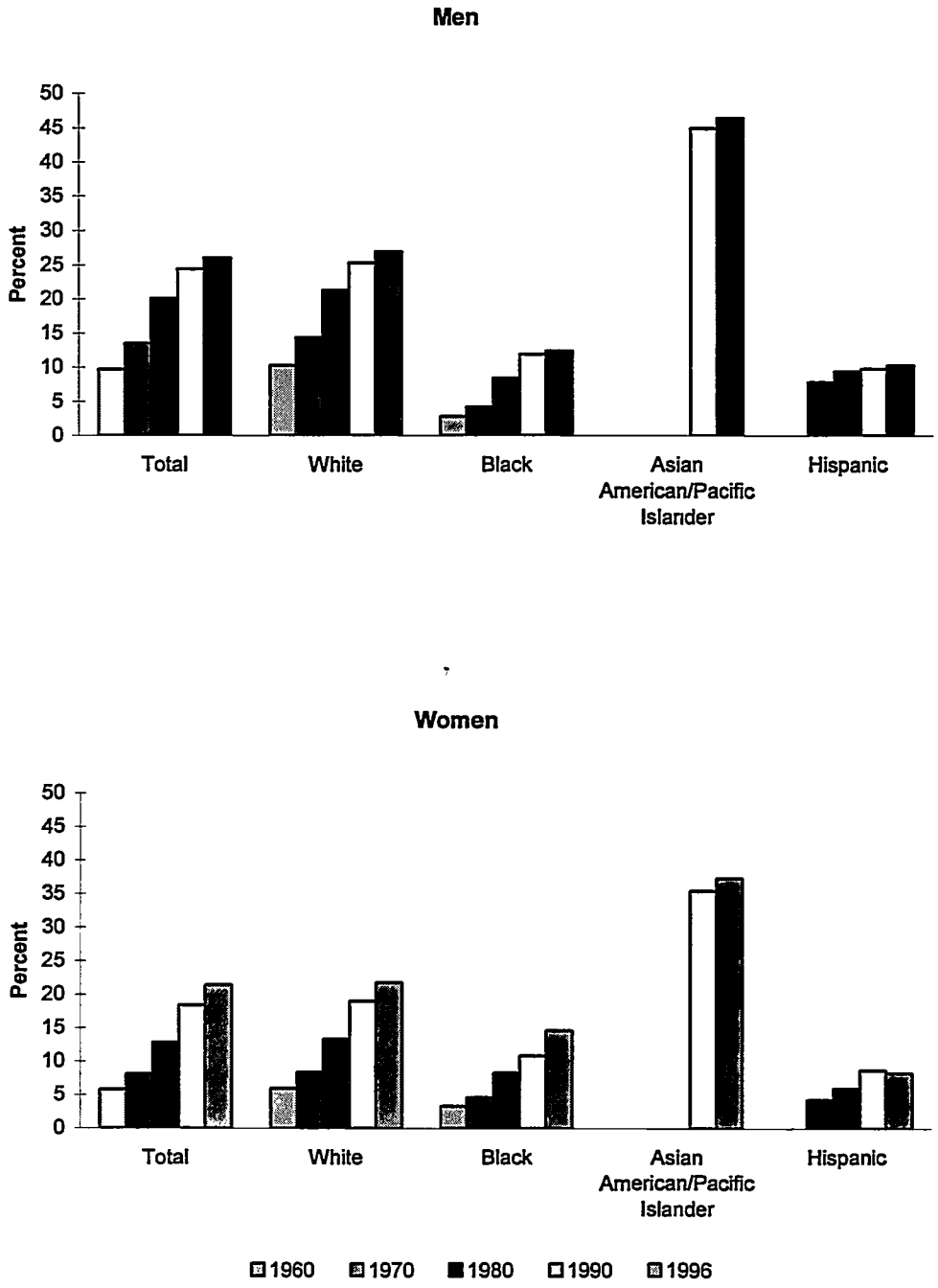
[89] Ibid., p. 167, table 261. *See* fig. 2-6.

[90] Ibid. *See* fig. 2-6.

[91] Ibid., p. 405, table 646. *See* table 2-4.

FIGURE 2-6

Receipt of Bachelor's Degrees by Race and Hispanic Origin, 1960 to 1996



SOURCE: U.S. Department of Commerce, Economics and Statistics Administration, Bureau of the Census, *Statistical Abstract of the United States: 1998,* 118th edition, p. 167, table 261. Data for Hispanics are not available prior to 1970; data for Asian Americans and Pacific Islanders are not available prior to 1990.

persons in the labor force. Comparatively, 37.4 percent of Hispanic workers had not completed high school, and only 12.4 percent of Hispanic workers had a college degree.[92]

TABLE 2-4

Civil Labor Force by Educational Attainment, Race, and Hispanic Origin, 1997

	White	Black	Hispanic
Less than high school	10.4%	14.3%	37.4%
High school graduate, no degree	32.8%	37.8%	28.1%
Some college	27.3%	31.3%	22.1%
College graduate	29.5%	16.6%	12.4%
Total	93,179	12,253	10,556

SOURCE: U.S. Department of Commerce, Economics and Statistics Administration, Bureau of the Census, *Statistical Abstract of the United States: 1998*, 118th edition, p. 405, table 648. Data are not available for the Asian American population.

Unemployment

February 2000 estimates of unemployment show that teenagers have the highest unemployment rate (14.1 percent), while the unemployment rate for the nation as a whole is 4.1 percent.[93] African Americans also have higher unemployment rates than other groups—7.8 percent compared with 3.6 for whites and 5.7 percent for persons of Hispanic origin.[94] Data from 1997 show that there are in-group differences as well. Among Hispanics, for example, Mexican Americans and Cuban Americans had lower unemployment rates: 7.7 and 6.6 percent, respectively. However, Puerto Ricans had an unemployment rate of 9.8 percent that year.[95]

Employment by Occupation

According to EEOC, one indicator of equal employment opportunity is the number of women and minorities in the "top" job categories.[96] The job categories of "officials/managers" and "professionals" offer better paying jobs and more opportunities than other occupations. In addition, officials and managers can have "significant influence" because they can develop employer policies that affect the employment opportunities of minorities and women.[97] EEOC data show that every minority group has increased its participation in these two job categories since 1966.[98]

Despite increases in the proportion of minorities in these jobs, minorities represent only 12.9 percent of all managerial jobs and 16.5 percent of all professional jobs.[99] Similarly, although women have increased their presence in managerial jobs three and a half times, they only occupy one-third of such positions. However, women currently account for approximately half of all professional jobs.[100]

An examination of employment in specific jobs reveals where women and minorities remain underrepresented. For example, women account for only 26 percent of all physicians and lawyers. They account for fewer than 20 percent of architects, dentists, police, and detectives and represent 10 percent or less of those employed as engineers, airline pilots and navigators, firefighters, mechanics, and construction workers, and those in mining, transportation, and forestry and logging occupations.[101] Men are underrepresented in the following occupations: registered nurses, prekindergarten and kindergarten teachers, radiologic technicians, secretaries, typists, receptionists, financial records processing personnel, teachers' aides, child care workers, cleaners and servants, dental assistants, and hairdressers—occupations in which women account for more than 90 percent of all employees.[102]

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92 Ibid., p. 405, table 648. *See* table 2-4.

93 BLS, "The Employment Situation: February 2000," table A.

94 Ibid.

95 Census, *Statistical Abstract of the United States: 1998*, p. 404, table 646.

96 EEOC, *Indicators of Equal Employment Opportunity—Status and Trends*, p. 14.

97 Ibid. Managerial positions include "officials," "managers," and "administrators." These are occupations in which the employee develops and executes policies, or directs particular departments of the business or particular phases of business operations. Professional occupations require a college degree or comparable experience. Such jobs include accountants, auditors, personnel and labor relations workers, pilots and navigators, architects, scientists, lawyers, nurses, teachers, counselors, and similar positions. Ibid., p. B-3.

98 Ibid., p. 14. *See* figs. 2.7a and 2.7b.

99 Ibid.

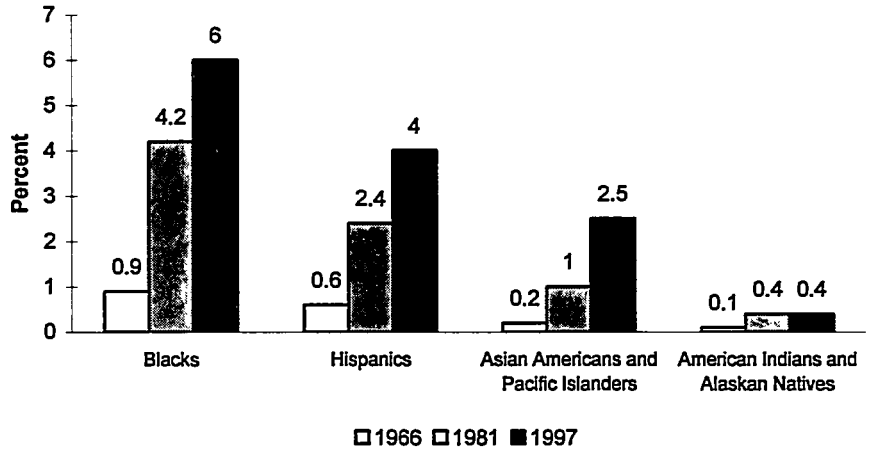
100 Ibid.

101 Census, *Statistical Abstract of the United States: 1998*, pp. 417–19, table 672.

102 Ibid.

FIGURE 2-7A

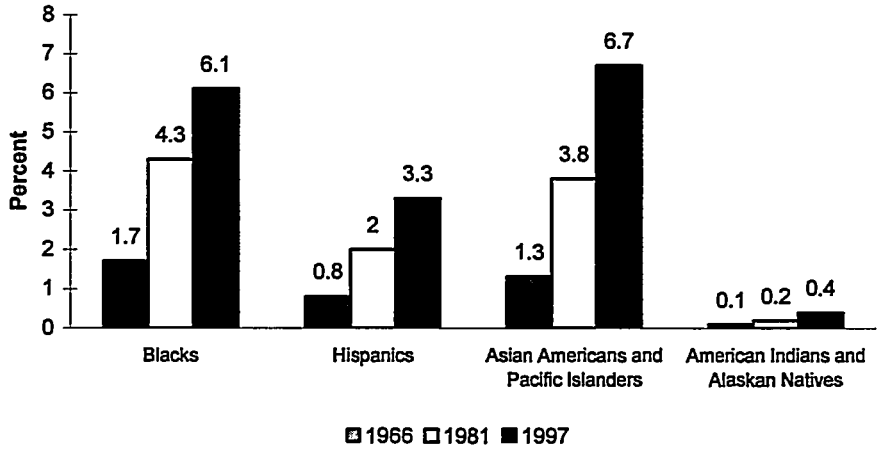
Percent of Minorities in Managerial Positions, 1966 to 1997



SOURCE: U.S. Equal Employment Opportunity Commission, *Indicators of Equal Employment Opportunity—Status and Trends,* December 1998, p. 14.

FIGURE 2-7B

Percent of Minorities in Professional Positions, 1966 to 1997



SOURCE: U.S. Equal Employment Opportunity Commission, *Indicators of Equal Employment Opportunity—Status and Trends,* December 1998, p. 14.

Blacks are severely underrepresented as aerospace engineers, authors, dental hygienists, airline pilots and navigators, and farm operators and managers, representing less than 2 percent of the employees in these occupations. They are also found in limited numbers as managers in marketing, advertising, and public relations (4 percent); engineers (4 percent); lawyers and judges (3 percent); and bartenders (2 percent).[103] Hispanics also are underrepresented in several occupations, including engineers, medical scientists, respiratory therapists, technical writers, editors and reporters, and radiologic technicians.[104]

Comparatively, there are certain occupations in which blacks and Hispanics are found in large numbers. Blacks represent 20 to 30 percent of all telephone operators, guards, dietitians, social workers, statistical clerks, correctional institution officers, health and nursing aides, maids and housemen, and pressing machine operators.[105] Hispanics account for a large proportion of cleaners and servants (31 percent), maids and housemen (25 percent), textile sewing machine operators (34 percent), and pressing machine operators (44 percent).[106]

Employment by Industry

Employment by race, ethnicity, and sex also varies by industry, which can affect salary, promotion opportunities, benefits, and prestige. The service industry employs the largest number of people. In 1997, 46 million people were employed in the service industry, with almost 31 million in professional and related services, such as the health, education, social services, and legal service industries.[107] The public services (including transportation and communication) and the wholesale and retail trade industries also employed more than 20 million people.[108]

Women are found in fewer numbers in the construction and mining industries, but are well represented in the following industries: finance, insurance, and real estate; personal services; and professional and related services.[109] Blacks are found in higher than average numbers in the public utilities industry, the personal service industry, and public administration. Hispanics are found employed in large numbers in the agriculture and personal service industries.[110]

EEO-1 data collected by EEOC show that minorities increased their employment in most of the major industries between 1983 and 1997.[111] In 1997, blacks held 16 percent of the jobs in the service industry, and Asian Americans and Pacific Islanders held 5 percent of the jobs. Hispanics held 10 percent of the jobs in the trade industries.[112] American Indians and Alaska Natives also experienced improved employment opportunities in wholesale and retail sales. In 1983, they accounted for 0.3 percent of jobs in that industry, increasing to 0.7 percent of such jobs in 1997.[113]

Job Opportunities

In addition to demographic shifts, changes in the structure of industry and jobs will affect the labor force and the opportunities available to men and women in the labor force. Bureau of Labor Statistics employment projections for 2008 suggest that among the major occupational groups, "professional specialty" occupations will experience the highest and quickest increase.[114] Two-thirds of the job growth in this group is expected to be within three occupational categories: (1) teachers, librarians, and counselors; (2) computers, mathematical and operations research; and (3) health assessment and treating occupations. Eighty-six percent of the growth in professional specialty jobs will be in the service industry, including education, business services, and health services.[115] In addition, 290,000 engineering jobs will be created by 2008.[116]

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[103] *See* ibid.

[104] *See* ibid.

[105] *See* ibid.

[106] *See* ibid.

[107] Ibid., p. 421, table 675. *See* table 2-5.

[108] Ibid. *See* table 2-5.

[109] Ibid. *See* table 2-5.

[110] Ibid. *See* table 2-5.

[111] EEOC, *Indicators of Equal Employment Opportunity—Status and Trends*, p. 24.

[112] Ibid., p. 26.

[113] Ibid., p. 24.

[114] Douglas Braddock, "Occupational Employment Projections to 2008," *Monthly Labor Review*, November 1999, p. 51. *See* fig. 2-7.

[115] Ibid., p. 53.

[116] Ibid., pp. 52–53.

TABLE 2.5

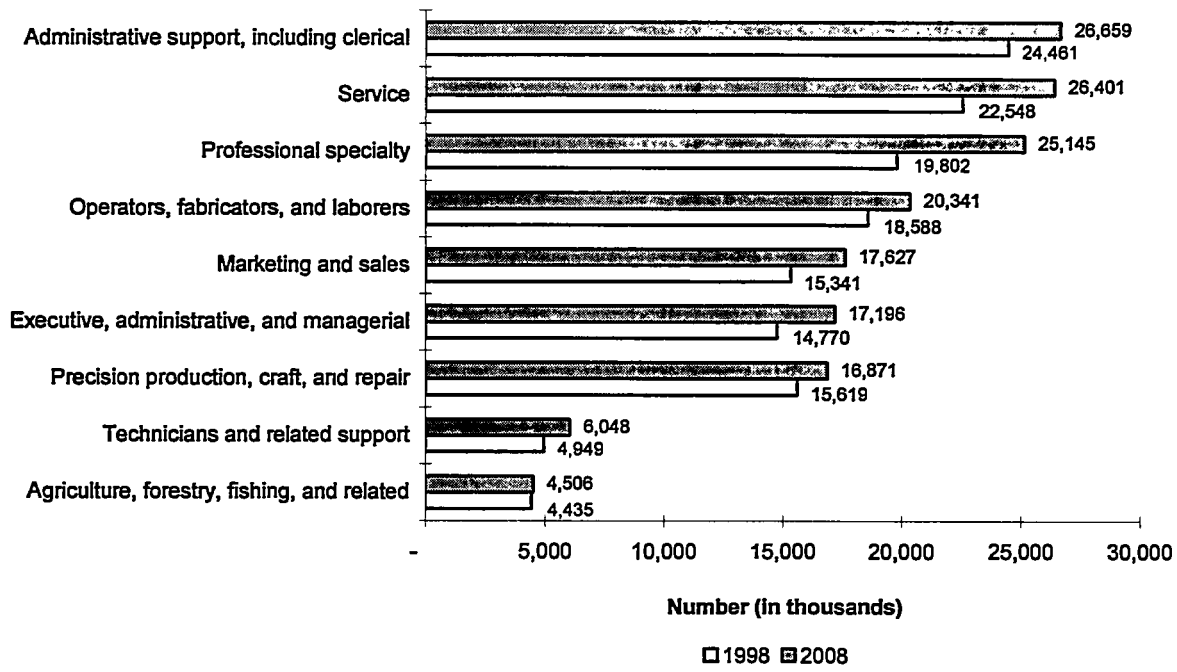
Employment by Industry, 1997

Industry	Total employed (in thousands)	Female (%)	Black (%)	Hispanic (%)
Agriculture	3,399	24.9	3.4	19.4
Mining	634	14.4	4.2	9.4
Construction	8,302	9.4	6.8	11.8
Manufacturing	20,835	32.1	10.4	11.2
Transportation, communication, and other public utilities	9,182	28.8	14.9	8.6
Wholesale and retail trade	26,777	47.3	8.9	11.1
Finance, insurance, and real estate	8,297	58.4	9.7	7.2
Business and repair services	8,450	37.2	11.6	11.0
Personal services	4,404	68.9	13.6	16.8
Entertainment and recreation	2,465	44.5	9.0	9.1
Professional and related services	30,935	69.4	12.3	6.6
Public administration	5,738	44.5	16.5	6.5

SOURCE: U.S. Department of Commerce, Economics and Statistics Administration, Bureau of the Census, *Statistical Abstract of the United States: 1998*, 118th edition, p. 421, table 675.

FIGURE 2-8

Employment by Major Occupational Group, 1998 and 2008 (projected)



SOURCE: Douglas Braddock, "Occupational Employment Projections to 2008," *Monthly Labor Review*, November 1999, p. 51.

Employment in the "executive, administrative, and managerial" category is expected to increase by 16.4 percent by 2008. This group of jobs will increase at a faster pace in some industries compared with others. For example, as with professional specialty jobs, the service industry, including public education and state and local hospitals, is expected to account for much of the growth in these jobs—creating 1.2 million executive, administrative, and managerial positions. An additional 363,000 jobs in this group will be created in the finance, insurance, and real estate industries.[117]

The slowest growth will be seen in the "agriculture, forestry, fishing, and related" occupations, which are projected to increase by only 211,000 additional jobs—a 1.6 percent increase between 1998 and 2008.[118] In addition, the "precision production, craft, and repair" occupational group will increase by only 8 percent, and the occupational group of "operators, fabricators, and laborers," will increase by only 9.4 percent between 1998 and 2008.[119]

Within specific occupational groups, certain jobs are expected to grow faster than others between 1998 and 2008.[120] In particular, certain jobs in retail trade, business services, health services, and education will account for more than 60 percent of job growth, including:

- retail salespersons;
- cashiers;
- waiters and waitresses;
- marketing and sales worker supervisors;
- food, counter, fountain, and related workers;
- systems analysts;
- computer support specialists;
- computer engineers;
- registered nurses;
- personal care and home health aides;
- nursing aides, orderlies, and attendants;
- teacher assistants;
- elementary and secondary teachers; and
- college and university faculty.[121]

Over the 10-year period, other occupations will experience declines in the number of jobs created. Between 1998 and 2008, farmers and farm workers will decline in large numbers. In addition, sewing machine operators, bank tellers, and switchboard operators will also see substantial declines.[122] Declines in these occupations may be the result of declines in the industry itself or because of technological and business practices reducing the demand for that occupation across several industries.[123]

Income and Earnings

In 1996, the median income for the United States was $35,492 for all households. However, the median income for whites ($37,161) was $12,255 higher than the median income for Hispanics, and $13,679 higher than that of blacks.[124] Asian Americans and Pacific Islanders experienced the highest median income at $43,276.[125] The income distribution in the United States was also skewed. Among whites, only 10 percent of all households earned less than $10,000 per year, compared with 23 percent of blacks and 17 percent of Hispanics. Conversely, while 17 percent of white households earned $75,000 per year or more, less than 8 percent of both blacks and Hispanics were in that income category.[126]

Data from the 1990 census show that the median household income for American Indians was $10,000 less than the national average, which was $30,056 at that time.[127] However, median household income varied greatly among the tribes. The Osage and Tlingit tribes were close to the national average, earning median household incomes of $28,703 and $29,211, respectively. Comparatively, the Navajo, Tohono O'Odham, and Pima Indians earned well below the national average, each earning a median household income of less than $13,000.[128]

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[117] Ibid., p. 52. *See* fig. 2-8.

[118] Ibid., p. 63, table 2. *See* fig. 2-8.

[119] Ibid., pp. 52, 54. *See* fig. 2-8.

[120] Ibid., pp. 72–73.

[121] Ibid.

[122] Ibid., p. 74.

[123] Ibid., p. 73.

[124] Census, *Statistical Abstract of the United States: 1998*, p. 468, table 738.

[125] Ibid., table 739.

[126] Ibid., table 738.

[127] U.S. Department of Health and Human Services, Indian Health Service, *1997 Trends in Indian Health*, 1997, p. 35.

[128] U.S. Department of Commerce, Bureau of the Census, "Table 2. Selected Social and Economic Characteristics for the 25 Largest American Indian Tribes: 1990," August 1995,

TABLE 2-6

Population and Median Household Income, Top 25 U.S. American Indian Tribes, 1990

Tribe	Population	Median income
Cherokee	369,035	$21,922
Navajo	225,298	12,817
Sioux	107,321	15,611
Chippewa	105,988	18,801
Choctaw	86,231	21,640
Pueblo	55,330	19,097
Apache	53,330	18,484
Iroquois	52,557	23,460
Lumbee	50,888	21,780
Creek	45,872	21,913
Blackfoot	37,992	20,860
Canadian and Latin American	27,179	24,502
Chickasaw	21,522	23,325
Tohono O'Odham	16,876	11,402
Potawatomi	16,719	23,722
Seminole	15,564	21,633
Pima	15,074	12,063
Tlingit	14,417	28,703
Alaskan Athabaskans	14,198	17,348
Cheyenne	11,809	16,371
Comanche	11,437	22,958
Paiute	11,369	19,154
Osage	10,430	29,211
Puget Sound Salish	10,384	19,191
Yaqui	9,838	18,667
Total	1,396,658	19,900

SOURCE: U.S. Department of Commerce, Bureau of the Census, "Table 2. Selected Social and Economic Characteristics for the 25 Largest American Indian Tribes: 1990," August 1995, accessed at <http://www.census.gov/population/socdemo/race/Indian/ailang2.txt>.

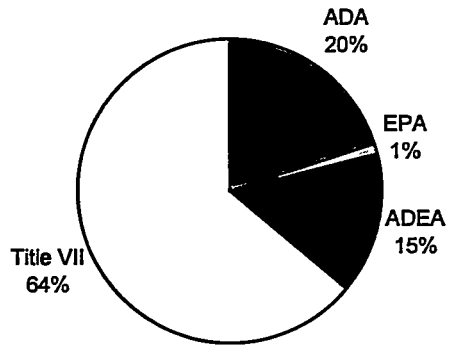
WORK EXPERIENCES OF AMERICANS

The U.S. Equal Employment Opportunity Commission takes charges of discrimination in employment based on race, national origin, religion, sex, age, or disability. Forms of discrimination experienced by EEOC complainants range from failure to hire, demotion, discharge, and layoffs, to harassment, intimidation, and segregation.[129] Discrimination can be veiled or subtle, resulting in disparate impact as well as disparate treatment.

In fiscal year (FY) 1999, EEOC received 138,106 charges of discrimination under Title VII, the ADEA, the Equal Pay Act, and the ADA.[130] The majority of charges cite Title VII; in FY 1999 more than 102,000 charges included allegations of discrimination under Title VII.[131] The most common issue is discharge. Hiring, harassment, discipline, and demotion are also frequently cited issues.[132] Race is cited as a basis in half of the charges, and gender is cited in slightly more than one-quarter of the charges. Age is found as a basis in almost 14 percent of the charges, while national origin and religion account for just less than 8 percent and 2 percent, respectively, of the bases cited.[133]

FIGURE 2-9

EEOC Charges of Discrimination Received in FY 1999



SOURCE: U.S. Equal Employment Opportunity Commission, Charge Data System.

There are other issues that often occur hand in hand with discrimination that alone may not be violations of civil rights laws. For example, workplace harassment and workplace abuse are often based on race, sex, or another protected class, but often span the bounds of individual characteristics as well. Several experts have noted that these instances of unfair employment

accessed at <http://www.census.gov/population/socdemo/race/indian/ailang2.txt>. *See* table 2-6.

[129] *See generally* EEOC, *Compliance Manual.*

[130] Data in this section are based on the Commission's analysis of EEOC's Charge Data System (hereafter cited as EEOC, Charge Data System). *See* chap. 5 for a more detailed analysis of EEOC's charge data.

[131] EEOC, Charge Data System. *See* fig. 2-9.

[132] EEOC, Charge Data System.

[133] Ibid.

practices and mistreatment of employees may be what is clogging the EEOC complaint system.[134]

In this section, the Commission examines a sample of problems in the workplace faced by U.S. workers. The issues presented here by no means represent all of the discriminatory and unfair practices existing in America's workplaces. Nor do they reflect the steps that many businesses have made in providing "employee-friendly" working environments. Nonetheless, a discussion of these issues is important to the understanding of today's employment environment and the issues that EEOC must address in fulfilling its mission to eradicate employment discrimination. Issues discussed in this section include wage discrimination, occupational segregation, comparable worth, the glass ceiling, family issues, sexual harassment, racial harassment, religious accommodation, workplace violence, and immigrant status. While some of these issues are covered by civil rights laws, others are not. Nonetheless, all of these experiences intersect to affect the work experiences of persons in the United States.

Protected Classifications

In FY 1999, women filed 55 percent of all charges, while men filed 45 percent.[135] In approximately 40 percent of all charges filed with EEOC, the charging party was white. Another 38 percent were black. Asian Americans and Pacific Islanders and Native Americans and Alaskan Natives account for less than 4 percent of all charges filed with EEOC.[136] EEOC statistics on national origin are less revealing. Three percent of the FY 1999 cases identified the charging party's national origin as Hispanic, and another 0.3 percent identified the charging party as Mexican American. Another 0.2 percent are identified as East Indian. However, 61 percent of the charges identify the charging party's national origin as "other." More than 35 percent of the charges do not identify national origin.[137]

Race, National Origin, and Ethnicity

There are still many reasons why differential employment patterns exist. Some employment experts have examined differences in employment as a function of ethnic niches that categorize different ethnic groups into certain jobs. Two California State at Northridge professors conducted an analysis in Southern California to explain the existence of ethnic group job niches and found that they exist for three reasons.[138] First, ethnic groups still differ in their educational training and other qualifications from whites. Second, networks of friends and family who inform them about work options and career goals limit the scope of employment possibilities by referring them to jobs where other members of their ethnic group are employed. Last, there has been an increase in the different immigrant groups that have expanded the networks.[139] Although several laws have been enacted to prevent discrimination in the workplace, many minority groups still face job discrimination every day. Often employment discrimination is not blatant, but rather stems from how individuals perceive other individuals not in their race or ethnic group.

African Americans

Throughout the United States there has been an increase in the economic social divide of the "haves" and "have nots." This divide is increasing because "there is not a full integration of African Americans" into the economy, which causes wage gaps to widen.[140] According to a survey of Wichita-area residents conducted by the Urban Institute of Wichita, "[a]lmost 71 percent of the respondents do not believe that

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[134] *See, e.g.*, Lori Barreras, supervisory investigator, Lucy Orta, investigator, Barbara Rusden, investigator, and Jose Robinson, investigator, Phoenix District Office, EEOC, interview in Phoenix, AZ, Mar. 29, 2000; Marc Stern, director, American Jewish Conference, telephone interview, Mar. 10, 2000, pp. 5–6 (hereafter cited as Stern interview); Jane Waldstedt, social science advisor, Cynthia Dawkins, social science advisor, and Suzanne Burnette, attorney, Women's Bureau, U.S. Department of Labor, interview in Washington, DC, Dec. 16, 1999, p. 6 (hereafter cited as Women's Bureau interview).

[135] EEOC, Charge Data System.

[136] EEOC, Charge Data System. Just under than 20 percent of the charges identified the race of the charging party as "unknown" or "other." Ibid.

[137] EEOC, Charge Data System.

[138] James P. Allen, "Ethnic Ties Help Determine Choice of Job: Niches are natural result of social networks that informed people of work in which members of their group are hired," *The Los Angeles Times*, Oct. 12, 1997, accessed at <http://proquest.umi.com>.

[139] Ibid.

[140] The Urban League of Wichita, Inc., "The Wichita African-American Community: A Quality of Life Assessment," December 1997, p. 9.

blacks and whites have equal employment opportunities."[141] Many times the employment opportunities for African Americans are "dead-end" jobs without advancement to higher paying jobs. These dead-end jobs tend to give few benefits, if any.[142]

Racial disparities in the labor market are on the rise, especially in the areas of earnings and employment for African American men compared with their white counterparts.[143] According to two authors, "[r]esearch on labor market issues facing black men shows that shifts in labor demand have contributed substantially to worsening the wage gap and employment situation."[144] For many jobs, skill requirements have changed because of technological advances. These changes have increased the racial inequality in employment and earnings.[145] As the demand for less-skilled labor decreases, it negatively affects African American males whose skills are often below average, thereby reducing the relative earnings and employment of African Americans causing inequality in the labor market to grow.[146]

Many employers are aware that African American males are often less educated than white males. It has been suggested that basic math and reading skills can explain some of the differences in income and hiring for men.[147] Although young African American males are reducing the gap in standardized test scores, they still score below the national average.[148] Comparatively, statistics show that African American women have improved their position in the labor market. According to the Women's Bureau of the U.S. Department of Labor, "[i]n 1996, eight out of every ten employed black women worked full time—at least 35 hours per week."[149] Nonetheless, African American women's unemployment rate is still two times higher and their poverty rate is three times higher than those of white women.[150]

One area that is often overlooked by researchers is stereotypes about the social skills of minorities. Many employers view social skills as a hiring criterion for entry-level jobs. At times, African American males are not hired for customer service oriented jobs because they are perceived as not having the necessary social skills or "soft" skills.[151] There are two variations of soft skills: first, the ability to interact with customers and co-workers, including friendliness, teamwork, ability to fit in, spoken communication skills, appearance, and attire; and second, motivational characteristics, such as enthusiasm, attitude, commitment, dependability, and the desire to learn.[152] With more employers placing emphasis on soft skills, African American males are no longer just underrepresented in technical jobs but also in service jobs that have direct contact with customers because it is assumed that they lack the soft skills employers look for in interviews.[153]

There are several occupations in which African Americans are disproportionately employed. These "job niches" often lead to stereotyping. For example, many African American women are characterized as postal clerks and bus drivers.[154] But the stereotypes do not end with the types of jobs occupied by African Americans. According to one study, 32 percent of managers stereotype African American attitudes in the workplace as difficult, defensive, and hostile.[155] Some of the comments from the study include:

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[141] Ibid., p. 2.

[142] Ibid., p. 11.

[143] Philip Moss and Chris Tilly, "Skills and Race in Hiring: Quantitative Findings from Face-to-Face Interviews," *Eastern Economic Journal*, vol. 21, no. 3 (1995), p. 1, accessed at <http://proquest.umi.com>.

[144] Philip Moss and Chris Tilly, " 'Soft' Skills and Race: An Investigation of Black Men's Employment Problems," *Work and Occupations*, vol. 23, no. 3 (August 1996), p. 2, accessed at <http://proquest.umi.com>.

[145] Ibid., p. 1.

[146] Moss and Tilly, "Skills and Race in Hiring," pp. 1–2.

[147] Moss and Tilly, " 'Soft' Skills and Race," p. 1. Harry J. Holzer and Keith R. Ihlanfedlt, "Spatial Factors and the Employment of Blacks at the Firm Level," *New England Economic Review* (May/June 1996), p. 7, accessed at <http://proquest.umi.com>.

[148] Moss and Tilly, "Skills and Race in Hiring," p. 1.

[149] U.S. Department of Labor, Women's Bureau, "Facts on Working Women: Black Women in the Labor Force," March 1997, no. 97-1, p. 2, accessed at <http://gatekeeper.dol.gov/dol/wb/public/wb_pubs/bwlf97.htm>.

[150] Women's Bureau, "Facts on Working Women," p. 9.

[151] Moss and Tilly, " 'Soft' Skills and Race," p. 2.

[152] Moss and Tilly, " 'Skills and Race in Hiring," p. 4.

[153] Moss and Tilly, " 'Soft' Skills and Race," p. 2.

[154] Allen, "Ethnic Ties Help Determine Choice of Job."

[155] Moss and Tilly, " 'Soft' Skills and Race," p. 6.

- A Latino store manager in an area of Los Angeles that is predominantly African American stated:

  You know, a lot of people are afraid, they [black men] project a certain image that makes you back off. . . . They're really scary.[156]

- In Detroit, an African American female personnel manager of a retail store stated:

  Employers are sometimes intimidated by uneducated Black males [who] come in. Their appearance really isn't up to par, their language, how they go about an interview. Whereas females Black or White, most people do feel, "I could control this person." . . . A lot of times people are physically intimidated by Black men . . . The majority of our employers are not Black. And if you think that person may be a problem, [that] young Black men normally are bad, or [that] the ones in this area [are], you say, "I'm not going to hire that person, because I don't want trouble."[157]

- In Los Angeles, a white female who works in the public sector as a personnel official stated that not only do African American men have attitude problems in the workplace, but also many managers mishandle the situations that occur in the workplace. She also stated:

  There's kind of a being cool attitude that comes with walking down the street a certain way and wearing your colors or challenging those who look at you wrong, and they come to work with an awful lot of that baggage. And they have a very difficult time not looking for prejudice. If a supervisor gives him an instruction, they immediately look to see if it's meant, if it's said different to them because they're Black. Or if something goes wrong in the workforce, they have a tendency to blame the race, their being Black . . . And I also think that part of the problem is that the supervisors and managers of these people have their own sets of expectations and their own sets of goals that don't address the diversity of these people, and it's kind of like, well, hell, if they're going to come work for me, they're going to damn well do it my way . . . And my personal feeling is that a lot of these young Black men who are being tough scare some of their supervisors. And so rather than address their behavior problems and deal with the issues, they will back away until they can find a way to get rid of them. We have a tendency to fear what we're not real familiar with.[158]

Another misperception some employers have of African Americans is that they have little or no motivation in the workplace, and that they believe employers owe them a job. In the same study, 40 percent of the respondents viewed black men as unmotivated employees.[159] In the study, a high percentage of respondents of the Detroit and Los Angeles areas thought that immigrants had a stronger work ethic than African Americans. A Los Angeles discount store manager stated:

I think the Hispanic people have a serious work ethic. I have a lot of respect for them. They take pride in what they do. Some of the Black folks that I've worked with do, but I'd say a majority of them are just putting in the time and kind of playing around.[160]

The three reasons given to explain why black men received negative evaluations are racial stereotypes, cultural differences, and actual skill differences.[161] Many employers base their perceptions of black men on their relations with current and past black employees, interaction with blacks outside of work, and the media. The study also found that in a business world with increased levels of interaction, racially biased attitudes held by customers or co-workers of other racial groups can themselves lead to lower measured productivity which can result in discrimination.[162]

Another employment issue facing African Americans and other minorities is corporate decisions to move out of the inner city, where there are high concentrations of minority populations.[163] When businesses move away from inner cities and from public transportation, it causes a shift in the labor force, because African Americans more often than not are unable to relocate

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[156] Ibid.

[157] Ibid.

[158] Ibid.

[159] Ibid.

[160] Ibid., p. 7.

[161] Ibid., p. 12.

[162] Ibid.

[163] Holzer and Ihlanfedlt, "Spatial Factors and the Employment of Blacks at the Firm Level," p. 1.

to the suburban areas.[164] The distance also affects African Americans when businesses in the suburbs post "help wanted" signs in windows rather than newspapers, thus limiting the applicant pool to individuals who live in close proximity to the business. African American employment is also affected in metropolitan areas where there is a high concentration of Hispanics. Often members of these groups are forced to compete for limited job opportunities, and employers must balance needs of both Hispanic and African American customers.[165]

Hispanics

African Americans are not the only group affected by some of the employment issues in the previous section; many Hispanics experience similar discrimination, as well as language barriers and cultural issues. A study conducted by the Urban Institute in collaboration with the General Accounting Office found that whites were offered jobs 52 percent more often than their Hispanic counterparts, and whites received 33 percent more interviews than Hispanics.[166] Although this study was limited to two cities and to jobs posted in the newspaper, it shows a trend in the employment arena that discriminates against Hispanics.[167]

Employment discrimination against Hispanic Americans continues to be prevalent in the Northwest, Midwest, and Deep South, and it is growing in other areas.[168] One of the most common forms of employment discrimination faced by Hispanic Americans is the English-only rule and discrimination on the basis of national origin.[169] According to representatives of Hispanic-serving organizations, there is little justification for English-only rules, especially when instituted to benefit other employees or customers who do not speak Spanish.[170] These experts are concerned that once English-only rules are accepted, they might lead to other forms of discrimination toward Hispanic Americans.[171]

Hispanic Americans are often discriminated against because of their accents and face the glass ceiling in employment as well. In addition, according to one advocacy group, many Hispanic and Asian American women who work in low-wage jobs are sexually harassed and abused.[172] They are vulnerable because they may be physically weaker than their male supervisors, and they do not have a support system to help them with problems of harassment.[173]

A staff member in the EEOC Dallas District Office stated that when investigators try to investigate cases, the Hispanic community does not generally speak out against employers, thus making it hard to prove that any employment discrimination occurred.[174] An investigator in that office stated that EEOC usually needs assistance from Hispanic stakeholders or community groups who file charges as a third party.[175] Many Hispanic workers will not speak out against their employers because it might be the only major industry in the area in which they live. According to one EEOC staff person, language barriers and the lack of education and outreach by EEOC cause Hispanics and immigrants not to file charges because they do not know their rights or where to go. Many immigrants do not file complaints because of immigration concerns or fear of retaliation by employers.[176]

Asian Americans and Pacific Islanders

Today many Asian Americans and Pacific Islanders face equal pay discrimination, language barriers, and public stereotypes. For ex-

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[164] Ibid., pp. 1, 7–8, 10.

[165] Ibid., p. 8.

[166] Henry Cross, Genvieve Kenny, Jane Mell, and Wendy Zimmerman, *Employer Hiring Practices: Differential Treatment of Hispanic and Anglo Job Seekers* (Washington, DC: The Urban Institute, 1990), pp. 15, 61–62.

[167] Ibid.

[168] Carmen Joge, National Council of La Raza, interview in Washington, DC, July 16, 1999, p. 2 (hereafter cited as Joge interview).

[169] Joge interview, p. 2; Tom Saenz and Enrique Gallardo, Mexican American Legal Defense and Education Fund, telephone interview, Mar. 10, 2000, p. 3 (hereafter cited as Saenz and Gallardo interview).

[170] Joge interview, p. 4; Donya Fernandez, supervising attorney, Language Rights Project, Legal Aid Society/Employment Law Center, telephone interview, July 22, 1999, p. 3 (hereafter cited as Fernandez interview).

[171] Joge interview, p. 4.

[172] Ibid.

[173] Ibid.

[174] Donald Birdseye, supervisory investigator, and George Garrett, investigator, Dallas District Office, EEOC, interview in Dallas, TX, Feb. 1, 2000, p. 6 (hereafter cited as Birdseye and Garrett interview, Dallas District Office).

[175] Ibid.

[176] Saenz and Gallardo interview, p. 3.

ample, according to one study, Asian American engineers still earn less than white males in the engineering field.[177] They also enter engineering and scientist management positions 20 percent less often than their white counterparts.[178] Many Asian Americans face various forms of employment discrimination and glass ceilings in organizations managed by white Americans.[179] As Asian Americans enter the 21st century they believe that they are viewed as lacking the desire and skills for top jobs.[180] Some Asian Americans have been successful, but many run into glass ceilings because they are viewed as lacking interpersonal, leadership, and English skills.[181] Many times Asian Americans have the requisite interpersonal skills but show them differently in the workplace. For example, they might not perceive invitations to social events as a way to enhance their careers.[182] Although many Asian Americans are affected by the glass ceiling, a widespread misperception exists that Asian Americans are not affected by the glass ceiling, causing Asian American struggles in the workplace to be overlooked by policy makers and social scientists.[183] There are other "model minority" myths that continue to have a detrimental effect on Asian Americans. Although some Asian American groups have achieved high educational attainment, many have not. For example, in the New York area approximately 23 percent of the Asian American population does not have a high school diploma or has not graduated on time, which causes many Asian Americans to obtain low-wage, dead-end jobs.[184]

Asian Americans also face language barriers similar to Hispanic Americans, but because there are several different national origins that are categorized under Asian Americans (Chinese, Japanese, Koreans, Vietnamese, etc.)[185] these problems may be compounded. Further, many employers stereotype Asian Americans as individuals who are willing to work for little pay for long hours in subhuman conditions. According to one expert, some employers believe Asian Americans break union lines and are not interested in asserting their rights.[186] Employers will sometimes use this stereotype to their benefit when Asian Americans file employment discrimination charges against them. Some employers will contact the Immigration and Naturalization Service to report undocumented workers as retaliation against employees who file complaints against them, especially when they are undocumented workers.[187]

An analysis conducted by two professors at California State University at Northridge identified some job niches that pertain to various Asian American groups. For example Japanese and Chinese men have niches as electrical engineers; Chinese women are represented as computer programmers and pharmacists; Vietnamese women are represented as electronics technicians (14 times more than white women); and Koreans are entrepreneurs working in laundry and dry cleaning businesses.[188] It has been stated that Asian Americans have a tendency to become entrepreneurs in industries that American entrepreneurs consider undesirable or poor working conditions.[189] The businesses they own are primarily in minority communities. But not all Asian Americans run small shops; some have formed and opened premier companies like Computer Associates International and Xylan Corporation, both of which are multimillion-dollar corporations.[190]

From the small percentage of Asian Americans who are successful, many view Asian

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177 Tojo Joseph Thatchenkery and Cliff Cheng, "Seeing Beneath the Surface to Appreciate What 'Is': A Call for a Balanced Inquiry and Consciousness Raising Regarding Asian Americans in Organizations," *Journal of Applied Behavioral Science*, vol. 33, no. 3 (September 1997), p. 399.

178 Don Lee, "Asian Americans Finding Cracks in the Glass Ceiling," *The Los Angeles Times*, July 15, 1998, p. 4, accessed at <http://proquest.umi.com>.

179 Thatchenkery and Cheng, "Seeing Beneath the Surface to Appreciate What 'Is,' " p. 399.

180 Lee, "Asian Americans Finding Cracks in the Glass Ceiling," p. 2.

181 Ibid.

182 Ibid., p. 5.

183 Ibid., p. 4.

184 Stanley Mark, Asian American Legal Defense and Educational Fund, telephone interview, Apr. 10, 2000, p. 21 (hereafter cited as Mark interview).

185 Ibid.

186 Ibid.

187 Ibid., pp. 9–10.

188 Allen, "Ethnic Ties Help Determine Choice of Job"; Mark interview, pp. 37–38.

189 Thatchenkery and Cheng, "Seeing Beneath the Surface to Appreciate What 'Is,' " p. 399.

190 Lee, "Asian Americans Finding Cracks in the Glass Ceiling," p. 3.

Americans as the "model minority." This perception hurts the Asian community in employment because researchers have a tendency to overlook other employment problems. Often Asian Americans do not know their rights or where to go to file employment discrimination complaints. The Asian American Defense and Education Fund in New York works with Asian Americans in the New York and New Jersey area to assist them in organizing their information to form a complaint against employers that have discriminated against them.[191] Other community legal service organizations, such as the Asian Law Alliance in San Jose, California, Asian Law Caucus in San Francisco, California, and the Asian Pacific American Legal Center of Southern California, offer similar employment education services and representation.

American Indians and Alaska Natives

There has been little data reported on American Indian and Alaska Native concerns or issues regarding employment discrimination.[192] In fact, few American Indians and Alaska Natives file discrimination charges with the EEOC.[193] Further, there are few Native American/American Indian organizations specializing in lobbying for Native American/American Indian employment concerns.[194]

According to former Commissioner Tony Gallegos of the U.S. Equal Employment Opportunity Commission, the vast majority of discrimination faced by American Indians and Alaska Natives is based on race.[195] Other types of employment discrimination that occur both on and off reservations are racial harassment, sexual harassment, glass ceilings, and low wages, all stemming from the negative perceptions that many individuals have of American Indians.[196] One negative stereotype is that of American Indians as alcoholics.[197] In addition, some inaccurately believe that American Indians receive benefits from the federal government in the form of free land and monthly stipends, leading to the belief that they do not need any assistance or jobs off the reservation.[198] Some employers do not think hiring members of a tribe is beneficial to the company because they assume tribal members will resign shortly after being trained. Staff of a tribal employment rights office provided an example of these types of misperceptions:

> [A] female that lives on our reservation, a member of this tribe, that tried to apply at another casino, but felt she was discriminated [against] based on being a female and based on being Indian. Comments of the person taking the application was "Well, if I hire you, you'll probably just quit in a few months. I have to take the time to train you and I'm just going to lose you," meaning that the Indians do not stay on a job site or he's wasting his time because of this.[199]

American Indians who work full time in jobs encounter glass ceilings, especially in management positions. Some employers may think that American Indians are not assertive employees.[200] Therefore, instead of promoting individuals to become managers based on job performance, some discriminatory employers will expect employees to request managerial positions, know-

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[191] Mark interview, p. 11.

[192] The research discussed in this section focuses specifically on American Indian issues. There was no available data on employment issues of concern to Alaska Natives.

[193] Antonio DeDios, state and local coordinator and Paul Manget, enforcement manager, Phoenix District Office, U.S. Equal Employment Opportunity Commission, interview in Phoenix, AZ, Mar. 29, 2000, p. 17; Larry Ketcher, director, Tribal Employment Rights Office, Cherokee Nation of Oklahoma, telephone interview, Mar. 14, 2000, p. 10; Marlo Norris-Enos, director, Williard Manuel, compliance officer, Catherine Whitman, administrative assistant, Robert Sixkiller, compliance officer, and Verna Espuma, contract specialist, Tribal Employment Rights Office, Tohono O'Odaham Nation, telephone interview, Mar. 23, 2000, p. 7 (hereafter cited as Norris-Enos et al. interview); Jean Stout, state and local coordinator, Dallas District Office, interview in Dallas, TX, Feb. 29, 2000, p. 3.

[194] The Commission contacted several Native American agencies and organizations that stated they were unable to assist with this report.

[195] *Testimony of Commissioner Tony Gallegos of the U.S. Equal Employment Opportunity Commission Submitted to the Special Committee on Aging*, United States Senate, Pine Ridge, South Dakota, July 21, 1988, p. 2.

[196] Conrad Edwards, president, Council on Tribal Employment Rights, telephone interview, Apr. 5, 2000, p. 16 (hereafter cited as Edwards interview); Joseph Manuel, director, Tribal Employment Rights Office, Gila River Indian Community, interview in Sacaton, AZ, Mar. 28, 2000, p. 22 (hereafter cited as Manuel interview).

[197] Manuel interview, pp. 36–37.

[198] Ibid.

[199] Norris-Enos et al. interview, pp. 20–21.

[200] Edwards interview, p. 17; Manuel interview, p. 28.

ing that more passive American Indians will not do so.[201]

Another barrier that some American Indians and Alaska Natives face is unnecessary application requirements. For example, one fast food restaurant chain required a driver's license to be hired. Although the employees would not be driving for the restaurant, many applicants were denied employment because they did not possess driver's licenses, which are not required to drive a vehicle on many reservations.[202] Many times employers do not realize that such basic job requirements are barriers to individuals applying for jobs off reservations.

To combat such discrimination, tribal employment rights offices (TEROs) work at eliminating some of the employment barriers for American Indians.[203] For example, the director of the tribal employment rights office of the Gila River Indian Community in Phoenix, Arizona, stated many employers do not fully understand the Native American/American Indian cultures or reservation laws, which causes miscommunication between employers and the Indian community.[204] TEROs work with employers to help eliminate negative perceptions by offering sensitivity training that explains these cultures to employers.

Summary

Employment discrimination on the basis of race, ethnicity, and national origin persists in 21st century America. According to one advocate,

> in terms of race discrimination, employers are more savvy and do not let on that they are discriminating . . . they are more subtle than before. Therefore, it is harder to find good race discrimination cases although race discrimination cases are still rampant.[205]

One similarity that exists among African Americans, Hispanic Americans, Asian Americans and Pacific Islanders, American Indians and Alaska Natives, and minority women is that many feel a steady paycheck is equivalent to employment opportunity. These employees are less likely to file a charge against employers for wrongful treatment. Many times the employees will quit their jobs and become unemployed for lack of understanding their rights or the perception that the system is not working for them. Further, individuals who live in small communities often do not wish to file charges against employers because they fear retaliation by the employer or they may not be able to locate another job. This mind-set allows employers to overlook conditions or treatment that employees receive because the individuals in these jobs will quit or work with the injustice instead of filing complaints against the employer.

Similarly, some minorities may not file complaints of discrimination because of their immigration status or lack of understanding of immigration laws. According to one expert, many undocumented workers do not understand that they are protected by Title VII.[206] According to her, this explains why so many undocumented employees endure abuse by their employers.[207]

Older Americans

As a whole, the population of the nation is aging as life expectancy increases. In 1994, one out of every eight persons was over age 65.[208] At last census count, there were more than 37,000 individuals in the United States over 100 years of age.[209] In the future, racial and ethnic diversity will increase within the nation's elderly population.[210] The increasing number of older persons will have implications for social security, health care, and employment:

> The growth and change of America's older population rank among the most important demographic devel-

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[201] Manual interview, pp. 30–31.

[202] Ibid., p. 33.

[203] *See* chap. 6 for information on TEROs and EEOC.

[204] Manuel interview, pp. 26, 33.

[205] Fernandez interview, p. 5.

[206] Joge interview, p. 7.

[207] Ibid.

[208] U.S. Department of Commerce, Economics and Statistics Administration, Bureau of the Census, "Sixty-Five Plus in the United States," *Statistical Brief*, SB/95-8, May 1995, p. 1.

[209] U.S. Department of Health and Human Services, National Institutes of Health, National Institute on Aging and U.S. Department of Commerce, Economics and Statistics Administration, Bureau of the Census, *Centenarians in the United States*, Current Population Reports Special Studies, P-23-199RV, July 1999, p. 2.

[210] U.S. Department of Health and Human Services, National Institutes of Health, National Institute on Aging and U.S. Department of Commerce, Economics and Statistics Administration, Bureau of the Census, "Racial and Ethnic Diversity of America's Elderly Population," *Profiles of America's Elderly*, no. 3 (November 1993), p. 1.

opments of the 20th century. Falling fertility and longer lives transformed the elderly from a small component to a significant part of the population. A sizable segment of all consumers, voters, homeowners, patients, and family members are older adults. In one way or another, every social institution in American society has had to accommodate to older people's needs, court their favor, or mobilize their resources and contributions.[211]

As the nation ages, more older workers will remain in the labor force past the age of 65. A 1987 report of the Bureau of National Affairs noted, "The United States seems to be unprepared to deal with the complex challenges presented by the unprecedented influx of older Americans into the workforce in the coming decades."[212] As such, the report identified several programs that are helping both older workers and businesses deal with issues related to an aging work force, such as flexible working arrangements, training programs, physical accommodations, and preretirement programs.[213]

One author notes that retirement is a "process" that is defined differently by different individuals.[214] Retirement from a full-time job does not necessarily mean not working—many older workers work part time or are self-employed. In addition, according to the author, "[m]ost older workers approaching retirement age say they would prefer to continue working at their career jobs, albeit with reduced hours, but relatively few employers permit phased retirement."[215] In addition, age discrimination and a shortage of part-time jobs discourage older Americans from participating in the labor force.[216]

The American Association of Retired Persons (AARP) agrees that the past concept of retirement has all but gone away:

> Traditional work and retirement patterns are in flux. The trend now is for individuals to leave and reenter the work force several times throughout their lives, interweaving work and leisure time activities and thus having the opportunity to create a better work-life balance.[217]

In addition, a recent survey conducted by AARP, found that recent changes in the American economy have forced employers to re-examine past models of employment and employer-employee relations.[218] Nonetheless, AARP found that the businesses that participated in its survey were not implementing programs to promote the greater utilization of older employees.[219] Further, AARP found that although businesses recognized many of the positive contributions older employees could make (such as working hard and providing experience, knowledge, and stability in the workplace), older employees were characterized as "inflexible, adverse to change, and resistant to learning new technologies."[220]

AARP lists the following employment scenarios that may indicate that an individual has been discriminated against on the basis of age:

- You didn't get hired because the employer wanted a younger looking person to do the job.
- You were passed over for training courses and then got a negative job evaluation because you weren't "flexible" in taking on new assignments.
- You got fired or laid off because your boss wanted to keep younger workers who are paid less.
- You received undeserved negative performance evaluations and then your employer used your "record" of poor performance to justify a demotion or termination.
- You got turned down for a promotion to a mid-management job, which went to someone younger, hired from the outside because the company needs "new blood."[221]

To combat such stereotypes and inflexible managing styles, AARP and other advocacy groups

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[211] Judith Treas, "Older Americans in the 1990s and Beyond," *Population Bulletin* (a publication of the Population Reference Bureau, Inc.), vol. 50, no. 2 (May 1995), p. 2.

[212] BNA, *Older Americans in the Workforce: Challenges and Solutions*, 1987, p. 6.

[213] Ibid., pp. 6–8.

[214] Treas, "Older Americans in the 1990s and Beyond," p. 21.

[215] Ibid.

[216] Ibid., p. 22.

[217] American Association of Retired Persons (AARP), "Flexible Ways of Working," accessed at <http://www.aarp.org/contacts/money/flexwork.html>.

[218] AARP, *American Business and Older Employers: A Summary of Findings*, 2000, p. 3.

[219] Ibid., p. 8.

[220] Ibid., p. 4.

[221] AARP, "Recognize Age Discrimination," accessed at <http://www.aarp.org/working_options/agedicrim/home.html>.

provide assistance in identifying age discrimination in the workplace.

Women

The female work force has changed dramatically in the past 100 years. According to the Women's Bureau of the U.S. Department of Labor, in 1920,

> the working woman was most likely to be single and in her twenties, and she generally went to work out of expediency to help her family in times of economic hardship. She did not expect to work for many years nor to acquire the same skills, seniority, or wages as a working man. She was most likely to be found in so-called "women's jobs," such as factory or other operative jobs, clerical, private household, or agricultural work—all requiring little education and skill. Only one out of five of her contemporaries probably graduate from high school.[222]

As more women entered and stayed in the labor force, particularly during World War II, child care issues and household employment became important concerns of working women.[223] In 1950, approximately one-quarter of households had both a husband and wife in the labor force.[224]

The 1960s and 1970s brought dramatic changes to the nation's work force as more women entered—and remained—in the labor force. Factors contributing to the increase in the number of women in the work force included the trend toward later marriages, women having fewer children, the increasing divorce rate, the rise of single-parent families, and greater educational attainment.[225] In addition, during this time there was an expansion in white-collar jobs in which women traditionally had been employed, and increased opportunities for part-time and part-year employment.[226]

By 1980, more than 40 million women were in the nation's work force.[227] With women fully entrenched in the workplace, the decade of the 1980s saw gender concerns taking an important role in workplace issues. Child care, elder care, work force diversity, flexible leave policies, alternative work patterns, job training, and benefit packages became key issues.[228]

In 1990, the number of women in the work force had grown to more than 56 million.[229] However, some would argue that, overall, the status of working women has changed only slightly. A recent article in the *Harvard Business Review* states: "Gender discrimination now is so deeply embedded in organizational life as to be virtually indiscernible. Even women who feel its impact are often hard-pressed to know what hit them."[230] In 1994, the Women's Bureau identified several pressing issues for women in the labor force:

- the inability of pay and benefits to provide economic security;
- the need for recognition and support of workers' family responsibilities; and
- the need for job and promotion opportunities to adequately reflect the value of women's work and educational experiences.[231]

Other concerns for working women in the 1990s included stress, particularly related to the dual responsibilities of labor force participation and household responsibilities; inadequacy of health, pension, vacation, and sick leave benefits; equal pay; and child care.[232]

The Department of Labor and others have recognized that many of the problems women experience in the workplace are also issues for working men.[233] Thus, many of the issues often traditionally considered as "women's issues," such as sexual harassment, workplace violence, child care issues, flexible schedules, and wage

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[222] U.S. Department of Labor, Women's Bureau, *Milestones: The Women's Bureau Celebrates 70 Years of Women's Labor History*, 1990, p. 3.

[223] Ibid., p. 6.

[224] Ibid.

[225] U.S. Department of Labor, Women's Bureau, *Time of Change: 1983 Handbook on Women Workers*, bulletin 298, 1983, p. 5.

[226] Ibid.

[227] Women's Bureau, *Milestones*, p. 36.

[228] Ibid., pp. 26–27, 36–38.

[229] U.S. Department of Labor, Women's Bureau, "Women Workers: Outlook to 2005," *Facts on Working Women*, no. 92-1, January 1992, p. 2, table 1.

[230] Debra E. Meyerson and Joyce K. Fletcher, "A Modest Manifesto for Shattering the Glass Ceiling," *Harvard Business Review*, January–February 2000, p. 127.

[231] U.S. Department of Labor, Women's Bureau, *Working Women Count! A Report to the Nation*, 1994, pp. 5–6.

[232] Ibid., pp. 6–7.

[233] Ibid., p. 8.

differentials, clearly are applicable to both men and women.[234]

Religion

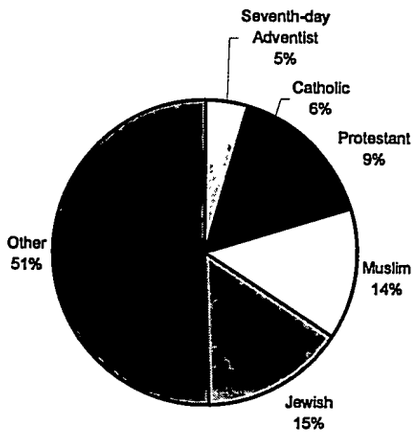
Religious discrimination and workplace conflicts over religion often take the form of requests for accommodation for the observance of the Sabbath and religious holidays.[235] Other issues involve religious dress and appearance, fulfillment of union obligations, and harassment and discrimination based on religious beliefs.[236] While the issue of days off for religious reasons is more of a problem in industries in which the way of organizing work involves shifts and labor unions, religious discrimination in its various forms is seen in all industries.[237]

Data from EEOC's Charge Data System show that for the 3,211 charges filed alleging discrimination based on religion in FY 1999, 15 percent were based on the Jewish religion. Another 14 percent allege discrimination based on the charging party being Muslim. Protestants and Catholics account for 9 percent and 6 percent of the EEOC charges, respectively, while Seventh-day Adventists account for another 5 percent of charges of religious discrimination. Just over half of the charges alleging religious discrimination identified other religions.[238]

At least one group is lobbying for changes in the law to further protect the rights of workers with regard to religion. The Coalition for Religious Freedom in the Workplace has been working on developing the Workplace Religious Freedom Act,[239] which would provide a definition of significant hardship so it is not just *de minimus*—i.e., administrative hardship would not be sufficient to bar accommodation.[240] The bill is based on similar language in the ADA and has a provision having to do with defining reasonable accommodation. The bill also deals with problems of overly strict readings of collective bargaining agreements. The bill aims to allow for amicable changes to take place—they do not want to restrict someone's right not to work on a Saturday. Further, the bill takes into account the size of the business when defining hardship.[241]

FIGURE 2-10

EEOC Religious Discrimination Charges, by Religion, FY 1999



SOURCE: EEOC, Charge Data System.

[234] These issues are discussed below.

[235] Richard Foltin, legislative director and counsel, Office of Government and International Affairs, American Jewish Committee, interview in Washington, DC, Jan. 26, 2000, p. 4 (hereafter cited as Foltin interview); Stern interview, p. 1; Mitchell Tyner, general counsel, Seventh-day Adventist Church, telephone interview, Apr. 5, 2000, interview transcript, p. 2; Jeff B. Cromwell, "Cultural Discrimination: The Reasonable Accommodation of Religion in the Workplace," *Employee Responsibilities and Rights Journal*, vol. 10, no. 2 (1997), p. 156.

[236] Cromwell, "Cultural Discrimination," p. 156. *See generally* Foltin interview; Stern interview.

[237] Stern interview, p. 2.

[238] EEOC, Charge Data System. *See* fig. 2-10.

[239] S. 1668, 106th Cong. § 1 (1999); H.R. 4237, 106th Cong. § 2 (2000). *See*, Richard T. Foltin, "Religious Discrimination in the Workplace: Administration Policy and Practice," chap. XXI in Citizens' Commission on Civil Rights, *The Test of Our Progress: The Clinton Record on Civil Rights*, 1999.

[240] Foltin interview, pp. 4–5.

[241] Ibid., p. 5.

The Glass Ceiling

The "glass ceiling" in America's workplaces is described as "the unseen, yet unbreachable barrier that keeps minorities and women from rising to the upper rungs of the corporate ladder, regardless of their qualifications and achievements."[242] Further, two authors have noted:

> Statistics also suggest that as women approach the top of the corporate ladder, many jump off, frustrated or disillusioned with the business world. Clearly, there have been gains, but as we enter the year 2000, the glass ceiling remains. What will it take to finally shatter it?[243]

The restructuring of the American economy has led to several conditions that intensify the glass ceiling phenomenon. These include the elimination of supervisory and low-level management positions, the increasing use of independent contractors, increasing emphasis on geographical mobility, and intensified stress and pressures placed on employees and managers.[244] Another reason why women and minorities find it difficult to move up to higher positions with their employers is the corporate culture, which often reflects cultural norms and practices that are biased toward white males and, thus, outside the experiences and values of other groups.[245]

Title II of the Civil Rights Act of 1991[246] established a Glass Ceiling Commission to study the "opportunities for, and artificial barriers to, the advancement of women and minorities to management and decision-making positions in business."[247] In 1995, the federal Glass Ceiling Commission released its recommendations aimed at eliminating the glass ceiling in the workplace. Among its recommendations were demonstrated commitment to work force diversity by management, in particular the chief executive officer of the company; the inclusion of diversity objectives in all strategic plans; and the use of affirmative action as a tool for ensuring that all qualified individuals have equal opportunity for advancement.[248] The Glass Ceiling Commission also recommended that corporations actively prepare minorities and women for senior positions by providing developmental activities and mentoring programs.[249]

The Intersection between Occupation and Earnings

Occupational Segregation

As discussed above in the section on the demographics of the labor force, there are certain occupations that remain divided by gender, racial, and ethnic lines. Despite civil rights laws protecting sex discrimination and the gains women have made in the labor force, women remain the majority of workers in stereotypically female roles such as nurse, teacher, secretary, typist, receptionist, dental assistant, and hairdresser.[250] Along racial and ethnic lines, whites are much more likely than minorities to hold positions such as engineer, airline pilot, and farm operator.[251] According to one author,

> [o]ccupational segregation by sex is extensive in every region, at all economic development levels, under all political systems, and in diverse religious, social and cultural environments. It is one of the most important and enduring aspects of labour markets around the world.[252]

There are several theories revolving around the existence of occupational segregation. In regard to occupational segregation by sex, one recent report notes that the ability of women to gain entry to male-dominated fields negates the existence of institutional sex discrimination in occupations.[253] The authors of the report argue that there are a variety of factors leading to the concentration of women in certain occupations. In particular, the authors state:

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[242] Glass Ceiling Commission, *Investment: Making Full Use of the Nation's Human Capital*, November 1995, p. 4.

[243] Meyerson and Fletcher, "A Modest Manifesto for Shattering the Glass Ceiling," p. 127.

[244] Institute for Women's Policy Research (IWPR), *The Impact of the Glass Ceiling and Structural Change on Minorities and Women*, executive summary, 1993.

[245] Meyerson and Fletcher, "A Modest Manifesto for Shattering the Glass Ceiling," pp. 128–31.

[246] 42 U.S.C. § 1981, 2000e (1994).

[247] *Id.*

[248] Glass Ceiling Commission, *Investment*, p. 13.

[249] Ibid., p. 14.

[250] Census, *Statistical Abstract of the United States: 1998*, pp. 417–19, table 672.

[251] *See* ibid. *See* pp. 26–28 above.

[252] Richard Anker, "Theories of Occupational Segregation by Sex: An Overview," *International Labour Review*, vol. 136 (Autumn 1997), p. 315.

[253] Diana Furchtgott-Roth and Christine Stolba, *Women's Figures: The Economic Progress of Women in America* (Arlington, VA: Independent Women's Forum, 1996), p. 26.

One of the most important and overlooked [reasons] is that many "pink-collar" jobs offer much-desired flexibility for working women. Many women are willing to accept substantially lower earnings to have a job with flexible hours. Furthermore, many traditional female jobs require job skills that deteriorate slowly, allowing women to leave the work force for a time—to have children, for example—and still retain the skills needed to be viable job candidates when they return to the work force. In a field such as engineering, for example, where job skills deteriorate rapidly, that would not be possible.[254]

A different view of the evidence finds occupational segregation to be less driven by choice than by changes in the structure of the economy. According to one author,

by contrast to the 1960s, the 1970s was a decade of considerable change in the occupational distribution, where women entered nearly all traditionally male (white-collar) occupations at an increasing rate. Many fewer occupations were male dominated at the end than at the beginning of the decade. Changes would be even greater had women not continued to flood the clerical occupations that grew substantially over this period. Change would also have been greater had women made even the slightest inroads into the traditionally male, blue-collar occupations.[255]

Similarly, there are arguments related to socialization and sex roles and limitations based on human capital.[256]

Other authors have tied occupational segregation more directly to discrimination. For example, one commentator states that women often must make occupational choices that are constrained by societal roles and expectations.[257] An employer's expectation of the male worker norm, reflecting "the lifestyles and privileges of male workers," creates a disparate impact on women, resulting in the exclusion of women from elite jobs.[258]

The Wage Gap

"Many people used to agree with employers' paying men more than women for the same work, because men had families to support. Times have changed, and now women have families to support, too, either on their own or along with men. Married women, particularly if they have children, are more likely to be employed at home. Single women, with or without children, also deserve a fair wage."[259]

Occupational segregation is often related to gender differences in pay.[260] Today, the issues focus on eliminating the gender wage gap. In 1963, on average, women earned less than 60 cents for every dollar men earned. Over the past 35 years, the wage discrepancy has narrowed, but women still earn a mere 75 cents on the dollar.[261]

Data from the Department of Labor show that women's earnings (in real dollars) as a percentage of men's earnings decreased from a high of 63.9 percent in 1951 to a low of 57.8 percent in 1967. Between 1968 and 1981, women's earnings hovered around 58 to 60 percent of men's earnings. In 1982, women's earnings began a steady rise, reaching 74.2 percent of men's earnings in 1997.[262]

A variety of reasons have been suggested for the pay differential between men and women. Such explanations include:

- the types of education, training, and counseling received by women;
- differences in educational attainment, occupation, and industry;

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[254] Ibid.

[255] Andrea H. Beller, "Occupational Segregation and the Earnings Gap," pp. 23–33 in USCCR, *Comparable Worth: Issues for the 80's*, consultation report, vol. 1, June 6–7, 1984, p. 31.

[256] *See* Paula England, "Explanations of Job Segregation and the Sex Gap in Pay," pp. 54–64 in USCCR, *Comparable Worth: Issues for the 80's*, consultation report, vol. 1, June 6–7, 1984.

[257] Deborah J. Vagins, "Occupational Segregation and the Male-Worker-Norm: Challenging Objective Work Requirements Under Title VII," *Women's Rights Law Reporter*, vol. 18, no. 1 (Fall 1996), p. 93.

[258] Ibid., pp. 93–94.

[259] U.S. Department of Labor, Women's Bureau, "Worth More Than We Earn: Fair Pay for Working Women," *Fair Pay Clearinghouse*, September 1996, p. 1.

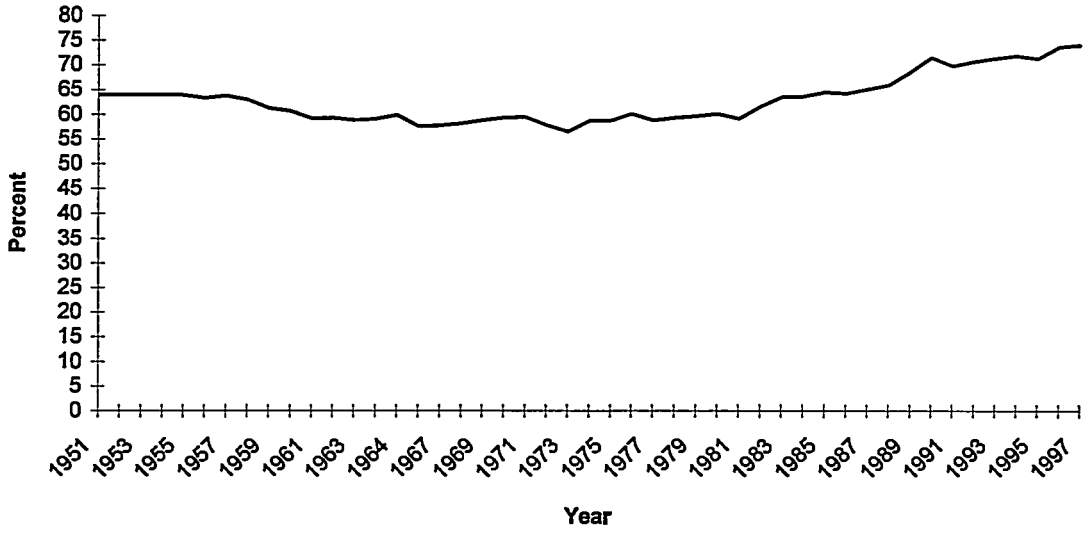
[260] *See generally* USCCR, *Comparable Worth: Issues for the 80's*, consultation report, June 6–7, 1984.

[261] *See* the White House, "President Clinton Calls for Passage of Equal Pay Legislation," June 10, 1998, accessed at <http://www.pub.whitehouse.gov>.

[262] U.S. Department of Labor, Women's Bureau, "Median Annual Earnings for Year-Round Full-Time Workers by Sex in Current and Real Dollars, 1951–1997," Mar. 22, 1999, accessed at <http://www2.dol.gov/dol/wb/public/wb_pubs/achart/htm>. *See* fig. 2-11.

FIGURE 2-11

Women's Median Annual Earnings as a Percentage of Men's Median Annual Earnings, 1951–1997



SOURCE: U.S. Department of Labor, Women's Bureau, "Median Annual Earnings for Year-Round Full-Time Workers by Sex in Current and Real Dollars, 1951–1997," accessed at <http://www2.dol.gov/dol/wb/public/wb_pubs/ achart/htm>, Mar. 22, 1999.

- differences in work experience and tenure between men and women; and
- discrimination in hiring, promotions, and pay scales.[263]

Similar to the issue of occupational segregation, there are different schools of thought as to what this wage discrepancy actually means. Some commentators argue that the wage gap has little to do with sex discrimination and that other factors adequately account for the wage discrepancy between the sexes. These authors conclude that when all such critical variables are accounted for, no wage gap exists that would indicate that women are underpaid.[264] Other authors, however, argue that when all nondiscriminatory factors are taken into account, the wage discrepancy does not disappear. Thus, this unexplained portion of the wage gap is evidence that sex discrimination in employment exists as part of a persistent "wage gap."[265]

Those who argue that there are factors other than sex discrimination that account for the wage discrepancy between the sexes assert that the wage gap essentially disappears when these factors are calculated. Differences in job tenure, seniority, job turnover, intermittent work force participation, experience, education, field of study, hours of work, industry occupation, and union status persist between men and women.[266] One contention is that when such differences are considered, the measured pay gap is estimated to be less than 2 percent.[267] In addition, it is asserted that women choose their particular occu-

[263] Institute for Women's Policy Research, "Equal Pay for Working Families," *Research-in-Brief*, publication C344, June 1999, p. 2; U.S. Department of Labor, Women's Bureau, *The Earnings Gap Between Men and Women*, 1979, pp. 1–2; U.S. Department of Labor, Women's Bureau, *Time of Change: 1983 Handbook on Women Workers*, bulletin 298, pp. 87–90.

[264] *See* Furchtgott-Roth and Stolba, *Women's Figures*, pp. 12–18.

[265] The White House, "President Clinton Calls for Passage of Equal Pay Legislation."

[266] *See generally* Employment Policy Foundation, "Compensation, Pay Equity & Comparable Worth," Briefing, Apr. 21, 1999. *See also* Furchtgott-Roth and Stolba, *Women's Figures*, pp. 12–18.

[267] *See generally* Employment Policy Foundation, "Compensation, Pay Equity & Comparable Worth."

pations because they offer benefits such as scheduling flexibility and lower penalties for work force absences.[268]

Furthermore, this argument emphasizes that forces outside the workplace prompt these choices. Ultimately, those choices have a negative effect on pensions, promotions, and total wages. One example used to explain how choice rather than discrimination affects the wage disparity between men and women is illustrated by women electing to take "pink-collar" or "pink-ghetto" jobs because they offer child-bearing women much-needed flexibility. Nearly 80 percent of women bear children at some point in their lives,[269] and approximately one-quarter of employed women work in part-time jobs.[270] Thus, a higher percentage of women's than men's work years are spent out of work. In turn, this may affect women's opportunity for promotion and would explain the difference between women's seniority as compared with that of men's.[271]

Other studies use different methods in identifying and statistically correcting for such factors in search of a corrected wage gap figure. Consequently, factors such as differences in skills and experience only make up approximately 33 percent of the wage discrepancy; and differences in industry, occupation, and union status among men and women make up only 28 percent of the wage discrepancy, which leaves approximately one-third of the discrepancy "unexplained" by such factors as educational attainment, work experience, and occupational choice.[272] Assuming such factors do account for a significant fraction of the wage gap, there may be important equity and discriminatory issues involved in the explained part of the gap and certainly in the unexplained part. This unexplained portion of the wage discrepancy is cited as evidence that sex discrimination is a significant factor of a gender wage gap.[273]

Regardless of the cause of the gender (and racial/ethnic) gap in wages, it is important for the nation to take steps to address such startling disparities. According to research by the AFL-CIO and the Institute for Women's Policy Research, if men and women received equal pay, the poverty rate for single working mothers would be cut in half.[274] For married women, the poverty rate would fall from 2.1 to 0.8 percent; for single women, poverty would be reduced from 6.3 to 1 percent.[275]

Fair Pay and Equal Pay

In April 1999, President Clinton urged Congress to pass legislation that would strengthen existing laws prohibiting sex discrimination in wages.[276] Among other things, the Paycheck Fairness Act[277] would require EEOC to determine what additional information is needed to enforce federal wage discrimination laws. In addition, the legislation would provide full compensatory and punitive damages as remedies for equal pay violations, in addition to liquidated damages currently available under the Equal Pay Act. The provision would put gender-based wage discrimination on an equal footing with wage discrimination based on race or ethnicity.[278] The bill also would bar employers from punishing employees for sharing salary information with their co-workers. The proposed legislation would provide increased training for EEOC employees to identify and respond to wage discrimination claims, to research discrimination in the payment of wages, and to establish an award

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[268] *See* Furchtgott-Roth and Stolba, *Women's Figures*, pp. 12–18.

[269] *See* U.S. Bureau of the Census, Current Population reports, Series P-20-482, 1995.

[270] *See* Furchtgott-Roth and Stolba, *Women's Figures*, p. 12.

[271] *See* ibid.

[272] *See* the White House, "President Clinton Calls for Passage of Equal Pay Legislation."

[273] AFL-CIO and Institute for Women's Policy Research (IWPR), *Equal Pay for Working Families: National and State Data on the Pay Gap and Its Costs*, 1999, pp. 6–7. *See, e.g.*, Francine Blau and Lawrence M. Kahn, "Swimming Upstream: Trends in the Gender Wage Differential in the 1980s," *Journal of Labor Economics*, vol. 15, no. 1, part 1 (1998), pp. 1–42; David A. MacPherson and Barry T. Hirsch, "Wages and Gender Composition: Why Do Women's Jobs Pay Less?" *Journal of Labor Economics*, vol. 13, no. 3 (1997), pp. 426–71.

[274] AFL-CIO and IWPR, *Equal Pay for Working Families*, p. 1.

[275] Ibid.

[276] "Clinton Calls for Passage of Legislation Strengthening Wage Discrimination Laws," *Daily Labor Report*, Apr. 8, 1999, p. AA-2; "President Urges Passage of Legislation to Strengthen Wage Discrimination Laws," *Employment Discrimination Report*, Apr. 14, 1999, p. 529.

[277] Paycheck Fairness Act, H.R. 541, 106th Cong. § 2 (1999).

[278] "President Urges Passage of Legislation to Strengthen Wage Discrimination Laws," p. 529; "Clinton Calls for Passage of Legislation Strengthening Wage Discrimination Laws," p. AA-2.

to recognize employers for eliminating pay disparities.[279]

Sexual Harassment

Sexual harassment is pervasive in the workplace, especially for women.[280] In addition, sexual harassment is often underreported.[281] It is also perceived differently by men and women, with women interpreting a broader range of behavior as sexual harassment.[282] Further, for both men and women, same-sex harassment is viewed as having a more severe impact on the victim than harassment by someone of the opposite sex.[283]

There also is evidence to suggest that sexual harassment diminishes job satisfaction.[284] In a study of the law profession, researchers found that female lawyers who had experienced or observed sexual harassment had lower job satisfaction than other female lawyers, and were more likely to report an intention to separate from their current employment situation.[285] They also concluded:

> Sexual harassment in the workplace is a matter of degree. Employers or coworkers may be able to sexually harass female employees in manners that are not sanctionable and yet so distress the targeted individuals that they quit.[286]

Similarly, another study concluded that "workplace harassment has the added characteristic of being harmful to a woman's economic well-being as well as to her mental welfare."[287]

Another recent study found that sexual harassment of men by men is "far more common than typically assumed."[288] Using a scale of emotional responses, the authors found that, on average, men were only "slightly upset" by the sexual harassment they experienced.[289] However, the authors found that the most upsetting form of sexual harassment was the forced or expected adherence to the typical, heterosexual male norm.[290] Thus, the study concluded:

> With respect to the law, it appears that cases involving unwanted sexual attention or sexual coercion may be protected under Title VII, but cases involving enforcement of traditional heterosexual masculinity are not protected by the courts, given that such harassment is generally viewed as motivated by the victim's perceived sexual orientation, not his sex. Cases involving other forms of gender harassment of men (e.g., repeated gender-related negative remarks creating a hostile environment for men) would presumably constitute a claim under Title VII if such cases were litigated. The data from the current study indicate that the enforcement of the heterosexual role was rated as the most upsetting to participants, a result that is especially interesting in light of statements by EEOC (1993) on what constitutes a harassing situation (i.e., that it is intimidating, hostile, or abusive). At present, however, victims have little legal redress for such harassment. Such harassment can take a variety of forms, and it is currently unclear whether instances directed at a presumably heterosexual target (e.g., ridiculing a man for leaving work for child care) will have the same impact as those directed toward a presumably gay target.[291]

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[279] "President Urges Passage of Legislation to Strengthen Wage Discrimination Laws," p. 529; "Clinton Calls for Passage of Legislation Strengthening Wage Discrimination Laws," p. AA-2.

[280] As many as half of working women will encounter sexual harassment in their lifetimes. *See* American Psychological Association, Resolution on Male Violence Against Women, July 11, 1999, accessed at <http://www.apa.org/ppo/apare solution04/html>. In addition, studies have chronicled the sexual harassment of men. *See, e.g.*, U.S. Merit Systems Protection Board, "Sexual Harassment in the Federal Workplace: Trends, Progress, and Continuing Challenges," 1994, p. 15. Nineteen percent of men in a federal workplace said they had experienced sexual harassment. Ibid.

[281] James E. Gruber and Michael D. Smith, "Women's Responses to Sexual Harassment—A Multivariate Analysis," *Basic & Applied Social Psychology*, vol. 17 (1995), pp. 544–45.

[282] Barbara Gutek, *Sex and the Workplace: The Impact of Sexual Harassment on Women, Men, and Organizations* (San Francisco, CA: Jossey-Bass,1985).

[283] Cathy L.Z. DuBois, Deborah E. Knapp, Robert H. Faley, and Gary A. Kustis, "An Empirical Examination of Same- and Other-Gender Sexual Harassment in the Workplace," *Sex Roles*, vol. 39, nos. 9/10 (1998), p. 745.

[284] David N. Laband and Bernard F. Lentz, "The Effects of Sexual Harassment on Job Satisfaction, Earnings, and Turnover Among Female Lawyers," *Industrial and Labor Relations Review*, vol. 5, no. 4 (July 1998), pp. 594–607.

[285] Ibid., p. 606.

[286] Ibid.

[287] Becky L. Glass, "Workplace Harassment and the Victimization of Women," *Women's Studies International Forum*, vol. 11, no. 1 (1988), p. 63.

[288] Craig R. Waldo, Jennifer L. Berdahl, and Louise F. Fitzgerald, "Are Men Sexually Harassed? If So, by Whom?" *Law and Human Behavior*, vol. 22, no. 1 (1998), p. 72.

[289] Ibid., pp. 70–71.

[290] Ibid., p. 75.

[291] Ibid.

Studies of sexual harassment in the workplace suggest that it is important to consider not only the degree to which harmful actions occur, but how such actions occur in relation to established workplace rules, gender norms, and civil rights legislation.

Child Care and Family Issues

"With respect to family leave, it is possible to view the issue through two very different prisms. On the one hand, family leave may facilitate, or accommodate, the ability of women to balance work and family life—a vision that largely informs the current legislation. A different perspective might view family leave as a way of reducing or combating workplace discrimination—a vision that is perhaps reflected in the gender-neutral nature of the FMLA, but is otherwise absent from the legislation."[292]

Between 1980 and 1996, the percentage of children with at least one parent working full time increased from 70 to 75 percent. During the same time period, the proportion of two-parent families in which both the mother and father worked increased from 17 to 30 percent.[293] According to the Federal Interagency on Child and Family Statistics,

> [s]ecure parental employment reduces the incidence of poverty and its attendant risks to children. Since most parents obtain health insurance for themselves and their children through their employers, a secure job can also be a key variable in determining whether children have access to health care. Secure parental employment may also enhance children's psychological well-being and improve family functioning by reducing stress and other negative effects that unemployment and underemployment can have on parents.[294]

Nonetheless, measures of secure parental employment remain skewed by race and ethnicity. Black and Hispanic children are more likely to have parents who are not working full time. In 1996, 56 percent of black children and 64 percent of Hispanic children had at least one parent working full time throughout the year.[295]

In addition, in the past 30 years, the number of mothers who work has increased, as has the proportion of single-parent families.[296] For example, in 1997, 9.8 million women with children under the age of 6 were employed, compared with 2.7 million in 1960. Another 14.3 million women with children between the ages of 6 and 17 were employed in 1997.[297]

The result of these structural changes in the labor force and the nation's families has been the increased need for child care and parental accommodations in the workplace. The Family and Medical Leave Act of 1993 (FMLA)[298] is the most recent Congressional attempt to address gender inequities in employment and maintenance of the family in contemporary society, and the first attempt to articulate a national family leave standard.[299] The act applies to men and women and allows for up to 12 weeks of unpaid leave per year for the following reasons: the birth of a child, the adoption of a child, placement of a foster child, serious health condition of the employee, or the need for the employee to care for a family member who has a serious health condition.[300] The elimination of existing gender inequities in employment depends upon such sophisticated legislation to ensure that both men and women are equally able to choose whether to commit primarily to career or to family, or to pursue concurrent involvement.[301]

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[292] Michael Selmi, "The Limited Vision of the Family and Medical Leave Act," *Villanova Law Review*, vol. 44 (1999), p. 396.

[293] Federal Interagency Forum on Child and Family Statistics, *America's Children: Key National Indicators of Well-Being*, 1998, p. 12.

[294] Ibid.

[295] Ibid.

[296] U.S. Department of Health and Human Services (HHS), Office of the Assistant Secretary for Planning and Evaluation, *Trends in the Well-Being of America's Children & Youth*, 1998, p. 94.

[297] Census, *Statistical Abstract of the United States: 1998*, p. 409, table 654.

[298] Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (1993) (codified as amended at 29 U.S.C. § 2601 (1994)).

[299] *See* 29 U.S.C. § 2601(a)(1) (1994) (recognizing that the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly).

[300] *See* Angie K. Young, "Assessing the Family and Medical Leave Act in Terms of Gender Equality, Work/Family Balance, and the Needs of Children," *Michigan Journal of Gender & Law*, vol. 5, p. 114.

[301] *See* 29 U.S.C. §§ 2601(a)(b) (1994) (noting that the elimination of existing gender inequities in employment will require first, the establishment of institutional and structural support for families such that concurrent commitments to

Child care issues also directly impact the work force and parents' decisions on where and if they should work. According to one author,

> [p]arenting takes time, and, as society is currently structured, those time demands fall disproportionately on mothers. Of course, pregnancy, childbirth and breastfeeding are exclusively functions of being a woman and may cause women to take leaves from jobs. Lack of excellent and affordable child care as well as parental choice, may also cause either fathers or mothers to take leaves from jobs, but more often, mothers.[302]

Child care arrangements depend on many things, including parents' race, ethnicity, sex, marital status, educational attainment, poverty status, and income.[303] For example, Hispanic children are less likely than children of other groups to be cared for in day care centers and preschools. In 1994, 19 percent of Hispanic children whose mothers worked were cared for in such facilities, compared with 31 percent of white children and 34 percent of black children.[304]

In addition, children in lower socioeconomic groups also are less likely to receive care in day care centers and preschools. Only 22 percent of poor children under age 5, compared with 30 percent of nonpoor children, attended day care centers and preschools.[305] Further, only 20 percent of children whose mothers had less than a high school diploma attended day care centers and preschools, compared with 35 percent of children whose mothers had at least a college degree.[306]

Overall, family- and child-care-related responsibilities have an impact on both parents' employment opportunities and children's well-being. In many cases, the decision to work while fulfilling parental responsibilities has resulted in workplace conflict and discrimination.[307] As one author states, "Despite the fact that many companies find family-friendly policies cost effective, many others penalize parents for having or caring for children."[308] In recognition of the continuing discrimination against mothers and fathers, legislation was introduced in Congress in 1999 addressing job discrimination on the basis of parental status.[309] According to the bill,

> no existing Federal statute protects all workers from employment discrimination on the basis of their status as parents. . . . Such discrimination occurs where, for example, employers refuse to hire or promote both men and women who are parents based on unwarranted stereotypes or overbroad assumptions about their level of commitment to the workforce.[310]

In his remarks concerning the bill, President Clinton stated that the bill "sends a clear message" that parents "should never be considered second class workers."[311] The President also identified several forms of employment discrimination that would be prohibited by the proposed law:

> The bill would, for the first time, protect parents and those with parental responsibilities from job discrimination. It does not stop employers from making hiring and promotion decisions on the basis of qualifications or job performance, but it does ensure that workers are not discriminated against because they are parents or exercise parental responsibilities. It would, for example, bar employers from taking a par-

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family and career are possible; second, the abandonment of prescriptive gender roles and expectations; and, third, an appropriate increase in our cultural valuation of nurturing work, particularly the work of childrearing).

302 Candace Saari Kovacic-Fleischer, "Litigating Against Employment Penalties for Pregnancy, Breastfeeding and Childcare," *Villanova Law Review*, vol. 44 (1999), p. 355.

303 HHS, *Trends in the Well-Being of America's Children & Youth*, 1998, p. 112.

304 Ibid.

305 Ibid.

306 Ibid.

307 *See* Kovacic-Fleischer, "Litigating Against Employment Penalties for Pregnancy, Breastfeeding and Childcare," pp. 355–93; Erin Kelly and Frank Dobbin, "Civil Rights Laws at Work: Sex Discrimination and the Rise of Maternity Leave Policies," *American Journal of Sociology*, vol. 105, no. 2 (September 1999), pp. 455–92; Martha Chamallas, "Mothers and Disparate Treatment: The Ghost of Martin Marietta," *Villanova Law Review*, vol. 44 (1999), pp. 337–54; Angie K. Young, "Assessing the Family and Medical Leave Act in Terms of Gender Equality, Work/Family Balance, and the Needs of Children," *Michigan Journal of Gender & Law*, vol. 5, pp. 113–62.

308 Kovacic-Fleischer, "Litigating Against Employment Penalties for Pregnancy, Breastfeeding and Childcare," p. 356.

309 *See* "Dodd, Kennedy Introduce Clinton Proposal to Bar Job Discrimination Against Parents," *Daily Labor Review*, no. 219 (Nov. 15, 1999), p. A-10.

310 Ending Discrimination Against Parents Act of 1999, S. 1907, 106th Cong. § 2(d)-(e) (1999).

311 The White House, Office of the Press Secretary, "Statement by the President," Nov. 11, 1999, accessed at <http://www.pub.whitehouse.gov>.

ent off the "fast track" because of unsubstantiated concerns that parents cannot perform in demanding jobs. Similarly, it would not allow employers to prefer applicants without children over equally qualified or better qualified working parents, or to refuse to hire single parents.[312]

There are many other family-related issues that affect working men and women. Whether or not such issues result in disparate impact or discrimination, they can affect the working life, employment opportunities, and earnings of individuals. Nonetheless discrimination in employment because of family status and marital status remains a problem for workers in today's work force. Closely related to family and child care issues in the workplace is the prohibition of pregnancy discrimination under Title VII.[313]

Alternative Work Arrangements

"In recent years, flexibilisation of working life has become a standard slogan in legal and socio-political parlance. Everyone seems to advocate it, though it is looked upon with emotions that range from trepidation—or even outright horror—to delight. Some praise its potentials to set humans free and to open them up to a road toward personal self-fulfillment and self-expression; in short, to liberate humans from the stifling bonds of a rigid labor regime imposed by ideologically motivated political activists, overzealous legislators or ironclad production methods of the factory-style work environment."[314]

Not only is the workplace becoming diversified by race, ethnicity, gender, age, and other individual characteristics, it is also beginning to reflect new and innovative ways of organizing the way people work. From working part time to telecommuting to having flexible and nonstandard working hours, employers are faced with meeting the challenge of business and employment in the new millennium.

Flexible schedules and alternative working arrangements are increasingly becoming popular in the nation's businesses and workplaces as unemployment remains low and companies are seeking ways to retain workers seeking to balance life both in and out of the office.[315] Human resources professionals are implementing strategies for balancing the needs of both the employer and the employees.[316] Such strategies will require a need for new personnel practices and policies, including policies aimed at ensuring equal opportunity in hiring, pay, and benefits.[317] In 1997, almost 28 percent of the labor force worked in a job that had a flexible schedule.[318] In addition, more than 50 percent of the largest U.S. employers offered work-at-home and/or job-sharing arrangements.[319] One study found that 22 percent of companies offered compressed work schedules and another 16 percent used telecommuting as a way of providing flexible environments for their employees.[320]

A sampling of the various forms of alternative and flexible work arrangements are discussed below. However, there is little research on the impact of flexible arrangements on minorities and women or on the equitable distribution of such practices by race, ethnicity, gender, and age, or by industry. Nonetheless, there have been some

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312 Ibid.

313 *See* discussion above, pp. 17–18.

314 Reinhold Fahlbeck, "Flexibility: Potentials and Challenges for Labor Law," *Comparative Labor Law Journal*, vol. 19 (Summer 1998), p. 515.

315 Jan Ziegler, "Can't Survive on Work Alone," *Business & Health*, vol. 16, no. 9 (September 1998), pp. 31–32; Helen Box Reynolds, "Work/life Initiatives Require Cultural Readiness," *Employee Benefit Plan Review*, vol. 54, no. 6 (December 1999), pp. 25–26; Charlene Marmer Solomon, "Workers Want a Life! Do Managers Care?" *Workforce*, vol. 78, no. 8 (August 1999), pp. 54–58.

316 Virginia I. Postrel, "Flexibility Rules," *Forbes*, Oct. 7, 1996, ASAP Supplement, p. 30; Julia Resnick, "What Makes Flex Work?" *HR Focus*, vol. 74, no. 4 (April 1997), p. 31.

317 Arne L. Kalleberg, Edith Rasell, Ken Hudson, David Webster, Barbara F. Reskin, Naomi Cassierer, and Eileen Appelbaum, *Nonstandard Work, Substandard Jobs: Flexible Work Arrangements in the U.S.* (Washington, DC: Economic Policy Institute, 1997) (hereafter cited as Kalleberg et al., *Nonstandard Work, Substandard Jobs)*; Institute for Women's Policy Research, *Part-Time Opportunities for Professionals and Managers: Where Are They, Who Uses Them and Why* (Washington, DC: IWPR, 2000), p. 68.

318 Census, *Statistical Abstract of the United States: 1998*, p. 413, table 664. Flexible schedules are described as "flexible work hours that allow you to vary or make changes in the time you begin and end work." U.S. Department of Labor, Bureau of Labor Statistics, "Workers on Flexible and Shift Schedules Technical Note," Mar. 25, 1998, accessed at <http://www.bls.gov/news.release./flex.tn.htm>.

319 Margaret Boles, "Flexible Work Arrangements Go Mainstream," *Workforce*, vol. 76, no. 8 (August 1997), p. 24.

320 Judy Greenwald, "Employers Warming up to Flexible Schedules," *Business Insurance*, vol. 32, no. 24 (June 15, 1998), pp. 3, 6.

studies on the long-term consequences of nontraditional employment.

One study found that nonstandard jobs are less likely to provide health insurance and pensions, more likely to be of limited duration, and are generally inferior compared with standard work arrangements.[321] The authors concluded that this was problematic because

> [w]orkers' personal characteristics, especially sex and race/ethnicity, are important determinants of the type (i.e., quality) of NSWAs [nonstandard work arrangements] in which they are employed. Women, more often than men, work in NSWAs, and women of all races and ethnic groups are highly concentrated in the lowest-quality types of nonstandard work. As a whole, men who do nonstandard work are concentrated in the higher quality types of work. However, nonwhite men are over-represented in low-quality nonstandard jobs and under-represented in high quality jobs.[322]

For the most part, the long-term effects of nonstandard working arrangements depend on both the type of work and the sex of the employee.[323]

Part-time Work

In 1997, more than 39 million Americans worked part time.[324] While part time is defined as working fewer than 35 hours, the average number of hours worked is between 21 and 23 hours, depending on the reasons for working part time.[325] Part-time workers fall into two categories: those who work for economic reasons and those who work for noneconomic reasons. Economic reasons include business conditions, seasonal work, and the inability to find full-time work.[326] Almost 1.5 million workers settled for part-time jobs because they could not find full-time work.[327]

Noneconomic reasons for working part time include child care problems, other personal obligations, and health or medical limitations. The top noneconomic reason for working part time is being in school. More than 6 million persons work part time because they are in school or in training.[328] Another 5.5 million persons cited family or personal obligations.[329]

A recent study on part-time work characterized such jobs as either "good" or "bad." "Good" part-time jobs are those that provide good compensation, job security, training opportunities, and growth potential.[330] Often these jobs are found in the nursing, legal, science, engineering, and special education professions.[331] "Bad" part-time jobs have low pay, few, if any, benefits, little security, and few opportunities for advancement.[332] As another study points out, most part-time jobs, particularly for professionals and managers, do not offer competitive salaries, benefits, or pensions.[333] Overall, there are few professionals and managers who have the opportunity to work part time, and few careers provide financial incentives for working part time.[334] In addition, part-time managers and professionals tend to be women, many of whom have young children. Compared with full-time professionals, they are less likely to have college or graduate degrees, although many are still in school.[335]

Further, several myths and stereotypes have been perpetuated about part-time workers. They have been characterized as less productive and less committed to their jobs than full-time employees.[336] However, many authors have noted

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[321] Kalleberg et al., *Nonstandard Work, Substandard Jobs*, pp. 1, 6. Kalleberg et al., define nonstandard work as that which meets one of the following criteria: "(1) the absence of an employer, as in self-employment and independent contracting; (2) a distinction between the organization that employs the worker and the one for whom the person works, as in contract and temp work; or (3) the temporal instability of the job, characteristics of temporary, day labor, on-call, and some forms of contract work." Ibid., p. 8.

[322] Ibid., p. 2.

[323] Ferber and Waldfogel, "The Long-Term Consequences of Nontraditional Employment."

[324] Census, *Statistical Abstract of the United States: 1998*, p. 415, table 667.

[325] Ibid.

[326] Ibid.

[327] Ibid.

[328] Ibid.

[329] Ibid.

[330] Chris Tilly, *Half a Job: Bad and Good Part-Time Jobs in a Changing Labor Market* (Philadelphia: Temple University Press, 1996).

[331] IWPR, *Part-Time Opportunities for Professionals and Managers*, p. 68.

[332] Tilly, *Half a Job.*

[333] IWPR, *Part-Time Opportunities for Professionals and Managers*, p. 68.

[334] Ibid., p. 67.

[335] Ibid.

[336] Crist Inman and Cathy Enz, "Shattering the Myths of the Part-time Worker," *Cornell Hotel & Restaurant Administra-*

the benefits of hiring workers part time, not only in the service industries, but in other industries as well.[337]

Independent Contractors

Current Population Survey data from February 1997 indicate that 8.5 million Americans, almost 7 percent of the labor force, work as independent contractors.[338] Approximately 88 percent of this group was self-employed, and 25 percent worked part time. In contrast to the total work force, where slightly more than half of the workers are men, two-thirds of all independent contractors are men.[339] Similarly, the pool of independent contractors differs from the traditional work force in that its workers are older and have more schooling.[340]

Independent contractors are most likely found in the agriculture, construction, and service industries. Among male independent contractors, the most prevalent occupations are manager, construction craft worker, proprietors, writer, artist, real estate agent, and insurance salesperson. Female independent contractors are often managers, writers, artists, real estate agents, insurance salespersons, door-to-door salespersons, and child care providers.[341]

Overall, independent contractors earn wages that are almost 15 percent higher than workers in traditional arrangements. The wage differential is caused, in part, by the differences in age and education between independent contractors and the average worker.[342] Female independent contractors, however, earn less than women in traditional work arrangements. In addition, male independent contractors' earnings are 50 percent higher than those of their female counterparts.[343]

Telecommuting

Increasingly, companies are offering the option of telecommuting. Telecommuters work at home or a designated site close to their homes. Those working away from the office can be in touch with their employers and customers through e-mail, fax, and telephone. In addition to saving time on the drive to and from work, telecommuting can provide many benefits, including fewer interruptions from co-workers and telephone callers.[344] Many employers also permit telecommuters to schedule their work around family commitments.[345] Telecommuting also can have a positive impact on recruitment, retention, and work life.[346]

Some experts have argued that telecommuting has not provided the expected benefits. One study highlighted several potential problems with telecommuting.[347] One is the difficulty of managing employees that the manager does not see on a daily basis. Being away from the formal workplace also inhibits the ability to communicate effectively. Similarly, lack of interaction with colleagues can cause a loss of creativity.[348] Another potential pitfall is disappointment: "[t]here is an assumption in telecommuting that, somehow, home is going to be a friendlier, easier, quieter place to work than the office. That's not always the case."[349] However, most of these problems can be overcome with the provision of appropriate training. According to the author, in addition to training on technology, telecommuters should be provided training on communication.[350] Training also should focus on perform-

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tion Quarterly, vol. 36, no. 5 (October 1995), pp. 70–73; IWPR, *Part-Time Opportunities for Professionals and Managers*, p. 71.

337 Inman and Enz, "Shattering the Myths of the Part-time Worker," pp. 70–73; IWPR, *Part-Time Opportunities for Professionals and Managers*; Daniel C. Feldman and Helen I. Doerpinghaus, "Missing Persons No Longer: Managing Part-time Workers in the '90s," *Organizational Dynamics*, vol. 21, no. 1 (Summer 1992), pp. 59–72; "Flexibility No Barrier for Professional Workers," *Employee Benefit Plan Review*, vol. 54, no. 6 (December 1999), p. 22.

338 Sharon R. Cohany, "Workers in Alternative Employment Arrangements: A Second Look," *Monthly Labor Review*, vol. 121, no. 22 (November 1998), pp. 3–21.

339 Ibid.

340 Ibid.

341 Ibid.

342 Ibid.

343 Ibid.

344 "Telecommuting: Personal Benefit vs. Corporate Impact," *Ohio CPA Journal*, vol. 58, no. 4 (October/December 1999), pp. 50–51.

345 Ibid.

346 "Telecommuting is a Tool of Millennial Business," *Workforce*, vol. 78, no. 11 (November 1999), p. 22.

347 Lin Grensing-Pophal, "Training Employees to Telecommute: A Recipe for Success," *HR Magazine*, vol. 43, no. 13 (December 1998), pp. 76–82.

348 Ibid.; "Telecommuting is a Tool of Millennial Business."

349 Grensing-Pophal, "Training Employees to Telecommute."

350 Ibid.

ance management skills and what an employee should expect from telecommuting.[351]

Workplace Abuse and Violence

"Griping, lawsuits and even violence are on the rise because there's a gap between expectations and reality. It's time for [human resources professionals] to bridge the gap. It's a lot like a mathematics question gone horribly wrong. Hmmm—let's see: lowest unemployment in decades, companies scrambling to woo new workers, more money than ever spent on workplace programs. These factors should all add up to a satisfied workforce. No. Instead, companies nationwide are reporting quite the opposite."[352]

One emerging issue requiring further analysis is that of workplace abuse and violence. Violence and abuse are increasingly becoming an issue for today's workers, yet workers remain unprotected from this seeming violation of their rights. In recent years, however, several researchers and organizations have become concerned with such violations, going so far as to deem workplace bullying as "one of the most insidious and destructive problems" in the workplace.[353] For example, one legal scholar noted:

> While courts understand that accessible workplaces may require teletypewriters or ramps, and that neither sexual harassment nor race discrimination is an employer prerogative, stress, punishing hours, overwork, unpleasant personality conflicts, and even worker abuse are much more commonly seen as simply intrinsic features of the workplace.[354]

Psychiatric disorders, stress, and other results of workplace abuse and violence are not clearly covered by fair employment laws. While it has been argued that the resulting disorders of workplace abuse should be covered under the ADA,[355] little attention has been paid to such abuse under other employment statutes.

Nonetheless, some experts have noted that workplace abuse and sexual and racial harassment often go hand in hand.[356] There are several forms of violence and abuse that can occur at the workplace. These include: (1) physical abuse and violence, (2) relationship violence, and (3) harassment and emotional or verbal abuse.[357] However, few data exist on the extent of such abuse or on the causes and consequences of physical and emotional abuse in the workplace.[358]

Physical Abuse and Violence

Workplace violence can be caused by employees as well as individuals unknown to the workers at a particular business. According to one study, three-quarters of female homicides in the workplace were perpetuated by an individual unknown to the victim.[359] The study found that 62 percent of male fatal assaults and 81 percent of female fatal assaults occurred within the retail and service industries.[360] According to the author,

> the evidence of this survey clearly indicates that women are more likely to be assaulted by a stranger, especially those working in a position that involves serving the public, such as fast food server or store cashier. These jobs, which often are easily accessed, offer flexible hours and require minimal training, allow women to raise children, work their way through school, or break out of a cycle of poverty. So it is shocking to think that women carry the horrible risk of being murdered while at the very job they need to survive.[361]

The incidence of violence committed by employees and former employees is receiving more and more media attention.[362] Take, for example,

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[351] Ibid.

[352] Gillian Flynn, "Why Employees Are so Angry," *Workforce*, vol. 77, no. 9 (September 1998), p. 26.

[353] Rudy M. Yandrick, "Lurking in the Shadows," *HR Magazine*, October 1999, reprinted at <http://www.bullybusters.org/home/twd/bb/press/hrmag1099.html>. *See generally* <www.bullybusters.org>.

[354] Susan Stefan, " 'You'd Have to Be Crazy to Work Here': Worker Stress, the Abusive Workplace, and Title I of the ADA," *Loyola of Los Angeles Law Review*, vol. 31 (April 1998), p. 803.

[355] *See* ibid.

[356] Women's Bureau interview, p. 6.

[357] *See* Beverly Younger, "Violence Against Women in the Workplace," pp. 113–33 in Marta Lundy and Beverly Younger, *Women in the Workplace and Employee Assistance Programs* (New York: The Haworth Press, 1994).

[358] Younger, "Violence Against Women in the Workplace," p. 131.

[359] Ibid., p. 117.

[360] Ibid., p. 119.

[361] Ibid., p. 121.

[362] *See, e.g.*, "Reports of Workplace Violence Increase, Employers Step Up Security, Survey Says," *Daily Labor Report*,

the following story reported by the Bureau of National Affairs:

> After being fired, the employee drove to another business and assaulted a former co-worker. . . . He then returned to the [automobile] dealership and shot and killed the company's vice president of finance and a customer. The employee wounded two other employees and then killed himself.[363]

Random violence at work is of increasing concern. Certain occupations are more susceptible to violence than others. For example, the Occupational Safety and Health Administration (OSHA) recently issued a fact sheet on violence against taxi drivers.[364] The fact sheet notes that "taxi and livery drivers are 60 times more likely than other workers to be murdered while on the job."[365] OSHA further states that it is the responsibility of both drivers and employers to ensure on-the-job safety.[366]

There are several theories for the existence of workplace violence. Changes in the structure of industry, job stress, and interpersonal conflicts are often cited as reasons for violence occurring in the workplace.[367] According to one author,

> [s]ome workers who have suffered long-term cumulative frustration, such as career failures, never getting the right job or promotion they perceived themselves as deserving, can become resentful and may launch attacks to extract vengeance against the supposed cause of their frustration. Being fired can be the final straw, particularly for people who typically externali[z]e blame and responsibility, leading to lashing out at those who they see as responsible for their failures.[368]

Although there has been some scholarship on the subjects of workplace violence and stress in the workplace, there have been few analyses of the industries and occupations in which violence occurs and the relationship between workplace violence and individual characteristics such as race, ethnicity, and gender.

Relationship Violence

According to data from the U.S. Department of Justice, women are more likely than men to be violently attacked at work by someone with whom they are, or have been, in a relationship.[369] Nonetheless, according to the Women's Bureau at the U.S. Department of Labor, "[m]any employers are unaware that domestic violence affects their job performance or don't know how to help them effectively. Others are aware of the problem, but don't feel that business should play a role in addressing it."[370] The spill over of domestic violence and violence against women into the workplace puts other employees at risk as well.[371]

Harassment and Emotional Abuse

While much research has been conducted on sexual and racial harassment, there has been little scholarship on emotional abuse. Even less information is available on the subject of emotional or psychological abuse in the workplace. Emotional abuse is defined as

> hostile verbal and nonverbal behaviors that are not explicitly tied to sexual or racial content yet are directed at gaining compliance from others. Examples of these behaviors included yelling or screaming, use of derogatory names, the "silent treatment," withholding of necessary information, aggressive eye contact, negative rumors, explosive outbursts of anger, and ridiculing someone in front of others.[372]

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no. 216 (Nov. 9, 1999), pp. A-7 to A-8; Younger, "Violence Against Women in the Workplace," p. 114.

[363] "Minnesota Employer Not Liable for Attack by Fired Employee," *Individual Employee Rights*, no. 21 (Mar. 21, 2000), p. 82.

[364] U.S. Department of Labor, Occupational Safety and Health Administration (OSHA), "Risk Factors and Protective Measures for Taxi and Livery Drivers," fact sheet, May 2000.

[365] Ibid., p. 1.

[366] Ibid.

[367] Elizabeth A. Mullen, "Workplace Violence: Cause for Concern or the Construction of a New Category of Fear?" *Journal of Industrial Relations*, vol. 39, no. 1 (March 1997), pp. 21–32.

[368] Ibid., p. 24.

[369] U.S. Department of Justice, Bureau of Justice Statistics, *Violence and Theft in the Workplace*, Crime Data Brief, July 1994.

[370] U.S. Department of Labor, Women's Bureau, *Domestic Violence: A Workplace Issue*, no. 96-3, October 1996, pp. 1–2.

[371] Ibid., p. 1.

[372] Loraleigh Keashly, "Emotional Abuse in the Workplace: Conceptual and Empirical Issues," *Journal of Emotional Abuse*, vol. 1, no. 1 (1998), p. 85.

Emotional abuse, nonviolent in nature (although often combined with physical abuse), is used as a controlling device.[373]

There have been instances in which sexual harassment and violence against women intersect. For example, a recent case against Hooters restaurant and bar alleged violations of both the Violence Against Women Act[374] and Title VII.[375] The district court found that the plaintiffs were hired as a bartender and waitress not for their experience or qualifications, but "because of their sex and appearance."[376] The court also determined:

> Once hired, the plaintiffs and [a witness] were continually subjected to a pattern and practice of sexual harassment and intentional discriminatory treatment by reason of their sex, including, without limitation, vulgar sexual remarks and jokes, sexual overtures to, and sexual touching of, female employees which were unwelcome and offensive.[377]

The offending acts were made by managers at the restaurant. The court noted that the plaintiffs "were constructively discharged when each was ultimately compelled to resign when the defendants' illegal behavior continued unabated" and concluded that the "[d]efendants acted with malice and in reckless indifference to the federally protected rights of its employees and in wilful [sic] and intentional reckless disregard of the rights of those employees."[378] As such, the court ruled in favor of the plaintiffs on their claims under Title VII and the Violence Against Women Act.[379]

Unfortunately, often there is no recourse for victims of emotional abuse in the workplace, unless sexual and/or racial harassment under Title VII can be shown. According to one author,

> [i]n the United States, organizations already have a legal obligation to prevent the misconduct of those they invest with power over others. Bosses are not permitted to behave in ways that produce a hostile, intimidating, or abusive work environment for an employee because of the employee's race, age, religion, gender, disability, or national origin. This organizational duty should be extended. It must ultimately apply to all employees, not only some.[380]

As with other forms of workplace violence and abuse, emotional abuse has received little attention by scholars and the popular press.[381] The extent to which emotional abuse results in sexual and racial harassment is an area requiring further research.[382]

SUMMARY

The United States has come a long way in combating illegal employment discrimination. The employment environment of the 21st century is more diverse than ever before. The wage gap between men and women has narrowed and more minorities and women are found in upper-level and managerial positions. Unemployment is down for all groups, while educational attainment is up. In addition, the workplace has become more "family friendly" and flexible.

Nonetheless, inequalities remain. Workers continue to file charges of employment discrimination at an alarming rate, attesting to the continued need for proactive enforcement of fair

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[373] *See, e.g.*, R. Geffner and R.B.B. Rossman, "Emotional Abuse: An Emerging Field of Research and Intervention," *Journal of Emotional Abuse*, vol. 1, no. 1 (1998), pp. 1–5. *See also* Ginny NiCarthy, Nancy Gottlieb, and Sandra Coffman, *You Don't Have to Take It: A Woman's Guide to Confronting Emotional Abuse at Work* (Seattle: Seal Press, 1993).

[374] Pub. L. No. 193-322, Title IV, 198 Stat 1902 (codified as amended in scattered sections of 8, 18, and 42 U.S.C.).

[375] Wells v. Lobb and Company, Inc., 1999 U.S. Dist. LEXIS 20058 (Dec. 1, 1999). *See* "Conduct by Hooters' Managers Creates Liability Under Violence Against Women Act," *Daily Labor Report*, no. 248 (Dec. 29, 1999), pp. A-2 to A-3; " 'Outrageous Conduct' Violates Violence Against Women Act," *Fair Employment Practices*, no. 889 (Jan. 20, 2000), p. 10.

[376] *Wells v. Lobb*, 1999 U.S. Dist. LEXIS 20058 *3.

[377] 1999 U.S. Dist. LEXIS 20058 *3.

[378] 1999 U.S. Dist. LEXIS 20058 *4.

[379] " 'Outrageous Conduct' Violates Violence Against Women Act," p. 10. In May 2000, the Supreme Court struck down the portions of the Violence Against Women Act that allowed women to sue assailants in federal court, thus weakening the civil rights provisions of the law. Joan Biskupic, "Justices Reject Lawsuits for Rape," *The Washington Post*, May 16, 2000, p. A1. Nonetheless, while there may be weak legal recognition of the relationship between sexual violence and emotional abuse and sexual harassment, the argument in *Wells v. Lobb* merits further attention. In particular, although Title VII offers federal legal remedies for sexual harassment in the workplace, emotional abuse and domestic violence may not fall under the protections of Title VII.

[380] Harvey A. Hornstein, *Brutal Bosses and Their Prey: How to Identify and Overcome Abuse in the Workplace* (New York: Riverhead Books, 1996), p. xv.

[381] *See* Keashly, "Emotional Abuse in the Workplace," p. 87.

[382] *See* Felix O. Chima, "Perceived Emotional Maltreatment Factors of African Americans in the Workplace," *Journal of Emotional Abuse*, vol. 1, no. 4 (1999), pp. 37–52.

employment laws. As the economy and labor force become more complex, employment discrimination becomes more subtle and more insidious. Issues of unfair workplace practices become intertwined with illegal discriminatory actions, often blurring the boundaries or leaving workers with no one else to turn to but the federal government.

Therefore, it is important not only for EEOC to vigorously and proactively enforce Title VII, the Age Discrimination in Employment Act, the Equal Pay Act, and the other laws under which it has jurisdiction, it has become exceedingly important for EEOC to publicize its mission, authority, and jurisdiction, and for other agencies and organizations to assist employees with nondiscrimination-related problems.

In the remaining chapters of this report, the Commission explains how EEOC functions, the policies it has developed to address employment discrimination, and its enforcement efforts. With these pages, the Commission hopes to highlight the areas in which EEOC is effective and has made progress, as well as to provide recommendations to the agency so that it may continue to work toward meeting and fulfilling its mission of eradicating employment discrimination.

CHAPTER 3

U.S. Equal Employment Opportunity Commission's Organization and Administration: An Overview

MISSION AND RESPONSIBILITIES

The U.S. Equal Employment Opportunity Commission (EEOC) was created to enforce Title VII of the Civil Rights Act of 1964,[1] which prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.[2] The mission of EEOC is "to eradicate employment discrimination at the workplace."[3] EEOC carries out its mission through alternative dispute resolution, investigation, conciliation, litigation, coordination, regulation, policy research, outreach and education, and technical assistance.[4] EEOC is responsible for addressing employment discrimination in the federal and private sectors, including public and private employers of 15 or more employees, public and private employment agencies, and labor organizations.[5] EEOC, through its field and headquarters offices, receives and investigates discrimination charges and where a violation exists, attempts to secure remedies through conciliation and, if necessary, court action.[6] In addition, the Agency provides leadership in coordinating equal employment opportunity programs with other federal departments and agencies; conducts hearings on proposed regulations that affect employees, employers, and labor organizations; and issues decisions on complaints of employment discrimination or where discrimination is an issue.[7]

Since its inception in July 1965, EEOC's responsibilities have changed and expanded significantly. Originally, EEOC's jurisdiction was Title VII enforcement for almost all nongovernment employers of 25 or more employees and unions, employment agencies, and sponsorships of apprenticeships or other job-training programs.[8] EEOC could hire staff, establish regional offices, subpoena records, and develop rules and regulations for carrying out its mandate.[9] Its primary functions included regulation, complaint (or charge) investigation, and conciliation. EEOC could intervene in litigation as a "friend of the court."[10] However, EEOC could not enforce decisions without assistance from the U.S. Department of Justice or the private bar and was limited to seeking compliance with Title VII through "persuasion and negotiation" between the complainant and the respondent.[11]

In 1972, Congress amended Title VII and gave EEOC new enforcement authority and ex-

[1] 42 U.S.C. § 2000e-4 (1994).

[2] *Id.* at § 2000e-2.

[3] U.S. Equal Employment Opportunity Commission (EEOC), "A Proud Legacy—A Challenging Future," *FY 2001 Budget Request* (Washington, DC: Submitted to the Congress of the United States, February 2000), p. 1.

[4] EEOC, "Directives Transmittal: Organization, Mission and Functions" (EEOC Notice 110.002), May 11, 1997, p. I-1; EEOC, *Fiscal Year 1994 Annual Report*, p. 7.

[5] *See* 42 U.S.C. § 2000e-5(a) (1994). *See also* EEOC, "Organization, Mission and Functions," p. I-1.

[6] EEOC, "Organization, Mission, and Functions," pp. I-1, II-1.

[7] Ibid., p. II-1.

[8] Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701, 703, 78 Stat. 241, 253, 255–59 (1964) (codified as amended at 42 U.S.C. §§ 2000e(b), 2000e-2 (1994)). *See also* U.S. Commission on Civil Rights (USCCR), *Helping Employers Comply with the ADA: An Assessment of How the United States Equal Employment Opportunity Commission Is Enforcing Title I of the Americans with Disabilities Act*, September 1998, p. 38.

[9] Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241, 258, 264–65 (codified as amended at 42 U.S.C. §§ 2000e-4, 2000e-9, 2000e-12 (1994)). *See also* USCCR, *Helping Employers Comply with the ADA*, p. 38.

[10] USCCR, *Helping Employers Comply with the ADA*, p. 39.

[11] Ibid.

panded jurisdiction. The new authority included the power to file lawsuits against private employers, employment agencies, and unions when conciliation failed, and authority (which shifted from the Department of Justice) to file systemic ("pattern and practice") suits against private employers.[12] The 1972 amendments also extended EEOC's jurisdiction to all educational institutions and state and local governments and broadened Title VII coverage to include employers of 15 or more employees and unions.[13] President Jimmy Carter's Reorganization Plan of 1978[14] established EEOC as the lead agency for coordinating all federal equal employment policies and procedures.[15] In addition, EEOC received enforcement responsibility for the Age Discrimination in Employment Act (ADEA),[16] which expanded the list of protected classifications to include persons 40 years or older, and the Equal Pay Act (EPA).[17] The reorganization also transferred to EEOC responsibility for enforcing equal employment opportunity requirements in the federal sector under Section 501 of the Rehabilitation Act of 1973[18] and Section 717 of Title VII, which prohibits discrimination by federal agencies on the basis of race, color, sex, religion, or national origin.[19] The 1978 Pregnancy Discrimination Act amended Title VII to provide that employment discrimination because of pregnancy, childbirth, or related medical conditions constitutes unlawful sex discrimination.[20] In 1992 EEOC began to enforce Title I of the Americans with Disabilities Act of 1990,[21] and the Civil Rights Act of 1991,[22] which strengthens the sanctions against employment discrimination by providing for compensatory and punitive damages and for jury trials in cases of intentional discrimination. EEOC's jurisdiction now includes the protection of workers from employment discrimination based on race, color, religion, sex, national origin, age, and disability.

LEADERSHIP, ORGANIZATIONAL STRUCTURE, AND COORDINATION

Five commissioners are responsible for the administration of EEOC. They are appointed by the President and confirmed by the U.S. Senate. Commissioners are appointed for five-year staggered terms. The commissioners develop and approve the policies of EEOC; participate equally on all matters; decide questions by majority vote; issue commissioner charges of discrimination where appropriate; authorize and approve the filing of suits; and perform any other functions related to issues that come before EEOC.[23]

The President designates a chairperson and a vice chairperson. The chairperson is responsible for the implementation of EEOC policy and has the authority to appoint attorneys and other personnel and agents to assist EEOC in the achievement of its mission. The chairperson recommends policies, procedures, and programs to the Agency and carries out other functions, including financial management and organizational development of EEOC. The vice chairperson serves as acting chairperson in the absence of the chairperson.[24]

Changes in Leadership

During the early 1990s, as a result of policies instituted in the 1980s, and the absence of new leadership, EEOC continued to drift into inconsequentiality.[25] There were numerous obstacles

[12] Ibid.

[13] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified as amended at 42 U.S.C. §§ 2000e(b), 2000e(e) (1994)). *See also* USCCR, *Helping Employers Comply with the ADA*, p. 39.

[14] *Reprinted in* 42 U.S.C. app. § 2000e-4 (1994).

[15] Exec. Order No. 12,067, 3 C.F.R. 206 (1978), *reprinted in* 42 U.S.C. app. § 2000e (1994).

[16] 29 U.S.C. §§ 621–634 (1994).

[17] 29 U.S.C. § 206(d) (1994). Responsibility for these two laws transferred from the Wage and Hour Division of the Department of Labor. *See* USCCR, *Federal Enforcement of Equal Employment*, July 1987, p. 11.

[18] 29 U.S.C § 791(b) (1994).

[19] The section also requires federal agencies to maintain equal opportunity programs and gives EEOC overall responsibility for federal procedures used in processing internal discrimination complaints. 42 U.S.C. § 2000e-16 (1994). *See also* USCCR, *Federal Enforcement of Equal Employment Requirements*, p. 11.

[20] 42 U.S.C. § 2000e(k) (1994).

[21] 42 U.S.C. §§ 12101–12213 (1994). Title I of the act bans discrimination against persons with disabilities in employment. *Id.* at §§ 12111–12117 (1994).

[22] Civil Rights Act of 1991, Pub. L. No. 102-166 105 Stat. 1071 (1991), codified in scattered sections of U.S.C.

[23] EEOC, "Organization, Mission, and Functions," p. II-1.

[24] Ibid.

[25] Alfred W. Blumrosen, "The Equal Employment Opportunity Commission," pp. 103–11 in Corrine M. Yu and William L. Taylor, eds., *New Challenges: The Civil Rights Record of*

that prevented EEOC from accomplishing its mission, such as management turnovers, insufficient staff, limited funding, lack of training, and an enormous backlog of cases.[26] In the summer of 1994, EEOC was criticized for the rate at which it settled cases, and for squandering away the litigation power it was given by Congress.[27]

A new chair, Gilbert F. Casellas, and two commissioners were not confirmed until the fall of 1994, nearly two years after President Clinton took office.[28] Chairman Casellas began an ambitious campaign to revitalize the Agency. Under his leadership, the charge processing system was streamlined, past policy directives were revised or reversed, National and Local Enforcement Plans and alternative dispute resolution were instituted, the backlog of cases declined significantly, the performance appraisal system was revamped, labor-management partnership agreements were instituted, and public outreach, education, and technical assistance activities were moved to the forefront.[29] Chairman Casellas attributed much of the Agency's success to staff, many of whose professional careers had been spent mostly in enforcing equal employment law.[30] Chairman Casellas left the Agency at the end of 1997, and the Agency was once again operating in a leadership flux. Paul Igasaki, who was the vice chairperson at this time, served as the acting chairman for the Agency during 1998.

In late 1998, Ida L. Castro was confirmed as the new chair and two commissioners were reconfirmed.[31] Before Chairwoman Castro's appointment to EEOC, she looked at what EEOC had done in terms of the Priority Charge Handling Procedures (PCHP) and the National Enforcement Plan (NEP). She also spoke to stakeholder groups and read what had been written about EEOC in the press. Chairwoman Castro determined that EEOC needed to look at and refine its internal processes because the Agency had been operating in much the same way that it had when it first began.[32] According to the chairwoman, EEOC needed to focus on its overall mission—to eliminate discrimination—rather than on individual offices' missions.[33]

Not only has there been leadership instability at EEOC headquarters, but several of the field offices have also been without permanent leadership for long periods of time. One of the key issues in terms of what constitutes a good or a bad office is whether there is a very good district director and regional attorney.[34] The Birmingham District Office was without a permanent director for a while, and the new director has been in place for almost two years.[35] The Baltimore District Office, until recently, had an acting director, who was also the deputy director of the Seattle District Office.[36] The Los Angeles District Office has an acting regional attorney.[37] The Albuquerque District Office does not have a director or a regional attorney.[38]

Organizational Structure

The current organizational structure of EEOC is the result of the May 1997 reorganiza-

the Clinton Administration Mid-Term (Washington, DC: Citizens' Commission on Civil Rights, 1995).

[26] USCCR, *Helping Employers Comply with the ADA*, p. 51.

[27] Blumrosen, "The Equal Employment Opportunity Commission," p. 103.

[28] Ibid., p. 109.

[29] Nancy Kreiter, "Equal Employment Opportunity: EEOC and OFCCP," pp. 163–70 in Corrine M. Yu and William L. Taylor, eds., *The Test of Our Progress: The Clinton Record on Civil Rights* (Washington, DC: Citizens' Commission on Civil Rights, 1999); *See also* USCCR, *Helping Employers Comply with the ADA*, pp. 51–52.

[30] EEOC, "EEOC Chairman Announces Resignation," press release, Oct. 1, 1997, accessed at <http://www.eeoc.gov/press/10-1-97.html>.

[31] Kreiter, "Equal Employment Opportunity: EEOC and OFCCP," p. 163.

[32] Ida L. Castro, chairwoman, EEOC, interview in Washington, DC, Mar. 8, 2000, p. 1 (hereafter cited as Castro interview).

[33] Castro interview, p. 2.

[34] Paul Igasaki, vice chairman, EEOC, interview in Washington, DC, Mar. 1, 2000, p. 47 (hereafter cited as Igasaki interview).

[35] Cynthia Pierre, district director, Birmingham District Office, EEOC, interview in Birmingham, AL, Feb. 24, 2000, p. 1 (hereafter cited as Pierre interview, Birmingham District Office).

[36] Michael Fetzer, acting director, and Barbara Veldhuizen, deputy director, Baltimore District Office, EEOC, interview in Baltimore, MD, Nov. 18, 1999, p. 1 (hereafter cited as Fetzer and Veldhuizen interview, Baltimore District Office).

[37] EEOC, "District Office Staffing Pattern," Third Quarter FY 1999 (hereafter cited as EEOC, "FY 1999 Third Quarter Staffing Pattern").

[38] Charles Burtner, district director, and Richard Trujillo, regional attorney, Phoenix District Office, EEOC, interview in Phoenix, AZ, Mar. 29, 2000, pp. 3–5 (hereafter cited as Burtner and Trujillo interview, Phoenix District Office).

tion.[39] The reorganization was "part of the Commission's continuing efforts to reinvent and improve the effectiveness of the agency" and reflected "the reforms implemented by the Commission in 1995 and 1996 to improve its management, and operational policies and procedures to maximize the effectiveness of the agency and [its] goal of making more strategic use of [its] resources."[40]

Currently, EEOC consists of 11 offices at headquarters and 50 field offices (district, area, and local offices) nationwide.[41] The headquarters offices most involved in enforcement of Title VII, the ADEA, and the Equal Pay Act are the Office of General Counsel, the Office of Legal Counsel, and the Office of Field Programs.[42] Although the Office of Research, Information, and Planning is not directly involved in the enforcement of EEOC laws, it does have an impact on how EEOC enforces its laws. The directors of these offices report to the chairwoman.

Office of General Counsel

The Office of General Counsel is responsible for conducting all enforcement litigation on behalf of EEOC.[43] The general counsel is appointed by the President and confirmed by the Senate for a term of four years.[44] The general counsel is delegated the authority to make decisions to commence or intervene in all litigation, except in cases where such litigation would involve a major expenditure of resources; cases where EEOC has not yet adopted a position in developing areas of law; cases that would likely raise public controversy; and *amicus curiae* cases, which need to be approved by the commissioners.[45] The Office of General Counsel has a legal unit in 23 of the district offices.[46] Area offices do not have legal units, but most have teams of two attorneys.

The Office of General Counsel has a total field staff of 395, which consists of 255 regional attorneys, supervisory attorneys, and trial attorneys and 140 paralegal specialists and legal support. The Office of General Counsel headquarters staff is divided into seven major sections:[47]

- *Appellate Services* represents EEOC in all matters in U.S. courts of appeals and as *amicus curiae* in all courts except the U.S. Supreme Court.[48] Appellate Services has three teams of staff and each team handles seven or eight of the 23 district offices.[49] The district offices give their recommendations about appeals and Agency litigation to their respective teams. The teams hold consultations with the district office legal units on legal developments in the district offices' circuits, on the interpretation of EEOC guidance, on development of legal issues in litigation, and in the development of cases.[50]
- *Systemic Investigations and Review Programs* initiates and refines policies, procedures, technical guidance, and administrative support systems for EEOC's systemic program and for investigating commission-initiated pattern and practice charges.[51]
- *Litigation Management Services* oversees the Agency's litigation in trial courts (with the exception of headquarters systemic litigation).[52] The section provides communication and guidance and serves as the liaison to the district offices' legal units.[53] The section also

[39] *See* EEOC, "Organization, Mission, and Functions."

[40] Claire Gonzales, director of communications and legislative affairs, letter to Judd Gregg, chairman, Subcommittee on Commerce, Justice, State, the Judiciary and Related Agencies, Committee on Appropriations, United States Senate, Apr. 18, 1997.

[41] EEOC, "A Proud Legacy—A Challenging Future," *FY 2000 Budget Request* (Washington, DC: Submitted to the Congress of the United States, February 1999), p. 97; *see* EEOC, "Organization, Mission and Functions," p. XV-1.

[42] EEOC, "Organization, Mission, and Functions," p. I-7. The other headquarters offices are the Office of Equal Opportunity, the Office of Communications and Legislative Affairs, the Office of Federal Operations, the Office of Human Resources, the Office of Information Resources Management, and the Office of Financial Resource Management.

[43] Ibid., p. III-3.

[44] Ibid., pp. I-1, III-5.

[45] Ibid., p. III-5.

[46] Gregory Stewart, general counsel, EEOC, interview in Washington, DC, Mar. 3, 2000, p. 2 (hereafter cited as Stewart interview).

[47] EEOC, "Organization, Mission, and Functions," p. III-1. Stewart interview, p. 2.

[48] EEOC, "Organization, Mission, and Functions," p. III-10.

[49] Stewart interview, p. 2. The Albuquerque, NM, and the Phoenix, AZ, district offices share the same legal unit.

[50] Stewart interview, p. 2.

[51] EEOC, "Organization, Mission, and Functions," p. III-7.

[52] Ibid., p. III-11.

[53] Stewart interview, p. 3.

tracks and manages all EEOC field office litigation and develops legal theories and strategies.[54] It reviews district offices' proposals for litigation. Section staff travel to district offices to work on projects, such as developing strategies of litigation, and to conduct audits of legal unit, regional attorney, and supervisory trial attorney performances on behalf of the general counsel. The section has three teams—one each for the East, Midwest, and West. An assistant general counsel heads each team.

- *Research and Analytic Services Staff* provides technical and analytic services during the course of investigation and litigation of charges.[55] These services are provided for headquarters and all 24 district offices.[56] The staff in this section consist of labor economists, industrial psychologists, statisticians, and other social science analysts.
- *Litigation Advisory Services* is the liaison to the commission and the chairwoman with respect to proposed litigation that requires commission approval. This unit reviews and recommends approval or disapproval of litigation proposals for the general counsel's consideration.[57] The unit serves as the Office of General Counsel's clearinghouse for reviewing and approving litigation that falls outside redelegated authority.[58] Litigation Advisory Services staff communicate with the commissioners' offices and commissioners' special assistants concerning any questions commissioners have about litigation. They also do the preparatory work for Agency meetings, for example, by responding to questions from commissioners or requests for information on cases to be discussed at the commission meeting.[59]
- *Administrative and Technical Services Staff* provides services dealing with the budget and fiscal management of the Office of General Counsel.[60] The section manages funding to support the Agency's litigation in the legal units within the district offices, including litigation travel, requests for experts, technical assistance with computer and data communication services and database development in litigation, and personnel services such as handling promotions.[61]
- *Systemic Litigation Services* recommends systemic cases, including interventions, to the Agency for litigation.[62] The section reports regularly to the general counsel on legal issues raised in headquarters systemic litigation. The section also litigates complex cases involving patterns of unlawful employment discrimination.[63]

The units of the Office of General Counsel coordinate with other EEOC offices in a variety of ways. For example, Litigation Management Services and Administrative and Technical Services staff provide litigation tracking through weekly reports on the status of litigation in the district offices' legal units and Appellate Services.[64] Apart from assembling these reports, the two sections maintain duplicate files of complaints, pleadings, settlements, resolutions, and any other information the headquarters office needs to review, evaluate, assess, and manage litigation.[65] Both the Systemic Investigations and Review Programs and the Systemic Litigation Services handle cases with national jurisdiction.[66]

Because of the various sections in the Office of General Counsel and the various teams assigned to serve district offices, interaction with field offices is ongoing through communication regarding administrative matters, funding for litigation, administrative services, oversight for the substance of litigation, matters that may be appealed, technical services, statistical analysis, the need for expert witnesses, and the develop-

[54] Ibid.

[55] EEOC, "Organization, Mission, and Functions," p. III-6.

[56] Stewart interview, p. 2.

[57] EEOC, "Organization, Mission, and Functions," p. III-12.

[58] Stewart interview, pp. 3–4. This includes presentation memoranda that will be filed under the general counsel's authority; recommendations under review by EEOC; appellate briefs to be filed for EEOC; briefs filed as *amicus curiae*; policy initiatives generated by the Office of Legal Counsel; and Agency requests, for example, from the Office of Field Programs or a commissioner, for advice from the general counsel on investigations or issues of law.

[59] Ibid., p. 4.

[60] EEOC, "Organization, Mission, and Functions," p. III-6.

[61] Stewart interview, p. 3.

[62] EEOC, "Organization, Mission, and Functions," p. III-8.

[63] Ibid.

[64] Stewart interview, p. 3.

[65] Ibid.

[66] Ibid.

ment of litigation. The Litigation Management Services staff visits each of the 23 legal units at least once a year. The regional attorneys and supervisory trial attorneys are brought to Washington, D.C., once or twice a year. The general counsel holds monthly conference calls with the regional attorneys and supervisory attorneys in the field offices.[67]

Office of Legal Counsel

The Office of Legal Counsel (OLC) provides legal advice and counsel to the chairperson and the Agency on legal matters other than enforcement litigation. OLC is the EEOC's policy office and, as such, is responsible for developing regulations, guidance, and other legal policies for the consideration and approval of the Agency's commissioners.[68] In addition, OLC serves as EEOC's in-house counsel, representing the Agency in connection with the full range of its institutional legal interests, including defending the Agency in cases filed against it.[69] EEOC is one of the few federal agencies with independent litigation authority that includes the authority to litigate defensive matters.

OLC provides extensive support to EEOC's field offices, and headquarters staff work with them in the policy development process. In addition, OLC staff work closely with other federal and many state agencies on employment litigation matters. OLC is divided into two programs: Legal Services Programs and Coordination and Guidance Services.[70]

In the Legal Services Programs, work is assigned through three units. Two units deal with internal litigation, and one unit handles advice and external litigation with charging parties and respondents who have suits against the Agency.[71] The Office of Legal Counsel does not litigate on the behalf of plaintiffs.[72]

- *Internal Litigation Divisions I and II* perform identical functions, such as providing legal representation for the EEOC on administrative matters to be adjudicated as unfair labor practices, or through the negotiated grievance procedures. These divisions also provide direct legal advice and guidance to headquarters and field office directors and managers on the legal aspects of employee-related issues. Legal representation and legal advice are also provided on matters subject to arbitration. Through these divisions, the Legal Services Programs also represents and defends the Agency in lawsuits filed against the commission and in administrative matters involving labor-management issues, equal employment opportunity (EEO) hearings, or Merit System Protection Board appeals.[73]
- *Advice and External Litigation Division* reviews for legal sufficiency proposed Agency issuances, all EEOC orders, directives, and notices, and applications for fair employment practices agency (FEPA) deferral status.[74] This division represents and defends the Agency in litigation, except for those actions brought by EEOC employees or arising out of enforcement litigation initiated by the Agency. Additionally, the division defends suits raising challenges to Agency policy interpretations and suits by charging parties and respondents.[75]

The Coordination and Guidance Programs develops policy and provides overall program guidance through three divisions.[76] Each division has a supervisor who is an assistant legal counsel.[77] The policies developed are the Agency's policies, not the Office of Legal Counsel's policies.[78]

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[67] Ibid.

[68] Ellen J. Vargyas, legal counsel, EEOC, letter to Ruby G. Moy, staff director, USCCR, re: draft report, July 7, 2000, p. 7 (hereafter cited as Vargyas letter).

[69] Stewart interview, p. 4.

[70] Vargyas letter, p. 7.

[71] Ellen J. Vargyas, legal counsel, EEOC, interview in Washington, DC, Mar. 7, 2000, p. 2 (hereafter cited as Vargyas interview).

[72] Ibid.

[73] EEOC, "Organization, Mission, and Functions," p. V-6.

[74] Ibid., p. V-5.

[75] Ibid.

[76] Ibid., p. V-6.

[77] Peggy Mastroianni, associate legal counsel, and Dianna Johnston, assistant legal counsel, Office of Legal Counsel, EEOC, interview in Washington, DC, Mar. 6, 2000, p. 2 (hereafter cited as Mastroianni and Johnston interview).

[78] Vargyas interview, p. 2.

- *Title VII/ADEA/EPA Division* develops and interprets EEOC policy for Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), and the Equal Pay Act (EPA).[79] Previously, these had been two separate divisions that covered Title VII/EPA and the ADEA, but they were consolidated because there were too few people to support two separate divisions.[80] The major functions of the division include developing regulations and guidelines, drafting Agency decisions, developing EEO notices, preparing opinion letters, and providing technical assistance to other Agency offices and the public on the interpretation of EEOC policy. Additionally, the division develops Title VII, ADEA, and EPA materials for volume II of Exec's Compliance Manual.[81]
- *Coordination Division* provides staff support under Executive Order 12067,[82] which designated EEOC as the lead equal employment opportunity agency and requires it to coordinate overlapping equal employment opportunity responsibilities among federal agencies.[83] EEOC coordinates more with the Departments of Labor, Justice, and Education than with some of the other federal agencies.[84] Coordination with federal agencies involves any EEO matters pertaining to forms, proposed regulation, guidance documents, technical assistance documents, and policy statements.[85] The Coordination Division tends to have discreet projects that involve reviewing materials or drafting a memorandum of understanding.[86]
- *ADA Policy Division* develops and interprets EEOC policy guidance under the provisions of the Americans with Disabilities Act (ADA), and sections 501 and 504 of the Rehabilitation Act of 1973.[87]

[79] EEOC, "Organization, Mission, and Functions," p. V-7.

[80] Mastroianni and Johnston interview, p. 2.

[81] EEOC, "Organization, Mission, and Functions," p. V-7.

[82] *Reprinted in* 42 U.S.C. app. § 2000e (1994).

[83] EEOC, "Organization, Mission, and Functions," p. V-7. *See* Vargyas interview, p. 7.

[84] Mastroianni and Johnston interview, p. 7.

[85] Ibid., p. 8.

[86] Ibid.

[87] EEOC, "Organization, Mission, and Functions," p. V-8. *See* USCCR, *Helping Employers Comply with the ADA.*

The Office of Legal Counsel has about 50 staff members.[88] In 1994, there were 65 staff members, and even though the office has been reduced in size, the legal counsel believes the office is more efficient.[89] The Office of Legal Counsel works closely with other offices such as the Office of General Counsel, Office of Field Programs, and the commissioners' offices. The Office of Legal Counsel attorneys meet routinely with civil rights groups, labor groups, various business groups, and education institutions.

The Office of Legal Counsel has frequent interaction with district offices, and attorneys from each team are assigned to provide backup to district offices.[90] The office has very limited resources, which restricts its ability to frequently visit district offices; as a result, it usually combines travel for conferences or speeches with visits to district offices.[91]

Office of Field Programs

The Office of Field Programs (OFP) is responsible for the administrative enforcement of the statutes under EEOC's jurisdiction.[92] Its responsibilities include guidance, direction, operational oversight, administrative support, and coordination of field offices.[93] The office is responsible for providing technical assistance and education for the field offices, headquarters, and the public on the laws enforced by EEOC and EEOC's administrative enforcement program. OFP also develops operational plans and budgets and implements approved plans concerning the administrative enforcement process.[94] OFP consists of three operational programs: Field Management Programs, Field Coordination Programs, and State and Local Programs.[95]

- *Field Management Programs* is responsible for ensuring the effective and efficient operations of the field operations through operational oversight, coordination of field services, monitoring of program implementa-

[88] Vargyas interview, p. 1.

[89] Ibid., pp. 1–2.

[90] Ibid., p. 2.

[91] Ibid.

[92] EEOC, "Organization, Mission, and Functions," p. VI-3.

[93] Ibid., p. VI-4.

[94] Ibid., pp. VI-4 to VI-5.

[95] Ibid., p. 2.

tion, evaluation of performance, and coordination of administrative services.

- *Field Coordination Programs* manages, coordinates, and provides support and technical assistance for EEOC's alternative dispute resolution (ADR) program and the outreach program, including the Revolving Fund.[96] The unit also provides coordination of the federal sector hearings program in the field and develops and coordinates training programs for field office staff.[97]
- *State and Local Programs* develops, implements, and monitors the state fair employment practices agencies (FEPAs) and tribal employment rights offices (TEROs).[98] Through evaluation of the FEPA and TERO programs, this unit is responsible for quality assurance and control mechanisms for these programs.[99]

Field Offices

Field offices include district, area, and local offices. Field offices represent the core of EEOC's enforcement program.[100] EEOC employs roughly 2,200 staff persons in 50 field offices, which include 24 district offices, the Washington, D.C., Field Office, and 25 area and local offices.[101]

District Offices

District offices are under the direct supervision of the director of Office of Field Programs. Area and local offices in a district are under the direct supervision of a district director.[102] The Albuquerque, New Mexico, District Office is the only office that does not have a district director.[103] All district offices are responsible for charge intake, investigation, conciliation, settlement, litigation, and the ADR function.[104]

The district offices are responsible for EEOC's enforcement functions. The district offices resolve charges of discrimination and seek remedies for victims of employment discrimination through investigations, settlements, determinations, conciliation, and litigation, as necessary, of all charges filed under Title VII, ADEA, EPA, and the ADA.[105]

District offices are headed by district directors who supervise all staff in the district offices except those in the legal division, who report to regional attorneys (who in turn report to the general counsel). Although district offices are set up differently, they all have the same basic components, which include intake, enforcement/investigation, legal, and ADR. A few district offices, such as Charlotte, Detroit, Los Angeles, and Miami, have separate systemic units.[106] All district offices have an Alternative Dispute Resolution Unit that has been in place since the end of 1997.[107]

- *Charge Receipt/Technical Information Units* (also known as Intake Units or Customer Service Units) serve a variety of functions, including performing charge intake, providing administrative and technical support to the enforcement units, and communicating with charging parties and respondents about the status of charges.[108]
- *Enforcement Units* conduct counseling and precharge interviewing and receive charges under Title VII, ADEA, EPA, and the ADA; conduct investigations of charges; and collect and analyze information to resolve charges.[109]
- *Systemic Units,* which only exist within some district offices, make recommendations for pattern and practice investigations, conduct detailed investigations of employment systems through interviews, interrogatories,

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[96] *See* chap. 5 for a discussion of EEOC's alternative dispute resolution program and chap. 7 for a discussion of the Revolving Fund.

[97] EEOC, "Organization, Mission and Functions," p. VI-5.

[98] *See* chap. 6 for further discussion of the state and local fair employment practices agencies and tribal employment rights offices.

[99] Vargyas letter, p. 8.

[100] EEOC, "A Proud Legacy—A Challenging Future," *FY 1999 Budget Request* (Washington, DC: Submitted to the Congress of the United States, February 1998), p. 24.

[101] Vargyas letter, p. 8. Information as of June 24, 2000. *See* table 3-1 for a list of district, area, and local offices and the number of staff employed in each office.

[102] EEOC, "Mission and Functions," p. VI-15.

[103] Burtner and Trujillo interview, Phoenix District Office, p. 3.

[104] These functions are assessed in chapter 4.

[105] EEOC, "Organization, Mission and Functions," p. XV-3.

[106] EEOC, "FY 1999 Third Quarter Staffing Pattern."

[107] Elizabeth Thornton, director, Office of Field Programs, EEOC, interview in Washington, DC, Mar. 1, 2000, p. 4 (hereafter cited as Thornton interview, Mar. 1, 2000). *See* chap. 5 for a discussion of how district offices are set up.

[108] EEOC, "Organization, Mission and Functions," p. XV-6.

[109] Ibid., pp. XV-6 to XV-8.

and field investigations to identify and attempt to resolve instances of discriminatory practices, and review compliance with negotiated settlement and conciliation agreements.[110]

- *Legal Divisions* are supervised by the regional attorney under the direction of the Office of General Counsel.[111] The legal divisions conduct litigation of Title VII, EPA, ADEA, and ADA cases under the supervision of the general counsel.[112] They provide legal advice to compliance offices that conduct investigations of private sector charges; work with investigators consulting on cases, assessing the strengths and weaknesses of charges and administrative findings, assisting in developing investigation strategy, and participating in site visits for litigation worthy cases; and participate in the management of compliance and conciliation.[113]

Within each district office, there is also a program analyst, who is responsible for coordinating and implementing the office's outreach and Revolving Fund activities and internal training of staff.

District offices have reported varying levels of interaction with EEOC headquarters staff. The extent of interaction with headquarters is related to the role of the staff member and the office in which he or she works. An inexperienced investigator may say he has contact with headquarters on a constant basis, but an experienced one will say he rarely has contact.[114] The Office of Legal Counsel has an "attorney of the day" who is assigned to specific district offices. Both the Office of General Counsel and Federal Operations also have an attorney of the day assigned to district offices.[115]

Headquarters interaction with district offices includes holding monthly conference calls with the ADR coordinators, district directors, program analysts, and administrative judges.[116] Additionally, the director of Office of Field Programs facilitates district offices trying to work more closely together; as a result, the district offices have been divided into five cluster groups.[117] These cluster groups interact and talk on a regular basis. In addition, each cluster group has one person who is a representative on the executive committee, and the director of OFP has a conference call with the group every other Friday. During these calls, the director of OFP informs the cluster groups about what is going on at headquarters, listens to issues, and informs them of when quick feedback is needed on something. The director of OFP can also call the leader of the group to get out information. The cluster groups have been in place since 1996.[118] The director of the Birmingham District Office indicated that the cluster groups have been good for keeping communication flowing both ways.[119]

Headquarters provides some ongoing management and oversight of the field offices, including technical assistance visits, but because of resources, each office (area and local) is visited about once every two years.[120] In visits to the district offices, headquarters staff look at their work, look at how they are doing things, talk about morale, and address many other issues.[121] At the end of these visits, there is an exit interview with the district director.

In Field Management Programs, there are analysts who are in contact with the district offices on a daily basis. Headquarters is constantly requesting information from the district offices and this allows EEOC to be responsive to the requests from Congress.[122] According to the director of OFP, headquarters does not know of the day-to-day activities in the district offices, but is aware of most of their operations.

If OFP recognizes a problem in a district office, that office will be provided with advice and counseling and other help, and may be paired with another district office to help it resolve the problem.[123] For example, a person was sent from one district to another district to show that office

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[110] Ibid., p. XV-8.

[111] Ibid., p. XV-4.

[112] Ibid., pp. XV-8 to XV-9.

[113] Stewart interview, p. 2.

[114] Thornton interview, Mar. 1, 2000, p. 4.

[115] Ibid.

[116] Ibid.

[117] Pierre interview, Birmingham District Office, p. 5.

[118] Thornton interview, Mar. 1, 2000, p. 3.

[119] Pierre interview, Birmingham District Office, p. 5.

[120] Thornton interview, Mar. 1, 2000, p. 3.

[121] Ibid.; Fetzer and Veldhuizen interview, Baltimore District Office, p. 10.

[122] Thornton interview, Mar. 1, 2000, p. 3.

[123] Ibid., p. 4.

how to set up the case management functions. There is an organizational development team at headquarters that will assist offices in resolving problems with interpersonal relationships that are affecting the operations of the office. The director of OFP said that her ultimate goal is to meet the Agency's goals, which involves producing sufficient work in a timely manner, and of sufficient quality.[124] People work best in environments where they like coming to work and doing what they are doing, she said.[125]

Area Offices

The area offices are under the direction of the district office. An area director provides overall direction, coordination, and leadership support to the office.[126] The area offices resolve discrimination cases, seeking relief through the implementation of various case processing systems.[127] They conduct counseling and precharge interviewing, frame written charges of discrimination, conduct investigations, and obtain settlements for charges of discrimination filed under Title VII, EPA, ADEA, and the ADA.[128] Each area office has a Charge Receipt/Technical Information Unit and one or more Enforcement Units with functions similar to those in district offices. However, the area offices do not have systemic units or separate legal divisions.[129] The area offices also monitor compliance, in consultation with the legal divisions, and make appropriate recommendations for enforcement action.[130]

Local Offices

The local offices are also under the direction of the district offices. Local offices resolve discrimination charges, seeking relief through the implementation of various charge processing systems. Local offices conduct counseling and precharge interviewing, frame written charges of discrimination, conduct investigations, and obtain settlements for complaints filed under Title VII, EPA, ADEA, and the ADA. The local offices also collect and analyze information to recommend the disposition of charges and provide other EEOC offices with sufficient information to render informed cause or no cause determinations. The local offices collect information on charges primarily through investigation, review of compliance reports, and monitoring.[131]

Washington Field Office

The Washington, D.C., Field Office is under the direction of the Office of Field Programs. The field office is a hybrid of an area and district office and has three attorneys who report to the Baltimore District Office.[132] The field office handles charges of discrimination from the District of Columbia and Northern Virginia.[133] The regional attorney in the Baltimore District Office supervises the attorneys in the Washington, D.C., Field Office. The Washington Field Office is responsible for investigation, determination, and appropriate resolution of discrimination cases, and securing relief through implementation of various case processing systems.[134]

The Office of Research, Information, and Planning

The Office of Research, Information, and Planning (ORIP) was created during the last major reorganization in May 1997. There are 46 staff members and 14 vacancies.[135] The mission of the office is to assist the Agency in accomplishing its mission through research, program evaluation, planning, and implementing organizational effectiveness programs.[136] ORIP works closely with the budget office. It is also responsible for developing the Annual Performance Plans and providing support and information for the Comprehensive Enforcement Program (CEP).

ORIP also is responsible for operating EEOC's survey collection system. Nearly every employer in the United States with 100 or more employees is required to file an Equal Employ-

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[124] Ibid., p. 5.

[125] Ibid.

[126] EEOC, "Organization, Mission, and Functions," p. XV-16.

[127] Ibid., p. XV-11.

[128] Ibid., p. XV-12.

[129] While area offices employ attorneys, these attorneys report to the regional attorney in the district office to which the area office is assigned.

[130] EEOC, "Organization, Mission, and Functions," p. XV-12.

[131] Ibid., pp. XV-15 to XV-16.

[132] Stewart interview, p. 2.

[133] Vargyas letter, p. 10.

[134] Stewart interview, p. 2.

[135] Diedre Flippen, director, Office of Research, Information, and Planning, EEOC, interview in Washington, DC, Mar. 7, 2000, p. 2 (hereafter cited as Flippen interview).

[136] Ibid., p. 1.

ment Survey with EEOC. In addition, the office provides analytic support for large-scale class or systemic investigations, which involves the construction of large analytic databases and statistical analyses. It conducts research and studies on the impact of EEOC programs and is a research source for other areas of the Agency.[137]

The office collects, analyzes, verifies, and reports EEOC enforcement data from the Charge Data System (CDS) and produces the quarterly Data Summary Report. The office also develops workload forecast and budget scenarios to assist the Agency in making determinations related to staffing and budget requests and in establishing the Agency goals and performance measures.[138]

ORIP also manages EEOC's library system, which includes a full-service library at headquarters, providing materials for decentralized libraries in the field operations. The office also operates an on-line library for all EEOC employees and maintains and operates the EEOC Web site. Further, ORIP is responsible for a number of management initiatives related to the National Performance Review, the Government Performance Results Act, and the Fiscal Integrity Act.[139]

An additional project ORIP is working on is the Quality Peer Review, which is linked to the CEP.[140] The chairwoman realized that EEOC had much procedural guidance, but no quality standards; as a result, she asked ORIP to explore developing quality standards using peer review.[141] ORIP conducted research on quality peer review programs and developed a proposal that was approved by the chairwoman. There is now an across-organizational team that is developing a quality peer review program. The team consists of 13 people, including the Birmingham district director, a regional attorney, program analysts, investigators, systemic investigators, and other staff from all over the country. The team has been developing a program intended to result in continuous improvement with the field offices and to identify best practices and communicate them to the Agency.[142]

[137] Vargyas letter, p. 11.

[138] Ibid. *See generally* Flippen interview.

[139] Vargyas letter, p. 11.

[140] Flippen interview, p. 5.

[141] Ibid.

[142] Ibid.

WORKLOAD, STAFFING, AND BUDGET

Between fiscal years 1981 and 1995, there was an inverse relationship between EEOC's workload and its level of funding. After adjusting for inflation, funding declined steadily as the Agency's workload increased dramatically during this period.[143] Between fiscal years 1996 and 2000, only once did EEOC receive the exact amount of funding requested, and this was the Agency's largest increase in history. EEOC has tried numerous procedures to overcome too much work for too few people.[144]

Workload and Staffing

During the early 1990s, the enforcement responsibilities of EEOC increased because of the Americans with Disabilities Act of 1990 and the Civil Rights Act of 1991. During fiscal year 1995, the Agency needed to close a $5 million gap between projected Agency spending and available resources. Strict hiring controls were put into place.[145] As a result, the number of full time equivalents (FTEs) was reduced from 2,851 to 2,785 by the end of July.[146] Although the decline in FTEs was good for the balance sheet, it had a negative effect on caseload reduction. By the end of fiscal year 1995, the pending inventory of charges reached 98,269, and the average caseload per investigator had rapidly increased to 122.7 cases.[147] In contrast, each investigator averaged 51 cases in 1990.[148]

By fiscal year 1997, although the Agency's FTEs had fallen to 2,680, the pending inventory declined to 79,448, from an all time high of 111,345.[149] By the end of fiscal year 1997, the inventory had been reduced to fewer than 65,000 charges.[150] This was accomplished by EEOC fo-

[143] USCCR, *Funding Federal Civil Rights Enforcement*, clearinghouse publication 98, July 1995, p. 38.

[144] EEOC, "Making Rights A Reality," *FY 1996 Budget Request* (Washington, DC: Submitted to the Congress of the United States, February 1995), p. 5.

[145] EEOC, "A Proud Legacy—A Challenging Future," *FY 1998 Budget Request* (Washington, DC: Submitted to the Congress of the United States, February 1997), p. i.

[146] EEOC, "A Proud Legacy—A Challenging Future," *FY 1997 Budget Request* (Washington, DC: Submitted to the Congress of the United States, March 1996), p. i.

[147] Ibid., pp. i–ii.

[148] Ibid., p. ii.

[149] EEOC, *Fiscal Year 1998 Budget Request*, p. i.

[150] EEOC, *Fiscal Year 1999 Budget Request*, p. 6.

cusing on removing those charges lacking merit from the inventory as soon as possible. During 1997 the Agency resolved more charges than in any time in its 32-year history.[151] While procedures such as the Priority Charge Handling Procedures, the National Enforcement Plan, and the Local Enforcement Plan have made significant progress toward reducing the inventory, additional staff resources are still needed to continue reducing the inventory and at the same time properly develop and resolve a large number of systemic and other class investigations.[152]

By the end of fiscal year 1999, EEOC had come closer to achieving many of its core performance measures. The pending inventory was reduced to approximately 40,200 charges by the end of fiscal year 1999 from 52,281 charges at the end of fiscal year 1998.[153] The average time to resolve charges declined from 310 days to 265 days.[154] The age of the pending inventory also continued to decline. At the end of the fiscal year, 60 percent of the inventory was less than 180 days old, while only 49 percent of the inventory was less than 180 days old in fiscal year 1998.[155] The most hiring that the Agency had done was during this fiscal year. Approximately 92 mediators were hired, as were some attorneys and administrative judges.[156] Some of these positions were filled in headquarters. The Agency also hired 160 investigators, which were divided among field offices to compensate for turnover and the move of individuals into mediation programs.[157]

The allocation of resources to the field offices in terms of investigators is based on workload. Among other things, headquarters looks at charge receipts and productivity when allocating resources, and some judgment also has to be used.[158] For example, if several local area offices had only a few people in them, resources would be allocated so that someone was always available for intake, even though additional investigators may not be necessary to process the workload. Staffing allocations are based primarily on charge receipt numbers rather than existing inventory now that the inventory is under control.[159]

The March 1998 joint task force report recommended that the Agency continue to prioritize field positions over headquarters positions in hiring and staffing decisions. The report also recommended that staffing decisions should take into account attorney/investigator ratios, recognizing that many offices experience staff shortages in the key positions of support staff, paralegals, and attorneys. According to the report, "[t]here needs to be a sufficient number of attorneys in EEOC's field offices to provide guidance to field investigators while conducting a viable litigation program."[160]

Field office staff consist primarily of investigators and attorneys. The duties of investigators include interviewing charging parties, analyzing cases, obtaining evidence, conducting investigations, conducting settlement discussions, and giving speeches on investigative techniques and statutes. Requirements for the position include knowledge of investigative techniques; Title VII, ADEA, EPA, and ADA; functions and jurisdictions of other federal, state, and local agencies; and standard employment practices. Negotiation and communication skills are required, as well as skill in obtaining evidence and substantiating information. Additionally, investigators must have the ability to plan, organize, and conduct investigations; to maintain integrity and impartiality; to use sound judgment and initiative; to be resourceful, adaptable, and thorough; and to analyze information, weigh evidence, explore leads, and arrive at sound conclusions.[161]

The duties of trial attorneys include analyzing investigations and recommending if a case should be litigated; reviewing recommendations of reasonable cause decisions; preparing pleadings, discovery papers, motion papers, and briefs of the Agency's position; preparing oral argu-

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[151] Ibid., p. iii.

[152] Ibid., p. 7.

[153] EEOC, *Fiscal Year 2001 Budget Request*, p. 28.

[154] Ibid., p. 6.

[155] EEOC, "EEOC Accomplishments Report for Fiscal Year 1999," p. 3, accessed at <http://www.eeoc.gov/accomplishments-99.html>.

[156] Thornton interview, Mar. 1, 2000, p. 2.

[157] Elizabeth Thornton, director, Office of Field Programs, EEOC, interview in Washington, DC, Nov. 9, 1999, p. 5 (hereafter cited as Thornton interview, Nov. 9, 1999).

[158] Thornton interview, Mar. 1, 2000, p. 2.

[159] Ibid.

[160] EEOC, *Priority Charge Handling Task Force, Litigation Task Force Report*, March 1998, p. 23 (hereafter cited as EEOC, *Joint Task Force Report*).

[161] EEOC, Position Description, Investigator, GS-1810-12.

ments on pretrial motions; examining and cross-examining trial witnesses; consulting with subject matter experts; and performing in-depth legal research. In addition, trial attorneys assist investigators in conducting prehearing conferences with defendants; provide assistance and guidance to less experienced trial attorneys; answer Congressional and other inquiries; make recommendations concerning appeals, when needed; and conduct in-depth investigations "in those cases where evidence tends to be incriminating and highly questionable or involve extremely sensitive issues."[162] Trial attorneys are also required to be admitted to the bar.

Budget

The majority of the Agency's annual budget is fixed costs, which includes salaries, rent, and overhead.[163] These costs increase every year, and pay increases also have to be included. The remaining funds are used to pay fees for charge investigations by state and local fair employment practices agencies (FEPAs) and provide program support, including education, outreach, technical assistance, and data collection. As a result, when the Agency does not receive what it perceives to be needed to keep it operating in a sufficient manner, resources such as hiring and training will be cut, and other programs will be funded at lower levels than anticipated.

The Agency received level funding for fiscal years 1995 to 1998 (see figure 3-1). For fiscal year 1995, EEOC received 95 percent of the funding that it requested. This difference between the requested amount and the actual appropriation may not seem significant, but an additional $12.7 million could have provided additional staff, more staff training, and an upgraded computer system. For fiscal years 1996 and 1997, the Agency received less than 90 percent of its requested budget. If additional funds had been appropriated, the Agency would not have had to put strict hiring controls in place to prevent layoffs.[164] For fiscal year 1998, the Agency's budget request was less than the amounts it requested in the previous three fiscal years. The actual appropriation was $4 million less than what was requested.

In fiscal year 1999, EEOC requested $279 million to carry out its mission. In submitting this request to Congress, the President stated, "Without additional resources to continue procedural reforms, implement greater use of mediation, and invest in technology, the Commission is unlikely to make further progress toward its goal of reducing the average time it takes to resolve private sector complaints from over 9.4 months to 6 months by the end of 2000."[165] The budget request included $13 million for an "enhanced mediation program," that would allow EEOC to hire "experienced and credible" mediators, both as employees and under contract.[166] The remainder of the budget increase was to be used for modernizing EEOC's "seriously antiquated information systems," further reducing the inventory of pending charges, hiring additional staff, conducting outreach, and providing for basic administrative functions.[167]

EEOC received the requested 15 percent increase in its budget for fiscal year 1999. This increase was to enable the Agency to reduce its backlog of cases to 28,000 by the end of 2000. The increase was based on assurances from EEOC officials that it would be able to meet the target without any additional increase in funding.[168] This increase, the largest in the Agency's history, allowed EEOC to do the most hiring that had been done in years.

For fiscal year 2000, EEOC received $282 million in funding, which was $3 million more than what it received last year (see figure 3-1).[169] The fiscal year 2000 budget appropriation was considerably less than President Clinton's requested amount of about $312 million. The $312

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[162] EEOC, Position Description, Trial Attorney (Civil Rights), GS-905-13.

[163] EEOC, *FY 1999 Budget Request*, p. vi.

[164] EEOC, *FY 1998 Budget Request*, p. i.

[165] "Excerpts from Analytical Perspectives on Federal Budget for Fiscal Year 1999," released Feb. 2, 1998, as published in Bureau of National Affairs, *Daily Labor Report* Feb. 3, 1998, p. E5.

[166] Ibid.

[167] Paul M. Igasaki, acting chairman, EEOC, Statement before the U.S. House of Representatives, Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce, Mar. 3, 1998, p. 14.

[168] EEOC, *Compliance Manual*, "News and Developments," no. 244, Jan. 29, 1999, p. 1.

[169] EEOC, *Compliance Manual*, "News and Developments," no. 255, Dec. 30, 1999, p. 80. The actual amount received for FY 2000 was $280.9 million after the $1.1 million governmentwide budget cut. Vargyas letter, p. 11.

million increase would have gone to support, among other things, the Agency's efforts to reduce the backlog of cases and increase hiring, and the use of mediation.[170]

Since the fiscal year 2000 funding was considerably less than EEOC had anticipated, the funding for contract mediators has been cut and there will be no hiring.[171] Seventy-five percent of funding for internal training was also cut.[172] According to Chairwoman Castro, 85 percent of the Agency's expenses are fixed, and the remaining 15 percent of expenses go toward upgrades in information technology, training, and funding for mediation.[173] One of the Agency's Government Performance and Results Act goals was to reduce inventory to 28,000 cases by July 2000, as well as to make sure charges are processed within 180 days. But due to limited funding, the Agency's goal is now to reduce inventory to 32,000 cases by the end of fiscal year 2000, and the 180-day goal no longer exists.[174] According to the director of OFP, there are some 360-day goals, and as the Agency gets greater control of the inventory, the 180-day goal will come eventually.[175]

For fiscal year 2001, EEOC submitted a $322 million budget request to Congress, an increase of $41 million. Ten million dollars is earmarked for an Equal Pay Initiative, which will be directed toward lowering the earnings gap between men and women and toward strengthening enforcement of the Equal Pay Act.[176] A similar initiative was defeated in Congress last year, but Chairwoman Castro is optimistic that this request will find support on Capitol Hill.[177] Representative William Goodling, the chairman of the House Education and Workforce Committee, was against an increase for this initiative last year and is even less enthusiastic about it now. According to Representative Goodling, this initiative is a repackaging of last year's initiative, and it "would serve primarily to ensure full employment for lawyers."[178] Although EEOC assumed enforcement authority for the Equal Pay Act in 1978, Chairwoman Castro indicated that staff have never been given specialized training in the law. The $10 million would also provide, for the first time ever, training and technical assistance to employers on how to comply with equal pay requirements. The Agency receives approximately 1,200 charges annually under the Equal Pay Act.[179]

EEOC's fiscal year 2001 budget request also includes nearly $11 million to maintain the staffing levels of the previous year and $13.3 million to reduce the private sector charge inventory to 28,000 and to resolve most charges in 180 days.[180] An additional $3.5 million has been requested to "get the agency back on track in achieving its 5-year strategy for improving agency efficiency through the use of technology."[181] Finally, another $2.2 million was requested for the management of federal sector hearings and appeals inventories.[182] It remains to be seen whether EEOC will receive the budget it has requested; if it does not, the Agency may be forced to reassess its program initiatives and resource allocations.

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[170] EEOC, "Administration to Seek $663 Million for Civil Rights Enforcement, Gore Says," *Compliance Manual*, "News and Developments," no. 244, Jan. 29, 1999, p. 1.

[171] Thornton interview, Mar. 1, 2000, p. 2.

[172] EEOC, "Castro Says Fiscal 2000 Budget Means EEOC Will Cut Use of External Mediators," *Compliance Manual*, "News and Developments," no. 257, Feb. 29, 2000, p. 1.

[173] Ibid.

[174] Thornton interview, Mar. 1, 2000, p. 4.

[175] Ibid.

[176] EEOC, "Clinton to Seek $10 Million for EEOC; Cash Balance Plans Are High on Agenda," *Compliance Manual*, "News and Developments," no. 256, Jan. 31, 2000, p. 2.

[177] Ibid.

[178] Ibid.

[179] Ibid.

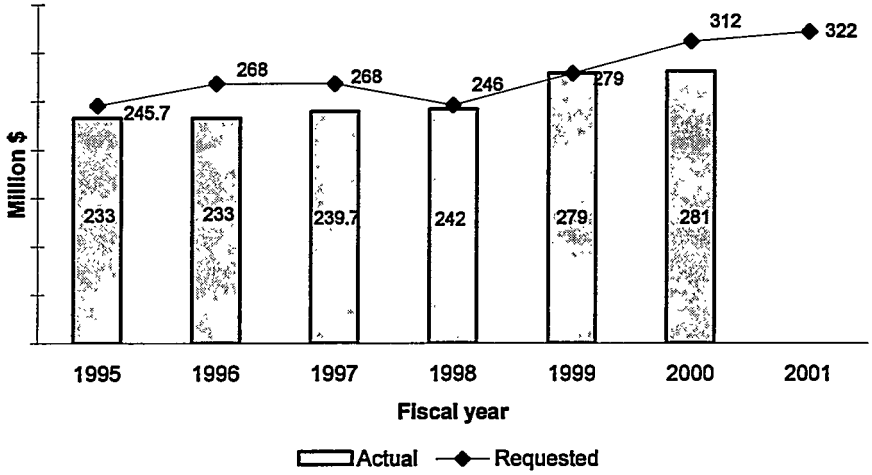
[180] Vargyas letter, p. 14.

[181] Ibid.

[182] Ibid.

FIGURE 3-1

EEOC Requested and Actual Budgets, FY 1995–2001



STAFF TRAINING

Title VII, ADEA, and EPA are statutes that have been in existence for several decades. Since the ADA was passed in 1990, the substantive training for EEOC staff has been almost exclusively on the ADA.[183] Whether employees receive the training they request or need depends on the funding the Agency receives during any given fiscal year. Because training is not a fixed cost, whenever an Agency does not receive the requested budget amount, training is one of the first areas in which reductions are made. For example, some employees have indicated that training is often sporadic and is one of the first resources to be cut when funding is tight.[184] Attorneys were hired for the Kansas City Area Office, but when Congress cut the budget, there was no money to drive to Kansas City to stay overnight and provide those attorneys with training or to work with them for a day or two.[185] The untrained attorney in Kansas City is expected to provide training to the investigators in the area office.[186] Employees indicated that when training is done, it is done very well.[187] Training is usually accomplished through the use of external vendors or through attendance at professional conferences, and through the development of on-site training programs.[188]

During fiscal year 1997, each employee developed a three-year individual development plan that documented their training needs as well as their career development objectives.[189] These individual development plans were used as the basis for developing each office's annual training plan. Significant resources were allocated to provide relevant training, and the Agency initiated or provided in-house training programs in the following areas:

[183] According to EEOC, much of the legal training provided to new staff in recent years has focused on the ADA in order to familiarize staff with the very complex provisions of the new law. According to the legal counsel, "Title VII, the ADEA, and the EPA have been in existence for several decades. In order to familiarize the staff with the complex provisions of the ADA, much of the legal training provided since 1991 has focused on the ADA. However, the EEOC has also provided training to staff on other statutes enforced by the agency. For example, much of the training provided during 1999 applied to all of the statutes enforced by EEOC." Vargyas letter, p. 14.

[184] Donna Harper, supervisory trial attorney, Felix Miller, senior trial attorney, and Rebecca Stith, senior trial attorney, St. Louis District Office, EEOC, interview in St. Louis, MO, Jan. 31, 2000, pp. 10–12.

[185] Ibid.

[186] Ibid.

[187] Ibid.

[188] EEOC, *FY 2000 Budget Request*, p. 22.

[189] EEOC, *FY 1999 Budget Request*, p. 45.

- *Developing "A" Cases.* Resources were used to develop a training program and manual to provide enhanced skills to investigators in the development of "A" cases. "A" cases are those that are most likely to result in a cause finding—i.e., to reveal that there is cause to believe that discrimination has occurred.[190] This training program has been set up as a two-day training session. Each field office was provided a copy of the manual. Included in the manual is a suggested schedule for training, instructor's notes, and a table of contents.
- *Negotiations Techniques.* This course was developed during fiscal year 1997, and a train-the-trainer session was held. The training was delivered on-site in the various field offices during fiscal year 1998.[191]

In fiscal year 1999, training was conducted for new investigators, in-house and contract mediators, attorneys, and other specialized staff.[192] Virtually all Agency employees received training, except for newly hired employees and staff who encountered scheduling problems.[193] This was the most substantial training effort the Agency has undertaken within the past decade. Training was based on an individual's job-related needs and delivered through national training classes and conferences. Training for fiscal year 1999 included:

- *Analyzing Respondent Defenses Training for Investigators.* This training was developed by EEOC staff to enhance the analytical skills necessary for quality investigations.[194]
- *New Investigator Training.* This training was developed by EEOC staff to acquaint new investigators with the Agency's mission and goals, the laws the Agency enforces, and the investigative tools and techniques used by the Agency.[195]
- *Class Case Development and Litigation Training.* This training was provided for the enforcement and legal units in field offices on the necessary knowledge, skills, and techniques needed to identify, develop, and litigate class cases successfully.[196]
- The Agency also developed two training videos to highlight the implementation of a new Compliance Manual section and enforcement guidance.[197] These videos were given to all field offices. Legal staff were available for question and answer sessions via conference call when each office scheduled its video training.
- *Investigator Support Assistant Training.* This training was to assist investigator support assistants in carrying out their responsibilities and to enhance the investigation of charges starting with intake. The training was set up as a three-day session in August 1999 and covered such topics as the general provisions of Title VII, ADA, ADEA, and EPA, theories of discrimination, the Priority Charge Handling Procedures, interviewing and communication techniques, drafting an affidavit and a request for information, and post-charge counseling. These topics are also addressed in the training manual.[198]

Aside from training developed by headquarters, district offices also provide in-house training to their employees. At the Dallas District Office, most investigators have between 5 and 15 years of experience and only one is not a senior investigator.[199] When new investigators are hired, if possible, they go to EEOC headquarters to get training. As new issues arise, all investigators are given the opportunity to learn about them.[200] Investigators receive "ongoing" training about regulations and policy guidance, meet

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190 EEOC, *Training on How to Develop the "A" Case,* Trainer's Manual and Participant's Manual, no date.

191 EEOC, *FY 1999 Budget Request,* p. 45.

192 EEOC, *FY 2001 Budget Request,* p. 159.

193 Ibid.

194 Ibid., p. 160.

195 Ibid.

196 Ibid.

197 Ibid., p. 161.

198 EEOC, *Investigator Support Assistant Training, 1999,* Participant Manual.

199 Thelma Taylor, district director, Brian McGovern, deputy director, and Robert Canino, regional attorney, Dallas District Office, EEOC, interview in Dallas, TX, Jan. 31, 2000, p. 5 (hereafter cited as Taylor, McGovern, and Canino interview, Dallas District Office).

200 Ibid., p. 2.

regularly to discuss issues, and attend meetings with the legal staff to review new information.[201]

At the St. Louis District Office, most investigators have been at the office between 8 and 25 years. Staff said that the office has a strong in-house training program that offers sessions where legal updates and training on case management for new investigators are provided. One investigator looks at advertisements on the Internet to see if he can identify potential "A" charges; as a result, a number of directed charges have been identified.[202]

According to staff at the Seattle District Office, investigators have been doing their jobs for a very long time, and their skills have been "honed" over the years. There has been training conducted by the FBI to help determine "the credibility factor" when charging parties and witnesses are interviewed.[203] According to an enforcement manager, investigators have received, benefited from, and applied the training. The office has also provided training to improve skills, enhance the knowledge of the statutes, and provide orientation to new regulations. The office expects additional investigative training within this fiscal year.[204]

Over half of the investigators in the Phoenix District Office have more than 20 years of federal government experience as investigators. The newer investigators receive weekly in-house training on various issues, participate in one-on-one sessions with supervisors for basic compliance training, are paired with senior investigators who serve as their mentors, and serve as members of "self-directed" teams with different investigators.[205]

The outreach staff has probably had the least amount of training in comparison to the investigative and attorney staff. It is only recently that district offices have each had outreach coordinators. In July 1997, the EEOC held a national conference for staff engaged in outreach, and a conference for program analysts has been planned each year since then. However, the 1999 program analyst conference was canceled due to budget cuts.[206]

STRATEGIC PLANNING AND INITIATIVES

Throughout the 1990s decreases in staff, increases in the number of charges filed, and budget problems hindered the ability of EEOC to accomplish its mission.[207] The enactment of the ADA in 1990 and the Civil Rights Act of 1991 resulted in a 26 percent increase in the number of charges filed.[208] By the mid-1990s, the backlog of charges was at an all time high of 111,345.[209] For the enforcement record of the Agency to improve, it would be necessary for EEOC to make substantial changes to its enforcement process.

The 1997–2002 Strategic Plan

Under the Government Performance and Results Act of 1993 (GPRA),[210] each federal agency

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[201] Sandra Taylor, acting Charge Receipt/Technical Information Unit advisor, Dallas District Office, EEOC, interview in Dallas, TX, Jan. 31, 2000, p. 3.

[202] Lynn Bruner, director, Richard Schuetz, deputy director, and Robert Johnson, regional attorney, St. Louis District Office, EEOC, interview in St. Louis, MO, Jan. 3, 2000, p. 7 (hereafter referred to as Bruner, Schuetz, and Johnson interview, St. Louis District Office). Direct charges are ADEA and EPA charges that are initiated by EEOC based on information that a violation of the statutes may have occurred. They do not require the filing of an individual charge.

[203] Ed Hill, enforcement manager, Matt Cleman, investigator, and Janet Little, investigator, Seattle District Office, EEOC, telephone interview, Mar. 16, 2000, p. 23.

[204] Ibid., p. 48.

[205] Paul Magnet, enforcement manager, Phoenix District Office, EEOC, interview in Phoenix, AZ, Mar. 29, 2000, pp. 20–21.

[206] Ed E. Elizondo, outreach and education coordinator, Dallas District Office, EEOC, telephone interview in Washington, DC, Apr. 13, 2000, p. 8.

[207] USCCR, *Federal Civil Rights Commitments: An Assessment of Enforcement Resources and Performance*, clearinghouse publication 82, November 1983; U.S. General Accounting Office (GAO), *EEOC and State Agencies Did Not Fully Investigate*, October 1988, p. 2; USCCR, *Federal Enforcement of Equal Employment Requirements*, July 1987.

[208] *EEOC: An Overview: Hearings Before the Subcomm. on Select Education and Civil Rights of the House Comm. on Education and Labor*, 103d Cong. (1993) (statement of Linda G. Morra, director, Education and Employment Issues, Human Resources Division, General Accounting Office); *Hearings to Review the Equal Employment Opportunity Commission: Hearing Before the House Comm. on Education and Workforce*, 105th Cong. 1-2 (Oct. 21, 1997) (statement of William H. Brown, III, Esq., Schnader, Harrison, Segal & Lewis).

[209] EEOC, *FY 1997 Budget Request*, p. iii.

[210] 5 U.S.C. § 306 (1994). A Strategic Plan is required of all federal agencies under the Government Performance and Results Act (GPRA), which was signed by President Clinton in 1993. The Strategic Plan should set out the long-term goals and objectives for which an agency can be held accountable. *See* EEOC, "Strategic Plan: 1997–2002," OMB Review Copy, Aug. 18, 1997, p. 1 (hereafter cited as EEOC, "Strategic Plan").

is required to develop six-year Strategic Plans and complementary Annual Performance Plans. Included in the Strategic Plan must be a mission statement covering the major functions of the Agency, general goals and objectives, a description of how to accomplish the goals and objectives, an explanation of how performance goals are to be related to the goals and objectives of the Strategic Plan, an identification of external factors that could affect the achievement of the goals and objectives, and a description of how program evaluations are to be used in establishing or revising the goals and objectives.[211]

EEOC developed its 1997–2002 Strategic Plan and submitted it to the Office of Management and Budget (OMB) for review in August 1997.[212] The Strategic Plan summarizes the EEOC's historical mandate, the evolution of its mission and responsibilities, and its recent and ongoing initiatives designed to permit it to carry out its mission and responsibilities consistent with GPRA. The Strategic Plan also highlights the positive results the Agency has obtained, such as a reduction in its backlog and the collection of "over 425 million dollars for victims of discrimination over the past two and one-half years."[213] To carry out EEOC's mission, the Strategic Plan states that the enforcement of the federal laws will be performed with a wide range of activities, including administrative and judicial actions through investigation, adjudication, settlement, conciliation, alternative dispute resolution, litigation, policy guidance, education, technical assistance, and outreach.[214] The plan also states that limited resources, increasing workload, changes in statutory authority, and changes in the economy could affect whether the Agency can meet these goals and objectives.[215]

> Even with level funding, we cannot maintain the same level of activity from year to year where price and/or workload increases erode our ability to function. In 1997, [EEOC] has more responsibility than [it has] ever had, but [it is] operating with the fewest number of employees in twenty years.[216]

The Office of Research, Information, and Planning was responsible for developing the current Strategic Plan. In mid-2000, the office began updating and revising the current Strategic Plan, which ends in 2002.[217] The Office of Research, Information, and Planning is also responsible for developing the Agency's annual operating plans.

Annual Performance Plans

The GPRA specifies that Annual Performance Plans must be linked to each agency's budget. Such plans must establish performance goals, express such goals in measurable form, describe resources required to achieve performance goals, establish performance indicators to assess outputs and outcomes, and provide a basis for comparing program results to performance goals.[218] Like the Strategic Plan, the Annual Performance Plan can be an effective tool if developed with care. EEOC submitted its first Annual Performance Plan to OMB in 1997, to take effect at the beginning of fiscal year 1999. Annual Performance Plans were developed by Agency employees, and no nonfederal assistance was involved in its preparation.[219]

The FY 1999 Annual Performance Plan and Results

EEOC used three measures to accomplish Goal I, which is to improve the effectiveness of the administrative process and litigation process. The first measure was to increase the proportion of category "A" charge resolutions that involve multiple aggrieved parties and discriminatory practices so that the proportion in fiscal year 1999 would be 5 percent greater than the proportion for fiscal year 1998.[220] The second measure was to reduce the average time it takes to process private sector complaints by increasing the number of complaints eligible for the ADR program.[221] The third measure was to increase the proportion of pattern and practice cases filed in court so that the proportion in fiscal year 1999 would be 10 percent greater than

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211 5 U.S.C. § 306 (1994).

212 EEOC, "Strategic Plan," p. 1.

213 Ibid., p. 16.

214 Ibid., p. 34.

215 Ibid., pp. 40–42.

216 Ibid., pp. 40–41.

217 Vargyas letter, p. 15. *See* Flippen interview, p. 2; Thornton interview, Nov. 9, 1999, p. 5.

218 31 U.S.C. § 1115 (1994).

219 EEOC, *FY 2000 Budget Request*, app. E, p. 2.

220 EEOC, *FY 2001 Budget Request*, p. 23. "A" charges are those that are likely to result in a cause finding. *See* chap. 5 for discussion on charge categorization.

221 Ibid.

the proportion for fiscal year 1998.[222] According to EEOC's fiscal year budget 2001 request, the Agency exceeded the first and second measures, but did not accomplish the third measure.[223]

In working with state and local fair employment practices agencies and tribal employment rights offices, EEOC used two measures to accomplish Goal I. The first measure was to improve technological capabilities of 18 FEPAs so that they could process charges more effectively and efficiently.[224] The second measure was to provide training to improve the investigative capabilities of 30 FEPAs. According to the fiscal year budget 2001 request, EEOC exceeded both measures. Upgraded technology was provided to 22 FEPAs, allowing them to interface more effectively with EEOC's Charge Data System.[225] EEOC also provided training and up-to-date information to 49 FEPAs.[226]

Goal II is to promote equal opportunity in employment by enforcing the federal civil rights employment laws through education and technical assistance.[227] Performance measures under this goal included consulting with 500 employer stakeholders on operational and legal issues; conducting 75 Revolving Fund activities for private sector and public sector employers; conducting 10,000 technical assistance efforts; and developing an outreach plan for fiscal years 2000–2002 to provide education and technical assistance to small private and federal sector employers.[228] EEOC stated that it either met or exceeded all five measures.[229]

The FY 2000 Annual Performance Plan

Under Goal I, which is to enforce federal civil rights employment laws through a comprehensive enforcement program, EEOC has identified five performance measures that it will use to achieve this goal. With some modification, these three measures are retained from the fiscal year 1999 Annual Performance Plan and Results. The first measure is to increase the percentage of category "A" charge resolutions that involve pattern and practice cases.[230] The second measure will extend the offer to mediate to at least half of all appropriate charges received in fiscal year 2000.[231] The third measure is to increase the filing of lawsuits involving pattern and practice charges to 32 percent.[232] The fourth measure will reduce the average time to resolve private sector charges.[233] The fifth measure will increase the proportion of resolved private sector charges that benefit victims of discrimination.[234]

To accomplish Goal I, with respect to FEPAs and TEROs, EEOC will provide training for both groups on emerging issues in charge processing, and distribute training materials covering at least two employment discrimination subjects to each FEPA with which EEOC has a charge resolution contract.[235] EEOC also plans to continue its contractual agreements with FEPAs to resolve approximately 53,000 dual-filed charges.[236]

Under Goal II, which is to promote equal opportunity in employment by enforcing federal civil rights employment issues through education and technical assistance, EEOC will conduct at least 1,200 consultations with both employee and employer stakeholders on operational and legal issues.[237] EEOC also plans to conduct at least 46,500 technical assistance efforts for private and federal sector employers.[238] Additionally, the outreach plan developed in fiscal year 1999 to inform underserved constituencies of their rights and to provide education and technical assistance to the public, including small private sector employers, will be implemented.[239] This plan will include the distribution of education and information materials to both employee stakeholders and small private sector employers.

EEOC's fiscal year 2001 budget request describes GPRA measures and fully integrates GPRA goals and measures with budget re-

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[222] Ibid., p. 24.

[223] Ibid., pp. 23–24.

[224] Ibid., p. 56.

[225] Ibid., pp. 56–57.

[226] Ibid., p. 57.

[227] *See* chap. 7 for detailed information on outreach, education, and technical assistance.

[228] EEOC, *FY 2001 Budget Request*, p. 101.

[229] Ibid., pp. 101–09.

[230] Ibid., p. 35.

[231] Ibid.

[232] Ibid., p. 36.

[233] Ibid.

[234] Ibid.

[235] Ibid., p. 59.

[236] Ibid.

[237] Ibid., pp. 110–11.

[238] Ibid., p. 110.

[239] Ibid., pp. 110–11.

sources.[240] The Office of Management and Budget commended EEOC for combining these two into one package.[241]

National Enforcement Plan

In recognizing that EEOC cannot pursue every case in which a violation occurs, a plan was needed that would define categories for prioritizing those cases that are of greatest importance and approaches for resolving older charges.[242] As a result, EEOC issued its National Enforcement Plan (NEP) in February 1996. In developing the NEP, EEOC sought and received recommendations from a broad range of external and internal stakeholders, including EEOC staff, such as regional attorneys, district directors, and union representatives.[243]

The NEP identifies priority issues and sets forth a plan for administrative enforcement and litigation of Title VII, ADEA, EPA, and ADA.[244] The NEP calls for EEOC to eliminate discrimination through education and outreach, the voluntary resolution of disputes, and where voluntary resolution fails, the use of strong and fair enforcement.[245] To carry out its mission, the NEP calls for EEOC to implement extensive public education and technical assistance at both the national and local levels and to implement voluntary resolution through alternative dispute resolution.[246]

Local Enforcement Plans

The NEP required that each district director and regional attorney develop a Local Enforcement Plan (LEP) and submit it to the commissioners, the general counsel, and the director of the Office of Field Programs.[247] The first LEPs were put in place in 1996 and were intended to have a lifespan of two years.[248] Between 1997 and 1998 when the Agency lost its chairperson and an acting chairperson took over, effort was made to revise the LEPs. The field offices did revise their plans during this time, but no action was taken because there was another change in administration.[249] The second set of LEPs were never approved or put in place.[250] It was difficult for headquarters to evaluate the original version and the first revision of the LEPs because there was no uniformity, and some LEPs were more than 200 pages in length.[251]

According to a March 1998 joint task force report, the original LEPs varied greatly from office to office and were not effective in assessing whether the Agency was accomplishing its mission.[252] The task force report recommended that LEPs be revised so that goals were clearly stated and achievable.[253] In April 1998, the acting chairman recommended that LEPs should be contracts between headquarters and field offices. The Office of Field Programs and the Office of General Counsel were instructed to design and implement a uniform LEP format "that contains sufficient detail to evaluate an office's use of its resources in obtaining results in NEP/LEP cases."[254]

In response to the above recommendations, the general counsel and the director of Office of Field Programs provided guidance to district offices on drafting LEPs for fiscal year 2000.[255] The guidance gives specific instructions to the district offices about what should be in the LEPs, including the length of the document.[256] The uniform LEPs include an introduction followed by the general demographics of the district, and a list of pertinent priority issues.[257] Although the LEPs are linked to the NEP, each district was

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[240] Ibid., p. 13.

[241] Flippen interview, p. 2.

[242] EEOC, *FY 1997 Budget Request*, p. iii; EEOC, *FY 1998 Budget Request*, p. ii.

[243] EEOC, *National Enforcement Plan*, February 1996, p. 2.

[244] Ibid., p. 1.

[245] Ibid., p. 2.

[246] Ibid., pp. 2–3; *see* chap. 5 for a detailed discussion of alternative dispute resolution.

[247] EEOC, *National Enforcement Plan*, p. 7.

[248] Thornton interview, Nov. 9, 1999, p. 3.

[249] Ibid.

[250] Ibid.

[251] Thornton interview, Mar. 1, 2000, p. 3.

[252] EEOC, *Joint Task Force Report*, p. 32; *See* USCCR, *Helping Employers Comply with the ADA*, pp. 55–56.

[253] EEOC, *Joint Task Force Report*, p. 32.

[254] Paul M. Igasaki, acting chairman, EEOC, recommendations made at EEOC meeting, Apr. 21, 1998.

[255] C. Gregory Stewart, general counsel, and Elizabeth M. Thornton, director, Office of Field Programs, EEOC, memorandum to district directors and regional attorneys, Oct. 1, 1999, (re: Guidance on Drafting Local Enforcement Plans), attachments, p. 1 (hereafter cited as Stewart and Thornton letter).

[256] Thornton interview, Mar. 1, 2000, p. 3; Stewart and Thornton letter, p. 2.

[257] Stewart and Thornton letter, attachment, pp. 1–9.

instructed to identify its own enforcement priorities and target population. Outreach, education, technical assistance and training, enforcement activities, and litigation are also to be included in the LEPs. The district offices were given until the end of October 1999 to submit their new LEPs to headquarters for approval.[258] Many of the district offices submitted their LEPs to headquarters between November and December 1999. Headquarters approved the revised LEPs in July 2000; however, most district offices were in the process of implementing their new LEPs prior to approval.[259]

Many of the district offices indicated that they liked the LEP and the NEP because the plans give them overall direction in what is important and what the commissioners think is important.[260] The district offices indicated that because resources are limited, it is good that some direction is given so that the office can focus on those things which are of the greatest importance.[261]

Comprehensive Enforcement Program

Shortly after taking office in 1998, Chairwoman Castro determined that a strategic comprehensive enforcement approach was needed to effectively move EEOC into the 21st century and to reach the next plateau in employment civil rights enforcement.[262] Although the Priority Charge Handling Procedures (PCHP) and the National Enforcement Plan have been invaluable in helping EEOC to manage its workload and resources more effectively, the chairwoman felt that there were additional issues to be addressed.[263] In January 1999, a large group of staff representing all levels and functions met to discuss the plan.[264] The challenge was to implement a process where non-meritorious charges could be separated from the rest of the charges and dealt with rapidly. Although the policy pieces were in place, an operational plan that brought the staff together without adding layers of work had to be developed.[265]

As a result, the Comprehensive Enforcement Program (CEP) was developed by the chairwoman, with the assistance of a task force led by the general counsel and the director of Office of Field Programs.[266] For the private sector program, both the director of the Office of Field Programs and the general counsel are responsible for integrating the CEP into the areas in which they manage and provide leadership. The CEP is less process oriented and more conceptual than the NEP or the PCHP.[267] The major focus of the CEP is to strengthen the relationships between the legal and administrative enforcement functions.[268] Further strengthening the relationships between these two staffs is crucial to the success of EEOC.

The CEP was released in draft form to district directors and regional attorneys in a meeting in May 1999.[269] At that time, the district directors were told to begin implementing the CEP's provisions. EEOC currently has an agreement with the union that the Agency would use pilot projects in the various field offices, and the union would have an opportunity to be involved through the local partnership council. When the projects are completed, the union will go to headquarters and have the opportunity to review and comment on the projects. The CEP is always a work in progress, and based on these pilot projects, the union and anybody else can recommend adjustments.[270] The final version of the CEP was distributed to district offices in April 2000.

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[258] Ibid., p. 2.

[259] Vargyas letter, p. 32. *See also* Thornton interview, Mar. 1, 2000, p. 2; Jacy Thurmond, assistant legal counsel, Legal Services Program, EEOC, telephone conversation, Apr. 20, 2000, p. 1 (hereafter cited as Thurmond telephone conversation).

[260] Bruner, Schuetz, and Johnson interview, St. Louis District Office, p. 6; Pierre interview, Birmingham District Office, p. 5.

[261] Bruner, Schuetz, and Johnson interview, St. Louis District Office, p. 6.

[262] EEOC, *Implementation of the National Enforcement Plan Through the Comprehensive Enforcement Program*, Mar. 6, 2000, p. 2 (hereafter cited as EEOC, *Comprehensive Enforcement Program*).

[263] Taylor, McGovern, and Canino interview, Dallas District Office, p. 1. *See* chap. 5 for discussion about the Priority Charge Handling Procedures.

[264] Castro Interview, p. 2.

[265] Ibid.

[266] Thornton interview, Nov. 9, 1999, p. 4.

[267] Ibid.

[268] EEOC, *Comprehensive Enforcement Program*, p. 4. *See* chap. 5 for further discussion about the CEP.

[269] Thurmond telephone conversation, p. 1.

[270] Thornton interview, Mar. 1, 2000, p. 2.

TABLE 3-1

EEOC District, Area, and Local Offices

District office		Area office(s)		Local office(s)	
Location	*No. of staff*	*Location*	*No. of staff*	*Location*	*No. of staff*
Albuquerque, NM	32				
Atlanta, GA	88			Savannah, GA	9
Baltimore, MD	69	Norfolk, VA	18		
		Richmond, VA	20		
Birmingham, AL	73	Jackson, MS	30		
Charlotte, NC	59	Raleigh, NC	17	Greensboro, NC	8
				Greenville, SC	9
Chicago, IL	97				
Cleveland, OH	64	Cincinnati, OH	21		
Dallas, TX	78	Oklahoma City, OK	11		
Denver, CO	66				
Detroit, MI	52				
Houston, TX	77				
Indianapolis, IN	75	Louisville, KY	16		
Los Angeles, CA	64	San Diego, CA	20		
Memphis, TN	57	Little Rock, AR	24		
		Nashville, TN	20		
Miami, FL	90	Tampa, FL	36		
Milwaukee, WI	44	Minneapolis, MN	20		
New Orleans, LA	69				
New York, NY	87	Boston, MA	21	Buffalo, NY	11
Philadelphia, PA	76	Newark, NJ	19		
		Pittsburgh, PA	26		
Phoenix, AZ	63				
San Antonio, TX	56	El Paso, TX	19		
San Francisco, CA	56	Oakland, CA	9	Fresno, CA	4
		San Jose, CA	11	Honolulu, HI	7
Seattle, WA	56				
St. Louis, MO	57	Kansas City, MO	23		
Washington, DC	52				
Total	1,686		403		28

SOURCE: EEOC, "FY 1999 Third Quarter Staffing Pattern"; Vargyas letter, p. 18. Some hiring and separations have occurred since this date; as a result, current numbers of onboard staff may differ slightly.

CHAPTER 4

Policy and Enforcement Guidance

In addition to its major enforcement activities, such as charge processing and litigation, which will be discussed in greater detail in the following chapters, the U.S. Equal Employment Opportunity Commission (EEOC) is charged with developing and disseminating policy statements, for both internal and external use. The term policy can be viewed in several ways, but for the purpose of this discussion will be defined to include procedural guidance and legal interpretations of laws.

EEOC develops, and then implements, policy through three methods:

- "Agency policy" is initiated by and through the commissioners. Such policies reflect the operational objectives of the enforcement program and include methods for carrying out the Agency's mission, such as charge handling procedures.[1]
- "Legal policy" and "enforcement guidance" are drafted by the Office of Legal Counsel (OLC) for approval and dissemination by the commissioners.[2] These include interpretations and clarifications of case law and reflect the Agency's views on court rulings and other legal decisions.[3]
- "Litigation-driven policy" is, in part, developed by and enforced through the Office of the General Counsel (OGC) and its strategic litigation efforts. OGC selects cases for litigation, with the approval of the commissioners, that support existing Agency policies or provide precedence for the creation of new policies in undeveloped areas of law.[4]

While this chapter is dedicated to examining EEOC's policy development, the scope of this report is limited to private sector employment, and therefore does not examine EEOC's policy development with respect to its federal sector program, although the Agency's work in that area has been quite substantial in recent years. Further, because the U.S. Commission on Civil Rights (Commission) evaluated EEOC's enforcement and policy development with respect to the Americans with Disabilities Act in a 1998 report, *Helping Employers Comply with the ADA*, guidance related to the ADA is not included here.[5]

[1] *See, e.g.*, U.S. Equal Employment Opportunity Commission (EEOC), *Priority Charge Handling Procedures*, June 1995; EEOC, *National Enforcement Plan*, February 1996; and EEOC, *Implementation of the National Enforcement Plan Through the Comprehensive Enforcement Program*, Mar. 6, 2000 (hereafter cited as EEOC, *Comprehensive Enforcement Program*).

[2] While the Office of Legal Counsel drafts legal policy, it does so for the "consideration and disposition of the full Commission" and not on its own. Ellen J. Vargyas, legal counsel, EEOC, letter to Ruby G. Moy, staff director, U.S. Commission on Civil Rights (USCCR), re: draft report, July 7, 2000, p. 19 (hereafter cited as Vargyas letter). It appears that, since 1994, EEOC's commissioners have been more involved with OLC in both the initiation and development of guidance.

[3] *See generally* EEOC, *Compliance Manual.*

[4] While EEOC has delegated much litigation authority to the general counsel, it has retained the authority to decide whether to commence litigation in cases that present issues in a developing area of law. Vargyas letter, p. 19. The authority to approve *amicus* briefs also lies with the EEOC commissioners, not the general counsel. *See generally* EEOC, *National Enforcement Plan.*

[5] EEOC has been significantly involved in these areas and has developed an active policy program to interpret the ADA. The Agency has also implemented major federal sector regulatory initiatives reforming the federal sector EEO procedure set out in 29 CFR § 1614. These initiatives have consumed significant Agency resources in recent years.

NATIONAL AGENCY POLICY INITIATIVES

As has been discussed in the report, EEOC has undergone a series of operational changes since its inception. Each change in strategy necessitated a change in internal policy and subsequent guidance. When EEOC first opened its doors in 1965, EEOC staff, by statute and design, were primarily concerned with individual complaints.[6] Within five years, the number of complaints filed with EEOC staff had grown far beyond initial projections. By 1972, Congress, concerned that EEOC was not able to handle the growing number of charges, amended Title VII to empower EEOC to file lawsuits against agencies and employers that allegedly discriminated against employees and candidates for employment.[7] By 1975, it was clear that EEOC needed a major programmatic and policy-oriented overhaul. The primary criticism of Agency policy centered on the unwieldy structure of the Agency;[8] procedural shortcomings in handling individual cases;[9] resource allocation;[10] and an inoperative systemic charge program.[11]

In 1977, with the appointment of Chairwoman Eleanor Holmes Norton, EEOC embarked upon sweeping policy change to reduce the backlog of more than 100,000 cases. Chairwoman Norton introduced the Rapid Charge Processing (RCP) system,[12] designated a separate unit in each district office to develop and investigate systemic charges,[13] and, in 1979, instituted the Early Litigation Identification Program (ELI).[14] With these changes, the average time for processing a charge dropped from 24 months in 1976, to 6.5 months in 1980,[15] and EEOC's settlement rate doubled when compared with 1976.[16] Despite the relative success, after a change in administration,[17] EEOC changed its litigation standards and moved to limit remedial relief, including back pay, reinstatement, and other compensatory awards. The new administration halted the use of the ELI system and adopted a policy requiring litigation of every charge for which a "reasonable cause" finding was issued.[18] EEOC, as a matter of policy, also adopted a formal definition of "reasonable cause" that required evidence enough "to win" rather than evidence enough "to sue."[19] By 1985, EEOC began requiring "full relief," or recovery on every issue, in cases in which reasonable cause was found, no longer allowing conciliation even when both parties reached terms of agreement.[20]

In 1995, EEOC undertook its most recent Agency policy changes.[21] By the mid-1990s, the backlog of charges had once again increased to more than 100,000. For the enforcement record of the Agency to improve, it was necessary for EEOC to make substantial changes to its enforcement process, and strategic, long-term planning was imperative.[22] Under the direction

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[6] Although the Civil Rights Act of 1964, Pub. L. No. 88-352, § 705, 78 Stat. 241, 258 (1964) (codified as amended at 42 U.S.C. § 2000e-4 (1994)) was passed in 1964, EEOC did not start operation until 1965.

[7] Nancy Kreiter, "Reinventing the EEOC: Barriers to Enforcement," *Employment Discrimination Report*, vol. 9, (1985), pp. 154–55.

[8] The lack of central authority diffused responsibility and accountability. Ibid.

[9] The procedural shortcomings resulted in a backlog of 130,000 cases by 1976. Ibid.

[10] Less than 35 percent of EEOC's budget is allocated to actual investigations. Ibid.

[11] Ibid.

[12] The Rapid Charge Processing Program was aimed at reworking the charge intake process. Ibid.

[13] Reorg. Plan No. 1 of 1978, 3 C.F.R. pt. 321 (1978), *reprinted in* 5 U.S.C. App. at 1155 (1982), and in 92 Stat. 3781 (1978); *see also* Act of Oct. 19, 1984, Pub. L. No. 98-532, 98 Stat. 2705 (ratifying all reorganization plans).

[14] ELI was designed to identify and expand individual charges that had the potential to affect a class of individuals. *See* USCCR, *Federal Civil Rights Commitment: An Assessment of Enforcement Resources and Performance*, clearinghouse publication 82, November 1983.

[15] This decrease occurred despite that under President Carter's Reorganization Plan No. 1, EEOC was given "lead agency" status and became responsible for coordinating all equal employment opportunity matters. At the same time EEOC was also given the responsibility to enforce both the Age Discrimination in Employment Act and the Equal Pay Act. Reorg. Plan No. 1 of 1978, 3 C.F.R. pt. 321 (1978), *reprinted in* 5 U.S.C. App. at 1155 (1982), and in 92 Stat. 3781 (1978); *see also* Act of Oct. 19, 1984, Pub. L. No. 98-532, 98 Stat. 2705 (ratifying all reorganization plans).

[16] USCCR, *Federal Civil Rights Commitment*, pp. 141–45.

[17] Norton's term ended with Carter's defeat in 1980, and the third major transformation of the Agency started. USCCR, *Federal Civil Rights Commitment*, pp. 141–45.

[18] Ibid., pp. 154–55.

[19] The change in standards made EEOC's standard the highest of any agency. Ibid., pp. 141–45.

[20] Kreiter, "Reinventing the EEOC," pp. 154–55.

[21] Ibid.

[22] Ibid. *See also* Elizabeth Thornton, director, Office of Field Programs, EEOC, interview in Washington, DC, Nov. 9,

of Chairman Gilbert F. Casellas, and later Acting Chair Paul Igasaki, the Agency initiated several projects, including the Charge Processing Task Force, the Strategic Plan, the Annual Performance Plans, the Priority Charge Handling Procedures (PCHP), the National Enforcement Plan (NEP), the Local Enforcement Plans (LEPs), and a pilot mediation program.[23]

In addition, the Agency made a decision to rescind three enforcement policies: the "full investigation" policy, which required the Agency to conduct a full investigation on each charge it received in the order in which it was received; the "full remedies" policy, which required the Agency to seek resolutions including the full range of potential recovery available under each statute for all meritorious cases; and the "statement of enforcement" policy, which provided that all cause cases for which conciliation had failed be recommended for litigation.[24]

In an interview with Commission staff, Chairwoman Ida L. Castro said she thought a strategic "comprehensive enforcement" approach was needed to continue to effectively move EEOC into the 21st century, and to the next level of civil rights enforcement.[25] Although the PCHP and the NEP had already been in place when Chairwoman Castro took office, she noted that the procedures, without additional change, did not accurately recognize the dramatic shift in the composition of the Agency's workload.[26] As a result, Chairwoman Castro developed and implemented the Comprehensive Enforcement Program (CEP).[27] The PCHP, NEP, and LEP describe what EEOC needs to do, and the CEP is the overall road map for how the Agency will integrate and implement the programs simultaneously.[28]

EEOC's Regulations and Policy Guidance

During EEOC's major policy changes, regulatory guidelines and subregulatory policy guidance are used to communicate changes to staff, the public, and other agencies seeking clarification and guidance.[29] EEOC principally advances policy positions in one of three ways: regulations,[30] policy guidance, and memoranda of understanding (MOU).[31] Since the 1980s when the Office of Legal Counsel was created by Chairman Clarence Thomas,[32] OLC has had the responsibility of drafting regulatory guidelines and subregu-

1999, p. 2 (hereafter cited as Thornton interview, Nov. 9, 1999).

[23] Paul Igasaki, vice chairman, EEOC, interview in Washington, DC, Mar. 1, 2000, p. 4 (hereafter cited as Igasaki interview). The Charge Processing Task Force initiated by Casellas recommended a comprehensive overhaul of EEOC's charge processing methods. In 1995, as a result of task force recommendations, EEOC streamlined its charge processing procedures. Ibid., p. 4.

[24] *See* EEOC, *Priority Charge Handling Procedures*, June 1995. Chairman Casellas later established two task forces. Because of their similar focus on the effectiveness of enforcement activities (the implementation of the new priority charge handling procedures and the success of EEOC's litigation program), the two task forces issued a joint report. The March 1998 report notes both strengths and weaknesses of EEOC's enforcement programs. In particular, the report offers the following overall recommendations: increase collaboration and coordination of headquarters and field offices; revise the local enforcement plans to include "clear and achievable enforcement outcome goals"; continue to reduce the charge inventory and focus on "strong" cases; and continue to encourage coordination between legal staff and investigators. *See generally* EEOC, *Priority Charge Handling Task Force, Litigation Task Force Report*, March 1998. *See also* EEOC, *National Enforcement Plan*, pp. 1–2.

[25] Ida L. Castro, chairwoman, EEOC, interview in Washington, DC, Mar. 8, 2000, pp. 1–2 (hereafter cited as Castro interview). *See also* EEOC, *Comprehensive Enforcement Program*, pp. 1–3.

[26] Castro interview, pp. 1–2. *See also* Thornton interview, Nov. 9, 1999, p. 4.

[27] EEOC, *Comprehensive Enforcement Program*, pp. 1–3.

[28] Robert Canino, regional attorney, Dallas District Office, EEOC, interview in Dallas, TX, Jan. 31, 2000, p. 2.

[29] Regulatory guidelines are those measures passed pursuant to the administrative procedures codified in the *Code of Federal Regulations*. Subregulatory guidelines are interpretive statements issued by EEOC regarding a regulation, area of law, or policy.

[30] EEOC has the power to make substantive rules under the Americans with Disabilities Act and the Age Discrimination in Employment Act that would be binding on the lower courts. Under Title VII, EEOC can issue guidelines that are influential and persuasive authority over the lower federal courts. *See* Alfred W. Blumrosen, Thomas A. Cowan professor of law, Rutgers University, telephone interview, Apr. 3, 2000, p. 10 (hereafter cited as Blumrosen interview).

[31] The Office of Legal Counsel, on behalf of EEOC commissioners, has drafted six memoranda of understanding. While EEOC has drafted and disseminated a wide variety of regulatory guidelines and subregulatory policy guidance over the years, as previously mentioned, this report does not address policies related to the ADA or the federal sector.

[32] Alfred W. Blumrosen, "The EEOC at the End of the Clinton Administration," pp. 71–95 in Corrine M. Yu and William L. Taylor, eds., *The Continuing Struggle: Civil Rights and the Clinton Administration* (Washington, DC: Citizens' Commission on Civil Rights, 1997), p. 83.

latory policy guidance; however, the commissioners ultimately must approve all policy.

Regulations

Pursuant to statute, EEOC has the authority to issue procedural regulations.[33] These regulations,[34] while under consideration, are listed in EEOC's semiannual regulatory agenda. After posting, notice, and comment,[35] the regulations are promulgated and then published annually in Title 29 of the *Code of Federal Regulations* (CFR), and are commonly referred to as guidelines.[36] It has been argued that the power to issue regulatory guidelines is the "most important aspect of equal employment law at this time."[37] Individuals in the civil rights community have stated that if interpretation of equal opportunity statutes remains in the hands of unfriendly federal courts, it will not matter what other statutory powers are given to the EEOC.[38]

There are other methods by which regulations can be developed. For example, EEOC's final regulation on waivers of Age Discrimination in Employment Act (ADEA) rights and claims was issued as a result of the first negotiated rule making ever conducted on a civil rights matter. EEOC convened a rule-making committee including employers' and plaintiffs' attorneys, organizations representing employers and the interests of older workers, and labor organizations. The committee successfully worked together to develop a consensus recommendation for the rule, which the Commission later adopted.[39]

While EEOC has the authority to issue guidelines under Title VII, the statute does not grant EEOC substantive rule-making authority, meaning EEOC guidelines under Title VII have persuasive authority in court, but are not mandatory or binding. However, under the ADEA and the ADA, EEOC does have substantive rule-making authority. Therefore, EEOC's regulations under those statutes may be binding as long as they meet the test articulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[40] where the Court stated:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given *controlling weight* unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[41]

Interpretive guidelines and other Agency policies are also entitled to judicial deference although they are accorded persuasive, as opposed to binding, authority.[42]

Since its inception and pursuant to its statutory mandate, EEOC has been active in promulgating regulatory guidelines, including:

- regulations covering employee responsibilities[43] and conduct[44];
- procedural regulations[45];
- record-keeping and reporting requirements under Title VII and the ADA[46];
- procedures for previously exempt state and local government employee complaints of employment discrimination under Section

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[33] 42 U.S.C. § 2000e-12(a); *see also* Blumrosen interview, p. 10. For a complete list of EEOC's regulations, *see* table 4-1.

[34] Significant regulations and certain subregulatory guidance under consideration by EEOC are listed in the semiannual regulatory agenda. Vargyas letter, p. 21.

[35] The Administrative Procedures Act, 5 U.S.C. 553, requires that proposed rules be published, that the public have an opportunity to comment on them before adoption, and that the adopting agency make a statement of basis and purpose incident to its adopting the regulation.

[36] The guidelines are found at 29 C.F.R. § 1600 (effective Feb. 20, 1979).

[37] Blumrosen, "The EEOC at the End of the Clinton Administration," p. 104.

[38] Ibid.

[39] Vargyas letter, p. 27.

[40] 467 U.S. 837, 844–845 (1984) (in *Chevron*, Congress created a two-part test to determine when an administrative agency's guidelines are binding authority).

[41] *Id.* at 845.

[42] Vargyas letter, p. 20.

[43] In addition, EEOC was given responsibility for adopting regulations to govern equal employment opportunity plans for federal agencies, as required by Section 717(b) of the Civil Rights Act, and for final administrative decisions in charges filed under that section against federal agencies by applicants or employees.

[44] 29 C.F.R. § 1600 (1999).

[45] 29 C.F.R. § 1601 (1999).

[46] 29 C.F.R. § 1602 (1999).

321 of the Government Employee Rights Act of 1991[47];
- guidelines on discrimination because of sex[48];
- guidelines on discrimination because of religion[49];
- guidelines on discrimination because of national origin[50];
- uniform guidelines on employee selection producers (1978)[51]; and
- affirmative action appropriate under Title VII, as amended.[52]

In addition, EEOC has issued policies on:

- the availability of records[53];
- Privacy Act regulations[54];
- government in the Sunshine Act regulations[55];
- federal sector equal employment opportunity[56];
- enforcement of nondiscrimination on the basis of handicap in programs or activities conducted by EEOC[57];
- the Equal Pay Act[58] and its procedures[59];
- the Age Discrimination in Employment Act[60] and its procedures[61];
- records to be made or kept relating to age, including notices to be posted and administrative exemptions[62];
- regulations to implement the equal employment provisions of the Americans with Disabilities Act[63];
- procedures for coordinating the investigation of complaints or charges of employment discrimination based on disability subject to the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973[64];
- procedures for complaints/charges of employment discrimination based on disability filed against employers holding government contracts or subcontracts[65];
- debt collection[66];
- procedures on interagency coordination of equal employment opportunity issuances[67]; and
- procedures for complaints of employment discrimination filed against recipients of federal financial assistance.[68]

Policy Guidance

Although EEOC has been very active in promulgating regulatory guidelines for enforcement of the covered civil rights laws, it is EEOC's subregulatory policy guidance that is the focus of this section. EEOC advances policy positions at the subregulatory level through less formal policy guidance. A "policy" or "enforcement guidance" is an interpretive statement issued by EEOC regarding a regulation, area of law, or policy. Through the issuance of policy or enforcement guidance, EEOC has sought to achieve a number of goals, specifically to provide a tool for training staff in meeting the requirements of NEP issues; to improve public access and awareness of EEOC priorities; to network with stakeholders and organizations regarding priorities of EEOC; to detect litigation worthy

[47] 29 C.F.R. § 1603 (1999).

[48] 29 C.F.R. § 1604 (1999).

[49] 29 C.F.R. § 1605 (1999).

[50] 29 C.F.R. § 1606 (1999).

[51] 29 C.F.R. § 1607 (1999).

[52] 29 C.F.R. § 1608 (1999). EEOC used its authority to adopt affirmative action guidelines in 1979 which, combined with the decision in United Steelworkers of America v. Weber, 433 U.S. 193 (1979), left private employers free to adopt affirmative action programs with relatively little fear of financial liability under Title VII for programs that favored blacks or women.

[53] 29 C.F.R. § 1610 (1999).

[54] 29 C.F.R. § 1611 (1999).

[55] 29 C.F.R. § 1612 (1999).

[56] 29 C.F.R. § 1614 (1999).

[57] 29 C.F.R. § 1615 (1999).

[58] 29 C.F.R. § 1620 (1999).

[59] 29 C.F.R. § 1621 (1999).

[60] 29 C.F.R. § 1625 (1999). EEOC has produced other guidelines, including its 1998 negotiated rule making on waivers under ADEA, 29 C.F.R. § 1625.22; the federal sector procedural rule, 29 C.F.R § 1614; and applying ADEA to apprenticeship programs, 29 C.F.R. § 1525.2. Vargyas letter, p. 21. The specific provisions of each ADEA policy are not discussed here, but it should be acknowledged that EEOC has developed an abundant amount of ADEA guidance.

[61] 29 C.F.R. § 1626 (1999).

[62] 29 C.F.R. § 1627 (1999).

[63] 29 C.F.R. § 1630 (1999).

[64] 29 C.F.R. § 1640 (1999).

[65] 29 C.F.R. § 1641 (1999).

[66] 29 C.F.R. § 1650 (1999).

[67] 29 C.F.R. § 1690 (1999).

[68] 29 C.F.R. § 1691 (1999).

cases; to update and balance the litigation docket; and to coordinate efforts among OGC, OLC, the state and local fair employment practices agencies under contract with EEOC, and other entities required to enforce the same laws.

EEOC also provides its staff with policy or enforcement guidance on various civil rights laws for which the Agency has enforcement responsibilities.[69] This assists EEOC staff in investigating and evaluating claims of discrimination under these laws;[70] interpreting and applying significant new court decisions and legislation; and gathering and evaluating evidence in cases raising issues addressed in the NEP.

In addition, EEOC produces guidance to educate employees, employers, and other stakeholders about their rights and responsibilities under the laws enforced by EEOC; to enhance compliance with the laws; and to make available EEOC's interpretation of the laws to the courts that give deference to the enforcing Agency's interpretations.[71] Policy guidance also informs the public of the position taken by EEOC on legal and policy issues. In addition, the legal interpretations advanced by EEOC in its guidance play an important role in shaping nearly every aspect of the Agency's implementation and enforcement efforts.[72]

While regulatory guidelines are subject to the Administrative Procedures Act,[73] which requires that proposed rules be published, that the public have an opportunity to comment on them before adoption, and that the adopting agency make a statement of basis and purpose incident to their adoption,[74] there are no such requirements for subregulatory policies. The current practice of EEOC and the Office of Legal Counsel is to issue subregulatory policy guidance—which does not require formal public comment and review—because it allows the Agency to "move in a more timely and efficient manner to address important developing issues."[75] Although EEOC solicits input and generally is responsive to its stakeholders, such opportunities often occur after the guidance has been written rather than at the draft stage, when the opportunity for influence is greater.

Further, EEOC does not allow for a scheduled and consistent review of subregulatory policy guidance after it has been issued.[76] Instead, the Agency periodically reviews existing policies, to determine if legal developments have been made, without a clear strategy for regular assessment and revision. If there were a set guidance review schedule made available to the public, stakeholders and external participants with interests in certain issues could have greater opportunity for input. Without such formal review procedures, it is difficult for stakeholders to know when those policies that affect them are under reconsideration.[77] According to EEOC's legal counsel, a formal mechanism to review and update guidance policies is not necessary, since OLC periodically examines policies and tries to keep them up to date.[78] While permissible, this practice does not engender public confidence in the Agency and the comprehensiveness of the policy guidance.

EEOC's Process of Developing Policy and Enforcement Guidance

OLC staff do not develop guidance on every regulation; instead EEOC develops new policy guidance based on the Agency's determination that there is a need for guidance on a regulation or court decision[79] or when it is determined that a regulation, policy, or issue requires revisiting.[80] OLC develops policy guidance for consid-

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[69] The policy and enforcement guidance is found in the interpretive section of the *Compliance Manual.*

[70] Vargyas interview, pp. 2–3.

[71] Vargyas letter, p. 22.

[72] EEOC, *Comprehensive Enforcement Program*, pp. 13–15.

[73] 5 U.S.C. 553 (1994).

[74] *Id.*

[75] Vargyas letter, p. 30. According to EEOC's legal counsel, notice and comment comes at a "substantial price in terms of time and resources" and could extend the process to well over two years. Ibid. *See also* Ellen Vargyas, legal counsel, EEOC, interview in Washington, DC, Mar. 7, 2000, pp. 2–3 (hereafter cited as Vargyas interview).

[76] Vargyas interview, pp. 2–3.

[77] OLC staff have stated that EEOC involves the public in policy development through discussions on the issues, letters, speeches, presentations, and other outreach activities. Vargyas letter, p. 21. These processes occur prior to the drafting of the guidance, and no public review occurs after the guidance has been drafted.

[78] Vargyas interview, pp. 2–3.

[79] Vargyas interview, pp. 2–3; Peggy Mastroianni, associate legal counsel, and Dianna Johnston, assistant legal counsel, Office of Legal Counsel, EEOC, interview in Washington, DC, Mar. 6, 2000, pp. 9–12 (hereafter cited as Mastroianni and Johnston interview).

[80] Policies originate in the Office of Legal Counsel, however, there is dialog with other agencies, such as the U.S. De-

eration based on requests from commissioners and Agency staff; recommendations from employers, employees, their representative organizations, and civil rights and labor organizations; input from other government agencies; and input and questions presented at speeches and other technical assistance and outreach events.[81] OLC also works closely with other EEOC offices such as the Office of General Counsel, Office of Field Programs (OFP), and the commissioners' offices.[82] In interview statements, EEOC's associate legal counsel noted that OLC assesses which issues it will present to EEOC's commissioners for policy guidance development based on a combination of factors, both formal and informal.[83] In addition to information provided by stakeholders, the Office of Legal Counsel also gets input from EEOC's field offices. Investigators and attorneys in the field often relay information to OLC about recurring issues.[84]

EEOC Policy Guidance Consistent with the Major Statutes and the NEP

During the past decade, EEOC has entered into seven memoranda of understanding and promulgated 40 guidance or related documents.[85] This chapter discusses only those related to the major statutes within the scope of this project or the NEP, specifically sex discrimination, harassment and hostile work environment, national origin discrimination, age discrimination, and religious accommodation. In addition, the review of sex discrimination includes the Equal Pay Act, vicarious employer liability for unlawful harassment by supervisors, and wage discrimination.[86]

Inasmuch as EEOC, on a national level, established the National Enforcement Plan and Comprehensive Enforcement Program as the vehicles to ensure comprehensive enforcement of the civil rights laws EEOC enforces, this section will examine whether subregulatory policy guidance is consistent with the purposes and direction of the NEP. It should be noted that in May 2000, for the purpose of clarifying existing guidance, EEOC issued a new guidance on threshold issues for addressing bias complaints, many of which are applicable to the issues discussed in greater detail below.[87]

Sex Discrimination

EEOC issued its initial regulation on sex discrimination in 1965,[88] clarified its regulation with guidance on sexual harassment in 1980,[89] and then followed with, "Current Issues of Sexual Harassment,"[90] "Employer Liability under Title VII for Sexual Favoritism,"[91] "Proposed Rules on Sexual Harassment,"[92] "Enforcement Guidance on *Harris v. Forklift Systems, Inc.*,"[93] and "Vicarious Employer Liability for Unlawful Harassment by Supervisors."[94] The initial guidance on sexual harassment issued by EEOC was intended to shed light on issues in developing law that were eventually adopted by the Su-

partment of Justice and the U.S. Department of Labor's Office of Federal Contract Compliance Programs. Comments from other agencies are considered, and the working relationship is usually close. *See* Vargyas interview, pp. 2–3.

[81] Vargyas letter, p. 23.

[82] Vargyas interview, pp. 2–3.

[83] Mastroianni and Johnston interview, pp. 9–12.

[84] Vargyas interview, pp. 2–3. *See also* USCCR, *Helping Employers Comply with the ADA: An Assessment of How the United States Equal Employment Opportunity Commission is Enforcing Title I of the Americans with Disabilities Act*, September 1998, p. 73.

[85] For a complete list of EEOC guidance, *see* table 4-2.

[86] In some instances, this section of the report focuses on policies adopted more than five years ago, before the implementation of the NEP. The Commission's mission was to examine the production of guidance under the major discrimination statutes as well as NEP-related issues; however, much of the guidance regarding the major statutes has not been updated in recent years.

[87] EEOC, "Threshold Issues for Addressing Bias Complaints," May 12, 2000, accessed at <http://www.eeoc.gov/press/512.html>. On initial examination, the new guidance appears to provide useful direction to both EEOC staff and the public as to the definitions and criteria for evaluating claims of discrimination.

[88] 29 C.F.R. § 1604 (1999).

[89] EEOC, *Compliance Manual*, §§ 615.1–615.6.

[90] EEOC, "Policy Guidance on Current Issues of Sexual Harassment," EEOC Notice No. 915-035 (1990).

[91] EEOC, "Policy Guidance on Employer Liability under Title VII for Sexual Favoritism," EEOC Notice No. 915-048 (1990).

[92] "Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability," 58 FR 1266 (1993). These guidelines have been proposed, but never formally adopted.

[93] EEOC, "Enforcement Guidance on *Harris v. Forklift Systems, Inc.*," EEOC Notice No. 915-002 (1994).

[94] EEOC, "Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors," EEOC Notice No. 915-002 (1999) (hereafter cited as EEOC, "Vicarious Employer Liability").

preme Court in *Meritor Savings Bank v. Vinson.*[95] Workplace harassment, and the law addressing it, became the center of public attention primarily because sexual harassment, just like affirmative action, became a common phrase in American society, yet it had no specific legal definition.

EEOC later issued additional subregulatory guidance to address the decision in *Meritor.* EEOC's guidance provides a definition of the two types of sexual harassment and outlines the Court's decision in *Meritor*, which adopted the definition of hostile environment harassment proposed by past EEOC guidelines and the standard of agency liability supported by the EEOC in its brief.[96] Although the guidance was drafted at a time when sexual harassment was an emerging area of law, it is still useful, especially when taken as a whole with EEOC's later guidance. Section 1604.11 of the guidance was rescinded by EEOC's enforcement guidance on vicarious employer liability for unlawful harassment by supervisors.[97]

Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors. In 1999, EEOC issued guidance on vicarious employer liability for unlawful harassment by supervisors in order to conform its policies to the principles articulated by the Supreme Court in *Burlington Industries, Inc. v. Ellerth,*[98] and *Faragher v. City of Boca Raton.*[99] These two decisions defined the standards of liability so that employers would be held liable for a supervisor's harassment if it culminated in a tangible job action and, if it did not, the employer could negate its liability by establishing two necessary elements of an affirmative defense. The following elements apply:

- The employer exercised reasonable care to prevent and correct promptly any harassing behavior.
- The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.[100]

EEOC indicates that the standards for harassment liability apply to all unlawful harassment. Although this guidance supersedes previous EEOC guidelines on vicarious liability for harassment by supervisors, past guidelines, to the extent not superseded by subsequent guidance or court decisions on employer liability for harassment by co-workers and nonemployees, still apply.[101]

In general, EEOC's guidance is clear. EEOC walks the fine line between providing criteria for determining sexual harassment and allowing flexibility in order to take each set of behaviors and each workplace context into account.

EEOC Guidance on the Equal Pay Act. In enacting the Equal Pay Act (EPA),[102] Congress noted that gender-based wage differentials negatively affect the economy, depressing wages, preventing the maximum use of resources, causing labor disputes (which subsequently obstruct commerce), burdening "commerce and the free flow of goods," and constituting "an unfair method of competition."[103] The Equal Pay Act states:

> No employer . . . shall discriminate, within any establishment . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . .[104]

In short, the Equal Pay Act aims to ensure nondiscrimination on the basis of sex in the payment of wages.[105] EEOC's interpretive guidance on wage discrimination makes reference to both Title VII of the Civil Rights Act of 1964 and the EPA. The guidance explains that there was a

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[95] 477 U.S. 57, 72 (1986).

[96] EEOC, "Current Issues of Sexual Harassment," p. 10.

[97] *See also* EEOC, "Threshold Issues for Addressing Bias Complaints."

[98] 524 U.S. 742 (1998), 118 S. Ct. 2257.

[99] 524 U.S. 775 (1998), 118 S. Ct. 2275.

[100] EEOC, "Vicarious Employer Liability," pp. 4077–78.

[101] Ibid.

[102] Equal Pay Act of 1963, Pub. L. 88-38 § 2(a) 77 Stat. 56 (1963) (codified as amended 29 U.S.C. § 206 (1994)). *See* app. B for a more detailed discussion about the Equal Pay Act.

[103] T.D. Stanley and Stephen B. Jarrell, "Gender Wage Discrimination Bias? A Meta-Regression Analysis," *Journal of Human Resources*, vol. 33, no. 4 (Sept. 22, 1998), p. 947.

[104] 29 U.S.C. § 206 (1994).

[105] *Id.* at 206(a).

lack of clarification and no clearly defined relationship between the two laws[106] despite the inclusion of the Bennett Amendment in Title VII, which states, "It is not unlawful to discriminate on the basis of sex with regard to wages if such wage differences are authorized by the Equal Pay Act."[107]

In its guidance EEOC seeks to clarify EPA's relationship to Title VII.[108] The guidance states that the Equal Pay Act differs from Title VII in its scope. The guidance further indicates that where the jurisdictional prerequisites of both the EPA and Title VII are satisfied, any violation of EPA is a violation under Title VII.[109] However, since the scope of the EPA is narrower than Title VII, acts that violate Title VII may not violate the EPA.[110] Additionally, an individual may receive relief under either statute, but may not receive duplicate relief for the same wrong.[111]

EEOC also provides guidance to help implement the provisions of the Equal Pay Act.[112] The guidance utilizes examples, case law, and reiterations of *Code of Federal Regulations* interpretations to illustrate how one should determine an unequal pay violation under the EPA. Retaliation for a claim under the EPA and the relationship of the EPA to Title VII are also discussed.[113] Finally, an explanation of each of the four statutory defenses against an EPA claim is provided in detail. EEOC's guidance offers case law examples to give meaning to the provisions of the EPA. However, these examples and explanations are at times inadequate to serve as a guide for implementing the provisions of the act.

In addition to examining the specific provisions of the EPA and its relationship to Title VII, EEOC has offered some insight into the issue of comparable worth. In section 633.4(b),[114] EEOC provides examples of potential comparable worth charges. In section 633.4(c),[115] EEOC turns to court treatment of comparable worth theory, noting that courts have generally found that comparable worth is not a Title VII issue. In addition, EEOC describes its own treatment of claims as well as those of other courts in sections 633.4(d) and (e).[116] However, the overall theme of the EEOC's guidance on comparable worth reveals that EEOC views it as a nonissue.[117]

Finally, although EEOC has not issued recent guidance on the EPA, the Agency has issued guidance titled "Compensation of Sports Coaches in Educational Institutions." While offering an analysis of compensation discrimination in a specific context, this guidance also restates many of the broad legal principles applicable to analyses of compensation discrimination issues.[118]

Pregnancy Discrimination. Pregnant women have the right to be treated the same as other workers.[119] Section 626 of EEOC's Compliance Manual states that "for all job-related purposes, women who are affected by pregnancy or related medical conditions must be treated the same as other employees or applicants for employment who are not so affected but who are similarly able or unable to work."[120] In section 626.1(b) of the Compliance Manual, EEOC outlines Supreme Court cases that led to the Pregnancy Discrimination Act, such as *General Electric Company v. Gilbert*,[121] *Geduldig v. Aiello*,[122] and

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[106] EEOC, *Compliance Manual*, § 633.

[107] 42 U.S.C. § 2000e-2(h); EEOC, *Compliance Manual*, § 633.

[108] EEOC, *Compliance Manual*, § 633.4.

[109] EEOC, *Compliance Manual*, § 633; 29 C.F.R. § 1620.27(a).

[110] EEOC, *Compliance Manual*, § 633.4.

[111] 29 C.F.R. § 1620.27(b) (1999).

[112] *See* EEOC, *Compliance Manual*, § 704.

[113] Ibid., § 633.4.

[114] Ibid.

[115] Ibid., § 633.4(c).

[116] Ibid., § 633.4(d).

[117] Ibid., § 633.4. The Commission once recommended that EEOC reject comparable worth and rely instead on the principle of equal pay for equal work. The Commission also recommended that Congress not adopt legislation that would establish comparable worth in the setting of wages in the federal or private sector. USCCR, *Comparable Worth: An Analysis and Recommendations*, consultation, June 6–7, 1984, p. 72. This recommendation was made over opposition of current chairwoman Mary Frances Berry who dissented and stated that she did not believe the Commission had "conducted sufficient fact finding to draw any conclusion about pay equity or comparable worth." Ibid., p. 80.

[118] Vargyas letter, p. 24.

[119] 42 U.S.C. § 2000e-(k).

[120] EEOC, *Compliance Manual*, § 626.1(a).

[121] 429 U.S. 125 (1976) (the Court held that an employer did not discriminate on the basis of sex under Title VII when it excluded only pregnancy from a disability plan that covered nonoccupational disabilities).

[122] 417 U.S. 484 (1974) (the Court held that pregnancy-related disabilities were an additional risk unique to women,

Nashville Gas Company v. Satty.[123] These decisions were in contrast to guidelines the EEOC had issued in 1972, and Congress affirmed EEOC's position with the passage of the Pregnancy Discrimination Act.[124]

In section 626.4 of the Compliance Manual, EEOC makes clear that "an employer may not deny a woman the right to work during or after pregnancy or childbirth if she is physically able to perform the necessary functions of the job."[125] Pregnancy cannot be the reason for refusal to hire, forced maternity leave, discharge, or failure to reinstate. When a woman cannot perform some function of her job because of pregnancy or a related condition, "the employer may not deny her the opportunity to perform modified tasks or alternative assignments or to transfer to another available position if the employer provides such opportunities to employees who are temporarily disabled for other reasons."[126] Therefore, the employer is not required to provide alternative work, but is required simply to accommodate pregnant employees the same way the employer accommodates similarly temporarily disabled employees.[127]

EEOC also notes that employers cannot take adverse actions against pregnant employees because they prefer (or perceive that customers, clients, or co-workers prefer) nonpregnant workers. Importantly, this section highlights the need for equal treatment of pregnant and nonpregnant workers and indicates that the right to work is not an absolute guarantee; rather, it is the right to be treated as other employees or other applicants are treated, on the basis of individual ability or inability and not on the basis of sex or sex stereotypes.[128] EEOC concludes section 626.4 with a detailed table of cases that relate to categories described in the section, which includes both EEOC decisions and court decisions.[129]

In general, EEOC's guidance on pregnancy discrimination is clear with regard to the Pregnancy Discrimination Act and how EEOC will interpret it. While areas of pregnancy discrimination policy remain ambiguous, unclear, or inadequate, EEOC has done much to ensure that Title VII's mandates are met, by bringing its guidelines into accordance with court decisions. EEOC sufficiently anticipated issues as they rose through the courts and responded to the outcomes of final court decisions.

In addition, EEOC provides clear and helpful examples of pregnancy discrimination policies, and its use of definitions in section 626.2(c) of its Compliance Manual is extremely helpful. It even provides examples of definitions, such as in explaining the phrase "available in connection with employment." EEOC also provides examples in its discussion of child care and related leave and in its discussion of disability and sick leave benefits.[130]

Racial Harassment and Hostile Work Environment

EEOC's guideline on racial harassment is found in section 615 of the Compliance Manual. Section 615.7 addresses harassment on the bases of race, religion, and national origin.[131] In the introduction, EEOC notes that harassment based on race is an illegal employment practice in violation of Title VII. EEOC states that under Title VII, an employer has an obligation to keep the working environment free of harassment and to take steps when necessary to remedy any harassment. The introduction states that EEOC's position has been upheld in the courts and cites to *Rogers v. EEOC*[132] and *EEOC v. Murphy Motor Freight Lines, Inc.*[133]

Harassment on the basis of race is one of the most deeply rooted concepts in discrimination law; however, EEOC's guidance scarcely deals with the concept of harassment based on race as an independent basis of discrimination. EEOC

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so that policies which excluded pregnancy did not discriminate against women, but distinguished between the categories of pregnant and nonpregnant women).

[123] 434 U.S. 136 (1977) (the Court held that an employer could deny sick leave pay to employees disabled by pregnancy but provide it to employees disabled by other nonoccupational disabilities, but did find that employers could not deny previously accumulated seniority only to female employees after they returned from mandatory pregnancy leave).

[124] EEOC, *Compliance Manual*, § 626.1(c).

[125] Ibid., § 626.4.

[126] Ibid.

[127] Ibid.

[128] Ibid.

[129] Ibid.

[130] Ibid., §§ 626.7, 626.8.

[131] Ibid., § 615.7. *See also* EEOC, "Threshold Issues for Addressing Bias Complaints."

[132] 454 F.2d 234 (5th Cir. 1971).

[133] 488 F. Supp. 381 (D. MN. 1980); *see* EEOC, *Compliance Manual*, § 615.7.

combined racial harassment with other forms of harassment and refers to the underlying principles only in relation to other forms. For example, the introductory section states, "as discussed above in the introduction to the topic of sexual harassment."[134] Nonetheless, the guidance provides a helpful section on applicable principles and standards as well as a list of EEOC decisions regarding racial harassment.[135]

In a related area, EEOC has issued regulatory guidelines on affirmative action[136] and subsequently new guidelines on vicarious employer liability for unlawful harassment by supervisors.[137] The guidelines were promulgated by EEOC to reflect the principles established by the Supreme Court in the cases of *Burlington Industries, Inc. v. Ellerth*,[138] and *Faragher v. City of Boca Raton*.[139] The guidelines are intended to apply to all types of unlawful harassment, including race.[140]

The guidelines explain that an employer will always be liable for unlawful harassment by a supervisor, if the conduct results in a tangible employment action for the employee.[141] A "tangible employment action" is defined in the guidelines as "a significant change in employment status."[142] The guidelines specify the typical characteristics of a tangible employment action,[143] such as significantly changing an individual's duties in his or her existing job, regardless of whether or not the individual retains the same salary and benefits.[144]

Although EEOC has designated this a major area under the NEP, EEOC has not been as active as it could be in producing guidance on racial discrimination, particularly racial harassment. While EEOC has promulgated both regulatory guidelines and policy guidance on sex[145] and national origin discrimination,[146] it has yet to issue any direct regulatory guidelines or subregulatory policy guidance solely dedicated to racial harassment.[147]

National Origin Discrimination

In its definition of national origin discrimination, EEOC's guidance states that protection includes, but is not limited to, the denial of equal employment opportunity because of an individual's or one's ancestor's place of origin or the physical, cultural, or linguistic characteristics of a national origin group.[148] EEOC also examines charges of denial of equal employment grounded in other national origin considerations such as marriage to or association with persons of a national origin group; membership in associations with organizations identified with promoting the interests of national origin groups; attendance or participation in churches, temples, or schools generally used by persons of a national origin group; or discrimination based on an individual's name or spousal name that is associated with a national origin group.[149]

Some courts have interpreted Title VII more broadly to encompass more than what the plain meaning for national origin provides. They have endeavored to protect ethnic traits such as accent, language differences, and physical disparities. In its guidelines on discrimination because of national origin, EEOC defines the realm of protection provided by national origin to cover physical, cultural, and linguistic characteristics of a national origin group. EEOC guidance asserts protection for individuals with these characteristics and also protects individuals associated with persons with these characteristics. National origin discrimination will be examined in the rest of this section with regard to English-

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134 EEOC, *Compliance Manual*, § 615.7.

135 Ibid.

136 29 C.F.R. 1608 (1982).

137 EEOC, "Vicarious Employer Liability."

138 118 S. Ct. 2257 (1998).

139 118 S. Ct. 2275 (1998).

140 EEOC, "Vicarious Employer Liability," § 615.

141 Ibid.

142 Ibid.

143 Ibid.

144 Ibid.

145 29 C.F.R. § 1604 (1999).

146 29 C.F.R. § 1608 (1999).

147 While there has been a lack of development of policy guidance in this area, EEOC has made other attempts to address this issue. For example, in FY 99, EEOC obtained $53 million in monetary benefits through administrative enforcement of race-based charges. EEOC filed 89 race discrimination lawsuits and obtained $8.5 million in monetary benefits for charging parties through litigation. Vargyas letter, p. 25. To support this work EEOC should also issue subregulatory guidelines, similar to those it has issued regarding sex and national origin discrimination.

148 29 C.F.R. § 1606.1 (1999). *See also* EEOC, "Threshold Issues for Addressing Bias Complaints."

149 29 C.F.R. § 1606.1 (1999).

only rules, manner of speaking or accent, and citizenship.

Discrimination on the Basis of Manner of Speaking or Accent. In presenting a prima facie discrimination case based on manner of speaking or accent, section 623 of EEOC's Compliance Manual focuses on *Carino v. University of Oklahoma Board of Regents*[150] and states that Title VII case law establishes that denial of an employment opportunity because of manner of speaking or accent is an unlawful discriminatory act.[151]

Specifically in *Carino*, a naturalized Filipino was demoted from a supervisory to a nonsupervisory position in the University of Oklahoma dental laboratory due to his national origin and foreign accent.[152] The district court, holding for the plaintiff, stated:

> Although not as permanent as race or color, an accent is not easily changed for a person who was born and lived in a foreign country for a good length of time and therefore, an accent would appear to approach that sort of immutable characteristic.[153]

The court thus concluded that an employment decision adverse to the plaintiff was made solely on the basis of his national origin and related accent, violating the plaintiff's right under Title VII.

EEOC guidance explains that the judgment was upheld because the plaintiff met his burden of establishing a prima facie case by satisfying the four criteria: (1) the plaintiff's country of national origin was the Republic of Philippines; (2) the plaintiff was qualified for the job of supervisor; (3) the plaintiff was reassigned from the position despite his qualifications; (4) a person of different national origin was hired after the plaintiff was demoted and denied the opportunity to apply for the position. EEOC states that the appellate court accepted the relationship between national origin and accent as "related."[154]

The guidance also lists examples of legitimate nondiscriminatory reasons for adverse employment decisions regarding discrimination on the basis of manner of speaking or accent. These reasons include failure to perform job requirements or proof that the manner of speaking or accent interferes with the employee's ability to perform the basic functions of employment. The guidance specifically references *Meija v. New York Sheraton Hotel,*[155] in which a teacher, though fluent in English, had an accent so strong it interfered with students' abilities to comprehend. The guidance also notes that when there is a business necessity or justification, requiring one to speak only English is lawful. However, if there is no business necessity, Title VII forbids such discrimination.[156]

Citizenship, Residence Requirements, and Undocumented Workers. Protection from discrimination as a result of citizenship, residency status, or working status is outlined in section 622 of the Compliance Manual.[157] EEOC makes it clear that discrimination against any individual because of lack of citizenship is not by itself an action protected by the discrimination statutes;[158] however, the National Enforcement Plan places a priority on national origin discrimination, and EEOC acts to enforce the underlying issues of the NEP.[159]

The guidance in section 622.2(a) makes it clear that EEOC will consider the purpose and effect of an employer's requirement when determining whether the requirement is discriminatory. The guidance also indicates that state law can be a defense to an allegation of discrimination regarding these issues. Specifically, a state law that prohibits the employment of noncitizens will only be superseded by Title VII laws when the purpose or effect of the discriminating requirement is to discriminate based upon national origin.[160] EEOC guidance also distinguishes between a potential violation of the Immigration Act and violations of Title VII.

The EEOC guidance offers insight into a difficult and newly developing area of law. Further,

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[150] *See* 26 EPD 31, 974 (W.D. Okla. 1981), *affirmed,* 750 F.2d 815, 35 EPD 34, 850 (10th Cir. 1984).

[151] EEOC, *Compliance Manual,* § 623.

[152] *See* 26 EPD 31, 974 (W.D. Okla. 1981), *affirmed,* 750 F.2d 815, 35 EPD 34, 850 (10th Cir. 1984); *see also* Berke v. Ohio Dept. of Public Welfare, 628 F.2d 980 (6th Cir. 1980).

[153] *See* 26 EPD 31, 974 (W.D. Okla. 1981), *affirmed,* 750 F.2d 815, 35 EPD 34, 850 (10th Cir. 1984); *see also* Berke v. Ohio Dept. of Public Welfare, 628 F.2d 980 (6th Cir. 1980).

[154] 750 F.2d at 819.

[155] 459 F. Supp. 375 (S.D.N.Y. 1979).

[156] *Id.*

[157] EEOC, *Compliance Manual,* § 622(a).

[158] Ibid.

[159] Ibid.

[160] Ibid.

the guidance seems to support the basic principle of the National Enforcement Plan's emphasis on national origin discrimination. EEOC has subsequently issued other guidance on remedies available to undocumented immigrants and a policy guidance on the national security exception.[161] EEOC has issued a useful guidance on the application of EEO law to contingent workers and others who are temporarily in the work force, such as migrant workers and individuals who work for temporary agencies.[162]

It is the standard practice of EEOC to provide numerous examples of potential application of the rules to various employer/employee situations. By providing these examples throughout the guidance, EEOC allows employers and employees to see how the Agency might apply the principles it outlines.

Religious Accommodation

EEOC's Compliance Manual contains one section on religious accommodation.[163] Section 628 of the manual provides a brief history of the religious accommodation requirement and related case law. However, the bulk of the discussion on religious accommodation is outdated (dated August 1984), with three appendices having been added in 1989.[164]

The first three parts of the Compliance Manual's discussion of religious accommodation provide an introduction to the issue. First, EEOC describes the court cases and laws enacted that shaped the interpretation of the religious accommodation requirement.[165] Then, the manual discusses the statutory provisions of the requirement.[166] Section 628.3 provides a section-by-section discussion of the EEOC regulations on religious accommodation.[167] The manual then provides greater detail on investigating and implementing the religious accommodation provision of Title VII.

EEOC notes that failure to provide reasonable religious accommodation is distinct from discrimination on the basis of religion.[168] However, the guidance provides conflicting and unclear instructions on how an investigator should identify religious accommodation. Equal opportunity specialists (EOS) are instructed to consider both the religious belief, as well as the sincerity of the charging party's belief. First, the guidance instructs EOS' to "scrutinize the practice or belief that allegedly deserves protection, while at the same time recognizing the intensely personal characteristics of adherence to a particular faith."[169] The investigator is further instructed to "determine the sincerity of the individual claiming to need an accommodation."[170]

EEOC's position on an employer's duty to reasonably accommodate, or an employee's acceptance of an offer, is unclear because EEOC states that employees do not have to cooperate or accept an employer's suggested accommodation. The employee's refusal to accept the offered accommodation "is irrelevant to the issue of that entity's duty to accommodate to the religious needs of that individual."[171] However, failure to accept the accommodation may result in disciplinary action and may make accommodation impossible where all reasonable accommodation without undue hardship has been offered.[172]

EEOC discusses four forms of accommodation, as determined through case law: (1) voluntary substitutes and "swaps," (2) flexible scheduling, (3) lateral transfers and change of job assignments, and (4) payments of sums equivalent to union dues as a charitable contribution.[173] EEOC notes that most complaints related to failure to accommodate religious beliefs and practices involve conflicts with work schedules, but that there are many beliefs and practices "which do not conflict with scheduling but which

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[161] Ibid.

[162] EEOC's enforcement guidance on "Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws" (1999) demonstrates an important attempt to address discrimination in this area. The Agency brought to resolution several cases on behalf of unauthorized workers, including a $1 million settlement of a class action lawsuit alleging sexual harassment of 22 Hispanic women at a food processing plant in Laurel, MD, in June 2000.

[163] EEOC, *Compliance Manual*, § 628.

[164] *See also* EEOC, "Threshold Issues for Addressing Bias Complaints."

[165] EEOC, *Compliance Manual*, § 628.1.

[166] Ibid., § 628.2.

[167] 29 C.F.R. § 1605 (1999).

[168] EEOC, *Compliance Manual*, § 628.4.

[169] Ibid., § 628.4(b)(2)(iii).

[170] Ibid.

[171] Ibid., § 628.5(a)(1).

[172] Ibid.

[173] Ibid., § 628.6(b)-(e).

nevertheless may require accommodation."[174] EEOC does not provide examples of these other beliefs and practices and merely refers to the appendix to the interpretive guidance, which provides five more examples.[175] Examples from EEOC's own charge investigations and resolution agreements would be useful in this section.

The guidance provides an adequate discussion of the undue hardship defense and discusses costs and conflicts with seniority rights as valid reasons for not providing a religious accommodation.[176] Few examples from actual charge investigations and resolutions are provided. Section 628.7 briefly discusses two 1973 EEO decisions; however in addition to the decisions being outdated, the information provided is insufficient.

Age Discrimination in Employment Act of 1967

EEOC has written more than 30 policy documents on ADEA. Although useful for knowledgeable investigative staff, newer investigators and the general public may have difficulty understanding these policies, although the newly released threshold guidelines should provide some clarity.[177] EEOC guidance appears to follow court decisions in a timely fashion, and EEOC writes policy guidance as needed to respond to such decisions. EEOC was prolific in its development of ADEA policy guidance between 1986 and 1991, although production has fallen off since then. Several of EEOC's policy documents have focused on employee benefits[178] and enforcement issues, including exemptions and remedies.[179]

Most significantly, in 1997 EEOC issued a notice of proposed rule making on waivers of rights on claims under ADEA. Since the 1980s, between 30 million and 40 million employees have lost their jobs through downsizing or restructuring. Many employers who were downsizing sought to have their employees sign releases in exchange for severance packages.[180] This caused considerable debate about whether these releases or waivers of rights violated ADEA. Since then, it has been determined that releases or waivers under ADEA are subject to the "knowing and voluntary" common law standard.[181] Congress continually suspended this rule until 1990 when the Older Workers Benefits Protection Act (OWBPA) was enacted.[182] The OWBPA amended ADEA in two respects. First, the OWBPA clarifies that age discrimination in virtually all forms of employee benefits is unlawful.[183] Second, the OWPBA ensures that older workers will not be coerced or manipulated into waiving their rights to seek legal relief under ADEA.

Under OWBPA there are seven listed requirements that must be satisfied before a court may proceed to determine factually whether the execution of a waiver was "knowing and volun-

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[174] Ibid., § 628.6(a).

[175] 29 C.F.R. § 1605 (1999).

[176] EEOC, *Compliance Manual*, § 628.6

[177] *See* EEOC, "Threshold Issues for Addressing Bias Complaints."

[178] *See, e.g.*, EEOC, "Policy Statement: Application of Section 4(f)(2) of the Age Discrimination in Employment Act of 1967 (ADEA), as Amended, to Defined Contribution Plans," EEOC Notice No. N-915, Sept. 4, 1987 (reprinted in EEOC, *Compliance Manual*, p. N:1211); EEOC, "Policy Statement: Application of Section 4(f)(2) of the Age Discrimination in Employment Act of 1967 (ADEA), as Amended, to Life Insurance and Long-Term Disability Plans," EEOC Notice No. N-915, Oct. 10, 1987 (reprinted in EEOC, *Compliance Manual*, p. N:1215); EEOC, "Policy Statement: Application of Section 4(g) of the Age Discrimination in Employment Act of 1967 (ADEA), as Amended, Coverage of Older Workers Under Group Health Plans," EEOC Notice No. N-915-026, May 12, 1988 (reprinted in EEOC, *Compliance Manual*, p. N:1225); EEOC, "Request for Comments on *Betts*" (29 CFR § 1625), April 1992 (reprinted in EEOC, *Compliance Manual*, p. N:1235); EEOC, "Policy Guidance on Application of ADEA § 4(f)(2) to Cases Ending Life Insurance Coverage for Employees Totally Disabled After Age 60," EEOC Notice No. N-915-023, Mar. 21, 1988 (reprinted in EEOC, *Compliance Manual*, p. N:1241); EEOC, "Policy Statement: Cases Involving the Extension of Additional Benefits to Older Workers," EEOC Notice No. N-915-029, June 1988 (reprinted in EEOC, *Compliance Manual*, p. N:3801).

[179] EEOC, "Policy Guidance: The Processing of Charges Where There is a Collective Bargaining Agreement or an Individual Employment Contract Requiring Arbitration of Age-Discrimination-Related Issues," EEOC Notice No. N-915-060, Aug. 29, 1990 (reprinted in EEOC, *Compliance Manual*, p. N:1321).

[180] Alfred W. Blumrosen, "The Equal Employment Opportunity Commission," pp. 71–95 in Corrine M. Yu and William L. Taylor, eds., *New Challenges: The Civil Rights Record of the Clinton Administration Mid-Term* (Washington, DC: Citizens' Commission on Civil Rights, 1995), pp. 84–85.

[181] Matthew T. Schaefer, "*Wamsley v. Champlin Refining & Chemicals, Inc.*: A Flawed Interpretation of the Waiver Provisions of the Older Workers Benefit Protection Act," *Capital University Law Review*, vol. 24 (1995), pp. 257, 263 (hereafter cited as Schaefer, "A Flawed Interpretation of the Waiver Provisions").

[182] Ibid.

[183] 29 U.S.C. § 621 (1994 and Supp. III 1997).

tary."[184] These requirements are (1) the waiver must be part of a written agreement; (2) the waiver must specifically refer to the rights and claims arising under ADEA; (3) the waiver may not affect any rights or claims that arise after the date of the agreement; (4) consideration must be provided for the waiver; (5) the individual must be given 21 (or in some instances 45) days within which to consider the agreement; (6) the individual must be given seven days within which to revoke the agreement; and (7) the worker must be advised to consult with an attorney.[185]

In responding to this issue, in April 1997 EEOC issued policy guidance on the use of waivers, and in 1998 the Agency issued final regulations on waivers of ADEA rights and claims.[186]

Retaliation

Protection from retaliation is one of the core principles of the NEP, and Vice Chairman Igasaki and EEOC's general counsel have indicated that EEOC is committed to supporting and protecting those who seek its services.[187] EEOC's Compliance Manual[188] highlights the need for and the scope of EEOC's authority to accept, investigate, and resolve charges and complaints of alleged unlawful retaliation against those who oppose employment discrimination or participate in the Title VII or ADEA process.[189]

EEOC makes it clear that all acts of retaliation will be viewed on a case-by-case basis and that, while the Agency will strictly enforce the retaliation provisions, the broad protections afforded to individuals who utilize the discrimination laws are not limitless.[190] EEOC indicated that in looking at each instance on a case-by-case basis, it will look for the seriousness of the actions, especially the use of violence in any form.[191] Further, the denial of rights when accompanied by threats to take adverse employment action, constructive discharge resulting from the denial of a charging party's right to protest, or the combining of the right to employment with the ceasing of protesting or harassment and intimidation, are also considered extreme in nature and will result in EEOC taking serious action.[192]

Litigation as a Policy Development Tool

In pursuing the development of regulations and policies, EEOC seeks, in part, to guide the development of the laws it enforces.[193] One of EEOC's most important goals, according to its NEP, is the development of a unified litigation strategy and the development of cases that have the potential of promoting the development of law supporting the antidiscrimination purposes of the statutes EEOC enforces.[194] Similarly, EEOC undertakes the development of policy guidance to offer the Agency's interpretation of complex provisions of law to facilitate compliance with the statutes.[195]

Two units in the Office of General Counsel, in particular, are actively involved in EEOC's policy development through litigation. The Systemic Enforcement Services unit develops EEOC policy through the pursuit of systemic cases.[196] Appellate Services furthers EEOC policy development through the filing of *amicus* briefs in cases before the U.S. courts of appeals. The Appellate Services Unit uses *amicus* and appeals of its own cases to develop and clarify the law. The unit looks for cases at the court of appeals level that might resolve unsettled issues of law. *Amicus* briefs serve as official EEOC policy posi-

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[184] Schaefer, "A Flawed Interpretation of the Waiver Provisions," pp. 257, 267.

[185] Ibid., pp. 257, 263. *See also* 29 U.S.C. § 621 (1994 and Supp. III 1997).

[186] In 1996 EEOC also determined that the protections of ADEA apply to apprentices and is currently involved in a major ongoing rule-making project regarding ADEA prohibitions against the use of "tender back" in connection with challenges to waivers. Vargyas letter, p. 27. *See also* 64 Fed. Reg. 19952 (Apr. 23, 1999).

[187] Igasaki interview; Stewart interview, pp. 4–5.

[188] Section 8 of the new *Compliance Manual* was issued in 1997 along with a transmittal letter which stated that the old section 614 was to be replaced by the new section 8. In addition, the May 2000 update to the *Compliance Manual* summarizes the information in the retaliation chapter. *See* EEOC, "Threshold Issues for Addressing Bias Complaints," § 2A(5).

[189] EEOC, *Compliance Manual*, § 8.

[190] Ibid.

[191] Ibid.

[192] Ibid.

[193] EEOC, *National Enforcement Plan*, p. 1.

[194] Ibid., p. 5.

[195] EEOC, "Strategic Plan: 1997–2002," OMB Review Copy, Aug. 18, 1997, pp. 17–18.

[196] USCCR, *Helping Employers Comply with the ADA*, p. 76.

tions, particularly in cases where the issues have not previously been addressed by EEOC.[197]

EEOC's general counsel, C. Gregory Stewart, explained that development of policy through litigation and through policy guidance is a continuum; both are tools that help EEOC reach the same goal.[198] He described the relative advantages of litigation and development of policy guidance as policy-making tools for the EEOC, stating that in some cases litigation is more appropriate than policy guidance because the situation is fact specific. In other circumstances, policy guidance may be more appropriate. Furthermore, the number of issues that arise makes it unfeasible to establish policy guidance on every subject. In addition, it is sometimes preferable to let an issue move through the courts, after which time there may be a need for guidance, or there may not. Therefore, according to General Counsel Stewart, policy guidance and litigation are two very complementary ways of developing the law.[199]

OGC does not have a separate strategic litigation plan; however, the general counsel indicated that the NEP directs his priorities. He indicated that he was involved in drafting the NEP, and although his office has limited resources and a broad mandate under the four statutes, when necessary, the pursuit of litigation has been an effective enforcement tool.[200]

The NEP accomplishes several things from the perspective of litigation.[201] First, it states a preference for pursuing litigation with the largest impact on discrimination in the workplace. Thus, the Office of General Counsel has a directive to develop and prosecute class or pattern and practice cases. Second, the NEP helps articulate preferred, high-priority issues, but enables field offices to control the priority of unique local issues.[202] The latter is accomplished through the Local Enforcement Plans, which are developed as a requirement of the NEP. Third, the plan authorizes the general counsel to delegate authority over certain individual cases of discrimination to the regional attorneys, keeping the discretion for these cases at the local level rather than requiring approval from headquarters.[203]

General Counsel Stewart described the current system, operating under the NEP, as one he prefers because, while it achieves a balance between independence and oversight of the field offices, it also helps to ensure that lower priority individual cases are not overlooked in the effort to litigate cases with more impact. He described it as strategic enforcement: setting priorities through consultation with national and local stakeholders about important issues needing enforcement.[204]

CONCLUSION

EEOC has done a good job developing and disseminating national Agency policy. In the mid-1990s, one legal scholar wrote that EEOC had not made serious changes in the policies and practices developed during the 12 years of the Reagan-Bush administration—policies and practices that narrowed EEOC's enforcement of the antidiscrimination laws.[205] Since that time, EEOC has worked hard to change public perception and has made significant strides in the development of national policy, specifically with its Priority Charge Handling Procedures, National Enforcement Plan, and Comprehensive Enforcement Program. Nonetheless, despite making significant strides in this area, EEOC has not kept pace with the development and dissemination of regulatory guidelines or subregulatory policy guidance in all areas where guidance is needed.

For instance, while most NEP concepts have at least been reviewed, EEOC has not produced guidance on all the key issues of the NEP. An example of this is race discrimination. Even though EEOC has been actively litigating race issues, the Agency does not have a regulatory guideline on race. It is clear that, at the same time, EEOC has been very active with ADEA, ADA, and national origin issues, producing valuable policies in those areas. In general, when EEOC has produced guidance on an issue, it has been timely, useful, and for the most part

[197] Ibid.

[198] Stewart interview, pp. 5–7.

[199] Ibid.

[200] Ibid.

[201] Ibid.

[202] Ibid.

[203] Ibid.

[204] Ibid.

[205] Blumrosen, "The Equal Employment Opportunity Commission," p. 103.

easy to understand. The process of developing the guidance, however, should be re-evaluated.

Despite significant community concern surrounding issues of employment discrimination, EEOC still has not adopted a formal strategy for public review or participation in the development of its subregulatory policy guidance. It is clear that EEOC has taken a carefully considered approach to seeking out information from its stakeholders, however, that is only part of the process. There should also be a point where the stakeholders may then review what has been done, before EEOC's issuance of the guidance. This is not to suggest that EEOC should adopt a formal notice and comment period as prescribed by the Administrative Procedures Act (APA) for regulatory guidance, which would be both cumbersome and unfeasible, but rather that the Agency should devise standards for obtaining public input and review in a regular and systematic way. This might include setting aside time before the release of a policy where external agencies can review and comment on suggested revisions, similar to the process EEOC already has with respect to its commissioners' review. EEOC has a dissemination process whereby after approval by the chairwoman's office, the draft is circulated to the commissioners' offices, through the Agency's Office of the Executive Secretariat, for a three-week review and briefing period. At the end of that period, commissioners are requested to provide their comments and any requested changes, and the comments are then incorporated to the extent possible.[206]

EEOC also does not have a formal mechanism that starts much earlier in the review process for the identification of those potential policy issues that will be presented to the commissioners for consideration. Specifically, EEOC should establish intervals during which it will review developments in the law surrounding each statute and NEP priority. Appropriate time intervals could be every six months or every year. EEOC could then assign staff to monitor trends to determine if a policy proposal should be presented to the commissioners. The proposals could be for action to amend, rescind, or address issues through the development of regulatory policy guidelines or subregulatory policy guidance.

Despite these procedural shortcomings, EEOC's record during the past five years is considerably better than it had been and shows signs of continued improvement. EEOC should be commended for making significant strides in the development of national policy and should be pushed and encouraged to follow that success with the development and dissemination of regulatory guidelines and subregulatory policy guidance.

[206] Vargyas letter, p. 31.

TABLE 4-1

EEOC Regulations

Title	Cite 29 C.F.R. §
New Regulations (not yet codified in the CFR)	
Amending the Interpretive Guidance On Title I of the Americans with Disabilities Act: Final Rule	
Sex Discrimination Guidelines and National Origin Discrimination Guidelines: Final Rule	
Federal Sector Equal Employment Opportunity: Final Rule	
Proposed Regulations	
Proposed Rule making to Update EEOC's Regulation Against Disability Discrimination in Federal Employment	
Existing Regulations	
Employee Responsibilities and Conduct	1600
Procedural Regulations	1601
Record-keeping and Reporting Requirements Under Title VII and the ADA	1602
Procedures for Previously Exempt State and Local Government Employee Complaints of Employment Discrimination Under Section 321 of the Government Employee Rights Act of 1991	1603
Guidelines on Discrimination Because of Sex	1604
Guidelines on Discrimination Because of Religion	1605
Guidelines on Discrimination Because of National Origin	1606
Uniform Guidelines on Employee Selection Procedures (1978)	1607
Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, as amended	1608
Availability of Records	1610
Privacy Act Regulations	1611
Government in the Sunshine Act Regulations	1612
Federal Sector Equal Employment Opportunity	1614
Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the EEOC	1615
The Equal Pay Act	1620
Procedures—The Equal Pay Act	1621
Age Discrimination in Employment Act	1625
Procedures—Age Discrimination in Employment Act	1626
Records to be Made or Kept Relating to Age: Notices to be Posted: Administrative Exemptions	1627
Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act	1630
Procedures for Coordinating the Investigation of Complaints or Charges of Employment Discrimination Based on Disability Subject to the ADA and Section 504 of the Rehabilitation Act of 1973	1640
Procedures for Complaints/Charges of Employment Discrimination Filed Against Employers Holding Government Contracts or Subcontracts	1641
Debt Collection	1650
Procedures for Interagency Coordination of Equal Employment Opportunity Issuances	1690
Procedures for Complaints of Employment Discrimination Filed Against Recipients of Federal Financial Assistance	1691

TABLE 4-2

Significant EEOC Enforcement Guidance and Related Documents Since 1990

Title	Date
Enforcement Guidance on Disability Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act	July 26, 2000
Policy Guidance on Executive Order 13145: To Prohibit Discrimination in Federal Employment Based on Genetic Information	July 26, 2000
Threshold Issues for Addressing Bias Complaints (Section 2 of the New Compliance Manual)	May 12, 2000
Guidelines on the Definition of the Terms "Disability" and "Qualified"	Feb. 1, 2000
Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws	Oct. 26, 1999
Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors	June 21, 1999
Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act	Mar. 1, 1999
Guidance on Retaliation (Section 8 of the New Compliance Manual)	May 20, 1998
Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms	Dec. 8, 1997
Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions	Oct. 31, 1997
Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment	July 10, 1997
EEOC Guidance on Counting Employees to Determine Jurisdiction	May 5, 1997
Enforcement Guidance on EEOC and Walters v. Metropolitan Educational Enterprises, Inc.	May 2, 1997
Enforcement Guidance on Non-Waivable Employee Rights Under EEOC Enforced Statutes	Apr. 11, 1997
Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities	Mar. 25, 1997
Enforcement Guidance on the Effect of Representations Made in Applications for Benefits on the Determination of Whether a Person Is a "Qualified Individual with a Disability" Under the Americans with Disabilities Act of 1990	Feb. 12, 1997
Letter to the National Labor Relations Board Stating the Commission's Position that, Under Limited Specified Circumstances, Title I of the ADA Permits and Employer to Give a Union Medical Information About an Applicant or Employee	Nov. 1, 1996
Enforcement Guidance on O'Connor v. Consolidated Coin Caterers Corp.	Sept. 18, 1996
Enforcement Guidance: Workers' Compensation and the ADA	Sept. 3, 1996
Enforcement Guidance: Whether "Testers" Can File Charges and Litigate Claims of Employment Discrimination	May 22, 1996
Enforcement Guidance on After-Acquired Evidence and McKennon v. Nashville Banner Publishing Co.	Dec. 14, 1995
ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations	Oct. 10, 1995
Enforcement Guidance: Questions and Answers About Disability and Service Retirement Plans Under the ADA	May 11, 1995
Section 902: Definition of the Term "Disability"	Mar. 14, 1995
EEOC Enforcement Guidance on St. Mary's Honor Center v. Hicks	Apr. 12, 1994
Enforcement Guidance on Application of Title VII and the Americans with Disabilities Act to Conduct Overseas and to Foreign Employers Discriminating in the United States	Oct. 20, 1993
Enforcement Guidance on Coverage of Federal Reserve Banks	Oct. 20, 1993
Enforcement Guidance on the Effect of Section 112 of the Civil Rights Act of 1991 on the Supreme Court Decision in Lorance v. AT&T Technologies, Inc. and Charges Involving Seniority Systems	Oct. 20, 1993
Enforcement Guidance on Harris v. Forklift Systems, Inc.	Sept. 9, 1993

TABLE 4-2 (cont.)

Title	Date
Interim Enforcement Guidance on the Application of the Americans with Disabilities Act of 1990 to Disability-Based Distinctions in Employer Provided Health Insurance	June 8, 1993
Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991	July 14, 1992
Enforcement Guidance on Recent Developments in Disparate Treatment Theory	July 14, 1992
Policy Guidance: What Constitutes an Employment Agency Under Title VII, How Should Charges Against Employment Agencies Be Investigated, and What Remedies Can Be Obtained for Employment Agency Violations of the Act?	Sept. 20, 1991
Policy Guidance on Supreme Court's Johnson Controls Decision	June 28, 1991
Arrest Records in Employment Decisions Under Title VII	Sept. 7, 1990
Circumstances where the Award of Prejudgment Interest is Appropriate	Aug. 29, 1990
Arbitration and ADEA	Aug. 29, 1990
Policy Guidance on Parental Leave	Aug. 27, 1990
Prohibition Against Discrimination in Employment on Basis of Disability	Aug. 14, 1990
Preliminary Relief under ADEA and Title VII	Aug. 13, 1990
Veteran's Preference Under Title VII	Aug. 10, 1990
Remedies Under ADEA: Violation by Labor Organizations	May 11, 1990
Deduction of Pension Payments from Back Pay Awards	May 11, 1990
Policy Guidance on Current Issues of Sexual Harassment	Mar. 19, 1990
Policy Guidance: Religious Organizations that Pay Women Less than Men in Accordance with Religious Beliefs	Feb. 1, 1990
Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism	Jan. 12, 1990

CHAPTER 5

EEOC's Enforcement Activities

The main function of the U.S. Equal Employment Opportunity Commission (EEOC)[1] is the enforcement of the fair employment statutes under its jurisdiction. It has been said that EEOC's effectiveness in enforcing the antidiscrimination laws with which it is charged determines the extent to which those laws have any real impact on the lives of American workers.[2] For many years, particularly during the 1980s and early 1990s, the Agency failed to fulfill this mandate. However, EEOC has been attempting to reinvent its enforcement efforts. As discussed earlier in this report, EEOC has undergone many changes in administration and, accordingly, has made many changes in policies and procedures since its inception. The information cited in the following chapters mainly focuses on those events that have occurred during the tenure of the Agency's current administration and its immediate predecessor.

As discussed in chapter 4, EEOC's overriding policy stance, with respect to carrying out its enforcement mission and goals, has evolved over time to reflect changes in the Agency's priorities and needs. How those policies are implemented, both theoretically and practically, are reflected in the mechanics of the Agency's enforcement procedures. Enforcement, as a broad concept, encompasses both the administrative processes with respect to specific charges of discrimination, as well as the promulgation of policy, litigation, and the attainment of remedial actions where violations of the law have occurred.

[1] EEOC may be also be referred to hereafter as the "Agency."

[2] Helen Norton, "Equal Employment Opportunity," pp. 97–105 in Corrine M. Yu and William L. Taylor, eds., *The Continuing Struggle: Civil Rights and the Clinton Administration* (Washington, DC: Citizens' Commission on Civil Rights, 1997).

A MOVE TOWARD STRATEGIC ENFORCEMENT

EEOC receives between 75,000 and 80,000 new charges each year.[3] This large caseload and the Agency's lack of comparable funding over the years required a reassessment of how charges would be processed to prevent the continued accumulation of a charge "backlog." Prior to her appointment, Chairwoman Ida L. Castro reviewed EEOC's active procedures and determined that the Agency needed to refine its internal processes to better integrate enforcement and litigation.[4] Under her direction, emphasis has been placed on "strategic enforcement," which calls for "the development of a methodology that ensures early recognition of charges that have potential for the most significant impact on eradicating discrimination."[5]

The methods for achieving strategic enforcement are outlined in the Agency's Comprehensive Enforcement Program (CEP), which was developed to forge a more cohesive approach to enforcement by linking the strategies of the National Enforcement Plan (NEP) and Local Enforcement Plans (LEPs) with the Agency's primary workload management tool, the Priority

[3] Elizabeth Thornton, director, Office of Field Programs, U.S. Equal Employment Opportunity Commission (EEOC), interview in Washington, DC, Nov. 9, 1999, p. 6 (hereafter cited as Thornton interview, Nov. 9, 1999). This number significantly increases when including those charges received by contracting state and local fair employment practices agencies (FEPAs). *See* discussion pp. 101–02 and chap. 6.

[4] Ida L. Castro, chairwoman, EEOC, interview in Washington, DC, Mar. 8, 2000, p. 1 (hereafter cited as Castro interview).

[5] EEOC, *Implementation of the National Enforcement Plan Through the Comprehensive Enforcement Program*, Mar. 6, 2000, p. 12 (hereafter cited as EEOC, *Comprehensive Enforcement Program*). *See* discussion about charge categorization, pp. 114–21.

Charge Handling Procedures (PCHP).[6] The CEP cites EEOC's changing caseload and the percentage increase in potentially meritorious charges as catalysts for the new enforcement approach. It should be noted that the CEP has been in place at EEOC since May 1999 when a draft copy was circulated among district directors and regional attorneys.[7] The plan has since undergone several revisions and has been continually refined by internal stakeholder groups, such as staff and the union. A final version was circulated in March 2000.[8]

There are several key elements of the CEP that focus specifically on EEOC's enforcement approach and methods by which enforcement procedures can be enhanced. Among those that will be discussed in greater detail throughout this chapter are:

- promoting the working relationships between legal and administrative enforcement staff;
- enhancing charge intake, interview, and initial investigation functions;
- ensuring a more strategic approach to civil rights enforcement, both locally and nationally, through the development of the most significant discrimination charges and the determination of which charges are the most suitable for litigation;
- implementing a Strategic Litigation Plan; and
- establishing results-oriented measurements of performance.[9]

District offices are responsible for developing programs and initiatives in accordance with the CEP objectives. The CEP provides that district offices should use their LEPs to "strategically prioritize cases which are the most likely to serve the public interest and address issues of particular importance" within the office's jurisdiction.[10] In particular, district offices should pursue cases that reveal systemic discrimination, egregious acts, and issues of law that require clarification as priorities.[11] Under those guidelines, EEOC enforcement staff have been charged with developing and restructuring programs at the district level that will result in more effective use of resources and more efficient processing of charges. These programs are to include the following elements:

- a plan to promote the early identification and development of strategic and significant impact cases;
- assessment of the demographics within each district's jurisdiction in relation to charge filings; and
- identification of priority issues that overlap district lines.[12]

The CEP further cautions that district offices' strategic enforcement plans should include a sufficient number of priority charges to ensure that the district will achieve expected results, and yet be small enough to be managed and prioritized effectively.[13] In other words, district offices are responsible for narrowing the scope of their enforcement priorities to include those issues that are most critical and to achieve a level that is feasible given their resources.

The Role of the Local Enforcement Plan

The National Enforcement Plan (NEP) developed in 1996 required each district office to develop a Local Enforcement Plan (LEP) identifying the priority issues specific to each region based, in part, on demographics, and outlining outreach plans to target underserved communities. The LEPs were originally slated to be updated every two years. The original plans were updated in 1998; however, the updated plans were not approved because EEOC was awaiting the confirmation of a permanent chairperson.[14] When Chairwoman Castro took office and the Comprehensive Enforcement Program was implemented, it was decided that the CEP should be included as an integral component of the re-

[6] Ibid., pp. 1–2.

[7] A. Jacy Thurmond, assistant legal counsel, Legal Services Program, EEOC, telephone conversation, Apr. 20, 2000.

[8] Castro interview, p. 1.

[9] EEOC, *Comprehensive Enforcement Program*, pp. 3–4.

[10] Ibid., p. 12.

[11] Ibid.

[12] Ibid.

[13] Ibid.

[14] Ellen J. Vargyas, legal counsel, EEOC, letter to Ruby G. Moy, staff director, U.S. Commission on Civil Rights (USCCR), July 7, 2000, re: comments on draft report, p. 32 (hereafter cited as Vargyas letter).

vised LEPs. In October 1999, the Office of Field Programs (OFP) and the Office of General Counsel (OGC) requested that district offices develop new LEPs based on the CEP and using a uniform format developed by both offices.[15] Those plans were finally approved in July 2000, after review and consultation by OFP and OGC.[16]

Under the Comprehensive Enforcement Program, the LEPs serve as the foundation on which to develop a strategic enforcement and litigation program.[17] The revised LEPs are to outline methods to be followed by the district offices to achieve this goal. Therefore, the CEP recommends that district office staff receive training on LEP priorities so that they can be incorporated into charge intake, resolution, and litigation.[18] Secondly, district offices' outreach activities should be consistent with the goals of the office and should focus on reaching underserved populations to ensure that the Agency's services are available to all populations and that the office's charge inventory accurately reflects the types of discrimination that may be occurring in the region.[19] Part of this outreach will entail networking with stakeholder organizations and community groups to gain their support. In addition, each district office is required to coordinate efforts with state or local fair employment practices agencies (FEPAs) in the development of their strategic plans.[20]

Attorney-Investigator Interaction

A major component of the CEP is the promotion of closer working relationships between legal and administrative enforcement staffs. It stipulates that communication between investigators and attorneys should be more effective and frequent, and there should be a heightened degree of consultation so that charges can be resolved more expeditiously.[21]

The respective responsibilities of enforcement and legal staffs must be viewed and valued not as separate functions associated with two compartmentalized processes, but on a continuum from outreach to charge receipt, investigation, and final resolution (whether by mediation, settlement, conciliation, or litigation).[22]

The procedures put in place to ensure this interaction and the extent to which collaboration actually occurs in the district offices are discussed in greater detail below. The goal, however, is that the enhanced relationship will provide greater breadth in the Agency's outreach efforts, facilitate comprehensive investigations, achieve more timely resolutions to cases, and aid in developing a more strategic litigation docket.[23]

Attorneys are responsible for reviewing all new charges and are to be assigned to all potential litigation cases to ensure that the investigator primarily responsible for the charge has access to legal advice. Development of litigation charges is the joint responsibility of both investigators and legal staff. Specifically, for potential litigation cases, there should be regular ongoing contact between investigators and attorneys, including the creation of a written case development plan.[24] With respect to other cases, investigators and attorneys are encouraged to confer on an informal basis.[25] Conversely, investigators are to be given the opportunity to provide support with respect to litigation activities so that they can gain "a contextual overview" and "see the fruits of their labor."[26]

The notion of creating a system where attorneys and investigators share the responsibilities for identifying priority cases and jointly developing litigation cases is a commendable one and has been a recurring goal at EEOC under past administrations. However, the extent to which attorney-investigator interaction will be fostered in the Agency's current climate remains to be seen. According to one regional attorney, there are some attorneys and investigators who ap-

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[15] Vargyas letter, p. 32. *See also* C. Gregory Stewart, general counsel, and Elizabeth M. Thornton, director, Office of Field Programs, EEOC, memorandum to district directors and regional attorneys, Oct. 1, 1999, re: Guidance on Drafting Local Enforcement Plans.

[16] Joseph Cleary, assistant legal counsel for policy development, Office of Legal Counsel, EEOC, telephone conversation, Jan. 21, 2000. During the fact finding stages of this report, approval was still pending and, therefore, the Commission was unable to review the draft versions.

[17] EEOC, *Comprehensive Enforcement Program*, p. 12.

[18] Ibid., p. 13.

[19] Ibid. *See* chap. 7 for discussion about EEOC's outreach and technical assistance efforts.

[20] Ibid. *See* chap. 6 for discussion about FEPAs.

[21] Ibid., p. 4.

[22] Ibid., p. 5.

[23] Ibid.

[24] Ibid., p. 6.

[25] Ibid.

[26] Ibid., p. 7.

pear wedded to the old practices which did not foster much collaboration, but rather emphasized the notion of distinct roles in case development.[27] Senior district office staff have focused much of their energy in the last year figuring out how to improve this interaction but have not as yet completely achieved the desired result.[28] EEOC acknowledges that because the Agency is in the beginning stages of implementing this policy, it will take time for the interaction between attorneys and investigators to operate successfully in all field offices.[29] However, in the view of one regional attorney, when the interaction has been successful, it has resulted in some of the best cases the Agency has litigated.[30]

Strategic Litigation Plan

The Strategic Litigation Plan is another integral component of the CEP. Its basic premise is that litigation resources must be strategically targeted to the development of cases that will produce a balanced docket and advance the positions and policies of EEOC with respect to its mission.[31] The goals of the Strategic Litigation Plan are to:

- attain relief for substantial numbers of workers in instances of employment discrimination;
- reinforce the Agency's policy-making function by coordinating the filing of law suits with the development of new policy positions;
- clarify important, unresolved legal issues;
- demonstrate that the federal government has a credible enforcement program;
- provide broad deterrence for future acts of discrimination; and
- educate the public about employee rights under federal civil rights laws.[32]

To those ends, the CEP requires that district directors and regional attorneys maintain a strategic case docket that is assessed on a regular basis and, where necessary, develop commissioner charges, directed investigations, and third-party charges to balance the docket.[33] To develop the docket, potential litigation charges are to be identified as early as possible, first by investigative staff designation and then with review by legal staff. This requires more detailed investigations at intake, including the identification of potential patterns of discriminatory practices.

According to the Strategic Litigation Plan, EEOC will maintain a list of the five most significant lawsuits on the dockets of each district office at any given time, and will draw from those lists the 20 most significant lawsuits pending at anytime nationally.[34] Each district office is in turn expected to maintain a list of its top 20 significant cases. The expected outcome of the CEP's litigation strategy is that the Agency will maintain a litigation docket of between 450 and 550 lawsuits with an increasing percentage over time of those suits seeking relief for more than one aggrieved individual, moving the Agency's focus toward cases with broader impact.[35]

EEOC'S CHARGE PROCESSING PROCEDURES

When combining the charges received through contracting state and local fair employment practices agencies (FEPAs) and EEOC itself, the total number of charges received by the Agency has been roughly 138,000 to 155,000 charges each fiscal year (FY) from 1993 to 1999 (see table 5-1).[36] The charges received are of increasing complexity, as more than 10 percent are filed under two or more statutes with corresponding multiple bases and multiple issues (see

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[27] Lynn Bruner, district director, Richard Schuetz, deputy director, and Robert Johnson, regional attorney, St. Louis District Office, EEOC, interview in St. Louis, MO, Feb. 1, 2000, p. 2 (hereafter cited as Bruner, Schuetz, and Johnson interview, St. Louis District Office, Feb. 1, 2000).

[28] Ibid.

[29] Vargyas letter, p. 33.

[30] Bruner, Schuetz, and Johnson interview, St. Louis District Office, Feb. 1, 2000, p. 2.

[31] EEOC, *Comprehensive Enforcement Program*, p. 14.

[32] Ibid., p. 15.

[33] Ibid., p. 4.

[34] Ibid., p. 16.

[35] Ibid., p. 15.

[36] These tables were compiled from EEOC's database for tracking charges, the Charge Data System (CDS), which was provided to the Commission by EEOC. The information analyzed includes data as of Dec. 2, 1999. The Commission's analysis revealed numbers inconsistent with those published by EEOC. After consulting with EEOC data staff, various analyses were run that did not resolve the discrepancies between the analysis presented here and the figures appearing on EEOC's Web site. The numbers included in this report attribute the largest workload and effort to EEOC.

figure 5-2). The number of charges received also varies by district office. In FY 1999, for example, the number of charges received in each district office (including those received by area and local offices) ranged from approximately 1,000 to 6,000 charges. The Birmingham, Indianapolis, and Miami district offices received more than 5,000 charges in FY 1999. The Chicago District Office, which has no area offices, and the Atlanta and New York district offices received well over 4,000. The Albuquerque District Office, which also has no area offices, and the Washington, D.C., Field Office received roughly 1,000 charges in FY 1999 (see figure 5-1).

Taking into consideration the size and complexity of EEOC's case inventory, the CEP and the resulting strategic enforcement efforts were intended to serve as an umbrella mechanism to complement and support EEOC's existing methods for charge processing. During the past five years, many long-awaited and much-needed changes have been implemented to improve EEOC's charge handling procedures. The first, and perhaps most significant, change of the new era came with the initiation of the Priority Charge Handling Procedures (PCHP) in 1995 under the direction of former Chair Gilbert Casellas. The purpose of the PCHP was to eliminate the charge backlog that had burdened the Agency for more than a decade and to improve the quality of investigations through prioritization and early screening of charges. When the PCHP was implemented, EEOC had a backlog of approximately 111,000 open charges, requiring a reassessment of where to concentrate resources.[37] The PCHP rescinded the Agency's "full investigation" policy, which required investigation of every charge, in favor of a policy which allowed investigations to be appropriate to each individual charge.[38] Since the implementation of the PCHP, EEOC's charge inventory has decreased by 64 percent.[39]

The PCHP gave district offices the discretion to prioritize charges based on set with the expectation that this would not only reduce the Agency's backlog, but would also better serve complainants and charging parties.[40] Substantial decision making authority was given to frontline staff to determine which charges deserve the greatest amount of attention. The CEP reiterates that authority by emphasizing to the district offices that they should consider district-specific needs, i.e. the local reality, when implementing work practices within the framework of EEOC goals.[41] To that end, district offices have taken the initiative, in some instances to a greater success than others, to develop methods for implementing their programs that necessarily include certain standard procedures. Generally, charge processing involves the following steps: intake, categorization/prioritization, investigation, resolution/closure (including settlement), and possibly litigation.[42]

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[37] Thornton interview, Nov. 9, 1999, p. 2.

[38] EEOC, *Priority Charge Handling Procedures*, June 1995, p. 2.

[39] EEOC, "A Proud Legacy—A Challenging Future," *FY 2001 Budget Request* (Washington, DC: Submitted to the Congress of the United States, February 2000), p. 28 (hereafter cited as EEOC, *FY 2001 Budget Request*).

[40] *See* evaluation of charge prioritization, pp. 118–21.

[41] Castro interview, p. 13.

[42] *See generally* EEOC, *Compliance Manual*, "Overview," p. 0:3101.

TABLE 5-1

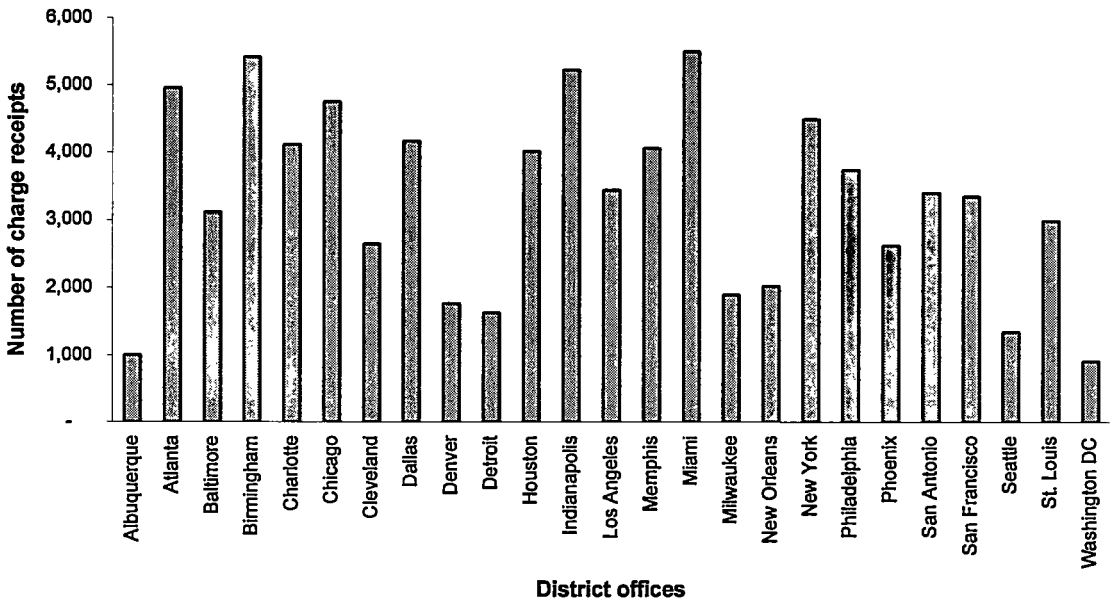
Characteristics of EEOC and FEPA Charge Receipts by Fiscal Year

	1993	1994	1995	1996	1997	1998	1999
				Number of charges			
Total charges	141,871	152,532	150,019	142,540	150,536	145,404	138,106
EEOC charges	86,137	93,915	91,705	85,480	90,090	87,676	82,428
Headquarters offices	*97*	*197*	*365*	*61*	*21*	*10*	*1*
District offices	*60,153*	*67,548*	*63,632*	*60,852*	*64,220*	*62,710*	*59,426*
Area or local offices	*25,886*	*26,168*	*27,708*	*24,567*	*25,840*	*24,954*	*23,000*
FEPA charges	55,733	58,617	58,314	57,060	60,446	57,728	55,678
				Percent of all charges			
Total charges	100.0	100.0	100.0	100.0	100.0	100.0	100.0
EEOC charges	60.7	61.6	61.1	60.0	59.8	60.3	59.7
Headquarters offices	*0.1*	*0.1*	*0.2*	*0.0*	*0.0*	*0.0*	*0.0*
District offices	*42.4*	*44.3*	*42.4*	*42.7*	*42.7*	*43.1*	*43.0*
Area or local offices	*18.2*	*17.2*	*18.5*	*17.2*	*17.2*	*17.2*	*16.7*
FEPA charges	39.3	38.4	38.9	40.0	40.2	39.7	40.3

SOURCE: EEOC, Charge Data System.

FIGURE 5-1

District Office Charge Receipts (including their area offices), FY 1999

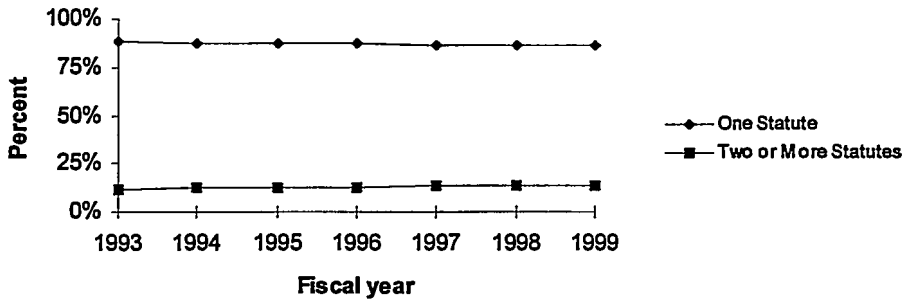


SOURCE: EEOC, Charge Data System.

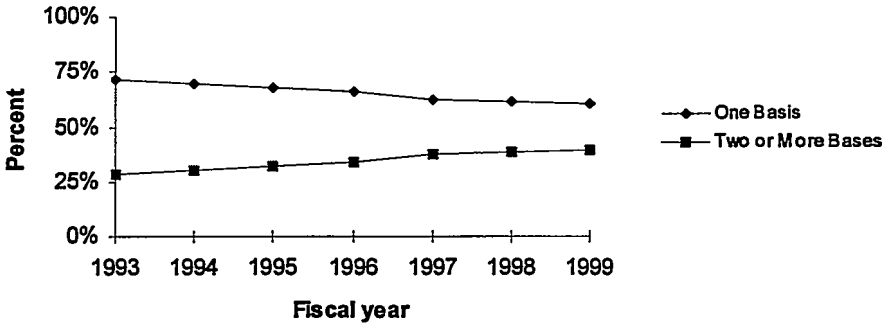
FIGURE 5-2

Complexity of Charge Receipts by Fiscal Year

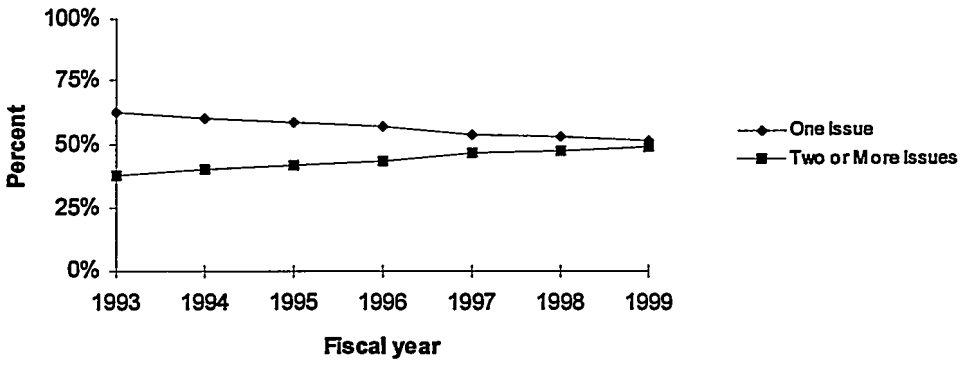
Percent of Charge Receipts Filed under One or More Statutes by Fiscal Year



Percent of Charge Receipts Filed Under One or More Bases by Fiscal Year



Percent of Charge Receipts with One or More Issues by Fiscal Year



SOURCE: EEOC, Charge Data System.

Charge Intake

EEOC discrimination proceedings against an employer usually begin when a charge is filed by an employee, former employee, rejected job applicant, or an individual or organization acting on an employee's behalf.[43] The processing of charges begins at the initial stage of development, which is called "charge intake." The importance of this function cannot be overstated, as it is the initial point of contact, and in many instances the only point of contact, between the potential charging party and the Agency. The thoroughness of the intake process often will determine the course a potential charge will or will not take.

Estimates of the number of complaint inquiries that actually become charges range between 20 and 50 percent in various district offices.[44] Because a large percentage of inquiries never actually become charges after initial consultation with EEOC staff, and many charges are being dismissed immediately following intake,[45] the process involved in the screening and drafting of charges is critical to the Agency's ability to ensure proper handling of allegations of discrimination.

Charge intake, if done thoroughly, is actually the preliminary stage of an investigation and should be treated as such. Chairwoman Castro has appropriately recognized the importance of intake in the CEP, which aims to enhance initial investigation of charges and early prioritization of charges, ultimately improving customer service.[46] The CEP asserts that charge intake is the "public's first and most memorable point of contact" with the Agency.[47] Therefore, the Agency must "insure that its intake function provides good customer service and has a strong investigative component so that its processes and structures support Agency goals."[48] By placing emphasis on intake, the CEP aims to compel intake staff to:

- obtain more thorough information at the earliest possible time, thus ensuring greater accuracy in the categorization and prioritization of charges, ultimately reducing the time required to bring charges to final resolution;
- identify quickly those cases which should be mediated;
- ensure that potential violations are swiftly identified, resourced as priorities, and given in-depth attention by both investigative and legal staff.[49]

To achieve these goals through the intake process, the CEP required district offices to develop pilot programs to implement these strategies. Some suggestions were given, including extending office hours, using rotational units rather than dedicated intake units, combining intake with other investigative functions, and elevating the visibility of the importance of the intake function.[50] The Office of Field Programs

[43] Charges also may be initiated by EEOC Commissioners. *See* discussion, pp. 161–64. In general, for a charge to be considered timely, it must be filed within 180 days from the date of the alleged discriminatory action. 42 USC § 2000e-5(e)(1)(1994); 29 CFR § 1601.13(a)(1) (1999). However, if a charge is first filed with a state agency, the time frame for filing is extended to 300 days. 29 CFR § 1601.13(b)(2)(ii) (1999).

[44] In the St. Louis District Office, 52 percent of inquiries became charges in FY 1999. In the Chicago District Office, approximately 50 percent of inquiries become charges. In the Birmingham and Phoenix district offices, approximately 20 percent of inquiries become charges. Bruner, Schuetz, and Johnson interview, St. Louis District Office, Feb. 1, 2000, p. 4; John Rowe, district director, and Judy Bowman, deputy director, Chicago District Office, EEOC, telephone interview, Mar. 15, 2000, p. 11 (hereafter cited as Rowe and Bowman interview, Chicago District Office); Allen Gosa, intake supervisor, and Linda Ross, investigative support assistant, Birmingham District Office, EEOC, interview in Birmingham, AL, Feb. 25, 2000, p. 3 (hereafter cited as Gosa and Ross interview, Birmingham District Office); Krista Watson, charge receipt and technical information supervisor, memorandum to Charles Burtner, district director, Phoenix District Office, EEOC, Mar. 9, 2000, re: report on inquiries/charges as requested.

[45] Since charge prioritization procedures have been implemented, 6 to 7 percent of charges have been closed within 30 days of receipt. In fact, the percent of charges closed in 30 days or less is double what it was before charge prioritization. (*See* EEOC, Charge Data System as of Dec. 2, 1999.) Of charges closed because of lack of jurisdiction, the percent closed in 30 days or less has steadily increased, from about 12 percent in FYs 1994 and 1995 to 23 percent in FY 1999. Of charges closed with a right-to-sue letter issued to the charging party, the percent closed in 30 days or less has increased from 8 percent in FYs 1993 and 1994 to 18 percent in 1999. Ibid. These trends may be partially attributed to the fact that, as the prioritization procedures have been perfected, investigative staff have become more adept at identifying those charges that should be dismissed early on.

[46] EEOC, *Comprehensive Enforcement Program*, p. 8.

[47] Ibid.

[48] Ibid.

[49] Ibid., pp. 3–4.

[50] Ibid., p. 11.

(OFP) was responsible for approving the intake models used in the field. However, OFP, as the office charged with coordination of the field offices, has not developed a process to ensure the facilitation of charge intake and does not instruct district offices specifically on how to fashion intake procedures.[51]

The OFP director stated that headquarters staff will look at district office procedures to identify problems and will offer assistance by sharing information on procedures that have been effective in other offices.[52] Headquarters staff also stated that a program analyst is assigned to each district office to provide oversight and conduct regular site visits to examine various aspects of the PCHP, including intake.[53] In general, however, this level of oversight was not reflected in interviews with field office staff. Interviews with staff in several district offices revealed that OFP visits to district offices occur about once every two years, and it appears that seldom does headquarters conduct formal reviews of intake procedures.[54] In fact, the OFP director acknowledged that technical assistance is most frequently provided to the field offices in response to specific complaints or when the field office requests assistance.[55] District offices are left to determine for themselves the way in which to carry out the intake function. While this autonomy has the benefit of allowing offices to tailor their programs to reflect the dynamics of the office and the needs of the community, some offices have been more successful than others. Regardless of structure, the ultimate goal of the intake function, as articulated by the CEP, should be improved customer service,[56] a goal that, as will be discussed later, continues to elude the Agency.

Intake Models

Review of intake procedures in various district offices reveals that the offices have, in fact, taken advantage of the latitude given to them to develop programs best suited to the dynamics of each office. However, most offices have some variation of one of two intake models: the rotational unit or the dedicated unit. In the dedicated intake model, a number of investigators are permanently assigned to the primary function of charge receipt. In the rotational system, all investigators serve in the intake function for a period of time at regularly scheduled intervals.[57]

For example, the Baltimore District Office has implemented a rotational intake model, whereby three staff "pods" made up of investigators, attorneys, and support staff, rotate into the intake function for periods of two weeks at a time.[58] The investigators actually perform the intake function, but the attorneys are involved in the prioritization of charges, development of investigation strategies, and assistance with particularly egregious cases.[59] There is also a permanent Charge Receipt and Technical Information Unit, which provides support for intake staff and receives all mail and telephone complaints. As they come in, those charges are referred to the staff on intake rotation.

The Seattle District Office has implemented a rotational intake model, but it differs from the standard rotational unit in that rotations parallel the office's appointment system.[60] Each quarter, investigators sign up for an equal number of slots or intake days, averaging out to about nine days per investigator per quarter. Three days a week (Tuesday, Wednesday, and Thursday) three appointment times are available for intake interviews. On Monday and Friday, an investigator is assigned to handle any walk-in complainants. A backup investigator sees individuals who walk in without an appointment on the

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[51] Thornton interview, Nov. 9, 1999, p. 6.

[52] Ibid.

[53] Vargyas letter, p. 35.

[54] *See, e.g.,* Michael Fetzer, acting director, and Barbara Veldhuizen, deputy director, Baltimore District Office, EEOC, interview in Baltimore, MD, Nov. 18, 1999, p. 10; Gosa and Ross interview, Birmingham District Office, p. 8.

[55] Thornton interview, Nov. 9, 1999, p. 6.

[56] EEOC, *Comprehensive Enforcement Program*, p. 8.

[57] EEOC, *Priority Charge Handling Task Force and Litigation Task Force Report*, March 1998, p. 57 (hereafter cited as EEOC, *Joint Task Force Report*).

[58] Michael Fetzer, acting director, and Barbara Veldhuizen, deputy director, Baltimore District Office, EEOC, interview in Baltimore, MD, Nov. 17, 1999, pp. 1–2 (hereafter cited as Fetzer and Veldhuizen interview, Baltimore District Office, Nov. 17, 1999).

[59] Fetzer and Veldhuizen interview, Baltimore District Office, Nov. 17, 1999, p. 2.

[60] Ed Hill, enforcement manager, Matt Cleman, investigator, and Janet Little, investigator, Seattle District Office, EEOC, telephone interview, Mar. 16, 2000, p. 5 (hereafter cited as Hill, Cleman, and Little interview).

other days.[61] The intake investigators are responsible for drafting charges as they come in and categorizing them. Investigators will usually keep the charge he or she takes in, unless it is a charge that is better suited for an investigator assigned to another enforcement unit.[62]

The St. Louis District Office, on the other hand, has established a dedicated intake unit called the Customer Service Unit, which is staffed with the office's most experienced investigators.[63] Although intake staff are permanently assigned to that function, they take turns acting as intake supervisors for 60-day periods.[64] The intake investigators are responsible for screening inquiry questionnaires, along with a staff attorney, and conducting an in-depth interview with charging parties. At that point, they will draft the formal charge, should the charging party choose to file.[65] The intake investigators, as the frontline staff dealing with the charge from its inception, are responsible for gathering as much information as possible so that cases can be resolved more quickly. In fact, the customer service investigators in the St. Louis District Office resolve about 40 percent of the charges that come into the office.[66] According to the office's enforcement manager, the current process allows cases to be acted upon in the first 30 days after being filed.[67] Once the Customer Service Unit has gathered as much information as necessary, either the charge will be drafted or the case will be handed off to another investigator who will draft the charge. Customer service staff make decisions fairly early about whether a complaint raises issues that can be quickly resolved.[68]

The Birmingham District Office also employs a dedicated intake unit, which is made up of seven investigators, two investigative support assistants, and an intake supervisor.[69] The intake unit oversees all initial communication between potential charging parties and the office, including telephone, written, and walk-in complaints.[70] The intake supervisor of the office stated that what the intake unit does is actually the initial stages of an investigation. The intake investigators will draft charges, review them for merit, and interview potential charging parties. They will actively pursue information that may be missing from a charge. Intake investigators are also responsible for categorizing charges.[71] Many times charges are closed within the charge receipt unit, for example, if they do not exhibit a prima facie case, or if there are suspicions about the credibility of a charge.[72] The intake unit then forwards the remaining charges to the appropriate enforcement unit.

In the Chicago District Office a somewhat unique approach to intake has been implemented, with the utilization of a hybrid model that combines both dedicated and rotational staff assignments. There are six investigators permanently assigned to intake on a full-time basis, but on a daily basis, three investigators also rotate to work on intake.[73] One reason for having additional staff rotate into the unit is to provide assistance to the permanent staff given the increased responsibilities and functions that have been assigned to the intake unit over the past few years.[74] Intake staff take turns receiving charges on a rotational basis. Usually, intake staff are able to complete charge intake on the day that the complainant comes into the office. In the event, however, that the charge is not

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[61] Ibid., pp. 5–6.

[62] Ibid., p. 12. *See* discussion about Seattle's enforcement unit setup, p. 142.

[63] Bruner, Schuetz, and Johnson interview, St. Louis District Office, Feb. 1, 2000, p. 4.

[64] Sharron Blalock, acting intake supervisor, and Inez Shiloh, investigative support assistant, St. Louis District Office, EEOC, interview in St. Louis, MO, Feb. 1, 2000, p. 1 (hereafter cited as Blalock and Shiloh interview, St. Louis District Office).

[65] Bruner, Schuetz, and Johnson interview, St. Louis District Office, Feb. 1, 2000, p. 4.

[66] Ibid., p. 5.

[67] Carl Fricks, enforcement manager, St. Louis District Office, EEOC, interview in St. Louis, MO, Jan. 31, 2000, p. 2 (hereafter cited as Fricks interview, St. Louis District Office).

[68] Ibid., p. 3.

[69] Cynthia Pierre, district director, Birmingham District Office, EEOC, interview in Birmingham, AL, Feb. 24, 2000, pp. 1–2 (hereafter cited as Pierre interview, Birmingham District Office, Feb. 24, 2000).

[70] Gosa and Ross interview, Birmingham District Office, p. 1.

[71] *See* discussion about charge categorization and prioritization, pp. 114–21.

[72] Gosa and Ross interview, Birmingham District Office, p. 4.

[73] Rowe and Bowman interview, Chicago District Office, p. 5.

[74] Ibid., p. 7.

complete, it will either remain with the intake investigator to complete, even if he or she rotated out of intake (if it is only a matter of completing paperwork), or it will be put back into the regular mix of cases once the additional information comes in.[75]

Each intake model has its benefits and drawbacks, and the district offices have chosen models based on a number of factors, including office climate, staffing patterns, intake volume, and input from staff. One advantage of having a dedicated unit is that it provides a level of consistency and specialization in the intake and categorization of charges.[76] Proponents of the dedicated intake system also believe that this model prevents charges without merit from getting into the system and that it provides a sense of accountability because charges coming in can be better tracked.[77] When investigators rotate in and out of intake, they tend to lose track of loose ends that may not have been resolved during their rotation.

On the other hand, the rotational system ensures that all investigators are knowledgeable in charge intake and the PCHP principles, which is particularly important in light of the Agency's new emphasis on improving customer service.[78] Also, in a rotational system, investigators usually keep the charges they take in, creating their own "destiny" and making them accountable to ensure that charges are developed properly from initial intake.[79] Another benefit of the rotational intake system is that it allows staff to share in the responsibility equally. According to some district office staff members, the intake process can be a particularly arduous task; therefore, to share its responsibility among staff ensures fair distribution of workload.[80]

To provide assistance to investigators with the intake function, regardless of intake model, most district offices also have a Charge Receipt and Technical Information Unit. The purpose of this unit is to provide support for the administrative aspect of intake, often including tracking telephone and mail inquiries, maintaining intake records, coordinating intake assignments, scheduling interviews, and having initial contact with potential charging parties.[81]

The Intake Process

Charge intake can be initiated through three methods: via telephone, mail, or walk-in. Most of the intake models described earlier are set up to accommodate the walk-in complainant, and charging parties are encouraged to file a charge in person whenever possible. However, the CEP emphasizes that mail-in charges and charges developed as a result of telephone inquiries are to be given the same attention and level of review as those received in person, particularly because "mail-in and telephone charges are often received from underserved geographic areas and populations that EEOC might otherwise not reach."[82]

There are specific procedures in place for the intake of charges received through the various modes. If a charging party is able to present his or her complaint in person, he or she will be counseled by intake staff and, whenever possible, the charge will be drafted during the initial visit.[83] Correspondence received by mail is to be treated as a potential charge. Intake staff are responsible for determining whether it provides

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[75] Ibid., pp. 11–12.

[76] EEOC, *Joint Task Force Report*, p. 42.

[77] Gosa and Ross interview, Birmingham District Office, p. 2.

[78] EEOC, *Joint Task Force Report*, p. 42.

[79] Chester Klienman, enforcement manager, M. Patricia Tanner, supervisory systemic investigator, and Judy Navarro, investigator, Baltimore District Office, EEOC, interview in Baltimore, MD, Nov. 18, 1999, p. 3 (hereafter cited as Klienman, Tanner, and Navarro interview, Baltimore District Office); Spencer Lewis, district director, and Richard Alpert, deputy director, New York District Office, EEOC, telephone interview, Mar. 13, 2000, p. 71 (hereafter cited as Lewis and Alpert interview, New York District Office).

[80] Judy Cassell, charge receipt supervisor, and Monica Jackson, investigative support assistant, Baltimore District Office, EEOC, interview in Baltimore, MD, Nov. 18, 1999, p. 2 (hereafter cited as Cassell and Jackson interview, Baltimore District Office).

[81] *See* Sandra Taylor, acting charge receipt and technical information supervisor, Dallas District Office, EEOC, interview in Dallas, TX, Jan. 31, 2000, pp. 1–4; Cassell and Jackson interview, Baltimore District Office, pp. 1–5; Lewis and Alpert interview, New York District Office, p. 8.

[82] EEOC, *Comprehensive Enforcement Program*, p. 8.

[83] There are instances where a charge will not be drafted upon initial visit: if it is in an area that is not within EEOC's jurisdiction, if it requires additional information, or if the charging party, once counseled, decides not to file. *See* discussion about counseling, pp. 110–13.

"minimally sufficient" information, as described below, or whether additional information is necessary, in which case the charging party should be interviewed.[84] If the correspondence provides adequate detail to initiate an investigation, it can be treated as a formal charge and served on the respondent.[85] In the event that a potential charging party calls an EEOC office to file a complaint, and cannot visit the office in person, the individual should be counseled and the charge drafted by intake staff accordingly.[86] The formal charge is then sent to the complainant for review and signature.

Regardless of the method of receipt or model of intake each office chooses to use, there are several components of charge receipt that must be employed by intake staff, including receipt or drafting of the charge, initial information gathering, and charging party counseling. Field offices have also been given a great deal of latitude in deciding what mechanisms will be used to facilitate charge receipt, within the parameters of what is required by Agency policy. Some offices rely on intake questionnaires or inquiry forms while others rely on written correspondence from potential charging parties to draft a charge. However, EEOC guidelines state that a charge must include the following minimal requirements to be accepted by the Agency:

- the name, address, and telephone number of the charging party;
- the name and address of the person or company against whom the charge is being filed;
- a clear statement explaining the alleged unlawful employment practices, including dates;
- an approximate number of people employed by the employer, if available; and
- whether and when proceedings have been initiated with a state or local fair employment practices agency.[87]

When asked specifically what types of information must be provided for a charge to be drafted, many investigators stated that it depends on the case. For example, in a case that alleges racial discrimination, it is often helpful if the charging party can provide a comparator, or an instance where an individual of another race was treated differently.[88] If a charge concerns a hiring issue, it is helpful if the charging party can establish that harm was incurred.[89] When reviewing charge information, the EEOC staff also should be responsible for identifying potential timeliness issues if a charge is approaching its statute of limitations for filing, either under state or federal laws, and should give top priority to those charges. Charges about to expire must be docketed quickly, and intake staff must pay careful attention to those dates. If a charge is filed after the filing deadline, it will most likely be dismissed by EEOC.[90]

Charging Party Inquiries and Questionnaires

Most district offices have chosen to collect the necessary information through intake questionnaires. For example, the Baltimore and New York district offices use several different intake questionnaires broken down by the issue of the complaint.[91] Intake investigators will obtain an abbreviated version of the charging party's allegations in order to determine which form to have him or her fill out. The forms are either given to the charging party for a signature on first contact to protect the timeliness of the charge, or they are mailed to the charging party before the intake interview so that the information can be

[84] EEOC, *Compliance Manual*, § 2.2, p. 2:0001.

[85] Ibid., § 2.2(b), p. 2:0002.

[86] Ibid., § 2.3, p. 2:0002.

[87] EEOC, *Compliance Manual*, "The Charge: Filing Requirements," p. 0:3202.

[88] Sandra Byrd, supervisory investigator, and Suzanne Kotrosa, investigator, Baltimore District Office, EEOC, interview in Baltimore, MD, Nov. 17, 1999, p. 4 (hereafter cited as Byrd and Kotrosa interview, Baltimore District Office).

[89] Ibid.

[90] EEOC, *Compliance Manual*, "The Charge: Filing Requirements," p. 0:3202. However, the Supreme Court ruled that a charging party who fails to file a charge in a timely manner can still file a lawsuit in federal court, "if traditional notions of fairness and equity so require." Ibid., *citing* Zipes v. Trans World Airlines, 455 U.S. 385, 393 (1982).

[91] Byrd and Kotrosa interview, Baltimore District Office, p. 3; Kleinman, Tanner, and Navarro interview, Baltimore District Office, p. 4; Ann Schrage, senior investigator, Anthony Linsk, investigator, Harold Wilkes, enforcement manager, and Bill Lai, supervisory investigator, New York District Office, EEOC, telephone interview, Mar. 13, 2000, p. 5 (hereafter cited as Schrage et al., interview, New York District Office).

reviewed in advance.[92] From these questionnaires, a formal charge can be drafted.

The St. Louis District Office also relies on inquiry forms, but unless there is a timeliness issue, those inquiries do not become official charges until after an in-depth interview is conducted with the potential charging party.[93] The only written submissions accepted outright as charges are those submitted by a charging party's attorney or those that are approaching the deadline for filing.[94]

Legal staff in the St. Louis office are careful to make the distinction between inquiries and charges. They stated that there are many instances where inquiries do not become charges and that many charging parties do not recognize the distinction between the two forms and erroneously believe they have filed a charge when, in fact, they have merely completed the intake inquiry.[95] This confusion surrounding the purpose of inquiry forms is precisely the reason that some district offices have chosen not to use them. The Birmingham District Office does not rely on intake questionnaires, but rather places the burden of providing written information about a potential charge on the complainant.[96] From that information the intake officer will develop and draft a charge. The Birmingham intake supervisor stated that the reason the office stopped using the questionnaire was because charging parties would often confuse it with the actual charge or misuse it to file complaints on issues not within EEOC's jurisdiction.[97]

Intake questionnaires can serve a dual purpose by allowing the intake officer to better focus the initial interview with the charging party. The investigator can then structure the interview and address all the necessary points. One investigator stated that obtaining questionnaires in advance is particularly useful in establishing a chronology of events. Often charging parties will not have the order of events related to a charge clear in their minds and, by putting it in writing, can save the investigator from having to try to recreate the chronology based on the interview.[98] An enforcement manager praised the questionnaires as being a "cost-productive, cost-effective way of talking with charging parties."[99]

Intake Counseling and Interviews

Perhaps one of the most important aspects of the intake function is the counseling of individuals seeking to file a charge. Because charging parties have a wide range of capabilities and knowledge of the EEOC filing process, it is important that intake staff assist them, through counseling and interviews, with framing their cases so that sufficient information is included. The quality of intake counseling is directly related to customer service and is appropriately reflected in Chairwoman Castro's goals for the Agency. The CEP states that, as a way to improve customer service, in-depth interviews are to be conducted with charging parties to gather as much data as possible, but should not be used to require charging parties to "prove their claims."[100]

Intake interviews and counseling are usually conducted immediately prior to the drafting of a charge and can be done on either an appointment or walk-in basis, depending on what method each office chooses. The purpose of the session, whether it be via telephone or in person, is to inform the potential charging party of his or her rights and responsibilities, to explain the Agency's jurisdiction and charge handling procedures, and ultimately to obtain information about the alleged instance of discrimination. Given the importance of the exchange of information during the initial session, the Office of Field Programs (OFP) and field office management must ensure that intake staff are kept abreast of changes in law that may affect charge handling procedures, as well as changes in internal policies, so that charging parties can be

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[92] Byrd and Kotrosa interview, Baltimore District Office, p. 3.

[93] Bruner, Schuetz, and Johnson interview, St. Louis District Office, Jan. 31, 2000, p. 4.

[94] Donna Harper, supervisory trial attorney, Felix Miller, senior trial attorney, and Rebecca Stith, senior trial attorney, St. Louis District Office, EEOC, interview in St. Louis, MO, Jan. 31, 2000, p. 3 (hereafter cited as Harper, Miller, and Stith interview, St. Louis District Office).

[95] Ibid., pp. 2–3. EEOC intake staff and legal staff should be particularly careful, in these instances, to explain the difference between the forms to charging parties to protect the timeliness and accuracy of their charges.

[96] Gosa and Ross interview, Birmingham District Office, p. 5.

[97] Ibid.

[98] Byrd and Kotrosa interview, Baltimore District Office, p. 3.

[99] Hill, Cleman, and Little interview, Seattle District Office, p. 10.

[100] EEOC, *Comprehensive Enforcement Program*, p. 11.

appropriately informed of their rights and responsibilities. Likewise, the charging party has a right to know about the procedures in place for the processing of his or her charge, including the charge prioritization system, and the likelihood and extent to which his or her charge will be investigated. EEOC staff should provide potential charging parties with enough information that they can make informed decisions about whether or not to file a charge.

Even those outside the Agency agree:

> Providing information to people that enables them to reach an accurate decision that they have no claim saves the time and resources of the agency, the time and resources of employers, and the time and resources of the courts.[101]

However, intake staff must be extremely careful that their counseling does not discourage complainants from filing a charge, whether intentional or not; but at the same time charging parties have the right to know, in instances where they have a "weak" case, that should they file, the charge will most likely be dismissed. The Investigative Procedures Manual instructs staff to "remember that while a person has the right to file a charge, it is the investigator's responsibility to counsel persons who have nonmeritorious charges."[102]

For example, according to the district director, during the intake interview, the investigator is responsible for informing the charging party of the processing procedures. Charging parties are counseled that they have the right to file a charge, but that the office may not always process it. Office management state that St. Louis intake staff try to be as candid and explanatory as possible, but at the same time do not have an obligation to process every charge beyond intake.[103]

Several respondents to the Commission's Web site questionnaire for attorneys and mediators[104] stated that they had experienced EEOC intake staff discouraging a potential client from filing a charge, although a similar number stated that they had not had this experience.[105] Questionnaire respondents reported incidents where charging parties were told "they wouldn't get anywhere with the charge," were "not allowed to file a charge," or were told "they should not file a charge."[106] One respondent to the attorney/mediator questionnaire stated:

> One of my clients was told flat out that she had no case and that the investigator would not "accept" the charge. I was outraged. In fact, the case had substantial merit, and settled later for a significant amount of money.[107]

Other questionnaire respondents noted that charging parties have been admonished for not being flexible to meet the needs of the employer and that EEOC intake staff did not take the time with less articulate charging parties and charging parties who did not use the appropriate legal terminology.[108] One attorney stated, "I even had one situation where the EEOC [intake staff] said she could not file a claim because she had already filed another one against the same employer a few months earlier."[109]

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[101] *Oversight Hearing on the U.S. Equal Employment Opportunity Commission: Hearing Before the House Committee on Education and the Workforce*, 105th Cong., 1st Sess. 183 (statement of Richard T. Seymour, director, Employment Discrimination Project, Lawyers' Committee for Civil Rights Under Law) (hereafter cited as Seymour testimony).

[102] EEOC, *Compliance Manual*, § 2.4, p. 2:0002.

[103] Bruner, Schuetz, and Johnson interview, St. Louis District Office, Feb. 1, 2000, p. 4.

[104] The Commission solicited opinions about EEOC's enforcement procedures from charging parties and employment attorneys and mediators via a survey posted on the Commission's Web site, accessed at <http://www. usccr.gov>. As of July 3, 2000, 87 responses from actual and alleged victims of discrimination and 96 responses from attorneys and mediators had been received. Because this survey is Web-based, there is no clearly defined sample or universe, and therefore statistical conclusions cannot be drawn. Further, given the nature of the data collection, survey responses do not constitute a representative sample and inferences cannot be drawn to the entire population. Thus, only descriptive summaries are provided. While these survey results do not provide a comprehensive evaluation of the performance of EEOC—and represent a small segment of the total number of attorneys, mediators, and charging parties who are potential respondents (for example, EEOC receives between 75,000 and 80,000 charges each year)—they may be used to support findings from other sources and can be used as an appropriate source of anecdotal evidence.

[105] USCCR, Web Site Survey Data (Attorneys and Mediators), July 3, 2000.

[106] Ibid.

[107] Ibid.

[108] Ibid.

[109] Ibid.

Actual and alleged victims of employment discrimination who responded to the Commission's Web site questionnaire also provided examples of ways in which they felt discouraged from filing a charge,[110] such as:

- I was told because I did not furnish the EEOC with written statements that they did not have time to conduct investigations. I explained that I read a statement by Ida Castro that retaliation was a high priority investigation and was told it was low.
- The investigator on the case has no real enthusiasm and never guides me through the process.
- The statement made was "it is too hard to prove that you are qualified for the job and exactly why the city did not hire you."
- When I came into the office the individual at the desk (white male) told me that I did not have a claim without any investigation or anything.
- I was basically brushed off and even yelled at by the EEOC representative . . . when I attempted to pursue a charge of discrimination against the state.
- Basically I was told it was a no win situation when you filed a charge against the state government, and when I insisted even though there was an unbroken chain of events I was told that would be too much paperwork . . .
- I was advised that I had not been harmed in anyway because I had not been discharged or lost any wages. The fact that I had been overlooked for advancement opportunities did not qualify for lost wages.[111]

In response to these allegations, EEOC contends that it has adequately trained its employees to inform a charging party that he or she has the right to file a charge and that filing a charge is necessary to preserve his or her right to file a private suit under Title VII, the ADA, or the ADEA.[112] Staff are also trained not to discourage potential charging parties from filing a charge and instead should counsel them about the process.

Headquarters and some district offices have developed fact sheets and other materials to aid in the counseling of potential charging parties.[113] These are made available to individuals seeking to file a charge. For example, investigators in the Baltimore District Office stated that they rely on a brochure that explains to charging parties their legal rights. This brochure will be mailed to charging parties prior to filing, assuming it is within the timeframe for filing.[114] In the Phoenix District Office, fact sheets and brochures are displayed in the designated intake interview rooms so that charging parties have the opportunity to review them during their initial intake session.[115] The enforcement manager stated that, at the time of intake, charging parties are also provided with literature and a briefing on charge categorization.[116] This office has also developed issue-specific questionnaires to be used by investigators during the intake interview to ensure that they are asking the right questions for the charge being presented, and a checklist for investigators to use to ensure that all critical information has been collected and all intake procedures have been carried out.[117]

In the Seattle District Office, charging parties are instructed to arrive at the office a half hour before their interview to watch a video that explains the purpose of EEOC, charge processing procedures, the types of issues that make up a charge, and a general sense of the issues that are "charge worthy."[118]

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[110] USCCR, Web Site Survey Data (Actual and Alleged Victims), July 3, 2000.

[111] Ibid.

[112] Vargyas letter, p. 37.

[113] *See* chap. 7, pp. 256–58.

[114] Byrd and Kotrosa interview, Baltimore District Office, p. 4.

[115] Paul Manget, enforcement manager, Phoenix District Office, EEOC, interview in Phoenix, AZ, Mar. 29, 2000, p. 7 (hereafter cited as Manget interview, Phoenix District Office). *See generally*, Krista Watson, intake supervisor, and Nancy Gratz, investigative support assistant, Phoenix District Office, EEOC, interview in Phoenix, AZ, Mar. 30, 2000 (hereafter cited as Watson and Gratz interview, Phoenix District Office).

[116] Manget interview, Phoenix District Office, p. 7.

[117] Ibid., p. 9. The interview guides were developed internally and are revised by Phoenix legal staff when necessary to reflect recent court decisions. Ibid. *See also* Watson and Gratz interview, Phoenix District Office, p. 17.

[118] Hill, Cleman, and Little interview, Seattle District Office, p. 5.

However, in at least one office, staff were unaware of any agencywide or standard information sheet outlining the PCHP or the categorization of charges.[119] EEOC headquarters stated that the Agency did in fact develop a handout for charging parties that explained the new procedures when the PCHP was initially implemented.[120] As will be discussed later in the chapter, the prioritization of charges is one area that appears to be a source of confusion for charging parties. Therefore, it is critical that this information is explained during the intake interview so that charging parties are aware of the extent to which their charges will be investigated early in the process, rather than after dismissal.

Role of Legal Staff in Intake

The CEP requires that legal staff be involved in intake, specifically for charges that are complex, require legal input, or are potential litigation cases.[121] District offices are required to set up structures where attorneys are made available to help with intake and to provide assistance to those area and local offices that do not have on-site attorneys, but they should not be specifically assigned to the intake function.[122] The purpose of early attorney involvement in charges is to ensure the identification of potential litigation cases and those cases that fall among the Agency's priority issues, particularly given the increase in the numbers of cause cases and the push to increase the number of cases on the Agency's litigation docket.

In the Birmingham District Office, one attorney is specifically assigned to the intake unit to answer any questions that may arise during the charge receipt phase.[123] Attorneys will also occasionally assist with intake interviews if necessary. Legal staff also review all charges that come into the intake unit, a process that they feel has allowed them to get involved with charges at the very initial stage.[124]

In the St. Louis District Office, legal staff serve as "attorney of the day" for one week at a time to the intake unit. During rotation, the attorneys are responsible for reviewing the intake questionnaires that come in each day (prior to becoming actual charges) and making determinations as to which ones are potential cause or litigation cases and which ones will require further investigation.[125] The Baltimore District Office's team setup allows attorneys to be involved in intake on a regular basis. Attorneys are assigned to each pod and, therefore, during intake rotation are available to offer assistance to investigative staff, particularly with cases that appear to be potential cause cases.[126]

External Perceptions of EEOC's Intake Process

The low number of inquiries that actually become charges raises the concern that perhaps complainants are being discouraged from filing charges by intake staff.[127] EEOC staff have repeatedly denied that this occurs and have stated that it is common procedure to counsel individuals as to the merits of their charge, but to emphasize that it is their right to file regardless.[128] For example, the intake supervisor in the Birmingham District Office stated that he is confident that valid charges are not being erroneously dismissed because there is a quality control mechanism in place, and he has not received complaints to that effect.[129] He also stated that the fact that the office takes in a large number of

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[119] Althea Bolden, enforcement supervisor, Maggie McFadden, enforcement supervisor, Harold Emde, investigator, and Kathy Compton, investigator, St. Louis District Office, EEOC, interview in St. Louis, MO, Feb. 1, 2000, p. 2 (hereafter cited as Bolden et al., interview, St. Louis District Office).

[120] Vargyas letter, p. 37.

[121] EEOC, *Comprehensive Enforcement Program*, pp. 8, 10.

[122] Ibid.

[123] Mildred Byrd, acting regional attorney, Jill Vincent, trial attorney, and Pamela Agee, trial attorney, Birmingham District Office, EEOC, interview in Birmingham, AL, Feb. 24, 2000, p. 1 (hereafter cited as Byrd, Vincent, and Agee interview, Birmingham District Office).

[124] Ibid., p. 2.

[125] Harper, Miller, and Stith interview, St. Louis District Office, p. 2.

[126] Gerald Kiel, regional attorney, Cecile Quinlan, trial attorney, Stephen O'Rourke, supervisory attorney, and Mildred Rivera, trial attorney, Baltimore District Office, EEOC, interview in Baltimore, MD, Nov. 17, 1999, p. 3 (hereafter cited as Kiel et al., interview, Baltimore District Office).

[127] It should be noted that only a few EEOC field offices currently track the number of inquiries that become charges. However, EEOC's new Integrated Mission System, which will eventually replace the CDS, will track inquiries. Vargyas letter, p. 38.

[128] *See, e.g.*, Bruner, Schuetz, and Johnson interview, St. Louis District Office, Jan. 31, 2000, p. 4; Gosa and Ross interview, Birmingham District Office, p. 3.

[129] Gosa and Ross interview, Birmingham District Office, p. 3.

charges proves that individuals are not being denied the right to file. The CEP instructs intake staff that:

> It must be remembered that individuals have a right to file a charge with the EEOC. If intake staff believe that an individual's allegations are outside the EEOC's jurisdiction or that the charge does not have merit, they should counsel the person to that effect, but if the individual continues to seek to file his or her charge, the charge must be accepted for filing.[130]

Nonetheless, through outreach to individuals who have participated in EEOC's intake process, either as a potential charging party or an attorney representing a charging party, the Commission discovered that the perception that individuals are frequently discouraged from filing a charge is very real. For example, two attorneys who have represented many clients through the EEOC charge process stated that one of the greatest barriers to charging parties is getting through the intake staff.[131] In the attorneys' experience, intake counselors often tell people that they should not file a charge because they do not have a case, when it is clear, from a legal perspective, that the charging parties have exhibited at least enough evidence for the cases to qualify as potentially valid.[132] It has been their experience that more often than not charging parties are not turned away because of jurisdictional issues, but rather because of value judgments about the strength of a case.[133] Certainly, it must be acknowledged that the procedures differ from office to office and so there may be certain offices that have better records than others, but then there must be some level of monitoring by headquarters to ensure that those offices that exhibit patterns of turning away individuals eliminate those practices.

Another complaint with respect to EEOC's intake process has been lack of communication between the potential charging party and intake staff. The enforcement manager in the St. Louis District Office acknowledged that this has been a concern over the past few years due to the large caseload investigators were forced to carry. He feels, however, that his office has gotten better at shortening the time between first contact, making a decision on what to do with the charge, and communicating that decision to the charging party.[134]

EEOC headquarters staff have voiced concern about these issues and have stated that the Agency is confident that the appropriate steps have been taken to ensure that charging parties are not discouraged from filing charges. For example, according to headquarters staff, the Agency has taken steps to increase outreach to the public so that individuals are aware of their rights; developed partnerships with national and local bar associations; and developed a quality peer review program to assess and improve the quality of the intake process.[135] The attempts to improve the intake process and customer service appear promising. Overall, there appears to be a new-found enthusiasm among EEOC staff that hopefully will translate into more efficient and customer friendly initial charge handling. However, EEOC should not become complacent with the systems that have been put in place, and there must be consistent monitoring and re-evaluation of the intake process. To gauge the effectiveness of the various plans as they are implemented, there must be some internal performance measurement standards in place, such as regular customer satisfaction surveys and top management reviews of intake productivity and early case development.

Charge Categorization and Prioritization

The main premise of the Priority Charge Handling Procedures (PCHP) is that the Agency can focus its attention and resources on those cases that more likely than not stem from violations of the law, i.e., "cause findings." Therefore, during or immediately following intake, charges are prioritized and categorized. Under the PCHP, charges are prioritized using the categories of "A," "B," or "C" which are defined as follows:

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[130] EEOC, *Comprehensive Enforcement Program*, p. 10.

[131] Tom Saenz, Los Angeles regional counsel, and Enrique Gallardo, staff attorney, Mexican American Legal Defense and Education Fund, telephone interview, Mar. 10, 2000, p. 2 (hereafter cited as Saenz and Gallardo interview).

[132] Ibid.

[133] Ibid.

[134] Fricks interview, St. Louis District Office, p. 3.

[135] Vargyas letter, p. 38.

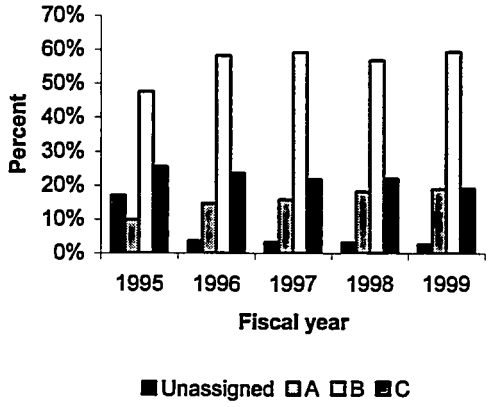
- A charges are those charges which fall within the National or Local Enforcement Plan and those where further investigation will probably result in a cause finding;
- B charges are those that initially appear to have some merit, but which require additional evidence to determine whether continued investigation is likely to result in a cause finding; and
- C charges are those that are dismissed on the grounds that there is sufficient information to conclude that it is not likely that further investigation will result in a cause finding. Charges may be categorized as C charges and subsequently dismissed for a number of reasons, including: lack of jurisdiction, failure to state a claim, failure to be supported by direct or circumstantial evidence, presentation of self-defeating facts, or lack of credibility.[136]

Some offices also use subcategories. The most common subcategories are "A1" and "A2." A1 charges are those that are possible cause findings with good litigation potential.[137] These charges are usually NEP or LEP issues and receive priority over all other charges in development. A2 charges are those that are possible cause findings, but do not necessarily have litigation potential.[138] The Baltimore District Office also uses the "A3" designation, which identifies charges that are not on the office's significant case list and will not be litigated but will still receive full investigation; this office gives the cases on its priority litigation list the designation "AY."[139] The Birmingham District Office uses the "B2" designation for cases that are between a B and a C because further clarification is needed.[140]

The categorization of a charge will determine the resources to be expended on it, and hence the level of investigation that charge will receive. For example, if a charge is categorized as a C it will receive the "appropriate amount of investigation," which appears to be little if any, and will be closed once it is determined that it will not likely result in a cause finding.[141] As shown by figure 5-3, most charges in EEOC's inventory at any given time are B charges, remaining close to 60 percent between 1996 and 1999. Although less than 20 percent of all charges are categorized as A charges, the percentage has been increasing each fiscal year since 1995. The percentage of charges categorized as C has been decreasing since FY 1996, when close to 25 percent of all charges were in the category. By FY 1999, about 19 percent of all charges were categorized as C. While there appears to be overall consistency with respect to how charges have been categorized, classifications have varied across district offices.

FIGURE 5-3

Charge Receipts by Assigned Category, FY 1995–1999



SOURCE: EEOC, Charge Data System.

For example, in FY 1999, district offices classified between 8 and 38 percent of charges as A, between 23 and 84 percent as B, and between 4 and 59 percent as C (see table 5-2). The proportion of charges that are not categorized also varies by district office. For instance, the Denver, Seattle, Birmingham, and Baltimore district offices have not categorized roughly 13, 11, 8, and 6 percent of charges, respectively, representing 100 to 300 charges per office (see table 5-2). Four

[136] EEOC, *Priority Charge Handling Procedures*, pp. 4–5. *See also* EEOC, *Joint Task Force Report*, app. A.

[137] EEOC, *Joint Task Force Report*, p. 57.

[138] EEOC, *Priority Charge Handling Procedures*, p. 4.

[139] Byrd and Kotrosa interview, Baltimore District Office, p. 7.

[140] Arthur McGhee, supervisory investigator, and Charles Hullet, investigator, Birmingham District Office, EEOC, interview in Birmingham, AL, Feb. 25, 2000, p. 2 (hereafter cited as McGhee and Hullet interview, Birmingham District Office).

[141] Thornton interview, Nov. 9, 1999, pp. 2–3.

TABLE 5-2

Charge Receipts by District Office and Charge Prioritization Category, FY 1999

	Percentage of charge receipts				
District office	Unassigned	A	B	C	Total receipts
Albuquerque	1.0	17.3	67.1	14.6	1,005
Atlanta	0.9	19.4	69.4	10.3	4,247
Baltimore	5.8	26.7	35.9	31.6	1,685
Birmingham	8.3	10.4	66.9	14.4	3,607
Charlotte	4.7	26.1	49.9	19.3	2,060
Chicago	0.7	17.5	66.2	15.7	4,749
Cleveland	3.0	13.5	55.4	28.1	1,753
Dallas	2.2	17.5	37.5	42.9	3,162
Denver	12.9	15.4	67.6	4.1	1,764
Detroit	0.1	17.7	22.8	59.4	1,625
Houston	0.2	17.2	77.0	5.6	4,009
Indianapolis	2.5	22.1	70.5	4.9	4,094
Los Angeles	0.6	14.9	51.3	33.2	2,428
Memphis	0.0	30.8	54.9	14.3	1,604
Miami	1.1	8.3	84.1	6.5	3,905
Milwaukee	5.0	11.5	49.6	33.9	922
New Orleans	0.0	14.7	72.3	13.0	2,023
New York	0.6	16.1	58.4	24.8	3,135
Philadelphia	1.5	26.2	52.2	20.2	1,835
Phoenix	0.5	36.5	36.9	26.2	2,616
San Antonio	0.7	37.9	51.3	10.2	2,270
San Francisco	0.4	19.2	66.3	14.0	1,814
Seattle	11.3	22.9	49.1	16.6	1,340
St. Louis	3.9	17.9	46.9	31.2	1,774
All district offices	2.4	19.3	59.6	18.6	59,426

SOURCE: EEOC.

district offices that illustrate the variability in prioritizing charges are shown in figure 5-4. The Detroit District Office categorizes most charges as C; the Denver and Miami district offices classify most charges as B; and the Phoenix District Office has equal, and fairly large proportions of A and B charges (37 percent). The Detroit, Miami, and Phoenix offices have insignificant percentages of charges without assigned prioritizations. The Denver District Office has nearly as many charges that have not been assigned categories (13 percent) as those that have been categorized as A (15 percent); and far more than have been designated as C (4 percent) (see figure 5-4).

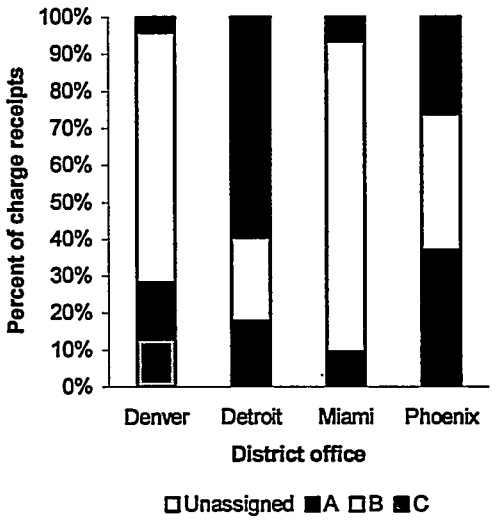
The categorization of a charge may change as an investigation produces additional evidence. For example, B cases may become A or C cases depending on what the investigation reveals. However, cases are not technically reclassified down—i.e., a case would not be reclassified from B to C in the Charge Data System (CDS) in order to dismiss it.[142] But a B case could be dismissed for the same reason that a C case is dismissed at an earlier stage, if staff do not believe that further investigation would result in a finding that the law was violated. Thus, B cases (and also A cases after evidence has been gathered) can be closed as "no cause." A case can become a C early on with an inquiry, or it can be dis-

[142] Bruner, Schuetz, and Johnson interview, St. Louis District Office, Feb. 1, 2000, p. 9.

missed after some investigation in either B or A status.[143]

FIGURE 5-4

Comparison of Four District Offices' Charge Prioritizations, FY 1999



SOURCE: EEOC, Charge Data System.

Because charges are often categorized immediately following intake, the intake staff will usually give an initial assessment of how a charge should be categorized. In some district offices, charges are being immediately dismissed after intake without ever being transferred to an investigative or legal unit for review and/or preliminary investigation. The enforcement manager in the St. Louis District Office stated that a portion of that office's C cases are being dismissed up-front.[144] The intake supervisor in the Birmingham District Office stated that many times a charge does not ever leave the intake unit in that office. Charges can be dismissed after categorization for a number of reasons, including failure to establish a prima facie case or suspicion about the credibility of the charge.[145] While early dismissal of non-meritorious charges is one of the main goals of the PCHP and a necessary inventory management procedure, those charges must undergo the same level of scrutiny as more promising charges.

Review of Charge Categorizations

If the process of categorization and prioritization is not implemented with extreme caution and under precise guidelines, it has the potential to undermine its very purpose by allowing potentially valid charges to go undiscovered. The PCHP empowered frontline staff to determine which cases appear most meritorious, thereby giving them greater control over case inventory. However, because a charge category will determine the fate of the charge, i.e., the extent to which it will be investigated, it is critical that enforcement staff are well versed not only in the category definitions themselves, but also in recognizing the attributes of potentially valid claims. When asked if it would be appropriate to provide field office staff with specific criteria to use in the charge prioritization process, the director of OFP stated that it would be impossible to come up with enough guidelines to cover every possible charge issue.[146] Instead, according to her, field staff are trained to know whether a situation requires more evidence or whether it is self-defeating and how to identify a potentially meritorious charge.[147] Nonetheless, there must be a consistent and thorough review of categorization.

District offices have implemented methods for reviewing charge categorization, but the consistency, frequency, and the selection of which cases are reviewed differ from office to office. In all district offices there must be some level of categorization review, usually by first line supervisors, but some have taken review a step further to include other managers or legal staff. In the Seattle District Office, the district director, deputy director, regional attorney, and enforcement and legal supervisors divide new charges that come in each week among themselves for review of categorization. They then meet to discuss the charges to determine if there are overlapping issues or multiple charges against the same employer.[148]

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[143] Ibid.

[144] Fricks interview, St. Louis District Office, p. 4.

[145] Gosa and Ross interview, Birmingham District Office, p. 4.

[146] Thornton interview, Nov. 9, 1999, p. 7.

[147] Ibid.

[148] Hill, Cleman, and Little interview, Seattle District Office, pp. 12–13.

In the Birmingham and New York district offices, legal staff review all charges that come into the office after they are categorized.[149] This allows investigative staff to feel more confident that meritorious charges are not being erroneously dismissed as C cases.[150] The Phoenix District Office has recently instituted a pilot project whereby attorneys will review all charges that are filed. Cases are reviewed on a daily basis.[151] In the Dallas District Office, C cases in which the charging party is represented by a private attorney are reviewed by the legal unit prior to being closed.[152] In other offices, only certain cases are reviewed by legal staff, such as in the Chicago District Office where the attorneys do not review C cases on a regular basis.[153]

Some offices come to group consensus on the categorization of charges. In the Baltimore District Office, for instance, investigators will categorize the charges they receive during their intake rotation. The charge assessment forms are reviewed by a supervisor and then, in the case of two "pods," the entire group, including attorneys, will come to an agreement on the assessment of a particular charge (with the exception of C charges) during regularly scheduled pod meetings that occur the week after intake rotation.[154] C charges are only reviewed by the pod supervisor, unless she disagrees with the designation in which case it will be brought before the entire group for discussion.[155]

Generally, the feeling among district office management is that, over the past few years, charge categorization has improved with investigators and intake staff more accurately assessing the potential merits of a charge. The regional attorney in the Phoenix District Office stated that management in that office has found that prioritization and the identification of cases are generally correct, and by instituting formal legal review of charges, they can make sure that record continues.[156]

Field Management Programs (FMP) in the Office of Field Programs at headquarters is responsible for providing management and oversight of the field offices. According to EEOC officials, FMP routinely conducts statistical analyses of field office charge categorizations to identify potential problems in applying the PCHP categories.[157] If problems are identified, FMP works with the district office to develop and implement corrective actions. FMP technical assistance reviews also involve the examination of charge files to review prioritization decisions.

An Evaluation of Charge Prioritization

EEOC staff have praised the notion of categorization as being one of the best procedural tools the Agency has seen in many years. Before implementation of the PCHP, many nonmeritorious charges got into the system and used up scarce resources, thereby creating a backlog.[158] Staff have further praised the prioritization system for allowing a better product to go into the litigation process, for giving staff the ability to manage resources accordingly, and for giving staff a tool for identifying cases similarly and consistently.[159] The acting intake supervisor at the EEOC St. Louis District Office said that, since 1994, the large backlog at that office has been eliminated because of the implementation

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[149] Pierre interview, Birmingham District Office, Feb. 24, 2000, p. 3; Lewis and Alpert interview, New York District Office, p. 21.

[150] W.D. Files, Jr., enforcement manager, Eunice Morrow, senior trial attorney, Eddy Abdulhaqq, supervisory investigator, and Roderick Childress, investigator, Birmingham District Office, EEOC, interview in Birmingham, AL, Feb. 24, 2000, p. 6 (hereafter cited as Files et al., interview, Birmingham District Office).

[151] Charles Burtner, district director, and Richard Trujillo, regional attorney, Phoenix District Office, EEOC, interview in Phoenix, AZ, Mar. 29, 2000, pp. 24–25 (hereafter cited as Burtner and Trujillo interview, Phoenix District Office, Mar. 29, 2000).

[152] Thelma Taylor, district director, and Brian McGovern, deputy director, Dallas District Office, EEOC, interview in Dallas, TX, Jan. 31, 2000, p. 5 (hereafter cited as Taylor and McGovern interview, Dallas District Office, Jan. 31, 2000).

[153] John Hendrickson, regional attorney, June Carson, trial attorney, and John Knight, trial attorney, Chicago District Office, EEOC, telephone interview, Mar. 15, 2000, p. 17 (hereafter cited as Hendrickson, Carson, and Knight interview, Chicago District Office).

[154] Byrd and Kotrosa interview, Baltimore District Office, p. 4; Wilma Scott, supervisory investigator, Tammy Lawrence, investigator, and Zetha Wofford, investigator, Baltimore District Office, EEOC, interview in Baltimore, MD, Nov. 18, 1999, p. 4.

[155] Byrd and Kotrosa interview, Baltimore District Office, p. 4.

[156] Burtner and Trujillo interview, Phoenix District Office, Mar. 29, 2000, pp. 25–26.

[157] Vargyas letter, p. 39.

[158] Files et al., interview, Birmingham District Office, p. 6.

[159] Ibid.

of the Priority Charge Handling Procedures.[160] Before the procedures, charging parties would have to wait three to four months for an interview with an investigator. With the procedures, charging parties are usually interviewed within two weeks.[161]

Other enforcement staff feel that the PCHP created a charge handling process that is more thorough and that provides more services to charging parties.[162] The procedures have also allowed investigators to process more cases. One investigator stated that before the PCHP, when she had a caseload of 80 charges without any priority, she did not know half of them. Now, she knows all of her cases in detail and can thus give charging parties more accurate information so that they can determine what the next course of action should be.[163]

However, the implementation of the charge categorization process has not been without problems. The Agency's own internal reviews have revealed inconsistencies across offices in the way charges are categorized and subsequently processed. The Agency's 1998 joint task force report found that some district offices do not always dismiss C charges at intake and noted an imbalance in the identification and processing of B charges.[164] The task force further found, during its evaluation, that many district offices do not have a system in place to ensure that B charges are in "continuous movement, development, and/or resolution."[165] This has the potential to result in a backlog of B charges and, as the task force identified, may result in potential A cases being missed.[166]

Another concern that has been raised is whether charges that could present viable instances of discrimination may be dismissed or given less emphasis simply because they are not in areas deemed a priority by the Agency. Some employment experts have argued that the prioritization of cases tends to politicize the EEOC and push the Agency toward "cutting edge" issues, potentially limiting those cases that are more straightforward but not new or novel.[167] Others argue that the Agency's success in reducing its backlog through the PHCP has been due to the dismissal of weaker C charges as opposed to the successful resolution of stronger A charges.[168]

There have also been issues raised as to the qualifications of the EEOC staff making categorization determinations. A director of one of EEOC's contracting fair employment practices agencies (FEPAs) stated that, although experienced investigators may be able to determine whether a charge will have merit up-front, she has seen instances where a full investigation would have revealed discrimination, but categorization prevented full investigation.[169]

Another FEPA director stated that he finds it problematic that "weak" EEOC charges can be dismissed without even an abbreviated information request.[170] Yet another FEPA director stated that EEOC's categorization approach has the potential to make a large number of complainants feel that they are being "kicked out" of the charge process and not getting fair treatment.[171] In addition, he thinks that experienced individuals are needed to implement a categorization system effectively.

All but three of the Web site questionnaire respondents who identified themselves as primarily being plaintiffs' attorneys stated that they had seen charges erroneously dismissed at some point in the investigative process.[172] This was attributed, in part, to improper charge categorization. One questionnaire respondent stated,

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[160] Blalock and Shiloh interview, St. Louis District Office, p. 2.

[161] Ibid.

[162] Byrd and Kotrosa interview, Baltimore District Office, p. 7.

[163] Ibid., p. 8.

[164] EEOC, *Joint Task Force Report*, p. 48.

[165] Ibid.

[166] Although it is true that this concern has not materialized, and in fact in FY 1999 the number of B charges in EEOC's inventory decreased, this concern warrants continued monitoring over a period longer than one year to ensure that the downward trend continues.

[167] Marc Stern, executive director, American Jewish Congress, telephone interview Mar. 10, 2000, p. 4 (hereafter cited as Stern interview).

[168] Norton, "Equal Employment Opportunity," p. 100.

[169] Paula Haley, executive director, Alaska State Commission for Human Rights, telephone interview, Jan. 12, 2000, p. 3. Some FEPAs have chosen to implement procedures similar to the EEOC's categorization process, while others have not. *See* chap. 6 for full discussion on FEPAs.

[170] Robert Steindler, director, Alexandria (Virginia) Office of Human Rights, interview in Alexandria, VA, Jan. 27, 2000, p. 4.

[171] Donald M. Stocks, interim director, District of Columbia Office of Human Rights, interview in Washington, DC, Jan. 8, 2000, p. 4 (hereafter cited as Stocks interview).

[172] USCCR, Web Site Survey Data (Attorneys and Mediators).

"The categorization of charges is a serious problem. Many valid cases are being [labeled as] 'Class C.' It is not working."[173] Another stated that the categorization of charges is detrimental to some individual complainants.[174]

However, the disadvantages of categorization need to be juxtaposed against the cost of investigating charges with little or no merit.[175] Many questionnaire respondents praised the PCHP. One stated: "I want to commend [EEOC] on the 1995 implementation of the categorization and prioritization of charges. I have noticed a dramatic difference in the time a case is handled."[176] This was reiterated by another questionnaire respondent who said, "Categorization/prioritization procedures have helped the EEOC and probably all parties in faster resolution and processing of charges. This has been an effective development."[177]

The benefits to charge prioritization, if done correctly and if implemented so as not to exclude nonpriority cases, seem to far outweigh the drawbacks in an era where Agency resources do not adequately reflect its caseload or the importance of its mission. In testimony before the House Committee on Education and the Workforce, the director of the Employment Discrimination Project of the Lawyers' Committee for Civil Rights Under Law stated that, when implemented correctly, EEOC's charge categorization system has resulted in its desired effects: baseless charges are being dismissed more quickly, and more resources are being spent on those that appear to have the most merit.[178] While it was acknowledged that there would be errors in classification and differences in success levels between field offices until enforcement staff gained experience, members of the civil rights community widely agree that the Agency needed to implement such a strategy to gain control over its inventory.[179]

[173] Ibid.

[174] Ibid.

[175] Stocks interview, p. 4.

[176] USCCR, Web Site Survey Data (Attorneys and Mediators).

[177] Ibid.

[178] Seymour testimony, pp. 182–83.

[179] Ibid., p. 183.

Public Perceptions about Charge Prioritization[180]

The categorization of charges is an internal EEOC process, and many respondents and complainants are not aware that any classification is done and are uninformed about how the process works. This is particularly true for charging parties who are usually only informed about the procedure in correspondence they receive after their charges have been dismissed. Three complainants who voiced a concern with the Commission stated that they were at a loss when they received notification from EEOC that an investigation would not be conducted and their charges had been dismissed. The correspondence alluded to the charge prioritization process, which in these cases demoted the charges from investigative priority.[181]

Another complainant received numerous correspondences from EEOC concerning her charges. The complainant's final letter from the Agency discussed the new prioritization procedure and stated that the charge prioritization process is based on a reallocation of EEOC staff resources. The letter further explained that the process is based on information and evidence gathered while processing her complaint and that EEOC found no evidence of discrimination, thus, no further investigation would be done.[182]

[180] To collect information from companies that have been respondents to charges or have had contact with EEOC, the Commission conducted telephone interviews with representatives from approximately 20 Fortune 500 companies. Many of these representatives include human resource professionals, labor relations specialists, in-house attorneys, and/or equal employment managers and staff.

To obtain information describing charging parties' experiences, perceptions, and understanding of the EEOC complaint process, the Commission contacted approximately 200 individuals who were referred to EEOC by the Commission. The Commission requested information as well as documents to illustrate experiences with EEOC in the handling of their alleged employment discrimination complaints. Because some of these charging parties still have open charges with EEOC, the Commission intends to preserve their anonymity. No analysis was made on the merit or validity of any of the complainants' charges. As of April 2000, 67 charging parties had responded.

[181] *See* Response of employment discrimination complainants to the U.S. Commission on Civil Rights, Fair Employment Practices Enforcement Report, September 2000, USCCR Complainants 26, 35, 49 (hereafter cited as USCCR, Fair Employment Report, USCCR Complainant __).

[182] USCCR, Fair Employment Report, USCCR Complainant 49. *See also* Kevin J. Berry, enforcement manager, New York District Office, EEOC, letter to USCCR Complainant 49, pp. 1–2 (hereafter cited as Berry letter).

The case was later dismissed. The complainant does not feel that EEOC provided adequate explanation and justification for dismissing her case, especially after receiving earlier correspondence that appeared to support her claims.[183] Another complainant received a letter from EEOC that stated that the Agency dismissed the case before a more exhaustive investigation was completed. The letter stated, "This practice is in keeping with the Commission's regulations and is designed to assure the Commission's limited resources are directed toward cases that have a higher probability of success."[184]

In addition to charging parties, most respondents interviewed by the Commission were unaware of EEOC's categorization procedures. The few respondents who were aware of the categorization procedure stated that they really did not understand how EEOC's charge prioritization system actually works. Two respondents said that their companies were not informed by EEOC how it ranked any of the charges. They learned about the process at an EEOC training seminar and saw written correspondence to company attorneys about it.[185] One of the respondents said she understands that EEOC ranks charges from A to C (high to low) but does not know how such rankings are determined.[186]

Although EEOC's charge prioritization procedure may be perceived by the Agency as a cost-effective and efficient process for handling charges, the general public is not informed of the procedure. It is conceivable that a complainant who is unfamiliar with the procedure and then receives correspondence that briefly discusses it may not believe that his or her case was demoted or dismissed for a legitimate reason. When a complainant has, in his or her opinion, submitted documentation supporting the claim, and has, in some cases, received earlier correspondence that leads him or her to believe EEOC is handling the charge, a final letter dismissing the case because of some unknown process raises, not alleviates, confusion or skepticism about an impartial determination of no cause.

Mediation/Alternative Dispute Resolution

Mediation/alternative dispute resolution has become one of the major tools in EEOC's charge processing system.[187] According to the Comprehensive Enforcement Program (CEP), one of the many benefits of mediation is its ability to resolve charges early. To do so, mediation charges must be identified immediately following intake and charge prioritization, and before any investigation is conducted.[188] The categorization of a charge is the most predictive factor of whether it will be recommended for mediation. The CEP instructs that all B charges are to be referred for mediation unless they contain class or systemic issues, are filed under the EPA, or involve issues that EEOC holds important for the furtherance of public interest.[189] Category A charges can be mediated, if the parties involved request it, and if the district director and regional attorney agree. C charges are not mediated.

Mediation is defined as "a voluntary and confidential process in which an impartial third party assists disputants in finding a mutually acceptable solution to their dispute."[190] It is a process in which the parties involved explore and reconcile their differences in a creative manner, and can resolve a host of issues at the

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[183] USCCR, Fair Employment Report, USCCR Complainant 49.

[184] *See* Manuel Zurita, area director, Tampa Area Office, EEOC, letter to USCCR Complainant 26, pp. 1–2 (hereafter cited as Zurita letter).

[185] Veronica Black, senior vice president—group executives, Dan McNatt, corporate counsel, and Gar Brannon, assistant vice president, Wachovia, telephone interview, Jan. 12, 2000, p. 6 (hereafter cited as Black, McNatt, and Brannon interview).

[186] *See, e.g.*, ibid., pp. 5–6.

[187] Mediation should not be confused with settlement negotiations or conciliation which will be discussed in greater detail later in the chapter. Negotiated settlements are conducted by a third party on behalf of the parties, whereas mediation requires the parties themselves to address the issues in dispute in order to reach a mutual resolution. Mediation occurs before the complaint is investigated and before a finding of cause or no cause is issued. Conciliation, on the other hand, occurs after the investigation and after a cause finding has been issued. Conciliation has no impartial third party, but rather the negotiation is between EEOC and the respondent. A failure to conciliate bears the threat of a lawsuit. *See* EEOC, *Mediation Deskbook: Office Policies, Procedures, and Guidelines*, "Chapter 1: Mediation Policies and Procedures," April 1999, p. 1; C. Gregory Stewart, general counsel, EEOC, interview in Washington, DC, Mar. 3, 2000, p. 8 (hereafter cited as Stewart interview).

[188] EEOC, *Comprehensive Enforcement Program*, p. 10.

[189] Ibid.

[190] EEOC, *History of ADR*, "Mediation Defined," Tab E, (no date) (hereafter cited as EEOC, *History of ADR*).

same time.[191] The mediator is a neutral third party who assists the charging party and respondent to reach a voluntary negotiated resolution of the charge. The mediator has no authority to impose a settlement, and the parties themselves reach what they consider to be a workable solution.[192]

History of Mediation at EEOC

In 1990 the Alternative Dispute Resolution Act required all federal agencies to develop policies on voluntary use of alternative dispute resolution.[193] In 1992, EEOC initiated an ADR pilot program in four district offices.[194] The program was designed to determine whether charges of employment discrimination could be resolved more quickly and effectively using a mediation process than by relying solely on investigations.[195] The program showed that, in appropriate circumstances, mediation was an effective method of early resolution for some types of charges.[196]

In 1995, under the direction of then Chairman Gilbert F. Casellas, EEOC established a Task Force on Alternative Dispute Resolution, which was assigned the responsibility of assessing how ADR could be used at the Agency.[197] Shortly after the task force's report, EEOC accepted its recommendations and voted to begin a program to offer mediation as an alternative to the investigative and litigation processes traditionally used to resolve charges of employment discrimination.[198] Later that year, EEOC issued its Policy Statement on Alternative Dispute Resolution which confirmed its commitment to use voluntary alternative methods for resolving disputes in all of its activities, including all aspects of the enforcement process.[199] Principles of the policy statement included:

- The ADR program must further the mission of the Agency.
- The ADR program must ensure fairness for both charging parties and respondents.
- The ADR program must be flexible so that it can respond to the differing challenges faced by the Agency and its individual offices.
- Workload and geographic/cultural differences must be accounted for in the ADR program.
- The ADR program must provide for training and evaluation.[200]

By the end of fiscal year 1997, EEOC had mediation pilot programs established in all of the district offices.[201] Each district office used its own creativity, ingenuity, and relationships with local organizations to establish mediation programs because there was no funding to support mediation.[202] Although offices were required to participate in mediation, they came into the program at different levels based on the resources available.[203] Consequently, there was no uni-

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191 "EEOC's Mediation Program Going Strong Despite Budget Shortfall, Coordinators Say," *Daily Labor Report*, Mar. 27, 2000, p. B-1.

192 EEOC, *Mediation Deskbook*, p. 1.

193 Alternative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (1990) (codified at 5 U.S.C. § 571) (1994).

194 In the pilot program, more than half of the charges mediated were resolved, and the mediations were completed in an average of 67 days. In cases in which the charging party was still employed, 48 percent of the respondents chose mediation. When the charging party was terminated, 39 percent chose mediation. The pilot program ended in 1994–95. EEOC, *Task Force on Alternative Dispute Resolution: Report to Chairman Gilbert F. Casellas*, Mar. 5, 1995, p. 5 (hereafter cited as EEOC, *Task Force on Alternative Dispute Resolution Report*).

195 EEOC, *FY 1994 Annual Report*, p. 4.

196 EEOC, *FY 1995 Annual Report*, p. 12.

197 EEOC, *Task Force on Alternative Dispute Resolution Report*, p. 2.

198 EEOC, *Mediation Deskbook*, p. 1.

199 EEOC, "Policy Statement on Alternative Dispute Resolution," EEOC Notice No. N-915-002, July 17, 1995 (hereafter cited as EEOC, "Policy Statement on Alternative Dispute Resolution.").

200 Ibid., pp. 4–5.

201 Elizabeth Thornton, director, Office of Field Programs, EEOC, interview in Washington, DC, Mar. 1, 2000, p. 4 (hereafter cited as Thornton interview, Mar. 1, 2000). *See also* EEOC, Commissioners Meeting, Open Session, Washington, DC, Sept. 28, 1999, Statement of Elizabeth Thornton, director, Office of Field Programs, p. 47 (hereafter cited as EEOC, Commissioners Meeting, Sept. 28, 1999); Irene Hill, attorney advisor to the director of the Office of Field Programs, and Steve Ichniowski, national alternative dispute resolution coordinator, EEOC, interview in Washington, DC, Mar. 2, 2000, p. 4 (hereafter cited as Hill and Ichniowski interview).

202 Castro interview, p. 3. *See also* Thornton interview, Mar. 1, 2000, p. 4; EEOC, Commissioners Meeting, Sept. 28, 1999, Thornton Statement, p. 47.

203 For example, by the end of 1995 there were two monetary contributions available for mediation. Each district office received $8,000 out of the budget to help develop a mediation program. The money was basically used for training staff in mediation skills. EEOC had its first interagency

formity in the Agency's overall mediation program.[204] District offices had to develop ways to either recruit mediators on a pro bono basis or devise ways to fund mediations through some other method. For example, under its pilot mediation program, the Birmingham District Office went to bar associations and solicited pro bono mediators. Staff also entered into a memorandum of understanding with the local Better Business Bureau whereby companies could pay into a fund, managed by the district office, that would be used to pay mediators for their services.[205] Other field offices conducted mediation with internal staff who were assigned on a detail basis acting as mediators[206] or used internal staff by rotating investigators or attorneys into mediation. One office relied on contract mediators paid for by either the charging party or the respondent.[207]

In July 1998, Ida Castro, then chairwoman-elect of the EEOC, told the Senate that she intended to move forward with alternative dispute resolution reforms initiated under former Chairman Gilbert Casellas.[208] She indicated at her confirmation hearing that she would "explore creative approaches to reduce the backlog and expand the use of alternative dispute resolution techniques," and said that she would "reach out to businesses, as well as underserved communities, the private bar, and State and local partners to further strategies and improve customer service."[209] When Chairwoman Castro was appointed, she wanted to establish a national mediation program that would help reduce the Agency's case backlog and increase services to customers.[210]

EEOC's New Mediation Program

Both the chairwoman and the director of OFP noted shortcomings in the pilot mediation programs. The director of OFP stated that although the programs netted some positive results, EEOC recognized that it needed to achieve national consistency and establish safeguards to make the program viable for its stakeholders.[211] Chairwoman Castro said that EEOC's ADR pilot programs showed that mediation has great potential as a component in the complaint process;[212] however, she realized that in developing a truly national mediation program, the pilot program had to be refined.

There were two major concerns raised by respondents and representatives for charging parties about the mediation program EEOC proposed. Both expressed concern about aspects of mediation that they deemed problematic. One concern was building employer support and participation in the mediation process. At an EEOC meeting in December 1998, a panel of business officials representing mid-sized and small businesses said that many small employers do not understand the benefits of mediation to resolve employment discrimination charges, resulting in a low participation rate.[213] During the pilot project, only approximately 30 percent of the respondents who were offered mediation accepted.[214] Respondents were reluctant to accept mediation because of the lack of consistency in

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agreement with the Federal Mediation/Conciliation Service (FMCS) for $250,000, and the FMCS provided mediation services throughout EEOC. A second contract allowed for mediation during 1996–1998. Hill and Ichniowski interview, p. 4.

[204] EEOC, Sept. 28, 1999 Commissioners Meeting, Castro Statement, p. 55.

[205] Debra Leo, ADR coordinator, and Emma Evans, mediator, Birmingham District Office, EEOC, interview in Birmingham, AL, Feb. 24, 2000, p. 3 (hereafter cited as Leo and Evans interview, Birmingham District Office).

[206] Hill and Ichniowski interview, p. 4.

[207] Thornton interview, Mar. 1, 2000, p. 5.

[208] "Commission Nominees Castro, Igasaki Face Mild Questions From Senate Panel," *Employment Discrimination Report*, July 29, 1998, p. 149.

[209] Ibid.

[210] Castro interview, p. 3.

[211] EEOC, Commissioners Meeting, Sept. 28, 1999, Thornton Statement, p. 48. Those individuals who have a vested interest in the operations of EEOC, such as potential charging parties, employment attorneys, and employers are generally referred to as stakeholders.

[212] Castro interview, p. 3. For example, the mediation pilot program resulted in 5,000 positive charge resolutions and obtained $58 million on behalf of charging parties in about six months. EEOC contracted a study to determine how well the mediation pilot worked, and the study's results showed that the majority of the charges were successfully resolved, and charges were resolved more quickly through mediation than those that were investigated.

[213] "Employers Urge EEOC to Improve Efficiency and Boost Communication with Industries," *Fair Employment Report*, Dec. 16, 1998, p. 190. *See also* "Small Business Reps Address Commission: Cite Confusing Laws, 'Biased' Investigators," *Daily Labor Report*, Dec. 10, 1998, pp. A-11 to A-12.

[214] Thornton interview, Mar. 1, 2000, p. 5.

the pilot program and concerns about confidentiality and bias on the part of EEOC staff.[215]

Another concern was the protection of the rights of the charging party in an unbiased mediation setting. Civil rights groups, such as the NAACP, expressed support for mediation, but also pointed out the need for a "diverse corps" of mediators in the proposed new mediation program.[216]

Taking these concerns into consideration, EEOC launched its new mediation program in early 1999. Congress initially supported mediation and provided $13 million for the establishment of the nationwide program.[217] To initiate the program, the Agency sponsored a national "kick off" in February 1999. EEOC invited individuals and organizations from all over the country to learn about the program. Later that year, each district office held a "local kickoff" inviting local groups to mediation conferences and programs.[218] Chairwoman Castro met with stakeholders about the program and incorporated their input in the development of the new mediation program.[219] She also promised to ensure adequate training of mediators and that ADR coordinators at each field office would be trained to address any questions that may arise.[220] The chairwoman stated that the new program gives both parties the opportunity to come together with a qualified mediator, to resolve a charge before decisions have been made on either side, to reach a resolution before EEOC invests time and resources on an investigation, and to reach a resolution before EEOC has taken a position on whether or not discrimination has occurred.[221]

Although mediation programs had been in place at some of the 50 field offices since the early 1990s, the expanded program put national parameters in place.[222] Approximately $12 million of EEOC's FY 1999 budget was designated to hire internal and external mediators and ADR coordinators, to conduct training, and to develop and disseminate informative material.[223] The Agency was authorized to hire 92 additional staff members, including 25 ADR coordinators in the 24 district offices and the Washington Field Office, and 67 mediators who were placed in offices based on need.[224] In addition to the funds allocated for internal mediation staff, approximately $4.9 million went toward external contracts for mediators. The district offices selected their own contractors, but only after headquarters provided them with basic nationwide standards and selection criteria.

A little over six months after the nationwide mediation program began as an alternative approach to resolve discrimination complaints, mediation had become an integral tool in EEOC's enforcement process. By September 1999, approximately 36 percent of employers and 81 percent of charging parties offered the option of mediation agreed to participate in the process. For the fiscal year, the monetary benefits achieved through mediation accounted for $56 million, or nearly 30 percent, of the estimated $188 million reaped by the EEOC administrative prelitigation process.[225] At a September 1999 commissioners meeting, the director of OFP reported the mediation success rates (successful resolutions) for internal and contract mediators as 72 and 58 percent, respectively.[226] At that time, internal mediators had mediated about 3,000 cases and contractors about 2,500 cases.[227]

The New Mediation Program Implemented

In order to establish a national mediation program, the EEOC used its experiences from the pilot programs, information collected from stakeholders, and feedback from district offices to develop a Mediation Deskbook, which is the

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[215] Ibid.

[216] *See* "EEOC's New Nationwide Mediation Plan Offers Option of Informal Settlements," *Daily Labor Report,* Feb. 12, 1999, pp. C1–C2.

[217] Castro interview, p. 3. The program would, however, prove difficult to maintain once the original funds ran out. *See* discussion on the funding dilemma, pp. 128–31.

[218] Hill and Ichniowski interview, p. 9.

[219] Castro interview, p. 3.

[220] "EEOC's New Nationwide Mediation Plan Offers Option of Informal Settlements," pp. C1–C2.

[221] Castro interview, p. 3.

[222] "EEOC's New Nationwide Mediation Plan Offers Option of Informal Settlements," pp. C1–C2.

[223] Ibid.

[224] Hill and Ichniowski interview, p. 5.

[225] "EEOC's Voluntary Mediation Program is Now Integral Tool in Enforcement Arsenal," *Daily Labor Report,* Sept. 29, 1999, p. A-1.

[226] EEOC, Commissioners Meeting, Sept. 28, 1999, Thornton Statement, p. 68.

[227] Ibid., p. 69.

first procedural guidance on mediation prepared by the Agency.[228] The extensive Deskbook, published in April 1999, serves as the Agency's primary mediation guidance for all EEOC mediators, both external and internal.[229]

The Deskbook outlines certain procedures and requirements in the mediation program. First, it emphasizes that participation in the mediation program is voluntary, and either the charging party or the respondent can decline to participate. If either party declines to participate, the charge will be investigated as it would have been prior to being referred to mediation. Second, mediators are to be impartial with no stake in the outcome and serve as facilitators to dispute resolution. Third, participants must agree to a confidentiality agreement which states that they are not to disclose any information presented during the mediation session. The agreement covers all admissions, proffered facts, tendered offers, and rejected offers. The mediation session is not transcribed or recorded, and all notes or other documents offered by either party are destroyed upon conclusion.[230]

To ensure impartiality and fairness, the EEOC mediation program requires a "firewall" between the mediation program and the enforcement program (the investigative and litigation functions). Under the firewall requirements, the mediation program operates completely separate from the investigative and litigation processes.[231] There is no exchange of information between mediation staff and the investigative staff once a charge is forwarded for mediation. To ensure that the firewall requirement is enforced, EEOC established several components that:

- require each office to have a separate ADR unit and an ADR coordinator who manages the program and reports directly to the district director;
- prohibit EEOC staff who serve as mediators from performing any investigative or other enforcement functions, and conversely, prohibit EEOC staff assigned to investigative or litigation units from involvement in the Agency's mediation program;
- prohibit any communication between the investigator and mediation staff during the mediation process; and
- require all mediation files to remain in the mediation unit, and if the charge is not successfully mediated, only a copy of the charge is referred to the investigative unit.[232]

In special circumstances where enforcement staff provide assistance with mediation, there must be procedures in place to ensure that they do not disclose any information revealed during the mediation process and, therefore, must not have any role in the investigation of a charge that fails to be settled through mediation. For example, the New York District Office serves a large bilingual population. In instances where a party's language preference is not English, staff investigators may be used as translators. If an investigator serves as a translator, he or she may not have anything to do with any subsequent processing of the charge and, therefore, the charge would be assigned to a different enforcement unit.[233]

Selection of Charges for Mediation

An office has 10 days from the receipt of a charge to categorize and send all appropriate B charges to the mediation unit.[234] Other selected charges may be referred as appropriate on a case-by-case basis.[235] Cases that are not referred for mediation include Equal Pay Act cases, particularly egregious cases, class or systemic cases, and those cases that EEOC may want to litigate. According to the director of OFP, cases categorized as A generally do not go into mediation. However, it is possible that if, at some point during charge processing, the charging party and respondent want to mediate a case that has not been categorized as a B, mediation may take place, particularly if both the district director and the regional attorney agree that a charge should be mediated. C cases

[228] *See generally* EEOC, *Mediation Deskbook.*

[229] Ibid., p. 4.

[230] Ibid., p. 2.

[231] Ibid., p. 3.

[232] Ibid.

[233] Lewis and Alpert interview, New York District Office, pp. 78–79.

[234] Hill and Ichniowski interview, p. 6; EEOC, *Mediation Deskbook*, p. 7.

[235] EEOC, *Mediation Deskbook*, p. 7.

should be mediated. C cases are never mediated because they are not deemed meritorious.[236]

According to Chairwoman Castro, in some B cases, the only way to know whether or not discrimination has occurred is to expend significant resources, which EEOC does not have. She feels those cases should go to mediation. EEOC had to determine the best way to invest resources to address as many concerns as possible, and mediation is one way in which the Agency can do so.[237]

In fiscal year 1999, all B cases except class or systemic cases and EPA cases were referred to the mediation unit where offers to mediate were made to the charging party and the respondent. If both parties accepted the offer, then the charge was referred to a mediator. Since both parties must agree to mediation, only about 15 percent of the B charges referred to the mediation unit were actually mediated.[238] In FY 2000, offices have again been instructed to refer all B charges to the mediation unit so that offers to mediate can be made to the parties. However, because all offices are not using contract mediators due to budget constraints, some offices may not be able to mediate all B cases where both parties accept the offer. If this occurs, offices have been given the authority to develop mechanisms for deciding which B cases will be referred to the mediation unit.[239]

The Mediation Offer

The ADR unit has 45 days to offer mediation to both parties and, if accepted, to assign the case to a mediator. If either party rejects the offer, the charge is referred to an investigative unit within five days of the rejection. If the mediation offer is accepted, the mediator has 45 days to schedule and complete the mediation process. If an impasse is reached or either party declines to proceed with mediation after initially accepting the offer, the charge is to be referred for an investigation within five days.[240]

The Deskbook outlines certain procedures for staff to follow with respect to the notification of charging parties and respondents about the mediation process. Staff are required to explain the mediation program to the charging party during intake of a charge.[241] The Agency has developed a fact sheet, brochure, and videotape of the process. If the charging party made initial contact with the Agency by mail, he or she should be mailed the fact sheet or brochure. The respondent should be mailed an invitation to mediate, an Agreement to Mediate form, and the fact sheet or brochure upon receipt of the charge notification. The respondent should also be contacted by telephone to discuss the information received.[242]

The Mediation Session

As noted earlier, the mediator serves as a neutral third party during the mediation session. He or she does not decide the dispute or impose a settlement, but rather facilitates the parties as they come to an agreement.[243] The other main function of the mediator is to maintain an atmosphere during the mediation session that is conducive to discussion and resolution of the charge.[244]

A mediation session begins with an introduction of the parties and explanation of the roles of the individuals involved, including representation of either party. The charging party and the respondent may bring legal representation or other support to the mediation, but the mediator determines what will be the role of representatives. All individuals attending the mediation session are required to sign a confidentiality agreement.[245]

Once mediation has been explained, the parties participate in an initial group session during which each party can share information regarding the facts surrounding the charge and their perspectives on the issues. This session is generally followed by individual sessions, or caucuses. The caucuses can be used to elicit sensitive information that a party may be unwilling to reveal in front of the other or to allow the parties to refute what was said during the joint session.[246] The parties are also asked to identify

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[236] Thornton interview, Nov. 9, 1999, p. 8.

[237] Castro interview, p. 4.

[238] Hill and Ichniowski interview, p. 6.

[239] Ibid.

[240] EEOC, *Mediation Deskbook*, p. 7.

[241] Ibid., p. 9.

[242] Ibid.

[243] Ibid., p. 13.

[244] Ibid., p. 14.

[245] Ibid., pp. 16–17.

[246] Ibid., p. 16.

their interests so that possible common ground can be found. Subsequent joint sessions are used to consider solutions and offer potential agreements. The final joint session is used to either clarify the terms of an agreement, if one has been reached, or to acknowledge that no agreement or only partial agreement has been reached.[247]

The Mediation Settlement Agreement

One of the core principles of the mediation program is that the mediation agreement is enforceable like any other conciliation or settlement agreement handled by EEOC.[248] EEOC's Office of Legal Counsel approved a model mediation agreement that should be used in instances where the Agency is party to the agreement.[249] While the parties may add language to the model agreement in limited circumstances, they cannot modify or delete any of the core provisions of the agreement. Under the model settlement agreement, EEOC is authorized to investigate compliance with the agreement, to enforce the agreement in court, and to use the agreement as evidence in a subsequent proceeding in which a breach of the agreement is alleged.[250] However, EEOC does not monitor the implementation of the provisions agreed upon in mediation. The parties are informed that the agreement is enforceable and are responsible for notifying the Agency if there is a breach.[251] The regional attorney of the appropriate district office will then decide whether to file suit to enforce the agreement.

The authority to sign off on mediation agreements has been delegated to the district directors. In some offices, only the district director will sign off on an agreement. In other offices, the district director or a designee (who is usually the office's ADR coordinator) will sign the agreement (unless the ADR coordinator was the mediator).[252] The parties involved can decide what will resolve a charge; as long as the agreement does not contain any unlawful provisions, EEOC will usually sign off on it. However, there are certain provisions EEOC cannot sign off on, such as confidentiality clauses (although they are not prohibited) or an agreement obtaining general release of issues not relating to the complaint. EEOC will reference any changes or resolutions not in the model agreement, but EEOC cannot incorporate special provisions that are beyond the scope of statutes the Agency enforces into the agreement. If the parties want a side agreement, or a general release that covers other issues than what is in the statutes, EEOC will not be a party to that agreement.[253] Regardless of what is in a settlement agreement, mediation is considered successful when both parties walk away satisfied with the outcome.[254]

Mediation Staff

District offices generally have between two and five full-time mediators on staff, including the ADR coordinator, who are often divided between district, area, and local offices. The ADR coordinator serves as the point person for the district office's mediation program and reports directly to the district director. The primary duties of the ADR coordinator include supervising the ADR unit; developing, implementing, and evaluating the district's mediation program; reviewing charges and making recommendations for mediation; assigning charges to mediators; monitoring and/or conducting mediation sessions; and developing and conducting training, education, and outreach programs on mediation.[255] Staff mediators also have responsibilities other than actual mediation, which include contacting the charging party and the respondent, encouraging them to agree to mediation, and scheduling mediation sessions.[256]

Currently, there are also two national ADR coordinators at headquarters.[257] Their day-to-day responsibilities are to provide oversight of

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247 Ibid.

248 Hill and Ichniowski interview, p. 7.

249 EEOC, *Mediation Deskbook*, p. 17.

250 Ibid., p. 21.

251 Hill and Ichniowski interview, p. 7.

252 Ibid., pp. 7–8.

253 Ibid., p. 7.

254 Lynn Bruner, director, Maria Schulte, mediator, St. Louis District Office, and Mike Conely, mediation specialist, Kansas City Area Office (via telephone), EEOC, interview in St. Louis, MO, Feb. 1, 2000, p. 6 (hereafter cited as Bruner, Schulte, and Conley interview, St. Louis District Office).

255 EEOC, *Mediation Deskbook*, pp. 4–5.

256 *See* Bruner, Schulte, and Conley interview, St. Louis District Office, p. 5; Leo and Evans interview, Birmingham District Office, p. 2.

257 Hill and Ichniowski interview, p. 1. Both began their roles as headquarters ADR Coordinators in 1999.

the field offices, monitor what is going on with mediation in the field, and perform mediation program development.[258] The national ADR coordinators also offer assistance to ADR coordinators in field offices as issues and concerns arise. Their role has expanded from merely keeping a handle on mediation to include coordinating input from mediators, stakeholders, contractors, civil rights organizations, advisory and professional groups, and other entities concerning the program.[259] Another element includes review of mediation materials, which is done in conjunction with the Office of Legal Counsel, through contact with contractors and budgetary personnel, and contact with the Office of Communications and Legislative Affairs.[260]

When funding permitted, EEOC's mediation program used the services of contract mediators and mediators from the Federal Mediation and Conciliation Service, in addition to EEOC staff and pro bono, or volunteer, mediators.[261] All internal and external mediators are required to meet national qualifications and standards.[262] EEOC does not require that mediators be attorneys; however, they must be trained in mediation, have experience mediating complaints, be knowledgeable about the laws EEOC enforces, and understand the Agency's charge processing procedures.[263] New mediators who need mediation experience can gain that experience comediating with seasoned mediators.[264]

Once a mediator enters into a contract, under the agreement, EEOC has to provide orientation about its complaint process and a legal orientation.[265] District offices can also choose to implement their own training programs for mediators. For example, in the San Francisco District Office, to ensure that the region's contract mediators are in sync, the ADR coordinator holds roundtables to communicate EEOC's expectations.[266] She requires contract mediators to have a background in employment law and to mentor with another mediator who has experience. The ADR coordinator also circulates a newsletter to keep contractors abreast of new developments.[267] To give mediators exposure, the office holds "mock mediations" with employers that are curious about the process.[268]

The Mediation Funding Dilemma

Although the Agency has established procedures for mediation, the actual implementation of the programs at district offices is primarily guided by the resources available.[269] Initially, about one-half of EEOC mediators were external to the Agency. They were employment attorneys or professional mediators who were paid $800 per mediation.[270] However, budget reductions for fiscal year 2000 eliminated funding for contract mediators in most EEOC districts, causing offices to rely more heavily on internal mediators and volunteers.[271]

Despite the funding cutbacks, the national ADR coordinators said that currently most of the offices have been able to meet their needs for mediators.[272] District offices have been encouraged by headquarters to use innovative and creative means to solicit the assistance of mediators in the community. In the Cleveland District Office, the ADR coordinator said that the office has a "full-scale" pro bono program in place.[273] Most of the office's current external mediators, who were paid for their services when funds were available, agreed to continue to serve on a pro bono basis when funds ran out. Currently, in addition to two full-time staff mediators, the office has about 35 volunteer mediators, which is sufficient to keep the program "afloat."[274] Other offices, such as the Birmingham District Office, have also relied on pro bono mediators who were

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[258] Ibid., p. 2.

[259] Ibid.

[260] Ibid., p. 3.

[261] EEOC, Commissioners Meeting, Thornton Statement, Sept. 28, 1999, p. 48.

[262] Ibid., pp. 48–49.

[263] Hill and Ichniowski interview, pp. 6–7.

[264] Dianne Lipsey, co-president, ADR Vantage, telephone interview, Apr. 4, 2000, pp. 35–36. ADR Vantage is a dispute resolution firm that provides a variety of ADR services, including training and mentoring new mediators. During EEOC's pilot mediation program, Ms. Lipsey was a contract mediator for the Washington, DC, Field Office.

[265] Hill and Ichniowski interview, p. 7.

[266] "EEOC's Mediation Program Going Strong," p. B-2.

[267] Ibid.

[268] Ibid.

[269] Hill and Ichniowski interview, p. 5.

[270] Ibid.

[271] Ibid.

[272] Ibid.; *See also* Thornton interview, Mar. 1, 2000, pp. 4–5.

[273] "EEOC's Mediation Program Going Strong," p. B-1.

[274] Ibid.

former contractors. The ADR coordinator in that office is hopeful that if contract money is made available, these pro bono mediators will become contract mediators again.[275]

EEOC's San Francisco District Office is one of the few EEOC offices that continues to rely heavily on external mediators solicited from the professional mediator community. Because of the large geographical area covered by the office, mediations have taken place in all of northern and central California, Guam, Hawaii, and Okinawa.[276] Therefore, mediators must be willing to travel. Further, due to the cultural makeup of the region, there must be diversity in mediators because many mediations are conducted in multiple languages, including Cantonese and Japanese.[277]

While some offices are using mediators who were formerly under contract as pro bono mediators, others have had more difficulty finding external mediators because the available pool varies geographically.[278] For example, the pool of external mediators is larger in the Washington, D.C., area than in South Dakota. Offices with mediator shortages have used the Federal Mediation and Conciliation Services (FMCS) for mediators in the past, but EEOC's contract with FMCS expired in the second quarter of FY 2000, leaving district offices to come up with alternative methods for finding mediators.[279] As stated earlier, the decision that a district office makes as to what pool of mediators to use depends on the office's resources and initiative.

In some district offices, internal staff other than staff mediators are being used as mediators to help with the shortage of external mediators. In the Phoenix District Office, in addition to the ADR coordinator and two full-time staff mediators, a program analyst and another staff person who works in administration have mediated cases.[280] In the Seattle District Office, six investigators have been trained to mediate and did so during the Agency's pilot mediation program. Some investigators are also working with a mediation training program in the Seattle area to gain experience and knowledge about the process.[281] However, these investigators are currently prohibited from mediating private sector cases due to the "firewall" provisions of the new mediation program.

Although many offices have been able to compensate for lack of funding by using other sources for mediators, the budget cut has had a profound impact on the maintenance of mediation programs at some district offices. The most obvious effect is that the caseloads of in-house mediators have increased significantly. The director and deputy director of the Chicago District Office stated that, although the office has some volunteer mediators, internal mediators are currently handling about 90 percent of the office's mediation workload.[282] Because of this situation and the large number of charges that come into the office, there are between one and two dozen pending mediations that have not been assigned and/or completed.[283]

Another burden created by inadequate funding is the inability to hire enough staff to coordinate mediations between internal and external mediators. In the New York District Office, for example, there are five staff members who are assigned to the mediation unit, including one ADR coordinator and four mediators.[284] The office uses pro bono mediators to a limited extent because the use of pro bono mediators depends on the availability of staff to coordinate that aspect of the mediation program.[285] The office's first concern is ensuring that its internal mediation program is effective. Currently, internal mediators are handling about 50 cases at a time.[286]

Funding has also limited the ability of internal staff to conduct the support functions necessary for a successful mediation program. Accord-

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[275] Leo and Evans interview, Birmingham District Office, p. 3.

[276] "EEOC's Mediation Program Going Strong," p. B-2.

[277] Ibid.

[278] Hill and Ichniowski interview, p. 7.

[279] Ibid., p. 5.

[280] Yvonne Gloria-Johnson, ADR coordinator, Phoenix District Office, EEOC, interview in Phoenix, AZ, Mar. 29, 2000, p. 5 (hereafter cited as Gloria-Johnson interview, Phoenix District Office).

[281] Hill, Cleman, and Little interview, Seattle District Office, p. 30.

[282] Rowe and Bowman interview, Chicago District Office, p. 32.

[283] Ibid., p. 31.

[284] Lewis and Alpert interview, New York District Office, p. 37.

[285] Ibid., p. 34.

[286] Ibid., p. 78.

ing to the director of the Phoenix District Office, the workload has increased as a result of a combination higher respondent acceptance rates and the lack of funds for external mediators. However, this increased workload is offset to some degree by the internal mediators not having to convene mediations for the external mediators.[287] The office has had to develop new ways to mediate certain cases that could have been assigned to external mediators in the past. To make mediation available in areas where the participants are out of the Phoenix area, such as Utah and southern Arizona, the office plans to try to conduct mediations by telephone. According to the office's ADR coordinator, this will be a new experience. The coordinator does not expect a great success rate, but is willing to try it because of the increased interest in mediation in those areas.[288] According to EEOC headquarters, verbal guidance has been provided to the field offices indicating that telephone mediations should be conducted in very limited circumstances when it is impossible for the parties and the mediator to meet together in one location.[289]

Most district offices have been able to overcome, or at least compensate for, the difficulties resulting from the lack of adequate resources and have implemented creative uses of existing resources. However, at least one office has decided to put a freeze on conducting mediation for the time being. According to staff at the St. Louis District Office, because of budgetary constraints, management has decided that no charges will be referred for mediation until the existing backlog of charges in the ADR unit is reduced.[290] The backlog was created largely because charges were scheduled for mediation by contractors prior to the loss of funding. Therefore, beginning in March 2000, the office planned to maintain a pool of only about 20 to 30 cases for actual mediation and to schedule a mediation only after another mediation has been completed. The mediation specialist in Kansas City stated that the exception to this would be if charging parties or respondents explicitly request mediation.[291] This approach is certain to have numerous undesirable effects on its enforcement program, including: either forcing more charges into the investigation stage creating a backlog or forcing the dismissal of charges that have potential due to limited staff resources; increasing the overall processing time for charges, thus negatively affecting customer satisfaction; decreasing the likelihood that charges will result in settlement; and causing charging parties and respondents to lose faith in the mediation process.

ADR staff in the St. Louis District Office schedule their own mediations, but the district director evaluates decisions about where and how to obtain mediators, how many cases to mediate, and how they are selected for mediation.[292] The director has considered using volunteer mediators, as well as investigators detailed as mediators, but is reluctant to do so for a number of reasons. She believes that managing the quality of volunteer mediators' work would be difficult.[293] Volunteer mediators, who usually have responsibilities in outside paying jobs, also present scheduling difficulties for mediation. The district director further indicated that she would need additional staff for scheduling and managing, as well as providing clerical support for volunteer mediators.[294]

The director of the St. Louis District Office has also been reluctant to detail EEOC investigators into the alternate dispute resolution function due to the firewall provision requiring that mediation and investigation be kept separate.[295] Even if the legal concerns were resolved, detailing investigators could create unique staff scheduling and assignment problems. She would also need sufficient investigator resources to reassign them to mediation.[296]

The funding dilemma appears to have created a wider degree of inconsistency in the mediation programs across district offices. However, when asked whether this was in fact the case, the di-

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[287] Burtner and Trujillo interview, Phoenix District Office, Mar. 29, 2000, pp. 32–33.

[288] Gloria-Johnson interview, Phoenix District Office, p. 16.

[289] Vargyas letter, p. 42.

[290] Bruner, Schulte, and Conley interview, St. Louis District Office, pp. 2–4; Bolden et. al., interview, St. Louis District Office, p. 7.

[291] Bruner, Schulte, and Conley interview, St. Louis District Office, pp. 3–4.

[292] Ibid., p. 2.

[293] Ibid., p. 3.

[294] Ibid.

[295] *See* discussion about firewall provisions, p. 125.

[296] Bruner, Schulte, and Conley interview, St. Louis District Office, p. 3.

rector of OFP denied that there are any great inconsistencies in the mediation program across offices. For example, she explained that every office has at least one person on board who is a trained and experienced mediator. She noted that ADR coordinators in the field can mediate cases themselves because the job is not 100 percent coordinating. She added that the St. Louis District Office director's decision to put a freeze on mediations is not because of a directive from headquarters and attributes the office's problems with mediation to factors other than resources or a lack of available mediators.[297] Currently, OFP is encouraging the St. Louis District Office to use pro bono mediators, consult the Mediation Deskbook, and contact headquarters for assistance.[298]

Assessment of EEOC's Mediation Program: Concerns and Solutions

In FY 1999, the year EEOC implemented its new mediation program, it successfully mediated 4,833 charges, a figure that increased from 1,631 in fiscal year 1998. The acceptance rate for charging parties increased to 81 percent from 68 percent; and the acceptance rate for respondents increased from 28 to 36 percent.[299] These increases reflect a remarkable amount of effort on the part of EEOC to implement a successful national program.

However, while mediation has proven to be a valuable method for solving disputes between individuals in the employment context, the Agency's success has not been achieved without criticism and obstacles by participants on both sides. Many of the complainants and respondents contacted for this evaluation had experience with mediation at EEOC prior to the institution of the new mediation program and expressed concerns about those experiences. EEOC staff acknowledge that many of the concerns and perceptions reflect problems of the pilot mediation projects, but the new mediation program has made real attempts to remedy those problems with the implementation of national standards, procedures, and criteria. EEOC staff are confident that the new program reflects the Agency's willingness to incorporate new strategies to improve the overall effectiveness of mediation as an enforcement mechanism. The following discussion examines what some of the complaints have been in the past and what the Agency has done to address them.

Balance of Power

Perhaps one of the most critical concerns, given the intent of mediation to bring parties together to work out a solution, is the inherent imbalance of power that results when one party goes into the mediation with more experience or better prepared. At issue particularly for charging parties is whether the mediation setting fosters a balanced environment when one party (usually the respondent) may be represented by individuals experienced in mediation, and the other party (usually the complainant) is unaware of what to expect. For example, one complainant expressed that, in her opinion, the outcome of her case's mediation session (which was not in her favor) was largely due to the unfairness of the environment. She stated that she was uncomfortable sitting in the same room with the respondent's legal representative. In mediation, she felt "intimidated, powerless, and at a disadvantage."[300] Another complainant, who participated in mediation in 1997, stated that she felt the mediation was "one sided," and the respondent had the advantage. The mediator appeared to be "too acquainted" with the respondent's lawyer. She also wrote that new information was introduced during mediation that she did not know anything about.[301]

The mediation setting itself can contribute to whether or not mediation is successful and whether parties feel they have been treated fairly. Before the new program, some complainants said that they felt intimidated or at a disadvantage in the mediation setting. Even the seating arrangement at mediation made one

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297 Thornton interview, Mar. 1, 2000, p. 5.

298 Ibid.

299 EEOC, "Accomplishments Report for FY 1999," accessed at <http://www.eeoc.gov.accomplishments-99.htm>.

300 USCCR, Fair Employment Report, USCCR Complainant 41. Approximately half of the 87 actual and alleged victims of discrimination responding to the Commission's Web site questionnaire who had participated in mediation also reported feeling disadvantaged during the process. USCCR, Web Site Survey Data (Actual and Alleged Victims). *See also* n. 105, p. 111, for clarification on the universe of survey respondents.

301 USCCR, Fair Employment Report, USCCR Complainant 35.

complainant feel intimidated.[302] The notion of an imbalance of power was especially expressed by those complainants who found more than one respondent in attendance, found out at mediation that an attorney would be representing the employer, or felt that the setting was different from what they expected. Respondents have also acknowledged that this could be problematic. One respondent said that he could see where a charging party would be at a disadvantage in mediation without legal representation when the respondent has an attorney.[303]

Several responses to the Commission's Web site questionnaire indicated that charging parties are at a disadvantage when they represent themselves if the employer has an attorney present.[304] Attorneys and mediators noted that it is important for charging parties to be represented by counsel during mediation to help maintain a balance of power. Counsel for the parties can provide advice on the relative strengths and weaknesses of the claim, assist in negotiating, and inform the parties to mediation of their legal rights and responsibilities.[305] One questionnaire respondent stated:

> Unrepresented plaintiffs would be sitting ducks for defense attorneys. The only mediations that have been effective are those where you hired outside mediators who were experienced. I have not found that EEOC personnel have been effective . . .[306]

Another questionnaire respondent stated, "Ideally, neither should be represented by counsel. However, most respondents are represented, so the charging party needs to be represented."[307] Interestingly, one respondent noted, "In almost every case I have handled, my clients have had results that were at a minimum twice the amount sought by the EEOC/human rights commission mediator."[308] Another stated, "Complainants without representation are taken advantage of by both employer and EEOC staff."[309]

While EEOC staff acknowledge that under the pilot program, the mediation setting could at times be intimidating to some of the charging parties, the national ADR coordinators feel that the new mediation program has components that should alleviate these concerns.[310] EEOC's position is that legal representation is not required to mediate a dispute and the Agency neither encourages nor discourages legal representation.[311] Staff at headquarters stated that there are protections put in place to ensure fairness and balance in the mediation process. First, mediation is voluntary and either party can end mediation if he or she feels uncomfortable. Second, mediators are trained to ensure balance or, when balance cannot be achieved, terminate the mediation.[312] To further address the issue of ensuring balance of power between parties in mediation, in March 1999 Chairwoman Castro announced a pilot three-city effort to enhance the Agency's voluntary mediation program by bringing outside, pro bono attorneys to aid unrepresented parties.[313]

The mediator can level the playing field even before the mediation takes place. He or she is supposed to find out who is going to be present at the mediation, including who each party is bringing for support, and ultimately has control over who attends. Informing the parties beforehand might alleviate any feeling of intimidation and any "surprise element."

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[302] *See* USCCR, Fair Employment Report, USCCR Complainant 41.

[303] *See* Thomas Simmons, assistant general counsel, OfficeMax, Inc., telephone interview, Dec. 8, 1999, p. 7 (hereafter cited as Simmons interview).

[304] USCCR, Web Site Survey Data (Attorneys and Mediators).

[305] Ibid.

[306] Ibid.

[307] Ibid. Overall, responses to the question of mediator bias on the Commission's Web site questionnaire were mixed. Many of the respondents stated that EEOC mediators do not favor one party over another. Slightly more attorneys representing plaintiffs than attorneys representing respondents stated that EEOC mediators did not favor one party over another. Attorneys representing respondents were more likely to say that EEOC mediators favored the charging parties. Ibid.

[308] Ibid.

[309] Ibid.

[310] Hill and Ichniowski interview, pp. 11–12.

[311] *See* "EEOC's Mediation Program Going Strong," p. B-2; EEOC, Commissioners Meeting, Sept. 28, 1999, Thornton Statement, p. 75.

[312] Thornton interview, Mar. 1, 2000, p. 9.

[313] "Commission to Use Pro Bono Lawyers for Mediation Program in Three Cities," *Daily Labor Report*, Mar. 29, 1999, p. C-1. The program, which was to be jointly sponsored by the American Bar Association, was held in Chicago, Cleveland, and New York. Ibid.

EEOC's field staff stated that the procedures in place have allowed them to control the mediation setting and ensure fairness. The ADR coordinator in the Dallas District Office said that the EEOC mediators decide how attorneys for either side will act in mediations. She tries to keep the "playing field as level as possible" if one side does not have legal representation. The Dallas ADR coordinator also limits the number of people who can attend a mediation, with the caveat that others can be available by telephone.[314]

A mediator in the Baltimore District Office stated that he does not discourage the charging party from having his or her own attorney during mediation. In addition to maintaining the balance of power, having legal representation in mediation can make it easier to reach settlement because parties with representation are more realistic about what they can or cannot get.[315] However, both mediators in the St. Louis District Office feel that the presence or absence of attorneys representing either party is not a factor affecting successful mediation, and that they do not allow attorneys to take over the negotiations.[316]

One of the national ADR coordinators said that one indication that the perception of mediation is improving is the rise in the percentage of charging parties who now agree to mediation (an increase from 68 to 70 percent in the pilot program to 83 percent in the new program).[317]

Mediator Bias

Another issue directly related to the balance of power is the fairness of the mediator. As the individual charged with fostering an environment where both parties can express their interests, the mediator plays a critical role in whether the mediation process is fair and conducive to a resolution. One national ADR coordinator acknowledged that even with the increase in outreach and education, many charging parties and employers are still somewhat skeptical about the program because of past experiences with biased mediators.[318] She said that EEOC has heard respondents' concerns that the internal mediators have not been totally neutral.[319]

Many of the employers interviewed for this report indicated that they perceive the EEOC mediator as being an advocate for the charging party. An attorney for a large corporation stated that mediation is good if you have "a good mediator," and it can be helpful if there is a case that has some bad facts or elements in it.[320] However, he has mixed feelings about the quality of the EEOC employees who are mediators. In his opinion, some enter into the mediation process with a mind-set that the charging party is automatically right.[321]

Other employers feel that the mediation process was biased in the past when an EEOC investigator was involved at some point. At least two respondents who experienced EEOC mediation before the new program attributed some of their apprehension about mediation to the handling of the process by EEOC investigators.[322] One said that now that EEOC has shifted to more professional mediators, the mediation program has improved and the process is more objective. His company now views mediation as being a favorable way to resolve issues.[323]

The national ADR coordinators stated that EEOC has worked "really hard" to overcome the perception that mediators would be biased, and believe that they have been successful in reaching respondents about mediation.[324] The firewall requirement under the new mediation program may also be one of the important components of the program that convinces respondents and charging parties that the mediator is impartial. Separating the two functions, investigation and mediation, may enhance both parties' participation.[325] EEOC staff claim that they are hearing more that employers like the internal mediators,

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[314] "EEOC's Mediation Program Going Strong," p. B-2.

[315] Bob Brown, mediator, Baltimore District Office, EEOC, interview in Baltimore, MD, Nov. 18, 1999, p. 2 (hereafter cited as Brown interview, Baltimore District Office).

[316] Bruner, Schulte, and Conley interview, St. Louis District Office, p. 5.

[317] Hill and Ichniowski interview, p. 11.

[318] Ibid., p. 9.

[319] Ibid.

[320] Simmons interview, p. 8.

[321] Ibid.

[322] Andrew Gold, labor and employee counsel, Pitney Bowes, telephone interview, Jan. 6, 2000, p. 4 (hereafter cited as Gold interview); Ogden Reid, human resources legal manager, Intel Corporation, telephone interview, Jan. 5, 2000, p. 5 (hereafter cited as Reid interview).

[323] Reid interview, p. 5.

[324] Hill and Ichniowski interview, pp. 9–10.

[325] *See* "EEOC's Mediation Program Going Strong," p. B-2.

that the mediators in the new program are doing a much better job, and that the respondents are not reporting many incidents of biased mediators.[326]

Pressure to Accept a Settlement

Respondents and charging parties alike have stated that they felt pressured into accepting settlement for the sake of resolving a charge. Some charging parties said that they entered into mediation thinking that some kind of settlement had to be reached or their cases would be dismissed. For example, one complainant wrote that, although she felt that overall she was treated fairly, she was told by the EEOC mediator that the offer made by the employer was "better than nothing," and that she should accept the offer or her case would be dismissed. The complainant informed the mediator that she would not accept an offer under the conditions presented. After her refusal to accept the settlement, she was not surprised when she received a letter of dismissal from the Agency.[327]

For respondents, the pressure to settle a charge is manifest in the belief that, if they participate, they are expected to dole out settlement money, which is perceived by some as an admission of guilt. One respondent said that only about 1 percent of the charges filed against her company have gone through EEOC mediation.[328] She attributes the low number of mediations to the company philosophy, which is not to just settle charges. She said many companies would simply throw "nuisance" money at a charge to make it go away. She indicated that it might be easier and probably more cost effective to throw a few thousand dollars into every charge, but that is not her company's mind-set.[329] To her, if an employee spent time filing out a complaint, then she is going to spend the time responding to it as opposed to creating an environment where employees know that if they file a charge they will receive some monetary reward.[330]

Another stated that if his company feels that it has not committed a violation of the law, it would not participate in mediation or attempt to settle. He feels that many employers do not participate in mediation because it is an admission that they have done something wrong.[331] Another concurred that employers are less willing to participate in mediation than litigation because mediation does not give an employer the same opportunity for vindication if there is some question about the merit of the charge.[332]

The director of OFP said that although there is a 65 percent success rate for mediation, there are procedures in place for when mediation fails. Thus, a settlement does not have to be reached.[333] One ADR coordinator added that cases are "screened" carefully before they are referred for mediation. He stressed that the EEOC mediation program is voluntary, and even if a charge is referred for mediation, all parties can decline the offer, withdraw anytime from mediation, and do not have to agree to any "model" settlement or outcome.[334] Another staff person said that if either the charging party or the respondent does not feel that he or she is getting an agreeable resolution, there does not have to be a settlement. The case will go right into investigation and will be handled like any other charge as if it never went into mediation.[335]

Appropriateness of Charges Mediated

As discussed earlier, EEOC has emphasized that certain charges are not appropriate for mediation and, therefore, not all charges are offered the mediation option. Respondents also feel that mediation is more effective or appropriate for some charges than others and will be selective in determining which cases they will accept for mediation. For example, one respondent feels that mediation may not be as appropriate for sexual harassment cases because it may be un-

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[326] Hill and Ichniowski interview, pp. 9–10.

[327] USCCR, Fair Employment Report, USCCR Complainant 26.

[328] Melanie Penna, vice president of human resources, Comcast Cable Communications, Inc., telephone interview, Dec. 6, 1999, p. 5 (hereafter cited as Penna interview).

[329] Ibid.

[330] Ibid.

[331] Glenn Felton, vice president and assistant general counsel, Unumprovident Corporation, telephone interview, Dec. 14, 1999, p. 5 (hereafter cited as Felton interview).

[332] Laura Brody, director of diversity and development, Bestfoods, telephone interview, Dec. 7, 1999, p. 5 (hereafter cited as Brody interview).

[333] Thornton interview, Mar. 1, 2000, p. 9. *See also* Bolden et al., interview, St. Louis District Office, p. 8.

[334] Hill and Ichniowski interview, p. 8.

[335] Ibid., p. 9.

comfortable for the charging party to face witnesses and talk about the charge.[336] Another respondent said that mediation works very well with disputes about workplace issues, but not with issues involving wrongful termination or promotions.[337] Another said that some charges go to mediation that are not appropriate and that his company has used mediation in order to get a better understanding of a charge and not necessarily to settle.[338]

Attorneys and mediators responding to the Commission's Web site questionnaire noted that mediation is inappropriate when it is used to force a settlement.[339] One respondent stated that mediation is inappropriate when the "charging party is not represented by counsel and the respondent is trying to get the charging party to waive all claims including those which are not handled by the EEOC and which neither they nor the EEOC may know they have."[340] Others noted that mediation is inappropriate when there is a class case or a significant legal question at issue that needs to be decided.[341]

A representative from a large corporation who has had only one experience with EEOC mediation feels that it was successful and that the mediator was well prepared and able to get the issue resolved quickly.[342] However, she said the company's decision to mediate usually stems from its internal investigation. If the company's internal investigation identifies some difference in treatment that cannot be adequately explained, those cases are "ripe" for mediation.[343] She feels that a case is inappropriate for mediation when the company feels it is without merit.[344]

Other related perceptions of mediation, particularly of respondents, are that mediation is a quick and inexpensive method used by EEOC to settle cases in place of investigations and that EEOC selects charges that have no merit for mediation. One of the national ADR coordinators said that in the past (before the new mediation program) EEOC did hear that many employers felt that cases without merit were going to mediation. As a result, the decision was made that charges that appeared not to have merit (the C charges) would not be referred for mediation.[345] Thus, by sending only B cases, which could potentially prove meritorious, and some A cases, EEOC is narrowing the probability that invalid charges are being mediated.

Addressing Discrimination

Critics of using mediation to resolve allegations of discrimination are concerned that, while mediation may result in a benefit for the charging party involved, it does not necessarily get to the root of the issue or practice behind the discriminatory action. An attorney who has mediated numerous cases in the federal court system and in the private sector agreed that this concern is a valid one. He explained:

> If you have a particular office head who is a discriminator and he discriminates against A (and the charge is mediated), and then along comes B, he/she is going to discriminate against B, and along comes C. It does not make a lot of sense to make each of those cases percolate up into the system and then do (mediation) again and again.[346]

Although EEOC's position is not to mediate pattern and practice or systemic cases, the attorney feels that if mediation were used for charges that require systemic relief, it could prevent many potentially discriminatory situations from occurring in the future.[347] He added that one of mediation's greatest strengths is that it

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[336] Donna Smith, manager of diversity programs, Campbell Soup Company, telephone interview, Dec. 15, 1999, p. 6 (hereafter cited as Smith interview). Responses to the Commission's questionnaire for attorneys and mediators also identified charges of sexual harassment and other emotionally charged issues as inappropriate for mediation. USCCR, Web Site Survey Data (Attorneys and Mediators).

[337] Henry Hammons, manager of employee compliance and selection, Chevron, telephone interview, Jan. 5, 2000, p. 5 (hereafter cited as Hammons interview).

[338] Gold interview, pp. 4–5.

[339] USCCR, Web Site Survey Data (Attorneys and Mediators).

[340] Ibid.

[341] Ibid.

[342] Gwendolyn Young, vice president, National City Bank of Kentucky, telephone interview, Dec. 15, 1999, p. 6 (hereafter cited as Young interview).

[343] Ibid., pp. 6–7.

[344] Ibid., p. 7.

[345] Hill and Ichniowski interview, p. 10.

[346] Donald Green, Esq., Pepper, Hamilton, L.L.P., telephone interview, Mar. 14, 2000, p. 34 (hereafter cited as Green interview).

[347] Ibid.

allows the parties to tailor a result so that when there is a continuing relationship between the employer and the employee, the settlement can go beyond monetary benefits. He added that not to consider the possibility of a recurring situation as part of the relief strikes him as unwise.[348]

Proponents of mediation, including EEOC staff, contend that both the mediation process and settlement agreements can address and resolve discriminatory practices. The ADR coordinator in the Birmingham District Office feels that mediation can be good for teaching employers that what they may be doing may not be discrimination, but that the policy or action is still wrong. The coordinator feels that the mediation experience can make employers aware they have a problem. Agreements in her office between parties have included training, and some respondents implement new procedures and policies after mediating.[349] She indicated that she has heard that some employers use mediation as an inexpensive discovery process, but that is not necessarily a bad thing. Mediation can make the respondent aware that he or she has a problem.[350]

Mediating Early in the Charge Handling Process

There has also been debate over whether mediation should take place before or after the initial investigation. Respondents generally expressed that EEOC mediation is offered too early in the charge handling process, which is a factor for unsuccessful mediation. From the employer's perspective, a company generally prepares for mediation by reviewing the facts of a case and, therefore, it is desirable to have investigation come first.[351] An employment attorney stated that employers are often not ready to offer money in a settlement because they feel that they have no reason to talk about settlement before there is any evidence to show a reason to mediate.[352] She feels that employers are often unwilling to mediate because the offer to participate comes prior to investigating the charge.[353] This concern was echoed by Web site survey respondents who stated that mediation in EEOC's charge handling process is premature. According to one response,

> [t]he problem with mediation prior to any response being made by the employer is that the plaintiff and attorney have no clue as to the strength of their claims. EEOC has more value as a information gathering source.[354]

On the other side of the debate are those who agree with EEOC that it makes sense to attempt mediation before investigation. One attorney who has represented clients in labor and employment disputes, as well as participated in the EEOC mediation program, feels that the timing of the offer is one of the keys to the success of the program.[355] Conducting mediation before investigation or litigation gives both parties a chance to become part of the solution early on, facilitates an agreement before the "adversity level" gets too high, and creates a situation where there is an exchange of views that is productive to the settlement process.[356] More than likely, if a case goes on to litigation, the feeling on the part of the parties is that they could have settled this dispute prior to litigation had they had the opportunity. Further, the fact that the request to mediate is made before the respondent files a position statement and before there is an extensive request for information to either party ultimately saves expenses.[357]

Currently, EEOC's position is that mediation is a fast and efficient process that should occur before time and resources are spent on a lengthy investigation that might not be necessary.[358] EEOC staff contend that given a choice between 86 to 90 days for resolving the charge with both parties participating, compared with 265 to 300 days and spending resources for investigating a charge, the idea of mediation, when it is fair and efficient, is more attractive.[359]

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[348] Ibid., p. 36.

[349] Leo and Evans interview, Birmingham District Office, p. 6.

[350] Ibid.

[351] Hammons interview, p. 5.

[352] Amy Sergent, attorney, Lancaster & Eure, PA, telephone interview, Nov. 22, 1999, p. 6.

[353] Ibid.

[354] USCCR, Web Site Survey Data (Attorneys and Mediators).

[355] EEOC, Commissioners Meeting, Sept. 28, 1999, Ted Meyer, attorney, Statement, p. 56.

[356] Ibid., pp. 56–58.

[357] Ibid., 59–60.

[358] Castro interview, pp. 3–4; Hill and Ichniowski interview, pp. 10, 12.

[359] Hill and Ichniowski interview, p. 10.

Improving the Participation Rate

Many of the concerns illustrated above reflect issues prevalent under EEOC's mediation program prior to its reinvention. EEOC staff acknowledge that before the new mediation program, minimal outreach was done on EEOC mediation and its benefits. This lack of information about the process was a factor in the participation rate of both charging parties and respondents. Under the new mediation program, mediation is a priority in EEOC's standard outreach program. The Agency has substantially increased the number of outreach presentations and workshops on mediation.[360]

As was mentioned earlier, materials, including question and answer sheets, brochures, fact sheets, and a video, are used to inform charging parties of the mediation process.[361] Staff at district offices have also developed outreach plans to get information to charging parties and respondents about the new mediation program, including counseling at intake and upon notification of a charge.[362] Information on mediation is also provided at management seminars, through advocacy groups and community organizations, and at the request of anyone who inquires about mediation.[363]

Although charging parties continue to have considerably higher mediation acceptance rates than respondents, there are certain groups that may be reluctant to participate and for whom outreach should be targeted. For some charging parties (and to a lesser extent employers), there may be language and cultural barriers in mediation that limit their participation. For instance, one community activist stated that there is a lack of Hispanic participation in mediation partly because many Hispanics are not even aware that mediation is an option.[364] In addition, few mediation models exist that serve the language and cultural needs of the Hispanic population. The principles of mediation may differ from culturally accepted norms among the Hispanic community that extend beyond language barriers to differences in values.[365] An Hispanic-oriented mediation model would recognize cultural and language influences in communication; family and community collaboration in resolving disputes; consideration of generational status and level of acculturation; and understanding and use of support systems to relieve stress and to serve as a power equalizer.[366] EEOC district offices should maintain dialogue with those communities that have lower participation rates and explore multicultural approaches to mediation.

Respondents, on the other hand, continue to have a lower acceptance rate than complainants, although visible increases have occurred since the inception of the new mediation program, from 29 to 36 percent.[367] EEOC staff attribute the increasing willingness of employers to take part in the process to the extensive outreach about mediation to respondent communities, particularly small businesses.[368] One respondent wrote that some EEOC offices have facilitated mediation by educating and encouraging his company to pursue such an avenue.[369] He cited EEOC's area office in Little Rock, Arkansas, as being instrumental in educating his company about the benefits of mediation, and has invited EEOC staff to speak to the company's human resources staff on mediation and other issues.[370] He said that his company now views the mediation process as an important charge resolution mechanism that is advantageous to both parties.[371]

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[360] Ibid., p. 9.

[361] Thornton interview, Mar. 1, 2000, p. 8; Hill and Ichniowski interview, p. 9.

[362] *See* Leo and Evans interview, Birmingham District Office, p. 4.

[363] Ibid., pp. 4–5.

[364] Edward Valenzuela, president, Ganas Professional Services, interview in Phoenix, AZ, March 31, 2000, p. 3. Dr. Valenzuela is a former district director of EEOC's Phoenix District Office who served in the 1970s and early 1980s. Currently, he is affiliated with several organizations focusing on issues of concern to the Hispanic community, particularly Mexican Americans in the Southwestern United States.

[365] Ibid.

[366] Ibid., p. 4.

[367] Thornton interview, Mar. 1, 2000, p. 8.

[368] Ibid.

[369] Frank O'Mara, vice president of human resources, Alltell Corp., letter to Frederick D. Isler, former assistant staff director for civil rights evaluation, USCCR, Dec. 7, 1999, re: information for Fair Employment Project, p. 1.

[370] Ibid.

[371] Ibid.

To further encourage respondents' participation in mediation, the acting director of the Baltimore District Office said that his staff go out and talk to employers to educate them about the benefits of mediation and translate it from an issue of merit to a business decision.[372] This office has established a program whereby major employers in the area are contacted and asked to agree that, whenever potential valid charges are filed against them, they will automatically participate in mediation. He indicated that this is an informal agreement and includes a letter informing employers that EEOC is willing to look at mediation for the appropriate cases. According to the mediator, EEOC has this type of informal agreement with eight major employers on the East Coast.[373]

The director of the Chicago District Office stated that his office has made many attempts to encourage employers to participate in mediation, and since the original "kick-off" for mediation in February 1999, outreach to small businesses about mediation has become routine.[374] There is a separate workshop on ADR in each of the office's technical assistance seminars, and staff are going around the state telling employers the benefits of mediation.[375] As a result, the office is getting more employers to agree to mediation, but because of the current budget situation, the requests have become more than the office can handle.[376]

The national ADR coordinators also attribute the growing participation rates for both charging parties and respondents to other factors, such as better qualified and trained mediators who have no stake in the outcome of the mediation; the confidentiality of the program, particularly the firewall between mediation and investigation; and the fact that the parties have nothing to lose by taking a charge to mediation. If the mediation is not successful, the charge will be investigated just like any other charge.[377]

[372] Fetzer and Veldhuizen interview, Baltimore District Office, Nov. 17, 1999, p. 5.

[373] Brown interview, Baltimore District Office, p. 3.

[374] Rowe and Bowman interview, Chicago District Office, p. 33.

[375] Ibid.

[376] Ibid., p. 34.

[377] Hill and Ichniowski interview, pp. 11–12.

Summary

Despite the criticisms and concerns, if done in such a manner as to ensure fairness, mediation can have many benefits for the charging party, the respondent, and EEOC. Specifically, mediation saves time and money; resolves charges that may otherwise remain unresolved through other EEOC processes, such as conciliation; and allows parties to be involved in the resolution of their own disputes. One Web site questionnaire respondent stated, "I believe that mediation is always a valuable tool. Even if the parties are unable to settle, they leave mediation with a better understanding of the issues, and the potential costs of going forward."[378]

Overall, attorneys and mediators who responded to the Commission's Web site questionnaire were divided in their evaluations of the effectiveness of EEOC's mediation program.[379] This is true for both attorneys representing plaintiffs and attorneys representing respondents. However, the majority of the 96 questionnaire respondents stated that EEOC mediators are knowledgeable about the legal aspects of employment discrimination. A majority also stated that EEOC mediators have the skills to maintain a balance between the parties.[380]

EEOC's general assessment is that its new mediation program has been successful.[381] Preliminary statistics show that mediation is effectively resolving charges spanning a variety of issues.[382] In fiscal year 2000, EEOC expects to mediate 16,000 charges and to successfully resolve at least 8,000 each year.[383] The director of OFP stated that mediation has increased the number of charges resolved and reduced the Agency's resolution time considerably.[384] In ad-

[378] USCCR, Web Site Survey Data (Attorneys and Mediators).

[379] Ibid.

[380] Ibid.

[381] *See* EEOC, "A Proud Legacy—A Challenging Future," *FY 2000 Budget Request* (Washington, DC: Submitted to the Congress of the United States, February 1999), pp. 32–34 (hereafter cited as EEOC, *FY 2000 Budget Request*).

[382] Ibid., pp. 34–35. In fiscal year 1998, using mostly pro bono mediators, EEOC resolved over 1,600 charges through mediation. In the area of monetary benefits, EEOC field offices reported nearly $17 million in settlement. Ibid., p. 33.

[383] Ibid., p. 32.

[384] EEOC, Commissioners Meeting, Sept. 28, 1999, Thornton Statement, p. 52. For example, in 1997, EEOC resolved 800 charges through mediation; by September 1999, more than

dition, she reported that the Agency has "dramatically improved" the acceptance rates of both charging parties and respondents. She reported that in March 1999, charging parties agreed to mediate 68 percent of the time and respondents 28 percent of the time. By September 1999, charging parties had accepted mediation 81 percent of the time and respondents accepted mediation 36 percent of the time. She attributes this increase in participation to EEOC's outreach programs and the credibility the program has gained among the Agency's customers.[385]

The director of OFP also noted other reasons that the program has worked. The Agency maintains confidentiality during and after the mediation process; ensures a firewall that insulates the mediation program from the investigative and litigation functions; supports the program with managers and staff in headquarters and in the field dedicated to its success; provides national training and technical assistance for all staff and mediators; and maintains procedures and forms through a formal deskbook that is under constant revision and update.[386] Mediation will remain a regular topic in outreach and technical assistance seminars and other public presentations.[387]

To track the success of the program, mediation information, such as charging party and respondent participation rates and resolution rates, is entered in the Agency's Charge Data System (CDS). Coding of mediation information began several years ago in some of the district offices, but as of fiscal year 1999, all offices were required to consistently enter the data using codes developed by headquarters.[388] The Agency is also implementing a national evaluative component to the mediation program. It contracted with an outside expert who developed a survey to assess participants' satisfaction with the program and to evaluate the responses. Last fiscal year, the Agency used an informal survey. The information obtained from those surveys was used by the ADR coordinators to review any problems that might exist in their programs so that they could take corrective action.[389]

Chairwoman Castro said that there is a commitment at EEOC from the top to making the new mediation program a success. She feels that everyone, including staff and stakeholders, needs to be full partners in the mediation process, and should view mediation as one of the Agency's strategies to move toward fulfilling its mission of eliminating discrimination in the workplace.[390]

Charge Investigation

Once a charge is received and categorized, and in the event that the charge is not resolved through mediation, the next step in EEOC's administrative processing is the investigation. As was described earlier, the categorization of a charge will determine the extent to which it is investigated, with C charges receiving little or no investigation and A charges receiving the most extensive investigations. EEOC guidelines state that the investigation conducted in each case should be appropriate to the particular charge. An "appropriate" investigation is defined as one where the responsible field office determines either that a statute has been violated or that there is sufficient information to conclude that further investigation is not likely to result in a cause finding.[391] EEOC cannot make a reasonable determination prior to investigation because the factual basis for such determination would be lacking.[392] The scope of an investigation is generally limited to the evidence necessary to come to a reasonable cause decision, but an investigation can be expanded to include any other violations uncovered as a result of the initial investigation.[393]

The Priority Charge Handling Procedures specify that "the investigation to be made in each case should be appropriate to the particular charge, taking into account the EEOC's resources."[394] EEOC field offices are to develop a

4,000 charges had been resolved. EEOC reduced the mediation processing time from 174 days at the end of the third quarter of FY 1998 to 87 days as of the third quarter of FY 1999. Ibid., p. 52.

385 Ibid., pp. 52–53.

386 Ibid., pp. 49–50.

387 Ibid., pp. 50–51.

388 Hill and Ichniowski interview, p. 8.

389 Ibid., p. 13.

390 Castro interview, p. 4.

391 EEOC, *Compliance Manual*, "The Investigation," p. 0:3301.

392 Ibid.

393 Ibid.

394 EEOC, *Priority Charge Handling Procedures*, p. 9.

flexible process to ensure that charges that have little merit are not "over investigated."[395] The procedures direct investigators to make a decision, as soon as possible after receiving a response to their request for information from the respondent, as to whether to dismiss the charge, investigate further, or pursue a settlement. The Priority Charge Handling Procedures emphasize that investigators should continually reassess and recategorize charges as they gather more information.[396]

Enforcement Unit Models

Each district office has been given the latitude to develop enforcement units in a manner best suited to their caseloads and staffing patterns, as long as they encompass the necessary components for effective charge processing, including supervisory review. For example, the CEP stresses the need for attorneys to be involved in cases during the classification and investigation stages and suggests organizing investigator-attorney teams for classification and investigation of charges. It states that designated offices will, on a pilot basis, use legal-enforcement teams to develop significant charges (A1 charges) that will result in litigation, if not conciliated.[397] Some offices have therefore developed legal-investigative hybrid units, while others have maintained more traditional enforcement unit structures. Another responsibility affecting the structural setup of an office's enforcement unit is the development of pattern and practice or systemic cases. District offices used to have formal units primarily to handle these cases and, while many of them still have staff designated to that function, there appears to be greater cross-fertilization of cases between enforcement groups and greater opportunity for investigators to develop a range of cases. It is also interesting to note that many district offices have chosen to develop investigative groups along charge category lines, i.e., A1 teams and A2 or B teams. Below are some examples of models that have been implemented in various district offices.

In the Dallas District Office, managers, attorneys, and investigators are involved in several stages of the complaint process, including investigations.[398] There are five enforcement units made up of six to eight investigators each, and the average caseload per investigator is 35–38 charges.[399] An enforcement supervisor oversees each investigative unit, rates investigators' performance, counsels them about charges when necessary, and interacts with them throughout the complaint process.[400] Attorneys review the charges, review the respondents' position statements to determine if they will broaden or narrow the scope of the case, and tailor requests for respondent information for A cases. After the investigator finishes an investigation, the attorneys have 20 days to review the case again to ensure the investigator obtained all the necessary information prior to making a determination. Throughout the complaint process, attorneys have deadlines set up for reviewing case information. The legal unit ensures that "all stones have been turned" and that the case was thoroughly investigated.[401]

In the St. Louis District Office, there are two investigative teams with 11 investigators on each team. An enforcement supervisor, who in turn is overseen by the office's enforcement manager, heads each team.[402] An investigator and an attorney are jointly assigned to all A1 cases, and, while there is less legal involvement, an attorney is assigned to A2 cases as well. An attorney is assigned each week to the Customer Service Unit to review intake assessments.[403] When the charge is assigned to the investigator, the investigator contacts the charging party im-

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395 Ibid.

396 Ibid., pp. 9–10.

397 EEOC, *Comprehensive Enforcement Program*, p. 7.

398 Taylor and McGovern interview, Dallas District Office, Jan. 31, 2000, p. 3.

399 Carol Hawkins, supervisory investigator, Becky Shyrock, investigator, Levi Morrow, investigator, and Belinda Rodriguez, investigative support assistant, Dallas District Office, EEOC, interview in Dallas, TX, Feb. 1, 2000, p. 2 (hereafter cited as Hawkins et al., interview, Dallas District Office); Taylor and McGovern interview, Dallas District Office, pp. 3–4.

400 Hawkins et al., interview, Dallas District Office, p. 2.

401 Robert Canino, regional attorney, Toby Costas, senior staff attorney, and Suzanne Anderson, senior staff attorney, Dallas District Office, EEOC, interview in Dallas, TX, Feb. 1, 2000, p. 4 (hereafter cited as Canino, Costas, and Anderson interview, Dallas District Office).

402 Bruner, Schuetz, and Johnson interview, St. Louis District Office, Jan. 31, 2000, p. 2; *See also* Fricks interview, St. Louis District Office, p. 2.

403 *See* description of the St. Louis District Office's Customer Service Unit, p. 107.

mediately for an in-depth interview. Teams of two or three investigators have been assigned to investigate pattern and practice cases, and attorneys are assigned to answer legal inquiries for all cases.[404]

There are six enforcement units, each comprising between five and six investigators, in the Birmingham District Office. Of the six units, five handle individual charges and one handles pattern and practice charges.[405] Each team is headed by a supervisory investigator and is assigned an attorney advisor to assist with charges as needed. According to one investigator in the Birmingham office, investigators interact with the attorney assigned to the unit on A cases almost daily. Meetings between management, investigators, and attorneys are held on a rotational basis every six weeks to discuss all A cases.[406] After a charge has been categorized, a supervisory investigator will assign the case to an investigator based on his or her caseload. All charges filed against the same respondent are given to the same investigator.[407] The current caseload is approximately 40 cases per investigator, a number that is significantly lower than in the past.[408] Staff attribute this to the charge prioritization system, which eliminated the time spent investigating "non-meritorious" cases, and mediation.[409]

The Baltimore District Office has recently undergone a structural reorganization that has put in place three investigative units, or "pods," each consisting of a supervisory investigator, a team of investigators, an investigative support assistant, and two attorneys.[410] The major difference between the old system and the new structure is that management and attorneys assigned to a pod work directly with investigators from intake of a charge through closure, including litigation.[411] While there is no formal structure for collaboration, and in the past the investigators had the opportunity to ask attorneys for guidance, under the new system attorneys are involved throughout the complaint process.[412] There is also a greater level of consistency throughout the charge handling process in the new system: the investigator does the intake, and if the case appears to have merit based on an initial inquiry, the same investigator conducts the in-person interview with the charging party and completes the investigation.[413] Attorneys become involved in a charge if there is uncertainty as to the strength of a case, and in potential A cases, the investigators always work with assigned attorneys. The attorney can even sit in during the in-person interview with the complainant.[414]

The Phoenix District Office has a somewhat unique enforcement unit setup because not only does it have three enforcement units headed by enforcement supervisors, but the investigators in each unit are divided among four subgroups or teams: the Early Resolution Team, the Investigative Group, the Case Development Team, and the Conciliation Group.[415] The Early Resolution Team primarily deals with charges when they first come into the office. The team will review position statements and determine which charges can be easily closed and which will require additional investigation. It will generally keep those that require less investigation, based on the categorization of the charges, and will refer others to the appropriate group. The Investigative Group is primarily responsible for investigating the A2 charges, or those charges that may have merit but that the legal unit has de-

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[404] Bruner, Schuetz, and Johnson interview, St. Louis District Office, Jan. 31, 2000, pp. 4–5.

[405] Samuel Hall, supervisory investigator, Julia Hodge, investigator, and Gaines Elenburg, investigator, Birmingham District Office, EEOC, interview in Birmingham, AL, Feb. 29, 2000, p. 1. This is in addition to the designated intake unit which has seven investigators assigned to it.

[406] Ibid., p. 3.

[407] McGhee and Hulett interview, Birmingham District Office, p. 2.

[408] Pierre interview, Birmingham District Office, Feb. 24, 2000, p. 3.

[409] McGhee and Hullett interview, Birmingham District Office, pp. 3, 6.

[410] Byrd and Kotrosa interview, Baltimore District Office, p. 2.

[411] Ibid., p. 8.

[412] Ibid.

[413] Scott, Lawrence, and Wofford interview, Baltimore District Office, p. 1.

[414] Ibid., p. 2.

[415] Burtner and Trujillo interview, Phoenix District Office, Mar. 29, 2000, pp. 7–9, 12. The system began about three years ago to deal with the office's backlog and, as the workload expanded to cover different areas and the categorization of charges became broader, to give investigators opportunities to choose charges based on interests. Ibid., pp. 12–15.

cided not to litigate.[416] The Case Development Team is primarily charged with investigating cases that will go to litigation and the majority of pattern and practice cases.[417] The Conciliation Group, the smallest of all the groups, specializes in conciliating cases for which cause findings have been issued.

The district director of the Phoenix office explained that there is an open system whereby every investigator, no matter what his or her primary assignment may be, can choose other assignments based on his or her interests.[418] This flexibility allows investigators to take on assignments that are not routine and develop skills in a variety of areas. Depending on the workload, what charges come into the office, and where emphasis is needed, the size of and assignment to teams can change. Each year, staff have the opportunity to collectively reassess team assignments and rotate if desired.[419]

Currently, there are 46 investigators in the Chicago District Office.[420] The average caseload per investigator is 49.[421] However, the director noted that there are differences in the distribution of charges among individual investigators. He attributes this to numerous factors, such as the number of charges that are still in intake or that have been referred to mediation, that newer investigators tend to receive smaller caseloads than average, and a lower caseload for those investigators assigned to the hybrid unit.[422] The hybrid unit includes both attorneys and investigators who are assigned primarily A1 and pattern and practice cases. The purpose of the hybrid unit from its initial inception has been to conduct pattern or practice investigations in anticipation of probable litigation.[423] Although some of the cases assigned to the hybrid unit may be successfully conciliated, and thus not litigated, the rationale for assigning cases to the hybrid unit has been that cases worthy of government litigation require a higher quality investigation.[424] In addition to this unit, there are four other enforcement units that handle a broad range of charges, including some A cases. New charges are generally distributed evenly across the remaining four units, but the office also employs a batching system where multiple charges involving the same respondent or within the same industry are given to the same investigator.[425]

There are 16 investigators in the Seattle District Office. The investigators are divided into three units, two that handle primarily A charges and one that handles B charges that, for whatever reason, were not resolved through mediation.[426] Average caseloads range between 20 cases for the A team investigators and 25 for those on the B team. There are three supervisory investigators, two that supervise investigators handling A1 and A2 cases and one that supervises investigators handling B cases.[427] While A charges may not make up the majority of the charges that are received, more investigators are assigned to work on them so they can be developed as expeditiously as possible.[428] In the Seattle office, each investigator has an assigned legal liaison who can assist with legal issues and questions. The result is an informal, collegial relationship between enforcement and legal staff.[429]

In the New York District Office, which includes a Boston Area Office, a Buffalo Local Office, and local fair employment offices in the Virgin Islands and Puerto Rico among others, the investigative process is more complex than in most other offices.[430] This district reports an av-

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[416] Ibid., p. 8.

[417] Ibid.

[418] Ibid.

[419] Ibid., pp. 8, 13, 15.

[420] Rowe and Bowman interview, Chicago District Office, p. 2.

[421] Ibid., pp. 2–3.

[422] Ibid., p. 3.

[423] Ibid., pp. 3–4.

[424] Ibid., p. 4.

[425] Ibid., p. 15.

[426] Hill, Cleman, and Little interview, Seattle District Office, p. 4.

[427] Ibid.

[428] Ibid., p. 15.

[429] Ibid., pp. 17–18, 29.

[430] Lewis and Alpert interview, New York District Office, p. 6. Charges filed in Puerto Rico and the Virgin Islands are initially handled by the state or local fair employment practices agencies (FEPA) in those localities. However, Puerto Rico and the Virgin Islands do not have jurisdiction over retaliation claims or municipal or commonwealth employees. Those charges are handled directly by the New York District Office. The deputy director said that an average of about 200 cases out of Puerto Rico and the Virgin Islands are filed and handled by the New York District Office each year. Ibid.

erage of about 6,000 charges a year (including charges filed in the Boston and Buffalo offices).[431] With the recent hire of 26 new investigators, the caseload per investigator declined from about 100 to approximately 50 cases.[432] The district office has four enforcement units, one of which is designated as the "T1" unit. It focuses mainly on A1 and pattern and practice case development and is supervised by a supervisory trial attorney. The other three units are overseen by enforcement supervisors.[433] The Boston and Buffalo offices have similar investigative processes as the New York District Office. There is ongoing communication between all directors on the status of case inventory and the status of various cases.[434]

With respect to legal staff involvement in investigations, the New York district director reports an intensive amount of interaction between the investigative and legal staff in all three offices. According to him, this interaction between managerial, legal, and investigative staff has been a part of the structure that contributes to substantial attorney involvement and advice in the handling of charges.[435] The regional attorney in the New York District Office stated that because the district has the largest active docket of cases, the interaction between investigators and attorneys is greater than in other district offices.[436] For A1 cases, the interaction is "regular and significant," as an attorney is assigned to work with investigators on these cases. Most of the attorneys' involvement during an investigation occurs when there is an A charge that is expected to lead to litigation.[437] In other cases, such as A2 and B cases, interaction is to a lesser degree, usually occurring when an investigator or his or her supervisor raises a legal issue.[438]

Investigative Procedures

Although EEOC's guidelines for investigating charges have, for the most part, standardized the process, the actual execution of investigations varies from office to office.[439] For example, decisions on how to investigate a charge may depend on the information collected before the investigation, the scope of the charge, and the nature of the allegations that are made.[440] The investigative approach also may depend on the staff who are involved in the investigative process, the resources available for such strategies as on-site investigations, the different assignments an investigator may have, and the caseload of the investigator. The caseloads of investigators are likewise guided by the issues and the categorizations of cases, the resources available for different approaches to investigation, and the use of other strategies, such as mediation, to resolve complaints before the investigative process takes place.

Regardless of the enforcement unit model employed by each district office, basic investigative procedures can be summarized as follows. Within 10 days of charge receipt (for Title VII claims), the investigator must serve the charge on the employer (respondent), giving the employer the opportunity to respond to the allegations of the charge through a position statement.[441] Depending on the information provided in the position statement, EEOC staff make a determination of how to proceed. If it is determined that additional information is needed, investigative staff will issue a request for information (RFI) to the respondent. Investigators can also conduct on-site investigations of employers, during which they can examine the employer's records and interview witnesses. EEOC has the authority to issue a subpoena to obtain access to the information necessary for reaching a determination on a charge.[442] It should be noted that at any time during the investigative process, an EEOC investigator can help the parties reach a settlement, although the investiga-

[431] Ibid., pp. 9–10.

[432] Ibid., pp. 55–56.

[433] Ibid., pp. 7–8.

[434] Ibid., pp. 42–43.

[435] Ibid., pp. 48–49.

[436] James Lee, regional attorney, Louis Graziano, trial attorney, and Luis Quinto, trial attorney, New York District Office, EEOC, telephone interview, Mar. 13, 2000, p. 2.

[437] Ibid., p. 3.

[438] Ibid., pp. 2–3.

[439] Rowe and Bowman interview, Chicago District Office, p. 18.

[440] Ibid.

[441] EEOC, *Compliance Manual*, "The Charge: Employer Notification Requirements," p. 0:3205.

[442] EEOC, *Compliance Manual*, "Overview," pp. 0:3302-7.

tor must remain neutral during settlement negotiations.[443]

Investigative Plans

The CEP requires that written investigative plans be developed for all A1 charges as a collaborative effort between enforcement and legal staff. Case development plans should include investigative procedures to be pursued and timeframes for their completion.[444] The CEP further identifies recommended points of contact between attorneys and investigators on A1 charges as being: before sending requests for information, before conducting on-site investigations and interviews, after receiving employer responses, and before conducting any determination interviews.[445]

The extent to which field office staff actually develop and use investigative plans for other, non-A1 charges varies among offices and, even within offices, between investigators. For example, in the Dallas District Office, the district director and deputy director stated that the level of interaction between the supervisor and the investigator, and the experience of the investigator dictate the investigative approach.[446] An investigative plan is not always required, and the nature and circumstances of the case determine whether one is developed.[447] One investigator stated that she develops written investigative plans for all of her cases.[448] Other investigators in the Dallas District Office said that they may develop a written investigative plan for a B case if they want additional information to upgrade the case.[449]

In the Chicago District Office, investigators are not required to formally put an investigative plan on paper. The investigators are encouraged to be creative about investigative techniques and apply them to the charges.[450] Likewise, in the Seattle District Office, investigators are not normally required to prepare investigation plans. However, staff emphasized that they have daily contact with supervisors to discuss strategies for handling charges, and they make joint decisions as to which direction investigations should move. One investigator in the Seattle office who works primarily on A cases stated that he does not usually prepare a formal written plan. The decision to prepare such a document depends on the complexity of the case, such as the number of witnesses, but can be useful as a tool to organize his thoughts. However, he does find it helpful to create a road map or a guide in the form of an investigative plan to outline all that needs to be addressed in an investigation.[451]

Because of the volume of cases coming into the New York District Office, investigative staff are responsible for figuring out what the most appropriate methods of investigation are, i.e., whether an on-site investigation, a request for information, or interviews with witnesses would be the more efficient process to use. Investigators are not required to develop any formal written documents such as an investigative plan, but case management assistance is offered for developing cases. It is during these case management sessions that the investigator receives guidance on where attention should be focused or where particular lines of questioning should lead.[452] In addition, investigators are encouraged to have discussions, on an as-needed basis, with their supervisors about cases, so there will not be any surprises at the end of the investigative process.[453]

While most investigative staff have stated that they do develop investigative plans for A1 cases, as required by the CEP, this case management device could be valuable for prioritizing work and minimizing duplication of efforts when dealing with similar charges and should be encouraged on all charges, regardless of categorization. Plans for non-A1 charges would obviously not require the same degree of detail, but could

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443 Ibid., p. 0:3501.

444 EEOC, *Comprehensive Enforcement Program*, p. 6.

445 Ibid.

446 Taylor and McGovern interview, Dallas District Office, p. 5.

447 Ibid.

448 Janice Reed, supervisory investigator, Lillie Wilson, investigator, and Armando Matamoros, investigator, Dallas District Office, EEOC, interview in Dallas, TX, Feb. 1, 2000, p. 3 (hereafter cited as Reed, Wilson, and Matamoros interview, Dallas District Office).

449 Hawkins et al., interview, Dallas District Office, p. 6.

450 Rowe and Bowman interview, Chicago District Office, p. 19.

451 Hill, Cleman, and Little interview, Seattle District Office, pp. 24–25.

452 Lewis and Alpert interview, New York District Office, p. 41.

453 Ibid., pp. 39–40.

rather be a simple statement of the procedures to be used. Investigative plans would allow for regular reassessments of the status of charges, from a managerial perspective, and could also serve as a valuable tracking device and case management tool for investigators.

Employer Notification and Requests for Information

As stated earlier, for Title VII charges, EEOC must notify employers that a charge has been filed within 10 days of charge receipt. This 10-day period begins to run at the time the charge is filed with the appropriate office.[454] Notice of a charge includes an actual copy of the charge (with the exception of EPA charges, which fall under different guidelines).[455] Copies of the charge will not be included with the notice in instances where:

- more than one respondent is identified, unless they are charged jointly;
- the charging party wishes to remain anonymous;
- the charging party expresses concern about the respondent viewing information in the charge;
- the allegations stated in the charge do not shed light on what the charge is asserting; or
- the charge has not been written on the official EEOC charge form.[456]

When submitting notification of the charge, the EEOC investigator has options for what can be identified to the respondent as the next step. He or she can indicate that no further information is needed from the employer at this time, request a position statement, or submit a specific request for information (RFI).[457] The position statement allows the respondent to refute the allegations made by the charging party and offer any evidence rebutting the claim. The purpose of the RFI is to gather the evidence needed to assess the merits of the charge and can include such things as personnel records, staffing patterns, job announcements and postings, and company policy statements.[458]

The implementation of the PCHP eliminated the use of boilerplate RFIs in favor of requests tailored to the needs of a particular charge.[459] The EEOC's Investigative Procedures Manual states that an interview with the charging party before drafting the RFI may assist the investigator in clarifying the issue and focusing the request more precisely.[460] This is another reason why the in-depth intake interview, as discussed earlier in this chapter, is so critical. The manual further states that when a position statement has been requested, the RFI should not be sent until the information provided in the position statement can be analyzed.[461] In addition, there may be instances where the information submitted pursuant to the initial RFI may require that additional information be requested.

The tailoring of RFIs has changed the way many investigators collect information from respondents. For example, Dallas District Office investigators stated that they write their own requests for information and do not rely on the standard questions. If the information request is for an A1 case, the attorney involved reviews it. Investigators are instructed to tailor the requests for information for all other charges as if they were A1 cases.[462] One investigator stated that, in many instances, there are already lists of generic questions that can be sent to the respondent, for example in cases involving allegations of unfair discharge. However, investigators can (and should) tailor the questions to a particular situation.[463] Similarly, in the Seattle District Office, while investigators may use a standardized request for information, the requests can be tailored by the investigator as much as possible to the allegations of the charge.[464]

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[454] EEOC, *Compliance Manual*, "The Charge: Employer Notification Requirements," p. 0:3205, *citing* 29 CFR § 1601.14 (1999). In the event that this deadline is missed, EEOC cannot be prevented from suing an employer because of the delay in notification, unless the employer can show that it was disadvantaged because of the delay. Ibid., pp. 0:3205–6.

[455] Ibid., p. 0:3206.

[456] Ibid.

[457] EEOC, *Compliance Manual*, § 3.1, pp. 3:0002–3.

[458] *See generally* ibid., § 26.1, pp. 26:0001–4.

[459] EEOC, *Priority Charge Handling Procedures*, p. 10.

[460] EEOC, *Compliance Manual*, § 14.1, p. 14:0001.

[461] Ibid.

[462] Reed, Wilson, and Matamoros interview, Dallas District Office, p. 3.

[463] Hawkins et al., interview, Dallas District Office, p. 6.

[464] Hill, Cleman, and Little interview, Seattle District Office, p. 20.

Generally, notification, whether accompanied by a copy of the actual charge or not, should provide the respondent with enough information to adequately respond to the allegations. Employers' perceptions of whether or not sufficient information is actually provided is mixed, presumably depending on the district office and the investigator handling the charge. One human resources professional stated that she believes she is generally provided with enough information to draft a charge, and the EEOC staff she has interacted with have been willing to provide clarification where necessary.[465]

However, most employers stated that they are not provided with enough information to respond to a charge appropriately, a deficiency that can be frustrating for the individual charged with responding.[466] One attorney at a large corporation stated that on numerous occasions he has received charges that state, "Details on file with the Commission."[467] He stated that he has seen notices that range from a lengthy, detailed description of the charge to a simple statement which reads, "I was treated unfairly because of my race." While he acknowledges that often charging parties may not provide enough detail when filing a charge, he believes it is the intake officer's or investigator's responsibility to gather more information.[468]

With respect to the types of information requested, many of the respondents to EEOC charges that were interviewed stated that the process is, for the most part, too standardized. Some complained that EEOC investigators routinely send out an information request in the form of a standard questionnaire with many questions not germane or relevant to a particular charge.[469] One respondent suggested that if investigators would tailor their questions to the specific charge they would get better, more relevant responses, and ultimately would save everybody time.[470] Another executive stated that there is a great deal of inconsistency: sometimes investigators will ask for too much information and, at other times, not enough.[471] In the instances where not enough information is requested, she will provide EEOC with additional information, particularly if she believes her case is strong.[472]

Some attorneys and mediators responding to the Commission's Web site questionnaire also stated that the information requested by EEOC pursuant to a charge often is irrelevant. One questionnaire respondent said, "EEOC demands high volumes of information (much of it irrelevant to the particular charge) immediately, even with threats . . . , then 'sits on it' for months or even years."[473] Another commented that EEOC staff "use a formulaic approach to seeking information without tailoring the request for information to the nature of the charge and its allegations."[474] These concerns compound the belief among external participants that EEOC investigators do not have a plan or approach in place for the investigation of charges.

On-site Investigations

EEOC representatives are authorized to enter and inspect employer facilities, examine and copy records, and interview employees.[475] The scope of the on-site investigation can include verifying information submitted by the respondent, evaluating compliance with notice-posting requirements, examining personnel records, and gathering documentary, statistical, and testimonial evidence.[476] According to EEOC's Investigative Procedures Manual, the appropriateness of an on-site investigation should be determined based on the timeliness of a charge; the nature or scope of the evidence provided in response to the request for information; the responsiveness of the respondent, including responsiveness on prior cases; the preservation of evidence; and the nature of the allegations.[477] If the employer is uncooperative with EEOC investigators, and/or attempts to impede the investigative process,

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[465] Penna interview, p. 3.

[466] Felton interview, p. 3.

[467] Simmons interview, pp. 4–5.

[468] Ibid., p. 5.

[469] *See, e.g.,* Black, McNatt, and Brannon interview, p. 5; Simmons interview, p. 4; Felton interview, p. 3.

[470] Simmons interview, p. 4.

[471] Smith interview, p. 5.

[472] Ibid., pp. 5–6.

[473] USCCR, Web Site Survey Data (Attorneys and Mediators).

[474] Ibid.

[475] EEOC, *Compliance Manual,* § 25.1.

[476] EEOC, *Compliance Manual,* "The Investigation," pp. 0:3304–5.

[477] EEOC, *Compliance Manual,* § 25.3.

EEOC can seek access by means of a subpoena.[478]

The on-site portion of the investigative process is, generally, left to the discretion of the investigator and his or her supervisor. The categorization of a charge appears to be the most important factor in determining whether an on-site investigation takes place. According to the CEP, on-sites should be conducted on all "A-1" cases, unless there is good reason not to conduct one.[479] An example of an instance where an on-site visit would not be necessary is if a charge concerns an employer's policy, and all of the policy is in written documents that have already been obtained. EEOC staff acknowledge that, for the most part, on-site investigations lead to better information and responses. However, it is commonly understood among Agency management and staff that, because on-site visits require a lot of resources and time, the Agency must be "judicious" in using them.[480]

Circumstances that may prompt a site visit vary from office to office. For example, the director of the St. Louis District Office said that at her office site visits for A2 cases are preferred; for B cases, investigators go on-site as the case warrants. She explained that a B case is a transitory classification, thus, enough information has to be obtained about the charge to make the final determination whether it is a C or an A case. She feels that a site visit is a good thing to do before a B case is redesignated as an A. The investigator makes the final decision about whether or not an on-site visit is conducted. If the investigator decides not to go on-site, the decision must be annotated in the case file with an explanation.[481]

The New York District Office is faced with a unique set of circumstances given the broadness of the geographic region under its jurisdiction (which includes Puerto Rico and the Virgin Islands). If an on-site investigation is deemed necessary for charges against employers in Puerto Rico or the Virgin Islands—the office's more remote locations—New York investigators will travel to conduct the on-site. However, given the Agency's limited travel budget, the staff try to "batch" cases together (based on same employer or similarity of issues) to make things as efficient as possible.[482]

The district director in the Chicago office agreed that agencywide there is "certainly a great encouragement for more on-sites to be done." He added that his office "put one little edge to that and said, we ought to do them (whenever) they gain something for the investigation."[483] In the Chicago District Office, the number of on-site investigations conducted has changed over time. Currently, about 7 percent of the office's investigations include on-site visits.[484] This reflects an average between investigations where on-sites are not considered (C charges, charges dismissed at intake, and charges that are successfully mediated) and those that largely receive on-site investigations, such as the pattern and practice cases that are investigated by the hybrid unit, and all those cases in which "it makes sense to do them."[485]

The supervisory systemic investigator in the Baltimore District Office said that, in her office, investigators will go on-site for any case that requires interviews. An investigator can also go out to investigate if he or she needs to see the location where the charging party works or worked, or if EEOC's presence needs to be known to the employer. The on-site investigation is also viewed as a good training vehicle for new investigators.[486] Investigators try now to go on-site for the majority of A cases, and it is estimated that currently at least 80 percent of A cases are investigated on-site.[487] If a B case comes back from mediation and there are still questions, investigators will go on-site if doing so will answer the questions. On an A1 case, an attorney may want an affidavit and would, therefore, go on-site with the investigator.[488]

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[478] Ibid., § 25.2(b)(2).

[479] EEOC, *Comprehensive Enforcement Program*, p. 6. *See also* Bruner, Schuetz, and Johnson interview, St. Louis District Office, Feb. 1, 2000, p. 8.

[480] Bruner, Schuetz, and Johnson interview, St. Louis District Office, Feb. 1, 2000, p. 8.

[481] Ibid.

[482] Lewis and Alpert interview, New York District Office, pp. 24, 38–39.

[483] Rowe and Bowman interview, Chicago District Office, p. 20.

[484] Ibid., p. 19.

[485] Ibid., p. 20.

[486] Kleinman, Tanner, and Navarro interview, Baltimore District Office, p. 6

[487] Byrd and Kotrosa interview, Baltimore District Office, p. 9.

[488] Kleinman, Tanner, and Navarro interview, Baltimore District Office, p. 6. EEOC's Comprehensive Enforcement

TABLE 5-3

Use of Selected Action Codes by Type of Processing Office and Fiscal Year of Case Closure

	Open charges	1993	1994	1995	1996	1997	1998	1999
(a) Witness contact action code								
EEOC	234	35	153	194	184	880	867	820
Headquarters offices	*0*	*0*	*0*	*0*	*2*	*14*	*0*	*0*
District offices	*120*	*12*	*67*	*116*	*73*	*454*	*420*	*402*
Area or local offices	*114*	*23*	*86*	*78*	*109*	*412*	*447*	*418*
FEPAs	208	90	80	55	42	327	379	374
TOTAL	442	125	233	249	226	1,207	1,246	1,194
(b) On-site action code								
EEOC	1,241	10,626	8,693	6,282	3,010	3,132	3,115	3,348
Headquarters offices	*1*	*13*	*8*	*0*	*4*	*1*	*0*	*0*
District offices	*815*	*7,518*	*6,005*	*4,530*	*2,100*	*2,172*	*2,082*	*2,084*
Area or local offices	*425*	*3,095*	*2,680*	*1,752*	*906*	*959*	*1,033*	*1,264*
FEPAs	65	705	643	412	362	325	266	184
TOTAL	1,306	11,331	9,336	6,694	3,372	3,457	3,381	3,532

SOURCE: EEOC, Charge Data System.

Investigators in the Seattle District Office have conducted approximately 50 on-site visits during the fiscal year, and management's goal is to increase that number to around 200 by the end of the fiscal year. The "lion's share" of the on-site visits involve A cases; however, the decision to do an on-site is based on whether it is a "witness intensive case or an evidence intensive case."[489] In addition, since the Seattle District Office covers a very large geographic area, the decision to do the on-site investigation also is based on the distance that might be involved in the travel, the ability to secure documents without travel, and the need to "meet people" and interview witnesses.[490]

EEOC's Charge Data System (CDS) shows that the number of on-site investigations has decreased dramatically since charge prioritization procedures were implemented in FY 1995. Nearly 12,000 on-site investigations were conducted on charges received in FY 1993, of which district offices conducted almost 8,000.[491] Fewer than 7,000 on-sites were done on charges received in FY 1994, about 4,300 by district offices. For charges received in FY 1995 through FY 1998, roughly 3,000 on-site investigations were conducted, with between 1,500 and 1,800 done by district offices. In FY 1999, the data suggest that fewer on-site investigations were conducted on charges than in earlier fiscal years, however the investigations of these charges may not yet have advanced to the on-site stage.

An examination of case closures, rather than charge receipts may give a better picture of the extent to which EEOC is conducting on-site investigations because all such charges have been sufficiently processed for the on-site investigation to occur. However, a review of data on case closures shows a similar abrupt decline in the number of on-site investigations, only it occurred between FY 1995 and FY 1996, a year after the charge handling procedures were put in place. The delay no doubt results from the length of

Program states that where appropriate, attorneys should participate in on-site investigations, as well as participate in the development of on-site plans. *See* EEOC, *Comprehensive Enforcement Program*, p. 6.

[489] Hill, Cleman, and Little interview, Seattle District Office, p. 26.

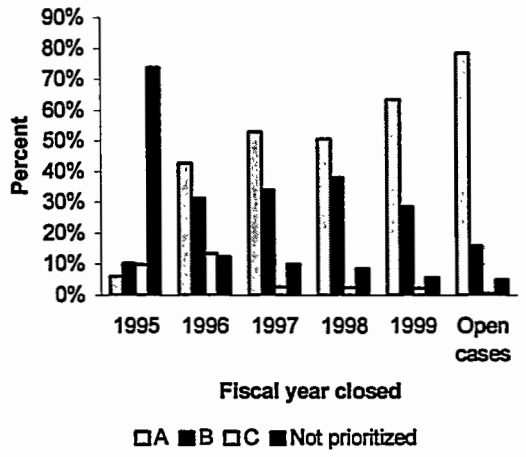
[490] Ibid., pp. 25–26.

[491] The remaining on-sites were conducted by local and area offices, headquarters, or state and local fair employment practices agencies (FEPAs).

time from when a charge is received to when it is closed. Thus, in FY 1993 EEOC closed about 11,300 charges that had an on-site investigation; approximately 7,500 from district offices. In FY 1994, the Agency closed about 9,300 cases, 6,000 from district offices, with on-site investigations. In FY 1995, fewer than 7,000 cases were closed having had on-site investigations, 4,500 from district offices. However, in FY 1996 to FY 1999, the number of charges closed each year having had on-site investigations was never more than approximately 3,500. The number conducted by district offices was never more than 2,200 (see table 5-3, panel (b)).

The number of on-site visits completed in recent years is small relative to the number of charges that EEOC processes. The number of cases closed from FY 1993 to FY 1999 that are recorded in the database as having had on-site investigations totaled about 41,000 (see table 5-3, panel (b)). However, EEOC closed more than a million cases during that time period. Among charges that presumably reached some stage of investigation, the Agency closed more than 560,000 charges with "no cause" findings, settled 72,000 cases, and obtained benefits for about 64,000 withdrawals (see table 5-8). The fact that the number of charges with on-site investigations recorded is far below these numbers suggests either that EEOC is doing very few on-sites or that staff are not recording on-site investigations in the Agency's database. At the same time, the drop in the number of on-site investigations that occurred when charge prioritization procedures were implemented could mean either that fewer on-site investigations were undertaken, possibly as a result of the fact that the PCHP rescinded the Agency's full investigation policy, or that staff changed their data entry procedures with respect to on-site investigations after charge prioritization took effect. Most certainly the failure to record on-sites in the CDS defeats the database's usefulness as a management tool for tracking Agency activity.[492]

FIGURE 5-5
Prioritization of Charges Receiving On-site Investigations by Fiscal Year Closed



SOURCE: EEOC, Charge Data System.

Under the PCHP, the level of resources devoted to a charge depends on the likely merit of the charge, and because on-sites require a lot of resources, they are more likely to occur in cases that appear to have merit. The on-site investigations that are recorded in the database confirm that, under the charge prioritization procedures and consistent with the CEP, on-sites are increasingly targeted to A cases. The percentages of A case closures with on-site investigations were 43 percent in FY 1996, over 50 percent in FY 1997 and FY 1998, and 63 percent in FY 1999. Of those charges remaining open and for which on-site investigations were conducted, 78 percent were categorized as A charges (see figure 5-5). B charges have constituted between 29 and 38 percent of the recorded on-site investigations between FY 1996 and FY 1999. C charges were 13 percent of those with on-site investigations that were closed in FY 1996, but have made up less than 3 percent of charges closed since that time (see figure 5-5).

[492] EEOC offices are now required to code on-site investigations in the Charge Data System.

In addition to the obvious purposes of gathering evidence and interviewing witnesses, on-site visits can have residual effects on the charge under investigation and enforcement efforts in general. The visits can serve to humanize EEOC staff and allow respondents to see that EEOC investigators are "real people."[493] In addition, the on-site visit can be one of the best outreach tools that EEOC has because the opportunity to meet with the respondent face to face can often result in improvements in the work environment and possibly changes in employer policies and practices.[494]

However, on-site visits are not always welcomed by employers, as would be expected. The enforcement manager in the St. Louis District Office stated that employers' resistance only fuels the Agency's desire to go on-site by giving EEOC the impression that the respondent is trying to hide something. If the employer makes it difficult to conduct an on-site investigation, the investigator has to convince the respondent that the visit is necessary. Sometimes an employer will come back with a compromise, but usually an investigator will be accommodated.[495] Conducting an on-site visit is determined by the significance of the case and the volume of the information that has to be collected, and not whether the respondent will be inconvenienced.[496]

Of course, given their interests, some respondents are critical of on-site investigations. One respondent said he prefers telephone interviews or written inquiries to on-site interviews because it means less time that the company has to spend on a complaint.[497] Another said that the value of on-site investigations depends on the case and whether interviewing participants in person or seeing the job site will be helpful to EEOC. She does not feel that on-site investigations should be automatic. However, her overall assessment of on-site investigations is that EEOC conducts them efficiently, preserves a level of confidentiality, and maintains a low profile.[498] Another respondent also feels that, because of EEOC's large workload, on-site investigations should be used "judiciously" for the right cases. The use of on-site investigations routinely will mean that the overall complaint process will take longer.[499]

Other respondents stated that the on-sites they have experienced have been poorly conducted. One executive said that on-site interviews are more like attempts to broker a settlement than interviews.[500] He added that, in one instance, after the on-site, nothing happened for many months, and the next thing the company heard was that the charge had been dismissed. In his assessment the company contributed significant time and effort to the on-site investigation, but it did not significantly contribute to the investigation.[501] Another complained that one on-site visit to her company was "sneaky" because EEOC did not inform her of the visit in advance and videotaped it without her prior knowledge.[502]

Contrary to the opinions expressed by those opposed to on-site investigations and the perception that employers are generally resistant, many of the employers interviewed for this report stated that they have found on-site investigations to be helpful and, in fact, encourage EEOC investigators to go on-site to gather information. Some respondents believe EEOC investigations would be more thorough if staff conducted more on-site investigations rather than simply relying on mail or telephone inquiries for information about charges. One general counsel for a large corporation stated that he recalls five on-site investigations which he found to be beneficial and efficient. He was given the opportunity to respond to the information collected in the on-site investigations and had the opportunity to enter any information he felt was relevant.[503]

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493 Fricks interview, St. Louis District Office, p. 5.

494 Ibid.

495 Ibid., pp. 5–6.

496 Ibid., p. 5.

497 *See* Dennis Wells, director, corporate employer and labor relations, Duke Energy, telephone interview, Jan. 13, 2000, p. 6 (hereafter cited as Wells interview).

498 Penna interview, p. 5.

499 Robert Bruce, vice president and labor and employment law counselor, Service Master Company, telephone interview, Jan. 18, 2000, p. 9 (hereafter cited as Bruce interview).

500 Black, McNatt, and Brannon interview, p. 7.

501 Ibid.

502 Susan Pigott, manager of human resources, Dean Foods Company, telephone interview, Dec. 22, 1999, p. 3 (hereafter cited as Pigott interview).

503 Simmons interview, p. 7.

Despite this appreciation for on-site visits, and as reflected by the low numbers noted earlier, many employers stated that seldom have EEOC investigations been conducted on-site in recent years. One respondent said that he could not recall an on-site visit in his company since 1995.[504] Another stated that in the last several years, EEOC has not conducted any on-site visits and, therefore, the company does not always know what information investigators have collected.[505] One respondent said that, to his knowledge, EEOC has rarely conducted on-site visits at his company. He indicated that, on the rare occasion they were conducted, he had more of an opportunity to review what the EEOC found.[506] Another respondent noted that in the six years she has been with her company, she could not recall any on-site investigations by EEOC. In addition, she said that she has had very little oral or written communication with EEOC during the investigation of complaints. She would like to be better informed as to how EEOC reaches its findings based on what it uncovered.[507] This could be achieved, in part, through on-site interaction.

One corporate executive compared her experience as an EEOC investigator in the 1980s with the way she perceives investigations today. She noted that, during her tenure, investigators did not have as many cases in their caseloads, and thus could conduct on-site investigations frequently. This demonstrated to both the respondent and the charging party that she was making an objective decision about a charge. Now, as a company representative, EEOC's failure to conduct on-site investigations is one of her criticisms about the complaint process. She firmly believes that, by going on-site to investigate charges, EEOC staff will gain better perspective of the claims and can be more objective.[508]

Of course, EEOC staff must juxtapose resource constraints with the benefits of conducting on-site investigations. There are ways to gather information without going on-site that may be entirely appropriate to the charge being investigated. However, some employers with sites in multiple locations expressed concern that there are vast differences in on-site investigative procedures across district offices. EEOC contends that there are indeed standards and procedures in place for investigating charges, but because each charge is slightly different, on-site investigations should be tailored to address the specific facts of a charge and the nature of each respondent facility.[509]

Witness Interviews and Testimonial Evidence

Generally, as part of an investigation, investigators interview the individual who filed the charge, an employer representative, and in some instances witnesses identified by the charging party.[510] Witness interviews can be conducted as part of an on-site investigation or independent from the on-site visit. The purpose of witness testimony is to obtain information regarding the alleged discriminatory statements, events, policies, or practices and any other relevant information about the charge or the status of the charging party.[511]

Although EEOC's Charge Data System (CDS) has a field for recording witness contact, it does not appear to have been used to record this activity much before FY 1997, or, for that matter, since then. Fewer than 1,000 witness contacts per year are recorded either for charge receipts or case closures before FY 1997. Charge receipts or closures for FY 1997 through FY 1999 have had witness contacts recorded in fewer than 1,250 instances per year. Charges received in FY 1999 are too recent in the extract of the database obtained for this report to have had many witness contacts recorded (see table 5-3, panel (a) above). Again, it is unclear whether EEOC actually conducts so few interviews of witnesses, or whether this information is not recorded in the database or both. EEOC headquarters acknowledges that investigators are not required to enter witness contacts in the CDS, but stated that it is the Agency's practice to capture this infor-

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[504] Louis Camardo, equal employment and workforce planning manager, Ford Motor Company, telephone interview, Dec. 12, 1999, p. 3.

[505] Felton interview, p. 4.

[506] Glenn Summers, attorney, Peter Kiewit & Sons, Inc., telephone interview, Dec. 9, 1999, p. 3 (hereafter cited as Summers interview).

[507] Young interview, p. 6.

[508] Smith interview, p. 5.

[509] Vargyas letter, p. 45.

[510] EEOC, *Compliance Manual*, "On-site Investigations," p. 0:3305.

[511] EEOC, *Compliance Manual*, § 26.6, p. 26:0004.

mation in an affidavit or statement and to record each witness contact in the case file log.[512]

Disclosure of Information and Communication with Parties

The disclosure of information in open case files is governed by EEOC's regulations. EEOC's general policy is not to disclose information from open investigative files, except with the parties involved, and even then confidential material is removed from the file.[513] The charging party has the right to access the respondent's position statement. Respondents, on the other hand, only have access to the charge file after the charging party has filed suit.[514] These regulations, for many valid reasons, in effect limit the ability of parties to obtain information about their charges. Because of the disclosure limitations, many charging parties have indicated that they feel they are not kept apprised of the status of their charges, nor do they have regular interaction with EEOC staff during the investigative phase. To that end, district offices have independently established procedures for the disclosure of information pertaining to a charge and communication of relevant information to the parties involved.

For example, it is Baltimore District Office policy that charging parties do not receive respondent information in writing, nor do they receive a copy of the respondent's position statement. EEOC investigators acknowledged that during an investigation the charging party must be able to provide a response to or refute the position statement; therefore, some information will have to be disclosed. The respondent only receives a copy of the formal charge that was filed. In addition, one investigator stated that investigators try to answer respondent questions with respect to the charge, but do not disclose the list of witnesses or any affidavits.[515]

Staff at the Baltimore District Office said that, under the office's new structure, there are now attempts to keep in contact with the complainant on the progress of the charge. The investigator will call the complainant, give him or her information, and get any necessary additional information, especially if the charge cannot be addressed for a while. The investigator will try to give the complainant projections as to when the steps in charge processing will be addressed.[516]

At the Dallas District Office, staff will discuss information in the file with the charging party, and will give the charging party the opportunity to respond to the position statement once it is received.[517] Once the case is closed, both respondents and charging parties can request a copy of the file in writing. Often this level of interaction is not satisfactory to the charging party. Investigators stated that sometimes charging parties call them on a daily basis. The Dallas office legal staff said that they realize charging parties are frustrated because they want more communication from EEOC.[518]

In an attempt to allay frustration of charging parties and to keep them better informed, the St. Louis District Office has established a 60-day communication rule. If an investigator has not been in contact with a charging party for 60 days, he or she will call the charging party to let him or her know the status of the charge, even if nothing has been done on the case since previous communication.[519] Further, once the investigator receives a response to a request for information or moves forward to another stage in the investigation, the investigator is responsible for notifying the charging party and documenting the case file accordingly.[520]

In the Seattle District Office, staff feel that the office works " pretty well" in keeping charging parties informed throughout the complaint process.[521] One enforcement manager acknowl-

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[512] Vargyas letter, p. 45.

[513] EEOC, *Compliance Manual*, § 83.1(a), p. 83:0001. Confidential materials include witness testimonies that were given on the grounds of confidentiality; investigative notes which reveal impressions, recommendations, strategies, or deliberative process; information identifying other respondents; and settlement or conciliation materials. Ibid., § 83.6(b), p. 83:0003.

[514] Ibid., § 83.5, p. 83:0002-3. This applies only to Title VII charges.

[515] Byrd and Kotrosa interview, Baltimore District Office, p. 9. *See also* Scott, Lawrence, and Wofford interview, Baltimore District Office, p. 6.

[516] Scott, Lawrence, and Wofford interview, Baltimore District Office, pp. 5–6.

[517] Reed, Wilson, and Matamoros interview, Dallas District Office, p. 4.

[518] Canino, Costas, and Anderson interview, Dallas District Office, p. 5.

[519] Bolden et. al., interview, St. Louis District Office, p. 5.

[520] Ibid.

[521] *See* Hill, Cleman, and Little interview, Seattle District Office, pp. 34–37.

edged that there is more interaction with charging parties who have A cases than those with, for example, B cases. He maintains that charging parties are told at intake if there is enough evidence, and it is made clear that if there is nothing in the charge, the next time that charging parties might hear from staff is when the case is ready to be closed.[522] He also acknowledged that most charging parties are concerned that EEOC has not made a finding in their favor. He said that staff at the office do try to explain to them, although sometimes at the "12th hour," that after the evidence has been reviewed, the case will be closed.[523] He feels that necessary information about the process should be explained at intake, and all of the information should be collected and reviewed, including witness statements, immediately and not two or three months down the road. If additional information or evidence is needed that could turn the decision around, then the office would look into it further and give the charging party an additional 10 days to send the information in for review. However, generally, there is no more additional information that charging parties can provide which can turn the case around.[524]

As far as day-to-day contact with charging parties or "courtesy calls" about the status of an investigation, one Seattle investigator said that perhaps a small office with a small inventory could give that kind of time and effort.[525] The enforcement manager added that resources also influence the amount of interaction. He explained that in Seattle, staff make it clear to the charging party that it is not necessary to contact the office.[526] In addition, staff assure the charging party that whenever there is information to share, EEOC staff will make an effort to contact the charging party.[527] However, if it is clear that a charging party does not have a case based on the evidence, then the next time he or she may hear from EEOC staff after intake will be when the case is closed.[528]

Despite statements by EEOC staff that they attempt to maintain communication with charging parties, individuals external to the Agency find the lack of interaction problematic. One of the respondents to the Commission's Web site questionnaire for attorneys and mediators stated that the Agency's primary weakness it its refusal to share information.[529] In fact, many of the attorneys and mediators responding to the questionnaire stated that EEOC does not keep them or their clients adequately informed of the progress of a charge as it goes through the charge handling process.[530] Similarly, most of the 87 respondents to the questionnaire for actual and alleged victims of employment discrimination stated that they were "rarely" or "never" informed of the status of their case.[531] Questionnaire responses support the impression of some individuals that, in some instances, EEOC staff are not responsive when complainants attempt to contact the individual handling their case.[532] As one attorney stated, "Short updates on a periodic basis would relieve anxiety."[533]

Employers have also expressed the desire to have more interaction and face-to-face contact with EEOC during the course of an investigation. They feel this would give them a better understanding of what is involved in the process, and provide more feedback about what the investigation uncovered in a timely manner. One respondent said that in many instances the company is not given the opportunity to respond to information that EEOC has gathered during the investigation, especially information from persons other than the charging party. He would like the opportunity to participate and respond and would like the process to be set up more like a fact-finding conference.[534] Another respondent at the same company stated that she finds more often than not that an investigator will not continue a working relationship with her once the investigation begins and the information has been obtained from her. She said that she would like to work more closely with the investigators

[522] Ibid., p. 37.

[523] Ibid., pp. 37–38.

[524] Ibid., p. 38.

[525] Ibid., p. 39.

[526] Ibid., pp. 39–40.

[527] Ibid.

[528] Ibid., p. 40.

[529] USCCR, Web Site Survey Data (Attorneys and Mediators).

[530] Ibid.

[531] USCCR, Web Site Survey Data (Actual and Alleged Victims).

[532] Ibid.

[533] USCCR, Web Site Survey Data (Attorneys and Mediators).

[534] Bruce interview, p. 9.

and have more interaction with EEOC throughout the investigation process.[535]

Legal Involvement in Investigations

As was discussed earlier when describing the enforcement unit models employed by various district offices, new Agency policy requires attorneys and investigators to have regular interaction during the processing of charges. According to the CEP, although the level of attorney interaction is based on charge complexity, an attorney is to be assigned to every A charge to ensure that the investigator has continuing access to legal advice on the development of potentially meritorious cases.[536] Legal-enforcement interaction is mandatory for all A-1 charges, and is available on an "as-needed" basis for A-2 charges. On all other charges, investigators and trial attorneys are encouraged to contact and confer with each other on an informal basis.[537]

In the Baltimore District Office, attorneys are involved in determining whether a complaint has been adequately investigated, particularly for those charges that are potential litigation cases. Also in the office, the district director has the authority to make investigation determinations.[538] In Chicago, there are frequent discussions between supervisors and investigators about certain individual charges and how to proceed. However, each investigator carries about 30 to 35 cases which makes it difficult to supervise each case closely without additional managers. A supervisor reviews all charges when the investigator thinks that the processing of the case is complete.[539] There is also attorney input when the investigator has a question. At the office, the legal-enforcement interaction is a "very fluid and informal process" that usually "runs the gambit" when there is a cause case or when there is a legal question about jurisdiction.[540]

Overall Impressions of EEOC's Investigative Process[541]

To evaluate EEOC's investigation process, the U.S. Commission on Civil Rights (Commission) asked charging parties, respondents, and employment attorneys about their experiences with and perceptions of EEOC's investigative process. The responses show that charging parties and respondents, in particular, are relatively uninformed about the investigation phase of the charge handling process. Many of them indicated that they are unaware of what is involved in an investigation, and both groups question whether unbiased fact finding is actually conducted. Both groups indicated that they want to be more involved in the process, to have more interaction with EEOC investigators, and to be more informed about how outcomes are reached. Many of the complainants and respondents indicated that they often do not even know when or if an investigation takes place, and many of the respondents said that on-site visits rather than telephone inquiries would produce more objective and informative investigation reports.

Although EEOC has procedures for investigations and for determining which charges will go through the investigative process (as was discussed earlier in the section on charge categorization), it should be noted that most respondents and charging parties are unaware of the Agency's prioritization process or other procedures that govern investigations. Because of this lack of knowledge, lack of involvement, and sporadic communication with EEOC during the investigation phase, the Commission found that the respondents and complainants have common misconceptions about EEOC's investigative process. Although the experiences of those who provided insights may have occurred before new procedures were put into place, it is important to evaluate the investigative process in accordance with whether or not these parties' concerns have been addressed.

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[535] Karen Hovorka, director of training and administration, Service Master Company, telephone interview, Jan. 18, 2000, p. 9 (hereafter cited as Hovorka interview).

[536] EEOC, *Comprehensive Enforcement Program*, p. 6.

[537] Ibid.

[538] Kiel et al., interview, Baltimore District Office, p. 7.

[539] Rowe and Bowman interview, Chicago District Office, p. 21.

[540] Ibid.

[541] EEOC and the Commission were unable to come to an agreement regarding the review of case files, and therefore a comprehensive analysis of the sufficiency of investigative files could not be conducted. Commission staff relied on the impressions of external participants and interviews with EEOC staff to formulate an evaluation of EEOC's investigative process.

Further, while the charging parties who volunteered their insights do not represent all charging parties who have filed cases with the EEOC, and in fact, by nature, those who would respond are more likely to be individuals who were dissatisfied with the way in which their charges were handled, it is interesting to note that there were some common themes found among their comments that should be given consideration.

In general, the Commission found that the majority of the complainants' statements revealed a great deal of misunderstanding and confusion about EEOC's investigative process. The majority of the complainants who had concerns about EEOC's investigation process indicated that they were not informed or contacted during the investigation process and did not believe that the investigation was impartial or was an unbiased fact-finding action. These individuals did not seem to have an idea of what the process involved or have any documentation that it actually took place.[542] Complainants wrote that, both during and after the investigation, they felt deceived, distrustful, and disillusioned with EEOC's investigation process, which affected their assessment of EEOC's effectiveness as a civil rights enforcement agency.[543]

Overall, results of the Commission's Web site questionnaire suggest that the individuals who completed the questionnaire may be confused about why their cases were handled the way they were and do not understand why their cases are deemed as not having merit or are dismissed for jurisdictional or administrative reasons.[544] Charging parties responding to the questionnaire noted that they were "discouraged," were "giving up," or had "lost confidence in [the] system."[545] Many of the questionnaire respondents reported that they were "somewhat dissatisfied" or "dissatisfied" with the way their charges were processed.[546]

A general theme throughout the responses from charging parties was the belief that EEOC investigators did not conduct a thorough investigation or any investigation at all.[547] While this may be because the case was nonjurisdictional, it also could be related to early dismissals for lack of evidence (C charges). These responses provide additional evidence that some individuals believe—justifiably or not—that cases meriting investigation are dismissed without being given appropriate consideration. In addition, almost half of the questionnaire respondents stated that they were not advised of what the law provides with respect to employment discrimination and how the administrative charge process works (although an equal number stated that they did receive this information).[548] Similarly, slightly less than half of the questionnaire respondents stated that they were advised of their rights and responsibilities.[549] These findings suggest that EEOC may need to provide greater explanation and more detailed counseling to potential charging parties at intake.

Many of the responses to individual questions reflected charging party dissatisfaction with EEOC's handling of their case. Charging parties expressed some degree of dissatisfaction with the way their cases were processed, the intake procedures, and their interaction with the Agency throughout the investigation. In addition, more negative than positive responses were received for questions regarding the drafting of charges, the responsiveness of Agency staff, fairness, and closure procedures.[550]

Questionnaire responses support the Commission's findings elsewhere that additional ways of contacting and interacting with EEOC are necessary. These responses suggest that EEOC may need to be more accessible to the public. Additional office hours, offices in more geographic locations, and more convenient locations for filing charges were all recommended by the questionnaire respondents.[551]

Respondents to the Web site questionnaire for attorneys and mediators also expressed dissatisfaction with EEOC investigations. Criti-

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542 USCCR, Fair Employment Report, USCCR Complainants 7, 16, 18, 54.

543 *See, e.g.*, USCCR, Fair Employment Report, USCCR Complainant 57.

544 USCCR, Web Site Survey Data (Actual and Alleged Victims).

545 Ibid.

546 Ibid.

547 Ibid.

548 Ibid.

549 Ibid.

550 Ibid.

551 Ibid.

cisms focused on the length of time it takes EEOC to conduct investigations, bias in favor of both respondents and charging parties, failure to interview witnesses, and insufficient or incomplete investigations.[552]

Whether these observations and perceptions about EEOC's investigation process are correct or appropriate is not the issue; the simple fact that these concerns were voiced warrants examination, particularly in light of the common themes of lack of communication and lack of understanding about the charge process.[553]

Lack of Understanding about the Investigative Process

Particularly for charging parties, lack of understanding about EEOC's charge handling procedures fueled the greatest amount of dissatisfaction with the investigative process. The following discussions and descriptions of the process show that there is a serious lack of understanding of the investigation process that is caused by the minimal interaction between the complainant and EEOC during the investigation phase. For example, one complainant describes his perception of the EEOC investigation process. He wrote:

> The investigator must get cases on and off his/her desk to avoid being buried. There is not time to do a thorough investigation. The respondent is well aware of [that] fact and aggravates the problem by providing volumes of irrelevant material through which the investigator has to wade. An investigator will find "no reasonable cause" also, because it is the safe thing to do. . . . The investigator gets the same tally mark for a reasonable cause as a no reasonable cause, and no reasonable cause is less risky and takes infinitely less time. If the complainant wins in court, the investigator can simply claim, "Well, I knew something was there, I just couldn't put my finger on it."[554]

Another complainant submitted a detailed log of his experience with EEOC's investigation process:

> I filed my charge on May ___, 1997. [Seventeen days later], I was notified by [an] EEOC Enforcement Supervisor [that the complaint had been received]. On September ___, 1997, I was assigned an investigator. On January __, 1998, I wrote [the investigator] asking for a status report. On February __, 1998 again I wrote [the investigator] for a status report, informing her of more details. . . . On May ___ 1998 I wrote [the district office Director] concerning my complaint. On July __, 1998 I received information that [there was a new] investigator. . . . [Two days later] I received information that the "investigation has been ceased." . . . I had until . . . [one week later] to present documentary evidence to keep my investigation going. On [that date] I hand-carried my job journal to EEOC of 403 pages. . . . [Two weeks later] I received a dismissal/right-to-sue letter. I voiced my dissatisfaction to EEOC within a time frame about the investigation of my case.[555]

Some complainants were confused when EEOC closed a case without conducting an investigation. The complainants felt that they provided EEOC with enough documentation and witnesses to support their allegations.[556] Therefore, they do not believe that the EEOC decision not to investigate had to do with an unbiased, impartial decision or a determination of no cause. For example, in a few instances EEOC sent correspondence to the complainants alluding to its charge prioritization process, which in some cases demotes complaints from investigative priority,[557] as the reason for not conducting an investigation.

While the charge prioritization process may be a legitimate EEOC procedure, both respondents and complaints are unfamiliar with the process and are not given any in-depth explanation. At least for these complainants, mentioning, but not providing in-depth explanation of, the charge prioritization process at this late phase only appeared to confuse and alienate them, and fuel their beliefs that EEOC was only giving them the "run-around" concerning their charges.

For example, one complainant who has filed several charges with EEOC and a FEPA has received much correspondence from the agencies concerning her complaints. None of the corre-

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552 Ibid.

553 It should also be noted that the Commission is unable to assess the validity of either their charges or their complaints about the EEOC.

554 USCCR, Fair Employment Report, USCCR Complainant 16.

555 USCCR, Fair Employment Report, USCCR Complainant 18.

556 *See* USCCR, Fair Employment Report, USCCR Complainants 18, 19, 24, 26, 51.

557 *See* USCCR, Fair Employment Report, USCCR Complainants 26, 35, 49.

spondence or her contact with the agencies officially closed her charges. After many contacts with EEOC, she finally received a letter explaining the new charge categorization process. The letter stated that the new process is based on a reallocation of EEOC staff resources. The letter further stated that the new procedure is based upon information and evidence gathered while processing her complaint, and that EEOC found no evidence of discrimination, thus, no further investigation would be done.[558] She then received a dismissal notice. The complainant does not feel that EEOC provided adequate explanation and justification for dismissing her case after all of the correspondence, and continues to contact other private agencies for what she sees as proper recourse in handling her charges.[559]

Another complainant received a letter from EEOC that stated it would dismiss the case before a more exhaustive investigation would be completed. The letter stated, "This practice is in keeping with the Commission's regulations and is designed to assure the Commission's limited resources are directed towards cases that have a higher probability of success."[560]

Another complainant wrote that after the investigation, EEOC dismissed her complaint. However, she contends that outside sources were willing to help her. She wrote:

> Many of the final decisions in my case showed that EEOC's investigators knew little or nothing about university tenure process. . . . [T]he District Director stated in one of her letters that my case did seem to be one of discrimination, then proceeded to justify why EEOC was not treating it as such. . . . In my case, only one witness [of four] was questioned; this questioning took place at my insistence. [Some other] sources [including] the American Association of College Professors who was willing to pursue my case through arbitration with a lawyer . . . and Senator . . . who saw such merit in my case that [his] office asked EEOC to reopen it.[561]

Some complainants offered suggestions on how investigations should be handled. These suggestions further illustrate the complainants' minimal understanding of investigation. For example, one complainant offered his suggestions for how EEOC should have addressed his complaint after the investigation. He wrote:

> After completing his/her investigation, some one should have sat down with me and said "this is what you have. You made this charge . . . and this is what we have discovered to support your charge. . . ." If something was uncovered during the investigation that I did not complain about, EEOC should have brought that something to my attention. Finding CAUSE should have obligated EEOC to fashion a remedy that would provide me with relief from the discrimination and harassment.[562]

Yet another source of confusion for complainants and respondents is the role of the investigator. As stated earlier, many of the complainants and some respondents believe that the EEOC investigator is the only role player in the decision making about the investigation, whether it takes place, and how it is conducted. Essentially, they believe that the investigator works alone and has complete autonomy over the process. Very few know of procedures or guidelines for investigators or investigations, or know of any other staff who are involved in this phase of complaint processing. Thus, for the most part, their lack of information and the disillusionment about the quality of the investigation process are blamed solely on the investigator. However, staff at the EEOC maintain that investigation is a complex process that has many guidelines and players.

Investigative Consistency

For the most part, the respondents interviewed by the U.S. Commission on Civil Rights believe that generally EEOC has improved its investigative process over the past five years, but that the effectiveness of EEOC investigations varies from office to office.[563] Generally,

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[558] USCCR, Fair Employment Report, USCCR Complainant 49. *See also* Berry letter, pp. 1–2.

[559] USCCR Complainant 49, letter to Diane Sawyer, Prime Time Live, Channel 7 News, New York, NY, p. 2.

[560] USCCR, Fair Employment Report, USCCR Complainant 26. *See also* Zurita letter, pp. 1–2.

[561] USCCR, Fair Employment Report, USCCR Complainant 51.

[562] USCCR, Fair Employment Report, USCCR Complainant 32.

[563] Wells interview, p. 4; Summers interview, p. 3; Pigott interview, p. 3; Black, McNatt, and Brannon interview, p. 6. The majority of the companies have offices or facilities in many states, and charges are filed at EEOC offices located in those areas.

some respondents are of the opinion that there is very little consistency in the way different investigators conduct investigations, on-site or otherwise, and are not aware that there are EEOC procedures and guidelines that govern the investigation process. A corporate counsel at one company said that he sees a difference in the style of investigators. He said that there are some investigators who dwell on settling the charge and do not ask for a lot of facts and other investigators who base their investigation strictly on what is in the position statement. He also criticized investigators who say that they are conducting an investigative interview when it appears to be more like a settlement attempt. It appears to him that EEOC has no consistent investigative procedures in place.[564]

For charging parties, the issue of lack of investigative consistency stems from how their investigations were handled differently by various enforcement staff. Many believe that who handles a charge determines its outcome. Complainants wrote that they were confused when investigators were changed or replaced during the investigation. One complainant wrote that several investigators handled his case and he found this to be "chaotic."[565] Another complainant who has filed three charges with EEOC described her experiences with more than one investigator. She alleges that one of her three complaints went in different directions when the investigator assigned to the charge changed.[566] It appears that one investigator was zealous about processing her charge while the other was more cautious about how to proceed with the complaint. She wrote:

> [The first investigator] gave the impression he was working on my behalf and not a neutral party. [The investigator] always gave . . . false hopes that he was going to blow this case and the [discriminating] officials out of the water. All along I thought he was on my side until another EEOC [investigator] told me that what the [first investigator] was doing were not his functions. [The second investigator] admitted that he found discriminatory action but that the [respondent] was trying to correct its actions and there was nothing he could do. . . .[567]

The same complainant also wrote about her experiences with the investigator assigned to her other two charges. When the initial investigation began on the two charges, she alleges that the investigator would only interview witnesses for the respondent and that the investigator "tried to put words" into her mouth.[568] In her final analysis about her experiences with EEOC and its investigation process, the complainant wrote:

> With the experience I have gained through this system, . . . it makes me acutely aware that EEOC is not trying to resolve any cases. . . . I felt deceived through this whole process and learned not to trust an EEOC person. From the local EEOC to the national [office], I have been disillusioned about [EEOC's] function, the lack of investigative reporting, and follow-through.[569]

Perceptions of Investigative Staff

Attorneys and mediators who responded to the Commission's Web site questionnaire identified several strengths and weaknesses of EEOC's investigative process, including the competence of EEOC staff, for which responses were mixed. A few of the questionnaire respondents noted that the quality of investigations depends on the investigators. According to one,

> [e]verything depends on the investigator. Some are diligent and conscientious and perform thorough investigations. Some are lazy and perform superficial investigations. These lazy investigators have a tendency to take the employer's word for everything. . . .[570]

Another questionnaire respondent stated:

> [The] quality of investigation depends on quality of investigator and supervisor. My experience has ranged from excellent to worse than awful.[571]

Similarly, another respondent to the attorney/mediator questionnaire stated:

> It depends on the individual investigator. I am very pleased with some of them but others (and some of

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564 Black, McNatt, and Brannon interview, p. 6.

565 USCCR, Fair Employment Report, USCCR Complainant 21.

566 USCCR, Fair Employment Report, USCCR Complainant 57.

567 Ibid.

568 Ibid.

569 Ibid.

570 USCCR, Web Site Survey Data (Attorneys and Mediators).

571 Ibid.

them are long-time employees) are problematic. It is sometimes difficult to understand where they are coming from.[572]

Several attorneys and mediators specifically identified lack of investigator knowledge as a barrier to thorough investigations.[573] One questionnaire respondent charged that "most investigators have little knowledge of the law, tend to be bureaucratic and are lazy."[574] Other criticisms were that investigators were insufficiently trained, discourteous, and biased.[575]

Some charging parties and employers also feel that investigators do not appear to be knowledgeable about employment issues, concerns, or laws, or have not been adequately trained to conduct investigations. For example, one employer said she found some investigators to be very inexperienced. However, she finds newer investigators are more diligent and will go through more steps than the older investigators.[576] Some complainants commented that the investigator assigned to them did not appear to understand their specific concern or work environment.

These assessments are not true of all EEOC investigators. There were several positive evaluations of investigative staff as well. One questionnaire respondent stated:

> Experienced, objective, fair investigators do wonderful work. They get to the heart of the issue quickly and frequently point out facts that the lawyer and the employer may not have completely understood. A good early investigation facilitates settlement. . . .[577]

Similarly, another individual noted:

> Usually the investigators have a plan and obtain the information relevant to the charge. They are usually courteous and responsive and think through their requests. By and large, they seem to come to a responsible conclusion. Some are quite efficient.[578]

Finally, one questionnaire respondent stated, "Although I've had some bad experiences with some investigators and district offices, I still believe that most EEOC staff are dedicated, competent, and fair."[579]

As other attorneys and mediators acknowledged, EEOC investigations are affected by the enormous workload of the Agency. One individual stated, "Investigators' caseloads are so large that they do not have adequate time to conduct a more thorough investigation."[580] Another noted that investigators are "overwhelmed" with cases resulting in inadequate investigations.[581]

Experts in employment discrimination agree that training of investigative staff is critical if the quality of EEOC investigations is going to improve. The director of the Employment Discrimination Project of the Lawyers' Committee for Civil Rights Under Law stated that he believes it is imperative that EEOC staff have standards to live up to and adequate training to rise to the level of those standards.[582] He acknowledged that there have been many positive changes made at the Agency in the past few years, but "getting on top of problems of poor performance of staff members is critical."[583] Another individual who has expertise in employment discrimination law concurred that he has seen instances where EEOC staff were not trained to recognize employment discrimination cases and, in fact, encountered one EEOC intake investigator who was even unsure of what the Agency's jurisdiction is. That investigator told a charging party that EEOC did not handle religious discrimination charges.[584] While this may be an exceptional instance, it illustrates the need for thorough training and quality standards for enforcement staff.

In summary, there are a few common themes voiced by parties presumably on opposite sides of the fence. Many respondents and complainants

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572 Ibid.

573 Ibid.

574 Ibid.

575 Ibid.

576 Black, McNatt, and Brannon interview, p. 4.

577 USCCR, Web Site Survey Data (Attorneys and Mediators).

578 Ibid.

579 Ibid.

580 Ibid.

581 Ibid.

582 Richard T. Seymour, director, Employment Discrimination Project, Lawyers' Committee for Civil Rights Under Law, interview in Washington, DC, Mar. 6, 2000, pp. 2–3, 17 (hereafter cited as Seymour interview).

583 Ibid., p. 3.

584 Mitchell Tyner, associate general counsel, Seventh-day Adventist Church, telephone interview, Apr. 5, 2000, pp. 13–15 (hereafter cited as Tyner interview).

alike are unfamiliar with the investigative process and do not believe that it is an impartial or thorough one. To many of the respondents and complainants, the investigator is viewed as an advocate for the other, rather than an impartial, unbiased staff member of EEOC. There is also the common misconception that one person, the investigator who is assigned to a case, is the only one responsible for the handling of a charge. One respondent said that he would like to have copies of procedures and guidelines that EEOC follows concerning the investigative process. He would like the investigation to be in the format of a deposition where there is input from both the charging party and the respondent.[585] Both respondents and complainants who commented on the EEOC investigation process agree that there needs to be more interaction with EEOC, particularly with investigators, during this phase of the EEOC complaint process.

The Web site questionnaire responses also support the need voiced by experts for an improved flow of information between charging parties and EEOC staff. Charging parties need to be better informed of legal requirements, jurisdictional issues, and the EEOC process. The questionnaire responses also suggest that charging parties may need to be better informed about what is happening with their charges during the EEOC process.[586]

While EEOC obviously cannot please all of its customers, it may be able to improve customer service by providing greater counseling and more information to ensure that individuals are fully informed of why their charges were handled in a certain manner. For example, if charging parties and potential charging parties are given more information as to why EEOC has no jurisdiction over an issue, and are given suggestions for where to go for assistance, they may feel that EEOC staff are concerned about their charge and that EEOC staff did the best they could to provide assistance.

Moreover, the investigation process is not an individual function at the EEOC involving only the investigator assigned to a charge, but a complex process with internal procedures and guidelines that usually involves different staff, including managers, attorneys, and investigators. Because, in most cases, the reasons behind the decision on whether and how to investigate are not shared with the public, it is likely that complainants' and respondents' perceptions about EEOC's investigations will remain negative. The bottom line is communication. EEOC staff would alleviate some of this negativity by keeping all parties informed. Obviously, given the large caseloads of the past, this was an impossibility; but as caseloads continue to decrease and inventory is more under control, interaction with charging parties and respondents should also improve.

Special Charges

Although most charges filed with EEOC are initiated by an aggrieved person and are mediated and/or investigated accordingly, there are a few unique types of charges that warrant special processing procedures. Commissioners or district office staff, with headquarters approval, can initiate EEOC charges when there are indications that discrimination has occurred in a single place of business or an entire industry. Other charges can be initiated on behalf of a group of aggrieved persons, either as a result of an individual complaint or as the result of a complaint identifying multiple parties. Still other charges may begin as an individual complaint, but upon further investigation lead to the suspicion that the alleged discriminatory practice or policy has broader implications and could affect an entire group of individuals.[587] In each instance, case development requires a different approach than the standard individual charge of discrimination.

Commissioner Charges and Directed Investigations[588]

EEOC enforcement staff can initiate a charge based on "information from a Commissioner, any of its staff, or any outside source on potential violations of the statutes."[589] Such charges are called commissioner charges or directed investigations. The commissioner charge is usually used in situations where discrimination victims are unaware of their rights or of the occurrence

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585 Black, McNatt, and Brannon interview, pp. 8–9.

586 *See generally* USCCR, Web Site Survey Data (Actual and Alleged Victims).

587 EEOC, *Compliance Manual*, § 8.1, p. 8:0001.

588 These charges are collectively referred to as commission-initiated charges, i.e., those charges initiated by EEOC.

589 EEOC, *Compliance Manual*, § 8.2, p. 8:0001.

of discriminatory practices.[590] It should be noted that the term "commissioner charge" only refers to Title VII claims. "Directed investigations" apply to ADEA and EPA charges. The main difference between the two is that under Title VII, EEOC must have a basis to investigate possible violations and must obtain a commissioner charge and notify the respondent of the ensuing investigation.[591] Under the ADEA and EPA there are no prerequisites, and no specific reason for the initiation of an investigation is required.[592]

To file a charge, a commissioner must have reasonable cause to believe that discrimination has occurred. A commissioner charge simply initiates an investigation; it is not a de facto conclusion that discrimination has occurred.[593] Through commission-initiated charges, respondents may be identified and scheduled for investigation in the absence of an individual charge or when the issues to be investigated are not adequately covered by a pending individual charge.[594] It is EEOC policy, "within available resources," to follow up on information received that may "point to a violation" of any of its statutes and initiate an investigation on its own.[595]

In their public roles, commissioners conduct outreach and hold meetings with stakeholders to garner awareness of what issues the Agency should actively seek to investigate.[596] According to Chairwoman Castro, commissioners do not take the responsibility of identifying issues for commissioner charges lightly and have staff do background research on issues that may lead to a commissioner charge prior to pursuing a charge.[597]

The EEOC Compliance Manual covers the procedures for Title VII commissioner charges and ADEA/EPA directed investigations.[598] One of EEOC's objectives, as evidenced by the amount of emphasis placed on its pattern and practice program, is to investigate and eliminate—through commissioner charges, directed investigations, and appropriate individual charges—discrimination in employment that could have a broad impact on employees or applicants for employment. Thus, EEOC staff, particularly those in field offices, are encouraged to recommend such charges or initiate directed investigations as a complement to individual charge investigations.[599]

To illustrate the importance of identifying issues for possible commission-initiated charges, the CEP's Strategic Litigation Plan section includes specific steps for identifying and developing commissioner charges and directed investigations in order to maintain a balanced litigation docket.[600] Identification strategies include:

- reviewing EEO-1 reports and other statistical data, including comparisons of utilization rates of employers in the same industry and labor market;
- networking with outside interest groups, including litigation and advocacy groups;
- networking with the private bar;
- networking with other federal and state agencies such as the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), the Department of Justice (DOJ), State fair employment practices agencies (FEPAs), and state attorney general offices;
- networking with professional organizations;
- monitoring media and publications; and
- monitoring private litigation (independent or legal issue review for *amicus* participation).[601]

The CEP also states that legal and enforcement staff are encouraged to work together using activities such as outreach, particularly to

[590] Ibid., § 8.1(a)(b), p. 8:0001.

[591] Ibid., § 8.1(b), p. 8:0001.

[592] Ibid.

[593] Castro interview, p. 4.

[594] EEOC, *Compliance Manual*, § 8.1, p. 8:0001.

[595] Ibid.

[596] Castro interview, p. 4.

[597] Ibid., p. 5.

[598] "Under Title VII, EEOC must have a basis to investigate possible violations and must obtain a Commissioner Charge and notify the respondent of such basis by specifying the date, place, and circumstances to be covered by the investigation. Under the ADEA/EPA, there are no prerequisites which must be met to investigate and no specific reason is required. However, the main operational difference between the laws is the Title VII charge filing and notice requirement, i.e., a Commissioner Charge must be obtained from headquarters and notice of it must be given to the respondent." EEOC, *Compliance Manual*, § 8.1(b), p. 8.0001.

[599] Ibid., § 8.1(a), p. 8000.1.

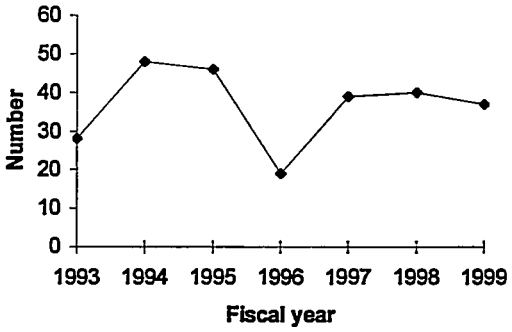
[600] EEOC, *Comprehensive Enforcement Program*, pp. 4, 21.

[601] Ibid., p. 21.

underserved groups, to identify significant issues for possible commissioner charges.[602] Legal and enforcement staff also are to determine geographic areas and industries where violations may exist but charges have not been filed.[603] One regional attorney stated that he and the district director determine areas in which commissioner charges should be recommended based on information presented in the media, observations in the community, or peripheral issues that may come to light during the investigation of a charge.[604] If performed effectively, EEOC's outreach activities can serve as an important tool to aid in the identification of commissioner charges.[605]

EEOC commissioners have filed from 19 to 48 charges per fiscal year during fiscal years 1993 to 1999, with the lowest number occurring in FY 1996. In recent years, that is FY 1997 to FY 1999, the number of commissioner charges has decreased to fewer than 40, from close to 50 in FY 1994 and FY 1995 (see figure 5-6). District offices are accountable for most commissioner charges. No district office received more than seven commissioner charges per fiscal year during the timeframe studied here; many offices go for a year or more without receiving any. The number of directed charges initiated each year under both the EPA and the ADEA has varied from 304 in FY 1993 to 66 in FY 1999 for all district, local, and area offices (see table 5-4). The National Enforcement Plan (NEP) appears to have influenced the types of charges that become

FIGURE 5-6
Commissioner Charges by Fiscal Year Received



SOURCE: EEOC, Charge Data System.

commissioner charges. For example, most charges received since the implementation of the NEP, including more than 70 percent of them between 1996 and 1998, concerned NEP issues (see table 5-5, panel A). Commissioner charges are not as clearly related to issues in the Local Enforcement Plans (LEP). In FY 1996, 32 percent of commissioner charges were related to LEP issues codified in the CDS, and in any other year no more than 13 percent were. From FY 1995 to FY 1999, the majority of commissioner charges—between 63 and 98 percent—had codes that were not defined in the codebook for the Charge Data System, indicating that EEOC staff were reporting information about LEP issues

[602] Ibid., p. 5.

[603] Ibid., p. 8.

[604] Hendrickson, Carson, and Knight interview, Chicago District Office, p. 24.

[605] *See* chap. 7 for a complete discussion on EEOC's outreach activities.

TABLE 5-4

Directed Charges by Accountable Office and Fiscal Year Received

Office type	1993	1994	1995	1996	1997	1998	1999
				Directed ADEA charges			
Headquarters offices	0	0	0	0	1	0	0
District offices	43	244	32	22	35	107	22
Area or local offices	195	11	13	20	69	18	19
TOTAL ADEA	238	255	45	42	105	125	41
				Directed EPA charges			
District offices	52	26	15	14	51	27	21
Area or local offices	14	15	14	6	14	6	4
TOTAL EPA	66	41	29	20	65	33	25

SOURCE: EEOC, Charge Data System.

TABLE 5-5

Commissioner Charges Related to NEP and LEP Issues, Charge Receipts by Fiscal Year

	1993	1994	1995	1996	1997	1998	1999
			A. National Enforcement Plan issues				
			Number of commissioner charges				
NEP issue	3	10	27	14	28	31	22
Non-NEP issue	25	38	19	5	11	9	15
TOTAL	28	48	46	19	39	40	37
			Percent of commissioner charges				
NEP issue	10.7	20.8	58.7	73.7	71.8	77.5	59.5
Non-NEP issue	89.3	79.2	41.3	26.3	28.2	22.5	40.5
			B. Local Enforcement Plan issues				
			Number of commissioner charges				
LEP issue	2	5	6	6	2	1	3
Unidentified LEP issue	7	15	35	12	36	39	33
Non-LEP issue	19	28	5	1	1	0	1
TOTAL	28	48	46	19	39	40	37
			Percent of commissioner charges				
LEP issue	7.1	10.4	13.0	31.6	5.1	2.5	8.1
Unidentified LEP issue	25.0	31.3	76.1	63.2	92.3	97.5	89.2
Non-LEP issue	67.9	58.3	10.9	5.3	2.6	0.0	2.7

SOURCE: EEOC, Charge Data System.

according to an alternative coding scheme (see table 5-5).[606]

Commissioner charges and directed investigations have been found useful for identifying LEP issues. The Agency's 1998 joint task force report concluded that to meet its NEP and LEP goals, EEOC must take full advantage of commission-initiated charges and recommended that headquarters reemphasize the importance of commissioner charges and directed investigations and encourage field offices to use these charges to fill gaps in their LEPs.[607] In addition, employment experts have indicated that the Agency should use commission-initiated charges to significantly reduce the patterns of discrimination that are related to employment practices.[608] However, despite the importance of these charges, EEOC data reveal that commissioner charges and directed investigations make up a minuscule percentage of the Agency's charge inventory.

Pattern and Practice, Systemic, and Class Charges

EEOC's NEP emphasizes the Agency's commitment to pursuing charges that have the broadest potential by including as a priority area challenges to broad-based employment practices affecting many employees.[609] The NEP states:

> Strategic enforcement will assure 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. As part of this strategic enforcement strategy the Commission is committed to the strategic and proactive use of its limited enforcement resources through, among other things, systemic investigations and litigation.[610]

Pattern and practice, systemic, and class charges, as a general matter, refer to charges of discrimination that affect or have the potential to affect multiple individuals and/or are broad enough to have implications industrywide or for multiple employers. There are subtle distinctions, however, with respect to what each of these terms means. EEOC defines "pattern and practice" discrimination as employer actions that constitute a pattern of conduct resulting in discriminatory treatment toward members of a class. Pattern and practice discrimination is generally demonstrated through statistical evidence and may rely on either the disparate treatment or disparate impact models of discrimination.[611]

"Systemic" discrimination, which, according to EEOC, is sometimes referred to as class discrimination or a pattern or practice of discrimination, concerns a recurring practice or continuing policy rather than an isolated act of discrimination. It results from employment policies or practices that differentiate or perpetuate a differentiation in terms or conditions of employment of applicants or employees because of their status as members of a particular group.[612] Intent to discriminate may or may not be involved and the policy or practice of concern may or may not be facially neutral.[613]

Pattern or practice suits are those that EEOC brings "against employers charged with having committed such frequent violations of Title VII to the extent 'that their conduct has become a

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[606] For issues codified in the Charge Data System, *see* EEOC, Information Resources Management Services, *Charge Data System (CDS) Codes*, March 1997, pp. 81–83. Although LEP category codes are alphanumeric, the unidentified codes appearing in the Charge Data System, with one exception, were numeric. The undefined numeric codes appear in the Charge Data System both before the codebook was last issued in 1997 and after. Thus, the codebook could have been updated to reflect the codes currently in use, but was not.

[607] EEOC, *Joint Task Force Report*, pp. 36–37.

[608] Alfred W. Blumrosen, Thomas A. Cowan Professor of Law, Rutgers University, telephone interview, Apr. 3, 2000, p. 12 (hereafter cited as Blumrosen interview).

[609] EEOC, *National Enforcement Plan*, February 1996, p. 3 (hereafter cited as EEOC, *National Enforcement Plan*).

[610] Ibid.

[611] EEOC, *Compliance Manual*, "Glossary of Terms and Acronyms," p. 0:4815. Disparate impact and disparate treatment are theories of discrimination. The glossary defines "disparate impact" as when a contractor's or employer's use of a facially neutral selection standard (e.g., a test, interview, or educational requirement) disqualifies members of a particular race or gender group at a significantly higher rate than others and is not justified by business necessity or job relatedness. Disparate treatment is when a contractor or employer treats an individual or group differently because of race, color, religion, sex, national origin, handicap, or veteran status. An intent to discriminate is a necessary element of the disparate treatment, but not the disparate impact theory. Ibid., p. 0:4807.

[612] Ibid., p. 0:4819.

[613] Ibid.

matter of public concern.' "[614] Class action suits, are not defined in the Compliance Manual glossary, but are generally a means by which one or more individuals can bring suit on behalf of a large group of individuals who have a similar interest in a subject matter.[615] "Class" cases, in the EEOC vocabulary, appear to be any case with the potential of more than one beneficiary that could result in a class action suit.[616] It should be noted that EEOC staff do not consistently define pattern or practice and systemic discrimination, nor do they distinguish these from class charges.[617]

Identification and Processing of Class/Systemic Charges

EEOC's general counsel said that by stating a preference for pursuing cases with the largest impact on discrimination in the workplace, the NEP gives the Office of General Counsel a directive to develop and prosecute cases with large impact, i.e., class or pattern and practice cases.[618] Legal and enforcement staff in the field offices are responsible for the identification and development of these large-scale cases. Class or systemic cases can be initiated by analyzing the respondent's EEO-1 report by performing statistical comparisons to aggregate EEO-1 data or Census data to determine if the respondent's work force was significantly different from those of its competitors in the labor market.[619] All district offices have had mainframe computer access to the EEO-1 data, but more user-friendly software is currently being installed on their computer networks to facilitate the process. District offices can request assistance with conducting analyses by contacting the Office of Research, Information, and Planning (ORIP) at headquarters.

According to the CEP, intake staff are expected to inquire about potential class issues on a regular basis.[620] Intake staff should also be responsible for determining whether the investigation of a particular charge should be broadened when there is evidence that there may be larger numbers of victims.[621] Class cases can be identified during other stages of the enforcement process as well. For example, during review of charges, district management staff may identify class cases based on their broader knowledge of the charge inventory. In addition, sometimes during the investigation, when talking with witnesses or reviewing evidence, investigative staff may gather information indicating that there may be a broader scope to a charge.[622]

In the past, district offices had systemic units designated to identify and investigate systemic charges, including commissioner charges, directed charges, and third-party charges. However, in at least some district offices the existence and staff of such units dwindled when district offices were given the authority to reassess and restructure their programs. For example, in the Baltimore District Office, each enforcement unit or "pod" is responsible for developing the systemic or pattern and practice cases that come into the unit during its intake rotation.[623]

The Dallas District Office has not had a systemic unit since 1995. Because of a lack of sufficient resources, the district office disbanded the dedicated systemic unit, and two staff were charged with preparing commissioner charges and overseeing the statistical work and approaches for class cases. In 1999, the staff responsible for these activities was reduced to one person. Since then, that person has been given

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[614] Ibid., p. 0:4815. *See also* EEOC, *Compliance Manual*, "Litigation," p. 0:3603.

[615] EEOC, *Compliance Manual*, "Litigation ," p. 0:3605. Title VII and ADA suits can be brought as "class actions" either in the private sector or by EEOC. However, ADEA and EPA claims can be brought as "class actions" only by EEOC. In the private sector, each ADEA or EPA claimant must first file separately with the court. Ibid. Also note that when several persons come to EEOC to file a charge against the same respondent on the same bases and issues, EEOC drafts separate charges even if the charging parties have visited EEOC at the same time or signed the same letter. However, EEOC may consolidate the charges for investigation. EEOC, *Compliance Manual*, "Intake of Charges and Complaints," p. 2:0008.

[616] EEOC, *Compliance Manual*, "Litigation," p. 0:3605.

[617] For example, EEOC's general counsel, admitted using the terms "class" and "systemic" interchangeably. Stewart interview, p. 7. *See also* Donald Birdseye, supervisor, and George "Randy" Garrett, investigator, Dallas District Office, EEOC, interview in Dallas, TX, Feb. 1, 2000, pp. 2–3 (hereafter cited as Birdseye and Garrett interview, Dallas District Office).

[618] Stewart interview, p. 5.

[619] Vargyas letter, p. 49.

[620] EEOC, *Comprehensive Enforcement Program*, p. 9.

[621] EEOC, *Joint Task Force Report*, p. 43.

[622] Bolden et al., interview, St. Louis District Office, p. 7.

[623] Byrd and Kotrosa interview, Baltimore District Office, p. 2.

other duties so that the staff time available for systemic cases is even less.[624]

EEOC's Class Charge Inventory

EEOC appears to have modified the frequency with which it identifies class charges in recent years. The Agency received roughly 1,300 to 1,650 class charges each fiscal year between 1993 and 1996, but only about 500 to 700 class charges per fiscal year in the period between 1997 and 1999 (see table 5-6 and figure 5-7). Of course charges received in these more recent years may yet be designated as class charges, in the event that additional evidence is uncovered which indicates that a charge may have more widespread impact. To gain further insight into the frequency of class charges, it may be necessary to examine charges according to the date that they were designated as class charges. This analysis shows a very similar marked decrease in the number of charges designated as class cases between fiscal years 1993 and 1996 and fiscal years 1997 and 1999, although in FY 1999 the number increased over the amount in FYs 1997 and 1998. Between 1,100 and 1,600 were designated as class cases in FYs 1993 to 1996; 600 to 700 were in FYs 1997 and 1998; and a little more than 800 were in FY 1999 (see table 5-6 and figure 5-7).

Fiscal years 1993 to 1996 also starkly contrast with fiscal years 1997 to 1999 in the length of time before a charge is designated as a class charge. Between 1993 and 1996, the vast majority of charges were designated as class cases from the point that they were received. In FYs 1997 to 1999, fewer than 70 charges per year were class charges from initial intake. In FYs 1998 and 1999, only 5 to 6 percent of charges were designated as class charges upon receipt (see figure 5-8). Thus, EEOC staff appear to be designating far fewer charges as class cases than they have in the past, but the cases they fail to designate as class charges are ones that would previously have been indicated as class cases at intake. In recent years, EEOC district offices have been designating charges as class cases approximately 9 months to a year after charge receipt. In a positive trend, staff identified class cases earlier in FY 1999 (i.e., 274 days) than in FY 1998 (356 days) (see table 5-7). It is hoped that this trend will continue.

The number of class charges also varies considerably among district offices. For example in FY 1999, the Los Angeles District Office designated 130 charges as class cases; the Atlanta District Office designated 93; the Detroit District Office identified 80; and the Chicago District Office designated 65 class charges. All other district offices designated fewer than 35 cases as class charges; and the Miami District Office did not designate any of its charges as class charges that fiscal year (see figure 5-9).

Class charges often involve multiple complainants filing a charge against a single respondent. EEOC data indicate the first instance as the "lead charge," and the charges of all other complainants that may join the class as "associated charges." Unfortunately, EEOC staff were not required to enter information on associated charges into the Charge Data System before FY 1998. The code for identifying associated charges did not even appear in the Agency's 1997 codebook on data entry.[625] Thus, the charges associated with lead charges can be examined only for recent years and not before charge prioritization procedures or the implementation of the NEP and LEP. The number of charges designated as associated class charges in fiscal years 1998 and 1999 was 1,700 to 1,800—roughly two to three times the number of charges designated as class charges during those fiscal years (see table 5-6).

The reduction in class case identification at intake is an anomaly in a period where EEOC staff appear to have become more skilled at identifying potentially meritorious cases earlier in the charge handling process, and particularly given the Agency's emphasis on pursuing cases with the greatest impact. It could be speculated that the steady decline in class cases is the result of procedural changes that have given investigative staff greater discretion to pursue those cases that appear to have the most potential, or that more detailed investigation is occurring at intake, thereby eliminating those charges that prove unsound before they get into the pool of charges receiving full investigation.

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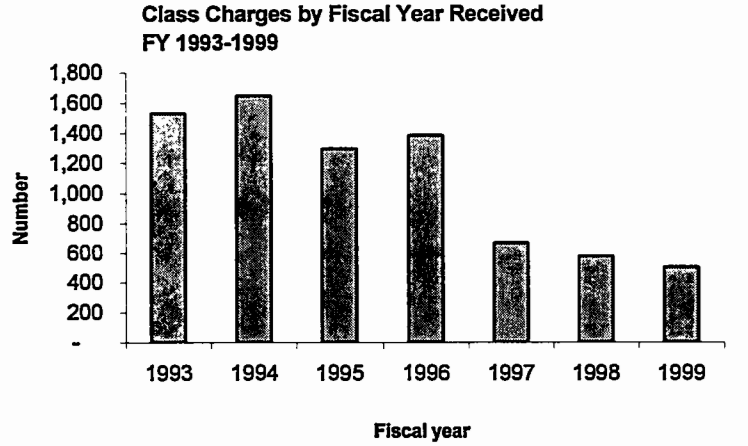
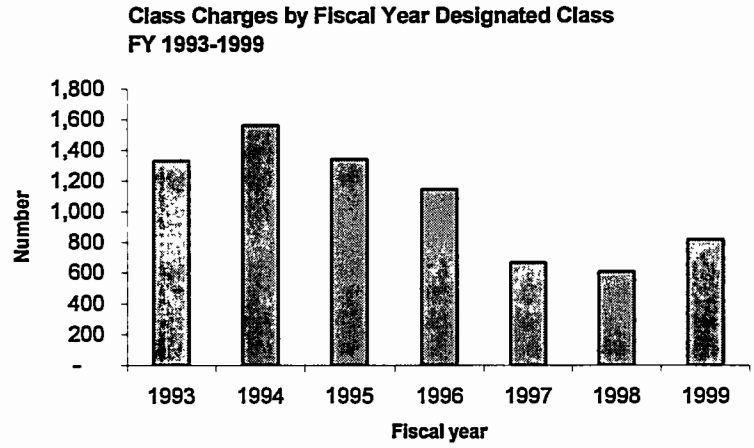
[624] Birdseye and Garrett interview, Dallas District Office, pp. 1–2.

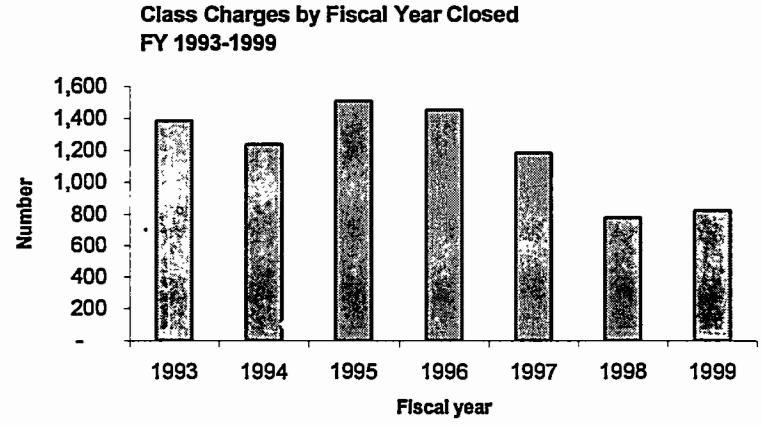
[625] *See* EEOC, *Charge Data System (CDS) Codes*, pp. 88–90 and memorandum to the file on May 16, 2000, conversation with Pierette Hickey.

FIGURE 5-7

Class Charges by Fiscal Year







SOURCE: EEOC, Charge Data System.

TABLE 5-6

Class Charges by Fiscal Year of Various Actions

	1993	1994	1995	1996	1997	1998	1999
				Lead charges			
Charge receipts	1,531	1,649	1,295	1,384	668	577	504
Designated class charges	1,330	1,561	1,340	1,142	666	608	817
Closures	1,385	1,238	1,507	1,453	1,183	779	824
				Associated charges			
Charge receipts	N/A	N/A	N/A	N/A	N/A	2,120	1,124
Designated class charges	N/A	N/A	N/A	N/A	N/A	1,795	1,734
Closures	N/A	N/A	N/A	N/A	N/A	472	2,249

NOTE: EEOC staff were not required to enter information on associated charges before 1998.

SOURCE: EEOC, Charge Data System.

TABLE 5-7

Days from Date Received to Date Made a Class Charge by Fiscal Year and Type of Office

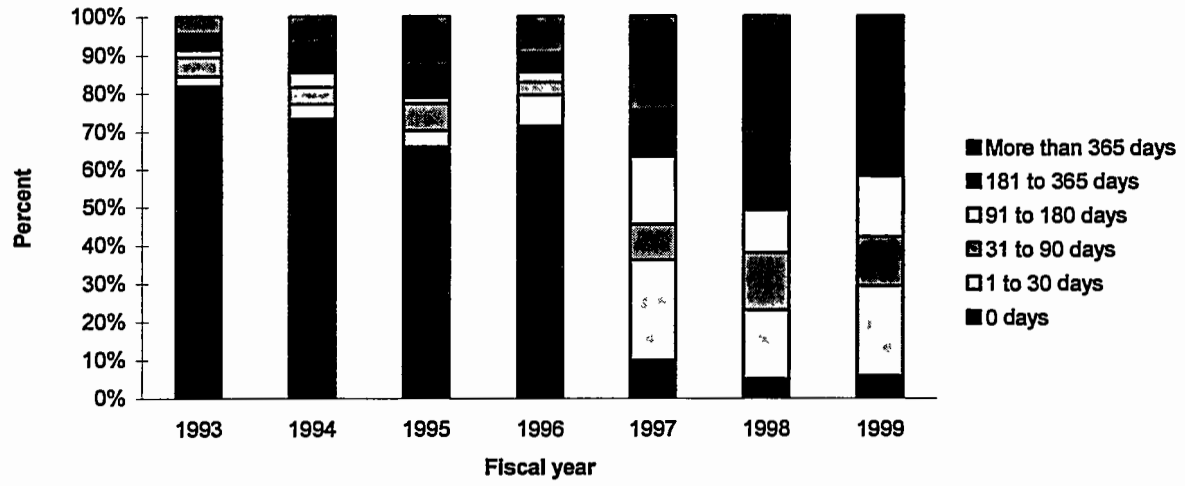
	1993	1994	1995	1996	1997	1998	1999
Office type				Average days for lead charges			
District offices	50.8	82.9	137.1	98.1	316.7	355.8	267.4
Area or local offices	12.7	18.3	26.5	73.5	152.5	219.4	224.4
Average days for associated charges							
District offices	N/A	N/A	N/A	N/A	N/A	267.3	284.2
Area or local offices	N/A	N/A	N/A	N/A	N/A	152.9	165.3
Number of lead charges							
District offices	986	1,230	1,002	813	454	476	609
Area or local offices	344	330	338	329	212	132	207
EEOC TOTAL	1,330	1,561	1,340	1,142	666	608	817
Number of associated charges							
District offices	N/A	N/A	N/A	N/A	N/A	1,503	1,396
Area or local offices	N/A	N/A	N/A	N/A	N/A	292	338
EEOC TOTAL	N/A	N/A	N/A	N/A	N/A	1,795	1,734

NOTE: EEOC staff were not required to enter information on associated charges before 1998.

SOURCE: EEOC, Charge Data System.

FIGURE 5-8

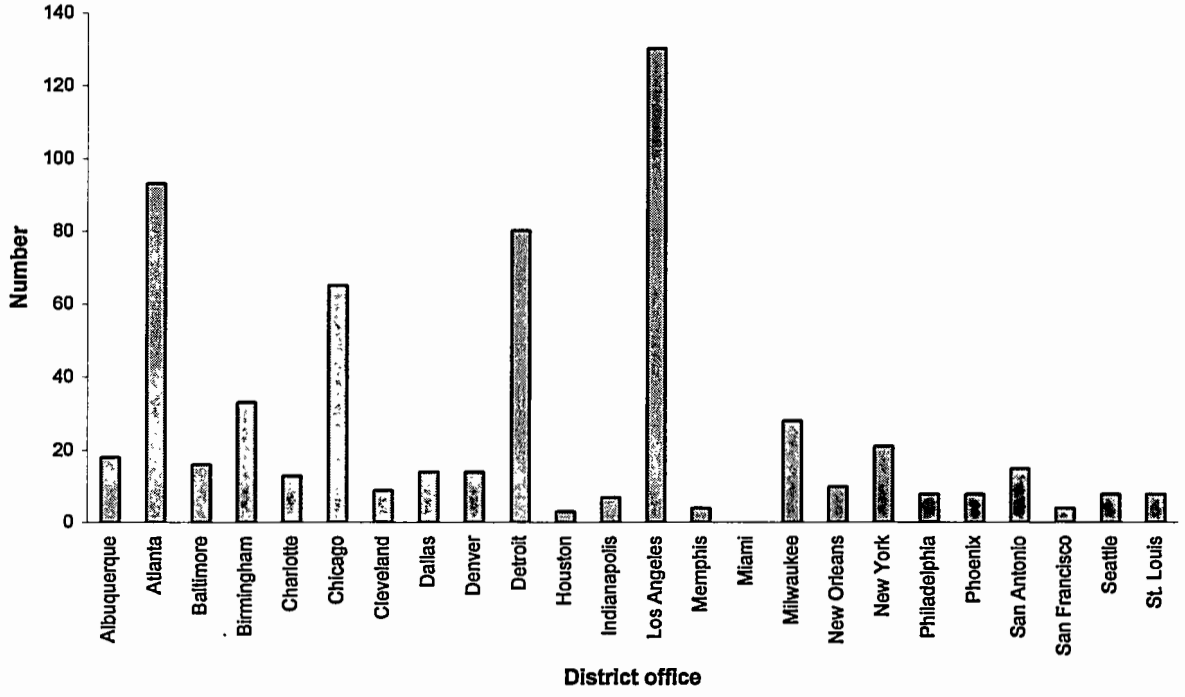
Class Charges: Time from Date Received to Date Made Class Charge by Fiscal Year



SOURCE: EEOC, Charge Data System.

FIGURE 5-9

Class Charges by District Office, FY 1999



SOURCE: EEOC, Charge Data System.

This theory is supported by the rates at which class charges have resulted in meritorious resolutions, including cause findings, settlements, and withdrawals with benefits. Between fiscal years 1995 and 1996, the number of meritorious resolutions more than doubled from 181 to 423.[626] In FY 1999, the meritorious resolutions increased to a high of 536 cases. The percentage of meritorious resolutions for class cases has also increased from 13.9 percent in FY 1993 to 65 percent in FY 1999. Accordingly, the percentage of no cause findings for class cases has diminished from 56.2 percent in FY 1993 to 24.6 percent in FY 1999.[627] This indicates that EEOC staff are either becoming more selective in the charges identified as class cases or are becoming more skilled in developing class charges to uncover violations.

Charge Resolutions

Negotiated Settlements

The PCHP rescinded the Agency's old policy which stated that the EEOC would not settle for less than full relief when there was reasonable cause to believe a violation of the law had occurred. The new procedures give enforcement staff more discretion to accept settlements providing "substantial relief" when evidence indicates a violation is likely to have occurred or "appropriate relief" at an earlier stage in the charge processing.[628] The PCHP generally encourages settlement efforts at all stages of the administrative process.

Parties involved in a charge can negotiate a settlement at any stage in the administrative process prior to an EEOC determination as to the merit of a charge, with the exception of EEOC-initiated pattern and practice investigations.[629] In general, EEOC supports early resolution of charges whenever it promotes "reasonable agreement" between the parties.[630] The Agency does not generally support settlement efforts when an investigation has been completed and enough information has been gathered to issue either a cause or no cause determination, unless both parties involved specifically request such an attempt.[631]

There are two types of negotiated settlements: those where EEOC is a party and those where EEOC is not. Generally, EEOC is a party in the settlement if it determines that no further investigation is necessary. On the other hand, if the Agency feels further investigation is needed, but the parties involved agree to settlement terms, the EEOC will not be a party to the settlement.[632] In these latter situations, EEOC does not enforce the terms of the agreement. In settlements where EEOC is a party, if there is a breach of the agreement, management in the field office (including the enforcement manager, deputy director, and/or district director) will consult with the legal unit about whether to pursue a breach of contract action in court or take another charge from the charging party to protect his or her rights.[633]

Determinations

After concluding an investigation, EEOC will make a determination on the merits of a charge. There are two basic determinations that can be issued: cause or no cause. A cause determination indicates that it is "more likely than not" that discrimination has occurred. A no cause determination indicates that EEOC has not found sufficient evidence to support a finding of discrimination.[634]

The number of no cause findings has increased in recent years. Roughly 32,000 to 45,000 cause findings were issued by EEOC headquarters and district and area offices in FYs 1993 to 1995 and between 58,000 and 65,000 in FYs 1996 to 1999. Not only have the numbers increased, but also no cause findings have become a larger proportion of resolutions. No cause findings were 46 to 55 percent of resolutions among charges closed in FY 1993 to 1995. In the fiscal years since then, however, no cause findings have remained close to 60 percent of resolutions (see table 5-8 and figure 5-10).

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[626] EEOC, Charge Data System as of Dec. 2, 1999.

[627] Ibid.

[628] EEOC, *Priority Charge Handling Procedures*, p. 3.

[629] EEOC, *Compliance Manual*, "Negotiating a Settlement," p. 0:3401.

[630] Ibid.

[631] Ibid.

[632] Ibid., p. 0:3402.

[633] Vargyas letter, p. 50.

[634] EEOC, *Compliance Manual*, "EEOC Determinations," p. 0:3501.

TABLE 5-8

EEOC Resolutions (excluding FEPAs) by Fiscal Year Closed

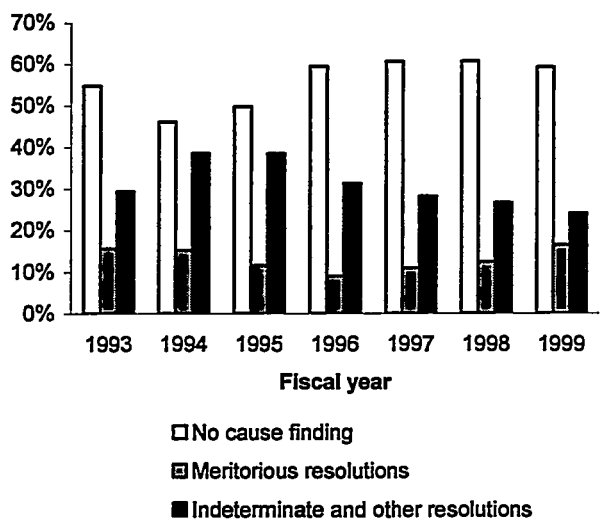
Resolution	1993	1994	1995	1996	1997	1998	1999
			Panel A: Numbers of resolutions				
No cause finding	34,847	31,862	44,524	60,576	64,288	61,702	58,056
Meritorious resolutions	9,967	10,507	10,396	9,225	11,609	12,610	16,106
Withdrawal with benefits	4,381	4,942	4,777	3,944	3,610	3,231	3,590
Settlement	3,721	3,729	3,603	3,073	3,973	4,676	6,083
Conciliation successful	570	585	504	744	1,040	1,359	1,571
Conciliation unsuccessful	1,295	1,251	1,512	1,464	2,986	3,344	4,862
Indeterminate and other resolutions	18,712	26,648	34,388	31,926	29,903	27,117	23,602
Right-to-sue letter	9,021	15,129	20,648	20,368	19,543	18,285	15,689
Withdrawal without benefits	1,968	2,273	2,332	1,716	1,425	1,198	1,095
No jurisdiction	2,360	3,126	3,696	3,593	3,542	3,219	3,248
Other closure	5,361	6,120	7,711	6,249	5,393	4,415	3,569
Unidentified resolution	2	0	1	0	0	0	1
			Panel B: Percentages of resolutions				
No cause finding	54.9	46.2	49.9	59.5	60.8	60.8	59.4
Meritorious resolutions	15.7	15.2	11.6	9.1	11.0	12.4	16.5
Withdrawal with benefits	44.0	47.0	46.0	42.8	31.1	25.6	22.3
Settlement	37.3	35.5	34.7	33.3	34.2	37.1	37.8
Conciliation successful	5.7	5.6	4.8	8.1	9.0	10.8	9.8
Conciliation unsuccessful	13.0	11.9	14.5	15.9	25.7	26.5	30.2
Indeterminate and other resolutions	29.5	38.6	38.5	31.4	28.3	26.7	24.1
Right-to-sue letter	48.2	56.8	60.0	63.8	65.4	67.4	66.5
Withdrawal without benefits	10.5	8.5	6.8	5.4	4.8	4.4	4.6
No jurisdiction	12.6	11.7	10.7	11.3	11.8	11.9	13.8
Other closure	28.7	23.0	22.4	19.6	18.0	16.3	15.1
Unidentified resolution	0.0	0.0	0.0	0.0	0.0	0.0	0.0

SOURCE: EEOC, Charge Data System.

The number of meritorious resolutions, i.e., "cause" findings, has also increased. In FYs 1993 to 1996, between 9,000 and about 10,500 charges were closed per fiscal year with meritorious findings. But, since then, the numbers have increased to about 11,600 in FY 1997, 12,600 in FY 1998, and 16,100 in FY 1999. Unlike the no cause findings, however, the proportion of meritorious resolutions issued is hardly greater in FY 1999 than it was in FY 1993. However, the percentage of meritorious resolutions declined from 16 percent in FY 1993 to 9 percent in FY 1996 and then increased until it reached 16 percent again in FY 1999 (see table 5-8 and figure 5-10).

FIGURE 5-10

EEOC Resolution (excluding FEPAs) by Fiscal Year Closed



SOURCE: EEOC, Charge Data System.

The types of meritorious resolutions have changed over time. Withdrawals with benefits were more common in FYs 1993 to 1996 (43 to 46 percent), but decreased to 22 percent in FY 1999. Also, conciliations have increased. Successful conciliations were about 5 to 6 percent of meritorious resolutions in FYs 1993 to 1995; 8 to 9 percent of them in FYs 1996 and 1997; and about 10 to 11 percent in FYs 1998 and 1999. Similarly, unsuccessful conciliations were about 12 to 16 percent of meritorious resolutions in FYs 1993 to 1996, but have been 25 to 30 percent in FYs 1997 to 1999 (see table 5-8). Thus, FYs 1996 and 1997 appear to have been a turning point in the types of meritorious resolutions that are reached.

EEOC has the discretion to determine the length and appropriateness of investigation required prior to an issuance of a determination, and a respondent cannot challenge the sufficiency of an investigation when a cause finding is issued.[635] Similarly, charging parties cannot sue the EEOC when a charge is dismissed.[636] However, the office issuing a no cause finding and dismissal of a charge is required to share with the charging party the basis for the dismissal. Along with the letter of dismissal, the Agency will issue a notice of right to sue which gives the charging party 90 days to file a private suit in court (this is not the case with EPA and ADEA cases.)[637]

The 1995 Priority Charge Handling Procedures ended the use of substantive "no cause" letters of determination in cases where investigation had not proven that discrimination had occurred.[638] Use of a short-form determination letter simply stating that the investigation failed to disclose a violation replaced the more detailed substantive letter. Some experts outside the Agency find this problematic because it does not give adequate detail to the charging party to let him or her know precisely why the charge was dismissed or whether it would be a waste of time to go to court.[639]

To address this concern, some district offices have implemented procedures to ensure that charging parties are aware of the grounds on which their charges were dismissed. For example, in the Dallas District Office, investigators are encouraged to contact the charging party before releasing the letter of determination.[640] District offices have also begun conducting predetermination interviews or issuing predetermination letters in which the investigator explains

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[635] Ibid., *citing* EEOC v. Keco Indus., 748 F.2d 1097 (6th Cir. 1984).

[636] EEOC, *Compliance Manual*, "Determinations," p. 0:3501.

[637] Ibid., p. 0:3502. *See generally* Age Discrimination in Employment Act, 29 U.S.C. § 621-634 (1994); and Equal Pay Act, 29 U.S.C. § 206-262 (1994).

[638] EEOC, *Priority Charge Handling Procedures*, p. 2.

[639] Seymour interview, p. 30.

[640] Taylor and McGovern interview, Feb. 4, 2000, Dallas District Office, p. 6. *See also* Bolden et al., interview, St. Louis District Office, p. 5.

that there appears to be no cause and asks the charging party for additional information.[641]

Conciliation

In instances where EEOC has found reasonable cause to believe violation of the law has occurred, with respect to Title VII and the ADA, the Agency must attempt conciliation.[642] Through conciliation, EEOC attempts to obtain relief for the charging party. Regulatory provisions allow EEOC to file suit 30 days from the date a charge is filed unless conciliation agreement is reached.[643] In practice, EEOC usually allows up to 90 days for an investigator to conciliate a case, but the complexity of a case will dictate how long it actually takes to reach an agreement.[644] No statements made during the conciliation efforts can be used as evidence in a subsequent court suit.[645] The ADEA provides that the EEOC use informal means of conciliation,[646] and the EPA contains no requirement for conciliation.[647]

If EEOC's attempts to conciliate fail, EEOC must make a decision as to whether to go to court or to issue a right-to-sue notice. If EEOC determines that the case should be litigated, EEOC files suit in federal court on behalf of the charging party.[648] Charging parties may bring suit in federal court once EEOC issues a right-to-sue notice. EEOC will issue a right-to-sue notice if it has dismissed a charge, if it has found no reasonable cause, or if it has found reasonable cause, conciliation efforts have failed, and has decided not to file suit itself.[649] One investigator noted that, in his experience, conciliation attempts fail more often than they succeed.[650] If conciliation fails on an A2 case, the investigator can make the determination of whether to refer it to an outside attorney, if the charging party so wishes.[651] Both the district director and the regional attorney must approve conciliation agreements for A1 cases.[652]

Determination Reviews and Requests for Reconsideration

To ensure that legitimate cause cases are not being dismissed as no cause findings, they are generally reviewed by supervisors.[653] In most district offices, a Top Management Committee (TMC), made up of the district director, deputy director, regional attorney, and enforcement supervisors, reviews charges as they are closed.[654] Generally, the district director reviews cause cases.[655]

Charging parties are also given the right to reconsideration if they feel their case has been treated unfairly. The right to reconsideration is an important safeguard because it protects charging parties from any mistakes EEOC staff may have made and gives the charging party the opportunity to bring perceived errors to the attention of management.[656] If the charging party provides additional evidence to support his or her charge, the request for reconsideration will hold more weight.[657]

The director of the Birmingham District Office stated that she does not get many requests for reconsideration, but when she does they are usually for no cause findings or administrative dismissals.[658] The number has decreased since the office established a procedure whereby charging parties are given the opportunity to offer a rebuttal to information provided by the plaintiff before dismissing the charge.[659]

It is unclear as to how frequently requests for consideration are made and denied in each district office, but according to the CDS, there were roughly 2,000 appeals of no cause findings for

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641 Taylor and McGovern interview, Feb. 4, 2000, Dallas District Office, p. 6; Bolden et al., interview, St. Louis District Office, p. 5.

642 EEOC, *Compliance Manual*, "Determinations," p. 0:3502.

643 29 CFR § 1601.27 (1999).

644 Vargyas letter, p. 50.

645 *See* 29 CFR § 1601.26 (1999).

646 29 U.S.C. § 626(b) (1994).

647 *See generally* Equal Pay Act, 29 U.S.C. § 206-262 (1994).

648 EEOC, *Compliance Manual*, "Determinations," 0:3503.

649 *See* EEOC, *Compliance Manual*, "Overview," p. 0:3502.

650 Bolden et al., interview, St. Louis District Office, p. 6.

651 Ibid.

652 EEOC, *Comprehensive Enforcement Program*, p. 7.

653 Thornton interview, Nov. 9, 1999, p. 7.

654 *See, e.g.*, McGhee and Hullett interview, Birmingham District Office, p. 4;

655 Files et al., interview, Birmingham District Office, p. 4.

656 McGhee and Hullett interview, Birmingham District Office, p. 4.

657 Reed, Wilson, and Matamoros interview, Dallas District Office, p. 4.

658 Pierre interview, Feb. 25, 2000, Birmingham District Office, p. 4.

659 Ibid.

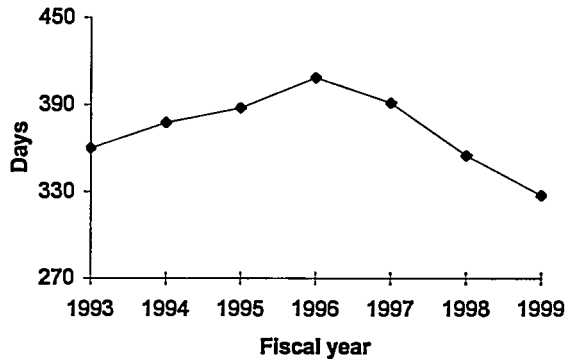
charges that were closed in fiscal years 1993 through 1999.[660] Relative to the roughly 560,000 no cause findings that EEOC issued during this time period, this number of appeals is quite low.[661] When charging parties appealed no cause findings, the no cause determination was upheld in a large majority of instances. Although the outcomes of all appeals may not yet be determined, the CDS shows that for cases closed in FYs 1993 to 1999, the no cause findings of appeals were upheld in 1,044 instances and reversed in only 49 cases. Another 129 cases had the appeal rejected on procedural grounds.[662] There have not been any Agency-initiated studies on reconsiderations.[663]

Charge Processing Time

EEOC guidelines state that investigation of a charge should generally be completed within 120 days from the time the charge is initially categorized.[664] However, tight resources have required that this goal be amended. One of the Agency's goals under the Government Performance and Results Act (GPRA) for FY 2000 was to process charges within 180 days, but again due to budget limitations, this goal has not been achieved.[665] Data from the Agency's CDS indicate that, in fact, the average processing time for a charge is upwards of 300 days, but has declined since charge prioritization procedures were implemented. In FY 1993, the average charge processing time was 360 days. It increased steadily until FY 1996, when it reached an average of more than 400 days. But with the implementation of charge prioritization procedures, the average processing time has dropped from that point forward to 327.5 days in FY 1999 (see figure 5-11).

FIGURE 5-11

Charge Processing Time by Fiscal Year Closed



SOURCE: EEOC, Charge Data System.

Although the average processing time for charges decreased between fiscal years 1996 and 1999, some district offices still had processing times that were well above 300 days. The Los Angeles District Office had one of the lowest average processing times in FY 1999 at 165 days. That office had reduced its processing time by more than 300 days since FY 1996. The Phoenix, New Orleans, Detroit, Cleveland, San Antonio, and Indianapolis district offices also had large reductions in average processing time between FY 1996 and FY 1999 (see figure 5-12). But despite reductions, the Denver, Memphis, Philadelphia, Miami, and San Antonio district offices had average processing times that remained well above 300 days (i.e., 462, 422, 403, 332, and 327, respectively) (see figure 5-12).

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660 EEOC, Charge Data System. In addition to the 1,966 appeals of no cause findings, the CDS showed 654 appeals of other closures, including withdrawals with and without benefits, right-to-sue letters, no jurisdiction closures, settlements, and successful and unsuccessful conciliations. In 41 instances, a charge resulted in more than one appeal. Also, note that the vast majority of appeals concern charges handled by FEPAs. Of the approximately 2,900 charging party appeals, about 2,500 concerned FEPA charges and the remaining 400 concerned charges that had been handled by EEOC, including headquarters, district, and area offices. Ibid.

661 *See* discussion on determinations, pp. 170–73.

662 EEOC, Charge Data System.

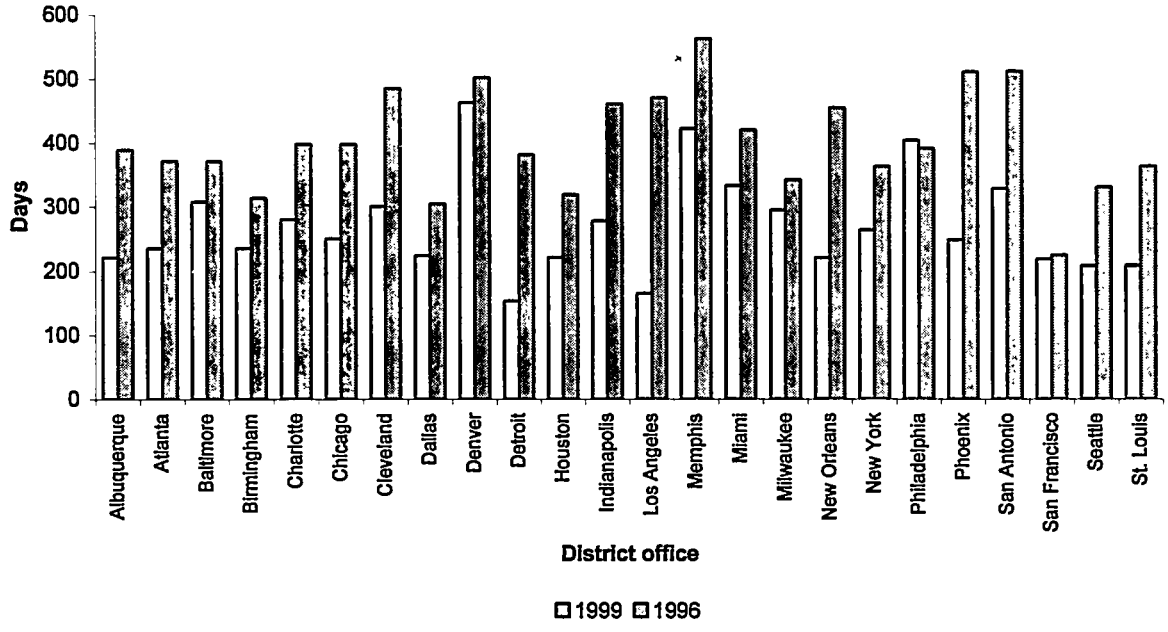
663 Thornton interview, Nov. 9, 1999, p. 7.

664 EEOC, *Compliance Manual*, "The Charge: Case Processing," p. 0:3207.

665 Thornton interview, Mar. 1, 2000, p. 4.

FIGURE 5-12

Average Charge Processing Time by District Office, FY 1996 and 1999



SOURCE: EEOC, Charge Data System.

As would be expected, processing time is directly related to how a charge is resolved. For example, in FY 1999:

- Charges that were deemed to be nonjurisdictional were closed, on average, in about 200 days.
- Charging parties that received right-to-sue letters had their charges closed in an average of 240 days.
- Charges that resulted in no cause findings took 322 days.
- Settlements took an average of 273 days.
- Withdrawals with benefits required an average of 316 days.
- Withdrawals without benefits took 338 days.
- Conciliations took 634 days when unsuccessful and 728 days when successful.[666]

[666] EEOC, Charge Data System, 1999.

LITIGATION

"A successful enforcement program necessarily includes a successful litigation program as well as an efficient charge processing system."[667]

In chapter 4, litigation was discussed as a method by which EEOC pursues the development of policy and guides the development of the laws it enforces.[668] EEOC's general counsel explained that development of policy through litigation and through policy guidance is a continuum—both are tools that help EEOC reach the same goal.[669] In some cases, litigation is more appropriate as a policy-making mechanism be-

[667] EEOC, *Joint Task Force Report*, p. 12.

[668] EEOC, *National Enforcement Plan*, p. 2 (stating "the Commission [EEOC] must use its limited resources more strategically to deter workplace discrimination, guide the development of the law, resolve disputes, and promote a work environment in which employment decisions are made on the basis of abilities, not on the basis of prejudice, stereotype and bigotry").

[669] Vargyas interview, pp. 2–3.

cause the situation is fact specific. Sometimes it is preferable to let an issue percolate up through the courts, after which there may be a need for guidance. Therefore, policy guidance and litigation are two very complementary ways of developing the law.[670]

In this chapter the focus is not on using litigation to shape policy, but rather how litigation is used as an enforcement tool to carry out policy. This section focuses on how litigation enforcement can be effective in changing employers' practices, enforcing fair employment statutes, and creating an overall impression that EEOC will not tolerate violations of the law. Heavily publicized litigation cases have allowed EEOC to articulate its mission. Big companies, in particular, follow EEOC's litigation docket, and, as a result, EEOC can make statements through its litigation that are then incorporated by employers in their practices.[671]

History of Litigation at EEOC

Before 1972, EEOC had no enforcement power and so, in an effort to affect court constructions of the law and have input into decisions, the Agency was primarily resigned to filing *amicus curiae* briefs in important cases. In 1972, recognizing the limited powers of investigation and conciliation, Congress gave EEOC authority to litigate charges against private employers, labor unions, and employment agencies that could not be resolved administratively.[672]

To carry out its litigation function, the Agency created five Regional Litigation Centers, which were separate from the district offices, with 30 to 40 attorneys in each. These litigation centers, although they were litigating cases that stemmed from investigators in the field offices, had little day-to-day interaction with enforcement staff. In 1977, after a reorganization and centralization of the Agency, the litigation centers were disbanded, the attorneys were divided among the district offices, and a regional attorney was assigned to oversee the legal staff in each office.[673]

This reorganization was the first step in achieving what has become a long-term, and until recent years unrealized, objective of improving interaction between attorneys and investigators in the field, particularly with respect to developing cases for litigation. As early as 1979, the Agency teamed up investigators and attorneys to identify litigation vehicles, through its Early Litigation Identification Program. However, not until 20 years later can actual evidence of collaboration be seen through the restructuring of internal district office processes as required by the current administration's Comprehensive Enforcement Program.

Litigation Program Structure and Procedures

The Office of General Counsel (OGC) at headquarters has primary oversight of EEOC's litigation program. Within OGC there are seven sections: the Appellate Services Division, the Research and Analytical Services Staff, the Administrative and Technical Services Staff, the Litigation Management Services Division, the General Counsel's Staff, the Systemic Litigation Services Division, and the Litigation Advisory Staff.[674] Each unit has individual responsibilities for assisting with various components of the Agency's litigation activities, including providing support for district offices and coordinating the litigation docket.

In addition to OGC at headquarters, each district office has a legal unit headed by a regional attorney. The primary responsibilities of the district office legal units are to conduct litigation in federal district courts across the country; provide legal support to and consult with investigators on cases; assess the strengths and weaknesses of administrative findings; assist in developing and carrying out investigation strategies for potential litigation cases; and participate in the management of compliance and conciliation.[675]

Among other things, legal staff in the district offices coordinate with OGC with respect to:

- how much money they can spend on litigation;
- advice on issues of law;
- advice on how to proceed with cases;

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[670] Stewart interview, pp. 5–7.

[671] Ibid.

[672] EEOC, "Strategic Plan: Introduction," accessed at <http://www.eeoc.gov/plan/intro.html>. *See also* EEOC, *Joint Task Force Report*, p. 3.

[673] EEOC, *Joint Task Force Report*, p. 4.

[674] Stewart interview, p. 2; *See also* EEOC, *Compliance Manual*, "Litigation," p. 0:3601.

[675] Stewart interview, p. 2.

- coordination with the appellate unit for advice on which cases to appeal;
- coordination on expert witnesses; and
- any expertise that headquarters staff may have.[676]

Redelegation of Authority

Although headquarters review is required for cases the district offices choose to litigate, regional attorneys have the responsibility for developing the litigation dockets in their offices. The Priority Charge Handling Procedures, in conjunction with the National Enforcement Plan, gave the general counsel overall discretion to decide which cases to litigate and encouraged the redelegation of authority to regional attorneys.[677] With the redelegation of authority, regional attorneys were given the ability to determine, with exception, which cases to pursue in court. Those cases that remain the domain of OGC include expensive cases, cases addressing novel issues, issues of public controversy on which EEOC needs to make a statement, cases affecting many individuals, and cases involving the Americans with Disabilities Act.[678] District offices have not been given the authority to litigate cases involving more than $50,000 in litigation expenses or more than 20 aggrieved individuals.[679]

Under the redelegation of authority, the procedure for headquarters review of district office litigation plans has changed. Each district office is required to submit a five-day notice to OGC prior to filing suit in court, informing headquarters about the basic facts and legal theories involved in the case. Originally, under the redelegated authority, if OGC did not contact the district office with an objection during that period, the district office could proceed with the case.[680] However, the authority given to regional attorneys has been somewhat modified in recent months to restrict them from filing suits until after permission is given from OGC pursuant to the five-day notice.[681] The general counsel also has the ability to withdraw the delegated authority at any time if district offices fail to exercise the authority properly and has done so when it was not appropriately and vigorously exercised.[682]

The general counsel stated that he believes the redelegation of authority has been beneficial because it achieves a balance between independence and guidance in the field offices.[683] Regional attorneys have also praised the redelegation of authority as a method whereby district office legal staff can better develop certain issues that will improve the quality of cases being litigated.[684] It gives legal staff greater discretion to assess the value of a charge by looking more closely at case development, the quality of evidence, and how it fits into the office's priority issues list, ultimately allowing the district offices to control their own dockets better.[685] The redelegation of authority has also resulted in a reduction in processing time of cases. In the past, the litigation process was often delayed while district office staff waited for approval from headquarters to pursue a case.[686]

Litigation Identification Procedures

Title VII outlines a series of procedural steps that must be taken by EEOC before filing suit in court.[687] The procedures require that EEOC receive a timely charge, notify the employer of the charge, investigate the charge, issue a reasonable cause determination, and attempt conciliation.[688] For ADEA cases, the only prerequisite is that EEOC attempt conciliation with the employer prior to filing suit.[689] The EPA contains no prerequisites for EEOC to comply with before filing a suit.[690] Within these requirements,

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676 Byrd, Vincent, and Agee interview, Birmingham District Office, p. 5.

677 EEOC, *Priority Charge Handling Procedures*, p. 3; Stewart interview, p. 5.

678 Stewart interview, p. 5. *See also* Harper, Miller, and Stith interview, St. Louis District Office, p. 4.

679 Stewart interview, p. 5.

680 Ibid., p. 6.

681 Hendrickson, Carson, and Knight interview, Chicago District Office, pp. 7–8.

682 Stewart interview, p. 6.

683 Ibid.

684 Kiel et al. interview, Baltimore District Office, p. 3.

685 Ibid., pp. 3–4.

686 Ibid.

687 42 U.S.C. § 2000e-5 (1994). *See also* EEOC, *Compliance Manual*, "Litigation," p. 0:3601.

688 42 U.S.C. § 2000e-5 (1994).

689 EEOC, *Compliance Manual*, "Litigation," p. 0:3603.

690 29 U.S.C. § 255 (1994).

EEOC has the discretion to determine which cases to pursue for litigation.

At the district office level, procedures have been put in place for the identification of litigation worthy charges. As was noted in the discussion on charge categorization, those charges that are potential litigation vehicles are categorized as A1 cases. Accordingly, those are the charges that require the greatest legal staff involvement. Now that, under the directive of the Comprehensive Enforcement Program, attorneys are required to have greater participation in the charge intake process, they are responsible for assisting with the identification of litigation worthy cases, but A1 designations should be made with regional attorney and district director agreement.[691] The CEP requires mandatory interaction between legal and enforcement staff on every A1 charge.[692]

In the Phoenix District Office, for example, attorneys review charges that come in on a daily basis, including those identified as C charges, to determine if there are any that appear to be potential litigation cases.[693] In particular, from an early stage of development, legal staff will monitor charges that bring up NEP or LEP issues in the event that they should be litigated. Generally, if a cause finding is issued on an NEP or LEP charge and conciliation attempts fail, it will be litigated.[694] However, legal staff in the Phoenix District Office stated that even if a charge results in a cause finding, if it no longer involves NEP or LEP issues, it would not be pursued through litigation.[695]

Another reason a case may not be pursued through litigation, even if it is a case in which a violation was found, would be if the case has the potential to result in "bad law."[696] For example, with respect to the Americans with Disabilities Act, it would not be in the Agency's interest to litigate a case on behalf of a diabetic school bus driver where the focus would be on potential risk rather than statutory coverage.[697]

Litigation cases may also be identified at other stages of the enforcement process. Legal staff stated that sometimes whether a case merits litigation is not always obvious from initial intake because often enough information is not provided, and information has not yet been solicited from the respondent.[698] Therefore, some cases are identified after the complainant is interviewed while others may be identified after investigation, once the quality of evidence is assessed.[699]

Litigation Strategies

Chairwoman Castro stated that the EEOC functions like a law firm in that it must be strategic about what it chooses to take to court, wanting to litigate those cases that will reach the most people and affect policies.[700] This does not exclude individual cases that very well may send a clear message to employers and worker communities about which practices are acceptable and unacceptable.[701] Prior to the Agency's new era of reform, litigation efforts were largely concentrated on individual cases of discrimination as opposed to larger, systemic cases with the potential to provide relief for numerous individuals. The Agency was criticized by many scholars for failing to concentrate its resources on larger cases that could have broader legal implications and more extensive benefits. By litigating systemic cases, EEOC has the opportunity to address a variety of employer practices that may be difficult to address in private class action litigation.[702]

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691 EEOC, *Comprehensive Enforcement Program*, p. 8.

692 Ibid., p. 6.

693 C. Emanuel Smith, supervisory trial attorney, Sandra Padegemas, trial attorney, and Michelle Marshall, trial attorney, Phoenix District Office, EEOC, interview in Phoenix, AZ, Mar. 30, 2000, pp. 11–12 (hereafter cited as Smith, Padegemas, and Marshall interview, Phoenix District Office). *See also* Burtner and Trujillo interview, Phoenix District Office, Mar. 29, 2000, pp. 24–25.

694 Smith, Padegemas, and Marshall interview, Phoenix District Office, p. 25.

695 Ibid., p. 26. It should be noted though that staff indicated that some of the NEP and LEP priorities are broad enough that almost any charge can fit into one or the other. Ibid., p. 27.

696 Ibid.

697 Ibid.

698 Harper, Miller, and Stith interview, St. Louis District Office, p. 3.

699 Lewis and Alpert interview, New York District Office, p. 30.

700 Castro interview, p. 4.

701 Ibid.

702 Alfred W. Blumrosen, "The EEOC at the End of the First Clinton Administration," pp. 71–95 in Corrine M. Yu and William L. Taylor, eds., *The Continuing Struggle: Civil*

The move toward strategic litigation began in 1995 with the implementation of the Priority Charge Handling Procedures which rescinded the policy that set forth a cause standard that was commensurate with litigation worthiness, and required litigation of all conciliation failures.[703] The PCHP instead allowed offices to find violation and attempt conciliation in "all cases where there is reasonable cause to believe that it is more likely than not that a statute has been violated," regardless of whether the case is deemed litigation worthy.[704] This gave the district offices the ability to focus better on those cases that are most likely to have the greatest impact, rather than dividing scarce litigation resources among all conciliation failures.

Cases are selected for litigation on the basis of their merit and in conjunction with the Agency's priority issues as identified in the National and Local Enforcement Plans. Further, in addition to using litigation to pursue the cases with the greatest impact, EEOC uses litigation to develop case law in new or undefined areas of law. For example, according to the general counsel, because the Americans with Disabilities Act is a relatively new law with new issues, it requires greater EEOC attention.[705]

The NEP and CEP establish enforcement priorities to ensure that employers in particular clearly understand the current state of the law and the degree to which EEOC will aggressively support the current law.[706] Specifically, EEOC has identified three major categories of priorities. First, EEOC has stated that it will strictly enforce cases involving established antidiscrimination principles, whether on an individual or systemic basis. Second, the Agency will pursue cases involving repeated and/or egregious discrimination, including harassment and facially discriminatory policies.[707] Third, EEOC has committed itself to the litigation of broad-based employment practices, including allegations of discrimination in hiring, layoffs, job mobility, including glass ceiling cases, and claims under the Equal Pay Act.[708]

To ensure that lower priority individual cases are not overlooked in the Agency's efforts to litigate cases with more impact, the general counsel stated that he has established district office goals for the number of cases to be litigated, based on the number and experience of the attorneys in each office.[709] To that end, district offices are required to maintain lists of the top 20 litigation cases under consideration at any given time. Generally, the lists are made up of commissioner charges, class action cases, cases involving issues the Agency wants to develop, and any other cases with a potentially large impact.[710] EEOC legal staff stated that they are interested in litigating cases that are going to have some impact, either on the law or the number of affected individuals, or something that may bring a lot of publicity to the Agency to advise employers that a practice or behavior is a violation of the law.[711]

Sample National Enforcement Plan Cases

As stated above, EEOC uses its litigation docket to fill the mandates of the NEP. In fiscal year 2000, EEOC reported that it enforced the NEP's mandate of upholding the antidiscrimination purposes of the statutes specifically with regard to claims of sex bias. EEOC recently announced the resolution of several cases involving various aspects of sex discrimination. In May 2000, EEOC announced a settlement with Toyota Logistics Services regarding alleged sex and race bias at its New Jersey Port plant;[712] and in April 2000, EEOC reported that it had settled suits against Eastern Michigan University alleging equal pay discrimination and retaliation.[713] In perhaps one of its largest sexual harassment

Rights and the Clinton Administration (Washington, DC: Citizens' Commission on Civil Rights, 1997) p. 80.

[703] EEOC, *Priority Charge Handling Procedures*, p. 3.

[704] Ibid.

[705] Stewart interview, p. 5.

[706] EEOC, *National Enforcement Plan*, pp. 4–5.

[707] Ibid.

[708] Ibid.

[709] Stewart interview, p. 6.

[710] Harper, Miller, and Stith interview, St. Louis District Office, p. 4.

[711] Smith, Padegemas, and Marshall interview, Phoenix District Office, p. 7.

[712] *See* EEOC, "EEOC and Toyota Logistics Services Settle Lawsuit Alleging Sex and Race Bias at New Jersey Port," press release, May 4, 2000, accessed at <http://www.eeoc.gov/pr.html>.

[713] *See* EEOC, "EEOC Settles Equal Pay Lawsuit Against Eastern Michigan University," press release, Apr. 27, 2000, accessed at <http://www.eeoc.gov/pr.html>.

cases, EEOC reached a settlement agreement with Mitsubishi Motor Manufacturing for $34 million on behalf of a class of employees.[714]

EEOC has also placed a priority on cases that involve particularly egregious actions or the integrity or effectiveness of EEOC's enforcement process, including retaliation for filing charges, attempts to block the filing of charges, or allegations involving material breach of an agreement, particularly with respect to investigation and conciliation.[715] EEOC announced that it obtained a consent decree order in its case against Advantage Staffing, Inc., which alleged that the company was screening applicants for employment on the basis of race, sex, ethnic origin, religion, and disability status.[716] The Agency also reported that it settled a retaliation-based lawsuit with the Baltimore Cable Access Corp. for firing a female manager after she complained about sex-based wage discrimination.[717]

Another area emphasized by the NEP is national origin discrimination. EEOC reported that it recently settled a national origin lawsuit against American Seafoods Company for $1.25 million on behalf of Vietnamese American fishing crew members who alleged that they were subjected to discriminatory conditions because of their national origin.[718] In March 1999, EEOC settled a $2.1 million suit against Woodbine Healthcare Center alleging wage, assignment, and terms and conditions discrimination against a class of Filipino nurses at a Midwest nursing facility.[719]

EEOC also announced that it has enforced the NEP provision on age bias, including the settlement of an age bias lawsuit for $7.1 million with Thomson Consumer Electronics and local unions based on the loss of severance packages for older workers;[720] the filing of a class action age discrimination case against Venator Group, Specialty, Inc., the owner of the former Woolworth stores, on behalf of 300 older workers who claimed they were targeted for layoff because of their age;[721] and a $28 million settlement in a case against Johnson and Higgins which alleged that the company's policy of forcing retirement on members of its board of directors violated the ADEA.[722]

The Role of the Private Bar

Many legal scholars have argued that EEOC should not litigate cases that the private bar is able to handle, but instead should focus its litigation efforts on cases where private litigation may not be effective because of lack of information or costs of preparation.[723] There are thousands of private practitioners across the country who are, in many ways, better equipped than EEOC attorneys to litigate individual cases of discrimination because litigation is a daily part of their existence.[724] In fact, Congressional intent, upon the creation of EEOC, was not to have the Agency litigate cases, but rather leave that form of enforcement to the private bar.[725]

To compensate for the Agency's inability to litigate the high numbers of cases that warrant litigation, due to its limited resources, it has been suggested that the Agency develop legal referral systems to assure charging parties access to the private bar. By doing so, the Agency can ensure that these cases are litigated by com-

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[714] *See* EEOC, "Mitsubishi Motor Manufacturing and EEOC Reach Voluntary Agreement to Settle Harassment Suit," press release, June 11, 1998, accessed at <http://www.eeoc.gov/pr.html>.

[715] EEOC, *National Enforcement Plan*, p. 6.

[716] *See* EEOC, "EEOC Wins Preliminary Injunction Against Advantage Staffing, Inc.," press release, Mar. 30, 2000, accessed at <http://www.eeoc.gov/pr.html>.

[717] *See* EEOC, "EEOC Settles Suit Against Public Access TV Corp. for Pay Discrimination and Retaliation," press release, Apr. 28, 2000, accessed at <http://www.eeoc.gov/pr.html>.

[718] *See* EEOC, "EEOC Settles National Origin Lawsuit for $1.25 million on Behalf of Vietnamese American Fishing Crew Members," press release, Sept. 22, 1999, accessed at <http://www.eeoc.gov/pr.html>.

[719] *See* EEOC, "EEOC Announces $2.1 Million Settlement of Wage Discrimination Suit for Class of Filipino Nurses," press release, Mar. 2, 1999, accessed at <http://www.eeoc.gov/ pr.html>.

[720] *See* EEOC, "EEOC Settles Major Age Bias Lawsuit for $7.1 Million with Thomson Consumer Electronics and Local Unions," press release, Aug. 17, 1999, accessed at <http://www.eeoc.gov/pr.html>.

[721] *See* EEOC, "EEOC Files Age Discrimination Lawsuit Against Woolworth Stores," press release, July 1, 1999, accessed at <http://www.eeoc.gov/pr.html>.

[722] *See* EEOC, "Johnson and Higgins to Pay $28 Million in Settlement of Age Discrimination Lawsuit," press release, July 29, 1999, accessed at <http://www.eeoc.gov/pr.html>.

[723] Blumrosen, "The EEOC at the End of the First Clinton Administration," p. 79.

[724] Blumrosen interview, p. 22.

[725] Ibid.

petent counsel and, at the same time, leverage publicity.[726] In fact, district offices have been instructed to develop relationships with the private employment bar and establish referral programs.[727] This will allow the Agency to concentrate its resources on cases that are related to NEP priorities.[728]

EEOC's general counsel confirmed the importance of the role of the private bar. For example, EEOC may choose not to litigate a Title VII case on the basis of discharge because the precedent in this area has been well established, and the Agency has litigated many cases in this area. If the case in question were merely seeking to recover damages for an individual, it would be referred to the private bar. These cases are excellent candidates for private bar referral because they can vindicate the aggrieved individual's rights, recover damages, obtain attorney's fees to sustain the private attorney, and allow private attorneys to gain experience in bringing employment discrimination suits.[729]

Comments on EEOC's Litigation Strategy

It is generally agreed that given its limited resources, EEOC should focus its litigation program on those cases that will have the greatest impact on employment discrimination. One employment attorney stated that he believes EEOC should focus its resources and energy on pattern and practice cases because there are many private attorneys around the country who are able and willing to take on individual cases. However, there are areas of the country where there may be fewer private attorneys, and thus it could be difficult for complainants to find representation.[730] He added that EEOC's mission is not to be a legal services program for people with small claims. Its mission is to end discrimination, and therefore it needs to focus its resources on what is going to be the most effective way to accomplish that goal.[731]

On the other hand, there has been some concern expressed that, by focusing litigation strategy only on broad-based claims, certain areas of law have been neglected. An attorney for a national advocacy group stated that he would not like to see EEOC litigate only pattern and practice cases because there are certain types of cases that are less likely to present themselves as pattern and practice than others.[732] For example, religious discrimination or accommodation cases, by nature, are less likely to fit into the pattern and practice approach because they are more individualized. He stated that he would hope that in making a decision on which cases to pursue, there would be a conscious balance made to focus on one class, but not eliminate the other.[733]

Another employment attorney agreed that there are some issues that cannot be addressed through pattern and practice cases, but which can still have a broader impact.[734] For example, English-only rules may affect only one or two employees in a given employment setting, but litigation in this area has the potential to affect many employees.[735] In addition, EEOC legal staff have expressed the concern that pursuing larger class and systemic cases for litigation requires greater staff involvement, taking away already limited staff attention from individual cases.[736]

A large number of respondents to the Commission's Web site survey for attorneys and mediators stated that obtaining relief for an individual and obtaining relief for a class of individuals should both be EEOC's priorities.[737] Few respondents selected only "further developing existing case law," "developing employment law in new or 'novel' areas," "litigating high profile cases," and "developing cases to support EEOC policies" as top priorities. However, many respondents selected all of these options.[738] Respondents to the questionnaire identified several other areas where EEOC should pursue litigation. Several attorneys and mediators stated

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[726] Blumrosen, "The EEOC at the End of the First Clinton Administration," pp. 79–80.

[727] EEOC, *Comprehensive Enforcement Program*, p. 17.

[728] EEOC, *FY 2001 Budget Request*, p. 49.

[729] Stewart interview, p. 6.

[730] Seymour interview, pp. 35–36.

[731] Ibid., p. 38.

[732] Tyner interview, pp. 21–22.

[733] Ibid., p. 23.

[734] Saenz and Gallardo interview, pp. 4–5.

[735] Ibid.

[736] Smith, Padegemas, and Marshall interview, Phoenix District Office, p. 41.

[737] USCCR, Web Site Survey Data (Attorneys and Mediators).

[738] Ibid.

that EEOC should take on cases that raise public awareness, strong public policy concerns, and class cases.[739] In addition, several individuals stated that EEOC should focus on cases in which individuals cannot afford an attorney or cases in which damages are low so the private bar is not to willing to get involved.[740] One questionnaire respondent stated that EEOC should concentrate on

> cases where the approach of the employer is to resist the EEOC efforts to investigate, conciliate, cases. A strong effort is needed to eliminate the contempt for the Commission shown by the employer.[741]

However, while some Web site questionnaire respondents agreed that EEOC should concentrate its efforts on developing cutting-edge litigation, others feel EEOC should not "pour resources into test cases probing questionable theories and interpretations of the law."[742] Other attorneys and mediators identified specific industries and occupations in which they thought EEOC should focus its litigation efforts, such as jobs in which women are found in small numbers or have been traditionally discriminated against, including automobile dealerships and the construction trades.[743]

Measuring Litigation Activity

There are several indices to gauge whether EEOC's litigation program is successful, such as the number of cases filed, the number of successful resolutions, and the amount of benefits received on behalf of aggrieved individuals. Perhaps less quantifiable is whether the Agency's litigation program is varied enough to address all of the emerging areas of law and whether litigation efforts accurately identify the most pressing issues. One regional attorney stated that he measures the effectiveness of his office's litigation program by looking at its priority issues list.[744] In his view, a case docket should reflect a balanced program with cases addressing a variety of issues.[745]

On a more tangible level, EEOC measures its litigation activity by the numbers and results of its cases.[746] During the first half of fiscal year 1999 (October 1, 1998, to March 30, 1999), EEOC attorneys reaped $7.4 million for victims of employment discrimination and filed 157 direct lawsuits and interventions in federal court.[747] The majority of the suits, 108, were filed under Title VII.[748] EEOC resolved 125 of the direct lawsuits and interventions during that period.

By the end of FY 1999, EEOC had filed 439 lawsuits: 324 were filed under Title VII, 54 were filed under the Americans with Disabilities Act (ADA), 36 were filed under the ADEA, 14 were filed under the EPA (either alone or in conjunction with Title VII), and the remaining alleged claims were filed under more than one statute.[749] In that same year, the Agency resolved 294 lawsuits, including 176 under Title VII, 65 under the ADA, 36 under the ADEA, 6 under the EPA, and 11 alleging claims under multiple statutes.[750]

As the fiscal year ended on September 30, EEOC's docket of active litigation had seen a 35 percent increase in the size of the caseload over the previous two years.[751] The proportion of class cases (defined as those that either were filed on behalf of multiple parties or challenged a discriminatory policy) grew from 20 percent in fiscal year 1996 to approximately 32 percent in

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739 Ibid.

740 Ibid.

741 Ibid.

742 Ibid.

743 Ibid.

744 Kiel et al. interview, Baltimore District Office, p. 8.

745 Ibid.

746 It should be noted that EEOC does not appear to track litigation through its Charge Data System in any consistent or thorough manner. It was, therefore, impossible to derive any meaningful analyses from the CDS. The numbers cited here are from other sources, including EEOC's FY 2001 budget request, comments made in an EEOC Commissioners Meeting, and numbers published on EEOC's Web site.

747 "EEOC Attorneys Recovered $7.4 Million, Filed 157 Suits in First Half of Fiscal '99," *Fair Employment Practices,* July 22, 1999, p. 87.

748 Ibid.

749 EEOC, *FY 2001 Budget Request,* p. 32.

750 Ibid.

751 "Nearly a Third of EEOC Litigation Docket Are Class Cases, General Counsel Reports," *Daily Labor Report,* Sept. 30, 1999, p. A-1. *See also* "Nearly a Third of EEOC Litigation Docket Are Class Cases, General Counsel Reports," *Employment Discrimination Report,* Oct. 13, 1999, pp. 561–62.

both fiscal years 1998 and 1999.[752] General Counsel C. Gregory Stewart acknowledged that he had anticipated bringing a larger number of cases to court in FY 2000. But the Agency was faced with a setback in June 1999, when the Supreme Court rejected EEOC's interpretation of the ADA in a trio of decisions.[753] The Court's rulings required EEOC attorneys to reassess pending claims.

As of March 6, 2000, the Agency's litigation docket listed 543 active cases, 185 of which (or 34 percent) were designated as class cases.[754] Of the active cases, 391 (72 percent) involved only Title VII, 76 (14 percent) involved only the ADA, 55 (10 percent) involved only the ADEA, and 3 (less than 1 percent) involved only the EPA. The remaining cases were filed under more than one statute.[755] Because more complex lawsuits generally take longer to resolve, and the number of lawsuits resolved each year is less than the number filed, EEOC's overall active docket is expected to grow over the next few years.[756] It is estimated that by the end of FY 2000 the Agency's total active caseload, including lawsuits carried over from previous years and those newly filed, will reach 850 cases. In FY 2001, it is expected to reach 880 cases. Of those, 103 and 137, respectively, are expected to be class or systemic cases.[757] According to the Agency's Strategic Litigation Plan, EEOC's ultimate goal is that eventually 50 percent of its litigation docket will involve multiple aggrieved parties or discriminatory policies.[758]

In a September 28, 1999, commissioners meeting, General Counsel Stewart stated that the number of cases filed is only one way to measure EEOC litigation activity.[759] He attributed the identification of a larger number of meritorious charges to earlier and more extensive attorney-investigator interaction. He further stated that when meritorious cases are not resolved through conciliation, they provide a larger pool of cases for possible litigation.[760]

It appears that, in recent years, EEOC has made major strides toward using litigation as an enforcement tool. However, given the Agency's limited resources and the amount of staff time and energy required for litigating cases, the degree to which litigation can and should be relied on for enforcement is questionable. The volume of EEOC's litigation appears to be less than one would expect to truly enforce the precepts of the NEP and for a maximum utilization of litigation as an enforcement tool. Limited resources could also continue to hamper the Agency's ability to litigate larger class or systemic cases in numbers adequate to reflect their significance.

BENEFITS

The success of EEOC's enforcement efforts can be measured, in part, by the benefits obtained for aggrieved individuals. Some of the benefits or remedies available for employment discrimination, whether caused by intentional acts or by practices that have a discriminatory effect, include back pay, hiring, promotion, reinstatement, front pay, and other actions that would place the charging party in the position that he or she would have been if the discrimination had not occurred.[761] Remedies may also include payment of attorneys' fees, expert witness fees, and court costs. Compensatory and punitive damages also may be available where intentional discrimination is found. If an employer acted with malice or reckless indifference, punitive damages also may be available. Punitive damages are not available against state or local governments.[762]

Between fiscal years 1993 and 1999, almost 60,000 charges received some type of nonmonetary benefit.[763] Non-monetary benefits can be a policy change, training/apprenticeship, religious accommodation, seniority, job referral, un-

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[752] EEOC, Commissioners Meeting, Sept. 28, 1999, statement of C. Gregory Stewart, p. 40.

[753] Ibid., p. 38.

[754] A. Jacy Thurmond, assistant legal counsel, Legal Services Program, EEOC, letter to Mireille Zieseniss, civil rights analyst, USCCR, Mar. 10, 2000, re: document submission, attachment 2.

[755] Ibid.

[756] EEOC, *FY 2001 Budget Request*, p. 48.

[757] Ibid.

[758] EEOC, *Comprehensive Enforcement Program*, pp. 15–16.

[759] EEOC, Commissioners Meeting, Sept. 28, 1999, statement of C. Gregory Stewart, p. 39.

[760] Ibid.

[761] EEOC, "What Remedies Are Available When Discrimination is Found?" accessed at <http://www.eeoc.gov/facts/qanda.html> (hereafter cited as EEOC, "Remedies Available When Discrimination is Found").

[762] Ibid.

[763] EEOC, Charge Data System.

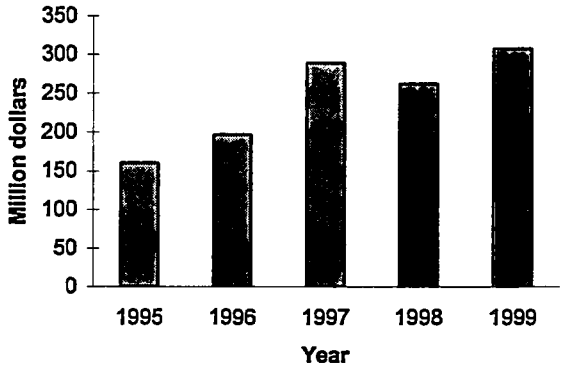
ion membership, EEO notices, or reasonable accommodation. A charging party can file a charge under more than one statute and also receive more than one benefit under the same charge. Twenty percent of all charges receiving non-monetary benefits received more than one benefit.[764] Most benefits were in the form of policy change and posting of EEO notices. During that period 5,833 charges resulted in policy changes, and 6,320 charges resulted in EEO notices being posted.[765] Numerous charges resulted in some other non-monetary benefit that is not listed above.

With the introduction of the CEP and as the composition of the Agency's workload shifted, monetary benefits obtained for charging parties increased dramatically between fiscal years 1995 and 1999 (figure 5-13).[766]

As a result of litigation, EEOC recovered more than $18.7 million in monetary benefits, in the form of back pay, for victims of discrimination during fiscal year 1995.[767] More than $974,000 was recovered under the ADEA, $162,500 under the EPA, $3.1 million under Title VII, and $974,000 for cases involving more than one statute.[768] Additionally, the agency approved 44 new systemic charges and resolved 42, resulting in benefits for 456 individuals, totaling $2 million.[769] The total amount of monetary benefits obtained during fiscal year 1995 was nearly $160 million (see figure 5-13). During the fiscal year, the Agency also obtained 9,514 non-monetary benefits for charging parties.[770] Two-thirds of those benefits resulted from charges filed only under Title VII and 8 percent of the benefits resulted from charges filed only under the Age Discrimination in Employment Act.[771]

FIGURE 5-13

Monetary Benefits Obtained for Charging Parties, 1995–1999



SOURCE: EEOC, FY 1997 Budget Request; EEOC, FY 1998 Budget Request; BNA, "Benefits Edged Down Last Year"; BNA, "EEOC Reaped Record Monetary Benefits."

In fiscal year 1996, EEOC obtained $196 million in monetary benefits through the administrative process and litigation, which was 23 percent more than the amount obtained in fiscal year 1996 (see figure 5-13). Through settlements and conciliation, EEOC obtained $145.2 million in monetary benefits for charging parties.[772] Monetary benefits from litigation totaled $50.8 million, which was more than double the amount obtained in fiscal year 1995. The number of non-monetary benefits obtained by EEOC and the proportion of benefits obtained under Title VII and the ADEA did not change significantly from what was obtained in fiscal year 1996.[773]

During fiscal year 1997, EEOC reported increases in both money recovered for discrimination claimants and litigation activity. The Agency obtained $289 million in benefits for charging parties (see figure 5-13).[774] Benefits obtained from administrative enforcement activities totaled $178.3 million, which was 23 percent higher than the amount of $145.2 million

764 Ibid.

765 Ibid.

766 EEOC, *FY 2001 Budget Request*, p. 29.

767 EEOC, "A Proud Legacy—A Challenging Future," *FY 1997 Budget Request* (Washington, DC: Submitted to the Congress of the United States, March 1996), p. 58.

768 Ibid., pp. 58–59.

769 Ibid., p. 57.

770 EEOC, Charge Data System.

771 Ibid.

772 EEOC, "A Proud Legacy—A Challenging Future" *FY 1998 Budget Request* (Washington, DC: Submitted to the Congress of the United States, Feb. 1997), p. iii (hereafter cited as EEOC, *FY 1998 Budget Request*).

773 EEOC, Charge Data System.

774 *See* "EEOC Backlog Continued to Drop, But Benefits Edged Down Last Year:, *Daily Labor Report*, Feb. 9, 1999, p. A-9 (hereafter cited as "Benefits Edged Down Last Year").

obtained in fiscal year 1996.[775] EEOC recovered $136 million in benefits in fiscal year 1995.[776] The administrative benefits included nearly $10.9 million recovered from the use of the recently expanded mediation program.[777] In fiscal year 1995, the amount of benefits recovered through ADR efforts was only $1 million.[778] According to EEOC's general counsel, benefits obtained from litigation were a record $111.8 million in fiscal year 1997, which was more than twice the amount of $51.2 million recovered in fiscal year 1996.[779] Monetary and non-monetary benefits obtained through litigation included settling an age bias case with Lockheed Martin for $13 million in back pay and 450 jobs for older workers who were dismissed and an $81 million gender-based settlement with Publix Super Markets.[780] During fiscal year 1997, EEOC also obtained 10,353 non-monetary benefits for charging parties.[781] As in previous fiscal years, most benefits were obtained only under Title VII.

Although EEOC continued to increase its litigation activity during fiscal year 1998, the amount of benefits recovered for victims of discrimination was roughly 11 percent, or nearly $30 million, less than the amount recovered in fiscal year 1997 (see figure 5-13). Benefits obtained by investigators through the administrative process and by attorneys through litigation totaled $261.4 million between October 1, 1997, and September 30, 1999.[782] Benefits obtained by investigators during the administrative process totaled $169.2 million, and benefits obtained through litigation were $88.1 million.[783] Litigation benefits included $60 million recovered under Title VII and nearly $25 million under the ADEA.[784] EEOC also obtained 10,008 non-monetary benefits.[785] Non-monetary benefits obtained for charging parties during the fiscal year included (1) a case in which a union agreed to provide 18 women with union memberships and seniority rights, and (2) a case involving retaliation and disparate treatment in employment against Hispanics, in which a health care provider agreed to roll back an English-only policy and remove disciplinary records from personnel files.[786]

EEOC obtained a record $307.3 million in benefits through the administrative process and litigation in fiscal year 1999.[787] Benefits obtained by EEOC investigators during the administrative process totaled $210 million, an increase of 25 percent from the previous fiscal year.[788] Benefits received through the mediation program, which is included in the $210 million, totaled $58 million. Litigation benefits totaling $96.9 million came largely from $46.9 million recovered under Title VII and $43.3 million under the ADEA.[789]

EEOC also settled several cases that resulted in the attainment of both monetary and non-monetary relief. For example, a glass ceiling sex discrimination case was settled for $2.25 million and injunctive relief, which included restructuring of the employer's management group to include an equal number of male and female members.[790] In another case, a charge of hiring discrimination against an East Coast health care provider was settled for $325,000 in monetary relief for African American applicants.[791] Also as part of the settlement agreement, the health care provider hired 33 registered nurses and 20 file clerks, provided diversity training, and developed a diversity recruitment database.[792]

In FY 1999, EEOC obtained nearly 11,000 non-monetary benefits for charging parties.[793] Sixty-three percent of all benefits were obtained only under Title VII, 7 percent were obtained only under the ADEA, 4 percent were obtained

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[775] "EEOC Reaps Record Benefits," *Fair Employment Practices*, vol. 34, no. 7, Apr. 2, 1998, p. 37.

[776] Ibid.

[777] Ibid.

[778] Ibid.

[779] Ibid.

[780] EEOC, *FY 1998 Budget Request*, p. iv.

[781] EEOC, Charge Data System.

[782] "Benefits Edged Down Last Year," p. A-9.

[783] Ibid., p. A-10.

[784] Ibid.

[785] EEOC, Charge Data System.

[786] *FY 2000 Budget Request*, p. 43.

[787] "EEOC Reaped Record Monetary Benefits, Continued Cutting Inventory in Last Year," *Fair Employment Practices*, Vol. 36, No. 890, Feb. 3, 2000, p. 15.

[788] Ibid.

[789] Ibid.

[790] EEOC, *FY 2001 Budget Request*, p. 30.

[791] Ibid.

[792] Ibid., p. 30.

[793] EEOC, Charge Data System.

under Title VII and ADEA, and less than 1 percent was obtained under Title VII and the EPA.[794]

MEASURING RESULTS: EVALUATING EEOC'S ENFORCEMENT EFFORTS

Employment experts have criticized EEOC in the past for its shortcomings:

> During the Reagan-Bush years, the emphasis on fair settlements, rapid resolution of charges, and strong enforcement that had existed during the Carter administration were replaced by inaction, incompetence, and hostility toward victims' rights to reasonable remedies. Many complainants felt compelled to hire attorneys to ensure adequate representation and protection during the complaint process, despite Congress' intent that the EEOC aid victims of legal discrimination without requiring legal counsel.[795]

The administration beginning under former Chair Gilbert Casellas inherited numerous problems, including an overwhelming backlog and the Agency's tarnished reputation. He and his colleagues set out to reinvent the Agency, through measures such as the PCHP and the NEP and LEP, with a fair amount of success. However, despite the positive reforms that have been implemented to date, room for improvement will contine, as long as potential barriers to enforcement remain entrenched in the processes of the Agency.

In an assessment of EEOC's civil rights record over a two-year period, the Citizens' Commission on Civil Rights found, in its 1999 report, that while the Agency had made significant strides, it continues to face barriers to successful enforcement and litigation.[796] The Citizens' Commission on Civil Rights expressed concern over the Agency's "troubling" record in obtaining remedies for discrimination victims and called for a greater emphasis on litigating claims of systemic and pay discrimination.[797] The author noted that EEOC has had "a tougher row to hoe, and its enforcement efforts have been decidedly mixed."[798] Under the former chairperson, EEOC proposed new initiatives to improve its charge processing system, decrease its backlog, and use the alternative dispute resolution program successfully. However, according to the researcher, being in place and being fully operative are two different things.[799]

Major Findings on Enforcement Activities

Although EEOC headquarters has issued various enforcement plans and policy documents and prepared instructional guidance for staff governing such processes as intake, charge categorization, investigations, and mediation, EEOC leaves much of the actual implementation of these functions to the discretion, and creativity of the district offices. The result is that the implementation of the enforcement process at EEOC varies from district to district. For example, some offices rotate staff to perform intake or assign permanent teams to perform the task. There is no uniformity in the information that a charging party receives about EEOC processes or how his or her charge will be addressed. In the charge categorization process, charges can be categorized, recategorized, referred for investigation or mediation, or closed by different staff at different times. As a result, a charge that would be investigated in one office might be mediated in another. One office may decide not to conduct an on-site investigation for a charge, and another office's investigator might decide to conduct an on-site investigation for a similar charge. To further illustrate the variation, in lieu of funds for contract mediators, one office uses trained investigators to serve as mediators while another district office that already has a backlog in mediation cases, placed a self-imposed "freeze" on its program.[800]

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[794] EEOC, Charge Data System.

[795] Nancy Kreiter, "Reinventing the EEOC: Barriers to Enforcement," *Employment Discrimination Report*, vol. 9, July 30, 1997, p. 154.

[796] The Citizens' Commission on Civil Rights is a private bipartisan organization that has monitored civil rights policies and programs since 1982. Nancy Kreiter, "Equal Employment Opportunity: EEOC and OFCCP," pp. 163–70 in Corrine M. Yu and William L. Taylor, eds., *The Test of Our Progress: The Clinton Record on Civil Rights* (Washington, DC: Citizens' Commission on Civil Rights, 1999); *See also* "Advocacy Group Sees Mixed Record On Enforcement Efforts at EEOC, OFCCP," *Daily Labor Report*, Jan. 19, 1999, pp. A-10 to A-11.

[797] Kreiter, "Equal Employment Opportunity," p. 165.

[798] "Advocacy Group Sees Mixed Record On Enforcement Efforts at EEOC, OFCCP," p. A-11. The *Daily Labor Report* includes the Citizens' Commission's draft of the chapter on EEOC and OFCCP. Ibid., pp. E-1 to E-5.

[799] Ibid., p. A-11.

[800] *See* discussion, p. 130.

In essence, the district offices are performing the same functions (intake, charge categorization, investigations, and mediation), but they are performing them differently. Headquarters' overall assessment is that the new procedures for these functions are successfully working at the Agency, despite the variation across offices. However, the basis for this assessment is unclear. While there should be some autonomy in the application of functions by the district offices, the degree of discretion in carrying out the charge handling process makes it difficult to evaluate and critique the quality of EEOC enforcement. The result of the almost total discretionary implementation of procedures is that EEOC cannot develop standard criteria that could be used to effectively monitor or evaluate the enforcement process.[801]

Many of the respondents and employment experts contacted for the purpose of this report have had contact with more than one EEOC office.[802] For the most part, they agree that their experiences and interaction with EEOC vary from office to office,[803] making it difficult to provide an overall assessment of the Agency.[804]

One company representative said that she has had contact with two EEOC offices and found them to be very different with respect to "effectiveness and fairness."[805] She explained that one of the offices has "an open door policy," and she has "regular discussions with the staff."[806] Her interaction with the other office is not as positive.[807] When asked to rate the overall effectiveness of EEOC, one respondent said that some offices are "fair and good,"[808] while another said that his experiences with different EEOC offices range from "fair to reasonable."[809] Another said that, on the whole, EEOC staff are "pretty good"; however, he has found that when he deals with different EEOC representatives there is a wide range of experience and skills.[810]

Representatives from advocacy groups and employment organizations concur. The research director at the Women Employed Institute stated that she has found different enforcement records for different offices and offices with different personnel, leadership, and skill levels which contribute to the "varying degrees of field office effectiveness."[811] A civil rights policy analyst at the National Council of La Raza, an advocacy organization that focuses on Hispanic issues, said that she has found that some EEOC offices have addressed employment discrimination as it affects Hispanics, but that the "success rate" in addressing these concerns varies regionally.[812]

Another employment discrimination expert, who has had interaction with many EEOC district offices, described his experiences:

My experiences, my frustrations with EEOC have been, number one, the erratic differences between competency in various offices. Number two, the lack of direction, a sense that everybody was simply going

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[801] It should be noted that EEOC officials disagree with the assessments presented here and contend that the Agency employs "sound management practices to achieve its goals by empowering front-line employees and streamlining operations." EEOC has further stated that the Agency has "placed considerable emphasis on clearly articulating agency-wide priorities and goals that the field is required to implement and then following up to assure that these priorities and goals are being implemented effectively." Vargyas letter, p. 50.

[802] The majority of the companies and organizations interviewed by the Commission have offices nationwide that interact with EEOC district offices across the country. Their assessment of EEOC is based on their experiences with these various offices. For example, one company has 900 different locations throughout the United States. Because the company is in every State, staff have "off and on" contact with numerous EEOC offices all around the country. *See* Simmons interview, p. 3.

[803] *See, e.g.,* Faye Wilson, senior vice president of values initiatives, and Jocelyn Hunter, senior corporate counsel for employee relations, Home Depot, telephone interview, Mar. 6, 2000, p. 3 (hereafter cited as Wilson and Hunter interview); Smith interview, p. 4; Nancy Kreiter, research director, Women Employed Institute, interview in Washington, DC, Sept. 17, 1999, p. 4 (hereafter cited as Kreiter interview).

[804] *See* Wilson and Hunter interview, p. 3; Simmons interview, pp. 3–4. *See* William McNeal, Employment Law Center, telephone interview, Apr. 11, 2000, pp. 5–7, 9, 11–12, 17, 30; Stanley Mark, program director, Asian-American Legal Defense and Educational Fund, telephone interview, Apr. 10, 2000, pp. 11–13, 46.

[805] Smith interview, p. 4.

[806] Ibid.

[807] Ibid.

[808] Pigott interview, pp. 2–3.

[809] Wells interview, p. 4.

[810] Simmons interview, p. 4.

[811] Kreiter interview, p. 4.

[812] Carmen Jorge, civil rights policy analyst, National Council of La Raza, interview in Washington, DC, July 16, 1999, p. 5.

around trying to put out the hottest fires, rather than really focusing on preventing fires.[813]

The employment director of a nationwide civil rights legal organization explained what he has found throughout EEOC offices, noting that in some EEOC offices charging parties are given adequate information on EEOC and its complaint process at intake.[814] For example, in one office he said that the parties have been shown videotapes, and they are given information about their claim of discrimination, while in other offices this is not the case. In addition, at some offices charges are rejected at intake because they have been drafted by outside attorneys rather than EEOC staff.[815] He also noted that the level of staff training differs among offices. Consequently, there are variations in the competency of investigators.[816]

The variation in EEOC performance across offices has been attributed to the lack of leadership and enforcement of policies at the national level, as well as the lack of national performance standards.[817] Further, in the past there was very little emphasis at EEOC on local initiatives and, in recent years, there has been less emphasis on headquarters control.[818] It appears to some experts that the Agency is in a constant state of flux precisely because it has difficulty finding middle ground between field office autonomy and headquarters control. As a result, EEOC continually finds itself taking corrective actions.[819] Others see the need for EEOC headquarters to set national priorities and establish a method to enforce those priorities. It is not efficient for a national office to merely "dictate" priorities, but rather a national office or headquarters should "direct" the priorities.[820]

The U.S. Commission on Civil Rights (Commission) concurs with these assessments. However, the Commission also recognizes that there must be flexibility and input from all components at EEOC, both headquarters and regionally, in order for enforcement to be effective. Moreover, while there has to be room for district office staff to have some level of autonomy and decision-making capacity to carry out the Agency's enforcement responsibilities, particularly given budget and resource constraints, the Commission finds that there has been too much left to field offices' discretion and creativity. The amount of discretion given to field offices makes it almost impossible for headquarters to apply national standards or evaluate the complaint process. In short, the Agency's overall effectiveness cannot be easily assessed.

Self-monitoring and Evaluation

The CEP establishes the goal that the Agency should develop results-oriented measurements of performance that will encourage a quality-driven approach to enforcement, customer service, and effective legal-enforcement interaction.[821] EEOC's performance measures are incorporated into the Agency's Annual Performance Plans required by the Government Performance and Results Act (GPRA).[822] In addition, the CEP calls for operationally based standards and measures, which are in the design phase.

The measures of success included in the Agency's Fiscal Year 2001 Budget Request to Congress are:

- the proportion of category A charge resolutions that involve multiple aggrieved parties or discriminatory policies;
- the average charge processing time of private sector complaints;
- the number of offers to mediate charges under the Alternative Dispute Resolution Program;
- the proportion of resolved private sector charges that benefit victims of discrimination; and
- the proportion of cases filed in court that involve multiple aggrieved persons or discriminatory policies.[823]

[813] Tyner interview, p. 36.

[814] Seymour interview, pp. 6–7.

[815] Ibid.

[816] Ibid., pp. 44–45.

[817] Ibid., p. 46.

[818] Ibid., p. 5.

[819] Ibid.

[820] Richard Fotlin, legislative director and counsel, American Jewish Committee, interview in Washington, DC, Jan. 26, 2000, p. 2.

[821] EEOC, *Comprehensive Enforcement Program*, p. 4.

[822] Ibid.

[823] EEOC, *FY 2001 Budget Request*, pp. 23–24, 35–36.

For fiscal year 2001, the Agency's goals, contingent on adequate funding, are:

- to reduce the number of private sector charges in the administrative process to 28,000 by the end of the year;
- to resolve 60 percent of newly filed charges within 180 days;
- to have at least 20 percent of the private sector charges filed benefit victims of discrimination;
- to have 70 percent of the A1 cases failing conciliation contain evidence meeting litigation requirements.[824]

These measurements of success are critical, but in addition to the results-oriented measurements, EEOC must also take a qualitative look at the effectiveness of internal procedures. EEOC has never conducted any general customer satisfaction surveys, apart from its current attempts to review its mediation program. For an agency that functions entirely to serve the public, this is a gross oversight. As the Commission found during the fact finding for this report, a multitude of useful information could be gleaned by speaking with stakeholders and individuals who have participated in EEOC's charge handling process.

It is difficult for an outsider to evaluate the effectiveness of EEOC's enforcement efforts. Most notably this is because there are so many differences in procedures and practices and levels of experience across district offices. The Commission commends EEOC for planting seeds of innovation in its attempts to better enforce employment civil rights statutes; however, it is too soon to tell whether the changes of the past few years will be effective or beneficial in the long run. There are preliminary indications, based on commentary of experts who have tracked the Agency's progress over the years, that traces of improvement are evident. But the process is slow and the road a long one. Therefore, it is critical that EEOC continue to monitor itself and modify its processes and policies as soon as internal reviews deem them ineffective, as a preventive measure, so that the reactive nature of the Agency of former years can be transformed into a proactive one.

Without dispute, much of the Agency's inability to implement global improvement strategies is the result of years of survival on an emaciated budget. However, many recommendations for cost-effective strategies have been made that could continue to push the Agency on the upswing it has witnessed over the past five years. EEOC should take the initiative to review and implement these recommendations as another step toward improvement.

[824] Ibid., p. 39.

Definitions of Case Closure Terms

Administrative Closure: Charge closed for administrative reasons, which include failure to locate a charging party, charging party failed to respond to EEOC communications, charging party refused to accept full relief, closed due to the outcome of related litigation which establishes a precedent that makes further processing of the charge futile, charging party requests withdrawal of a charge without receiving benefits of having resolved the issue, no statutory jurisdiction.

Merit Resolutions: Charges with outcomes favorable to charging parties and/or charges with meritorious allegations. These include negotiated settlements, withdrawals with benefits, and successful and unsuccessful conciliations.

No Reasonable Cause: EEOC's determination of no reasonable cause to believe that discrimination occurred based upon evidence obtained in investigation. The charging party may exercise the right to bring private court action.

Reasonable Cause: EEOC's determination of reasonable cause to believe that discrimination occurred based upon evidence obtained in investigation. Reasonable cause determinations are generally followed by efforts to conciliate the discriminatory issues which gave rise to the initial charge. Some reasonable cause findings are resolved through negotiated settlements, withdrawals with benefits, and other types of resolutions, which are not categorized as either successful or unsuccessful conciliations.

Negotiated Settlements: Charges settled with benefits to the charging party as warranted by evidence of record. In such cases, EEOC and/or a FEPA is a party to the settlement agreement between the charging party and the respondent (an employer, union, or other entity covered by EEOC-enforced statutes).

Successful Conciliation: Charge with reasonable cause determination closed after successful conciliation. Successful conciliations result in substantial relief to the charging party and all others adversely affected by the discrimination.

Unsuccessful Conciliation: Charge with reasonable cause determination closed after efforts to conciliate the charge are unsuccessful. Pursuant to EEOC policy, the field office will close the charge and review it for litigation consideration. Because "reasonable cause" has been found, this is considered a merit resolution.

Withdrawal with Benefits: Charge is withdrawn by charging party upon receipt of desired benefits. The withdrawal may take place after a settlement or after the respondent grants the appropriate benefit to the charging party.

SOURCE: EEOC, "Definitions of Terms," accessed at <http://www.eeoc.gov/stats/define.html>.

CHAPTER 6

Employment Rights Enforcement by State, Local, and Tribal Governments

EEOC relies on the assistance of tribal employment rights offices (TEROs) of tribal governments and fair employment practices agencies (FEPAs) of state and local governments in its effort to eliminate employment discrimination. Through these joint efforts, EEOC can achieve greater results and reach more employers and their employees than it could if it were operating by itself.

TRIBAL EMPLOYMENT RIGHTS OFFICES

"The primary purpose of TERO is to ensure that . . . American Indians gain their rightful share of employment, business and training opportunities on or near [the] reservation. Jobs and training and other economic opportunities are fundamental to the self-image, social progress and economic prosperity of all human beings."[1]

The purpose of a tribal employment rights office is "[t]o access employment, training, business and economic opportunities for Indian and Native People."[2] TEROs are part of tribal economic development programs and assist in securing employment for tribal members and Native Americans.[3] This is achieved by

utilizing the inherent sovereignty of the tribes to develop and enforce a TERO ordinance which preserves and protects the tribes' right to preferential treatment, training, and business opportunities within the exterior boundaries of the reservation. Utilizing the tribes' powers of exclusion and existing federal Indian laws, the tribes can capture existing opportunities currently available to Indian workers but being monopolized by non-Indians. The concept recognizes tribal employment rights as sovereign and protected, much like water, mineral, hunting and fishing rights.[4]

Once a TERO and tribal employment rights ordinance are in place, the tribe can develop new job opportunities for members through negotiations with employers, public relations initiatives, and enforcement of tribal and federal employment laws and regulations.[5] The Council for Tribal Employment Rights (CTER) notes that American Indians can benefit from their special rights "only by passing a Tribal law imposing Indian preference requirements" and establishing a TERO.[6]

CTER has measured the impact of TEROs on Indian tribes.[7] First, Indian preference in contracting and subcontracting has increased in federally funded projects. Second, an average of more than 60,000 Native Americans have been placed in jobs every year; and almost one-third are making at least $11 per hour. In addition, between 400 and 500 compliance agreements with employers are signed each year. Over the years, TEROs have collected $16 million in back pay, wages, taxes, fees, fines, and contracts from

[1] Eli O. Hunt, "TERO Ordinance Promotes Job Resources," *The Ojibwe News*, vol. 11, no. 37 (June 25, 1999), p. 4.

[2] Council for Tribal Employment Rights (CTER), "Indian Preference & TERO Fact Sheet," Aug. 13, 1996, p. 4. CTER is a nonprofit organization with the mission "to eliminate all barriers prohibitive to Indian and Native People seeking these jobs and economic opportunities." CTER, "Project Summary," undated document, pp. 36–37.

[3] CTER, "TERO Self-Determination," fact sheet (undated), p. 1.

[4] Ibid.

[5] Ibid.

[6] CTER, "Indian Preference & TERO Fact Sheet," Aug. 13, 1996, p. 2.

[7] CTER, "Project Summary," undated document, pp. 44–45.

employers that discriminated against American Indians.[8]

Responsibilities of TEROs

Tribal employment rights offices are part of the economic strategies of Native American communities. TEROs have four primary responsibilities: (1) to enforce Indian preference rules, (2) to mediate charges of discrimination, (3) to assist in placing tribal members in jobs on or near the reservation, and (4) to provide training to businesses concerning Indian preference and other employment-related issues.[9] TEROs work with local employers to ensure their understanding of Indian preference and local customs. Employers must register with the tribe and comply with tribal rules regarding businesses on the reservation.[10]

In addition, most TEROs have the ability to conduct investigations and impose sanctions on employers for noncompliance with tribal ordinances. Further, several TEROs have incorporated nondiscrimination provisions into their ordinances, including provisions prohibiting sexual harassment and other forms of discrimination.[11]

TEROs are eligible to receive $25,000 per year from EEOC. To be eligible, a tribe must be "a Federally registered, land based American Indian Tribe that has a tribal employment rights office established under an ordinance passed by the tribal council."[12] In fiscal year (FY) 1999, EEOC funded 64 TEROs.[13]

Indian Preference

Title VII of the Civil Rights Act of 1964[14] as well as tribal employment rights ordinances allow for preference in hiring to be given to Indians working on or near reservations. Many tribes have passed such ordinances, which are modeled after the Indian hiring preference adopted by the federal government as part of the Indian Reorganization Act (IRA) of 1934.[15] The purpose of the IRA preference was to correct the negative effect of non-Indian administration on Indian tribes and allow the tribes to become self-governing.[16] Following these principles, the Supreme Court has upheld the preference.[17]

One example of a hiring preference ordinance is that of the Labor and Employment Ordinance of the Gila River Community in Sacaton, Arizona, which states:

> All Employers operating within the Exterior boundaries of the Gila River Indian Reservation, hereinafter called "RESERVATION," are hereby required to give preference to Indians in employment. Said Employers shall comply with the rules, regulations, guidelines of the "COMMUNITY" and the Employment Rights Office that set out the specific obligations of the employer in regard to Indian Preference.[18]

Under the contract with EEOC, TEROs are to negotiate agreements with employers concerning Indian preference.[19] TEROs also oversee the ap-

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[8] Ibid.

[9] U.S. Equal Employment Opportunity Commission (EEOC), "Uniform Contract Format," § C (undated); Tony Gallegos, former commissioner, EEOC, testimony submitted to the Special Committee on Aging, U.S. Senate, July 12, 1988, p. 3 (hereafter cited as Gallegos testimony). *See also* Joseph Manuel, director, Tribal Employment Rights Office, Gila River Indian Community, interview in Sacaton, AZ, Mar. 28, 2000 (hereafter cited as Manuel interview).

[10] Manuel interview, pp. 26–27; Larry Ketcher, director, Tribal Employment Rights Office, Cherokee Nation of Oklahoma, telephone interview, Mar. 14, 2000 (hereafter cited as Ketcher interview).

[11] Daniel Press, attorney, Van Ness-Feldman Law Firm, telephone interview, May 9, 2000, p. 5 (hereafter cited as Press interview).

[12] Executive Office of the President, Office of Management and Budget and U.S. General Services Administration, *1999 Catalog of Federal Domestic Assistance*, June 1999, § 30.009, p. 586.

[13] EEOC, *Directory of TEROs Under Contract by District Office*, June 1999.

[14] Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e (1994)); *see* 42 U.S.C. § 2000e-2(i) (1994).

[15] 25 U.S.C. 472.

[16] Within the federal government, the Indian hiring preference applies only to positions within the Bureau of Indian Affairs and Indian Health Services. Self-government is the key distinguishing characteristic from affirmative action programs, which are meant to remedy the current effects of past discrimination.

[17] Morton v. Mancari, 417 U.S. 535 (1974).

[18] Gila River Indian Community, Labor and Employment Ordinance—Title 12, § 12.102.

[19] EEOC, "Uniform Contract Format," § C (1)(a).

plications of contractors applying for work with the tribe.[20] Most tribes require employers to have a license from the tribal government to conduct business on the reservation. In addition, employers must submit to the TERO an Indian preference compliance plan and periodic reports on the number of tribe members and American Indians employed by the company.[21]

Through application and certification processes, TEROs negotiate with employers up-front concerning compliance with Indian preference rules in order to prevent discrimination.[22] According to the president of the Council for Tribal Employment Rights, "if you prevent discrimination, that should be worth as much as filing a complaint because you're actually stopping it before it starts."[23]

Charges of Discrimination

TEROs, unlike fair employment practices agencies, do not investigate charges of discrimination for EEOC. Their first priority is to negotiate disputes related to federal and tribal civil rights laws related to employment.[24] According to the director of the Gila Indian Community TERO, its mission is "to work things out equitably for all parties involved."[25] According to their tribal employment rights ordinance,

> [t]he Tribal Employment Rights Office is authorized to impose sanctions or penalties on any employer only as a last resort. The Director or TERO prior to imposition of sanction or penalties shall first attempt to resolve any alleged failure of compliance with this chapter by informal means.[26]

Most TEROs use a mediation process for resolving complaints of discrimination, similar to that of EEOC.[27] Rather than using their enforcement power, TEROs prefer to discuss the issues with the employer and provide training to the employer concerning the employment of Native Americans and employer responsibilities.[28] In this way, they can preserve job opportunities for American Indians and strengthen their relationship with local businesses.[29]

TEROs have 30 days with which to resolve a civil rights complaint. If unresolved after that time period, the TERO will formally intake the charge and forward it to EEOC for processing, unless an extension is granted by EEOC.[30] Few complaints, however, are forwarded to EEOC. For example, TERO staff for the Tohono O'Odham Nation estimated that approximately six charges were referred to EEOC in 1999.[31] The state and local coordinator for EEOC's Dallas and Phoenix district offices stated that they receive very few charges of discrimination each year from the TEROs in their districts.[32]

Job Placement

TEROs also act as a job placement service for tribe members.[33] According to the standard contract with EEOC, TEROs are to "[p]rovide referral services to provide a point of contact between employers operating on or near the reservation and residents of the reservation with skills required by those employers."[34] For example, the Gila River Indian Community TERO maintains a list of job opportunities with companies doing business on the reservation as well as a list of

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[20] Ketcher interview, pp. 5–7.

[21] Manuel interview, pp. 8, 15–16.

[22] Ketcher interview, pp. 5–7; Manuel interview, pp. 8, 15–16.

[23] Conrad Edwards, president, Council on Tribal Employment Rights, telephone interview, Apr. 5, 2000, p. 9 (hereafter cited as Edwards interview, Apr. 5, 2000).

[24] Edwards interview, Apr. 5, 2000; Ketcher interview; Manuel interview.

[25] Manuel interview, p. 6.

[26] Gila River Indian Community, Labor and Employment Ordinance—Title 12, § 12.107.

[27] Ketcher interview, p. 10; Manuel interview, p. 5; Marlo Norris-Enos, director, Willard Manuel, compliance officer, Catherine Whitman, administrative assistant, Robert Sixkiller, compliance officer, and Verna Espuma, contract specialist, Tribal Employment Rights Office, Tohono O'Odham Nation, telephone interview, Mar. 23, 2000, p. 6 (hereafter cited as Norris-Enos et al. interview).

[28] Press interview, p. 5; Manuel interview, pp. 25–26.

[29] Manuel interview, pp. 25–26.

[30] Ibid., p. 7; Ketcher interview, pp. 9–11; Norris-Enos et al. interview, p. 4; Antonio DeDios, state and local coordinator, and Paul Manget, enforcement manger, Phoenix District Office, EEOC, interview in Phoenix, AZ, Mar. 29, 2000, p. 3 (hereafter cited as DeDios and Manget interview, Phoenix District Office).

[31] Norris-Enos et al. interview, p. 7.

[32] DeDios and Manget interview, Phoenix District Office, p. 17; Jean Stout, state and local coordinator, Dallas District Office, EEOC interview in Dallas, TX, Feb. 29, 2000, pp. 2–3 (hereafter cited as Stout interview, Dallas District Office).

[33] Manuel interview, p. 17; Hunt, "TERO Ordinance Promotes Job Resources," p. 4.

[34] EEOC, "Uniform Contract Format," § C (1)(c).

tribe members seeking employment.[35] Businesses are required to inform the TERO of job openings. The placement service is available to those who wish to seek employment through the TERO, but members of the Gila River Indian Community are not required to go through the TERO when seeking employment.[36]

Training

An important part of the TERO function is to provide training to employers concerning the employment of Native Americans and Indian preference rules.[37] According to the EEOC contract, the TEROs should

> provide activities to enhance public awareness of the complaints resolution process under Tribal Ordinance for alleged discrimination occurring on the reservation, and of Title VII protection against unlawful employment discrimination both on and off the reservation.[38]

Through their mediation processes, TERO staff also attempt to educate employers on Indian culture and beliefs.[39] In addition, TEROs provide sensitivity training. For example, the Gila River Indian Community TERO provides training for management-level employees of businesses on the reservation. The course explains the culture of Indian tribes in the area and helps employers see Native Americans from a different perspective.[40]

Indian Preference under Title VII

Section 703(i) of the Civil Rights Act of 1964 provides an exception to the nondiscrimination provisions of Title VII by allowing certain employers to hire Native Americans over other applicants.[41] The law states:

> Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.[42]

However, the law failed to define "Indian reservation" or "on or near a reservation." Thus, EEOC was left to determine the meaning of these terms under the law and to clarify the meaning of the Indian preference provision of Title VII.[43]

Definitions of Indian Reservation and "Near a Reservation"

In 1988, EEOC issued a policy statement on Indian preference. Based on existing case law and regulations, EEOC chose to include "former Indian reservations in Oklahoma and land held by incorporated reservations in Alaska under the provisions of the Alaska Native Claims Settlement Act"[44] in its definition of "Indian reservation," in addition to the traditional meaning of the word reservation, which includes lands specifically reserved by the federal government.[45]

EEOC adopted the definition of "near" used by the U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP). OFCCP regulations state:

> It shall not be a violation of the equal opportunity clause for a construction or nonconstruction contract to extend a public[ly] announced preference in employment to Indians living on or near an Indian reservation in connection with employment opportunities on or near an Indian reservation. *The use of the word "near" would include all that area where a person seeking employment could reasonably be expected to commute to and from in the course of the work day.*[46]

Covered Employment Practices

EEOC's policy statement on Indian preference also addresses the issue of what employment practices are included in the Indian preference rule. After reviewing case law and federal statutes, EEOC determined that the term "employment practice" in Section 703(i) of Title VII goes beyond hiring practices. EEOC states:

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[35] Manuel interview, p. 17.

[36] Ibid., pp. 19–20.

[37] Ibid., pp. 19, 26; Hunt, "TERO Ordinance Promotes Job Resources," p. 4.

[38] EEOC, "Uniform Contract Format," § C (1)(b).

[39] Manuel interview, p. 26.

[40] Ibid.

[41] 42 U.S.C. § 2000e-2(i) (1994).

[42] *Id.*

[43] EEOC, "Policy Statement on Indian Preference Under Title VII," EEOC Notice No. N-915-027, May 16, 1988 (reprinted in EEOC, *Compliance Manual*, pp. N:3421–31).

[44] Ibid., p. N:3426.

[45] Ibid., p. N:3423.

[46] 41 C.F.R. § 60-1.5(a)(6) (1999) (emphasis added).

[F]or Title VII purposes, employment practices under which preferential treatment may be accorded to Indians are those requiring the selection of individuals to fill positions, how ever created, or to retain positions when jobs are eliminated. Accordingly, the preference is applicable to employment decisions involving, for example, hiring, promotion, transfer, and reinstatement as well as to layoffs and reductions in force.[47]

EEOC, however, declined to determine whether the term "employment practice" included other terms, conditions, or privileges of employment. Thus, it is unclear if other issues such as compensation, benefits, assignments, and training are included in Indian preference rules.[48]

Tribal Affiliation

The final section of EEOC's policy guidance on Indian preference addresses the issue of whether Section 703(i) allows for a distinction among different tribes in terms of Indian preference. While Title VII does not clarify this issue, regulations issued by OFCCP and the U.S. Department of the Interior clearly prohibit consideration of tribal affiliation when making employment decisions based on Indian preference.[49] Thus, EEOC concluded:

[I]n enacting Section 703(i), Congress intended to encourage the extension of employment opportunities to Indians generally, without allowing discrimination among Indians of different tribes. Under Section 703(i), the exception applies to employment practices under which preferential treatment is given to "*any* individual because he is an Indian living on or near a reservation" (emphasis added). The statutory language supports the conclusion that Congress did not intend to permit tribal distinctions among Indians otherwise qualifying for such preferential treatment.[50]

Thus, although the employment practices of employers on or near Indian reservations may favor American Indians over other employees, employers may not discriminate among Native Americans on the basis of religion, sex, or tribal affiliation.[51]

It has been argued, however, that because preference based on tribal affiliation is permissible under the 1994 amendments of the Indian Self-Determination and Education Assistance Act of 1975,[52] there is potential for conflict with the EEOC guidelines.[53] The 1994 amendments state that tribal preference is admissible with respect to contracts issued pursuant to the act.[54] However, the tribes themselves, because they are exempt from Title VII, may grant employment preference based on tribal affiliation.[55] Therefore two legal authors note:

[A] potential conflict may exist for a nontribal employer operating on a reservation if the particular tribe imposes upon employers a preference for its own members under tribal law in the tribe's Tribal Employment Rights Ordinance (TERO). Under the applicable TERO, the employer may be required to follow that preference. If the employer exercises any preference based on tribal affiliation, however, he may violate Title VII according to the EEOC's 1988 Policy Statement.[56]

EEOC, in fact, has addressed this issue, although not in any written guidance or policy. Staff in EEOC's Phoenix District Office recently dealt with a charge that the TERO on the Navajo reservation was requiring businesses to give first preference to Navajos. EEOC treated this as a national origin discrimination case.[57] EEOC staff stated that this was not permitted under Title VII, unless the employer was the tribe itself.[58] The Gila River Indian Community notes this distinction in its educational materials for employers, stating that there shall be four levels of priority (first preference being given to members of the Gila River Indian Community), ex-

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[47] EEOC, "Policy Statement on Indian Preference Under Title VII," p. N:3429.

[48] Ibid.

[49] Ibid., p. N:3431.

[50] Ibid.

[51] Ibid., p. N:3430.

[52] Pub. L. No. 103-413, 108 Stat. 4250 (1994) (codified at 42 U.S.C. § 450 (1994)).

[53] William Buffalo and Kevin J. Wadzinski, "Application of Federal and State Labor and Employment Laws to Indian Tribal Employers," *University of Memphis Law Review*, vol. 25 (Summer 1995), p. 1375.

[54] 25 U.S.C. § 450e(c).

[55] EEOC, "Policy Statement on Indian Preference Under Title VII," p. N:3431.

[56] Buffalo and Wadzinski, "Application of Federal and State Labor and Employment Laws to Indian Tribal Employers," p. 1375.

[57] DeDios and Manget interview, Phoenix District Office, pp. 23–27.

[58] Ibid.

cept where prohibited by federal laws and regulations.[59]

Applicability of Federal Civil Rights Laws to Indian and Non-Indian Employers and Employees

Both Title VII and the Americans with Disabilities Act (ADA)[60] specifically exempt tribes from the definition of employer. Section 701 of Title VII states:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but the term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service. . . .[61]

The Age Discrimination in Employment Act (ADEA)[62] and the Equal Pay Act,[63] however, do not specifically exclude Indian tribes from their reach.

However, there are conflicting interpretations of the Title VII exemption, and areas where EEOC jurisdiction on reservations is unclear.[64] At least one author has argued:

> Neither Title VII nor its legislative history explicitly state that tribal companies that hire non-Native American employees enjoy absolute exemption from the statute. To the contrary, the vague language excluding Native American tribes and the legislative purpose behind it indicate congressional intent to bar Title VII claims only in very limited situations. Specifically, the legislative history demonstrates an intent to protect tribes from suits only in two situations: employment decisions specifically involving tribal government, and the preferential hiring of a Native American over a non-Native American.[65]

In contrast, according to the former general counsel for the Council for Tribal Employment Rights, federal law applies on reservations unless Congress specifically exempts tribes from the force of the law.[66] According to the former general counsel, the Title VII exemption for tribes is strictly for tribes in their capacity as employers. The statute does not distinguish between the tribe as a government and the tribe as a business; it simply says the "tribe" is not an employer under the law.[67] He stated that there are three scenarios: (1) tribal governments and tribally owned businesses are exempt from Title VII; (2) Indian-owned businesses on the reservation are subject to Title VII; and (3) non-Indian-owned businesses on the reservation are subject to Title VII.[68]

Both sides of this argument rely on the legislative history of Title VII to argue their positions. In particular, both quote Senator Karl Mundt (R-SD), who said:

> The reason why it is necessary to add these words is that Indian tribes, in many parts of the country, are virtually political subdivisions of the Government. To a large extent many tribes control and operate their own affairs, even to the extent of having their own elected officials, courts and police force. This amendment would provide to American Indian tribes in their capacity as a political entity, the same privileges accorded to the U.S. Government and its political subdivisions, to conduct their own affairs and economic activities without consideration of the provisions of the bill.[69]

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[59] Joseph Manuel, director, Gila River Indian Community, Tribal Employment Rights Office, "Compliance Information Letter," Feb. 24, 2000.

[60] Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101–12213 (1994)); *See* 42 U.S.C. § 2000e(b) (1994); 42 U.S.C. § 1211(5)(B)(i) (1994).

[61] 42 U.S.C. 2000e(b).

[62] Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634 (1994 and Supp. IV 1998)); EEOC v. Cherokee Nation, 871 F.2d 937, 938–39 (10th Cir. 1989) (holding that the ADEA does not apply to tribes absent express Congressional language abrogating Native American treaty rights or their sovereign immunity).

[63] Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. §206 (1994)).

[64] Conrad Edwards, president, Council on Tribal Employment Rights, telephone interview, May 16, 2000, pp. 1–2 (hereafter cited as Edwards interview, May 16, 2000).

[65] Scott D. Danahy, "License to Discriminate: The Application of Sovereign Immunity to Employment Discrimination Claims Brought by Non-Native American Employees of Tribally Owned Businesses," *Florida State University Law Review*, vol. 25 (Spring 1998), pp. 688–89.

[66] Press interview, p. 2.

[67] Ibid.

[68] Ibid. *See also* Buffalo and Wadzinski, "Application of Federal and State Labor and Employment Laws to Indian Tribal Employers," p. 1371.

[69] 110 Cong. Rec. 13702 (1964) (statement of Sen. Karl Mundt, R-SD).

One author states that Congress included the Title VII exemption for Indian tribes in order "to recognize their status as self-governing entities."[70] However, another author argues that Senator Mundt's clarification, "in their capacity as a political entity," makes it clear that "the intent was to protect the employment decisions of tribes relating to tribal government, not to deny non-Native American employees of Native American-owned corporations their rights under Title VII."[71] Thus, according to that author, tribally owned businesses were not intended to be exempt from civil rights laws related to employment.

Court decisions, as well, are inconsistent concerning the applicability of Title VII, the ADEA, and other civil rights laws to non-Indian employees of Native American-owned business enterprises.[72] For example, in *Wardle v. Ute Indian Tribe*,[73] the 10th Circuit discussed the applicability of Title VII to American Indian tribes. In this case, the plaintiff alleged he was discriminated against on the basis of his race when he was discharged from his position as a police officer for the tribe and replaced by a tribal member. Wardle's termination allowed a tribal member to work in his place thus benefiting the economic development of the tribe. Nonetheless, Wardle alleged that his discharge violated the Indian Civil Rights Act, the Fifth Amendment to the U.S. Constitution, and other civil rights provisions.[74] The court concluded that these provisions did not provide Wardle with a federal cause of action because the civil rights provisions he relied upon "do not specifically prohibit preferential employment of tribal members by Indian tribes."[75] In addition, the court decided that Title VII was directly related to the plaintiff's claim because he alleged that he was solely discharged because of his race, which brings it "squarely within the provision of Title VII of the Civil Rights Act of 1964 which declares that it shall be an unlawful employment practice for an employer . . . to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin."[76]

The court noted, however, that Indian tribes and Indian-owned businesses operating on or near Indian reservations are exempt from Title VII. According to the court, the exemptions show Congressional sentiment that Indian preference in the context of tribal or reservation employment did not constitute racial discrimination.[77]

In 1989, the U.S. District Court of Appeals for the 10th Circuit heard the case of *EEOC v. Cherokee Nation*.[78] In this case, the Cherokee Nation asserted that tribal sovereign immunity precluded EEOC jurisdiction over the tribe in regard to an Age Discrimination in Employment Act case.[79] Although the District Court for the Eastern District of Oklahoma had held that the legislative history of the ADEA made it clear that Congress intended the act to apply to Indian tribes, the court of appeals determined that because there was no clear indication of Congressional intent (by not specifying the reach of the act to Native Americans and American Indians), EEOC could not prove it had the authority to investigate charges of discrimination against the Cherokee Nation.[80] Similarly, the Eighth Circuit concluded in the 1993 case, *EEOC v. Fond du Lac Heavy Equipment*,[81] that EEOC had no jurisdiction over the Fond du Lac Band of Lake Superior Chippewa.[82]

Other courts have argued that Title VII and other federal laws allow for a distinction between tribal government matters and commercial activities of Indian-owned businesses and employers.[83] For example, in *Donovan v. Coeur*

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[70] Vicki J. Limas, "Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency," *Arizona State Law Journal*, vol. 26 (Fall 1994), p. 715.

[71] Danahy, "License to Discriminate," p. 689.

[72] *See generally* Buffalo and Wadzinski, "Application of Federal and State Labor and Employment Laws to Indian Tribal Employers," pp. 1365–98; Danahy, "License to Discriminate," pp. 679–702; Limas, "Application of Federal Labor and Employment Statutes to Native American Tribes," pp. 681–746.

[73] 623 F.2d 670 (10th Cir. 1980).

[74] *Id.* at 671–72.

[75] *Id.* at 672.

[76] *Id.*

[77] *Id.*

[78] 871 F.2d 937 (10th Cir. 1989).

[79] *Id.* at 938.

[80] *Id* at 939.

[81] 986 F.2d 246 (8th Cir. 1993).

[82] *Id.* at 251.

[83] *See* Danahy, "License to Discriminate," p. 690; Limas, "Application of Federal Labor and Employment Statutes to Native American Tribes," p. 721.

d'Alene Tribal Farm,[84] the Ninth Circuit ruled that tribal sovereignty applies only to tribal government and not to tribal business enterprises.[85] As such, the court found that the tribal business fell within the definition of employer set forth in the Occupational Safety and Health Act and was therefore subject to regulation by the Occupational Safety and Health Administration.[86]

EEOC has been silent on the issue of jurisdiction in its Compliance Manual and policy statements. According to one author, the increasing employment of non-Native Americans by tribal businesses calls for clarification of whether civil rights protections are afforded to such employees.[87] Thus, because of the lack of EEOC guidance, the ambiguity of the laws, and the disagreement among the district courts, CTER would like to develop a series of tribal Native American work force protection laws that would protect the civil rights of Indians and non-Indians working on reservations.[88] Such legislation would provide civil rights protections to tribes and tribal enterprises that are not available under existing civil rights laws.[89] According to CTER's proposal, such legislation:

> will strengthen Tribal and Alaska Native governments by providing a new body of sovereignty-based Tribal legislation which are culturally appropriate and designed to offer equal pay, safety, anti-discrimination and anti-harassment protections currently not afforded Indian reservation and Native community workforces.[90]

CTER recommends that several agencies assist in the development of this legislation, including EEOC, OFCCP, the Bureau of Indian Affairs, and the National Labor Relations Board.[91]

[84] 751 F.2d 1113 (9th Cir. 1985).

[85] *Id.*

[86] *Id.*

[87] Danahy, "License to Discriminate," p. 680.

[88] Edwards interview, Apr. 5, 2000, pp. 13–16.

[89] Edwards interview, May 16, 2000, attachment, "Project Abstract for Administration for Native Americans Grant Proposal."

[90] Edwards interview, May 16, 2000, attachment.

[91] Edwards interview, May 16, 2000, p. 2.

The Relationship between EEOC and TEROs

The Evolution of TERO Programs

The EEOC-TERO relationship began in the mid-1970s.[92] A group of Navajos who were working on the construction of the Navajo generating station, located on the Navajo reservation, alleged that construction companies and unions were discriminating against applicants for employment. The agreements between the companies and the tribe included a provision requiring that preference be given to Navajos. However, the companies and unions allegedly were ignoring that requirement and/or using a variety of techniques to get around it.[93] First, a complaint was filed with the Office of Federal Contract Compliance Programs. Later, EEOC was called upon to investigate.[94] EEOC worked with OFCCP and the tribal government and determined that discrimination had occurred.[95] The case was settled, but as a result, the Navajo Nation determined that it needed its own office to enforce its contracts and established what was effectively the first TERO, the Office of Navajo Labor Relations. Subsequently, EEOC began working with several tribes to establish tribal employment rights offices, which later entered into contracts with EEOC.[96]

Since 1976, EEOC has provided funding to TEROs.[97] At first, EEOC funded a pilot project to see if there was interest among the tribes in working with EEOC to resolve discrimination complaints.[98] EEOC hired an Indian-owned consulting firm to set up the initial TEROs.[99] Tribes were selected based on "interest, the potential for a successful model program and the tribes' willingness to commit at least one staff person to

[92] Edwards interview, Apr. 5, 2000, p. 3.

[93] Press interview, p. 3. For example, unions allegedly would say that they would give preference to Navajos if they had as much seniority in their unions as a non-Indian; however, since Navajos had not had the chance to work construction before, very few of them had seniority. Other discriminatory practices included criteria that were not bona fide occupational criteria. Ibid.

[94] Ibid.

[95] Edwards interview, Apr. 5, 2000, p. 4.

[96] Press interview, pp. 3–4.

[97] EEOC, "Making Rights A Reality," *FY 1996 Budget Request* (Washington, DC: Submitted to the Congress of the United States, February 1995), p. 74.

[98] Press interview, p. 3; Edwards interview, Apr. 5, 2000, pp. 4–5.

[99] Gallegos testimony, p. 3.

the program."[100] In the first year of the TERO program, EEOC awarded contracts of $7,500 to 15 TEROs. By 1978, EEOC had contracts with 20 tribes.[101] Today there are 130 Indian tribes and 150 Alaska Native Villages that have enacted tribal employment rights ordinances.[102] EEOC has contracts with 64 TEROs.[103]

Current Interaction between EEOC and TEROs

Overall, the TEROs the Commission contacted for this project seem to have good working relationships with EEOC. For example, the TERO director of the Cherokee Nation of Oklahoma stated that EEOC has always met the needs of his office.[104] Similarly, the director of the Gila River Indian Community TERO said that the state and local coordinator of the Phoenix District Office is always accessible and responsive.[105]

EEOC conducts some training for TEROs.[106] For example, in 1999, EEOC held two training sessions for TEROs in Oklahoma. The Dallas District Office of EEOC sought the input of local tribes when developing the training courses.[107] However, the director of the Tohono O'Odham Nation TERO, who was recently appointed to the position, noted that she and her staff would like more training on mediation, Title VII, and remedies under Title VII.[108]

Further, EEOC spends little time monitoring the work of TEROs, compared with the time spent on FEPA matters. State and local coordinators responsible for overseeing contracts with Indian tribes spend as little as 5 percent of their time on TERO issues.[109] In addition, there is little high-level interaction between EEOC headquarters and the TEROs or the Council for Tribal Employment Rights.[110] Although the chairwoman of EEOC, Ida L. Castro, met with community groups, including TERO staff, while visiting the Phoenix District Office in March 2000, previously TEROs had little interaction with EEOC top management.[111] According to CTER, in the past, when EEOC commissioners had asked for TERO input, no actions were ever taken to address the issues CTER brought to their attention.[112] The president of CTER stated:

> Basically, what we have is a nonprofit corporation relating to the bureaucracy so it's not a leader-to-leader kind of relationship, but I'd like to see that reestablished. . . . Where the commissioners hold hearings in Indian country, come out and see how things are really going, where they visit Indian country.[113]

The former general counsel of CTER also noted that although occasionally EEOC has been an ally to TEROs, and certain EEOC commissioners have supported the TERO program, EEOC has never been willing to fight for additional funds for the TERO program. As such, TEROs primarily have been "step-children" of EEOC compared with FEPAs and other EEOC programs.[114]

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[100] Ibid.

[101] Edwards interview, Apr. 5, 2000, p. 6.

[102] CTER, "Abstract," Mar. 9, 2000, pp. 1–2.

[103] EEOC, *Directory of TEROs Under Contract by District Office*, June 1999. *See* table 6-1 for a listing of TEROs under contract with EEOC. Alaska villages do not have the sovereign authority that other Indian tribes have, partially because they do not have reservations or equivalent jurisdiction. Thus, they lack the legal authority that the TEROs have and, as such, do not have a similar relationship with EEOC. Press interview, pp. 4–5.

[104] Ketcher interview, p. 13.

[105] Manuel interview, p. 11.

[106] According to EEOC's legal counsel: "In the past, the agency conducted a national TERO conference every two or three years. However, in response to concerns raised by the TEROs that a national conference did not permit them to discuss local issues in depth, EEOC began to hold regional conferences. For the last three years, EEOC has given each of the district offices $1,000 for each TERO in its jurisdiction to conduct training for those TEROs on the local level." Ellen J. Vargyas, legal counsel, EEOC, letter to Ruby G. Moy, staff director, U.S. Commission on Civil Rights (USCCR), re: draft report, July 7, 2000, p. 53 (hereafter cited as Vargyas letter).

[107] Ketcher interview, pp. 13–14.

[108] Norris-Enos et al. interview, p. 13.

[109] EEOC, Los Angeles District Office, response to Commission request for information, Jan. 20, 2000, item 13; EEOC, Dallas District Office, response to Commission request for information, Jan. 20, 2000, item 13.

[110] Edwards interview, Apr. 5, 2000, pp. 32–35. EEOC maintains that the relationship is designed to occur at the local level, not the national level. Vargyas letter, p. 54. Nonetheless, the TERO program must be a national priority for it to receive the proper attention and funding at the local level.

[111] Manuel interview, p. 13.

[112] Edwards interview, Apr. 5, 2000, pp. 32–35.

[113] Ibid., p. 32.

[114] Press interview, pp. 5–6.

TABLE 6-1

Tribal Enforcement Rights Offices under Contract with EEOC by District Office, 1999

Albuquerque, NM
- Pueblo of Zuni (NM)

Dallas, TX
- Cherokee Nation of Oklahoma
- Cheyenne and Arapaho Tribes of Oklahoma
- Comanche Indian Tribe (OK)
- Four Tribes Consortium of Oklahoma
- Kiowa Tribe of Oklahoma
- Otoe-Missouria Tribe of Oklahoma
- Seminole Nation of Oklahoma
- Wichita and Affiliated Tribes (OK)

Detroit, MI
- Keweenaw Bay Indian Community (MI)

Los Angeles, CA
- Campo Band of Mission Indians (CA)
- Chemehuevi Indian Tribe (CA)
- Moapa Band of Paiutes (NV)
- Shoshone-Paiute Tribes (NV)

Milwaukee, WI
- Bois Forte Band of Chippewa (MN)
- Fond du Lac Reservation (MN)
- Ho-Chunk Nation (WI)
- Red Lake Band of Chippewa (MN)

Denver, CO
- Blackfeet Nation (MT)
- Cheyenne River Sioux Tribe (SD)
- Chippewa Cree Tribe (MT)
- Crow Tribal Council (MT)
- Fort Peck Tribes (MT)
- Gros Ventre/Assiniboine Tribes Fort Belknap Community Council (MT)
- Lower Brule Sioux Tribe (SD)
- Northern Cheyenne Tribe (MT)
- Oglala Sioux Tribe (SD)
- Rosebud Sioux Tribe (SD)
- Shoshone and Arapahoe Tribes (WY)
- Sisseton-Wahpeton Sioux Tribe (SD)
- Southern Ute Tribe (CO)
- Spirit Lake Sioux Tribe (ND)
- Standing Rock Sioux Tribe (ND)
- Three Affiliated Tribes, Fort Berthold Reservation Mandan, Hidatsa and Arikara Tribes (ND)
- Turtle Mountain Band of Chippewa Indians (ND)
- Ute Mountain Ute Tribe (CO)

Miami, FL
- Seminole Tribe of Florida

New York, NY
- Narragansett Indian Tribe (RI)
- Tribal Governors, Inc. (ME)

Phoenix, AZ
- Colorado River Indian Tribes (AZ)
- Gila River Indian Community (AZ)
- The Hopi Tribe (AZ)
- Hualapi Tribal Council (AZ)
- Pascua Yaqui Tribe of Arizona
- San Carlos Apache Tribe (AZ)
- Tohono O'Odham Nation (AZ)
- White Mountain Apache Tribe (AZ)

Seattle, WA
- Coeur D'Alene Tribe of Idaho
- Confederated Tribes of the Colville Reservation (WA)
- Confederated Tribes of the Umatilla Indian Reservation (OR)
- Kootenai Tribe of Idaho (OR)
- Lower Elwha Klallam Tribe (WA)
- Lummi Nation (WA)
- Markah Tribe (WA)
- Metlakatla Indian Community (AK)
- Nez Perce Tribe (ID)
- Puyallap Tribe of Indians (WA)
- Quinault Indian Nation (WA)
- Shoshone-Bannock Tribe (ID)
- Spokane Tribe of Indians (WA)
- Swinomish Tribal Community (WA)
- Tulalip Tribes of Washington
- Yakama Indian Nation (WA)

San Francisco, CA
- Hoopa Valley Tribe (CA)

SOURCE: U.S. Equal Employment Opportunity Commission, *Directory of TEROs Under Contract by District Office*, June 1999.

Strategic Planning and Budgeting

TERO appropriations are not a separate budget category in EEOC's budget; TERO funding comes from the budget for state and local programs.[115] Thus, Congress does not specifically appropriate money for EEOC's TERO contracts. As such, not all TEROs are funded by EEOC. In 1999, EEOC funded 64 of the more than 100 TEROs in the country.[116]

EEOC's Strategic Plan contains only two references to TEROs (and FEPAs). In its discussion of the progress it has made since 1994, EEOC states that it has

> restructured its relationship with the state fair employment practices agencies and the tribal employment rights organizations to enhance the efficiency and effectiveness of these programs. When enacting Title VII Congress recognized a significant role for state and local fair employment practices agencies and tribal employment rights organizations in fighting workplace discrimination. We continue to work with them to improve their enforcement capability by providing technical assistance, training, and technology.[117]

In addition, to achieve its general goal of promoting equal opportunity in employment by enforcing civil rights laws related to employment, EEOC states that it will work with FEPAs and TEROs "to improve employment discrimination charge processing and other approaches for addressing workplace discrimination."[118]

There are relatively few references to TEROs in the EEOC FY 2001 budget request. In its discussion of FY 1999 highlights and results, there is no reference to TEROs except to note that EEOC "recognizes the valuable role" both FEPAs and TEROs play in their "mutual mission to eradicate employment discrimination at the workplace."[119] However, EEOC provides no discussion of accomplishments of TEROs or its TERO program for FY 1999.

For both FY 2000 and FY 2001, EEOC plans to provide training to TEROs, though the types of training planned are not discussed in detail.[120] Also in FY 2000, EEOC plans to "[c]ontinue to promote and protect the employment rights of Native Americans employed on or near Indian Reservations," yet provides no explanation as to how it will accomplish this.[121]

EEOC Guidance on TEROs

EEOC has issued virtually no guidance on TEROs. The State and Local Programs Handbook is silent on the matter.[122] Further, there is no mention of TEROs on EEOC's Web site.[123] The EEOC Compliance Manual contains only one policy statement concerning Native Americans and American Indians—the statement on Indian preference.[124] However, the Dallas District Office developed a TERO handbook a few years ago.[125] In addition, an EEOC reference guide and EEOC participant workbook for TERO directors are available from the Council for Employment Rights; however these documents have not been updated since the mid-1980s.[126]

FAIR EMPLOYMENT PRACTICES AGENCIES

State and local laws concerning fair employment practices have been in existence since 1945, when both New York and New Jersey passed laws identifying unlawful employment practices.[127] By 1964, 25 states had similar laws.[128] Many of these laws created specific agencies designed to enforce the state and local laws.[129]

When the Civil Rights Act of 1964 was passed, Congress recognized the potential contributions of such agencies. Therefore, a new agency, EEOC, was instructed to work with FEPAs in resolving charges of employment dis-

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[115] EEOC, "A Proud Legacy—A Challenging Future," *FY 2001 Budget Request* (Washington, DC: Submitted to the Congress of the United States, February 2000), p. 65.

[116] Edwards interview, Apr. 5, 2000.

[117] EEOC, "Strategic Plan: 1997–2002," September 1997, pp. 12–13.

[118] Ibid., pp. 36–37.

[119] EEOC, *FY 2001 Budget Request*, p. 57.

[120] Ibid., pp. 59–60.

[121] Ibid., p. 60.

[122] EEOC, *State and Local Programs Handbook*, Dec. 17, 1998, § 14. This section contains no information and is "reserved." Ibid., p. 75.

[123] *See* <http://www.eeoc.gov>.

[124] EEOC, "Policy Statement on Indian Preference Under Title VII," pp. N:3421–N:3431.

[125] Stout interview, Dallas District Office, pp. 15–16.

[126] CTER, "Council for Tribal Employment Rights," fact sheet (undated), p. 5; Edwards interview, May 16, 2000, p. 2.

[127] Bureau of National Affairs (BNA), *State Fair Employment Laws and Their Administration*, 1964, p. 1.

[128] Ibid.

[129] Ibid., p. 3.

crimination.[130] Many states had antidiscrimination laws that designated agencies to enforce the ordinances long before the enactment of Title VII.[131] With the inception of EEOC, some legislators and researchers viewed EEOC as the federal counterpart to these agencies and recognized the potential contributions of these agencies in resolving charges of employment discrimination at the federal level.[132]

The relationship between the fair employment practices agencies and EEOC has evolved over time. The EEOC-FEPA relationship began in 1966 with a small research grant for $165,000 involving 11 FEPAs. Later, EEOC funded pilot projects to train FEPA personnel to expand their enforcement activities. Today, the required EEOC-FEPA partnership is a formal component within the EEOC enforcement process with a separate budget for the State and Local Program.[133]

Requirements of the EEOC-FEPA Partnership

Basic Requirements

Generally, FEPAs are certified or designated state or local agencies that can enforce state antidiscrimination ordinances covering a broad range of civil rights and human rights laws under which EEOC can dual-file Title VII, ADEA, and ADA charges.[134] Dual-filing is the term used to describe the filing of charges over which both EEOC and the FEPA have jurisdiction. According to EEOC, "[c]harges are dual-filed to ensure that charging parties' rights are timely protected under both federal statutes and state or local laws."[135] States with laws similar in enforcement and intent to the laws enforced by EEOC contract with EEOC for the resolution of charges that can be dual-filed under the state and federal law.[136]

Under this partnership, there are certain requirements that EEOC and FEPAs must meet in order to carry out their joint enforcement responsibilities. At the initial passage of Title VII, certain sections within the law laid the foundation of the program. For example, Section 706 of Title VII sets forth the requirement that EEOC defer charges to state and local FEPAs that meet certain requirements (these FEPAs are sometimes called the "706" agencies).[137] EEOC also was required to defer charges to FEPAs within a 60-day period prior to EEOC processing.[138] In addition, the law requires that EEOC give "substantial weight" to the determinations of FEPAs in its own charge processing.[139] EEOC's contractual relationship with FEPAs permits EEOC to coordinate the resolution of dual-filed charges using cooperative worksharing agreements to avoid any duplication of charge processing.[140] With the annual State and Local Program appropriation, EEOC contracts with FEPAs to provide a set contribution for each acceptable charge resolution, up to a certain level, as supplemental funding to the FEPAs' state or local budgets.[141]

Over the years, with the expansion of the FEPAs' role and involvement in EEOC's complex

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130 42 U.S.C. § 2000e-5 (1994).

131 BNA, *State Fair Employment Laws and Their Administration*, p. 1.

132 *See* USCCR, *Federal Civil Rights Enforcement Effort*, 1971, p. 85.

133 *See* EEOC, Office of Field Programs, *State and Local Programs Handbook*, Dec. 17, 1997, pp. 4–5. The handbook serves as a resource for EEOC district directors, field office staff who work in this area, and FEPAs. It explains roles and responsibilities, as well as the procedures within the program. The handbook reflects the working partnership between the EEOC and FEPAs, is for general guidance, and does not establish policy. Ibid., p. 1.

134 42 U.S.C. § 2000e-5 (1994); *See* USCCR, *Helping Employers Comply with the ADA: An Assessment of How the United States Equal Employment Opportunity Commission Is Enforcing Title I of the Americans with Disabilities Act*, September 1998, p. 48.

135 EEOC, *State and Local Programs Handbook*, p. 8.

136 USCCR, *Helping Employers Comply with the ADA*, p. 48.

137 *See* 42 U.S.C. § 2000e-5(b) (1994).

138 42 U.S.C. § 2000e-5(c-d) (1994); EEOC, *State and Local Programs Handbook*, p. 1.

139 Congress amended Title VII through the Equal Employment Opportunity Act of 1972, adding the requirement that EEOC give substantial weight to the findings of FEPAs in its complaint processing. Prior to this statutory requirement, there was a lack of uniformity in the use that EEOC district offices made of state or local investigations or conclusions when the EEOC assumed jurisdiction after 60 days. The substantial weight review is given to final actions of FEPAs in order to accord substantial weight to their findings in charges. EEOC, *State and Local Programs Handbook*, pp. 2, 10. Also in 1972, significant effort was devoted to developing guidance for FEPAs and district offices on measuring the quality and quantity of FEPA charge processing. Ibid., p. 4.

140 Ibid., p. 1. A worksharing agreement is an agreement negotiated between the EEOC district office and the FEPA to coordinate the timely processing of dual-filed charges and to prevent duplication of effort. It is required as a condition of a charge resolution contract. Ibid., p. 10.

141 Vargyas letter, p. 54.

charge processing system, specific State and Local Program regulations have been developed,[142] and requirements and procedures have been included in EEOC's Compliance Manual.[143] These requirements and procedures cover responsibilities of both EEOC and the FEPAs, the types of charges handled by the FEPA,[144] the filing procedures, timelines in carrying out the dual filling process, and the exceptions in the use of FEPAs for certain types of charges.[145] The Compliance Manual also discusses the investigation requirements and procedures for charge processing and EEOC's reviewing of FEPA final actions.[146]

FEPA Certification and Designation Procedures

State and local FEPAs receive payments to investigate and resolve employment discrimination charges. In order to receive payments, there has to be a contract between EEOC and the FEPAs.[147] A FEPA must meet certain requirements to be eligible for a contract. A state or local agency must have been "designated" as a FEPA for at least four years before its work can be "certified" by EEOC.[148] To become a "designated" FEPA, the state or local agency must be in a locality that has a fair employment practice law and must be an agency or authority empowered to seek or grant relief or institute criminal proceedings under the law.[149] In addition, the agency must submit a written request to the director of Field Programs with a copy of its fair employment practice laws and regulations.[150] The certification is based on EEOC's acceptance of the findings and resolutions of designated agencies with respect to cases processed under contracts with those agencies without individual, case-by-case substantial weight review by EEOC.[151] Because not all laws are compatible, FEPA contracts may specify that only certain statutes may be handled by the FEPA.

When a state or local agency not previously designated to receive charges of employment discrimination applies to EEOC for designation, the procedures are somewhat different and more complicated. The process begins with the Office of Field Operations' State and Local Programs (SLP) staff, who receive an application from an agency seeking designation.[152] The SLP staff reviews the written request or application to see if the agency meets the criteria set out in the regulation. The criteria include that the state or local agency has a fair employment practice law that makes unlawful employment practices based upon race, color, religion, sex, national origin, or disability; and that the state or local political subdivision has either established a state or local authority or authorized an existing state or local authority that is empowered with respect to employment practices found to be unlawful, to do one of three things: grant relief from the unlawful practice, seek relief from the practice, or institute criminal proceedings with respect to the practice.[153]

SLP staff are to notify the appropriate EEOC district director of the "designation application," and comments are solicited as to his or her knowledge of the applicant's law and/or work. The SLP staff will review the documents and comments, which also can come from the state attorney general and corporation counsel if the applicant is a local political subdivision.[154]

If the application and comments meet approval, the SLP staff will forward the request for designation to the EEOC executive secretariat in order for the application to be submitted to the

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[142] 29 C.F.R. §§ 1601.70–1601.80 (1999).

[143] EEOC, *Compliance Manual*, § 5, p. 5.0001.

[144] The regulations provide authority for EEOC to enter into worksharing agreements or contracts with certified "706" agencies to process Title VII and ADEA charges for a fixed price per charge. There is a provision for the deferral or referral for EPA complaints. Worksharing agreements generally provide for dual filing of charges and identify certain categories of charges for which EEOC or the FEPA has initial investigation authority. *See* ibid., §§ 5.1, 5.2, p. 5.0001.

[145] *See* ibid., §§ 5.2, 5.4, pp. 5.0001–03. For example, the usual deferral procedure does not apply to charges the FEPA has no subject matter jurisdiction over or amended charges. Special deferral procedures apply to charges whereby EEOC does not have jurisdiction, commissioner charges, and allegations occurring 240 or more days before receipt.

[146] Ibid., §§ 5.6, 5.8, pp. 5.0005–5.0007.

[147] Most FEPAs have Title VII contracts, however some do not have ADA or ADEA contracts. *See* EEOC, *State and Local Program and Relationship with Fair Employment Practices Agencies*, task force report, Mar. 15, 1995, p. X-3 (hereafter cited as EEOC, *FEPA Task Force Report*).

[148] Ibid., p. V-1.

[149] EEOC, *State and Local Programs Handbook*, p. 19.

[150] EEOC, *FEPA Task Force Report*, pp. V-1 to V-2.

[151] EEOC, *State and Local Programs Handbook*, p. 19.

[152] Ibid., p. 15.

[153] Ibid.

[154] Ibid., p. 16.

commissioners for a vote. A presentation memorandum and draft *Federal Register* notice for publication accompany the proposal. If the Commission approves the proposed designation, the chairperson signs the *Federal Register* notice, which SLP will then forward for publication. If the application is not approved, the agency or applicant is notified.[155]

If the newly designated agency is located in a state where a state FEPA already exists, EEOC will continue to defer to the existing FEPA those charges that fall under the jurisdiction of both. After guidance is sent regarding the appropriateness of deferral of charges jurisdictional to the newly designated FEPA, the EEOC district director will determine whether the deferral of charges jurisdictional to the newly designated FEPA is appropriate and will notify in writing the state FEPA and the newly designated FEPA explaining the determination.[156]

Roles and Responsibilities of EEOC and FEPAs

The EEOC State and Local Programs Handbook discusses the roles and responsibilities of the participants who carry out the requirements of the program. At the headquarters level, the SLP staff within the Office of Field Programs support the EEOC district office in the administration of the program to ensure the smooth functioning of the EEOC-FEPA partnership.[157] SLP staff are responsible for monitoring, reviewing, and evaluating dual-filed contractual workloads to ensure compliance with EEOC and statutory requirements.[158] SLP staff monitor the work performed by the FEPAs under contract and make recommendations regarding any contract modifications. In addition, SLP staff review proposals from state and local agencies seeking certification and conduct the required three-year certification reviews of participating agencies.[159]

At the field level, the EEOC district director is responsible for the overall management of the State and Local Program. The district director's responsibilities include negotiating contracts and worksharing agreements, determining training needs of EEOC and FEPA staff, formulating programs for improvement, providing technical assistance and guidance, and enhancing meaningful and comprehensive relationships between EEOC and the FEPAs.[160]

The focal person for all FEPA functions and activities within the EEOC district office is the state and local coordinator who is assigned day-to-day FEPA contract administration responsibilities.[161] The state and local coordinator is responsible for communicating with the FEPAs concerning investigations and charge processing. Further, the state and local coordinator ensures that charges are processed by FEPAs in compliance with EEOC standards, policies, practices, and federal laws.[162] Under the direction of the district director, the state and local coordinator performs such tasks as conducting the substantial weight reviews; evaluating, analyzing, and interpreting charges processed by FEPAs; providing guidance, orientation, and training to FEPA staff on investigative procedures and enforcement standards; and informing the district director and headquarters through required reports of the overall administration of the program.[163]

Among the various responsibilities, the FEPA director is responsible for negotiating contracts and worksharing agreements with the EEOC district director.[164] The FEPA director designates staff to work with the EEOC district office and acts as a conduit for the communication between the two agencies. Under the FEPA director's direction, the staff are responsible for meet-

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155 Ibid., pp. 15–16.

156 Ibid., pp. 16–17.

157 Ibid., p. 13.

158 Ibid.

159 Ibid.

160 Ibid., p. 11.

161 Ibid., pp. 9, 11; DeDios and Manget interview, Phoenix District Office; Stout interview, Dallas District Office; Maggie McFadden, supervisor, State and Local Functions, Scott Barnhart, state and local coordinator, Richard Schuetz, deputy director, St. Louis District Office, EEOC, interview in St. Louis, MO, Jan. 31, 2000 (hereafter cited as McFadden, Barnhart, and Schuetz interview, St. Louis District Office); Denise Purnell, state and local coordinator, and Barbara Veldhuizen, deputy director, Baltimore District Office, EEOC, interview in Baltimore, MD, Nov. 23, 1999 (hereafter cited as Purnell and Veldhuizen interview, Baltimore District Office).

162 EEOC, *State and Local Programs Handbook*, p. 11.

163 Ibid., p. 12; DeDios and Manget interview, Phoenix District Office; Stout interview, Dallas District Office; McFadden, Barnhart, and Schuetz interview, St. Louis District Office; Purnell and Veldhuizen interview, Baltimore District Office.

164 EEOC, *State and Local Programs Handbook*, p. 13.

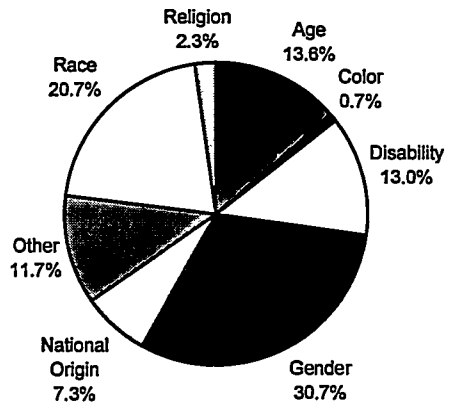
ing the terms of the contract and the timely input and reconciliation of data entered in EEOC's FEPA Charge Data System.[165]

Charge Processing

The EEOC Compliance Manual discusses both FEPAs' and EEOC's charge processing responsibilities under the program.[166] Under the worksharing agreement, FEPAs generally are to accept and investigate all charges that are received at the FEPA as well as additional charges specified in the agreement, if applicable. Charges must be dual-filed with an agency that has a law similar to federal civil rights laws.

FIGURE 6-1

Charges Received by FEPAs by Basis, FY 1999



SOURCE: EEOC, Charge Data System.

Workload

In FY 1999, 92 FEPAs were under contract with EEOC.[167] During that year, FEPAs received 59,092 charges of discrimination that were dual-filed with EEOC.[168] Almost one-third of the charges received concerned gender. One-fifth of the charges alleged race discrimination. Few charges related to religion or color.[169]

The number of charges received and investigated varies greatly by FEPA. In particular, local agencies, such as city human rights offices, have fewer resources and a smaller jurisdiction so they do not handle as many cases as state FEPAs. For example, in FY 1999, the New York Division of Human Rights handled 4,524 dual-filed complaints, while the Bloomington Human Relations Commission in Indiana handled only 14 complaints.[170]

Since 1994, the total caseload of all FEPAs has fluctuated between 71,000 and 84,000 charges. During this time, their resolution rate has improved. Overall, FEPAs resolve approximately 50 percent of their total caseload (including charges received and backlogged charges) each year.[171]

Complaint Investigations

EEOC provides assistance, as needed, but does not get involved in the investigation process.[172] FEPAs are not required to conduct investigations in a particular manner.[173] In addition, dual-filed cases are not prioritized as category A, B, or C by most FEPAs.[174] Some of the FEPA

[165] Ibid.

[166] EEOC, *Compliance Manual*, § 5.4(b)(1)(2), p. 5:0002; § 5.6(a)(1), p. 5.0005; § 5.6 (b)(1)(2), p. 5.0006.

[167] EEOC, *Directory of FEP Agencies Under Contract by District Office*, June 1999. *See* table 6-3.

[168] EEOC, *FY 2001 Budget Request*, p. 78.

[169] EEOC, Charge Data System. *See* fig. 6-1.

[170] Ibid.

[171] EEOC, *FY 2001 Budget Request*; EEOC, *FY 2000 Budget Request*, February 1999; EEOC, *FY 1999 Budget Request*, February 1998; EEOC, *FY 1998 Budget Request*, February 1997; EEOC, *FY 1997 Budget Request*, March 1996; EEOC, *FY 1996 Budget Request*; EEOC, *FY 1995 Budget Request*, February 1994 (hereafter cited as EEOC, *FY 1995 to FY 2001 Budget Requests*). *See* table 6-2.

[172] Purnell and Veldhuizen interview, Baltimore District Office, p. 3.

[173] McFadden, Barnhart, and Schuetz interview, St. Louis District Office, p. 4.

[174] Joseph Gallegos, director, Anti-Discrimination and Labor Division, Industrial Commission of Utah, telephone interview, Mar. 16, 2000, pp. 6–7 (hereafter cited as Gallegos interview); Paula Haley, executive director, Alaska State Commission for Human Rights, telephone interview, Jan. 19, 2000, pp. 2–3 (hereafter cited as Haley interview); Rufus Clanzy, administrator, Howard County (Maryland) Office of Human Rights, telephone interview, Feb. 10, 2000, p. 2 (hereafter cited as Clanzy interview); Donald Stocks, interim director, District of Columbia Office of Human Rights, interview in Washington, DC, Jan. 8, 2000, p. 3 (hereafter cited as Stocks interview); Jacqueline Carr, director of compliance, St. Louis Civil Rights Enforcement Agency, telephone interview, Jan. 20, 2000, p. 2 (hereafter cited as Carr interview); Twanda Smith, deputy director, Prince George's County (Maryland) Human Relations Commission, tele-

TABLE 6-2

FEPA Workload, FY 1994–2000

Workload	1994	1995	1996	1997*	1998	1999	2000*
Charges pending (from previous year)	73,402	80,021	84,346	78,023	80,655	79,007	71,564
Charges received	65,069	64,764	63,809	67,635	64,882	59,092	59,092
Total charges	***138,471***	***144,785***	***148,155***	***145,658***	***145,537***	***138,099***	***130,656***
Charges resolved	54,192	56,156	58,114	62,037	59,965	58,189	58,189
Charges deferred to EEOC	4,258	5,750	6,505	8,840	9,557	8,346	8,346

SOURCE: EEOC, *FY 1997 to FY 2001 budget requests.* * Data for 1997 were estimated for the FY 1999 budget request; data for FY 2000 were estimated for the FY 2001 budget request.

personnel stated that the reason for not prioritizing cases in this manner is because the FEPA would not receive credit for C cases.[175]

Because FEPAs are free to develop their own methods for investigating and resolving charges of discrimination, there are a variety of things FEPAs do that could be instructive for EEOC. Alternatively, EEOC may want to review such practices to determine their appropriateness. Examples of ways in which FEPA practices differ from EEOC's and each other's are the following:

- Some FEPAs have agreements with local companies that their charges will be handled by the FEPA. For example, the Texas Commission on Human Rights has agreements with at least two companies that it will process all of the charges against those companies, with the exception of A cases.[176] However, the Baltimore Community Relations Commission (BCRC) notes how such agreements can have a negative effect. According to the unit supervisor for the BCRC, the Baltimore District Office of EEOC entered into an agreement with Johns Hopkins Hospital to mediate all charges against the hospital. When BCRC attempted to investigate charges against Johns Hopkins, it was met with resistance. Ultimately, it was agreed that if a complainant filed a charge against Johns Hopkins with BCRC and the complainant did not want the charge mediated, then BCRC could proceed with an investigation.[177]
- Investigators in the Seattle Office for Civil Rights are required to contact each charging party at least once every 30 days.[178]

phone interview, Jan. 24, 2000, p. 2 (hereafter cited as Smith interview); Barbara Osinski, enforcement manager, Seattle Office for Civil Rights, telephone interview, Jan. 28, 2000, p. 1 (hereafter cited as Osinski interview). (However, the Nevada Equal Rights Commission does use EEOC's charge prioritization system). William H. Stewart, administrator, Nevada Equal Rights Commission, telephone interview, Jan. 6, 2000, p. 3 (hereafter cited as W.H. Stewart interview).

[175] Walter Shook, unit supervisor, Baltimore Community Relations Commission, interview in Baltimore, MD, Jan. 21, 2000, attachment, "Answers to FEPA Questions Posed by U.S. Commission on Civil Rights," p. 1 (hereafter cited as Shook interview); Henry Ford, executive director, and J. Neil Bell, operations manager, Maryland Commission on Human Relations, interview in Baltimore, MD, Jan. 21, 2000, pp. 4–5 (hereafter cited as Ford and Bell interview); Robert Steindler, director, Alexandria (Virginia) Office of Human Rights, interview in Alexandria, VA, Jan. 11, 2000, p. 4 (hereafter cited as Steindler interview). However, EEOC contends that these observations are inaccurate. According to EEOC's legal counsel: "Under PCHP, a 'C' charge is one where an office has sufficient information from which to conclude that it is not likely that further investigation will result in a cause finding. An office will have sufficient information to make this determination when it has conducted an investigation appropriate to the particular charge, factoring in resource considerations, and has assured that the charging party has been provided a fair opportunity to present his or her case. This category includes charges that are non-jurisdictional or self defeating. Currently, EEOC contracts for the acceptable resolution of FEPAs' administrative resolutions, some of which would be categorized as 'C' charges under PCHP. If a FEPA chooses to adopt a system that permits it to dismiss charges once it has sufficient information to conclude that it is not likely that further investigation will result in a cause finding, it can be paid for the acceptable resolution of those charges." Vargyas letter, p. 55. Thus, there is obvious need for EEOC to clarify to FEPAs what types of closure it can and cannot accept.

[176] William Hale, executive director, Texas Commission on Human Rights, telephone interview, Jan. 24, 2000, pp. 2–3 (hereafter cited as Hale interview).

[177] Shook interview, p. 5.

[178] Oskinski interview, p. 3.

- In addition to EEOC reviewing the work of the FEPAs, the executive director of the Alaska State Commission for Human Rights also reviews EEOC's files, and has been doing so for the past 12 years.[179] Only a couple of FEPAs do this. According to the executive director of the Alaska FEPA, there is a legal obligation to ensure that EEOC has met the FEPA standards.[180] The executive director often travels to EEOC on her own time if the budget does not provide travel funds. She indicated that she looks at the entire EEOC file and has her own way of reviewing charges. The executive director now scrutinizes cases more because full investigations are done on fewer cases since the categorization of charges was implemented. If she comes across a case that was not investigated by EEOC, her office will sometimes do more investigation.[181]
- According to the unit supervisor of the Baltimore Community Relations Commission, his agency still uses the Rapid Charge Processing System that was developed by former Chairwoman Eleanor Holmes Norton in 1977.[182] Although EEOC discontinued its use of this model, the unit supervisor indicated that by using this model, his agency is able to settle just as many cases as EEOC, even though his agency has only four investigators.[183]
- In processing charges, the Baltimore Community Relations Commission and most state agencies have an extra step, whereby they have a hearing process, which EEOC does not have.[184] The FEPA provides the attorney and the judge for the hearing process for the party bringing the charge. The hearing is not as formal as a federal or state court hearing, but all of the witnesses are called, everything is reported, and a decision is made as to whether or not discrimination occurred.[185]

One FEPA director noted that, overall, there is a "gross inequity" in the way charges are handled by EEOC compared with FEPAs. He stated that EEOC has options that are not available to FEPAs under the worksharing agreement, such as the ability to issue a right-to-sue notice.[186] For example, with C cases, EEOC can dismiss a case stating that an investigation will not be done; however, a FEPA cannot get paid for such a closure. As a result, this director feels that FEPAs are held to a higher standard.[187]

Substantial Weight Reviews

The 1972 amendments to Title VII called for substantial weight to be given to FEPA decisions.[188] EEOC uses a "substantial weight review" process to determine whether a FEPA's resolution of dual-filed charges meets EEOC standards. The purpose of the review is to ensure that all jurisdictional requirements have been met, all evidence or information meets EEOC guidelines and standards for investigation, all parties were notified properly of the charge resolution, and that the time period for FEPA appeal, if applicable, has elapsed.[189] The review requires an examination of all documentation obtained by the FEPA during its investigation of a dual-filed charge.[190] Further, a substantial weight review is done by EEOC if a charging party is adversely affected by the FEPA's decision. A charging party can make a request for a substantial weight review within 15 days of the FEPA decision.[191]

Interaction between EEOC and FEPAs

The majority of the FEPAs interviewed characterized their relationship with EEOC as really

[179] Haley interview, p. 2.

[180] Ibid.

[181] Ibid.

[182] Shook interview, p. 1.

[183] Ibid.

[184] Ibid., p. 3.

[185] Ibid.

[186] Steindler interview, p. 4.

[187] Ibid. Alternatively, EEOC argues that "the implication is that these 'inequities' allow EEOC to process a charge more rapidly than the FEPAs. This is not an inequity, merely a difference in the case processing derived from different statutory authorities, and as noted above, FEPAs can be paid for closing a 'C' case under the PCHP or a similar system." Vargyas letter, p. 55.

[188] 42 U.S.C. § 2000e-5(b) (1994); EEOC, *FEPA Task Force Report*, p. III-1.

[189] EEOC, *FEPA Task Force Report*, p. VIII-1.

[190] Ibid.

[191] 29 C.F.R. § 1601.76 (1997).

good or excellent.[192] FEPA staff have easy access to EEOC district office staff and feel that, for the most part, EEOC is responsive to their needs. The statement of one FEPA director is representative of many of the views shared with the Commission during this review:

> They are always receptive to our calls and very prompt to answer any questions or concerns that we have. To the extent that we might want input, request input or their advice on particular issues, we've felt comfortable asking for that kind of advice and, in fact, have received it. . . . So anybody that we really want access to is available to us by phone. Whenever their people are in town—they're [currently] conducting a class action investigation in this area—they'll always drop by to make a courtesy call.
>
> I've asked at times that they also come in to present while they're here, to help train staff on different issues. They've always been very accommodating in that way. I've asked that when they conduct internal training in [the district office] that they call us and advise us of that and invite us to them. And they have been very gracious to doing that as well. . . . So we have a close working relationship. And I'm basically, I think, very pleased with it.[193]

The relationship, however, is not perfect. Some FEPAs indicated that the relationship is not always handled as an equal partnership.[194] The following sections highlight some areas where EEOC has received both good and bad reviews from FEPAs.[195]

Strategic Planning

EEOC's most recent budget request notes the FY 1999 highlights of the EEOC-FEPA relationship. In FY 1999, EEOC provided technological upgrades to 22 FEPAs "to improve efficiency and effectiveness of charge processing procedures."[196] In addition, EEOC conducted 49 training activities for FEPAs, which focused on topics such as improving charge investigative capabilities and issues pertaining to the Americans with Disabilities Act.[197]

For FY 2000, EEOC planned to provide training and distribute training materials on at least two employment discrimination issues to each FEPA. EEOC also noted that to strengthen its partnership with the FEPAs, it planned to provide training on charge processing at the national FEPA conference and through ongoing technical assistance.[198] For FY 2001, EEOC plans to provide additional training and to conduct 20 joint outreach programs with FEPAs. These outreach programs will target small businesses and underserved communities.[199] EEOC also intends to conduct 25 joint investigations with FEPAs.[200] EEOC states:

> These new endeavors, carried out as partners, will serve the American people well as we enter the 21st Century by conducting innovative activities with a sample of FEPAs to better coordinate charge processing and prevention activities, resulting in more effective service to the public.[201]

Training from EEOC

There are disagreements among the FEPAs concerning the training they receive from EEOC. While several FEPAs noted that EEOC has done a good job of training FEPA staff, others were unaware of EEOC training opportunities. For example, the deputy director of the Prince George's County (Maryland) Human Relations Commission stated that EEOC has provided on-site training and follow-up training, and has done training on charge processing and technical skills.[202] However, she noted that she would like EEOC to do more technical training and updates when the laws change or there are new EEOC guidelines.[203] The director of the Alexandria (Virginia) Office of Human Rights stated that the EEOC district office he reports to has provided no training to his staff, which is an issue he would like to see addressed.[204]

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[192] *See, e.g.,* Clanzy interview, p. 5; Haley interview, p. 5; Smith interview, p. 5; W.H. Stewart interview, p. 6; Ford and Bell interview, p. 43.

[193] Gallegos interview, pp. 9–10.

[194] Ford and Bell interview, p. 32; Hale interview, p. 4.

[195] It is important to note, however, that many of the deficiencies presented in this section cannot be addressed without additional funding for EEOC's State and Local Program.

[196] EEOC, *FY 2001 Budget Request,* p. 56.

[197] Ibid., p. 57.

[198] Ibid., pp. 59–60.

[199] Ibid., pp. 60–61.

[200] Ibid., p. 61.

[201] Ibid., p. 63.

[202] Smith interview, pp. 4–5.

[203] Ibid., p. 5.

[204] Steindler interview, p. 8.

The enforcement manager for the Seattle Office for Civil Rights noted that EEOC staff are helpful when she calls them with questions, but EEOC does not offer training like the U.S. Department of Housing and Urban Development (HUD) does.[205] The unit supervisor of the Baltimore Community Relations Commission recommends that EEOC establish a national training academy for both EEOC and FEPA investigators.[206] He stated that there needs to be a strong, consistent, funded, and established place where people can go for training.[207] One FEPA director noted that the EEOC-FEPA contract usually provides $1,000 to cover the costs of the national training conference, while HUD includes an annual training budget of $20,000 in its contracts with state and local agencies.[208]

Joint Investigations

EEOC's National Enforcement Plan encourages "joint investigative and enforcement activities" between field offices and FEPAs, and solicitation of suggestions from the FEPAs in developing their Local Enforcement Plans.[209] Currently, there is little coordination between FEPAs and local EEOC offices in investigations.

For FY 2001, EEOC plans to conduct 25 joint investigations with FEPAs, focusing on major employers with several charges filed against them, or with charges involving multiple charging parties or discriminatory policies.[210] To date, few joint investigations have been conducted, although some FEPAs appear interested in working with EEOC. According to the BCRC,

> two years ago EEOC, BCRC and the Maryland Commission on Human Relations undertook a joint investigation of the Baltimore City Police Department. That effort was not well coordinated and in the end EEOC took over responsibility for the case. It was, however, an admirable first step in cooperation. For efforts like this to be successful in the future we would recommend that (1) EEOC take a lead roll and assign investigative tasks to the FEPA investigators, and (2) questions of contract credit for the work should be worked out in advance.[211]

According to a staff person with the BCRC, without one agency taking a lead role, the agencies pursued the case differently, using different theories.[212] The staff of the Maryland Commission on Human Relations noted that coordination among the various agencies for the joint investigation was "extremely difficult," and "has not worked with anything that's going on."[213] EEOC, however, deemed the project a success, noting that the investigation was a good idea and that it wanted to do additional joint investigations in the future.[214]

The director of the Alaska State Commission for Human Rights noted that joint investigations would promote a sense of teamwork and serve as a public relations opportunity.[215] Similarly, the director of the Anti-Discrimination and Labor Division of the Industrial Commission of Utah stated:

> [I]t's important for the employer community to see that there is, in fact, a working relationship [between EEOC and the FEPAs] and that, in fact, we work together to accomplish the mission of eradicating employment discrimination from America's worksites.[216]

Nonetheless, he noted that given the tight budgets of both EEOC and the FEPAs, it would be more efficient for his agency to direct its resources elsewhere.[217]

The executive director of the Texas Commission on Human Rights stated that his agency had not done any joint investigations with EEOC because it would be difficult to do. He stated that the idea of the deferral relationship is to avoid duplication of effort, and to avoid having two agencies investigating the same case.[218]

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[205] Oskinski interview, p. 2.

[206] Shook interview, attachment, p. 4.

[207] Shook interview, p. 6.

[208] Gallegos interview, p. 31.

[209] EEOC, *National Enforcement Plan*, February 1996, p. 10.

[210] EEOC, *FY 2001 Budget Request*, p. 55.

[211] Shook interview, attachment, p. 1.

[212] Shook interview, p. 4.

[213] Ford and Bell interview, pp. 21–23.

[214] Purnell and Veldhuizen interview, Baltimore District Office, pp. 3–4.

[215] Haley interview, p. 3.

[216] Gallegos interview, pp. 17–18.

[217] Ibid., pp. 18–19.

[218] Hale interview, p. 4.

Meetings with EEOC

Several FEPA staff on a quarterly basis meet with the EEOC district office that oversees their contract.[219] One FEPA director, however, noted that the state and local coordinator does not visit his office and, in fact, EEOC has not done an on-site visit of his agency in several years. He also stated that the district office does not hold regular meetings with the local FEPAs.[220]

The executive director of the Alaska State Commission for Human Rights noted that, because of the geographic distances, EEOC's Seattle District Office staff members visit her office only about once a year, and their interaction is primarily over the telephone.[221] She stated that it would be beneficial if they could meet in person more often. Therefore, she recommends that EEOC district offices that have such geographical challenges be given a proportional increase in their travel budget that would allow them to visit the FEPAs in their district more often.[222]

In addition to contact at the local level, EEOC holds an annual conference for FEPAs.[223] In 1999, the conference included sessions on hate crimes, community violence, and employer liability for sexual harassment. FEPAs were briefed on EEOC's mediation program, its FY 2000 budget plan, and the FY 2000 contracting principles and model worksharing agreement.[224] FEPA staff noted that, although EEOC provides funding for at least one staff person from each FEPA to attend the conference, they would like to see the contract expanded to allow more FEPA staff to attend.[225]

Funding for FEPAs

Each year when EEOC submits its annual budget to Congress, the Agency requests an amount of money necessary to fund charge resolutions processed by the FEPAs. Funding is also used to upgrade the FEPAs' charge data system equipment and for the maintenance of computer equipment. During the past five years, funding for the State and Local Program has not increased significantly. Funding for fiscal years 1995 and 1996 remained level at $26.5 million.[226] In FY 1997, EEOC asked for an increase in funding and received $27.5 million to fund the FEPAs.[227] This funding remained level until FY 1999, when the Agency received $29 million to fund the State and Local Program.[228] Congress provided the Agency with $29 million for the program for FY 2000, and the agency is requesting level funding for FY 2001.[229]

Although there has been a slight increase in the funding allocated for the State and Local Program over the past five years, the amount paid per investigation to FEPAs has not increased since fiscal year 1994. In its budget request for FY 1996, EEOC indicated that an increase in funding for the State and Local Program would allow it to increase the rate of reimbursement to FEPAs from $500 per charge to $525 per charge.[230] However, this did not occur.

During FY 1999, even though EEOC's budget was increased substantially, the amount of money EEOC pays to FEPAs per investigation did not increase at that time. During an appropriations hearing for EEOC's FY 1999 budget, former Acting Chairman Igasaki indicated that FEPAs could use additional monies, but he felt that it was up to the individual states to determine how much extra money should be put in for FEPAs.[231] When asked if EEOC considered funding for FEPAs to be a supplement to its budget, rather than enforcement policy for the Agency, former Acting Chairman Igasaki stated, "Well, it is part of our enforcement policy, but given the amount of money that we are able to share with them, it is really only a supplement."[232] In pre-

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[219] Carr interview, p. 2; McFadden, Barnhart, and Schuetz interview, St. Louis District Office, pp. 1–2.

[220] Steindler interview, p. 7.

[221] Haley interview, p. 2.

[222] Ibid.

[223] Elizabeth Thornton, director, Office of Field Programs, EEOC, interview in Washington, DC, Mar. 1, 2000, p. 6 (hereafter cited as Thornton interview, Mar. 1, 2000).

[224] EEOC, "Agenda: 1999 EEOC/FEPA Training Conference, New Orleans, LA," June 6–9, 1999.

[225] Gallegos interview, p. 31; Osinski interview, p. 4.

[226] EEOC, *FY 1997 Budget Request*, p. 44; EEOC, *FY 1998 Budget Request*, p. 30.

[227] EEOC, *FY 1999 Budget Request*, p. 41.

[228] EEOC, *FY 2001 Budget Request*, p. 62.

[229] Thornton interview, Mar. 1, 2000, p. 6; EEOC, *FY 2001 Budget Request*, p. 62.

[230] EEOC, *FY 1996 Budget Request*, p. 76.

[231] Paul M. Igasaki, acting chairman, Statement before the Hearing Before A Subcommittee of the Committee on Appropriations, Apr. 1, 1998, p. 479.

[232] Ibid.

paring its budgets, EEOC focuses on what it needs to enhance its capabilities.

The amount of money Congress authorizes for the State and Local Program is not sufficient.[233] As a result, FEPAs have constantly complained that the amount of payment per investigation should be more in line with what other agencies are paying for investigations and also with what contractors are paid. EEOC pays FEPAs $500 per investigation, but FEPAs believe that EEOC should pay them at the same rate as contract mediators are paid. EEOC pays contract mediators $800, whether mediation is successful or not.[234] The FEPAs rely on the funds they receive from EEOC to remain functional. One FEPA administrator stated that if EEOC can afford to pay $800 for mediation, it can pay $800 for investigations.[235] According to one FEPA director,

> [EEOC] got a nice increase. . . . and not one cent—not one cent—went to the FEPAs. . . . there's a lack of respect. I mean, $50 or $25 more a case, just something to say, you know, we appreciate the fact that you're doing 40 percent of our work. It is, I think, a matter of respect.[236]

Further, FEPAs also process housing complaints for the U.S. Department of Housing and Urban Development, for which they are paid $1,700 per investigation.[237] EEOC notes that it has been agreed upon that housing discrimination complaints are no more difficult, and in most cases, less difficult to investigate than complaints of discrimination.[238] Nonetheless, when one looks at the amount of money HUD provides to pay for investigations and then compares it with what EEOC is paying for investigations, it appears that EEOC's support for civil rights enforcement at the state and local levels is low.

FEPAs have also indicated that $500 is not enough to cover the full cost of processing a charge.[239] The average cost to process a claim of employment discrimination varies from one FEPA to another. In Texas, the average cost is between $900 and $1,100.[240] According to another FEPA, the court reporter alone cost $1,700 for one charge that it processed.[241] As one EEOC staff person noted, travel costs often total more than the $500 reimbursement limit.[242]

The director of Office of Field Programs indicated that EEOC's goal is not to reimburse FEPAs for the full cost of processing a charge, but is instead to supplement the FEPAs' processing costs.[243] FEPAs would have to process the charge whether or not they were being supplemented by EEOC. The amount paid to FEPAs is an evolving amount. It started out being $250 to $300; then it increased to $400; it then inched up slightly to $450 in FY 1993; and increased to $500 in FY 1994.[244]

The St. Louis district deputy director sympathizes with the FEPAs, and indicated that more funding is a good idea because $500 per case is a bit low.[245] Some years ago an area director was reprimanded for setting a dollar amount for each type of closure, but the St. Louis deputy director indicated that it might be a good idea to return to this method of payment.[246] One of the concerns with this method of payment is whether FEPAs would drag cases out so that they could be paid more money, but the state and local functions supervisor indicated that based on what she knows about FEPAs, she does not think something like this would happen.[247] The director of Office of Field Programs indicated that only when EEOC can pay the FEPAs for 100 percent of what they do will EEOC raise the price paid for each investigation.[248]

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[233] Hale interview, p. 3.

[234] W.H. Stewart interview, p. 6.

[235] Ibid.

[236] Ford and Bell interview, p. 33.

[237] EEOC, *FY 1997 Budget Request*, p. 42; Steindler interview, p. 8; Haley interview, p. 4.

[238] EEOC, *FY 1997 Budget Request*, p. 42.

[239] Hale interview, p. 3; Haley interview, p. 4; Shook interview, p. 3.

[240] Hale interview, p. 3.

[241] Shook interview, p. 3.

[242] Stout interview, Dallas District Office, p. 27.

[243] Thornton interview, Mar. 1, 2000, p. 6.

[244] Ibid.; Haley interview.

[245] McFadden, Barhnart, and Schuetz interview, St. Louis District Office, p. 4.

[246] Ibid.

[247] Ibid., p. 5.

[248] Thornton interview, Mar. 1, 2000, p. 6.

Another issue raised by FEPAs is that they are not paid for all charges they investigate.[249] Between fiscal years 1994 and 1998, FEPAs were paid for only 76 to 88 percent of the total charges they investigated during a given fiscal year.[250] According to the executive director of the Alaska State Commission for Human Rights, the rate needs to be raised to cover all charges processed by the FEPAs, even if it is at a lower rate, and only then should the rate per investigation be increased.[251] She indicated that there needs to be an additional $6 million to $10 million in order to have sufficient funds to pay for all cases processed by the FEPAs.[252]

Contracting Issues

Several FEPA directors stated that in the past there have been substantial delays in getting final contracts from EEOC.[253] For example, the executive director of the Maryland Commission on Human Relations stated that by the second quarter of the fiscal year he still had not received his FY 2000 contract from EEOC. Therefore, he has no idea how many charges his agency will be reimbursed for handling. He stated:

> Two months ago I was promised a contract for the year that in 10 days we will be a third of the way through . . . We have no idea what this number will be, but we make our best guess. Of course, that process is where you have to overestimate because they notoriously underestimate what it is that they're going to give to you. So it's this guessing game. You want to make the number come out to where you can allocate the resources, produce the cases, but there's this whole charade of "this is the contract that we will put in for because we know we're not going to get it."[254]

The delay in receiving the final contract is combined with insufficient knowledge of how many cases have been accepted by EEOC for contract credit throughout the year.[255] The same FEPA director stated:

> We had a contract for 817 cases [in FY 1999]. It looked at one point that we were not going to make it and they did a down remodification all the way down to 810 cases. We were on the last day of the contract in September, and most of us were in an all-day management training session, and I just happened to check my messages. And I got a call from the local office saying that we were going to be short. Now, up to this time I had been led to believe—and by the way, I have to request these reports; they're not routinely sent as to where we are in the contract. . . . So on this last day with literally about four hours to go, I'm told I have to come up with eight cases. Well, I pulled some people together and we were able to do that.[256]

Other FEPA staff noted that it is difficult to get revisions made to their contracts with EEOC, and it is even more difficult to get the contracts revised for a higher number of charges.[257] Several FEPAs noted that they are resolving more charges per year than is specified in their contracts, essentially doing this work for free.[258] In response, one EEOC state and local coordinator stated that although FEPAs do not receive funds for processing charges beyond the specified contract amount, the completion of additional charges is factored into that FEPA's contract the following year.[259] Further, EEOC's legal counsel stated:

> EEOC's ability to revise contracts upwards is dependent on the availability of funds to do so. After the third quarter, EEOC reviews contracts to determine if

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[249] *See* fig. 6-2.

[250] *See* fig. 6-2.

[251] Haley interview, p. 4.

[252] Ibid., p. 3.

[253] Steindler interview, p. 9; Ford and Bell interview, pp. 25–26.

[254] Ford and Bell interview, pp. 25–26.

[255] Ibid., pp. 26–27. Nonetheless, EEOC contends that "ample information should be available to all contract FEPAs about their recommended contract levels before recommendations are submitted to the Commission for approval. Recommendations are based on data for the relevant preceding twelve month period. It is true that for the last several years EEOC has not been able to provide full funding to each FEPA because the FEPAs consistently produce more resolutions eligible for contract credit than EEOC can pay for with the annual state and local appropriation. However, in recent years there has been a consistent and fairly predictable across-the-board reduction for each FEPA." Vargyas letter, p. 57.

[256] Ford and Bell interview, pp. 26–27.

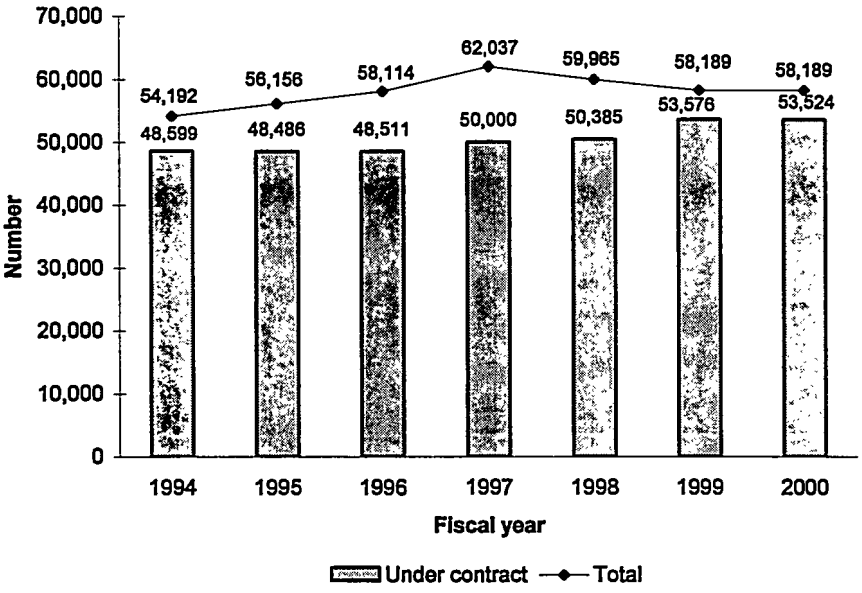
[257] Clanzy interview, pp. 4–5.

[258] Steindler interview, p. 9. *See* fig. 6-2.

[259] DeDios and Manget interview, Phoenix District Office, p. 18.

FIGURE 6-2

Charges Resolved under Contract and Total Charges Resolved, FY 1994 to FY 2000



SOURCE: EEOC, FY 1997–FY 2001 budget requests. Data for FY 2000 were estimated for the FY 2001 budget request.

modifications are necessary. We can only do upward modifications if one or more FEPAs are not able to complete all of the resolutions in their contracts, in which case funds will be available to transfer to other agencies.[260]

Another concern of FEPA staff is that EEOC continues to establish contracts with new FEPAs, which results in the inability to increase contracts for existing FEPAs. He stated that if there is level funding, and more FEPAs are established, then the existing FEPAs are going to face reduced contracts.[261] In addition, he noted that there are certain areas, such as Northern Virginia, that are saturated with FEPAs. However, there are other areas of the country, such as in the western United States, where FEPAs must cover large areas, which can prove difficult.[262]

Mediation

Several FEPA directors voiced concerns about the difference between what EEOC pays them per charge ($500) and the contract price for mediators ($800) in FY 1999, when EEOC had funds to pay outside mediators.[263] One FEPA director stated:

> [W]hy is this such a disparity in what they're paying? And we've had a mediation program for what? Five years? Six years, at least? You know, one of the first probably in the country to have a mediation program. Way before EEOC even had the authority to do so. And, again, it's like they choose to reinvent the wheel.[264]

FEPA staff also felt the funding differential was unfair because they closed many of their cases through mediation or alternative dispute resolu-

[260] Vargyas letter, p. 57.

[261] Steindler interview, p. 9.

[262] Ibid.

[263] W.H. Stewart interview, p. 6; Ford and Bell interview, pp. 34–35; Clanzy interview, p. 5; Hale interview, p. 3; Haley interview, p. 4; Gallegos interview, pp. 32–33.

[264] Ford and Bell interview, pp. 34–35.

tion (ADR), yet still only received $500 for that closure. As another FEPA director stated,

> I understood that when EEOC took this whole thing on and started to, you know, assign staff to conduct mediation conferences and ADR that they also contracted out with private consulting firms to do ADR conferences. And I think that they're paying them more for an ADR closure than they pay us. And I just don't think that's right. I think that whatever EEOC did with monies that were available to them to conduct and encourage ADR, that the first priority in consideration should have been the FEPAs who were doing it and had the ability to do it, and rather than to contract and pay additional monies to private contractors, that they ought be utilizing the FEPAs who could do it and, if nothing else, they can pay us what they're paying them. I think that has troubled a lot of FEPAs. I don't know if you've heard this complaint before but it's one that I'm troubled by because I just don't think that the $500 has kept pace. And if they've got it for somebody else, I can't imagine why they wouldn't have it for their FEPAs.[265]

Two of the FEPA directors noted that when they suggested to EEOC that FEPAs be allowed to contract with EEOC for mediation, they were told that would not be permissible because the appropriations bill authorizing the mediation program stated that payments to FEPAs could not exceed $29 million.[266] However, Congress told the FEPA directors that EEOC could pay them for mediation if EEOC submitted to Congress a request for an exemption of the funding limit.[267]

Charge Data System

Although some FEPA staff stated that EEOC's Charge Data System (CDS) is adequate, several FEPAs identified problems with the system. For example, the Maryland Commission on Human Relations staff stated that they are "tired of waiting for [EEOC] to come up with their new and improved database, which they promised—literally they promised—back in 1991."[268] Because of the limitations of the CDS, the Maryland Commission on Human Relations is developing its own database, which will require them to duplicate efforts as they input data into both the EEOC system and their own.[269] The Alaska State Commission for Human Rights also maintains two charge tracking systems because of the limitations of the CDS.[270]

The smaller agencies, however, appear to have fewer problems with the CDS. The Baltimore Human Relations Commission, for example, stated that the system is reliable and that it meets the agency's needs.[271]

Additional Issues

Several FEPA and EEOC staff discussed issues that need to be addressed. Below is a summary of their concerns:

- One FEPA director stated that there is no real coordination between his agency and other EEOC district offices and other FEPAs outside his region. He stated that this would be particularly useful with systemic cases. Currently, FEPAs do not have adequate information on what other FEPAs and EEOC offices are doing with regard to a specific employer.[272]
- Another FEPA staff person suggested that EEOC's categorization of charges has diminished the number of charges being deferred to the FEPAs. She noted that EEOC does not defer "A" charges to her agency. The FEPA only receives "B" charges that do not go to mediation or that have failed mediation. She stated that the number of charges being referred to her agency has declined since the implementation of the Priority Charge Handling Procedures.[273]

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[265] Gallegos interview, pp. 32–33.

[266] Hale interview, p. 3.

[267] Ibid.; Haley interview, p. 4.

[268] Ford and Bell interview, p. 46.

[269] Ibid., p. 47.

[270] Haley interview, p. 4.

[271] Shook interview, p. 6.

[272] Steindler interview, pp. 7–8.

[273] Carr interview, pp. 3–4. In response, the supervisor of State and Local functions in the EEOC St. Louis District Office stated the number of charges that the FEPA receives has declined as a result of the questionnaire procedure used by the office. When intake questionnaires are received by the FEPA, the FEPA reviews the form to determine if the charge should be filed. The deputy director of the St. Louis District Office stated external factors also have affected the number of charges being filed with the city FEPA. For example, there has been a decreasing business population within the city. McFadden, Barhnart, and Schuetz interview, St. Louis District Office, p. 3. In addition, EEOC's legal counsel stated that "EEOC does not routinely transfer charges it initially receives to FEPAs to supplement the FEPAs' receipts and workload. The model worksharing

- EEOC staff noted that sometimes charging parties request that their cases be sent to the FEPA because they thought that EEOC was going to issue a no cause finding. In addition, after they had their predetermination interview with the FEPA, charging parties have asked that the charge be transferred to EEOC.[274]
- Several FEPAs stated that EEOC should use the case processing capabilities of the FEPAs more intensely than it currently does. In addition to stating that they are able to handle more cases than are deferred to them,[275] FEPAs stated that it is more efficient and cost effective for them to handle individual discrimination cases than it is for EEOC to handle such cases.[276]
- FEPA staff note that most FEPAs have more experience than EEOC in enforcing antidiscrimination laws because the FEPAs have been around longer.[277]

Criticisms of the EEOC-FEPA Relationship

A 1986 report of the American Jewish Congress stated, "The sad truth about state civil rights agencies is that they have consistently disappointed even their most fervent advocates."[278] While perhaps harsh, this statement is representative of the criticisms that many have made concerning state and local fair employment practices agencies. The 1986 American Jewish Congress report noted that many of the deficiencies plaguing FEPAs included lack of funds, weak laws, and inconsistent approaches to resolving complaints of discrimination.[279] Some of the recommendations offered included:

- expanded coverage of state civil rights laws (e.g., to include age discrimination, marital status, and discrimination);
- increased funding for state agencies targeted for specific functions, such as increases in investigators' salaries, the hiring of bilingual staff, and the opening of intake offices in areas with large minority populations;
- more vigorous enforcement and proactive approaches to combating discrimination, such as the use of testers, conducting more public hearings, and initiating independent studies;
- reducing delays in processing complaints and abiding by established time limits;
- use of alternative dispute resolution mechanisms;
- the development and application of "consistently applied guidelines for conducting investigations and making determinations of probable cause";
- an increase in staff quality; and
- finding ways to encourage the filing of more complaints.[280]

The executive director of the American Jewish Congress stated that FEPAs have essentially the same deficiencies today as they reported having in 1986. He stated that EEOC has delegated a great amount of authority to state agencies, yet it does relatively little to police those agencies. He stated that the decisions of FEPAs are "totally erratic—you win cases you should lose, you lose cases you should win, and all of it takes far too long."[281]

A representative of the Utah Federation of Business and Professional Women stated several concerns about the lack of civil rights law enforcement by the FEPAs. She said that she does not have "hope that the system will be improved."[282] She provided much documentation

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agreement between EEOC and the FEPAs establishes that each agency will generally process the charges it initially receives. When transfers from EEOC to FEPAs do occur it is on a limited basis or in certain jurisdictions." Vargyas letter, p. 57.

[274] Purnell and Veldhuizen interview, Baltimore District Office, pp. 4–5.

[275] Carr interview, p. 3; Shook interview, p. 4; Steindler interview, p. 2; DeDios and Manget interview, Phoenix District Office, p. 19.

[276] Hale interview, p. 5; Shook interview, attachment, p. 4; Ford and Bell interview, p. 55.

[277] Haley interview, p. 5.

[278] American Jewish Congress, *State Civil Rights Agencies: The Unfulfilled Promise* (New York: The American Jewish Congress, 1986), p. 1.

[279] Ibid., pp. 38–39.

[280] Ibid., pp. 38–41.

[281] Marc Stern, executive director, American Jewish Congress, telephone interview, Mar. 10, 2000, p. 3.

[282] Julie Davies, Utah Federation of Business and Professional Women, letter to Rebecca Kraus, social scientist, USCCR, Apr. 29, 2000, p. 1. Ms. Davies has spent several years working with federal and state agencies to improve the resolution of charges by civil rights agencies. Ibid.; *see also* Julie Davies, Utah Federation of Business and Professional Women, telephone interview, Apr. 5, 2000. Several organizations are concerned with the quality of investiga-

pointing to the inability of the FEPA in her state to combat discrimination. One article notes:

> When you file with the state you automatically file with the federal Equal Employment Opportunity Commission. You explain your case to the investigator, complete a six-page form, and submit all of the evidence and testimony you can dig up that documents the mistreatment. Then prepare for the fight of your life and the realization, say people who have learned from years of trying, that you can't beat the system. Besides taking on the company, many find themselves battling the [state FEPA] itself.[283]

The article accuses the FEPA of mishandling cases and doing poor investigative work, although acknowledging that FEPAs, as well as EEOC, have suffered budget cuts, are overworked, and receive insufficient funding.[284]

A 1995 report by the Alaska State Advisory Committee (SAC) to the U.S. Commission on Civil Rights looked at the handling of civil rights complaints under several civil rights statutes by state and local agencies in Alaska. Concerned with the diversity of the state's residents, the Alaska SAC held a forum to gather information on allegations that civil rights laws were not being properly enforced in Alaska.[285] The report concluded that, in the case of employment discrimination, it was difficult for EEOC to have a presence in Alaska because of the geographical distance between the FEPAs and the Seattle District Office of EEOC which monitors their work.[286] The Alaska SAC report noted:

> Although these agencies do an admirable job of handling complaints, in the majority of cases, they are not responsible for monitoring or enforcing Federal civil rights laws. An exception is the processing of employment complaints by contract agencies for the EEOC. . . . The Advisory Committee concludes that the community perception remains valid and that the lack of Federal presence has a detrimental effect on the filing of complaints and civil rights enforcement in the State.[287]

Thus, the SAC recommended the development of "any creative program" that would facilitate the provision of information from federal agencies to the community in Alaska.[288]

A recent review of the processing of ADA charges by both EEOC and the FEPAs stated that there appears to be a difference in the outcome of charges depending on whether the charge was processed by EEOC or a FEPA. According to the report,

> [w]hile a much higher percentage of individuals whose charges are investigated by FEPAs receive benefits, a much lower percentage of such people receive monetary benefits. They also may receive very different types of charge outcomes, depending on which particular EEOC office of FEPA processes their charge.[289]

The authors of the report recommended that EEOC focus more of its efforts on the nature of charge resolutions by FEPAs.[290]

A legal expert with extensive experience dealing with state and local FEPAs noted that there are several obstacles that FEPAs face in dealing with their caseload of discrimination charges. These include limited funding, limited resources and methods for dealing with systemic discrimination, and political pressures.[291] According to this expert, FEPAs "are closer to the communities where employers basically have a very substantial political influence," making it harder for state and local agencies to do their jobs effectively.[292] He noted that another problem facing FEPAs is that "[t]he caliber of the average state investigator probably does not quite match the caliber of the average federal agency investiga-

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tions conducted by the Utah FEPA. *See* Michael Martinez, attorney, telephone interview, Apr. 5, 2000.

[283] Cheryl Smith, "Sex Discrimination in Utah: Even if You Win, You Lose," *Utah Holiday*, January 1993, p. 32.

[284] Ibid., p. 37.

[285] Alaska Advisory Committee, USCCR, *Enforcing Civil Rights in Alaska: Who is Handling the Complaints?* May 1995, p. 3.

[286] Ibid., p. 16.

[287] Ibid., p. 20.

[288] Ibid., pp. 20–21.

[289] Kathryn Moss, Michael Ullman, Matthew C. Johnsen, Barbara E. Starrett, and Scott Burris, "Different Paths to Justice: The ADA, Employment, and Administrative Enforcement by the EEOC and FEPAs," *Behavioral Sciences and the Law*, vol. 17 (1999), p. 44.

[290] Ibid.

[291] Alfred W. Blumrosen, Thomas A. Cowan Professor of Law, Rutgers University, telephone interview, Apr. 3, 2000, pp. 44–47.

[292] Ibid., p. 46.

tor."[293] However, he states that because FEPAs have been processing charges of discrimination for much longer than EEOC, in some ways they are doing a better job than EEOC. For example, data he collected in the mid-1990s indicated that state agencies were finding cause at a greater rate than EEOC.[294]

[293] Ibid.

[294] Ibid., p. 45.

TABLE 6-3

Fair Employment Practices Agencies under Contract to EEOC by District Office, 1999

Albuquerque, NM
- New Mexico Department of Labor, Human Rights Division

Atlanta, GA
- Augusta-Richmond County Human Relations Commission
- Georgia Commission on Equal Opportunity

Baltimore, MD
- Baltimore Community Relations Commission
- Howard County Office of Human Rights
- Maryland Commission on Human Relations
- Montgomery County Human Relations Commission
- Prince George's County Human Relations Commission
- Virginia Council on Human Rights

Charlotte, NC
- Durham Human Relations Department
- New Hanover County Human Relations Commission
- North Carolina Office of Administrative Hearings
- South Carolina Human Affairs Commission
- Orange County Human Relations Commission

Milwaukee, WI
- Iowa Civil Rights Commission
- Madison Equal Opportunities Commission
- Minneapolis Department of Civil Rights
- Minnesota Department of Human Rights
- St. Paul Human Rights Department
- Wisconsin Department of Workforce Development

Philadelphia, PA
- Delaware Department of Labor
- New Jersey Division of Civil Rights

Cleveland, OH
- Ohio Civil Rights Commission

Dallas, TX
- Fort Worth Human Relations Commission
- Oklahoma Human Rights Commission
- Texas Commission on Human Rights

Denver, CO
- Colorado Civil Rights Division
- Montana Human Rights Commission
- Nebraska Equal Opportunity Commission
- North Dakota Department of Labor
- Omaha Human Relations Department
- South Dakota Division of Human Rights
- Sioux Falls Human Relations Commission
- Wyoming Department of Employment Labor Standards Division

Detroit, MI
- Michigan Department of Civil Rights

Los Angeles, CA
- Nevada Equal Rights Commission

Memphis, TN
- Tennessee Human Rights Commission

New York, NY
- Connecticut Commission on Human Rights and Opportunities
- Maine Human Rights Commission
- Massachusetts Commission Against Discrimination
- New Hampshire Commission for Human Rights
- New York City Commission on Human Rights
- New York State Division of Human Rights
- Puerto Rico Department of Labor & Human Resources Anti-Discrimination Unit

Chicago, IL
- Illinois Department of Human Rights

Indianapolis, IN
- East Chicago Human Rights Commission
- Fort Wayne Metropolitan Human Relations Commission
- Gary Human Relations Commission
- Indiana Civil Rights Commission
- Kentucky Commission on Human Rights
- Lexington-Fayette Urban County Human Rights Commission
- Louisville & Jefferson County Human Relations Commission
- South Bend Human Rights Commission

Miami, FL
- Broward County Human Rights Division
- Clearwater Human Relations Department
- Dade County Equal Opportunity Board
- Florida Commission on Human Relations
- Jacksonville Equal Employment Opportunity Commission
- Lee County Office of Equal Opportunity
- City of Orlando Human Relations Department
- City of St. Petersburg Human Relations Commission
- City of Tampa Office of Community Relations and Services
- Palm Beach County Office of Equal Opportunity

Seattle, WA
- Alaska State Commission for Human Rights
- Anchorage Equal Rights Commission
- Idaho Human Rights Commission
- Oregon Bureau of Labor and Industries Civil Rights Division
- Seattle Office for Civil Rights
- Tacoma Human Rights Department
- Washington State Human Rights Commission

St. Louis, MO
- Kansas Human Rights Commission
- Kansas City Human Relations Department

TABLE 6-3 (cont.)

Philadelphia, PA, (cont.)
- Pennsylvania Human Relations Commission
- Philadelphia Commission on Human Relations
- Pittsburgh Commission on Human Relations
- West Virginia Human Rights Commission

Phoenix, AZ
- Arizona Office of the Attorney General Civil Rights Division
- Industrial Commission of Utah Anti-discrimination and Labor Division

New York, NY, (cont.)
- Rhode Island Commission for Human Rights
- Vermont Attorney General's Office Public Protection Division
- Virgin Islands Department of Labor

San Antonio, TX
- Austin Human Relations Commission Compliance Division
- Corpus Christi Human Relations Commission

San Francisco, CA
- California Department on Fair Employment and Housing
- Hawaii Civil Rights Commission

St. Louis, MO (cont.)
- Missouri Commission on Human Rights
- St. Louis Civil Rights Enforcement Agency

Washington, DC
- Alexandria Office of Human Rights
- Arlington County Human Rights Commission
- District of Columbia Office of Human Rights
- Fairfax County Human Rights Commission
- Prince William County Human Rights Commission

CHAPTER 7

EEOC's Technical Assistance, Outreach, and Education Activities

The U.S. Equal Employment Opportunity Commission (EEOC) provides technical assistance and conducts outreach to inform the public about the obligations of employers and the rights of employees under the fair employment laws it enforces, as well as about the role it plays in enforcing these laws through the processing of complaints. Outreach and technical assistance takes many forms. These include formal training programs, for example, conferences or workshops with presentations to professional organizations such as private attorneys, business owners, advocacy groups, and employers and employees; and also customized training for specific employers and their employees. It includes individualized counseling of employees, employers, and attorneys who call EEOC with inquiries. Employees typically call with complaints that may or may not lead to charges against their employers, and the counseling they receive is part of EEOC's intake process. Employers generally call about charges to which they are responding, but may have inquires about other compliance matters with regard to fair employment laws. Attorneys may call with questions concerning clients who are either employees or employers. The outreach and technical assistance EEOC provides also includes the dissemination of information through literature, such as fact sheets, pamphlets, and booklets, that are made available through intake procedures or other forms of counseling; through information posted on the Internet, and through the media in the form of public service announcements or publicity for EEOC's successful litigation.

The importance of technical assistance for achieving EEOC's goal of eradicating discrimination in the workplace[1] will be discussed next in terms of how it is emphasized in statutory requirements, commissioner leadership, financial support, and other managerial aspects. The chapter then will look in more detail at the technical assistance activities themselves.

THE IMPORTANCE OF TECHNICAL ASSISTANCE AND OUTREACH

Both Congress and EEOC recognize the importance of technical assistance and outreach for achieving the Agency's mission and function in many ways: the statutory requirements for EEOC's technical assistance and outreach, Congress' provision for a Revolving Fund, statements of the commissioners, the integration of technical assistance and outreach into planning documents, and the mission and function statements of offices throughout EEOC.

Statutory Requirements for Technical Assistance and Outreach

The Civil Rights Act of 1991 requires EEOC to provide technical assistance to employers and interested individuals and organizations regarding their rights and obligations under the fair employment statutes.[2] Its amendments to Title VII specifically require EEOC to:

[1] U.S. Equal Employment Opportunity Commission (EEOC), transcript of Commissioners Meeting, open session, Sept. 28, 1999, p. 7, statement of Ida L. Castro, chairwoman (hereafter cited as EEOC, Commissioners Meeting, Sept. 28, 1999).

[2] The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), § 111, *amending* 42 U.S.C. § 2000e-4(h). Note that the Americans with Disabilities Act (ADA) also has language regarding EEOC's provision of technical assistance

carry out educational and outreach activities (including dissemination of information in languages other than English) targeted to—

individuals who historically have been victims of employment discrimination and have not been equitably served by the Commission; and

individuals on whose behalf the Commission has authority to enforce any other law prohibiting employment discrimination, concerning rights and obligations under this title or such law, as the case may be.[3]

In addition, these amendments require EEOC to establish a "Technical Assistance Training Institute, through which the Commission shall provide technical assistance and training regarding the laws and regulations enforced by the Commission,"[4] and authorizes the appropriation of "such funds as may be necessary for fiscal year 1992."[5] In October 1992, Congress passed the EEOC Education, Technical Assistance, and Training Revolving Fund Act, which amended Title VII to create a Revolving Fund "to pay the cost . . . of providing education, technical assistance, and training relating to laws administered by the Commission."[6]

With the creation of the Revolving Fund, EEOC now divides its technical assistance and outreach into two components. First, information available through printed materials, speeches, workshops, and presentations produced with appropriated funds is delivered free of charge to audiences across the country and is generally referred to as "outreach." Second, more specialized and in-depth training services called technical assistance are provided through the Revolving Fund to augment the free activities. This technical assistance is provided for a fee and is primarily directed at employers.[7]

The amendments regarding technical assistance and outreach are directed toward all the laws that the EEOC enforces.[8] Thus, they provide for technical assistance and outreach not just under Title VII, but more broadly under the Equal Pay Act (EPA),[9] the Age Discrimination in Employment Act (ADEA),[10] and the Americans with Disabilities Act (ADA).[11]

EEOC Leadership on Technical Assistance and Outreach

Technical assistance and outreach has commissioner support. Commissioner Paul Stephen Miller has said that technical assistance, outreach, and education are critical to EEOC's mission. He said that discrimination cannot be eradicated simply by enforcement and processing charges. EEOC must provide training to give employers a network for getting answers to questions. At the same time, it is also important to inform the public about its rights. While technical assistance is not a central driving force in

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and outreach. *See* 42 U.S.C. § 12206(c)(2) (1994). *See also* EEOC, "Policy Guidance: Provisions of the Americans with Disabilities Act of 1990: Summary of the Act and Responsibilities of the EEOC in Enforcing the Act's Prohibitions Against Discrimination in Employment on the Basis of Disability" (EEOC Notice 915-055), Aug. 14, 1990, p. 29 (hereafter cited as EEOC, "Policy Guidance: Provisions of the ADA"). However, the ADA language provides for the start up of a new law and the coordination of responsibilities for technical assistance and outreach among various federal agencies, each with different enforcement authority. The attorney general is required to develop a plan, in consultation with EEOC and other agencies with ADA enforcement responsibilities, to assist covered entities in understanding and carrying out their responsibilities under the act. EEOC and the attorney general implement the plan for Title I (42 U.S.C. § 12206(a)(1) and (c)(2)(A) (1994)). The statute required EEOC to develop and publish a technical assistance manual to help employers comply with Title I of the ADA within 6 months after publication of the final regulations implementing Title I (42 U.S.C. § 12206(c)(3) (1994)). The law does not address ongoing needs for technical assistance and outreach, which are subsumed under the amendments of the Civil Rights Act of 1991 as described below.

[3] 42 U.S.C. § 2000e-4(h)(2) (1994).

[4] *Id.* at 2000e-4(j) (1994). The amendment also provides, "An employer or other entity covered under this title shall not be excused from compliance with the requirements of this title because of any failure to receive technical assistance under this subsection." *Id.*

[5] 42 U.S.C. § 2000e-4(j) (1994).

[6] EEOC Education, Technical Assistance, and Training Revolving Fund Act of 1992, P.L. 102-411 (1992), sec. 2, adding subsection (k) to 42 U.S.C. § 2000e-4 (1994).

[7] EEOC, "A Proud Legacy—A Challenging Future," *FY 1998 Budget Request* (Washington, DC: Submitted to the Congress of the United States, February 1997), p. 50 (hereafter cited as EEOC, *FY 1998 Budget Request*); EEOC, "A Proud Legacy—A Challenging Future," *FY 2001 Budget Request* (Washington, DC: Submitted to the Congress of the United States, February 2000), p. 171 (hereafter cited as EEOC, *FY 2001 Budget Request*).

[8] 42 U.S.C. § 2000e-4(h)(2) (1994).

[9] 29 U.S.C. § 206(d) (1994).

[10] 29 U.S.C. §§ 621–634 (1994 & Supp. IV 1998).

[11] 42 U.S.C. §§ 12101–12212 (1994).

what the Agency does, he would like to see EEOC do a better job in outreach.[12]

Vice Chair Paul Igasaki stated that EEOC has made the outreach program a high priority in order to reach communities where discrimination is on the rise, but where employees often do not file charges because they do not understand their rights.[13] Commissioner Reginald Jones describes technical assistance programs as "part of an integrated and strategic approach that coordinates all of [EEOC's] activities."[14] It is a common planning and implementation thread that runs through the National Enforcement Plan, the district offices' Local Enforcement Plans, the Agency's Strategic Plan under the Government Performance and Results Act (GPRA), and the implementation structure of the comprehensive enforcement strategy.[15] Elsewhere he has noted that in the EEOC Strategic Plan, outreach and education have the same priority as litigation.[16]

Technical Assistance and Outreach in EEOC Planning and Budget Documents

As has been discussed in preceding chapters, Chairwoman Ida L. Castro implemented a Comprehensive Enforcement Program (CEP) in May 1999, approximately six months after she assumed her leadership of the Agency. With respect to outreach and education, the CEP emphasizes improving customer service; providing information to employers to prevent discrimination or to quickly remedy it when it does occur; educating employees and advocacy groups to recognize discrimination; identifying underserved areas and industries; and promoting relationships with community organizations, civil rights advocacy groups, and private attorneys.[17]

EEOC's fiscal year (FY) 2001 Budget Request integrates goals of the GPRA Annual Performance Plan, the CEP, and the National Enforcement Plan and links them to funding requests. A major theme of the document is "Prevention of Employment Discrimination," and the tools by which this goal will be achieved are through education, outreach, and technical assistance to facilitate voluntary compliance with the laws.[18] EEOC asked for approximately an additional $1 million for expanding dissemination of publications for private sector prevention activities, and $10 million and nine staff positions to undertake an Equal Pay Initiative.[19]

The Equal Pay Initiative is "to expand opportunities for women and minorities and close the wage gap affecting millions of families dependent on their earnings."[20] The proposal includes both outreach and staff training. The outreach component is to fund public service announcements and seminars with employee groups whose missions are to inform workers of their rights; to provide technical assistance and education to more than 3,000 employers affecting more than one million employees; and to provide information on wage discrimination and employee rights to union and other community leaders and the people they represent.[21]

How Congress will respond to EEOC's current budget request through appropriations remains to be seen. Since it passed the legislation for the Revolving Fund, it has not supported any requests for appropriated funds to conduct expanded outreach. EEOC's FY 1996 budget request included a request for $500,000 to establish a coordinated program of outreach and technical assistance. The request stated that

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[12] Paul Steven Miller, commissioner, EEOC, interview in Washington, DC, Apr. 7, 1998.

[13] EEOC, Commissioners Meeting, Sept. 28, 1999, pp. 21–22, statement of Paul M. Igasaki, vice chairperson.

[14] EEOC, Commissioners Meeting, Sept. 28, 1999, p. 28, statement of Reginald E. Jones, commissioner.

[15] Ibid.

[16] Regional E. Jones, commissioner, EEOC, interview in Washington, DC, Apr. 1, 1998.

[17] EEOC, *Implementation of the National Enforcement Plan Through the Comprehensive Enforcement Program*, Mar. 6, 2000, pp. 7–8 (hereafter cited as EEOC, *Comprehensive Enforcement Program)*; A. Jacy Thurmond, assistant legal counsel, Legal Services Program, EEOC, telephone conversation, Apr. 20, 2000.

[18] EEOC, *FY 2001 Budget Request*, p. 95. Note, however, that "increased emphasis on outreach as a major factor in preventing employment discrimination" had been mentioned earlier in the FY 1999 Budget Request. *See* EEOC, "A Proud Legacy—A Challenging Future," *FY 1999 Budget Request* (Washington, DC: Submitted to the Congress of the United States, February 1998), p. 49 (hereafter cited as EEOC, *FY 1999 Budget Request*). The EEOC *FY 2001 Budget Request*, however, highlights this theme.

[19] EEOC, *FY 2001 Budget Request*, p. 95. *See also* EEOC, "A Proud Legacy—A Challenging Future," *FY 2000 Budget Request* (Washington, DC: Submitted to the Congress of the United States, February 1999), pp. 63–64 (hereafter cited as EEOC, *FY 2000 Budget Request*).

[20] EEOC, *FY 2001 Budget Request*, p. 97.

[21] Ibid., pp. 97–98; EEOC, *FY 2000 Budget Request*, p. 64.

current technical assistance and education efforts were carried out by several sources within the Agency and needed a comprehensive agencywide focus on goals beyond individual program objectives. During FY 1996, EEOC planned to establish a strategy for national, regional, and local collaboration activities between both EEOC headquarters and field offices and the organizations representing the many communities served or affected by the Agency. The strategy mentions using a wide range of sustained outreach vehicles and products and dissemination models, including training seminars, videos, coordination of conference participation, public service announcement campaigns, special and ethnic media, and developing core information products that could be replicated for mass distribution.[22]

EEOC's appropriations in FY 1996 were $35 million below the requested budget of $268 million.[23] Neither the requested special funding nor any plans came to fruition that fiscal year. A report released the following year indicates only that the Agency began a review of its inventory of public information pieces to ensure they were informative and complete. Because of policy and procedural changes in FY 1996, many of these documents needed updating and revision. An intra-agency group was formed to do this task.[24]

The Agency developed a multiyear business plan for expanding technical assistance and outreach through the Revolving Fund, but it took more than one fiscal year to develop. It was under development in FY 1997 and FY 1998.[25] Implementation of the five-year business plan began in FY 1999.[26] The plan was to enable the EEOC to develop and implement a national outreach strategy defining the relationship between free and fee-paid activities, setting goals and objectives for sustained outreach activities, and coordinating outreach between and among headquarters and field offices.[27] So far, the plan has resulted in the development of a new financial management and tracking system and a computerized marketing, sales, and registration system to improve customer service, reduce overhead, and improve the efficiency of the Revolving Fund.[28]

Technical Assistance and Outreach in Office Missions and Functions

The management and functions of EEOC's technical assistance and outreach programs are distributed throughout EEOC. Two headquarters offices that monitor and support district technical assistance and outreach are the Office of Communication and Legislative Affairs (OCLA) and the Office of Field Programs (OFP); however, the district offices bear responsibility for developing their own technical assistance and outreach programs. The Office of Communications and Legislative Affairs

- develops, coordinates, and monitors a comprehensive, integrated, standardized approach for providing authoritative technical assistance, outreach and education on the Agency's programs and activities, and on the laws the Commission enforces;
- On a national level, [it] coordinates the production and delivery of technical assistance, outreach, and education activities that augment program offices' efforts to educate the public, including employers, regarding their rights and responsibilities under the laws [EEOC] enforces; and
- Coordinates the production of information materials for public dissemination. . . .[29]

In addition, OCLA is responsible for communicating EEOC's policies and programs to the media and the public. It serves as liaison with the news media, produces public service announcements, and provides guidance to the district directors on media.[30]

The Office of Field Programs' outreach functions are directed toward ensuring that the Agency complies with the law. Its Field Coordi-

[22] EEOC, "Making Rights a Reality," *FY 1996 Budget Request* (Washington, DC: Submitted to the Congress of the United States, February 1995), p. 19 (hereafter cited as EEOC, *FY 1996 Budget Request*).

[23] *See* chap. 3, fig. 3-1.

[24] EEOC, *FY 1998 Budget Request*, p. 37.

[25] Ibid., pp. 51–52; EEOC, *FY 1999 Budget Request*, pp. 48–49; EEOC, *FY 2000 Budget Request*, p. 72.

[26] EEOC, *FY 2000 Budget Request*, p. 72.

[27] EEOC, *FY 1999 Budget Request*, pp. 48–49.

[28] EEOC, *FY 2000 Budget Request*, p. 72.

[29] EEOC, *Compliance Manual*, "Equal Employment Opportunity Commission General Management," § IV.B(8)(9)(11), p. 0110:0801.

[30] Ibid., § IV.B(2)(7)(13), p. 0110:0801.

nation Programs Unit is responsible for seeing that technical assistance coverage is broadly based and targets underserved areas[31] and for managing the Revolving Fund.[32] Outreach functions for the former require it to:

- coordinate with field offices and headquarters offices to develop nationwide data that will assist in identifying underserved areas;
- compile information to be used across field office jurisdictions to avoid duplication of coverage, and to insure balances and full coverage by the field office outreach and technical assistance efforts; and
- establish systems and collect information to determine results of these activities.[33]

Among the functions related to the management of the Revolving Fund, the Field Coordination Programs' Revolving Fund Division is to develop operational policy for budgeting and financial management; to develop procedures that identify suitable projects to be supported by the fund; to provide oversight and facilitation in the design, development, and content of all supported projects; to evaluate supported projects; and to assess whether the supported projects are meeting customer needs.[34] All program analysts in the district offices work directly with the Revolving Fund Division, under the supervision of their district directors.[35]

District offices are charged with the responsibility of increasing "the public's awareness of its rights and responsibilities through education and technical assistance."[36] The district director's office has the following functions:

- provide technical and educational assistance on, and in consultation with the legal division, responding to questions on interpretation of statutes, regulations and case decisions, and advice and guidance about relevant laws and procedures;
- implement EEOC's public information program by generating news releases and public service announcements for radio and television in coordination with the Office of Communications and Legislative Affairs; and
- ensure that information on EEO rights and responsibilities reaches segments of the general public which may have the greatest need for such assistance.[37]

In short, the roles of these various offices have been described as follows: The Office of Communications and Legislative Affairs has a national perspective on EEOC's technical assistance and outreach and is responsible for national publications. The district offices deal with outreach in terms of their jurisdictional and geographical areas. The Office of Field Programs oversees the activities of the field offices and reviews how these fit into EEOC's National Enforcement Plan.[38]

HEADQUARTERS MANAGEMENT OF TECHNICAL ASSISTANCE AND OUTREACH

With the establishment of the Revolving Fund, the Office of Field Programs, then known as the Office of Program Operations,[39] began a

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[31] Ibid., § IV.D.4(a), p. 0110:0602.

[32] Ibid., § IV.D.4(c), p. 0110:0603.

[33] Ibid., § IV.D.4.a.(5)(6)(7), p. 0110:0602.

[34] Ibid., § IV.D.4.c(2)(3)(4)(7)(9), p. 0110:0603.

[35] Ellen J. Vargyas, legal counsel, EEOC, letter to Ruby G. Moy, staff director, U.S. Commission on Civil Rights (USCCR), re: draft report, July 7, 2000, p. 59. *See* Beverly Hinton, outreach/program analyst, Birmingham District Office, EEOC, interview in Birmingham, AL, Feb. 25, 2000, p. 1 (hereafter cited as Hinton interview, Birmingham District Office).

[36] EEOC, *Compliance Manual,* "Equal Employment Opportunity Commission General Management," § IV.1.H., p. 0110:0501.

[37] Ibid., § IV.A.1.d., e. and f, p. 0110:0501. Area and local offices have similar functions. *See* ibid., § I.E., pp. 0110:1503 and 0110:1504.

[38] USCCR, *Helping Employers Comply with the ADA: An Assessment of How the United States Equal Employment Opportunity Commission is Enforcing Title I of the Americans with Disabilities Act,* September 1998, p. 237, *citing* Elizabeth Thornton, director, Office of Field Programs, EEOC (hereafter cited as USCCR, *Helping Employers Comply with the ADA). See also* discussion on the National Enforcement Plan, chap. 3.

[39] The organization, mission, and functions of the Equal Employment Opportunity Commission were revised, effective May 11, 1997. Prior to this restructuring of the Agency, the organization, mission, and functions had been in effect since 1982 with amendments in 1989. At that time the functions of the Office of Field Programs were in a section called the Office of Program Operations. Thus, the Office of Program Operations was responsible for management of the Revolving Fund when it was established. *See* EEOC, *Compliance Manual,* "Equal Employment Opportunity Commission General Management, Mission and Functions," pp. 0110:0601–0605; and EEOC, *Compliance Manual,* "Equal Employment Opportunity Commission General Manage-

pilot technical assistance program during FY 1993[40] that evolved into a more broadly implemented three-prong approach the following year.[41] First, each district is to have a program analyst position to integrate technical assistance, outreach, and education in field programs. The program analyst is to establish and coordinate comprehensive technical assistance and outreach activities, including a public relations program, and to implement and monitor an approach for developing and delivering such activities.[42]

The second prong was in response to the mandate of the Civil Rights Act of 1991 to establish a training institute. Every fiscal year each district office is required to develop two seminars, known as Technical Assistance Program Seminars (TAPS). The TAPS are directed to private employers, attorneys, human resource practitioners, and the public, and are supported by the Revolving Fund.[43] After TAPS were well established, this prong was expanded to include customer-specific training, also supported by the fund, but which is at an employer's request and addresses the needs of a particular company.[44]

The third prong is to have EEOC personnel conduct workshops, make presentations, and participate in conferences and meetings representing EEOC on various aspects of the laws it enforces.[45] Headquarters staff have the same requirements as district office staff for developing and presenting seminars, giving speeches, and participating in workshops and conferences.[46]

Headquarters has articulated other goals for the technical assistance programs. For example, one goal is to expand communications in the field. Some ways in which communications might be expanded are by each field office having a stakeholder council for consultation or sending out newsletters to stakeholders.[47]

Over time, a number of management tools by which headquarters offices monitor or influence district offices' technical assistance and outreach activities have emerged. First, field offices' technical assistance and outreach plans are submitted to headquarters as part of the Local Enforcement Plan (LEP), a requirement of the National Enforcement Plan.[48] Second, procedures developed for managing the Revolving Fund provide for oversight of activities supported by the fund. Third, EEOC maintains a special database for tracking technical assistance and outreach. Fourth, headquarters conducts formal program evaluation, getting feedback from participants. Finally, headquarters provides training to technical assistance and outreach staff.

Outreach Goals in Local Enforcement Plans

Since the National Enforcement Plan was developed in 1996, field offices have been required to develop Local Enforcement Plans (LEPs) that, in addition to specifying local issues that require attention, include goals for outreach and education.[49] The LEP must include an evaluation of relevant regional employment practices and a strategy to provide EEOC services to underserved populations and geographic regions in the district office's area.[50] Or, as the director of the Office of Field Programs explained, goals for outreach and education are to be based upon analyses of demographics, charge receipts and district geography, and on an awareness of what is going on in the community derived by talking

ment, Mission and Functions," pp. 110:0701–0720 (No. 189, July 1994, obsolete as of Dec. 30, 1999).

[40] EEOC, Office of Program Operations, "Report on Technical Assistance, Education and Outreach Program, EEOC District Offices," 1994 (hereafter cited as EEOC, 1994 OPO Report).

[41] EEOC, Office of Program Operations, "Technical Assistance and Education in EEOC: The Role of the Office of Program Operations," Report to the Commission, Jan. 10, 1995, pp. 3–5 (hereafter cited as EEOC, 1995 OPO Report).

[42] EEOC, 1995 OPO Report, p. 3; *see also* USCCR, *Helping Employers Comply with the ADA*, p. 240.

[43] EEOC, 1995 OPO Report, pp. 3–4.

[44] EEOC, *FY 2000 Budget Request*, pp. 70–71. The expansion of Revolving Fund activities also included direct sales of TAPS books, and other new books are in development, including a practical handbook geared specifically to small businesses. Vargyas letter, p. 59.

[45] EEOC, 1995 OPO Report, p. 4.

[46] Ibid.

[47] USCCR, *Helping Employers Comply with the ADA*, p. 240.

[48] EEOC, *National Enforcement Plan*, February 1996, accessed at <http://www.eeoc.gov./nep.html> (last modified Jan. 15, 1997).

[49] Ibid. *See also* Elizabeth Thornton, director, Office of Field Programs, EEOC, interview in Washington, DC, Nov. 9, 1999, p. 3 (hereafter cited as Thornton interview, Nov. 9, 1999).

[50] EEOC, *National Enforcement Plan.*

to employers, charging parties, and advocacy groups.[51]

The LEPs do indeed contain a wealth of information about plans for outreach and technical assistance. They typically specify the methods or criteria for determining targeted populations, identify those targeted populations, and list the regions considered underserved. They also specify the strategies planned to conduct the technical assistance and outreach, whether in the form of seminars, meetings, or working with organizations; or in the form of written communication such as fact sheets, or other media such as videos.[52]

With the LEPs in place, EEOC had hoped eventually to implement a national outreach plan identifying areas where technical assistance needs strengthening.[53] Headquarters has issued occasional initiatives such as a Small Business Initiative[54] and an Equal Pay Initiative planned for FY 2001.[55] Until recently, apart from these and the outreach to underserved communities specified in the law, no national plan had emerged.[56] Indeed, EEOC has not been able to approve revised LEPs on the anticipated biannual schedule.

Managing the Revolving Fund

Headquarters has taken a leadership role in managing the Revolving Fund to ensure both that its monies are efficiently spent and cost effective and that they are targeted as Congress intended. Soon after the Revolving Fund was established, EEOC hired a consultant for advice on how to manage and market the TAPS programs and information materials. Focus groups were convened and 20,000 letters were sent to various groups and individuals to determine what types of technical assistance and outreach programs the Agency's stakeholders wanted and needed.[57] The Agency used this input to best target technical assistance and outreach activities. Since this beginning effort, headquarters continues to consult stakeholders[58] and has required that district offices do the same.[59]

Second, when Congress established the Revolving Fund, it stipulated that EEOC could charge fees to offset the costs of education, technical assistance, and training provided with the fund. It further required that the fees be uniformly imposed upon the persons and entities receiving it; and that they be reasonably related to and not in excess of the cost of providing it.[60] Because of these provisions in the statute, headquarters sets the amount of fees for Technical Assistance Program Seminars (TAPS) and reviews proposals for customer-specific training to ensure uniformity of cost throughout the nation. All district office training proposals must pass this inspection before the office can proceed.[61]

In setting the costs of TAPS seminars, headquarters staff begin with a discussion of the needs, support, and administrative overhead for the offering. The seminar is then marketed to individual subscribers, and attendance is estimated. The fee per person is calculated as the full cost for the seminar distributed among the projected participants.[62] The seminars must have a minimum of 190 participants to break even.[63] Fees for customer-specific training are based on all direct and indirect costs for the development and delivery of the training, including costs for staffing, materials, overhead, and travel.[64]

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[51] Thornton interview, Nov. 9, 1999, p. 3.

[52] *See* Peggy R. Mastroianni, associate legal counsel, EEOC, letter to Frederick D. Isler, former assistant staff director for civil rights evaluation, USCCR, Mar. 6, 1998, attachments (Local Enforcement Plans) (hereafter cited as EEOC, *Local Enforcement Plans*). This response to an information request included the Local Enforcement Plans for all 26 district offices. The plans were dated 1996 or 1997. Ibid.

[53] USCCR, *Helping Employers Comply with the ADA*, p. 237, *citing* Elizabeth Thornton, director, Office of Field Programs.

[54] EEOC, "EEOC Focuses on Relationship with Small and Mid-Sized Businesses," press release, Dec. 10, 1998, accessed at <http://www.eeoc.gov/press/12-10-98.html>.

[55] EEOC, *FY 2001 Budget Request*, pp. 97–98, 117–19.

[56] In FY 1999 the Agency developed a national three-year outreach plan, covering FY 2000–2002. Vargyas letter, p. 60.

[57] USCCR, *Helping Employers Comply with the ADA*, p. 231, *citing* interview with Paula M. Choate, director, Field Coordination Programs, Office of Field Programs, EEOC.

[58] *See, e.g.*, EEOC, Commissioners Meeting, Sept. 28, 1999.

[59] EEOC, *Comprehensive Enforcement Program*, pp. 6, 13.

[60] 42 U.S.C. § 2000e-4(k) (1994).

[61] Edward P. Elizondo, program analyst, Dallas District Office, EEOC, interview in Dallas, TX, Jan. 31, 2000, pp. 3–4, 8 (hereafter cited as E. Elizondo interview, Dallas District Office).

[62] EEOC, *FY 1999 Budget Request*, p. 65.

[63] EEOC, "Cost of Technical Assistance Program Seminars (TAPS)," January 1998; Vargyas letter, p. 60.

[64] Vargyas letter, p. 60.

With TAPS training now ongoing for a number of years and customer-specific training for private employers relatively new, the Office of Field Programs' most recent guidance on providing technical assistance has primarily concerned customized training. That office developed interim guidelines for field offices to ensure uniformity throughout the country. One outreach coordinator explained that he sent a proposal for a customized technical assistance program to headquarters only to have it sent back to him for justification as to why his estimated cost was lower than a similar program with the same employer in another part of the country. The two district office outreach coordinators had prepared similar proposals with the same amount of preparation time and same grade-level staff, however, differences in salaries and commuting distances led to differences in costs. Headquarters approved the proposal when these differences were explained.[65]

Congress provided a one-time transfer of $1 million from EEOC's Salaries and Expenses Account to the Revolving Fund.[66] Since then the fund has been supported through fees charged to recipients of technical assistance. The fund has increased in amount each fiscal year since then, except FY 1998 (see figure 6-1). Looking at the end of each fiscal year, in FY 1993, the fund had $1,258,000; in FYs 1994 and 1995, it had about $1,750,000; in FY 1996, $2,339,000; in FY 1997, $2,515,000; in FY 1998, just under $2 million, and in FY 1999, $2,402,000.[67]

FY 1998 was not really a set back for the fund. The fund was actually more solvent than before. In FY 1997, it had begun to pay full salaries and benefits of headquarters staff in addition to the direct program costs.[68] Further, the activities supported by the fund had expanded. FY 1998 was when the technical assistance program started to include customer-specific training to private employers.

Initially, the Revolving Fund could pay only for direct costs association with TAPS, such as printing, supplies, travel, and hotel costs. Currently, the fund also can pay for some staffing and overhead costs.[69] Further, district office staff reported that when TAPS fees go back into the Revolving Fund, the district office receives a portion of the money for quality enhancement of its TAPS program.[70]

Despite reports that the Revolving Fund had become more self-sustaining, district office staff expressed concerns that funds were not sufficient to support travel to remote areas of the district[71] or that the funds would not continue to be adequate.[72] Furthermore, the charging of fees for technical assistance services has raised some concerns about whether EEOC is reaching a broad-based audience with its outreach. For example, a large proportion of the recipients of technical assistance under the Revolving Fund are large employers. And although many medium-sized employers are recipients, too, EEOC staff are concerned that small employers do not participate in fee-based programs.[73] Because of these concerns, headquarters EEOC adopted a Small Business Initiative which district offices are now working to implement. Their efforts to design activities to reach small businesses will be described in later sections.

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[65] E. Elizondo, interview, p. 8.

[66] 42 U.S.C. § 2000e-4(k) (1994).

[67] EEOC, "Continuing its Quest of Ensuring Diversity in the Workplace," *FY 1995 Budget Request* (Washington, DC: Submitted to the Congress of the United States, February 1994), p. 66 (hereafter cited as EEOC, *FY 1995 Budget Request*); EEOC, *FY 1996 Budget Request*, p. 85; EEOC, "A Proud Legacy—A Challenging Future," *FY 1997 Budget Request* (Washington, DC: Submitted to the Congress of the United States, March 1996), p. 70 (hereafter cited as EEOC, *FY 1997 Budget Request*); EEOC, *FY 1998 Budget Request*, p. 53; EEOC, *FY 1999 Budget Request*, p. 66, EEOC, *FY 2000 Budget Request*, p. 91; EEOC, *FY 2001 Budget Request*, p. 179.

[68] EEOC, *FY 1999 Budget Request*, p. 65.

[69] Vargyas letter, p. 60.

[70] Hinton interview, Birmingham District Office, p. 5.

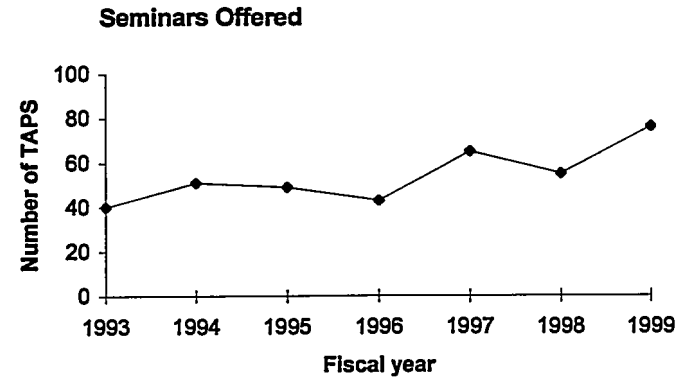
[71] James Lee, regional attorney, Louis Graziano, trial attorney, and Luis Quinto, trial attorney, New York District Office, EEOC, telephone interview, Mar. 13, 2000, p. 8 (hereafter cited as Lee, Graziano, and Quinto interview, New York District Office). According to EEOC's legal counsel, the Revolving Fund will always pay for travel costs for Revolving Fund projects, but different criteria apply to the selection of locations for TAPS versus locations for free outreach. Deciding where to hold a TAPS session is based on market factors to ensure that costs are covered. Vargyas letter, p. 60.

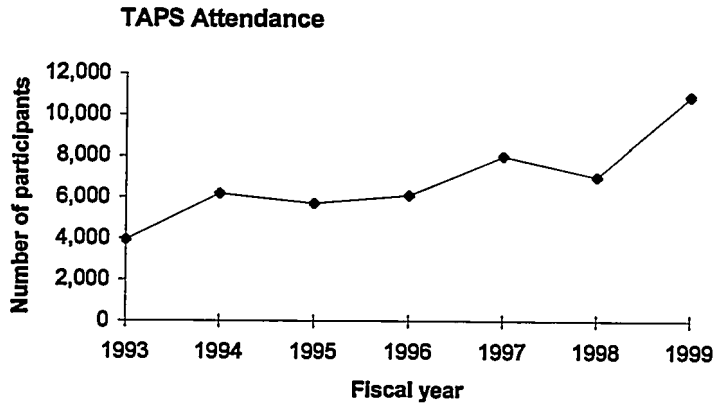
[72] Hinton interview, Birmingham District Office, p. 5.

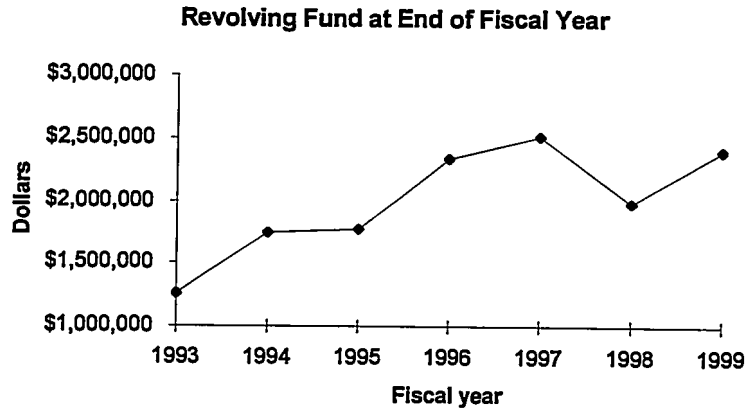
[73] USCCR, *Helping Employers Comply with the ADA*, p. 232.

FIGURE 7-1

TAPS Program Activities by Fiscal Year







SOURCES: EEOC, "Continuing its Quest of Ensuring Diversity in the Workplace" FY 1995 Budget Request, February 1994, pp. 64, 66; EEOC, "Making Rights a Reality" FY 1996 Budget Request, February 1995, pp. 83, 85; EEOC, "A Proud Legacy—A Challenging Future" FY 1997 Budget Request, February 1996, pp. 69, 70; EEOC, "A Proud Legacy—A Challenging Future" FY 1998 Budget Request, February 1997, pp. 51, 53; EEOC, "A Proud Legacy—A Challenging Future" FY 1999 Budget Request, February 1998, pp. 64, 66; EEOC, "A Proud Legacy—A Challenging Future" FY 2000 Budget Request, February 1999, pp. 71, 91; EEOC, "A Proud Legacy—A Challenging Future" FY 2001 Budget Request, February 2000, pp. 173, 179.

Database for Tracking Technical Assistance

In FY 1997, EEOC developed a new database called the "Automated Outreach System" that allows tracking of technical assistance and outreach efforts. It is intended to support offices in managing the planning, scheduling, and reporting on EEOC's training events, technical assistance visits, and outreach. It can also help in identifying geographical areas and types of audiences that have not been fully represented in outreach and technical assistance efforts.[74] This system records the location, date, and type of event, information on the presenter, number of hours of the event, topics covered, audience type and size, geographic area, and sponsor for outreach efforts.[75]

The Automated Outreach System can be used to generate summary reports overall or by district office. Headquarters assembles an elaborate quarterly report of all district office activities. Staff can, for example, obtain a report of a given month's outreach activity with the African American community, Asian Americans and Pacific Islanders, Hispanic groups, women's groups, or disability advocacy groups.[76] One sample district office summary report contains approximately 250 events for 1996 through 1999.[77] Most of the information in this Automated Outreach System is the free outreach that EEOC has done.[78]

Program Evaluation

The Revolving Fund-supported technical assistance programs—TAPS and customer-specific training—are evaluated systematically. Headquarters developed an evaluation form that is provided to all registrants.[79] The form asks the participants what topics were most helpful, how the speaker did, if the content of the program met company needs, and what other topics they would like to have covered.[80] At the end of the presentations, the presenters collect the evaluation sheets and send them back to headquarters to be tabulated.[81] In order to continually address customer needs, district office staff are required to review and summarize their program evaluations, identify what worked and those areas that require improvement, and consider new topics for future TAPS.[82] District office staff may review these evaluations to gauge the success of the program and make changes to it. One program analyst does this by determining the percentages of those who responded that the programs were excellent, average, and below average.[83]

Training Outreach Staff

Outreach staff have had very little training. It is only recently that district offices have each had outreach coordinators. Indeed, it was only in 1998 that the Office of Field Programs, Field Coordination Programs Unit, gained an outreach coordinator to coordinate field technical assistance activities with other headquarters offices.[84] Thus, it is not surprising that EEOC held a national conference for EEOC staff engaged in outreach for the first time in July 1997.[85] Headquarters has planned conferences for program analysts once a year since then. Although a training conference was held for program analysts in FY 1998, the conference was shelved in FY 1999 because of budget cuts.[86]

During fiscal years 1999 and 2000, EEOC conducted training on presentation techniques for nearly 300 staff who participate in Revolving Fund and TAPS programs. The training was a

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[74] EEOC, *FY 1999 Budget Request*, p. 53; EEOC, Baltimore District Office, "Automated Outreach System Program Summary," Oct. 29, 1999 (hereafter cited as Baltimore District Office, AOS Summary).

[75] Baltimore District Office, AOS Summary; E. Elizondo interview, Dallas District Office, p. 2.

[76] E. Elizondo interview, Dallas District Office, p. 2.

[77] Baltimore District Office, AOS Summary.

[78] Erica Cryor, program analyst, and Barbara Veldhuizen, deputy director, Baltimore District Office, EEOC, interview in Baltimore, MD, Nov. 18, 1999, p. 5 (hereafter cited as Cryor and Veldhuizen interview, Baltimore District Office).

[79] E. Elizondo interview, Dallas District Office, p. 7; Cryor and Veldhuizen interview, Baltimore District Office, p. 6.

[80] Hinton interview, Birmingham District Office, p. 4.

[81] E. Elizondo interview, Dallas District Office, p. 7; Cryor and Veldhuizen interview, Baltimore District Office, p. 6.

[82] Vargyas letter, p. 61.

[83] Hinton interview, Birmingham District Office, p. 4.

[84] USCCR, *Helping Employers Comply with the ADA*, p. 237, *citing* Paula Choate, director, Field Coordination Programs, Office of Field Programs, EEOC.

[85] USCCR, *Helping Employers Comply with the ADA*, p. 237, *citing* Ed Elizondo, outreach and education coordinator, Dallas District Office, EEOC, telephone interview, Apr. 13, 1998.

[86] E. Elizondo interview, Dallas District Office, p. 8; Vargyas letter, p. 61.

two-day presentation paid for with revolving funds. It was a hands-on training limited to 12 staff persons per district office.[87]

Headquarters has other ways by which it promotes the exchange of ideas among outreach coordinators. It posts TAPS agendas on the Web site and sends sample training materials and slide shows to field offices via e-mail. In addition, EEOC has created an electronic bulletin board so that field office staff can post and share training materials. Headquarters staff also disseminate a newsletter that includes information on field office outreach activities and hold a monthly conference call with technical assistance coordinators during which they discuss concerns or clarifications needed for local programs.[88]

HEADQUARTERS OUTREACH

The commissioners themselves have been involved in many outreach activities. They participate in TAPS programs throughout the country and have invited stakeholders to speak at the monthly commission meetings. The last meeting of FY 1999 had three panels of stakeholders speaking on mediation, small business outreach, and outreach more generally.[89] They have also held commission meetings outside Washington, D.C., in order to provide stakeholders better opportunities to participate. One such meeting was held in Houston, Texas, in June 1999. During the daylong meeting the commissioners heard testimony about how discrimination affects low-wage workers, particularly immigrants, minorities, and women.[90]

Commissioners also do outreach on their own. Vice Chair Igasaki explained that the role of the vice chair is doing outreach in communities, communicating EEOC's mission and function, and taking complaints. He reported spending at least half of his time on travel, making about four trips a month to different cities. During these trips the commissioner talks with people and works with communities to understand their concerns and to gain outsiders' perspectives on EEOC. He meets with employers, civil rights groups, social service agencies, job developers, and people knowledgeable about employment. He visits with the National Association for the Advancement of Colored People (NAACP), with women's groups, and disability rights groups. He also meets with lawyers, both defense and plaintiffs' counsels. The vice chair stated that before the Agency made changes to its charge processing systems, he received a lot of criticism and little praise about the Agency, but since the reforms he has heard far more praise and less criticism.[91]

In addition to the special outreach functions of OCLA and OFP described earlier, other headquarters offices also reported involvement in outreach. For example, in FY 1997, the Office of Legal Counsel (OLC) provided guidance and interpreted Agency statutes in response to more than 10,000 telephone inquiries and several hundred written requests. Office staff also made 150 public presentations interpreting EEOC statutes during the year, and initiated a series of meetings with national organizations representing major sectors of covered employers and groups protected by EEOC-enforced statutes.[92] In FY 1999, OLC provided guidance and statutory interpretation in response to more than 8,000 telephone inquiries and several hundred written requests, and made 115 public presentations.[93] In another example, in FY 1997, the Agency's Publications Distribution Center mailed out about 365,000 publications, more than one-third of which were ADA related.[94]

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[87] E. Elizondo interview, Dallas District Office, p. 8; Vargyas letter, p. 61.

[88] Vargyas letter, p. 62; Ed Elizondo, outreach and education coordinator, Dallas District Office, EEOC, telephone interview, Apr. 13, 1998 (hereafter cited as E. Elizondo interview, Dallas District Office); Hinton interview, Birmingham District Office, p. 1; EEOC, Los Angeles District Office, "Questions for Los Angeles District Office," written response, April 2000, item 38 (hereafter cited as Los Angeles District Office, written response).

[89] EEOC, Commissioners Meeting, Sept. 28, 1999.

[90] EEOC, "EEOC Addresses Discrimination Against Low-Wage Earners at Historic Public Meeting in Houston," press release, June 24, 1999, accessed at <http://www.eeoc.gov/press/6-24-99.html> last modified June 24, 1999 (hereafter cited as EEOC, "Discrimination Against Low-Wage Earners"). Texas field offices have formed a task force to target technical assistance and outreach to this group. *See* E. Elizondo interview, Dallas District Office, p. 5; EEOC, *FY 2001 Budget Request*, p. 107.

[91] Paul Igasaki, vice chairperson, EEOC, interview in Washington, DC, Mar. 1, 2000, pp. 6–8.

[92] EEOC, *FY 1997 Budget Request*, p. 47.

[93] EEOC, *FY 1999 Budget Request*, pp. 50–51.

[94] Ibid., p. 49.

Headquarters offices engage not only in conducting outreach, but also in planning it. A major accomplishment of headquarters offices—the Office of Field Programs, the Office of Federal Operations, the Office of General Counsel, and Office of Communications and Legislative Affairs—in FY 1999 was preparing an outreach plan for fiscal years 2000 to 2002. The plan has core objectives and activities for providing outreach, technical assistance, and education to stakeholders, employers, employee groups, and underserved communities in diverse geographical areas, with strategic application of Agency resources.[95]

DISTRICT OFFICE TECHNICAL ASSISTANCE AND OUTREACH

District office technical assistance and outreach consists of the two or more TAPS offered each year, the customer-specific training, and outreach. Although TAPS and customer-specific training are aimed at employers, EEOC activities overall reach a much more diverse audience. In FY 1999, 32 percent of the total audience were representatives of private and federal employers, 38 percent were from diverse advocacy groups, and 30 percent were members of the general public.[96] The diversity of the audience requires that EEOC tailor the technical assistance to its needs. This section will examine TAPS, customer-specific training, and outreach in more detail before looking at special outreach efforts and the technical assistance provided to or conducted with the fair employment practices agencies (FEPAs) that are under contract with EEOC to investigate charges of employment discrimination.

Technical Assistance Program Seminars

The chief undertaking of the EEOC's technical assistance program supported by the Revolving Fund has been an annual nationwide series of Technical Assistance Program Seminars, known as TAPS, geared toward private employers and state and local agencies and sponsored by EEOC field offices.[97] EEOC reported that it conducted more than 40 seminars each year, totaling more than 16,000 participants, from 1993 to 1995;[98] 43 seminars with nearly 6,100 participants in fiscal year 1996,[99] 65 with more than 8,000 participants in FY 1997;[100] 55 with about 7,000 participants in FY 1998;[101] and 76 with 10,900 participants in FY 1999.[102] In short, each field office now delivers at least two TAPS programs annually.[103]

In FY 1996, many of the seminars were heavily oversubscribed, and some applicants could not be accommodated due to space limitations.[104] Thus, EEOC nearly doubled the number of TAPS in FY 1997.[105] Although the number of TAPS conducted decreased in FY 1998, an anomaly in a trend that is otherwise mostly increasing, it is because EEOC began offering customized training for private employers that year and was focusing its efforts elsewhere.[106]

TAPS were conceived as full-day programs. Over the years, concerns that underserved groups could not afford the fee have led district offices to offer lower cost half-day events.[107] Furthermore, input from stakeholders has revealed the need for technical assistance on broader-based employment laws than those EEOC enforces. Often participants ask why other federal agencies do not have similar statutory mandates to conduct technical assistance and outreach. Advocacy groups helping to plan technical assistance have requested that education, housing, and justice components be added to the employment one. People also do not know how or where to file complaints in these areas.[108] To accommo-

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[95] EEOC, *FY 2001 Budget Request*, p. 102.

[96] Ibid., p. 105; *see also* EEOC, Automated Outreach System data as of Apr. 25, 2000, where over the course of this database system (FY 1996 to mid-FY 2000), the audiences were slightly different. Thirty-eight percent of the audiences for outreach activities were employer organizations, 36 percent were employee groups, and 26 percent were general audiences.

[97] EEOC, *FY 2000 Budget Request*, p. 70.

[98] EEOC, *FY 1998 Budget Request*, p. 51. *See also* EEOC, *FY 1995 Budget Request*, p. 64; EEOC, *FY 1996 Budget Request*, p. 83; and EEOC, *FY 1997 Budget Request*, p. 69.

[99] EEOC, *FY 1998 Budget Request*, p. 51.

[100] EEOC, *FY 1999 Budget Request*, p. 64.

[101] EEOC, *FY 2000 Budget Request*, p. 71.

[102] EEOC, *FY 2001 Budget Request*, p. 173.

[103] EEOC, 1995 OPO Report, p. 4.

[104] EEOC, *FY 1998 Budget Request*, p. 51.

[105] EEOC, *FY 1999 Budget Request*, p. 64.

[106] EEOC, *FY 2000 Budget Request*, p. 71.

[107] Cryor and Veldhuizen interview, Baltimore District Office, p. 6.

[108] E. Elizondo interview, Dallas District Office, p. 4.

date the coverage of other employment laws, one district office has offered a four-day TAPS where other federal agencies present technical assistance, too.[109] District offices offer programs of varying lengths to meet the needs of the participants. For example, the Baltimore District Office held six TAPS programs in FY 1999—three full days and three half days.[110] In FY 2000, the Birmingham District Office planned four full-day programs in Biloxi, Mississippi, and in Jackson, Mississippi, and a two-day program in Birmingham, Alabama.[111]

EEOC's legal counsel stated that the decision of where to hold a TAPS is based on market factors to ensure that costs are covered. Some remote locations cannot sustain a TAPS program.[112] District offices vary the locations of the TAPS to attract more participants. The Dallas District Office anticipates holding FY 2000 sessions in Dallas and Tulsa, Oklahoma, or Oklahoma City.[113] Each year the Baltimore District Office plans one TAPS in Maryland on the Baltimore-Washington corridor, one in Virginia, either Richmond or Norfolk, and, lately, a half-day TAPS on the Eastern Shore of Maryland.[114] The St. Louis District Office holds one seminar in a city and one in a nonmetropolitan area. The city training sites rotate between St. Louis and Kansas City.[115]

In FY 2000 headquarters set the fee for a full-day TAPS at $209 per person,[116] an increase from $199 two years ago.[117] The fee includes the cost of resource books with information on the topic of the seminar.[118] Half-day seminars cost $75.[119] The cost of the TAPS programs has long been regarded as high relative to employers' budgets, particularly for small businesses with small budgets.[120]

TAPS are marketed to employers throughout the district offices' jurisdictions, and the registrants tend to be labor law attorneys who may be on contract with employers, labor law personnel, human relations and personnel directors, and labor relations people. The technical assistance also attracts mediators, union representatives, and anyone with an interest in employment law.[121] TAPS audiences are becoming broader over time. TAPS were originally targeted to employers of 100 or more employees, but EEOC has expanded the audience to include small and medium-sized employers, i.e., employers with 50 or more employees.[122] And, in a departure from marketing TAPS to employers, one district office created a half-day program for first line supervisors after receiving feedback that many problems occur at that level.[123]

EEOC states that the marketing of its TAPS programs is very extensive and aimed at all types of employers, including small businesses. The annual TAPS marketing program begins with a national mailing of 350,000 brochures to private sector employers and state, local, and federal government agencies. These brochures

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[109] Hinton interview, Birmingham District Office, p. 2.

[110] Cryor and Veldhuizen interview, Baltimore District Office, pp. 5–6.

[111] Hinton interview, Birmingham District Office, p. 2.

[112] Vargyas letter, pp. 60–61. While EEOC is statutorily required to charge fees for all Revolving Fund programs and materials, free outreach, which is supported with appropriated funds, substantially amplifies the overall outreach effort. The two programs together enable the agency to reach a broad audience of stakeholders. Ibid.

[113] E. Elizondo interview, Dallas District Office, p. 3.

[114] Cryor and Veldhuizen interview, Baltimore District Office, p. 6.

[115] John Fultz, outreach program analyst, St. Louis District Office, EEOC, interview in St. Louis, MO, Feb. 1, 2000, p. 2 (hereafter cited as Fultz interview, St. Louis District Office).

[116] EEOC, "Technical Assistance Program Seminars (TAPS) Designed Especially for the Private Sector and State and Local Agencies," accessed at <http://www.eeoc.gov/taps/private.html> last modified May 3, 2000 (hereafter cited as EEOC, "TAPS for the Private Sector and State and Local Agencies").

[117] USCCR, *Helping Employers Comply with the ADA*, p. 231. EEOC noted that the $10 increase did not cover the increase in costs due to inflation, not even covering the costs of the two new books provided to TAPS participants that year. Nonetheless, EEOC made the decision to limit the fee increase in order to keep TAPS affordable. EEOC further notes that its marketing research indicates that TAPS fees are less than fees for comparable EEOC seminars offered by the private sector. Vargyas letter, p. 63.

[118] EEOC, "TAPS for the Private Sector and State and Local Agencies."

[119] Ibid.

[120] USCCR, *Helping Employers Comply with the ADA*, pp. 231–32 and n. 134.

[121] Fultz interview, St. Louis District Office, p. 2; E. Elizondo interview, Dallas District Office, p. 3; Charles Burtner, district director, Phoenix District Office, EEOC, interview in Phoenix, AZ, Mar. 30, 2000, p. 4 (hereafter cited as Burtner interview, Phoenix District Office).

[122] Cryor and Veldhuizen interview, Baltimore District Office, p. 6.

[123] Burtner interview, Phoenix District Office, p. 4.

announce all TAPS programs being offered during the year.[124]

EEOC staff gave mixed reports about the audience reached. On the one hand, one staff person suggested that the same people come to TAPS every year and that the seminars should be an update of information;[125] another believed that because attendance has increased every year, new people are continually reached.[126]

TAPS have no set agenda. The programs can cover any of the laws EEOC enforces,[127] but the content is often tailored to areas of public interest.[128] In the Baltimore District Office, the outreach program analyst and management select at least five "hot" topics—two for the morning and a choice of three topics for the afternoon.[129] EEOC staff reported that sexual harassment, the ADA, alternate dispute resolution, and governmentwide sessions on employment law have been recent popular topics.[130]

In fact, the most frequent topic in presentations is an overview of EEOC's laws and procedures. In FY 1999, 42 percent of all events included that topic. Mediation presentations have become the second most frequent topic. They were in 11 percent of the events in FY 1998 and 23 percent in FY 1999. ADA was the third most frequent topic in FY 1999, covered in 18 percent of the events. Sexual harassment, and specific issues concerning sex, race, and national origin discrimination, and the charge processing procedures were other common topics.[131] Alternative dispute resolution has been a topic for technical assistance and outreach for the past three years.[132]

TAPS programs also include workshops of case scenarios where attendees can actively participate.[133] For example, the Indianapolis District Office has developed 18 different scenarios for use in role playing during TAPS.[134] These scenarios cover a variety of topics, including racial harassment, retaliation, age discrimination, disability discrimination, sexual harassment, mediation, national origin discrimination, and wage discrimination.[135]

District office staff try to arrange "powerful" speakers for TAPS, such as EEOC headquarters staff or private attorneys.[136] For example, a member of a San Francisco law firm who has been very successful in big sexual harassment cases spoke as part of a presentation on recent Supreme Court decisions on sexual harassment.[137] A governmentwide employment law

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[124] Vargyas letter, p. 63.

[125] Cryor and Veldhuizen interview, Baltimore District Office, pp. 5–6.

[126] Hinton interview, Birmingham District Office, p. 5.

[127] USCCR, *Helping Employers Comply with the ADA*, p. 231.

[128] Thornton interview, Nov. 9, 2000, pp. 9–10. *See also* Hinton interview, Birmingham District Office, p. 2.

[129] Cryor and Veldhuizen interview, Baltimore District Office, pp. 5–6.

[130] Thornton interview, Nov. 9, 1999, pp. 9–10; Hinton interview, Birmingham District Office, p. 2; E. Elizondo interview, Dallas District Office, p. 3; Fultz interview, St. Louis District Office, p. 2; Cryor and Veldhuizen interview, Baltimore District Office, p. 4.

[131] EEOC, *FY 2001 Budget Request*, p. 105. Other sources of information confirm that the common topics are EEOC procedures or an overview, mediation, the ADA, and sexual harassment, but may give different proportions. A summary of topics covered in full-day TAPS during FY 1998 shows that of 277 sessions, 54 (19 percent) were on ADA; 46 and 47 (17 percent) were on alternative dispute resolution and sexual harassment, respectively; and 35 (13 percent) were on EEOC procedures, some of which addressed charge processing. Thus, these four topics accounted for two-thirds of the sessions offered at TAPS that fiscal year. *See* EEOC, "Summary of Topics Covered in FY 98 TAP Full Day Seminars," no date. EEOC's Automated Outreach System, which includes technical assistance and outreach events since 1996, shows that among events supported by the Revolving Fund, 28 percent gave an EEOC overview; 14 percent covered charge handling procedures; and 10 percent were on mediation. When TAPS sessions were classified by substantive issue, sexual harassment was the most common issue covered (30 percent). *See* EEOC, Automated Outreach System, data as of Apr. 25, 2000.

[132] Fultz interview, St. Louis District Office, p. 3. Mr. Fultz reported that TAPS sessions encouraged employers to develop their own internal dispute resolution programs so that employees can use these programs before seeking assistance from EEOC. Ibid.

In addition to covering alternative dispute resolution (ADR) in TAPS, EEOC conducts outreach on ADR. In FY 99, 26 ADR programs were conducted and 1,360 persons attended. For ADR outreach, the St. Louis District Office targets bar associations, educational institutions, chambers of commerce, and various professional organizations. Ibid.

[133] Fultz interview, St. Louis District Office, p. 2.

[134] Joseph N. Cleary, assistant legal counsel for policy development, EEOC, letter to Laura R. Aneckstein, civil rights analyst, USCCR, Dec. 2, 1999, attachments (training materials used in TAPS and gathered for the December 1998 Outreach and Revolving Fund Training Conference).

[135] Vargyas letter, pp. 63–64.

[136] E. Elizondo interview, Dallas District Office, p. 3; Fultz interview, St. Louis District Office, p. 2.

[137] E. Elizondo interview, Dallas District Office, p. 3.

panel might include speakers from the Department of Labor's Office of Federal Contract Compliance Programs, Department of Justice, Immigration and Naturalization Service, and state workers' compensation agencies to answer any possible questions.[138]

EEOC staff reported that the district office staff who conduct TAPS seminars are knowledgeable about both enforcement and litigation practices of the Agency and are experts in the field of employment discrimination. They include regional attorneys, supervisory trial attorneys, outreach and training directors, trial attorneys, supervisory administrative judges, administrative judges, and investigative staff.[139]

Although the U.S. Commission on Civil Rights has not had the opportunity to view TAPS evaluations, EEOC staff believe that the TAPS are effective. For example, the outreach coordinator in the Dallas District Office reports having favorable evaluations for that office's training, good audience participation, and many questions from the audience.[140] Outreach program analysts believe that employers are taking preventive measures after attending TAPS,[141] but none indicated that EEOC was following up with TAPS participants to know whether or not this is true.

Customer-specific Training

In addition to TAPS, EEOC offers customized technical assistance that is tailored to the needs of individual employers. Requests for customized training come from employers, schools, and unions that want seminars for their employees.[142] There are a number of similarities and differences in how EEOC manages its customer-specific training and TAPS. TAPS are broadly advertised and open to the public; customized training is conducted on-site at the invitation of the employer. Both are fee based and supported by the Revolving Fund. However, the fee for TAPS is per person; the customer-specific training fee generally is not. As one EEOC staff person explained, when customer-specific training has a per-person fee structure, it is simply a mini-TAPS.[143]

EEOC did not develop the capacity to respond to requests for specialized training from employers until FY 1998.[144] EEOC district offices provided customized training to 40 private employers in FY 1998,[145] and to 93 in FY 1999.[146] The effort in FY 1999 reached more than 8,000 participants.[147] In FY 2000, EEOC expects to reach more participants with more customer-specific training sessions than ever. For example, one of the 24 district offices—St. Louis—alone reported conducting five customer-specific training sessions, attended by approximately 500 persons during the first quarter of the fiscal year.[148] The Baltimore District Office did one customer-specific training last year and has another one scheduled for FY 2000.[149]

However, the process of negotiating customized training has been long and does not always come to fruition.[150] For example, one program

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[138] Fultz interview, St. Louis District Office, p. 2; Hinton interview, Birmingham District Office, p. 2; EEOC, St. Louis District Office, response to information request, Jan. 20, 2000, item 18, "Customer Specific Training and Technical Assistance Seminars" (hereafter cited as St. Louis District Office, "Customer Specific Training and Technical Assistance Seminars").

[139] St. Louis District Office, "Customer Specific Training and Technical Assistance Seminars."

[140] E. Elizondo interview, Dallas District Office, p. 3.

[141] Hinton interview, Birmingham District Office, p. 5; E. Elizondo interview, Dallas District Office, p. 7.

[142] Fultz interview, St. Louis District Office, p. 2.

[143] Cryor and Veldhuizen interview, Baltimore District Office, p. 4. The differences in fees are also explained in EEOC, *FY 1995 Budget Request*, p. 65.

[144] EEOC, *FY 2000 Budget Request*, p. 71. *See also* Cryor and Veldhuizen interview, Baltimore District Office, p. 4.

[145] EEOC, *FY 2000 Budget Request*, p. 71.

[146] EEOC, *FY 2001 Budget Request*, pp. 173–74.

[147] Vargyas letter, p. 64.

[148] St. Louis District Office, "Customer Specific Training and Technical Assistance Seminars."

[149] Cryor and Veldhuizen interview, Baltimore District Office, p. 5.

[150] EEOC states that the process has been greatly simplified and now includes standardized agreements, a pricing formula, a spreadsheet for calculating prices for customer-specific training developed in the field, and a pricing table for nationally developed programs. All of these documents can be created and sent to headquarters electronically. Headquarters approval still is required to ensure consistency, but with the use of e-mail, the review and approval process is very fast, frequently occurring on the same day the information is sent to headquarters. The design of the training program should not begin until the agreement is signed by the customer. For any large customer-specific training project, the Revolving Fund builds a specific design fee into the agreement that the customers must pay even if they subsequently decide not to schedule the training. Vargyas letter, p. 64.

analyst stated that he drafts proposals for training and sends them to the headquarters director of the Revolving Fund.[151] Headquarters reviews the proposed fee and may challenge it. In calculating the fee for customer-specific training, EEOC considers the amount of time it will take to design and perform the training, travel, and materials.[152] When the district office receives headquarters' approval for the request, the program analyst notifies the employer. At that point, the employer may still reject the proposal or indicate that it is not yet ready to proceed with the training.[153] In one instance, after a program analyst worked up a training proposal for an employer, the employer complained that the district office's cost was too high; he had found the same resource elsewhere for less. The program analyst speculated that the alternative resource may have been a contracted attorney retained after a conciliation agreement.[154] Furthermore, when an employer rejects the customized training after headquarters has approved it, the time spent designing the training, which should have been supported by the fee, is not funded. After all, the fee goes into the Revolving Fund only after EEOC has performed the training.[155]

When employers ask for customer-specific training, sexual harassment and the ADA are popular topics.[156] Some examples of customer-specific training sessions include:

- In December 1999, the Dallas District Office had a two-pronged training session on sexual harassment for a company in Grand Prairie. The program analyst trained 18 supervisors and managers in the morning and about 15 nonsupervisory employees in the afternoon.[157]
- The St. Louis District Office held a session on sexual harassment for employees of a Kansas City employer.[158] It was the only one of five employer-specific training sessions the office conducted that was not for federal government agencies.[159]

Free Outreach

Apart from TAPS and the customer-specific training sessions that are fee based, EEOC engages in many other technical assistance activities that are provided at no charge to the public. During the first three quarters of FY 1999, for example, EEOC field offices participated in 1,876 educational training and outreach events reaching more than 150,000 persons. These events included more than 1,000 oral presentations, 189 training sessions, 89 stakeholder input meetings, and 24 activities providing individual counseling and assistance to underserved areas of the nation.[160] In addition, field offices provided information on EEO laws or representatives at more than 300 public events with audiences totaling 33,500 persons. These events included job fairs, conventions, cultural expeditions, conferences, and community organization meetings.[161] Media presentations, a small business initiative, upgrading the Agency's Web site, federal sector outreach, and commissioner outreach were additional activities.[162]

Outreach as Part of Routine Charge Processing

EEOC staff clearly see outreach as any means by which they educate charging parties, employers and other respondents, or the private bar about the civil rights statutes EEOC enforces. Indeed, numerous staff identified the routine activities of charge processing as a form of outreach. Many of the charge intake procedures

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151 E. Elizondo interview, Dallas District Office, pp. 3–4.

152 Cryor and Veldhuizen interview, Baltimore District Office, p. 4; Fultz interview, St. Louis District Office, p. 2.

153 E. Elizondo interview, Dallas District Office, pp. 3–4.

154 Ibid., p. 3.

155 Cryor and Veldhuizen interview, Baltimore District Office, p. 4; Fultz interview, St. Louis District Office, p. 2.

156 E. Elizondo interview, Dallas District Office, p. 3; St. Louis District Office, "Customer Specific Training and Technical Assistance Seminars"; Burtner interview, Phoenix District Office, p. 16.

157 E. Elizondo interview, Dallas District Office, p. 4.

158 St. Louis District Office, "Customer Specific Training and Technical Assistance Seminars."

159 The federal agencies were the Council for Employment of Individuals with Disabilities, the Federal Executive Board, the Internal Revenue Service, and various others. The topics covered included the Rehabilitation Act and the ADA; EEOC processing regulations ("Section 1614"); and sexual harassment. The audience ranged in size from 50 to 250 persons. *See* St. Louis District Office, "Customer Specific Training and Technical Assistance Seminars."

160 EEOC, Commissioners Meeting, Sept. 28, 1999, p. 29, statement of Reginald E. Jones, commissioner.

161 Ibid., pp. 29–30.

162 Ibid., pp. 30–31.

can be thought of as outreach, for example, providing fact sheets and pamphlets and responding to inquiries. District office staff reported that they have been encouraged to think creatively about outreach[163] with the result that many described aspects of their normal daily tasks as outreach. Among them were on-site investigation, mediation, working cases jointly with the private bar, litigating, and publicizing litigation outcomes.

The Baltimore and St. Louis district offices regard on-site investigation as a component of outreach. And, according to staff, investigation sends a message to the community that EEOC is interested and has helpful and competent people working in the field.[164] The Baltimore acting director wants the staff to be out in the community building confidence in EEOC's abilities, rather than getting caught up in giving speeches and doing presentations without meaning.[165]

The Birmingham District Office alternative dispute resolution coordinator believes that the mediation program is good for teaching employers what they are doing or have done wrong. Some respondents implement new procedures and policies after being involved in mediation. Also, mediation agreements often include a requirement for the employer to provide training on fair employment laws.[166] Similarly, the Baltimore District Office staff suggested that resolving charges with no-fault settlements and an agreement requiring the employer to provide staff training on employment discrimination issues is a form of outreach, too.[167]

EEOC's general counsel explained that an important mechanism for outreach is litigating cases in underserved communities. Litigation demonstrates to those communities that the government will protect their rights and interests.[168] Other EEOC staff also stated that when EEOC files a lawsuit it is educating the public.[169] There are two good examples where the issues of discrimination are not well understood, and where EEOC litigation has had an effect. In the first example, a woman's religious beliefs did not allow her to celebrate birthdays. This woman worked for a restaurant chain and asked that she not be required to sing happy birthday to customers. The restaurant told her this was an essential function of her job. EEOC filed a lawsuit against the company on her behalf.[170] In the second example, a Filipino nurse was recruited to come to the United States to work in a nursing home. After she came, she was not permitted to work as a nurse and was forced to work as a janitor. After she filed a charge, it was discovered that there was a pattern of unfair treatment among other Filipino nurses in the same facility. EEOC won a settlement of $2 million on behalf of several Filipino nurses and has since found other instances of such discrimination.[171] This case was first filed with a private attorney who was inexperienced in discrimination law and contacted EEOC for assistance. EEOC joined the case when the plaintiff claimed others were similarly treated. EEOC staff claimed that, as this case demonstrated, working with the private bar is an important part of outreach, too.[172]

It is important for EEOC staff to recognize their routine activities as related to outreach so that they can take advantage of every opportu-

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[163] Michael Fetzer, acting director, and Barbara Veldhuizen, deputy director, Baltimore District Office, EEOC, interview in Baltimore, MD, Nov. 18, 1999, p. 10 (hereafter cited as Fetzer and Veldhuizen interview, Baltimore District Office).

[164] Fetzer and Veldhuizen interview, Baltimore District Office, p. 10; Carl Fricks, enforcement manager, St. Louis District Office, EEOC, interview in St. Louis, MO, Jan. 31, 2000, p. 5 (hereafter cited as Fricks interview, St. Louis District Office).

[165] Fetzer and Veldhuizen interview, Baltimore District Office, p. 10.

[166] Debra Leo, ADR coordinator, and Emma Evans, mediator, Birmingham District Office, EEOC, interview in Birmingham, AL, Feb. 24, 2000, p. 6.

[167] Wilma Scott, supervisory investigator, Tammy Lawrence, investigator, and Zetha Wofford, investigator, Baltimore District Office, EEOC, interview in Baltimore, MD, Nov. 18, 1999, p. 7 (hereafter cited as Scott, Lawrence, and Wofford interview, Baltimore District Office).

[168] C. Gregory Stewart, general counsel, EEOC, interview in Washington, DC, Mar. 3, 2000, p. 9 (hereafter cited as Stewart interview).

[169] Cryor and Veldhuizen interview, Baltimore District Office, p. 5.

[170] Ibid. *See* Philip P. Pan, "EEOC Suit Settled by Restaurant; Woman Said Firing Was Tied to Religion," *The Washington Post*, Dec. 11, 1997, p. B7.

[171] Stewart interview, pp. 6, 8. *See also* Bruner, Johnson, and Schuetz interview, St. Louis District Office, Feb. 1, 2000, p. 9. *See* Villanueva and EEOC v. Woodbine Healthcare Limited Partnership, No. 97-1607-CV (W.D. Mo.) (settlement filed 3/2/99).

[172] Stewart interview, pp. 6, 8. *See also* Bruner, Johnson, and Schuetz interview, St. Louis District Office, Feb. 1, 2000, p. 9.

nity to educate employers, charging parties, and the public about fair employment laws. At the same time, staff should not limit their outreach to their every-day activities but seek to develop and implement an outreach program.

Developing an Outreach Program

EEOC staff reported that headquarters gives district offices much less detail about how to run their outreach programs than their TAPS programs, because outreach does not involve fees.[173] At the same time, the greater flexibility is helpful because the outreach program must be indigenous to the community and the jurisdiction in order to be successful.[174]

The guidance headquarters does give to district offices for developing an outreach program charges them with identifying underserved communities and with seeking input from advocacy groups and stakeholders. Dallas District Office legal staff explained how they developed their outreach strategy. First, they sought information from the Office of Field Programs about what other district offices were doing. Then the regional attorney worked with the program analyst and another staff person to analyze census data that would help them target geographical areas or community groups that were underserved. They also worked together to identify stakeholders in the community and then put together a task force of stakeholders with the regional attorney acting as co-chair.[175]

District office plans for outreach are described in the Local Enforcement Plans (LEPs). Revised LEPs had only been approved in July 2000, after the fact finding for this report was completed, and therefore, could not be analyzed. For the most part, district office staff indicated that they had made few revisions to the outreach plans that were originally submitted four years ago. Some of the original goals had been achieved; some had not been; and some were changed. For example, the Birmingham District Office's LEP called for developing a database of local employers with fewer than 100 employees.[176] This had been done using the Charge Data System.[177] The LEP stated videotapes were to be developed using district office staff as role players.[178] This was not done locally because of monetary constraints, although the district office could use videotapes from headquarters.[179] Finally, the district office made some minor modifications to its technical assistance plans in the LEP based upon input from town hall meetings.[180]

The 1996–1997 LEPs do not give a timeline for when the district offices' plans would be completed. The activities in these plans were broad ranging (for example, listing numerous outlying areas that would be targeted and various strategies such as developing and producing educational videos, radio and television shows, and educational programs for schoolchildren) and ambitious for the intended two-year period. Furthermore, the LEPs were not pegged to any budget or funding.[181] Recent headquarters guidance on drafting revised LEPs does not ask district staff to relate outreach goals to timelines or funding either. It directs district staff to describe outreach plans for fiscal year 2000 in a document intended to remain in effect for two or, judging from the example of the previous LEPs, more years.[182]

The budget for outreach also affects the activities a district office can perform. Last year the Baltimore District Office's outreach budget was $15,000, including money for travel.[183] Attending expositions, holding job fairs, and visiting with organizations and advocacy groups result in routine travel expenses.[184] However,

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[173] Cryor and Veldhuizen interview, Baltimore District Office, p. 2.

[174] Ibid.

[175] Robert Canino, regional attorney, Toby Costas, senior staff attorney, and Suzanne Anderson, senior staff attorneys, Dallas District Office, EEOC, interview in Dallas, TX, Jan. 31, 2000, p. 6 (hereafter cited as Canino, Costas, and Anderson interview, Dallas District Office).

[176] EEOC, Birmingham District Office, *Local Enforcement Plan*, May 1997, p. 5.

[177] Hinton interview, Birmingham District Office, p. 4.

[178] EEOC, Birmingham District Office, *Local Enforcement Plan*, p. 6.

[179] Hinton interview, Birmingham District Office, p. 4.

[180] Ibid., p. 3.

[181] *See* EEOC, *Local Enforcement Plans.*

[182] C. Gregory Stewart, general counsel, and Elizabeth M. Thornton, director, Office of Field Programs, EEOC, memorandum to district directors and regional attorneys, re: guidance on drafting local enforcement plans, Oct. 1, 1999, and attachment, p. 1 of memorandum and pp. 2–3 of attachment.

[183] Cryor and Veldhuizen interview, Baltimore District Office, p. 2.

[184] Ibid.

travel to underserved areas is often expensive, and district offices may not have the funds to travel to those areas.[185] For example, the Baltimore District Office must reach areas as far as the Eastern Shore of Maryland and Roanoke, Virginia;[186] the New York District Office must reach out to Puerto Rico and the Virgin Islands.[187] Furthermore, if a district office has a special project, the budget may need to be increased. For example, for FY 2000 the Baltimore office has asked for $44,000 for outreach to support a small business initiative along with the more usual outreach activity.[188]

Resource constraints are only one factor, although a very important one, that staff must consider in developing an adequate local outreach program. Other factors are the methods by which outreach can be promoted most effectively and the avenues through which it can be executed. Three important aspects of an outreach program are presentations, outreach to attorneys in private practice, and interaction with advocacy groups.

Presentations

The typical outreach activity involves giving presentations, responding to questions, and providing handouts.[189] Outreach presentations tend to be informal, but can have formal speakers as in TAPS.[190] The audience for outreach sessions is slightly different from the audience for TAPS. While private, state, local, and federal government employers may attend outreach activities, the audience also consists of defendant and plaintiff attorneys; members of bar associations, labor organizations, human resource associations, and advocacy groups; local media; and staff from local congressional and senatorial offices.[191]

As one example, in the first quarter of FY 2000, the St. Louis District Office conducted six outreach sessions attended by more than 400 persons.[192] Four of the programs promoted the use of alternative dispute resolution to resolve employment disputes; two of these sessions were for small businesses. Attending the four programs were approximately 30 members of the Bar Association of Metropolitan St. Louis; 125 members of Associated Industries of Missouri, mostly small employers from Ozark, Missouri; 100 representatives of small employers in Eastern Missouri; and 50 managers and EEO counselors employed by the city of St. Louis.[193]

The material covered in the presentations and handouts is broad. It includes information on how and where to file a charge, what documentation to bring, and what is helpful or not; examples of discrimination versus unfair labor practices; and all of the fair employment statutes. The handouts address the statutes (e.g., Title VII), bases of discrimination (e.g., national origin), issues (e.g., retaliation), the kinds of evidence needed for a charge (e.g., comparative data or witnesses), and notice requirements under the statutes (notifying the employer).[194]

Outreach to Practicing Attorneys

Presentations, however, are only one component of an outreach effort. Outreach to the private bar is another important part. District offices engage in outreach to the local bar in a variety of ways. First, practicing attorneys frequently call district offices and receive technical assistance by asking questions of the legal staff.[195]

Second, some attorneys mentioned maintaining their professional contacts, for example, by attending local National Employment Law Asso-

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[185] Ibid.; Lee, Graziano, and Quinto interview, New York District Office, p. 8.

[186] Cryor and Veldhuizen interview, Baltimore District Office, p. 2.

[187] Lee, Graziano, and Quinto interview, New York District Office, p. 8.

[188] Cryor and Veldhuizen interview, Baltimore District Office, p. 2.

[189] E. Elizondo interview, Baltimore District Office, p. 4.

[190] Cryor and Veldhuizen interview, Baltimore District Office, p. 4; Vargyas letter, p. 65.

[191] EEOC, St. Louis District Office, response to information request, Jan. 20, 2000, item 18, "Outreach" (hereafter cited as St. Louis District Office, "Outreach").

[192] Ibid.

[193] Ibid.

[194] E. Elizondo interview, Dallas District Office, p. 4.

[195] Mildred Byrd, acting regional attorney, Jill Vincent, supervisory trial attorney, and Pamela Agee, trial attorney, Birmingham District Office, EEOC, interview in Birmingham, AL, Feb. 24, 2000, p. 7 (hereafter cited as Byrd, Vincent, and Agee interview, Birmingham District Office).

ciation (NELA) meetings regularly. They use these contacts to discuss what the district office can do about some of the recent unfavorable Supreme Court cases and other case precedents.[196]

Third, many district office attorneys speak to bar associations.[197] One regional attorney explains internal EEOC procedures to attorneys in the context of an attorney referral program and believes that members of the bar who handle employment discrimination cases benefit from these events because she can discuss their cases and litigation strategies or potential legal problems with them.[198] Finally, as in the case discussed earlier, EEOC staff can work closely with inexperienced private attorneys to help them successfully bring suits.[199]

Contacting Community Organizations and Advocacy Groups

Yet another component of an outreach program is contacting community organizations and advocacy groups. The Comprehensive Enforcement Program urges EEOC staff to pursue ongoing relationships with community organizations, civil rights advocacy groups, and other state and federal government authorities to support strategic enforcement and litigation development.[200] Contact with community organizations and advocacy groups can take a variety of forms. It can be advertising outreach activities through advocacy groups;[201] educating the groups about EEOC; or soliciting input on fair employment issues and ways of reaching underserved communities. It can also be working together with advocacy groups to co-sponsor technical assistance and outreach activities. Or, in a more aggressive approach to enforcement of fair employment laws, contact with community organization and advocacy groups may be used as a way to encourage them to file third-party charges with EEOC.[202]

District offices are moving in the direction of having two-way relationships with community organizations and advocacy groups. Whereas in the past, EEOC's relationship with these groups has been to explain EEOC's mission and functions, now the Agency is trying to not only give out information, but to receive it as well.[203] Thus, for example, community organizations and advocacy groups are a source of information about areas where there are problems of discrimination but employees are not filing charges.[204] EEOC can go even further toward involving community organizations and advocacy groups in combating discrimination than merely having them report the problem. Collaborating with community organizations when sponsoring outreach events is one way to get them more involved. A district office deputy director commented that the government has no credibility in some communities. As a result, members of those communities will not come to an EEOC event, unless a community organization with an established presence in that area co-sponsors it.[205] By building relationships with community organizations, EEOC staff can learn who to contact to do outreach in underserved areas and encourage community groups to organize and advertise outreach activities jointly with EEOC.[206]

There are several examples where community organizations or advocacy groups are more

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[196] Donna Harper, supervisory trial attorney, Felix Miller, trial attorney, and Rebecca Stith, senior trial attorney, St. Louis District Office, EEOC, interview in St. Louis, MO, Jan. 31, 2000, p. 4.

[197] Canino, Costas, and Anderson interview, Dallas District Office, p. 6; Byrd, Vincent, and Agee interview, Birmingham District Office, p. 7.

[198] Byrd, Vincent, and Agee interview, Birmingham District Office, p. 7.

[199] Stewart interview, pp. 6, 8.

[200] EEOC, *Comprehensive Enforcement Program.*

[201] For example, the Birmingham District Office sends announcements of upcoming outreach activities to local churches, advocacy groups, and community organizations. *See* EEOC, Birmingham District Office, response to information request, Feb. 7, 2000, item 18, "Public Service Announcement Regarding Scheduled Training & Expanded Presence" and "Sample Letter to Organizations."

[202] The EEOC's database for tracking charges, known as the Charge Data System, shows that district and area offices received on average 121 charges filed by a third party each fiscal year for FYs 1993 through 1999. The number of third-party charges filed ranged between 69 in FY 1997 and 239 in FY 1995. These numbers appear quite low relative to the 80,000 to 95,000 charges that district and area offices receive each fiscal year. *See* EEOC, Charge Data System, data as of Dec. 2, 1999.

[203] Cryor and Veldhuizen interview, Baltimore District Office, p. 4.

[204] E. Elizondo interview, Dallas District Office, p. 5.

[205] Cryor and Veldhuizen interview, Baltimore District Office, p. 3.

[206] E. Elizondo interview, Dallas District Office, p. 6; Cryor and Veldhuizen interview, Baltimore District Office, p. 3; Los Angeles District Office, written response, item 37.

involved in EEOC's outreach efforts than in just exchanging information:

- The Baltimore District Office planned to produce a video on fair employment involving students and facilities at Morgan State University and the national NAACP.[207] Using the students of this historically black school to design and produce a video would have been an excellent way of teaching young people about discrimination apart from leaving a product that could be viewed by others again and again. Unfortunately, this video has not been done.[208]
- The Birmingham District Office has a two-way relationship with the Urban League. It provides training to the Urban League, and in turn the Urban League provides interns to work in the EEOC office for two-week periods.[209]
- In the Dallas District Office, the program analyst has succeeded in having the League of United Latin American Citizens (LULAC) file three third-party charges on behalf of Hispanic employees. This is an effective means of enforcement because many Hispanics are reluctant to file charges for fear of losing their jobs, particularly when they live in remote areas where there are few employers. LULAC is learning about filing third-party charges and is beginning to make wider use of that procedure.[210]

Evaluating Outreach Effectiveness

Technical assistance in the form of employers' seminars is evaluated systematically, but other outreach efforts are not.[211] Yet both commissioners and district office staff view EEOC's outreach efforts as generally effective within current budgetary constraints.

In a 1998 statement before Congress, then Acting Chairman Igasaki said that while EEOC has been able to devote only a small portion of its budget to outreach and education activities, the Agency has found that these programs have been invaluable in communicating what and who is covered by federal equal employment laws. In order to get the most from its limited funds, EEOC has actively sought ways to expand its outreach activities through creative and cost-efficient strategies and techniques. He gave as examples the Agency's Web site and plans for developing direct sales items to market to those who cannot afford TAPS.[212]

District office staff believe that outreach has increased the number of charges filed, especially from underserved communities, and the awareness of fair employment laws.[213] For example, Asian Americans and Hispanics are beginning to inquire about filing charges more frequently.[214] The Los Angeles District Office identified several other measures of the success of an office's outreach program. They include increases in the number of requests for customer-specific training, the number of TAPS and TAPS participants, communications with stakeholders, and joint outreach activities with community organizations. The Los Angeles District Office reports that since outreach efforts were stepped up, all of these have increased.[215]

Furthermore, district offices have developed their own sources for feedback on the success of their outreach programs. Community organizations are quick to tell the district offices when they are not appropriately serving the community and what needs to be done. The Los Angeles and Dallas district offices have organized advisory councils with representatives of groups with an interest in EEOC, either as charging parties or respondents. The advisory councils discuss what issues EEOC needs to address and provides a more formal channel for evaluating outreach.[216] The Los Angeles District Office has established these advisory groups in different ar-

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[207] Cryor and Veldhuizen interview, Baltimore District Office, p. 3.

[208] Ibid.

[209] Hinton interview, Birmingham District Office, p. 3.

[210] E. Elizondo interview, Dallas District Office, p. 7. *See* Burtner interview, Phoenix District Office, p. 39, for another description of the fear of filing charges and efforts to encourage third-party filing.

[211] E. Elizondo interview, Dallas District Office, p. 7.

[212] *Hearing before the Subcomm. On Commerce, Justice, State, The Judiciary and Related Agencies of the House Comm. On Appropriations,* 105th Cong. 2 (Apr. 1, 1998) (statement of Paul M. Igasaki, then acting chairman, EEOC).

[213] E. Elizondo interview, Dallas District Office, p. 7; Los Angeles District Office, written response, item 35.

[214] E. Elizondo interview, Dallas District Office, p. 7.

[215] Los Angeles District Office, written response, item 35.

[216] E. Elizondo interview, Dallas District Office, pp. 7–8; Los Angeles District Office, written response, item 35.

eas, including Los Angeles, San Diego, and Northern Nevada.[217]

Staffing Outreach

When EEOC began its pilot technical assistance and outreach program in six district offices in 1993, headquarters provided each office a personnel "slot" for the creation of the program analyst position. As the pilot program was implemented more broadly the following year, headquarters gave the district director the option of creating the program analyst position. EEOC did not have the staffing allocation that would allow the placement of the analyst position in each district office without affecting the existing staffing patterns.[218] One program analyst stated that in his office, outreach, technical assistance, training, and education programs used to be fragmented. In his office, an enforcement manager did the training, the deputy director handled most TAPS activities, and the outreach coordinator was primarily doing outreach with underserved groups.[219] The office also had a "Speaker's Bureau" to handle organizations' requests for speakers, and the bureau was primarily composed of supervisors and managers.[220] Only in mid-FY 1999 did all the outreach efforts become joined together as the program analyst's responsibility.[221] All district offices now have a program analyst whose primary duties are doing outreach.[222]

In most district offices, the program analyst assumes the role of coordinating and conducting outreach.[223] However, district offices have autonomy in structuring their staff. The Baltimore and Birmingham district offices have unusual structures that spread responsibility for outreach among the entire staff. These will be described in more detail after a discussion about the more common outreach structure.

The Program Analyst

In the more typical office structure, the program analyst's duties largely involve going to localities and making presentations.[224] However, when events conflict, are long and intensive (e.g., full-day or overnight sessions), or occur frequently on weekends and during evenings, it becomes impossible for the program analyst to respond to all of the requests for technical assistance. Then it becomes the program analyst's responsibility to coordinate staff members who have volunteered to conduct technical assistance and outreach.[225]

To coordinate volunteers for the outreach presentations, program analysts maintain lists of staff who have expressed an interest in assisting in outreach, some of whom prefer to make presentations and others who prefer to assist in other ways, perhaps by interviewing people wishing to file charges.[226] One program analyst goes through his list to find two or three people who are available, then provides them the presentation documents with overhead projector transparencies so that they have to do very little preparation.[227] He maintains the handouts for presentations, too.[228]

Apart from giving presentations in response to organizations' requests, the outreach coordinator must maintain contacts with advocacy groups and business organizations and aggressively seek out the organizations that may serve as vehicles for further outreach. One program analyst keeps a log of callers—potential complainants, respondents, organizations, employees, and employers that call for technical assis-

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[217] Los Angeles District Office, written response, item 35.

[218] EEOC, 1994 OPO Report.

[219] E. Elizondo interview, Dallas District Office, p. 1.

[220] Ibid., p. 2.

[221] Ibid., p. 1.

[222] *See* Ellen J. Vargyas, legal counsel, EEOC, letter to Frederick D. Isler, former assistant staff director for civil rights evaluation, USCCR, re: response to information request, Sept. 17, 1999, attachments (District Office Staffing Patterns, Third Quarter FY 1999).

[223] Ibid.; Fultz interview, St. Louis District Office, p. 3; Hinton interview, Birmingham District Office, p. 1.

[224] E. Elizondo interview, Dallas District Office, p. 4; Carol Hawkins, supervisory investigator, Becky Shryock, investigator, Levi Morrow, investigator, and Belinda Rodriquez, investigative support assistant, Dallas District Office, EEOC, in Dallas, TX, Feb. 1, 2000, p. 6 (hereafter cited as Hawkins et al. interview, Dallas District Office).

[225] E. Elizondo interview, Dallas District Office, p. 2; Hinton interview, Birmingham District Office, p. 5; Paul Manget, enforcement manager, Phoenix District Office, EEOC, interview in Phoenix, AZ, Mar. 29, 2000, p. 4.

[226] E. Elizondo interview, Dallas District Office, p. 2; Burtner interview, Phoenix District Office, p. 10.

[227] E. Elizondo interview, Dallas District Office, p. 2. In fact, Agency experts drafted standardized training modules in FY 1994 to provide to presenters. *See* EEOC, *FY 1996 Budget Request*, p. 83.

[228] E. Elizondo interview, Dallas District Office, p. 2.

tance[229]—in the course of carrying out this function.

Finally, the district office is required to submit detailed quarterly reports of outreach activities to headquarters for the automated outreach data system. To report information such as the audience type, one outreach coordinator reported that he queries the audience to make estimates of how many participants are employers and representatives of advocacy groups or of the general public.[230]

Another task that is often the responsibility of the program analyst in charge of coordinating outreach is the identification of underserved areas and communities. Instead of assigning this task to the program analyst, the Dallas District Office has a Targeting Unit with one or two staff to perform this work.[231]

Regardless of the activities assigned to them, program analyst positions, at least in some instances, have been staffed with individuals with experience as investigators.[232] This ensures that they have in-depth knowledge of the Agency's charge handling procedures and can, therefore, more effectively educate the public about the EEOC's operations. Their effectiveness in this area is (and should be) reflected in their performance appraisals. One program analyst reported that his performance appraisal is based upon the full breadth of outreach. With respect to other staff, the performance appraisals have some language that will allow the person rating them to recognize any extraordinary contribution in the area of outreach in their appraisals.[233]

The Role of Other Staff in Technical Assistance and Outreach

The Comprehensive Enforcement Program states that outreach and education are joint responsibilities of both enforcement and legal staff and seeks innovative ways to team legal and enforcement staff to have the greatest effect on Agency activities, such as outreach.[234] District office management have generally supported the involvement of staff in outreach activities.[235] Thus, whether outreach is the primary responsibility of the district office's program analyst or of staff working under an alternative structure, other district office staff assist in technical assistance and outreach. Their assistance is usually by giving presentations and typically on a voluntary basis. District directors, supervisors, enforcement managers, investigators, and attorneys participate in technical assistance and outreach.[236] Attorneys are commonly asked to do presentations, particularly for bar associations.[237] One acting regional attorney works closely with an attorney referral program.[238] The Dallas and Birmingham district offices send staff to outreach events to take charges.[239] Investigators, however, rather than intake staff, are the ones most likely to go.[240]

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[229] Ibid.

[230] Ibid.

[231] Ibid.

[232] Mr. Elizondo in the Dallas District Office was previously an enforcement manager and an investigator. Mr. John Fultz in the St. Louis District Office has been with EEOC for 29 years and was previously an investigator. *See* Hawkins et al. interview, Dallas District Office, p. 6; Fultz interview, St. Louis District Office, p. 1.

[233] E. Elizondo interview, Dallas District Office, pp. 2–3.

[234] EEOC, *Comprehensive Enforcement Program.*

[235] For example, the Dallas District Office enforcement manager stated that investigators should be actively involved in this important part of the office responsibilities. Janet Elizondo, enforcement manager, Dallas District Office, EEOC, interview in Dallas, TX, Jan. 31, 2000, p. 4 (hereafter cited as J. Elizondo interview, Dallas District Office).

[236] Hinton interview, Birmingham District Office, p. 5; Samuel Hall, supervisory investigator, Julia Hodge, investigator, and Gaines Elenburg, investigator, Birmingham District Office, EEOC, interview in Birmingham, AL, Feb. 24, 2000, p. 5 (hereafter cited as Hall, Hodge, and Elenburg interview, Birmingham District Office); Hawkins et al. interview, Dallas District Office, p. 6; Janice Reed, supervisory investigator, Lillie Wilson, investigator, and Armando Matamoros, investigator, Dallas District Office, EEOC, interview in Dallas, TX, Feb. 1, 2000, p. 4 (hereafter cited as Reed, Wilson, and Matamoros interview, Dallas District Office); Donald Birdseye, supervisory investigator, and George "Randy" Garrett, investigator, Dallas District Office, EEOC, interview in Dallas, TX, Feb. 1, 2000, p. 8 (hereafter cited as Birdseye and Garrett interview, Dallas District Office); J. Elizondo interview, Dallas District Office, p. 4; Lee, Graziano, and Quinto interview, New York District Office, pp. 6–7; Cryor and Veldhuizen interview, Baltimore District Office, p. 2; St. Louis District Office, "Outreach"; and Burtner interview, Phoenix District Office, pp. 10–12.

[237] Hinton interview, Birmingham District Office, p. 2; E. Elizondo interview, Dallas District Office, p. 2.

[238] Byrd, Vincent, and Agee interview, Birmingham District Office, p. 7.

[239] E. Elizondo interview, Dallas District Office, p. 2; Hall, Hodge, and Elenburg interview, Birmingham District Office, p. 5.

[240] The Birmingham District Office's intake supervisor said that intake staff cannot afford to take time away from in-

Most staff participate by giving presentations. For example, investigators reported speaking during university human resources classes, telling students what they do and how they process cases; visiting special-emphasis groups; and participating in TAPS.[241] A supervisory investigator gave an outreach presentation about the standards needed to prove a case, what it takes to create a class case, and preserving charging parties' rights.[242] One enforcement manager is conducting training for the health care industry's federal sector.[243]

Despite working together to do presentations, the roles of investigators and program analysts are clearly delineated. For example, outreach is not a primary responsibility of investigators. If an investigator is approached in the field and asked to explain what EEOC does, as frequently happens, the investigator will answer questions as appropriate and often will relay this information to the program analyst who will then make contact with the inquiring party and inform him or her of what the Agency can do in terms of outreach and technical assistance. However, an enforcement manager acknowledged that making outreach part of the investigators' responsibilities might be a valuable way to gain influence in the community.[244] Similarly, if, based on his or her investigations, an investigator knows of a resource or a need to address a particular community, geographic area, or industry, he or she will make recommendations to the outreach program analyst, the supervisor, enforcement manager, or the director.[245] One program analyst remarked that she has had much input from investigators concerning where employers need training or areas need outreach.[246] Investigators provide input into TAPS programs, but they do not help in developing overall outreach programs.[247]

Training is provided to all employees who conduct outreach.[248] In addition, one district office has an informal apprenticeship program. If a person has not engaged in outreach before, he or she is paired with an experienced person to observe and assist until he or she is familiar with the activity. The novice then does outreach with an observer, usually the program analyst, before conducting outreach independently.[249]

Unique District Office Structures for Handling Outreach

The Birmingham District Office. In the Birmingham District Office, each enforcement unit is responsible for outreach in various Congressional districts. Each quarter, the staff hold town hall meetings where a team of investigators and the program analyst provide educational outreach to the community and take charges from individuals.[250] The program analyst, the investigators, and the attorneys select two of the major cities in each district in which to conduct the outreach and education programs. They send notices about the meeting to the media, to community organizations, and to the Congressional representatives' local aides.[251] On the first day of the town meeting, staff provide information and answer questions. On the second day, they have an "expanded presence" during which they interview potential charging parties and draft charges.[252] The feedback from the town meeting is used to identify employers that may have a pattern and practice of discriminating against

take to assist with outreach other than through their daily duties of providing assistance to charging parties and respondents. *See* Allen Gosa, intake supervisor, and Linda Ross, investigative support assistant, Birmingham District Office, EEOC, interview in Birmingham, AL, Feb. 25, 2000, p. 8.

241 Reed, Wilson, and Matamoros interview, Dallas District Office, p. 4.

242 Birdseye and Garrett interview, Dallas District Office, p. 8.

243 J. Elizondo interview, Dallas District Office, p. 4.

244 Fricks interview, St. Louis District Office, p. 8.

245 Althea Bolden, enforcement supervisor, Maggie McFadden, enforcement supervisors, Harold Emde, investigator, and Kathy Compton, investigator, St. Louis District Office, EEOC, interview in St. Louis, MO, Feb. 1, 2000, p. 10 (hereafter cited as Bolden et al. interview, St. Louis District Office); Hall, Hodge, and Elenburg interview, Birmingham District Office, p. 5; and Hinton interview, Birmingham District Office, p. 2.

246 Hinton interview, Birmingham District Office, p. 2.

247 Bolden et al. interview, St. Louis District Office, p. 10.

248 Vargyas letter, p. 66.

249 Burtner interview, Phoenix District Office, p. 3.

250 Hall, Hodge, and Elenburg interview, Birmingham District Office, p. 5; Hinton interview, Birmingham District Office, p. 2.

251 Hinton interview, Birmingham District Office, p. 2. Ms. Hinton further indicated that Congressional aides sometimes attend the programs, and that the Birmingham District Office has provided some of them training so they can assist with providing information on charge processing and what EEOC does. Ibid.

252 Ibid.

individuals of a particular group,[253] to develop the TAPS program, and to determine whether certain areas need more outreach.[254]

The Baltimore District Office. As was discussed earlier in this report, in an unusual office structure, the Baltimore District Office has three "pods," consisting of a supervisory investigator, a team of investigators, an investigative support assistant, and two attorneys. Each of the pods has its own outreach projects which are discussed at pod meetings.[255] Pod members, the office's program analyst, and the deputy director collaboratively determine areas to target for outreach and education[256] following the guidelines stated in the office's Local Enforcement Plan.[257] Pod members will suggest ideas based on concerns, locations, and the types of cases received.[258] The program analyst provides data and works with them to identify contacts for the outreach projects.[259] One pod was inspired by the large number of charges that high school aged workers who are new to the job market filed and is currently developing programs for students and young workers employed for the first time. Another pod is focusing on outreach to high school juniors and seniors to inform them about sexual harassment in the workplace generally, and particularly in the fast food industry; and to the disabled community, and African Americans in particular, on the Americans with Disabilities Act. This pod is also exploring media outreach through a cable channel.[260] Each quarter the pods work on a different project.[261] Because of the pod organization, everyone gets involved in outreach; as a result, no one person is solely responsible for outreach.[262]

Time Spent on Outreach

Program analysts spend most or all of their time doing outreach and technical assistance.[263] However, most staff who volunteer to help with outreach and technical assistance programs, whether investigators or attorneys, spend modest amounts of time on technical assistance and outreach.[264] Estimates were about 10 to 20 percent or less.[265] Another estimate suggested that staff from the various enforcement units collectively spend about 35 hours a week supporting outreach efforts and that management staff spend about 20 hours a week.[266] Furthermore, time spent doing outreach varies among staff.[267] Most staff participate in outreach from time to time; but a number of people spend a lot of time.[268] For example, in the Dallas District Office, staff assigned to the Targeting Unit spend more time working on technical assistance and outreach, during which they make presentations. But one staff member also recently spent

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253 Ibid.

254 Hall, Hodge, and Elenburg interview, Birmingham District Office, p. 5.

255 Sandra Byrd, supervisory investigator, and Suzanne Kotrosa, investigator, Baltimore District Office, EEOC, interview in Baltimore, MD, Nov. 17, 1999, p. 11 (hereafter cited as Byrd and Kotrosa interview, Baltimore District Office); Scott, Lawrence, and Wofford interview, Baltimore District Office, p. 7; Chester Kleinman, enforcement manager, M. Patricia Tanner, supervisory systemic investigator, and Judy Navarro, investigator, Baltimore District Office, EEOC, interview in Baltimore, MD, Nov. 19, 1999, p. 8 (hereafter cited as Kleinman, Tanner, and Navarro interview, Baltimore District Office).

256 Byrd and Kotrosa interview, Baltimore District Office, p. 11; Scott, Lawrence, and Wofford interview, Baltimore District Office, p. 7; Kleinman, Tanner, and Navarro, Baltimore District Office, EEOC, p. 8.

257 Kleinman, Tanner, and Navarro interview, Baltimore District Office, p. 8.

258 Byrd and Kotrosa interview, Baltimore District Office, p. 11.

259 Ibid.

260 Scott, Lawrence, and Wofford interview, Baltimore District Office, p. 7; Cryor and Veldhuizen interview, Baltimore District Office, p. 2.

261 Byrd and Kotrosa interview, Baltimore District Office, p. 11.

262 Cryor and Veldhuizen interview, Baltimore District Office, p. 3.

263 Hinton interview, Birmingham District Office, p. 1; E. Elizondo interview, Dallas District Office, p. 1; Fultz interview, St. Louis District Office, p. 1. Mr. Fultz and Mr. Elizondo indicated that they do some internal training in addition to outreach. Fultz interview, St. Louis District Office, p. 1; E. Elizondo interview, Dallas District Office, p. 1; Los Angeles District Office, written response, item 36; Burtner interview, Phoenix District Office, pp. 9–10.

264 Byrd and Kotrosa interview, Baltimore District Office, p. 11; J. Elizondo interview, Dallas District Office, p. 4; E. Elizondo interview, Dallas District Office, p. 2.

265 J. Elizondo interview, Dallas District Office, p. 4; Burtner interview, Phoenix District Office, pp. 9–10.

266 Los Angeles District Office, written response, item 36.

267 J. Elizondo interview, Dallas District Office, p. 4; E. Elizondo interview, Dallas District Office, p. 2; Lee, Graziano, and Quinto interview, New York District Office, pp. 6–7; Cryor and Veldhuizen interview, Baltimore District Office, p. 3.

268 Lee, Graziano, and Quinto interview, New York District Office, pp. 6–7.

about 40 hours compiling statistical information for a special outreach project (the Low Wage Earner Task Force described below).[269]

The program analyst minimizes the time investigators and attorneys must spend on outreach by maintaining overhead projector transparencies, handouts, and other presentation materials and providing them to the volunteer staff so that they do not have to spend additional time preparing presentations. A presentation may be 45 minutes to an hour, followed by a question and answer session. The amount of time staff spend doing outreach is, therefore, dependent upon the frequency with which the program analyst uses them. If the office has many staff who volunteer, the frequency is less.[270]

Staff in the Baltimore District Office reported that they are trying to increase the amount of staff time spent doing outreach.[271] At the same time, if staff spent too much time doing outreach, they most likely would not be able to process as many charges. This, in turn, could ultimately result in another backlog of unprocessed charges. However, if outreach is effective, more employers will be aware of their responsibilities under civil rights laws, ultimately reducing discrimination and the number of charges filed. Therefore, outreach efforts should be carefully coordinated by the district offices to maintain an appropriate balance between outreach and charge processing.

SPECIAL OUTREACH EFFORTS

EEOC has several initiatives for technical assistance and outreach to particular groups. They include a headquarters initiative for small and mid-sized businesses, a statutory mandate to reach those who are underserved, which has been interpreted to mean underserved geographical areas, underserved groups, and minorities; a State of Texas initiative to reach low-wage earners; and a yet to be implemented Equal Pay Initiative.

Outreach to Small and Mid-sized Businesses

When Ida L. Castro became chairwoman of EEOC, she implemented a Small and Mid-Sized Businesses Initiative to bolster businesses' access to information about antidiscrimination laws and to promote voluntary compliance.[272] Her initiative grew out of concerns that small businesses were not informed of their obligations under fair employment laws, that EEOC outreach to small businesses was not as great as it should have been, and that TAPS were not affordable for small employers.[273]

EEOC's Small and Mid-Sized Businesses Initiative began when EEOC invited representatives of small businesses to speak at a commission meeting on their issues and concerns and on how EEOC could better serve them. The panelists revealed that the needs for small businesses to receive technical assistance on employment discrimination laws were vast. As a representative of the U.S. Chamber of Commerce explained, small businesses must comply with numerous laws: the discrimination laws that EEOC enforces, wage and hour requirements, pension requirements, affirmative action requirements, immigration laws, plant closing laws, safety and health requirements from the Department of Labor, and other laws of the Environmental Protection Agency and the Internal Revenue Service. Even with the best effort to comply, the small business owner cannot possibly grasp all of his or her legal obligations with all their complexities, vagueness, and nuances.[274] Furthermore, employers believe that federal agencies, including EEOC, currently take an adversarial regulatory approach.[275]

Small businesses complained that meritless charges can be filed which cause employers to expend $25,000 to $100,000 to prove their inno-

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269 E. Elizondo interview, Dallas District Office, p. 2.

270 Ibid. For example, Mr. Elizondo uses attorneys and investigators primarily for all-day seminars involving overnight travel. He currently has a list of about 16 volunteers. Ibid.

271 Byrd and Kotrosa interview, Baltimore District Office, p. 11.

272 EEOC, "Relationship with Small and Mid-Sized Businesses."

273 USCCR, *Helping Employers Comply with the ADA*, p. 232.

274 Randel K. Johnson, vice president of labor and employee benefits, U.S. Chamber of Commerce, "Small Business Realities, Discrimination Laws and the Equal Employment Opportunity Commission," Statement of the U.S. Chamber of Commerce to the EEOC, Dec. 9, 1998, pp. 3–4 (hereafter cited as Johnson, "Small Business Realities").

275 Johnson, "Small Business Realities," p. 5, *citing* U.S. General Accounting Office, "Workplace Regulation—Information on Selected Employer and Union Practices," 1994, p. 4.

cence to EEOC and/or the courts unless they settle the charges to avoid the expense.[276] At the same time, small businesses were highly unlikely to minimize their expenditures for charges by using alternative dispute resolution. They either did not know about mediation or had misunderstandings about it. They may, for example, confuse alternate dispute resolution with arbitration. In the former, charging parties and respondents resolve conflict with the help of a mediator, whereas arbitration involves a ruling from an independent third party.[277]

The small business representatives made a number of recommendations to EEOC concerning its technical assistance and outreach. They asked for:

- appointed "liaisons" in each district office to focus specifically on small business concerns;
- half-hour presentations for local chambers of commerce explaining how EEOC operates and where employers may obtain information about the statutes it enforces; and
- an "easily understandable" description of EEOC's charge processing, investigation, and decision-making procedures that would be included in notice-of-charge statements that are mailed to employers.[278]

In addition, the small business community's lack of use of mediation indicates a clear need for technical assistance regarding that procedure.

Even before the Small Business Initiative was launched, EEOC had added a fact sheet for small businesses on its Web site.[279] But although the Web site was highly praised as a valuable information resource,[280] small business representatives criticized it for not having more information on how to prevent discrimination[281] and for being written for judges, not human resource professionals or business owners.[282]

In short, the small business community asked EEOC to attach a fact sheet to the charge notices sent to employers; rewrite handouts and the Web site in plain English and add information on preventive measures; designate a contact person in each district office; offer half-day TAPS for lower cost; increase outreach to small businesses on mediation, as well as generally; and start a customer service initiative. Headquarters and district offices already had some of these remedies underway; others could be set in place quickly; still others take longer to realize results. For example, at the initiative's kick-off meeting, Commissioner Miller agreed that EEOC should be able to make copies of a fact sheet for small businesses and send it along with outgoing charge notices.[283]

District Office Liaisons

The program analysts in district offices have assumed the role of small business liaisons.[284] The small business section of EEOC's Web site lists their names as persons to contact according to the location of their field offices. Indeed, contacts are given not just for district offices, but also for some area offices.[285] This listing is helpful. As the president of one small company explained, he called the phone number from the Internet and was very pleased to receive a call back the same day. The liaison talked with him for about an hour and was very helpful, especially since the Web site did not address the businessman's concerns.[286]

The existence of the liaisons is also publicized in other ways. For example, district offices disseminate a one-page letter signed by Chair-

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[276] Johnson, "Small Business Realities," p. 7.

[277] "EEOC: Small Business Reps Address Commission; Cite Confusing Laws, 'Biased' Investigators," *Daily Labor Report*, no. 237 (Dec. 10, 1998), p. A-11 (hereafter cited as "EEOC: Small Business Reps Address Commission"). *See* chap. 5 for a discussion about mediation.

[278] "EEOC: Small Business Reps Address Commission," p. A-11.

[279] EEOC, "EEOC Develops Small Business Fact Sheet for its Internet Web Site," press release, Oct. 16, 1997, accessed at <www.eeoc.gov/press/10-16-97.html>.

[280] EEOC, "EEOC Revamps Internet Web Site," press release, July 9, 1999, accessed at <http://www.eeoc.gov/press/7-9-99.html>. *See also* EEOC, *FY 2001 Budget Request*, p. 116.

[281] EEOC, Commissioners Meeting, Sept. 28, 1999, pp. 83–86, 95–96, statement of George B. Wintson, III, president of GBW International.

[282] Ibid., pp. 98–99, statement of John Sarno, Employers Association of New Jersey.

[283] "EEOC: Small Business Reps Address Commission," p. A-11.

[284] E. Elizondo interview, Dallas District Office, pp. 7–8; Hinton interview, Birmingham District Office, p. 2.

[285] Hinton interview, Birmingham District Office, p. 2.

[286] EEOC, Commissioners Meeting, Sept. 28, 1999, pp. 85–89, statement of George B. Wintson, III, president of GBW International.

woman Castro that summarizes the Small Business Initiative and gives the liaison's phone number.[287] District office staff report that this method is effective. For example, on a typical day one liaison received two calls. One was from a person who had been working on the initiative at the Department of Commerce's Small Business Administration. The other call was from a start-up employer whose work force has now grown to just over 100 employees, who was asking for a copy of the EEO-1 report so that he could be in compliance with EEOC reporting requirements.[288]

Half-day TAPS

The need for more affordable half-day TAPS to reach small businesses was well known in both headquarters and district offices before Chairwoman Castro took office.[289] Despite these concerns, only a handful of half-day TAPS were offered in FY 1998,[290] and only12 in FY 1999. The dozen FY 1999 sessions had 478 attendees. They were sponsored by the Chicago, Phoenix, Birmingham, and Baltimore district offices.[291] Thus, the practice of having half-day TAPS is neither common, nor, with only four of 24 district offices offering them, widespread.

According to EEOC, half-day TAPS do not generate enough fees to cover their expenses. Thus, under the mandate of the Revolving Fund legislation, EEOC cannot offer them on a widespread basis and also achieve its statutorily mandated objective to become financially self-sufficient and cover all of its costs.[292] Therefore, according to EEOC's legal counsel, free outreach is the major vehicle for reaching small businesses and underserved communities on a face-to-face basis, not TAPS. Similarly, customer-specific training is a vehicle to meet the needs of small businesses. In addition, the Revolving Fund is preparing a low-cost practical handbook on EEO for direct sales to small businesses.[293]

Outreach on Mediation

In February 1999, EEOC expanded mediation to a nationwide program.[294] The Agency promoted Alternative Dispute Resolution (ADR) as a nonadversarial approach to resolving disputes. It held well-publicized ADR "kick-off" meetings in 40 communities nationwide with strong participation from the business and legal communities, and advocacy and employee organizations. Media coverage of these programs was favorable. Another 576 outreach events or more focused on the Agency's mediation program, while all other outreach activities emphasized it.[295] The effort also included issuance of new mediation outreach materials in various languages, production of videos for use by employers and charging parties, and the addition of a mediation section to EEOC's Web site containing mediation fact sheets and brochures.[296]

Customer Service Initiative

On March 23, 1999, Chairwoman Castro announced a new Customer Service Initiative as part of the Small Business Initiative in a speech to the Society for Human Resource Management. The actions to be included in this initiative were clearly in response to the earlier meeting with small business representatives. They included the expansion of EEOC's voluntary mediation program on a national level; the designation of a small business liaison in every Agency district office; the availability of public information material and guidance in a "plain language" format; an update of the small business information section on the EEOC Web site; and the development of regional small business outreach plans by Agency field offices.

In September 1999, Chairwoman Castro reiterated her promise to make customer service a priority when the Agency met with small busi-

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[287] E. Elizondo interview, Dallas District Office, 4.

[288] Ibid.

[289] USCCR, *Helping Employers Comply with the ADA*, p. 238.

[290] EEOC, *FY 2000 Budget Request*, p. 71. In fact, the Chicago District Office reported holding half-day TAPS in 1997. *See* USCCR, *Helping Employers Comply with the ADA*, p. 239.

[291] EEOC, *FY 2001 Budget Request*, p. 173.

[292] Vargyas letter, p. 67.

[293] Ibid.

[294] EEOC, "EEOC Launches Major Expansion of its Mediation Program," press release, Feb. 11, 1999, accessed at <http://www.eeoc.gov/press/2-11-99.html>.

[295] EEOC, *FY 2001 Budget Request*, p. 107.

[296] EEOC, "EEOC Launches Major Expansion of its Mediation Program."

ness representatives.[297] And indeed, in the Comprehensive Enforcement Program, excellence in customer service is the first named goal.[298]

Plain English and Preventive Measures on the Web Site

The technical language of EEOC communications was criticized again a year after the Small Business Initiative was announced. Thus, in October 1999, Chairwoman Castro promised to enlist the aid of small business persons in translating the handouts and Web site into lay language.[299] District office staff reported that the translation is occurring.[300] However, not only does existing Web site information need to be translated into more user-friendly language, but additional informative resources could be posted.

The Web site still does not contain information that helps to prevent employment discrimination from occurring, for example, through an employer's policy manual.[301] Yet EEOC's training modules for TAPS abound with such information.[302] For example, a New Orleans District Office training module gives an overview of the laws that EEOC enforces. It also has practical information on the hiring and selection process, and the supervising of employees. Graphs on how to carry out the hiring and selection process introduce a discussion of problems that arise with certain methods used during the recruitment process. It advises that, when screening applicants, the employer should establish written objective criteria; apply the criteria consistently; keep a record of the criteria and how they were applied; and review the results of these criteria to guard against disparate impact. When interviewing, the interviewer should ask the same questions of each applicant; retain notes of each interview; ensure that the person selected is the most qualified or at least equally qualified in comparison to the set of criteria; and retain records for at least one year. It also lists, by statute, prohibited or questionable inquiries.[303]

There are other examples of practical information that EEOC provides, but not on the Web site. A Seattle District Office module provides preventive measures for sexual harassment. For example, employers should establish a policy that clearly defines and explains the types of prohibited conduct and ensures that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation. The module also lists information about remedial measures for sexual harassment and ineffective policies and methods.[304]

Another New Orleans District Office presentation on supervising the work force recommends reviewing, evaluating, and controlling managerial and supervisory performance to ensure a continuing affirmative application and vigorous enforcement of the policy of equal opportunity. Managers and supervisors should take disciplinary action against employees who engage in discriminatory practices. They should reasonably accommodate the religious needs or physical and mental limitations of qualified applicants and employees. Nonprobationary employees who develop physical or mental limitations that prevent performing essential functions of the job should be reassigned. Finally, the effectiveness of the equal opportunity program should be evaluated. Supervisors should know the laws and train staff on the laws; ensure that policies are reviewed and are available for review by staff; ensure that staff feel free to discuss situations and issues without feeling threatened; promote equal opportunity programs by allowing staff to participate when feasible; provide training opportunities; and maintain objectivity when serving on hiring panels. Man-

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[297] EEOC, Commissioners Meeting, Sept. 28, 1999, pp. 120–21, statement of Ida L. Castro, chairwoman.

[298] EEOC, *Comprehensive Enforcement Program*, p. 7. *See* chap. 5 for discussion on customer service.

[299] Ibid., pp. 103–04, statement of Ida L. Castro, chairwoman.

[300] E. Elizondo interview, Dallas District Office, pp. 7–8.

[301] *See* EEOC, Commissioners Meeting, Sept. 28, 1999, pp. 84–86, statement of George B. Winston, III, president of GBW International; and <http://www.eeoc.gov>.

[302] EEOC contends that it is illegal for the Agency to offer materials for free on its Web site when it has charged a fee for the same materials under the Revolving Fund. Vargyas letter, p. 68. Nonetheless, it would be useful if such materials could be used to develop information—in a shortened or different form—that can be made available to the public.

[303] EEOC, New Orleans District Office, response to information request, Mar. 3, 2000, tab 18, "U.S. Equal Employment Opportunity Commission," and "1999 Technical Assistance Program Seminar," May 5, 1999 and Aug. 19, 1999 (hereafter cited as New Orleans District Office, FY 1999 TAPS Modules).

[304] EEOC, Seattle District Office, "Preventing Sexual Harassment in the Workplace," TAPS module, May 1999.

agers should know the laws; ensure that equal opportunity policies are current and posted and that all staff are trained on those policies; and ensure that selections for vacancies are objective.[305]

In addition, for employers that become a respondent to a charge, a Seattle District Office training module explains how to respond to an EEOC charge. It advises the employer to establish a relationship with the EEOC investigator, to conduct an internal investigation regarding the charge, and to analyze the case internally. It recommends reviewing the EEOC charge and request for information, establishing the parameters of the investigation, and identifying the documents sought and persons that should be interviewed. Next it suggests interviewing the complainant and the alleged discriminator, obtaining detailed accounts from them, distinguishing the facts from impressions, and taking notes during the interviews. The case should be analyzed for costs—money, exposure, and other risk factors. The monetary costs include "front" and back pay to the complainant, compensatory damages, punitive damages, and attorneys' fees. Indirect costs include the time of the people involved in the case, interference with business, and deflection from the company's mission. Further, if other employees have been treated similarly, other claimants could emerge. With this analysis in hand, the employer has a critical decision to make about whether to attempt settlement or to respond to the charge. If he or she attempts settlement, he or she can opt for mediation or a private settlement. If mediation is chosen, a mediation brief should be prepared. If the employer responds to the charge, he or she should find out information about the charging party's statement, tell the employer's story with a clear and accurate statement of facts, and respond to any EEOC questions and offer to supplement them.[306] Thus, through its district offices, EEOC has a wealth of material that could be used to provide more practical and user-friendly information to employers via the Internet or booklets and would have a broader impact if it were, but the material has not been used in this fashion.

Outreach to Small Businesses

In general outreach to small businesses, program analysts reported working with chambers of commerce and Rotary Clubs.[307] For example, the Birmingham District Office contacted each of the chamber organizations in Alabama and Mississippi to let them know about available information.[308] The Dallas and Houston district offices made presentations before 100 members of chambers in East Texas, explaining Priority Charge Handling Procedures, the Small Business Initiative, and what EEOC can and cannot do; and distributed packets of handouts.[309] The program analyst commented that the chambers of commerce and Rotary Clubs are good sources for information on how effective or ineffective EEOC has been to businesses.[310]

Some district office staff claimed they were conducting more technical assistance to small businesses since the Small Business Initiative was begun, for example through mail or phone requests for information and through TAPS.[311] The Baltimore District Office's planned activities in response to the initiative include (1) sending a mailer and pamphlet to all of the chambers of commerce in the Maryland and Virginia area with an offer to visit and work with their roundtables; (2) working with the Small Business Administration's small business development coordinator to broadcast EEOC's message; and (3) designing a trifold brochure on EEOC's services—outreach, technical assistance programs, and customer-specific training—to mail to businesses. District office liaisons were listed on mail-out packets for any questions that the small businesses might have.[312] The Baltimore District Office gauges the effectiveness of its program to the small business community by the increases

[305] New Orleans District Office, FY 1999 TAPS Modules.

[306] Michael Reiss, and Davis Wright Tremaine, LLP, "Employer Response to an EEOC Charge," module prepared for the EEOC Technical Assistance Program, May 18, 1999. *See* EEOC Seattle District Office, response to information request, Mar. 10, 2000, item 18.

[307] E. Elizondo interview, Dallas District Office, p. 4; Hinton interview, Birmingham District Office, p. 3; Cryor and Veldhuizen interview, Baltimore District Office, pp. 3–4.

[308] Hinton interview, Birmingham District Office, p. 3.

[309] E. Elizondo interview, Dallas District Office, p. 4.

[310] Ibid., p. 8.

[311] Scott, Lawrence, and Wofford interview, Baltimore District Office, p. 7; *see also* St. Louis District Office, "Customer Specific Training and Technical Assistance Seminars."

[312] Cryor and Veldhuizen interview, Baltimore District Office, pp. 3–4.

in inquiries and requests from small businesses for EEOC assistance in handling a charge of discrimination.[313]

EEOC notes that in FY 1999, 20.7 percent of the outreach and technical assistance events for employers focused on the small business audience, and many TAPS programs were marketed specifically to small and mid-sized employers.[314] However, by far the majority of businesses in the United States are small. For example, Bureau of Census data show that even excluding the self-employed, more than 85 percent of establishments have fewer than 20 employees.[315] Thus, most of EEOC's outreach to employers should be targeted to small businesses.

Outreach to Underserved Areas and Groups

EEOC did not attempt to target a broader audience with initiatives aimed at reaching the underserved until FY 1995 or FY 1996.[316] When it did, it first had to identify the underserved. District offices used different methods to do this. Many looked first at geographic areas. For example, in the Dallas District Office, about 65 to 70 percent of charges come from the Dallas-Fort Worth metropolitan area. Another substantial percentage of charges comes from the small towns of Longview, Tyler, and Marshall. Together these two areas probably account for 85 to 90 percent of the charges in the 102 counties served by the Dallas Office. All other areas in Texas are considered underserved communities. Similarly, in Oklahoma, the bulk of the charges are from the Oklahoma City area and Tulsa. Very few come from areas other than the two large cities. Thus, it is easy to recognize the underserved areas. The Tex-Arkana area that borders Louisiana and Arkansas (the extreme northeast of Texas) is underserved. A string of small towns that front Texas and Oklahoma, such as Sherman and Dennison, produce few charges, despite the presence of large industry, and therefore may also be underserved.[317]

Another method was to look at industries. The Dallas District Office's staff in the Targeting Unit were assigned to look at certain industries and identify potential systemic and class charges. They were to access EEO-1 reports[318] to identify employers with more than 100 employees in underserved areas (i.e., geographic areas where few charges have been filed).[319]

Other district offices reported using newspaper articles, knowledge of the community, public events, and, most importantly, input from stakeholder organizations and advocacy groups to help identify the underserved.[320] Getting input from advocacy groups reporting problems in areas where very few charges are filed is a good method for identifying underserved areas.[321] However, more aggressively, the Phoenix District Office solicited ideas from stakeholders and advocacy groups with a letter and brief questionnaire. The questionnaire asked for specific

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[313] Ibid., p. 5.

[314] Vargyas letter, p. 68. That same year, 11,000 small business employers attended 237 outreach events held specifically for the small business audience. In addition, the chairwoman has spoken to 12 business groups around the country and has attended approximately 17 meetings with employers and their representatives in EEOC field offices. Ibid. EEOC's Automated Outreach System (AOS) data show representatives of small businesses to be in half as many technical assistance and outreach events as other employers and that small business representatives attend roughly one-quarter as many fee-based events as employers more generally. EEOC, Automated Outreach System data as of Apr. 25, 2000. However, the AOS does not distinguish small business representatives from other business representatives and only reports small business information for free outreach. Further, participation in TAPS and customer-specific training is not broken down by size of business. Vargyas letter, p. 68. Thus, there clearly is a need for EEOC to develop a more detailed tracking system for its outreach.

[315] In 1996, there were 6,739,000 establishments with 5,843,000 of them, or 86.7 percent, having fewer than 20 employees. *See* U.S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States: 1999*, table 876, p. 555, *citing* U.S. Census Bureau, *County Business Patterns*, annual.

[316] EEOC, *FY 1996 Budget Request*, p. 84.

[317] E. Elizondo interview, Dallas District Office, p. 5. For other district offices targeting geographic areas, *see* Hinton interview, Birmingham District Office, p. 3, and the examples given below.

[318] Typically private employers with 100 or more employees and federal contractors with more than 50 employees are required to submit EEO-1 reports to EEOC by law. The report must include counts of all employees by race, sex, and job category (e.g., officials and managers, professionals, sales, office and clerical workers, etc.). EEOC's statutory authority to collect this information is from Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972. *See* EEOC, "Equal Employment Opportunity, Standard Form 100, Rev. 4-89, Employer Information Report EEO-1, 100-116, Instruction Booklet."

[319] E. Elizondo interview, Dallas District Office, p. 5.

[320] Cryor and Veldhuizen interview, Baltimore District Office, p. 2; E. Elizondo interview, Dallas District Office, p. 5.

[321] E. Elizondo interview, Dallas District Office, p. 5.

enforcement issues, geographic locations, underserved populations, or industries where there are violations of fair employment laws, as well as for suggestions for outreach and educational activities and means for achieving a well-balanced approach to eradicating job discrimination.[322]

Once underserved areas were identified, district offices had to develop a strategy to best reach the people in these areas. Some representation of these areas at TAPS has been achieved by including addresses from these areas in the TAPS mailing list, but not as much representation as the district offices would like. The cost of TAPS probably constrained participation.[323] Thus, to reach the underserved community it is better to use outreach.[324]

Some district offices have reported that a good way to reach underserved communities is through co-sponsoring seminars with community-based organizations.[325] Organizations through which district office staff can better reach areas where few charges are filed include the NAACP, LaRaza, LULAC, the Urban League, the Organization of Chinese Americans, and the tribal councils.[326] For example, to reach people in the Roanoke area of Virginia, which is far from the Baltimore District Office or any metropolitan area, staff worked with the NAACP and the Southern Christian Leadership Conference (SCLC).[327]

EEOC staff gave many examples of their efforts to identify and reach out to underserved areas and groups:

- The St. Louis District Office has deemed remote sections of Illinois, Missouri, and Kansas, where very little is known about EEOC, and where most employers are small businesses with few staff and resources to take advantage of employment law training, as underserved.[328]
- The borough of Queens in New York City has undergone tremendous changes in demographics in recent years with the influx of immigrant groups who are unaware of their civil rights. The New York District Office is trying to acquaint them with their rights and to identify some of the ongoing violations they experience.[329]
- The New York District Office has made a large effort in Puerto Rico during the last fiscal year. Staff have spoken with Puerto Rican community activists, legal representatives, government employees, and other groups to identify employment discrimination issues.[330]
- The Baltimore District Office plans to target the Eastern Shore of Maryland because of the African American and Latino communities, and the Baltimore-Washington corridor because of underserved Asian Americans, Pacific Islanders, and Hispanics.[331]
- The Baltimore District Office has targeted the central area of Virginia for outreach on race and disability. It recently found race to be a factor in a couple of class cases there. For example, one company employs about 200 workers, but no African Americans. The office will also be looking at whether these companies hire or accommodate persons with disabilities, or make their companies accessible to them. A representative of the Mid-Atlantic Disability Referral Agency in Virginia is helping to organize outreach for the disability community in central Virginia.[332]
- The Baltimore area has a very diverse religious community which includes Orthodox Jews, Muslims, and fundamentalists where issues such as grooming and religious accommodation have arisen. The district office hopes to reach out to this community.[333]

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[322] Charles D. Burtner, district director, Phoenix District Office, EEOC, letter to "Colleague," July 28, 1998. *See* EEOC, Phoenix District Office, response to information request, Mar. 30, 2000, tab 8.

[323] E. Elizondo interview, Dallas District Office, p. 5.

[324] Cryor and Veldhuizen interview, Baltimore District Office, p. 4.

[325] EEOC, *FY 1996 Budget Request*, p. 84; E. Elizondo interview, Dallas District Office, p. 6.

[326] E. Elizondo interview, Dallas District Office, p. 6.

[327] Cryor and Veldhuizen interview, Baltimore District Office, p. 2.

[328] St. Louis District Office, "Outreach."

[329] Lee, Graziano, and Quinto interview, New York District Office, pp. 6–7.

[330] Ibid.

[331] Cryor and Veldhuizen interview, Baltimore District Office, p. 2.

[332] Ibid.

[333] Ibid., pp. 2–3.

Other than the small businesses and underserved localities, the groups that district offices have identified as underserved have mostly been those specifically protected by antidiscrimination laws, for example, racial and ethnic groups and persons with disabilities. Exceptions to that include low-wage earners and farm workers. Special efforts to conduct outreach to the low-wage earners, farm workers, and the various racial and ethnic groups are discussed below.

Texas Tri-district Task Force on Low Wage Workers

As a result of efforts to identify and reach underserved groups, several field offices—the Dallas, Houston, San Antonio district offices and the El Paso Area Office—formed a Low Wage Worker Task Force in the state of Texas.[334] Because of a lack of education, cultural differences, and language barriers, many low-wage workers are unaware of their rights and are unfamiliar with EEOC's charge processing procedures. Employers easily abuse and have taken advantage of these workers because they are often immigrants who are vulnerable to threats of retaliation and fear deportation. EEOC brought attention to their concerns when it held its June 1999 commission meeting in Houston and heard testimony on the issues affecting this group. Panelists recommended that EEOC pay increased enforcement attention to the agricultural, poultry, meat packing, construction, and restaurant industries; survey employees in the temporary farm worker program regarding employer compliance with EEO laws; and monitor workplace bias in public works construction projects.[335] The activity is innovative both because of the unusual group that was targeted for service and because of the national attention brought to the issue by holding a commission meeting in the local area.

Farm Workers

The Phoenix District Office solicited input from stakeholders on the identification of underserved groups, from which several issues involving farm workers arose. For example, age discrimination is an issue for many farm workers. Many older farm workers have difficulty keeping a fast pace. When wages are based upon piece rates, they do not earn the minimum wage and employers must augment their salaries. This situation results in selective layoffs of allegedly unproductive workers when employers do not have clear policies, conveyed to workers, which establish minimum standards for speed.[336] Also, stakeholders identified areas where farm workers were not accommodated under the ADA or were sexually harassed. Sexual harassment is a very common and severe form of discrimination for this group. It is often directed to married women working in the same crew as their husbands. It, therefore, threatens both family incomes.[337] Few farm workers file charges with EEOC, either because of lack of faith in the

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[334] EEOC, Dallas District Office, "Texas Tri-District Task Force on Low Wage Workers: An Overview," no date (hereafter cited as Dallas District Office, "Texas Tri-District Task Force"); E. Elizondo interview, Dallas District Office, p. 5.

[335] EEOC, "Discrimination Against Low-Wage Earners"; Dallas District Office, "Texas Tri-District Task Force." Dallas District Office staff are involved in this project. The Dallas regional attorney is a co-chair of the task force. A staff person from the Dallas District Office's Targeting Unit generated a lot of statistical information for the task force. *See* E. Elizondo interview, Dallas District Office, p. 5.

[336] EEOC, Phoenix District Office, response to information request, Mar. 30, 2000, tab 8, "Input from Stakeholders for LEP" (hereafter cited as Phoenix District Office, "Input from Stakeholders for LEP"); Gary M. Restaino, staff attorney, Community Legal Services Law Offices, Farmworker Office, letter to Susan Grace, EEOC, Phoenix District Office, re: Outreach Survey, July 21, 1998 (hereafter cited as Restaino letter).

Another concern was that employers discriminate against permanent resident and citizen farm workers by hiring guest workers under the H-2A provisions of the Immigration Reform and Control Act. The H-2A program was designed to overcome a critical shortage of agricultural workers by permitting temporary employees to live and work in the United States only during a designated harvest for an individual employer. When the work is done they must leave the United States. However, more and more growers and packers are requesting these temporary workers, and their use keeps farm worker wages low. The H-2A program requires employers to recruit domestic farm workers and provide work during the first half of the season to all local applicants with the requisite skills, but employers may be evading these requirements. The Department of Labor is required to enforce this law. *See* Restaino letter; U.S. Department of Labor, Office of Inspector General, "Consolidation of Labor's Enforcement Responsibilities for the H-2A Program Could Better Protect U.S. Agricultural Workers," report no. 04-98-004-03-321, Mar. 31, 1998, accessed at <http:// www.oig.dol.gov/public/reports/oa/1998/h2a_rpt.htm>.

[337] Phoenix District Office, "Input from Stakeholders for LEP"; Janine Duron, employment unit supervisor, Arizona Department of Economic Security, Employment Security Administration, response to EEOC, Phoenix District Office outreach survey.

process or fear that their immigration status may be jeopardized.[338]

A number of ideas were given for reaching farm workers. They included providing information through a variety of events: the "Day of the Farm Worker" celebration, health fairs in remote areas, and farm worker information sessions, particularly in agricultural "company towns," and during the summer and fall melon harvests.[339]

To better reach farm workers, the Phoenix District Office has a folded business card to pass out to them in the field. Spanish and English versions of the card state, "Job Discrimination is Wrong!" They list the various bases of discrimination, give simple examples of harassment, and include a phone number for assistance.[340] Outreach to farm workers is difficult in other parts of the nation, too. The New York District Office has a project in Upstate New York to reach farm and migratory workers.[341]

Outreach to Minority Groups

Vice Chair Igasaki has raised compelling concerns about national origin discrimination, particularly among Hispanic and Asian Americans and Pacific Islanders. Ten percent of the civilian labor force is Hispanic, but only 4 percent of EEOC's caseload is charges filed by Hispanics. Similarly, 4 percent of the civilian labor force is Asian American, but only 1 percent of EEOC charge receipts are from Asian Americans and Pacific Islanders. Vice Chair Igasaki further states that these communities do not experience a lack of discrimination, but rather do not understand their rights, do not know that EEOC can help them, and are not comfortable with filing charges.[342] To address these concerns, EEOC has made national origin discrimination one of its highest priorities. Outreach—going out and talking to communities both in their native languages and in their media—is a high priority. The Agency has emphasized multilingual outreach; hiring multilingual investigators and program analysts; communicating with ethnic media; producing materials in a variety of ethnic languages; and working with community organizations.[343]

EEOC staff echoed the vice chair's concerns about these groups. The Mexican and Asian American communities are very difficult to reach because they generally distrust government. They fear anything reported to a government agency may be shared with the Immigration and Naturalization Service (INS). Therefore, in many instances, they just do not file charges.[344]

Asian Americans and Pacific Islanders and Hispanics are not the only groups who have filed few charges. Native Americans are also unlikely to have filed charges. For example, the Dallas District Office has contracted with eight tribal employment rights offices (TEROs) in Oklahoma to do intake, charge resolution, and settlement of charges. But, the TEROs have not yet produced a charge.[345]

Sending letters to these communities and networking with other governmental agencies are ways that district office staff have tried to reach them.[346] Some special efforts to reach Asian, Mexican, and Native Americans are listed below.

- In 1998, an Asian American in Dallas scheduled several events for attorneys and other professionals and leaders in the Asian American community with then Acting Chair Igasaki. These events included roundtable discussions and receptions, held when the vice chairman was in Dallas for a TAPS. (Mr. Igasaki and Chairwoman Castro were in Dallas again in February 2000 speaking before the Dallas Bar Association, Employment Law Section, and other groups).[347]

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[338] Ed, Valenzuela, president, Ganas Professional Services, interview in Phoenix, AZ, Apr. 4, 2000, p. 3. Dr. Valenzuela was director of the Phoenix District Office of EEOC in the 1970s and early 1980s. Ibid., p. 1.

[339] Phoenix District Office, "Input from Stakeholders for LEP."

[340] EEOC, Phoenix District Office, response to information request, Mar. 30, 2000, item 18; Burtner interview, Phoenix District Office, pp. 33–34.

[341] Lee, Graziano, and Quinto interview, New York District Office, pp. 6–7.

[342] EEOC Commissioners Meeting, Sept. 28, 1999, pp. 20–21, statement of Paul M. Igasaki, vice chairperson.

[343] Ibid., pp. 21–22.

[344] E. Elizondo interview, Dallas District Office, pp. 6–7.

[345] Ibid., p. 6.

[346] Ibid.

[347] Ibid., p. 7.

- In December 1999, Dallas District Office staff spoke at an event sponsored by the Organization of Chinese Americans.[348]
- One program analyst suggested that the best way to reach Mexican Americans in the Southwest may be to promote legislation whereby all federal agencies, not just EEOC, do more for this group. Mandating outreach by other federal agencies would help.[349]
- To help reach Native Americans, the Dallas District Office has scheduled tribal outreach seminars for 8 a.m. to 5:30 p.m. on a Saturday. Usually three EEOC staff members do presentations, and one or two others take charges from persons not willing to discuss their grievances in front of the audience. The on-site staff include someone who speaks the local language who can interpret or interview people submitting the charges.[350]

District office staff expect more significant complaints from individuals within these underserved communities because EEOC is trying to get them involved in its outreach programs.[351]

It is not clear what special efforts are made to reach African Americans.[352] Although some district office staff reported working with the NAACP, staff in one district office reported that EEOC has had a troubled relationship with at least some branches of this organization in the past.[353] As EEOC focuses more effort on reaching underserved groups and on developing class cases and cases that change or clarify law, the concerns of African Americans, as well as all protected classes, must be included.

Outreach to Women

EEOC headquarters proposed a major initiative on equal pay in FY 2000 and FY 2001.[354] The Equal Pay Initiative will expand opportunities for women and minorities and attempt to close the wage gap affecting millions of families dependent on women's earnings. EEOC plans to use public service announcements and seminars with employee groups across the country to reach millions of workers and inform them of their rights. They also plan to reach small, mid-sized, and large employers to provide technical assistance and education on equal pay issues, and to provide unions and other community leaders and the people they represent, with information on wage discrimination and employee rights.[355] EEOC has requested an additional $10.8 million and nine full-time-equivalent positions to carry out this and other expanded outreach efforts.[356] Congress did not honor the Agency's request for additional funding in FY 2000;[357] it is unclear whether or not it will in FY 2001.

EEOC Outreach with or for Fair Employment Practices Agencies

EEOC does not appear to have made any concerted effort to include the fair employment practices agencies (FEPAs) in its technical assistance and outreach programs. EEOC district office staff reported only that FEPAs receive invitations to participate in TAPS.[358] Headquarters also holds an annual FEPA training conference for FEPA staff.[359] It is not clear that EEOC gives

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[348] Ibid.

[349] Ibid., p. 6.

[350] Ibid.

[351] Cryor and Veldhuizen interview, Baltimore District Office, p. 4.

[352] African Americans are the targeted audience in 23 percent of technical assistance and outreach events that are aimed at various protected groups (i.e., groups protected on the basis of race, national origin, gender, disability, age, or religion). *See* EEOC, Automated Outreach System data as of Apr. 25, 2000.

[353] E. Elizondo interview, Dallas District Office, p. 6.

[354] EEOC, *FY 2001 Budget Request*, pp. 96–98; EEOC, *FY 2000 Budget Request*, pp. 63–64.

[355] EEOC, *FY 2001 Budget Request*, p. 97.

[356] The money is for the Equal Pay Initiative described above, for training EEOC staff to identify and properly analyze and investigate complex pay discrimination issues, and to better reach underserved groups or communities. *See* EEOC, *FY 2001 Budget Request*, pp. 96–98.

[357] The FY 2000 appropriation was marginally higher than that for FY 1999. At $281 million, it was well below the $312 that EEOC requested. *See* chap. 3, fig. 3-1.

[358] Fultz interview, St. Louis District Office, p. 1.

[359] Elizabeth Thornton, director, Office of Field Programs, EEOC, interview in Washington, DC, Mar. 1, 2000, pp. 6–7; Paula Haley, executive director, Alaska State Commission for Human Rights, telephone interview, Jan. 12, 2000, pp. 4–5; EEOC, "Agenda: 1999 EEOC/FEPA Training Conference, New Orleans, Louisiana," June 6–9, 1999 (hereafter cited as EEOC, 1999 EEOC/FEPA Training Conference). EEOC, "Agenda: 1998 EEOC/FEPA Training Conference,"

the FEPAs any direction on conducting outreach with or without district offices.[360]

EEOC and the FEPAs appear to coexist, but rarely work together. For example, FEPAs do participate in EEOC's seminars and forums, and, the FEPAs conduct annual programs that representatives of EEOC attend.[361] But some FEPA staff reported that they had not recently worked together with EEOC on outreach or technical assistance.[362] One FEPA director explained the lack of joint EEOC and FEPA projects is because EEOC staff were trying to focus outreach efforts in jurisdictions that are not covered by a FEPA, and because neither agency has adequate resources.[363]

The FEPAs have potential for greater involvement in EEOC's technical assistance and outreach. Staff in the St. Louis District Office, for example, reported having had more than one joint effort with FEPAs. The office held town meetings or gatherings throughout the district where the FEPAs are invited to make presentations and answer questions. At one time, four town meetings or gatherings were held per year. However, town meetings are no longer planned for the first quarter of the fiscal year because routinely the office has not received its appropriations at that time and cannot commit the necessary funds.[364] In another example, a Columbia, Maryland, FEPA had a joint training session with EEOC. EEOC did the overall presentation, then local FEPAs did breakout sessions on different issues. The audience consisted of human resources people and human rights lawyers, and the sessions compared EEOC and the FEPAs on the bases they cover and their investigative procedures.[365]

FEPAs do engage in outreach on their own, for example holding annual programs,[366] responding to inquiries on a daily basis, and giving requested presentations to employer organizations or civic groups.[367]

EDUCATIONAL MATERIALS

The Internet and Other Written Communication

EEOC has a variety of written communication ranging from fact sheets and pamphlets explaining employee and employer rights under fair employment laws and where and how to file complaints, to the more technical information contained in its Compliance Manual published by the Bureau of National Affairs. Much of the information intended for the public is posted on the Agency's Web site.

The Internet

EEOC launched a Web site on the Internet in February 1997. It began with general Agency information, including biographies of the commissioners and general counsel, annual reports, addresses and phone numbers of field offices, the text of the laws enforced by the Agency, press releases, fact sheets, and periodicals.[368] A fact sheet for small businesses was added in October 1997. The fact sheet explained which employers are covered by EEOC-enforced laws, record-keeping and reporting requirements, charge processing procedures, mediation, and a variety of substantive issues. It also included information on EEOC's technical assistance programs and publications.[369]

May 10–13, 1998 (hereafter cited as EEOC, 1998 EEOC/FEPA Training Conference).

[360] The 1999 conference appeared to cover mostly updates and issues, however, the 1998 session covered management strategies that might have addressed outreach, whether or not conducted jointly with EEOC district offices. *See* EEOC, 1999 EEOC/FEPA Training Conference; EEOC, 1998 EEOC/FEPA Training Conference.

[361] Fultz interview, St. Louis District Office, p. 3.

[362] Donald M. Stocks, interim director, District of Columbia Office of Human Rights, interview in Washington, DC, Jan. 8, 2000, p. 9 (hereafter cited as Stocks interview); Robert Steindler, director, Alexandria (Virginia) Office of Human Rights, interview in Alexandria, VA, Jan. 11, 2000, p. 10 (hereafter cited as Steindler interview); Jacqueline Carr, director of compliance, St. Louis Civil Rights Enforcement Agency, St. Louis, Mo., telephone interview, Jan. 20, 2000, p. 3.

[363] Steindler interview, p. 10.

[364] Maggie McFadden, supervisor, state and local functions, Scott Barnhart, state and local coordinator, and Richard Schuetz, deputy director, St. Louis District Office, EEOC, interview in St. Louis, MO, Jan. 31, 2000, p. 5.

[365] Rufus Clanzy, administrator, Howard County Office of Human Rights, Columbia, MD, telephone interview, Feb. 10, 2000, p. 5.

[366] Fultz interview, St. Louis District Office, p. 3.

[367] Stocks interview, p. 9; Steindler interview, p. 10; William H. Stewart, administrator, Nevada Equal Rights Commission, telephone interview, Jan. 6, 2000, p. 7.

[368] EEOC, "EEOC Launches Internet Web Site," press release, Feb. 25, 1997, accessed at <http://www.eeoc.gov/press/2-25-97.html>.

[369] EEOC, "EEOC Develops Small Business Fact Sheet."

In July 1999, the EEOC Web site was restructured to make access to information faster and easier. The Web site was hailed as a highly valuable information resource and praised for its innovative design and for providing direct information about equal employment opportunity in an easy-to-understand format.[370] Use of the Web site increased four fold, from approximately 100,000 visitors per month before the revamping,[371] to more than 100,000 hits per week after.[372]

Despite the praise that EEOC's Web site received, one small business owner criticized it for not having more information on how to prevent discrimination. He was looking for help in writing a policy manual for employees. Instead, the Web site had information and laws on what to do after discrimination has occurred.[373] Another person explained that the guidance on the Web site was written for judges, not human resource professionals or businesses.[374] Chairwoman Castro stated that she would enlist the aid of the speaker lodging the complaint to rewrite the Web site.[375]

Fact Sheets, Brochures, and Booklets

EEOC's fact sheets appear both on the Internet[376] and as one-page flyers that are distributed at technical assistance and outreach sessions and to persons making inquiries about charges. Fact sheets that address Title VII are mostly printed in English and Spanish and address discrimination on the bases of race or color, national origin, religion, pregnancy, and sex, including sexual harassment.[377] Other fact sheets address discrimination on the bases of age and disability.[378] Notably, none of the headquarters fact sheets concerns the Equal Pay Act.[379] One district office has developed its own fact sheet on the Equal Pay Act,[380] and another uses the American Federation of Labor-Congress of Industrial Organization's (AFL-CIO's) fact sheet on it.[381]

In addition to the fact sheets, EEOC has brochures and booklets. The Agency has a general brochure about filing a charge of job discrimination. It is available in English and also in Braille, large print, audiotape, and electronic file.[382] Booklets give questions and answers or other information about sexual harassment and about disabilities.[383] In addition to headquarters material, many district offices have translated informational materials into other languages. For example, the New York District Office developed a brochure for recent immigrants that has been translated into Korean, Chinese, Haitian-Creole, Vietnamese, Arabic, and Spanish.[384]

Nearly all the above fact sheets, brochures, and booklets are targeted to the charging

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370 EEOC, "EEOC Revamps Internet Web Site"; *see also* EEOC, *FY 2001 Budget Request*, p. 116.

371 EEOC, "EEOC Revamps Internet Web Site."

372 EEOC, Commissioners Meeting, Sept. 28, 1999, p. 15, statement of Ida L. Castro, chairwoman.

373 Ibid., pp. 83–86, 95–96, statement of George B. Winston, III, president of GBW International.

374 Ibid., pp. 98–99, statement of John Sarno, Employers Association of New Jersey.

375 Ibid., pp. 103–04, statement of Ida L. Castro, chairwoman.

376 *See* <http://www.eeoc.gov/facts/>.

377 EEOC, "Facts about Race/Color Discrimination," EEOC-FS-E-8; EEOC, "Facts About National Origin Discrimination," EEOC-FS/E-1, and in Spanish, EEOC-FS/S-1; EEOC, "Facts About Religious Discrimination," EEOC-FS/E-3, and in Spanish, EEOC-FS/S-3; EEOC, "Facts About Pregnancy Discrimination," EEOC-FS/E-2, and in Spanish, EEOC-FS/S-2; EEOC, "Facts About Sexual Harassment," EEOC-FS/E-4, and in Spanish, EEOC-FS/S-4.

378 EEOC, "Facts About Age Discrimination," EEOC-FS/E-9; "Facts About the Americans with Disabilities Act," EEOC-FS/E-5, and in Spanish, EEOC-FS/S-5; and EEOC, "Facts About Disability-Related Tax Provisions," EEOC-FS/E6, Jan. 92, and in Spanish, EEOC-FS/S6.

379 *See, e.g.*, EEOC, Publications Distribution Center, "Publications Order Form," prepared by EEOC, Office of Communications and Legislative Affairs, April 1999.

380 EEOC, Seattle District Office, "Facts About the Equal Pay Act," SEDO/EEOC, Nov. 22, 1996.

381 EEOC, New Orleans District Office, response to information request, Mar. 3, 2000, tab 18, "Equal Pay Act," pp. 8–9. *See also* AFL-CIO, "Fact Sheet: It's Time for Working Women to Earn Equal Pay," accessed at <http://www.afl-cio.org/women/f_eqpay.html>, Apr. 18, 2000.

382 EEOC, "Filing a Charge of Job Discrimination," EEOC-FC-E4/99. *See* EEOC, Dallas District Office, response to information request, Jan. 20, 2000, item 1; EEOC, Birmingham District Office, response to information request, Feb. 7, 2000.

383 EEOC, "Questions and Answers About Sexual Harassment," EEOC-BK-SH; EEOC, "The Americans With Disabilities Act: Questions and Answers," EEOC-BK-15, 1991; EEOC, "The Americans With Disabilities Act: Your Responsibility as an Employer," EEOC-BK-17, 1991; and EEOC, "The Americans With Disabilities Act," EEOC-BK-18, 1991.

384 Vargyas letter, p. 70.

party.[385] Fact sheets directed to employers are labeled "Small Business" and appear on the EEOC Web site and are all in English.[386] In fact, the Web site contains more than 20 such fact sheets, including explanations of EEOC laws that apply to small businesses; record-keeping and reporting requirements, and EEOC charge processing; as well as employment discrimination; racial and ethnic, age, disability, religious, and pregnancy discrimination; and sexual harassment.[387] EEOC also has printed information and pamphlets on mediation. A brochure on mediation is available in English, Spanish, and other languages.[388]

For the most part, only the fact sheets are available in languages other than English, and the only other language they are in is Spanish.[389] The Office of Communications and Legislative Affairs (OCLA) has undertaken the translations of EEOC publications into languages other than English, but has found that government-contracted translators sometimes choose inappropriate words because they are not familiar with the vocabulary of equal employment opportunity. OCLA then decided to have each translated publication proofread by someone fluent in the language and familiar with the vocabulary of equal employment opportunity procedures and laws. In May 1999, OCLA was seeking more people fluent in Chinese, Arabic, Korean, Russian, Vietnamese, and Haitian-Creole to perform the proofreading.[390] Arabic versions of EEOC's mediation brochure and fact sheet on mediation were then in the proofreading stage.[391] It is unclear whether this review is complete or how soon additional language material will be available.

Although headquarters EEOC has primary responsibility for developing fact sheets, pamphlets, and booklets, a number of district offices have developed literature of their own. These pamphlets generally bear the address and names of contact persons in the district office. Pamphlets and other handouts developed by district offices include:

- In 1997, the Chicago District Office and three local human rights organizations developed a guide to working with Chicago area agencies on employment discrimination. The manual explains the differences among federal and state laws and local ordinances and differences among the agencies that enforce these laws in charge filing and intake, investigation, conciliation, hearing process, and relief.[392]
- Some district offices have a three-fold pamphlet on employment rights of immigrants. It discusses national origin discrimination under Title VII, including discrimination based on accent and speak-English-only rules. The district office address and phone numbers are listed on the brochure.[393]

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[385] One exception is EEOC, "The Americans With Disabilities Act: Your Responsibility as an Employer," EEOC-BK-17, 1991.

[386] One that has an official publication number and does not appear on the Web site is EEOC, "Get the Facts Series: Small Business Information," EEOC-FS-E13.

[387] *See* <http://www.eeoc.gov/small/>.

[388] *See* <http//www.eeoc.gov/mediate/>. The mediation brochure is available in English and Spanish. It appears on the Web site in PDF format and plain text. *See* <http//www.eeoc.gov.mediate/.week.html>. It is also available as a glossy brochure. EEOC, "Mediate! Employment Discrimination Charges: Fair, Efficient and Everyone Wins." *See* EEOC Dallas District Office, response to information request, Jan. 20, 2000; EEOC Detroit District Office, response to information request, Feb. 28, 2000. The Detroit District Office has the brochure in Arabic.

[389] EEOC's publications list indicates that a pamphlet on the employment rights of immigrants under federal antidiscrimination laws is available in English, Vietnamese, Korean, Chinese, Spanish, and Haitian-Creole. *See* EEOC, Publications Distribution Center, "Publications Order Form."

[390] William J. White, Jr., acting director of communications and legislative affairs, EEOC, memorandum to district directors, through Elizabeth M. Thornton, director, Office of Field Programs, re: translation of EEOC public information materials, May 26, 1999. *See* EEOC, Detroit District Office, response to information request, Feb. 28, 2000, item 1.

[391] Harriet Hartman, Office of Communications and Legislative Affairs, EEOC, fax to Jesse Vidaurri, re: mediation brochure and fact sheet, May 19, 1999. *See* EEOC, Detroit District Office, response to information request, Feb. 28, 2000, item 1.

[392] EEOC, Illinois Department of Human Rights, Cook County Commission on Human Rights, Chicago Commission on Human Relations, *Employment Discrimination: A Guide to Working with Chicago Area Agencies*, May 1997.

[393] EEOC, Los Angeles District Office, "Employment Rights of Immigrants Under Federal Anti-Discrimination Laws," no date; EEOC, New York District Office, "Employment Rights of Immigrants Under Federal Anti-Discrimination Laws," no date. The Seattle District Office has the same pamphlet in Spanish and Chinese. *See* EEOC, Seattle District Office, response to information request, Mar. 7, 2000, tab 1.

- The Detroit and Phoenix district offices developed pamphlets on alternative dispute resolution giving more detail than is found in the headquarters pamphlet. These explain mediation and its advantages and give the name and phone number of a contact person. One pamphlet lists a series of questions and answers; the other explains what to expect in the mediation process.[394]
- District offices have developed fact sheets on intake and charge processing procedures, and on charging party rights and responsibilities.[395] A Seattle District Office fact sheet is titled "Are You in the Right Place?" and presents jurisdictional information for charging parties.[396]
- The Phoenix District Office has a pocket folder containing information on the laws EEOC enforces; the FEPAs; documenting discrimination; case processing of systemic, class, or pattern and practice charge processing; and the investigative process. The folder also contains a copy of the charge questionnaire and EEOC fact sheets.[397] The folders are distributed to both employers and community groups.[398]
- Some district offices produce newsletters. For example, the Philadelphia District Office sends an annual newsletter to approximately 7,500 stakeholders. The newsletter updates recent developments in equal employment opportunity law. It gives highlights of EEOC litigation and policy guidance. It also mentions EEOC services such as the mediation program and technical assistance.[399] The Phoenix District Office sends a similar newsletter to organizations representing workers.[400]
- The Detroit District Office has distributed plastic tote bags at workshops and forums. The tote bag is printed with EEOC's logo and the location of its Web site.[401]

Demonstrating yet again the autonomy that district offices have, the Seattle District Office has developed fact sheets on national origin discrimination, sexual harassment, pregnancy discrimination, and the Americans with Disabilities Act, which the office uses in lieu of the headquarters fact sheets. The Seattle fact sheets are the same as the headquarters fact sheets, except that they list the phone numbers for the district office and for state and local antidiscrimination agencies.[402]

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[394] EEOC, Detroit District Office, "Alternative Dispute Resolution: Resolving Employment Disputes Without Investigation or Litigation Through Mediation," no date; EEOC, Phoenix District Office, "Mediation . . . An Alternative," no date. *See* EEOC, Phoenix District Office, response to information request, item 19B.

[395] EEOC, Baltimore District Office, "Customer Service Brochure: Intake and Charge Processing Information," no date; EEOC, Detroit District Office, "Intake & Case Processing Procedures," no date; and EEOC, Detroit District Office, "Charging Party Rights and Responsibilities," no date. *See* EEOC, Detroit District Office, response to information request, Feb. 28, 2000, item 1; EEOC, Seattle District Office, "Are You in the Right Place?" fact sheet, EEOC/SEDO/CRTIU/Inf/Jurisdiction, April 1997; EEOC, Seattle District Office, "Additional Information for You, The Charging Party," CRTIU/ChrSrv/AddInfo/CP, April 1997; EEOC, Seattle District Office, "Laws Enforced by EEOC," EEOC/SEDO/CRTIU/Inf/EEOCLaws, April 1997; EEOC, Seattle District Office, "Private Suit Rights: Information Sheet for Charging Parties," EEOC/SEDO/CRTIU/PrivateSuitRightsInfo, April 1997; EEOC, Seattle District Office, "Information for the Private Sector and State and Local Governments," EEOC/SEDO/CRTIU/Inf/PrivateSec, April 1997. *See* EEOC, Seattle District Office, response to information request, Mar. 10, 2000, item 1.

[396] EEOC, Seattle District Office, "Are You in the Right Place?"

[397] EEOC, Phoenix District Office, response to information request, Mar. 30, 2000, item 18.

[398] Burtner interview, Phoenix District Office, pp. 34–35.

[399] Edward McCaffrey, program analyst, Philadelphia District Office, EEOC, memorandum to USCCR, re: response to documentary request, items 11 and 18, Feb. 22, 2000; EEOC, Philadelphia District Office, "EEO Report," vol. 1 (FY 1997), vol. 2 (FY 1998), and vol. 3 (FY 1999); Burtner interview, Phoenix District Office, p. 5.

[400] Burtner interview, Phoenix District Office, pp. 5, 30–31; EEOC, Phoenix District Office, "EEOC Developments," January 2000. *See* EEOC, Phoenix District Office, response to information request, Mar. 30, 2000, tab 18.

[401] EEOC, Detroit District Office, response to information request, Feb. 28, 2000, item 1.

[402] EEOC, Seattle District Office "Facts About National Origin Discrimination," SEDO/EEOC, May 1, 1996; EEOC, Seattle District Office "Facts About National Origin Discrimination," EEOC/SEDO/CRTIU/Inf/FS-NatOrig, April 1997; EEOC, Seattle District Office, "Facts About Sexual Harassment," SEDO/EEOC, May 1, 1996; EEOC, Seattle District Office, "Facts About Pregnancy Discrimination," SEDO/EEOC, May 1, 1996; and EEOC, Seattle District Office, "Facts About the Americans With Disabilities Act," SEDO/EEOC, May 1, 1996. *See* EEOC, Seattle District Office, response to information request, Mar. 10, 2000, item 1.

Compliance Manual

EEOC's fact sheets, brochures, and booklets are directed toward the public, that is charging parties, employers, advocacy groups, and community organizations that do not have a professional interest in the area of equal employment law. For those with a more technical interest in employment law, EEOC has a Compliance Manual that can be purchased. EEOC's Compliance Manual sets forth extensive information on the Agency's enforcement activities, including its organization, mission and functions, investigative procedures, interpretative material, orders, notices, and recent news and developments.[403] The manual is massive, occupying three binders and totaling more than 2,000 pages. The Bureau of National Affairs, Inc., (BNA), publishes this manual and provides monthly updates. Anyone can subscribe to the BNA service, but subscribers are most likely large employers, employment rights organizations, attorneys, or others with a desire to remain current on employment discrimination law and policy. Unfortunately, EEOC does not appear to monitor or support the BNA's effort to ensure that the manual remains current.[404] At least some of the materials in the three volume set are outdated or obsolete. For example, the EEOC's organization, mission, and functions were revised in May 1997; yet a year and a half passed before the BNA's Compliance Manual update was issued on December 30, 1999.[405]

The responsibility to ensure that the Compliance Manual is current is apparently scattered throughout EEOC. The Field Coordination Programs Unit in the Office of Field Programs is responsible for Volume I.[406] EEOC now recognizes that the Compliance Manual is out of date and is revising its chapters and making them more user friendly.[407]

Videos

Developing videos for a variety of uses in outreach has been an EEOC goal for some time. EEOC's plan was to establish a well-organized and effective technical assistance and outreach program based upon the Revolving Fund, and then to focus on developing technical assistance products, such as videos.[408] A plan to develop audio-visual materials was reported for FY 1994 activities.[409] Videos were a sustained outreach vehicle mentioned in an FY 1996 planning document.[410]

Headquarters may have been successful in developing videos. However, district offices, many of which planned to make videos in their LEPs, have not been. District office staff reported using videotapes in their training, but these were borrowed from a headquarters videotape library. The district offices request videotapes on various topics and take these to employers for technical assistance programs. Usually they can show the tapes at no cost.[411]

Using the Mass Media

Using the media is regarded as an important component of outreach and education efforts. Both EEOC headquarters and district office staff spoke of using the media through print, radio, and television. District offices reported that different forms of media were more effective with some groups than with others. And, they reported different kinds of information that was conveyed through different media.

EEOC field offices use the news media to report results of cases or settlements because of its

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[403] *See generally*, EEOC, *Compliance Manual.*

[404] EEOC contends that the updating of the manual is not the Agency's responsibility, stating that it is BNA's responsibility as a commercial enterprise to ensure that its publication is up to date. Vargyas letter, p. 70. Nonetheless, since the information contained in the manual is developed and updated by EEOC, EEOC should work more closely with BNA to ensure that the manual, as published, also remains up to date.

[405] EEOC, *Compliance Manual*, "Equal Employment Opportunity Commission General Management," p. O110:i. The previous order regarding organization, mission, and functions was also not circulated in a timely fashion. It was issued in October 1982 and revised in December 1989, but not copyrighted as part of the BNA publication until 1994. *See* EEOC, *Compliance Manual*, "Equal Employment Opportunity Commission General Management," 110:000i (No. 189, July 1994, obsolete as of Dec. 30, 1999).

[406] EEOC, *Compliance Manual*, "Equal Employment Opportunity Commission General Management," § IV.D.4.a.(8), p. 0110:06032.

[407] Peggy Mastroianni, associate legal counsel, Coordination and Guidance Programs, and Dianna Johnston, assistant legal counsel, Office of Legal Counsel, EEOC, interview in Washington, DC, Mar. 6, 2000, p. 16.

[408] *See* USCCR, *Helping Employers Comply with the ADA*, p. 231.

[409] EEOC, *FY 1995 Budget Request*, p. 65.

[410] EEOC, *FY 1996 Budget Request*, p. 19.

[411] Hinton interview, Birmingham District Office, p. 4.

suspected deterrent effect on discrimination. When the media announce that a sexual harassment case has reached settlement, the number of charges filed pertaining to that issue increases.[412] EEOC's Web site carries many such press releases.[413] Examples include:

- Chuck E. Cheese's Must Pay Maximum Damages Under the ADA to Mentally Retarded Employee Following Multi-Million Dollar Jury Award (Mar. 15, 2000)
- Wal-Mart Settles Employment Discrimination Claim of Two Applicants Who are Deaf (Jan. 7, 2000)
- $1.3 Million Settlement in EEOC Racial and Sexual Harassment Against Foster Wheeler Constructors (Jan. 7, 2000)
- EEOC Settles National Origin Lawsuit For $1.25 Million On Behalf of Vietnamese American Fishing Crew Members (Sept. 22, 1999)
- EEOC and Ford Sign Multi-Million Dollar Settlement of Sexual Harassment Case (Sept. 7, 1999)
- EEOC Settles Major Age Bias Lawsuit for $7.1 Million with Thomson Consumer Electronics and Local Unions (Aug. 17, 1999)
- EEOC Settles First Male-On-Male Sexual Harassment Class Action (Aug. 11, 1999)
- EEOC Announces $2.1 Million Settlement of Wage Discrimination Suit For Class of Filipino Nurses (Mar. 2, 1999)[414]

Field offices must establish contacts in the media and distribute press releases when important decisions are made.[415] The St. Louis District Office routinely advises its media contacts not just of litigation activities, such as lawsuits and consent degrees, but also of charge processing activities, the mediation program, and TAPS.[416] Recently, the office greatly expanded its media contact list with good results. The list now has approximately 300 contacts within the district, including print, television, and radio.[417] And, with this expanded media contact, the district office received coverage in three different news media on a suit filed in an underserved geographic area concerning a race-based discharge of an African American, which was a priority issue in the LEP.[418]

District office staff seem to agree that some media are better than others for certain groups. However, which media are best with which groups is not always clear. Generally, district office staff reported that television and newspapers are the most effective.[419] Newspapers or brochures may not be the best ways to reach some communities, such as low-wage Hispanics, many of whom cannot read. To reach them, people have to meet with them and speak their language.[420] Some district offices use public service announcements and appearances on talk shows.[421] For example, the Birmingham District Office uses public service announcements to announce upcoming town meetings.[422] But some staff believe that public service announcements would work better in some communities, such as among Asian Americans and Pacific Islanders, than in others, such as among Hispanics.[423] Also, some feared that appearances on talk shows would be aired on cable television and that those in the intended audience might have televisions, but not cable.[424] Similarly, the Agency's Web site is viewed as having made some progress in civil rights, but many people do not have computers.[425] The Baltimore District Office is part of a national origin task force that is trying to figure out how to best reach the victims of national origin discrimination.[426]

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412 Thornton interview, Nov. 9, 1999, pp. 9–10.

413 EEOC, "EEOC Press Releases," <http://www.eeoc.gov/pr.html>.

414 Ibid.

415 Thornton interview, Nov. 9, 1999, pp. 9–10.

416 EEOC, St. Louis District Office, response to information request, Jan. 20, 2000, item 18, "Media" (hereafter cited as St. Louis District Office, "Media").

417 Ibid.

418 Ibid.

419 Fetzer and Veldhuizen interview, Baltimore District Office, p. 14.

420 Cryor and Veldhuizen interview, Baltimore District Office, p. 5.

421 Hinton interview, Birmingham District Office, p. 4.

422 Ibid.

423 Ibid

424 Cryor and Veldhuizen interview, Baltimore District Office, p. 5.

425 Fetzer and Veldhuizen interview, Baltimore District Office, p. 14.

426 Cryor and Veldhuizen interview, Baltimore District Office, p. 5.

District office staff view the mass media as very effective, perhaps more so than any other approach.[427] Thus, district office staff would like to see more funds invested in advertising, print, and electronic media.[428]

To be effective, however, media use must be carefully planned and strategically executed. If it is not, it is a wasted effort. As an example of the use of media, an article by Chairwoman Castro recently appeared in the commentary section of *The Washington Afro-American*.[429] The article touts EEOC's accomplishments, i.e., reducing the backlog of charges and the average charge processing time; obtaining more merit resolutions and larger monetary benefits for charging parties; increasing the proportion of class action suits filed; and increasing outreach. It promises to ensure that EEOC remains the nation's premier civil rights enforcement agency. It expresses a desire that every community should be aware of its rights and understand that EEOC will act aggressively to eliminate discrimination whenever and wherever it exists.[430] The list of EEOC's accomplishments may be a good justification to Congress for why EEOC should be reauthorized and appropriated; or it may boost morale of EEOC staff. It does not, however, tell the African American reader of this newspaper how EEOC might help him or her personally. It does not say that if you, the reader, believe you have been discriminated against in employment, you may contact the EEOC for help in filing a charge. It does not say that EEOC will review your complaint to determine if it is timely and falls within its jurisdiction. It does not say that you must come armed with documentation of the discrimination and a list of witnesses. In short, this example of outreach does not help a person know where or how to file a charge, nor does it diffuse in this manner frustration with the limitations of what EEOC can and cannot do. Thus, the use of the media in this manner may not be most effective.[431]

Similarly, public service announcements could be used in more effective ways. One such announcement gives the time and place of an outreach event for "individuals desiring information regarding antidiscrimination laws enforced by EEOC."[432] It does not catch the attention of victims of discrimination. It could, for instance, give examples of discrimination and state, "If you have been subjected to this or other instances of employment discrimination, come to this event."

CONCLUSION

The importance of technical assistance and outreach for EEOC's enforcement mission is stressed in statutory requirements, in statements of the commissioners, in Agency planning documents, and in office missions and functions. Congress established a Revolving Fund to support formal training sessions largely targeted to employers. Nonetheless, the resources devoted to technical assistance and outreach are meager. District offices typically have one program analyst dedicated to outreach. The program analyst's efforts are supplemented by volunteers from among other staff, all of whom spend modest amounts of time on outreach and technical assistance. Appropriated funds are low, and often inadequate for covering travel to remote areas within the district. Furthermore, Congress has failed to fund EEOC's proposals for outreach initiatives, and district office staff have struggled to maintain a consistent outreach program that builds EEOC's credibility.

Within the constraints of these limited resources, EEOC's program of technical assistance and outreach is slowly maturing. With the advent of the Revolving Fund, EEOC established regular technical assistance seminars held throughout the nation. The Agency then added customer-specific training to this base, giving employers the opportunity to have custom training that meets their specialized needs. The number of customer-specific training sessions is small, but has potential to grow. To supplement

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427 Fetzer and Veldhuizen interview, Baltimore District Office, p. 14; St. Louis District Office, "Media"; Burtner interview, Phoenix District Office, p. 22.

428 Fetzer and Veldhuizen interview, Baltimore District Office, p. 14; St. Louis District Office, "Media."

429 Ida L. Castro, "EEOC celebrates 35 years of fighting back," *The Washington Afro-American*, Apr. 22–28, 2000, p. A5.

430 Ibid.

431 *See* ibid.

432 EEOC, Birmingham District Office, response to information request, Feb, 7, 2000, item 18, "Public Service Announcement: Advertising Training & Expanded Presence in Under Served Areas."

these fee-based training sessions, EEOC has better focused its free outreach by having a program analyst in each district office. The program analysts are receiving headquarters training, although so far on a biannual schedule rather than an annual one. The program analysts have established contacts with stakeholders (i.e., community groups and employer organizations), are seeking input from them, and in some cases are moving toward involving them more deeply in enforcement efforts. Feedback from stakeholders has led to an increasing number of initiatives to reach underserved groups, such as small businesses, low-wage earners, farm workers, Hispanics, and Asian Americans and Pacific Islanders.

Where EEOC's technical assistance and outreach programs fall short is in adopting the perspectives of its customers. It fails to provide the practical information that small or large businesses need, for example, in writing the policy manuals that will communicate fair employment principles, and in designing fair recruitment, interview, and selection procedures. Similarly, outreach efforts struggle to dispel the frustrated attitudes of persons whose complaints were more poorly handled in the past and build confidence in EEOC. Nor have these efforts been able to communicate to employees realistic expectations of what EEOC can do for them without dwelling on the Agency's limitations. Complainants might be better served through advocacy groups, which could give assistance by assembling evidence of discrimination and filing third-party charges, and with attorney referral programs.

CHAPTER 8

Findings and Recommendations

GENERAL

Finding 1.1: Over the past several fiscal years, the U.S. Equal Employment Opportunity Commission (EEOC) has developed and implemented new procedures and policies to improve its enforcement activities within the constraints of limited resources. By focusing appropriations on new charge processing initiatives, EEOC has successfully reduced its pending inventory and made strides toward improving its efficiency. However, the minimal increases in appropriations received have hampered the Agency's ability to continue to improve its overall efficiency with adequate staff training, implementation of its new programs and activities such as mediation, and the strengthening of other enforcement efforts, including outreach programs and initiatives to underserved communities and stakeholders.[1]

Recommendation 1.1: First, the U.S. Commission on Civil Rights (Commission) recommends that Congress allocate a general funding increase to EEOC so that the Agency can move forward with its mission. However, since a substantial increase in appropriations is not projected or guaranteed, EEOC must develop and implement strategies and initiatives that provide funding alternatives or result in the reallocation of funds. The Commission recommends that EEOC conduct an internal evaluation of its spending priorities and identify major program areas in which appropriations can be focused or reallocated. The study should include a plan that prioritizes areas that currently need funding and should include accountability factors to ensure that resources are used appropriately. The Commission has identified the following areas as candidates for increased or reallocated funding:

- *Mediation.* EEOC should be given additional funds to continue its mediation program which was proven successful in its first full year of operation. Budget allocations should include funds for contract mediators; the hiring of more internal coordinators and mediators in all district, area, and local offices; training for pro bono and internal mediators; and outreach to increase participation of respondents and underserved communities. Funds should also be allocated for the renewal of a contract with the Federal Mediation/Conciliation Services which can provide services to geographic regions in which the pool of available mediation resources is small.
- *Technical Assistance and Outreach.* EEOC should dedicate more funds specifically to support its free outreach programs. Provision of additional funds in this area would support the Agency's statutory mandate to provide outreach to underserved communities and groups. This funding should be earmarked for areas including: travel expenses to reach remote areas; support of activities spelled out in district offices' Local Enforcement Plans; written/visual materials for the public; annual training conferences for outreach staff; and the continuance of initiatives such as the Equal Pay Initiative and the Small Business Initiative.
- *State and Local Fair Employment Agencies.* Congress should provide EEOC with more funds to support contracting fair employment agencies. In particular, tribal employment rights offices (TEROs) need funds to expand their operations with increased staff and training. TEROs also need additional funds to conduct outreach to tribal communi-

[1] *See generally* chaps. 3–7.

ties in an effort to encourage the filing of charges against discriminating employers, both on and off reservations. TERO-initiated outreach can also serve the purpose of improving employers' understanding of Indian cultures and laws and the people themselves. Secondly, Congress should provide EEOC with additional funding to support state and local fair employment practices agencies (FEPAs), specifically to increase per-charge reimbursement for investigations conducted by the FEPAs and, on a more global level, to increase funds so that these agencies can conduct more investigations, thereby reducing some of EEOC's workload.

- *Staff Training.* Additional funds are needed for training of EEOC staff, including legal, investigative, outreach, and mediation staff. Extensive training should be provided for new hires as well as seasoned EEOC staff who could benefit from refresher training and updates. Funds should be allocated not only for headquarters-initiated training on global employment issues, but also so that district offices can develop targeted training programs based on individual staff needs.
- *Trends Research and Analysis.* EEOC should be allocated adequate funds to hire experts to conduct research on EEO-1 data and other data sources. This will allow the Agency to become more proactive in the search for patterns of discrimination. The Office of Research and Information Planning at headquarters should be appropriately staffed to fully utilize the available data. Until internal staff can be hired and trained to perform this function, EEOC should explore the options of hiring external contractors with statistical and demographic expertise or working with other federal agencies to produce research in this area.
- *Headquarters Oversight of Field Offices.* In order to facilitate adequate monitoring and oversight of the field offices, EEOC must have adequate funds to support travel of headquarters staff to the field and the improvement and maintenance of electronic communication systems. Funding should be sufficient enough to include regular on-site visits to FEPAs and TEROs as well.

EEOC should closely examine its requests for funding and provide detailed justifications to Congress based on internal program evaluations. The Agency should be held accountable for demonstrating responsible use of the funds. If the elimination of employment discrimination is to be attained, Congress should provide graduated, incremental budget increases over a five-year period during which the Agency would demonstrate how the funds are being used.

Finding 1.2: EEOC, through its state and local programs and interaction with advocacy and community organizations, has viable external resources that can assist with many of the Agency's programs and initiatives, including charge processing. However, EEOC is not fully utilizing these outside resources, many of which have experience aligned with EEOC's mission of eliminating employment discrimination through outreach, mediation, training, and investigation. Funding for the inclusion and participation of these agencies in the total EEOC structure could be one of the priorities of new appropriations.[2]

Recommendation 1.2: The Commission strongly urges EEOC to strengthen and expand its working relationship with other federal, state, and local agencies and organizations. For example, EEOC should assess how it can fully utilize FEPAs and TEROs, as well as other community organizations, as viable resources in Agency activities such as mediation, outreach and education, and internal and external training on civil rights issues. In addition, there are many national organizations that could provide assistance to EEOC staff and insights into the development of national policies and programs. EEOC, given its current limited funding, must develop innovative and cost-effective means of tapping into existing resources rather than "recreating the wheel" with each initiative. By demonstrating to Congress fiscal responsibility, the Agency can show the need for additional funding to support those programs that cannot be otherwise sustained.

Finding 1.3: Throughout this assessment, it was demonstrated that EEOC does not have sufficient internal mechanisms in place to monitor and evaluate Agency programs. Nor does the Agency use any qualitative measures to assess its success rate and overall effectiveness in

[2] *See generally* chaps. 4–7.

eliminating workplace discrimination. This is a common theme throughout many EEOC programs, including policy development, charge handling procedures, and litigation. In addition, EEOC does not appear to be using its Charge Data System to its fullest capacity with respect to performing analyses of both charge inventory and broader discrimination trends.[3]

Recommendation 1.3: EEOC should develop both quantitative and qualitative measures to monitor its effectiveness. Standardized criteria should be reviewed and analyzed on a regular basis, and not be the result of sporadic initiatives that change with the Agency's administration. To truly assess its record over time, and foster the ability to predict future success with a greater level of accuracy, the Agency must conduct longitudinal studies of its enforcement activities, including charge processing and outreach. In addition, the Agency must take an introspective look that goes beyond obvious measurable outcomes and which includes insights from individual stakeholders—those persons most affected by EEOC's procedures and policies. This can be achieved through regular and broad-based customer satisfaction surveys. Further, from a more quantitative perspective, EEOC should better utilize the measurement instruments currently in place, such as its Charge Data System and EEO-1 data, to identify both patterns of discrimination and areas in which discrimination claims are low. In doing so, the Agency can substantiate the need for the reallocation of existing money and, eventually, the appropriation of a larger budget.

CHAPTER 2. BACKGROUND

Profile of the United States Labor Force

Finding 2.1: The work force of the 21st century is becoming increasingly diverse. However, while progress has been made in diversifying management, narrowing the gender wage gap, and reducing unemployment for all groups, significant gaps remain. African Americans and persons of Hispanic origin have higher unemployment rates than whites, while whites and Asian Americans and Pacific Islanders have the highest median incomes in the United States. Further, women continue to earn 75 percent of men's salaries. There are also significant differences by sex, race, and ethnicity in the types of jobs people hold. Although women and minorities have increased their presence in managerial jobs, they remain underrepresented in such positions.[4]

Recommendation 2.1: As the work force becomes more diverse, it is increasingly important to have strong, proactive enforcement of civil rights laws in the employment environment, as well as continued training and education on the rights and responsibilities of both employers and employees. EEOC should continue its efforts to reach out to specific minority groups to ensure they understand their rights under fair employment laws. In addition, EEOC should conduct specific studies on occupations and industries in which minorities and women are underrepresented. Further, EEOC should partner with other federal agencies, such as the U.S. Department of Labor (DOL) and the U.S. Department of Education (DOEd) to participate in studies on educational outcomes and employment opportunities for women and minorities.

Finding 2.2: Employment projections for 2008 forecast a high demand for workers in certain occupations, including (1) teachers, librarians, and counselors; (2) computers and mathematical and operations research; and (3) health assessment and treating occupations. Also expected is extensive job growth in professional specialty jobs in the service industry, including education, business services, and health services. In addition, 290,000 engineering jobs will be created by 2008.[5]

Recommendation 2.2: The federal government should institute an initiative to encourage individuals to receive training that will allow them to enter growing occupational fields over the next decade. This initiative should be spearheaded by EEOC, DOL, and DOEd. In addition, EEOC and DOL should work with employers to ensure that minorities and women are included in the demand for workers in these growing fields.

Work Experiences of Americans

Finding 2.3: This study identified issues that coincide with discrimination, but which are not in themselves violations of civil rights laws.

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[3] *See generally* chaps. 4–7.

[4] *See generally* chap. 2.

[5] *See* chap. 2, p. 28.

For example, workplace harassment and abuse often occur in race- and gender-related contexts, but span the bounds of individual characteristics as well. Several experts have noted that these instances of unfair employment practices and mistreatment of employees may be clogging the EEOC complaint system.[6]

Recommendation 2.3: EEOC and advocacy groups should provide counseling to potential charging parties concerning their rights under fair employment laws, as well as other avenues for redressing unfair work practices. Individuals with issues that are nonjurisdictional to EEOC should be provided specific referrals to other outlets for their issues and assisted where possible. EEOC should develop a systematic program for directing such individuals to advocacy groups or other agencies that can assist in resolving problems that are not handled by EEOC.

Further, researchers should study the other forms of workplace problems faced by today's workers, particularly in light of the rapid changes in industries and technology that have affected employment opportunities. To assist in this effort, EEOC should collect information on the types of problems that employees report to the Agency that are not within its jurisdiction. Significant, recurring problems, such as violence in the workplace and abusive supervisors, may need to be addressed through legislation or other federal, state, or local government intervention.

Protected Classifications

Finding 2.4: Myths and stereotypes surrounding minorities and women in the workplace persist in 21st century America. Discrimination is magnified by a lack of understanding of their rights or the perception that filing a charge will not be fruitful. Further, individuals who live in small communities often do not wish to file charges against employers for fear of retaliation or the inability to locate another job. Similarly, some minorities may not file complaints of discrimination because of their immigration status or lack of understanding of immigration laws. These attitudes, misperceptions, and stereotypes feed into discrimination and perpetuate an underclass of mistreated employees and a cycle of unemployment.[7]

Recommendation 2.4: EEOC must increase its presence in small communities and minority communities. EEOC should increase its technical assistance, outreach, and education efforts to ensure that employees do not feel that they must leave jobs in order to remove themselves from a discriminatory situation. In addition, EEOC should work with the Immigration and Naturalization Service (INS) to provide information and conduct joint presentations to dispel any myths about undocumented workers, deportation, and related concerns.

Finding 2.5: Work patterns for older Americans have changed as traditional ideas of retirement change and life expectancy increases. However, employers may not recognize the potential contributions of older employees, and discrimination on the basis of age exists in hiring and other employment practices.[8]

Recommendation 2.5: EEOC should partner with groups such as Legal Services for the Elderly and the American Association of Retired Persons to ensure that businesses and older Americans are aware of their rights and responsibilities under civil rights laws related to employment. In addition, EEOC should conduct a study on the employment patterns of older Americans to ensure that such individuals are not facing discrimination. Periodically, EEOC should review data collected through its EEO-1 survey and other surveys to ensure that age discrimination does not occur in the nation's workplaces. Further, employers should embrace strategies aimed at hiring and retaining older workers. Some of these strategies include the provision of part-time work and flexible working arrangements, as well as training older employees in new technology to make them more competitive in the job market.

Finding 2.6: The female work force has changed dramatically in the past 100 years. At the beginning of the 21st century, there are several issues facing working women, including (1) the inability of pay and benefits to provide economic security; (2) the need for recognition and support of workers' family responsibilities; and (3) the need for job and promotion opportunities to adequately reflect the value of women's work and educational experiences. In addition, many of the issues often traditionally considered as

[6] *See* chap. 2, pp. 31–32.

[7] *See* chap. 2, pp. 32–38.

[8] *See* chap. 2, pp. 38–40.

"women's issues," such as sexual harassment, workplace violence, child care issues, flexible schedules, and wage differentials, clearly are applicable to men as well.[9]

Recommendation 2.6: Federal agencies, such as EEOC and DOL, should continue their efforts to provide information on sexual harassment, child care issues, and wage differentials to the American public and employers. EEOC should move forward with its Equal Pay Initiative and work with the Office of Federal Contract Compliance Programs to conduct adequate investigation of EPA charges and promote compliance with the law.

Finding 2.7: Religious discrimination and workplace conflicts over religion often take the form of requests for accommodation for the observance of the Sabbath and religious holidays. Other issues involve religious dress and appearance, fulfillment of union obligations, and harassment and discrimination based on religious beliefs. Legislation has been drafted to further protect the rights of workers with regard to religion.[10]

Recommendation 2.7: The Commission supports legislation that can clarify and further protect the rights of workers with respect to religion and the promulgation of EEOC policy in this area. Such legislation should define religious discrimination and set forth standards for its elimination.

The Glass Ceiling

Finding 2.8: The restructuring of the American economy has led to several conditions that intensify the glass ceiling phenomenon. These include the elimination of supervisory and low-level management positions, the increasing use of independent contractors, increasing emphasis on geographical mobility, and intensified stress and pressures placed on employees and managers. Another reason why women and minorities find it difficult to move up to higher positions with their employers is the corporate culture, which often reflects social norms and practices that are biased toward white males and, thus, outside the experiences and values of other groups.

In 1995, the federal Glass Ceiling Commission released its recommendations aimed at eliminating the glass ceiling in the workplace. Among its recommendations were demonstrated commitment to work force diversity by management, in particular the chief executive officer of the company; the inclusion of diversity objectives in all strategic plans; and the use of affirmative action as a tool for ensuring that all qualified individuals have equal opportunity for advancement. The Glass Ceiling Commission also recommended that corporations actively prepare minorities and women for senior positions by providing developmental activities and mentoring programs.[11]

Recommendation 2.8: The Commission supports the Glass Ceiling Commission's recommendations, as well as initiatives to enhance diversity in supervisory and managerial positions through mid-level hiring and opportunities for managerial training. To support these recommendations, EEOC should ensure that these issues are included in pertinent investigations and through commissioner charges.

The Intersection between Occupation and Earnings

Finding 2.9: In April 1999, President Clinton urged Congress to pass legislation that would strengthen existing laws prohibiting sex discrimination in wages. Among other things, the Paycheck Fairness Act would require EEOC to determine what additional information is needed to enforce federal wage discrimination laws. In addition, the legislation would provide full compensatory and punitive damages as remedies for equal pay violations, in addition to liquidated damages currently available under the Equal Pay Act. The provision would put gender-based wage discrimination on an equal footing with wage discrimination based on race or ethnicity. The bill also would bar employers from punishing employees for sharing salary information with their co-workers. The proposed legislation would provide increased training for EEOC employees to identify and respond to wage discrimination claims, to research discrimination in the payment of wages, and to establish an award

[9] *See* chap. 2, pp. 40–41.

[10] *See* chap. 2, p. 41.

[11] *See* chap. 2, p. 42.

to recognize employers for eliminating pay disparities.[12]

Recommendation 2.9: The Commission supports passage of the Paycheck Fairness Act or similar legislation that would strengthen the Equal Pay Act, aid in narrowing the pay gap, and improve EEOC's ability to address such issues.

Sexual Harassment

Finding 2.10: Sexual harassment is pervasive in the workplace, especially for women. In addition, sexual harassment is often underreported. It is also perceived differently by men and women, with women interpreting a broader range of behavior as sexual harassment. Further, for both men and women, same-sex harassment is viewed as having a more severe impact on the victim than harassment by someone of the opposite sex. There is also evidence that sexual harassment diminishes job satisfaction and affects an employee's overall welfare.[13]

Recommendation 2.10: The Commission urges EEOC to continue its work on identifying sexual harassment in the workplace and litigating cases involving sexual harassment. EEOC should widely disseminate technical assistance materials that will help both employers and employees identify sexual harassment and provide information about how to eliminate sexual harassment and where to go for assistance.

Because sexual harassment often is underreported or unnoticed, EEOC and DOL should conduct a nationwide survey on the prevalence of sexual harassment in the workplace. This survey could also focus on related issues such as emotional abuse and violence in the workplace. While such a survey should not be used for enforcement purposes, it can be used to measure the extent to which sexual harassment occurs and to identify industries in which it is prevalent. With this information, EEOC can conduct compliance reviews or investigate matters related to sexual harassment when examining charges of other forms of discrimination and can initiate commissioner charges.

Child Care and Family Issues

Finding 2.11: In the 1980s and 1990s, the number of parents working full time increased dramatically. Overall, family- and child-care-related responsibilities have an impact on both parents' employment opportunities and children's well-being. In many cases, the decision to work while fulfilling parental responsibilities has resulted in workplace conflict and discrimination. In recognition of the continuing discrimination against mothers and fathers, in 1999 legislation was introduced in Congress addressing job discrimination on the basis of parental status.[14]

Recommendation 2.11: The Commission supports the passage of legislation aimed at addressing job discrimination on the basis of parental status. Until such legislation is passed, EEOC should collect information on the charges and inquiries it receives related to this topic to provide support for such legislation.

Alternative Work Arrangements

Finding 2.12: Not only is the workplace becoming diversified by race, ethnicity, gender, age, and other individual characteristics, it also is beginning to reflect new and innovative ways of organizing the way people work. From working part time to telecommuting to having flexible and nonstandard working hours, employers are faced with meeting the challenge of business and employment in the new millennium. However, there is little research on the impact of flexible arrangements on minorities and women or on the equitable distribution of such practices by race, ethnicity, gender, and age, or by industry.

Nonetheless, overall, there are few professionals and managers who actually have the opportunity to work part time, and few careers provide financial incentives for working part time. Further, myths and stereotypes are associated with part-time workers. They have been characterized as less productive and less committed to their jobs than full-time employees. Many authors, however, have noted the benefits of hiring workers part time not only in the service industries, but in other industries as well.[15]

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[12] *See* chap. 2, pp. 45–46.

[13] *See* chap. 2, pp. 46–47.

[14] *See* chap. 2, pp. 47–49.

[15] *See* chap. 2, pp. 49–51.

Recommendation 2.12: EEOC, working with DOL and other appropriate entities, should further assess the advantages and disadvantages of alternative work arrangements on female and minority employees. Research could include the effects of part-time work on benefit plans, and the feasibility of alternatives such as job sharing. In particular, EEOC should determine whether or not individuals requesting a change to part-time work from full-time work are experiencing discrimination or other negative consequences and whether opportunities for alternative work arrangements have a positive or negative impact on the careers of women and minorities.

Workplace Abuse and Violence

Finding 2.13: Violence and abuse are increasingly becoming an issue for today's workers, yet workers remain unprotected from this seeming violation of their rights. Psychiatric disorders, stress, and other results of workplace abuse and violence are not clearly covered by fair employment laws. While some violence is random or unrelated to the workplace, violence in the workplace has also resulted from changes in the structure of industry, job stress, and interpersonal conflicts among co-workers. A spillover of relationship violence and domestic violence can also affect job performance or put other employees at risk.[16]

Recommendation 2.13: Additional research on this issue is needed to determine how workplace issues can be addressed before violence occurs. EEOC, in conjunction with DOL, should develop a nationwide educational campaign on workplace violence, as well as issue a report or fact sheet to educate workers and employers on the subject of violence in the workplace, its prevalence, and where to go for assistance when violence occurs.

Further, research is needed in the area of violence prevention. Agencies such as EEOC, DOL, and DOJ should partner to fund or conduct research on strategies to reduce violence in the workplace, particularly violence that is motivated by race, ethnicity, religion, or gender.

Finding 2.14: As with other forms of workplace violence and abuse, emotional abuse has received little attention by scholars and the popular press. Often there is no recourse for victims of emotional and physical abuse in the workplace, unless sexual and/or racial harassment under Title VII can be demonstrated. A 1999 court case against a restaurant alleged violations of both the Violence Against Women Act and Title VII; however, in May 2000, the Supreme Court struck down the portions of the Violence Against Women Act that allowed women to sue assailants in federal court, thus weakening the civil rights provisions of the law.[17]

Recommendation 2.14: The extent to which emotional abuse is linked to sexual and racial harassment is an area requiring further research. EEOC and private researchers should conduct research in this area. In addition, Congress should enact legislation aimed at protecting workers from unfair and harmful employment practices that go hand in hand with discrimination.

Further, researchers should address the issue of the link between emotional abuse and harassment at work. Findings from such research should be used to develop federal legislation or policies aimed at reducing the risk of emotional abuse and harassment in the workplace, particularly as they relate to violations of fair employment laws.

CHAPTER 3. EEOC'S ORGANIZATION AND ADMINISTRATION

Finding 3.1: During the early 1990s, as a result of policies instituted in the 1980s, and the absence of consistent leadership, EEOC drifted into inconsequentiality. There were numerous obstacles that prevented EEOC from accomplishing its mission, such as management turnovers, insufficient staff, limited funding, lack of training, and an enormous backlog of charges. Various chairpersons have attempted to revitalize and reform the Agency, but their tenures have been brief and policy directives have been revised or reversed as leadership has changed. Not only has there been leadership instability at EEOC headquarters office, but several field offices also have been without permanent leadership, namely district directors and/or regional attorneys, for long periods of time.[18]

[16] *See* chap. 2, pp. 52–53.

[17] *See* chap. 2, pp. 53–54.

[18] *See* chap. 3, pp. 57–58.

Recommendation 3.1: The Agency must maintain a sense of stability and consistency, a necessity which takes on additional importance given the potential for a change in administration as a result of presidential elections and the nature of the government appointment system. Congress and the President should strive to reach confirmation agreement as quickly as possible so that agencies are not without top leadership for extended periods. Along those lines, but on a more immediate level, EEOC must make efforts to ensure that management in field offices remains stable. Without adequate leadership, particularly in the field offices, many of EEOC's objectives and initiatives cannot be achieved. Thus, EEOC's focus should be to fill high-managerial positions as soon as possible, particularly district director and/or regional attorney vacancies. Further, through long-term strategic planning, EEOC should develop mechanisms to ensure consistency across changes in administration.

Finding 3.2: Between fiscal years 1981 and 1995, there was an inverse relationship between EEOC's workload and its level of funding. After adjusting for inflation, funding declined steadily as the Agency's workload increased dramatically. These circumstances resulted, in part, from new additional enforcement responsibilities required by the Americans with Disabilities Act of 1990 and the Civil Rights Act of 1991. During fiscal year 1995, EEOC needed to close a $5 million gap between projected Agency spending and available resources. Strict hiring controls were established and there was a reduction of full time equivalents which thwarted caseload reduction efforts. After that time, EEOC began to develop various procedures and implement strategies to address the problem of too much work for too few people. In fiscal year 1999, the Agency received its largest funding increase in history, which was used to help reduce the inventory of pending charges, hire new staff, fund the mediation program, and modernize its information system. But funding for fiscal year 2000 was less than the Agency anticipated; as a result, the funding for contract mediators and staff training has been cut, and there was no hiring of additional staff.[19]

Recommendation 3.2: Although the current chairwoman has stated that EEOC has focused on its overall mission to eliminate employment discrimination, without allocating funds for staff training, hiring replacement staff at all levels, and establishing contracts with external mediators, the Agency's mission and overall efficiency will not be achieved. Therefore, Congress should take into consideration the importance of EEOC's mission when allocating funds and should increase the Agency's budget accordingly.

CHAPTER 4. POLICY AND ENFORCEMENT GUIDANCE

Finding 4.1: In recent years, EEOC has done a good job developing and disseminating national policy. However, as recently as the mid-1990s, EEOC was criticized for not making serious changes in the policies and practices developed during the 12 years of the Reagan-Bush administration. Those policies and practices were described as ones that narrowed EEOC's enforcement of the antidiscrimination laws it is charged with, and the Agency was chastised for drifting into inconsequentiality. EEOC has worked hard since 1995 to change that and has made significant strides in national policy development, specifically with the development of the Priority Charge Handling Procedures, National Enforcement Plan, and Comprehensive Enforcement Program.[20]

Recommendation 4.1: EEOC should continue to self monitor both internal and external policies in an aggressive manner and should find ways to develop strategic plans to deal with the changing civil rights environment.

Finding 4.2: Despite making significant strides with the development of national Agency policy, EEOC has not kept pace with the development of regulations and subregulatory policy guidance in the private employment sector with respect to Title VII, ADEA, and EPA. In the past EEOC has been criticized for failure to use its formal rule-making powers. While in some instances EEOC guidelines are not law, they are usually given considerable deference, and EEOC must use this method more often.[21]

Recommendation 4.2: EEOC has to ensure that information on how to implement its na-

[19] *See* chap. 3, pp. 66–69.

[20] *See* chap. 4, pp. 79–80.

[21] *See* chap. 4, pp. 81–82.

tional policy keeps pace with national policy developments. In addition, EEOC has the power to be a leader and to guide public and political interpretations of laws through the passage of guidelines. EEOC must employ its formal rulemaking powers more frequently, particularly in areas articulated in the National Enforcement Plan. EEOC has a semiannual regulatory agenda which should always include issues related to the National Enforcement Plan (NEP).

Finding 4.3: While EEOC has produced a lot of policy guidance, it has only issued a few subregulatory guidelines to support either the NEP priorities or Comprehensive Enforcement Program mandates. One example of an NEP-related guideline that has been produced is the comprehensive policy guidance on employer liability for harassment by supervisors. Although EEOC has not produced informal guidelines on all the key issues of the NEP, the guidance that has been produced is timely, useful, and easy to understand. This is especially true regarding the ADEA.[22]

Recommendation 4.3:. EEOC should continue to stay active in this area and should continue to ensure that once it sets its semiannual regulatory agenda the Agency then works hard to meet the agenda and to draft and disseminate relevant guidance.

Finding 4.4: EEOC uses an "interactive," yet seemingly informal, approach to policy development. Despite significant community concern, EEOC still has not adopted a procedure for final public review of subregulatory policy guidance. In addition, EEOC does not have formal set intervals for the review, development, and issuance of subregulatory policy guidance.[23]

Recommendation 4.4: EEOC must engage the public, community groups, and other organizations in discourse about the development of subregulatory guidance not only during the planning stage, but also prior to releasing the guidance. Appropriate stakeholders, reflecting a wide range of interests, should be identified and consulted routinely and consistently throughout the development process to ensure the identification of policy imperatives. EEOC should also develop a timetable for reviewing existing guidance to determine relevance and current usefulness.

Finding 4.5: EEOC only had two items on its semiannual regulatory agenda, which published November 22, 1999, in the *Federal Register*. The first item was a proposal to issue legislative regulations to provide detailed guidance for employers and employees on ADEA waivers. The second was a proposed rule for federal sector equal employment opportunity.[24]

Recommendation 4.5: EEOC must become more active in the development of regulatory guidelines (regulations). The power and authority to regulate through notice and comment is one of EEOC's greatest powers and should not be used solely in a reactive manner. EEOC should take a proactive stance to regulate areas of concern that are within its authority.

Finding 4.6: Overall, while EEOC has been active litigating race issues, it has issued little guidance on race discrimination under Title VII. There are a few sections of existing policies that offer some guidance, but none directly refers to and offers guidance on race discrimination, specifically racial harassment.[25]

Recommendation 4.6: EEOC should issue a guidance on racial harassment. The guidance should include information on recent court cases and should provide clear examples of unacceptable practices.

Finding 4.7: Overall, EEOC has done a good job in providing interpretive guidance and policy statements concerning the Equal Pay Act. For example, EEOC produced enforcement guidance on sex discrimination with respect to sports coaches' pay. The guidance provides an excellent step-by-step analysis of the issues involved in analyzing an Equal Pay Act case, and the applicability of both the EPA and Title VII to the issue of wage discrimination in college and university coaching positions. The only deficiencies in EPA policies are a lack of focus on instances where men may earn less than women and few examples concerning occupations in which women are overrepresented.[26]

Recommendation 4.7: EEOC should update its Equal Pay Act guidance when needed and incorporate all interpretive guidance and policy

[22] *See* chap. 4, pp. 84–92.

[23] *See* chap. 4, p. 83.

[24] *See* chap. 4, p. 81. *See also* pp. 91–92.

[25] *See* chap. 4, pp. 87–88.

[26] *See* chap. 4, pp. 85–86.

statements in the Compliance Manual into one comprehensive policy guidance. In addition, EEOC should expand its coverage of the EPA to discuss instances where men may receive less pay than women for equal work and occupations in which women are overrepresented. In addition, as it did with the sports coaches guidance, EEOC should issue guidance for other areas for which the Agency receives many complaints. The guidance should follow the same basic format as the enforcement guidance relating to sports coaches.

Finding 4.8: Over the past five years EEOC has produced much guidance on the ADEA. Most significantly, in 1997 EEOC issued a notice of proposed rule making on waivers of rights on claims under ADEA, which was followed by a policy guidance in April 1997 on the use of waivers, and issued final regulations on waivers of ADEA rights and claims in June 1998.[27]

Recommendation 4.8: EEOC should be commended for the guidance produced regarding the Age Discrimination in Employment Act. EEOC should continue to stay active in this area as the number of aging citizens is growing and baby boomers are moving into retirement.

Finding 4.9: EEOC has named retaliation as a major priority of the new administration. The original guidance on retaliation contained in section 614 has been updated by section 8 of the Compliance Manual. Further, EEOC has issued a new section in its Compliance Manual dealing with threshold issues for addressing bias complaints which contains a section on retaliation.[28]

Recommendation 4.9: EEOC should continue to update, and when necessary replace, its policy guidance on retaliation, including specific examples of the forms of retaliation practiced by today's employers. Such guidance should rely on recent court cases and should provide instruction to investigators on how to determine whether or not retaliation has occurred. Specifically, EEOC should issue a guidance consistent with the Supreme Court's decision in *Clover v. Total System Services*, which extended protection against retaliation to situations where an employer is responding to an inquiry by EEOC. EEOC should also work on completing the issuance of the new Compliance Manual, given that since 1998 only two new sections have been issued.

CHAPTER 5. EEOC'S ENFORCEMENT ACTIVITIES

Strategic Planning

Finding 5.1: Through the Comprehensive Enforcement Program (CEP), EEOC's current administration has put in place a new strategy designed to forge a more cohesive approach to enforcement. The CEP was developed as a mechanism to link the strategies of the National Enforcement Plan (NEP) and Local Enforcement Plans (LEPs) with the Agency's primary workload management tool, the Priority Charge Handling Procedures (PCHP).

The CEP cites EEOC's changing caseload and the percentage increase in potentially meritorious charges as catalysts for the new enforcement approach. Key elements of the CEP include promoting the working relationships between legal and administrative enforcement staff; enhancing charge intake and initial investigation functions; ensuring a more strategic approach to civil rights enforcement through the development of the most significant discrimination charges; implementing a Strategic Litigation Plan; and establishing results-oriented measurements of performance. District offices are responsible for developing programs and initiatives in accordance with the CEP objectives.[29]

Recommendation 5.1: The CEP is, in general, a valuable umbrella mechanism which brings together EEOC's operating plans and appropriately addresses the most critical Agency functions. However, the CEP does not discuss, in any detail, specific ways in which its tenets can be instituted as a practical matter. Therefore, its implementation in the district offices must be closely monitored by the Office of Field Programs. In addition, field office management should be afforded the opportunity to meet collaboratively with the chairwoman and the director of OFP to discuss methods to meet such CEP requirements as greater attorney-investigator interaction, the enhancement of the intake function, and the measurement of performance.

Finding 5.2: Pursuant to a recommendation made in 1998 by former Acting Chairperson Paul Igasaki, district offices were instructed to revise their Local Enforcement Plans (LEPs) to fit a

[27] *See* chap. 4, pp. 91–92.

[28] *See* chap. 4, p. 92.

[29] *See* chap. 5, pp. 98–99.

uniform format. In October 1999, the district offices were asked to revise their LEPs and submit them to the Office of Field Programs for approval. Those plans were approved in July 2000 after review and consultation by OFP and OGC. However, most offices had already engaged in the process of implementing the provisions of their revised LEPs despite not having had formal written approval.[30]

Recommendation 5.2: Because the LEP is a major planning device used by the district offices in developing their enforcement programs, it is imperative that OFP review and approve them in a timely manner so that they can be implemented immediately. The LEPs are supposed to be revised every two years, which is impossible if it takes a year to obtain headquarters approval. Nonetheless, using a uniform LEP is a commendable practice that EEOC should continue in the future.

District Office Latitude and Headquarters Oversight

Finding 5.3: The Priority Charge Handling Procedures (PCHP) gave district offices the latitude to develop procedures for processing charges as well as the discretion to decide the level of resources to be expended on each charge. As a result, several Agency functions, such as charge intake and investigator-attorney collaboration, vary across EEOC district offices. The use of informational materials, intake questionnaires, communication methods with charging parties, and charge categorization reviews also differ from office to office.

Although there are standard procedures for conducting intake, investigations, and mediation, there is no uniformity in the implementation of these processes within EEOC. District offices are using different approaches and strategies to carry out these functions, depending on the available staff resources and the caseload in the district. EEOC headquarters, while offering some guidance, is leaving too much to the discretion of the district offices in the implementation of charge processing programs, resulting in variations across offices.

This explains the different experiences, perceptions, and assessments by respondents and charging parties. For the most part, the respondents interviewed by the U.S. Commission on Civil Rights feel that EEOC has improved its investigative process over the past five years, but that the quality of EEOC investigations varies greatly from office to office. Many stated that they are not aware that EEOC procedures and guidelines exist that govern the investigation process.[31]

Recommendation 5.3: Although district offices should be given latitude and should be allowed to use creativity and ingenuity in conducting charge handling procedures, headquarters must evaluate and monitor these functions. Therefore, EEOC must establish criteria and standards that must be followed throughout the districts, with guidance and monitoring from headquarters. Headquarters personnel should closely monitor the performance of district offices from intake procedures to use of the Charge Data System to ensure consistency in charge processing across the nation. Headquarters should identify "best practices" within the district offices and encourage such practices nationwide. In addition, certain functions, such as use of intake forms and review of charge categorization, should be standardized throughout all EEOC offices.

While allowing district offices some degree of autonomy is necessary given the unique composition of individual jurisdictions, OFP should establish routine site visits to the district offices to ensure that standard processes are implemented. In turn, district office management should be responsible for securing approval from headquarters for any procedural or operational changes prior to implementation. The offices should submit a proposal for any major changes to OFP for review and comment. Headquarters should not preclude district offices from taking innovative steps toward improving their operations; however, headquarters expertise and input can prevent the implementation of processes that have proven unsuccessful in the past and foster consistency.

Along those lines, field offices must take the initiative to have open lines of communication with other offices to share ideas and resources that have proven successful. There should be both formal and informal interaction between offices. One solution to the lack of coordination

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[30] *See* chap. 5, pp. 99–100.

[31] *See generally* chap. 5.

between field offices might be the development and dissemination of an electronic newsletter, facsimile newsletter, or "chat room" to provide forums through which EEOC staff can exchange information on global employment issues or provide advice on specific charges.

Finding 5.4: OFP visits to district offices occur about once every two years, and headquarters seldom conducts formal reviews of intake procedures. The OFP director acknowledged that technical assistance is most frequently provided to the field offices in response to specific complaints or when the field office requests assistance. The district offices are left to determine for themselves the way in which to carry out the intake function.[32]

Recommendation 5.4: Again, OFP should review and monitor intake procedures in the district offices, especially given the prominence of the intake function in the Agency's Comprehensive Enforcement Program. While some offices have found the rotational system to be most effective and others have found it beneficial to have a dedicated intake unit, productivity should be evaluated to determine if the setup of a given office is appropriate for its staffing and charge intake volume. The intake model should be re-evaluated on a biannual basis.

EEOC Charge Handling Procedures

Finding 5.5: While many of EEOC's documents, regulations, and procedures are posted on the Internet, many respondents rely on information printed by other sources, such as the Bureau of National Affairs, for EEOC information. The information about EEOC's responsibilities is less readily available for the general public, given that many potential complainants may not have access to computers. Most of the information is given when a charge is filed. However, the general public does not know when to file, how to file, timelines for filing, information that is needed, and/or when an investigation takes place. Thus, there tends to be misinformation or a lack of information about EEOC's requirements, policies, and procedures, which affects the credibility of the Agency with the general public.[33]

Recommendation 5.5: Because there is limited public access to EEOC procedures, the Agency needs more visibility and contact with the public. EEOC should devise other means to make its responsibilities and procedures available to the public. EEOC should issue more public statements, attend forums and seminars sponsored by employers and employee advocacy groups, co-sponsor workshops and institutes at educational facilities and public libraries, and whenever possible, interact with state and local governments and the business community.

EEOC district offices should compile organization and advocacy group referral lists so that when a charging party approaches EEOC with a complaint that is not within its jurisdiction or with which it cannot assist, staff can refer complainants to the appropriate source. By referring individuals to the correct agency, EEOC can eliminate the chances that there will be recurring inquiries by the same party and also reduce the amount of public dissatisfaction. In addition, by formulating relationships with these groups, EEOC can increase the number of third-party charges filed. These organizations can also counsel complainants as to what constitutes a violation of the law and how the charge process works. EEOC and community groups can work in tandem to identify problem areas or industries, identify underserved groups, and educate the public and employers simultaneously. Given EEOC's limited budget, it is imperative that the Agency tap into these cost-free alternative resources.

Charge Intake and Counseling

Finding 5.6: Estimates of the number of complaint inquiries that become charges range between 20 and 50 percent in various district offices. Because a large percentage of inquiries never actually become charges after initial consultation with EEOC staff, and many charges are being dismissed immediately following intake, the process involved in the screening and drafting of charges is critical to the Agency's ability to ensure proper handling of allegations of discrimination. Various groups and individuals have criticized EEOC for its intake procedures, stating that intake staff discourage individuals from filing charges and do not clearly explain the charge handling process. Others

[32] *See* chap. 5, p. 106.

[33] *See* chap. 5, pp. 154–56.

have noted that it is difficult to reach EEOC staff or communicate with them.[34]

Recommendation 5.6: EEOC's recent emphasis on improving customer service is a commendable goal and the Agency's administration should be applauded for its efforts in this area. However, the Agency is now at the critical juncture of determining how to improve intake procedures so that customers ultimately benefit, and should implement some internal requirements. First, district offices should monitor charge inquiries to determine why they are not becoming charges. If inquiries are not becoming charges as a result of better initial counseling which weeds out those complaints not within the Agency's jurisdiction, this should be so noted, and staff should be commended. But, if inquiries are not becoming charges due to discouragement from intake staff, then those staff at fault should be appropriately managed.

Second, EEOC intake staff should receive training on interaction and communication skills, particularly as they relate to dealing with the public. It is crucial that EEOC staff learn to deal with individuals who are in particularly stressful situations without trivializing their claims. Additionally, the Agency must consider public and private sector models for customer service and, where possible, adapt methods used by world-class customer service providers.

Third, enforcement supervisors in the district offices should regularly evaluate intake sessions first hand so that they can observe intake personnel in action and provide constructive guidance on how to improve their intake approaches.

Finally, it is critical that intake staff explain to charging parties their rights and at the same time inform them of the merits of the charge without discouraging them from filing if that is their desire. It is reasonable to assume that many charging parties feel discouraged from filing a charge because they do not understand the intricacies of the law or the EEOC charge process. If these things were explained to them at intake, they would be less likely to feel dissatisfied. To identify and eradicate problems faced by charging parties and respondents, the Agency must engage in regular evaluation of its service through customer satisfaction surveys. The Agency has the internal expertise and resources to design and disseminate such a survey. By allowing parties involved the opportunity to speak about their experiences with EEOC, the Agency can strive to eradicate problematic procedures, eliminate staff who are not providing fair and efficient service, and clear up any misunderstandings or confusion that may cause customer dissatisfaction.

Finding 5.7: Charge intake, if done thoroughly, is actually the preliminary stage of an investigation and should be treated as such. Chairwoman Castro has appropriately recognized the importance of intake in the Comprehensive Enforcement Program which aims to enhance initial investigation of charges and early prioritization of charges.[35]

Recommendation 5.7: To the extent possible, charges should be investigated early in the process by intake staff. Initial investigation at intake will allow for more thorough screening, more accurate categorization of charges, and quicker resolution. It will also reduce the workload of investigative staff. Therefore, in district offices where intake staff are not also investigators, training should be provided on the fundamentals of charge investigation.

Finding 5.8: The CEP requires district offices to develop pilot programs to implement strategies for improving charge intake. Some suggestions were given, including extending office hours, providing for rotational units rather than dedicated intake units, combining intake with other investigative functions, and elevating the visibility of the importance of the intake function.[36]

Recommendation 5.8: District offices must explore some of the options suggested by the CEP and make efforts to ease the process of filing a charge for charging parties. EEOC management should work with the union and staff members to develop agreeable strategies for expanding office hours to include evenings and weekends and to set up charge intake booths in various convenient locations such as community centers, shopping malls, and places that allow easy access via public transportation.

EEOC district offices should continue exploring options for organization of intake and should

[34] *See* chap. 5, pp. 105, 113–14.

[35] *See* chap. 5, p. 105.

[36] *See* chap. 5, p. 105.

be commended for taking steps in the direction outlined by the CEP. They should assess the intake function on a continual basis and strive toward fluidity and inclusion of the intake process into other enforcement activities.

Finding 5.9: Some district offices have chosen to collect the necessary information about a charge through intake questionnaires. From these questionnaires, a formal charge can be drafted.

However, charging party confusion as to the difference between a questionnaire or inquiry and a formal charge has caused some district offices not to use them. Nonetheless, intake questionnaires can serve a dual purpose by allowing the intake officer to better focus the initial interview with the charging party. The investigator can then structure the interview to address all the necessary points.[37]

Recommendation 5.9: District offices should have the discretion to use inquiry or questionnaire forms based on caseload, but should be encouraged to do so. Inquiries, if thorough and issue specific can be useful for the drafting of a charge and for initial tailoring of an investigation, ultimately saving investigators and intake staff time. However, offices that use intake questionnaires must be extremely careful to counsel charging parties about the difference between a questionnaire and a charge so that there are no misunderstandings that could compromise the timeliness of a charge. In instances where a charge is approaching its statute of limitations, intake staff should have the ability to docket the questionnaire or inquiry as a charge to preserve its validity.

Charge Categorization and Prioritization

Finding 5.10: The PCHP empowered front-line staff to determine which cases appear most meritorious, thereby giving them greater control over case inventory. Because a charge category determines the extent to which it will be investigated, it is critical that enforcement staff are well versed not only in the category definitions themselves, but also in recognizing the attributes of potentially valid claims.[38]

Recommendation 5.10: EEOC should provide periodic training and refresher courses to enforcement staff regarding charge categorization criteria, particularly given the numbers of investigators and attorneys hired in the last year. They should be given sample cases to categorize on a regular basis, and those staff who have difficulty with charge assessment should be assigned a mentor with greater experience.

Finding 5.11: In at least one district office, investigative staff were unaware of any agency-wide information sheet for charging parties that outlines the Agency's Priority Charge Handling Procedures or the categorization of charges.[39]

Recommendation 5.11: EEOC should make the creation and dissemination of procedural guidelines on charge categorization and prioritization an outreach priority. The fact sheets and/or brochures should explain in a clear and understandable manner how the Agency selects charges for investigation and how the prioritization system works so that charging parties are made aware of the chances their charges will be either dismissed or processed further. In addition, charging parties should be counseled at charge intake as to the probability that their charges will be investigated. EEOC should develop a system by which staff in the district offices can refer potential charging parties to advocacy groups and organizations that can provide assistance or information on workplace issues that are not under EEOC's jurisdiction. The referral program should be developed by headquarters with input from district offices and implemented consistently across field offices.

Finding 5.12: EEOC staff have praised the notion of categorization as being one of the best procedural tools the Agency has seen in many years. However, the implementation of the charge categorization process has not been without problems. Internal reviews have revealed inconsistencies across offices in the way charges are categorized and subsequently processed. The Agency's 1998 joint task force report found that some district offices do not always dismiss C charges at intake and noted an imbalance in the identification and processing of B charges. The task force further found that many district offices do not have a system in place to ensure that B charges are in "continuous movement, development, and/or resolution." This has the potential to result in a backlog of B charges and, as

[37] *See* chap. 5, pp. 109–10.

[38] *See* chap. 5, p. 117.

[39] *See* chap. 5, p. 113.

the task force identified, may result in potential A cases being missed.[40]

Recommendation 5.12: Overall, the Commission supports EEOC's charge categorization procedures as a much-needed tool for inventory control. The PCHP has been perhaps the most influential change to Agency procedures in the last decade. However, there must be systems in place to ensure that, when implementing charge prioritization, potentially valid charges are not being dismissed and B charges are given the appropriate amount of attention, to the extent that they require investigation. This is not to suggest that investigators expend unnecessary resources on charges that prove to be no cause, but rather that the Agency should be accountable for the dismissal of charges and ensure that B charges do not remain inactive for long periods of time. Most importantly, EEOC headquarters must ensure that similar charges are being handled similarly across district offices.

Finding 5.13: District offices have implemented methods for reviewing charge categorization, but the consistency and frequency of reviews, and the selection of cases for review, differ from office to office. In addition, neither the Office of Field Programs nor any other headquarters office performs regular reviews of charge categorization in the district offices.[41]

Recommendation 5.13: Headquarters should develop guidelines for mandatory charge review procedures across district offices. These guidelines should require charge review at various stages of development, including after initial assessment, during investigation, and upon issuance of a determination. They also should require review by both enforcement and legal staff. Tracking sheets should be placed in case files identifying the points at which a charge was reviewed so that OFP can review random samples of case files for consistency during regularly scheduled field visits. This added layer of review will provide quality assurance and possibly alleviate, to some degree, the concerns of charging parties, advocacy groups, and employment attorneys that valid charges are being erroneously dismissed. The charge prioritization system has reduced EEOC's case backlog and the caseload of the investigators by eliminating non-meritorious charges, therefore, there have to be procedural safeguards in place to make sure that meritorious charges do not fall through the cracks.

Mediation

Finding 5.14: There is considerable debate as to whether EEOC's main objective should be to resolve charges through settlement or by litigation. Mediation is one of the strategies that EEOC uses to eliminate employment discrimination in the workplace. Despite the criticisms and concerns, if done in such a manner as to ensure fairness, mediation can have many benefits for the charging party, the respondent, and EEOC. Specifically, mediation saves time and money; resolves charges that may otherwise remain unresolved through other EEOC processes, such as conciliation; and allows parties to be involved in the resolution of their own disputes.[42]

Recommendation 5.14: Mediation should not be seen as a solution for all charges or as a substitute for investigation and litigation. Mediation should be viewed as just one of the strategies used by EEOC to eliminate unfair employment practices. Early resolution through settlement of certain charges can save Agency time and resources, and thus the Agency should continue to explore methods for achieving settlement. The Commission fully supports EEOC's mediation efforts and encourages Congress to provide continued funding in support of the mediation program.

Finding 5.15: Despite limited resources, EEOC's mediation program is generally viewed as successful and has become one of the Agency's integral tools for eliminating unfair employment practices. However, there is the opinion that while this vehicle has become a quick and inexpensive approach to settlement, mediation does not always get to the root of the alleged employment discrimination.[43]

Recommendation 5.15: The elimination of unfair employment practices or employment discrimination within the workplace should be EEOC's major objective, using whatever strategies are appropriate for the situation. Mediation should be used when appropriate, and settlement agreements should take into account the

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[40] *See* chap. 5, pp. 118–19.

[41] *See* chap. 5, pp. 117–18.

[42] *See* chap. 5, pp. 121–39.

[43] *See* chap. 5, pp. 135–36.

possibility that the same problem could occur again if systemic relief is not included.

Mediation staff should be encouraged to recommend that settlements reached as a result of mediation include provisions for changes in employer practices or policies that might have a discriminatory effect. Not to include such a provision in a settlement agreement would be a disservice to both the charging party and the respondent.

Finding 5.16: According to EEOC procedures, all B charges are supposed to be given the option of mediation. Because B cases make up the majority of charges in an office's inventory at any given time, a large burden is placed on the ADR unit. In fiscal year 2000, because of budget constraints, district offices were unable to use contract mediators, and therefore were not able to offer mediation to all B cases. Offices have been given the discretion to decide which cases to refer for mediation.[44]

Recommendation 5.16: Ideally, all parties to a B charge should at least be given the mediation option. However, because of current resource limitations, this is an impossibility in many district offices. Headquarters must develop criteria for determining which B charges are referred for mediation. There should be uniformity across district offices so that charging parties and respondents alike can predict, to some degree of certainty, whether mediation is an option for a given charge.

Finding 5.17: One of the problems that the chairwoman cited in the mediation pilot program was a lack of national parameters governing the program. The new mediation program was designed to bring these dynamics into place. While a Mediation Deskbook has been prepared that outlines procedures, it does not establish formal structural guidelines for mediation units in district offices; hence, regional programs differ.

Although mediation is now an integral part of EEOC's enforcement program, limited resources have hindered the implementation of a uniform program. Currently, there are no funds for contract mediators. Thus, the number of mediations, who mediates, and when mediation takes place vary from office to office. The result is sporadic implementation of the process. One district office has a backlog of mediation cases and has decided on its own to put a freeze on mediation, while another office, due to a shortage of mediators, has had to temporarily reject requests from some respondents who want mediation.[45]

Recommendation 5.17: Although there is, and should be, latitude to foster creativity in district mediation programs, EEOC should prepare standard criteria for program monitoring and evaluating. These general standards should be applied to every district office, and each office should be held accountable for maintaining a consistent, fair, and impartial program. The Mediation Deskbook should be updated on a regular basis and should serve much the same function as the Agency's Investigative Procedures Manual by offering step-by-step instructions to mediation staff.

OFP should conduct an evaluation of district office mediation programs in the immediate future, particularly given the current funding constraints, and should offer assistance to those offices struggling to meet Agency requirements for mediation programs. For example, the ADR coordinators at headquarters should be assigned to work with the management and ADR coordinator of the district office that has put a freeze on mediation to determine creative ways to meet the office's need for external mediation assistance. If the office's internal staff are unable to develop an effective program, staff from a district office with a successful program should be detailed to offer assistance.

Until uniform requirements are established and resources are made available for mediation, especially for contract mediators nationwide, district offices will have to continue using creative strategies to solicit mediators. District offices should continue to use pro bono mediators whenever possible. Other pools for mediators might include professors at higher education institutions, state and local attorney groups, court affiliated mediators, and paralegal specialists. Other sources for mediators are county and city government services and schools district staff who have experience mediating school-related conflicts. For the mediation program to remain credible, however, EEOC district offices must ensure that the mediators being recruited for pro bono mediation purposes have extensive experience and knowledge about EEO laws.

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[44] *See* chap. 5, pp. 125–26.

[45] *See* chap. 5, pp. 123, 128–31.

Another solution for the shortage of mediation staff could be the use of mediators in tribal employment rights offices (TEROs) and state and local fair employment practices agencies (FEPAs). EEOC should consider these agencies as possible contract mediators in its appropriation requests authorizing the mediation program. EEOC could pay FEPAs for mediation if EEOC submits to Congress a request for an exemption of the FEPA funding limit.

Finding 5.18: Currently, there are only two "detailed" ADR coordinators at headquarters who report to the director of the Office of Field Programs. While they have routine telephone contact with field ADR coordinators, there is no office at headquarters solely responsible for monitoring and overseeing on a routine basis the mediation program throughout the Agency.[46]

Recommendation 5.18: EEOC should consider creating a separate ADR unit at headquarters to bring consistency and uniformity to the national program. The ADR unit should report to the chairperson, and field office ADR units should report to the headquarters unit. The unit would oversee recruitment, outreach and technical assistance, training, and the development of uniform procedures and guidelines for EEOC's mediation program.

Finding 5.19: EEOC's mediation outreach and technical assistance activities have proven to be effective in encouraging charging parties and respondents to participate in mediation and have enhanced general support for the program. However, although charging parties continue to have considerably higher mediation acceptance rates than respondents, there are certain groups that continue to be reluctant to participate. For some charging parties (and to a lesser extent employers), there may be language and cultural barriers in mediation that limit their participation. For instance, one community activist stated that there is a lack of Hispanic participation in mediation, and many Hispanics may not even be aware that mediation is an option.[47]

Recommendation 5.19: EEOC should continue its outreach and education programs on mediation nationwide, as well as initiate other efforts, such as seminars within company facilities, to enhance participation rates. To encourage ethnic and language minorities' participation in mediation, EEOC should contact appropriate organizations and advocacy groups for input and involvement in outreach efforts targeted to underserved communities. ADR coordinators and outreach program analysts in the district offices should work together to identify communities within their jurisdiction that have lower mediation participation rates. Through town hall meetings and sessions with community leaders, they should assess why participation rates vary and institute plans to remedy these discrepancies.

Some solutions may include providing mediation materials in multiple languages; ensuring that trained translators are available during the mediation process; making the location of the mediation sessions more flexible so that the parties feel comfortable in their surroundings; and encouraging mediation staff, both internal and external to EEOC, to participate in cultural competency training to gain an understanding of cultural differences that may affect the mediation outcome. Efforts should be made to develop a process that can reflect issues, values, and concerns of these populations. EEOC also should enlist the assistance of community organizations with publicizing its mediation program.

Investigation

Finding 5.20: Although EEOC's guidelines for investigating charges have, for the most part, standardized the process, the actual execution of investigations varies from office to office and within offices. For example, decisions on how to investigate a charge may depend on the information collected before the investigation, the scope of the charge, and the nature of the allegations that are made. The investigative approach also may depend on the staff who are involved in the investigative process, the resources available for such strategies as on-site investigations, the different assignments that an investigator may have, and the caseload of the investigator.[48]

Recommendation 5.20: Obviously, charge investigation is, as it should be, specific to a charge. However, investigative staff should be encouraged, if not required, to confer with the investigative procedures outlined in the Compliance Manual when determining the scope and

[46] *See* chap. 5, pp. 127–28.

[47] *See* chap. 5, pp. 137–38.

[48] *See* chap. 5, p. 143.

parameters of an investigation. Investigative staff must be responsible for conducting thorough and fair investigations on all charges that merit examination, including A and B charges, under the supervision of enforcement managers. The extent to which a charge is investigated should be the result of collaborative discussions between legal and enforcement staff so that the degree of variation in investigative procedures for similar charges can be minimized.

On a regular basis, perhaps monthly, district office management staff should evaluate the caseloads of investigators to determine whether there is a disproportionate burden of difficult charges on any one investigator. Charges should be distributed according to investigative experience and difficulty of the charge so that lack of consistency in investigation cannot be attributed to case management problems.

Headquarters staff in the Office of Field Programs and the Office of Legal Counsel should work together to ensure that the investigative procedures guidelines are kept current with changes in the law that may affect charge processing. A task force including individuals from OFP, OLC, and the field offices, should be set up to evaluate the existing procedures to determine (1) if they are appropriate to the types of charges in the Agency's inventory; (2) if there are frequently occurring issues not addressed in the procedures; (3) whether more useful examples of investigative scenarios that can provide context for investigators should be included; and (4) if there are more efficient methods for conducting investigations given advances in technology and research methods.

Finding 5.21: The CEP requires that written investigative plans be developed for all A1 charges as a collaborative effort between enforcement and legal staff. Case development plans include investigative procedures and timeframes for their completion. The CEP further identifies recommended points of contact between attorneys and investigators on A1 charges as being: before sending requests for information, before conducting on-site investigations and interviews, after receiving employer responses, and before conducting any determination interviews. The extent to which field office staff actually develop and use investigative plans varies among offices and, even within offices, between investigators.[49]

Recommendation 5.21: While most investigative staff have stated that they develop investigative plans for A1 cases, this case management device could be a valuable tool for prioritizing work and minimizing duplication of efforts when dealing with similar charges and should be encouraged on all charges, regardless of categorization. Plans for non-A1 charges would obviously not require the same degree of detail, but rather could be a simple statement of the procedures to be used or could be developed through a standard checklist. Investigative plans would allow for regular reassessments of the status of charges, from a managerial perspective, and could also be a valuable tracking device and case management tool for investigators. Enforcement managers or supervisory investigators should review all investigative plans for consistency in investigations.

Finding 5.22: The implementation of the PCHP eliminated the use of "boilerplate" requests for information in favor of requests tailored to the needs of a particular charge. EEOC's Investigative Procedures Manual states that an interview with the charging party before drafting the RFI may assist the investigator in clarifying the issue and focusing the request more precisely.[50]

Recommendation 5.22: EEOC investigative staff should be encouraged to tailor requests for information. This will allow respondents to submit only relevant information, thereby reducing the amount of time spent reviewing documents and the need for a second request for information.

Finding 5.23: The number of on-site visits completed in recent years is small relative to the number of charges EEOC processes. The number of cases closed from FY 1993 to FY 1999 that are recorded in the database as having had on-site investigations totaled about 31,500. However, EEOC closed more than one million cases during that time period. The on-site investigations that are recorded in the database suggest that, under the charge prioritization procedures and consis-

[49] *See* chap. 5, p. 144.

[50] *See* chap. 5, pp. 145–46.

tent with the CEP, on-sites are increasingly targeted to A cases.[51]

Recommendation 5.23: In addition to the obvious purposes for on-site investigations—gathering evidence and interviewing witnesses—on-site visits can have residual effects on the charge under investigation and enforcement efforts in general. The visits can serve to humanize EEOC staff and allow respondents to see that EEOC investigators are "real people." In addition, the on-site visit can be one of the best outreach tools that EEOC has because the opportunity to meet with the respondent face to face can result in improvements in the work environment and possibly changes in employer policies and practices. Further, site visits should be used as outreach and educational opportunities as well as opportunities to interact, share information about EEOC, and network with stakeholders, charging parties, and respondents. EEOC staff should take full advantage of on-site visits as a forum for outreach in an effort to make the most of limited outreach funds.

The Agency should continue to emphasize on-site visits for A cases, and with the help of increased funding, should increase on-site investigations for B charges that merit site visits. However, the resources dedicated for on-site investigations should be used judiciously, because there are many instances where appropriate information can be gathered through other methods.

Finding 5.24: Although EEOC's Charge Data System has a field for recording witness contact, it does not appear to have been used to record this activity much before FY 1997, or, for that matter, since then. Charges received in FY 1999 are too recent in the extract of the database obtained for this report to have had many witness contacts recorded. Again, it is unclear whether EEOC actually conducts so few interviews of witnesses, or whether staff do not record this information in the database or both.[52]

Recommendation 5.24: Headquarters must issue exact guidelines for the tracking of witness contact data through the Agency's Charge Data System (CDS). District offices should be required to record whether witness contacts are made for each charge and should be required to report the numbers of witnesses contacted on a quarterly basis through their 396 reports. Tracking witness contacts will not only provide a more accurate measure of investigative consistency and serve as a performance indicator, but it will increase investigator accountability for ensuring that charges are processed thoroughly. On a more general level, EEOC should review all data fields in the CDS to ensure that they are necessary and fully utilized. Accuracy and completeness of data should be monitored so that greater use of the data can be made, including use of the CDS for quality control.

Finding 5.25: Correspondence with charging parties and respondents reveals that both groups are relatively uninformed about the investigation phase of the charge handling process. Many of them indicated that they are unaware of what is involved in an investigation, and both groups question whether unbiased fact finding is actually conducted. Both groups indicated that they want to be more involved in the process, have more interaction with EEOC investigators, and be more informed about how outcomes are reached. However, with the workload and responsibilities of EEOC staff, it is unlikely that day-to-day or routine contact can be made with the parties involved.[53]

Recommendation 5.25: EEOC staff have an obligation to keep all parties involved in a complaint apprised not only of the charge handling process, but also of the progress of a charge. Attempts should be made to provide information, as well as answer inquiries of charging parties and/or respondents, whenever possible, especially for cases that are being investigated and forwarded for litigation. Initial counseling should ensure that charging parties are aware of their rights and responsibilities with respect to providing accurate and timely information pertaining to their charges.

In addition, the primary investigator of a charge should make periodic calls to the charging party to inform him or her of the charge's status, even if it has not changed. For larger offices where this may be unrealistic given their large caseloads, it might be more feasible to maintain status checklists in case files which can be mailed to the charging party on a periodic basis (for example, every 30 days) and which would provide a summary of the charge process-

[51] *See* chap. 5, pp. 148–49.

[52] *See* chap. 5, p. 151.

[53] *See* chap. 5, pp. 153, 154, 156–57.

ing that has occurred. Either way, investigators should be held accountable for maintaining contact with charging parties in their individual inventories. With respect to employers, EEOC should also ensure that they are kept apprised, albeit to a lesser extent, of the status of a charge, and information about investigative procedures should accompany notification of a charge.

The impression that fact finding is biased could be remedied through greater interaction and involvement of both parties. One of the reasons mediation has proven so successful is because the parties feel like participants rather than observers. In carrying out investigations, EEOC staff should employ strategies borrowed from other programs that have proven effective.

Finding 5.26: Some respondents and complainants expressed concern that certain investigators do not appear to be knowledgeable about employment issues, concerns, or laws, or have not been adequately trained to conduct investigations.[54]

Recommendation 5.26: As has been noted in other recommendations, EEOC investigative staff must be provided training on investigative procedures and legal issues on a regular basis. New staff should receive substantive training, and more experienced staff should receive periodic refresher courses. Headquarters must hold district directors accountable for ensuring that training needs of staff are met.

Special Charges

Finding 5.27: EEOC commissioners have filed between 19 and 48 charges per fiscal year during fiscal years 1993 to 1999. In recent years, that is FY 1997 to FY 1999, the number of commissioner charges has decreased to fewer than 40 from close to 50 in FY 1994 and FY 1995. The number of directed charges initiated each year under both the EPA and the ADEA has varied from 304 in FY 1993 to 66 in FY 1999 for all district, local, and area offices. Despite the importance of these charges, EEOC data reveal that commissioner charges and directed investigations make up a minuscule percentage of the Agency's charge inventory.[55]

Recommendation 5.27: The Agency should recognize commission-initiated charges as a way to significantly reduce the patterns of discrimination that are related to employment practices. Headquarters must re-emphasize the importance of commissioner charges and directed investigations and encourage field offices to use these charges to fill gaps in their charge inventories. District offices should have clearly defined performance goals for how many commission-initiated charges to conduct based on staff size and charge inventory.

Finding 5.28: EEOC's National Enforcement Plan (NEP) emphasizes the Agency's commitment to pursuing charges that have the broadest reach by including as a priority area challenges to broad-based employment practices affecting many employees. According to the Comprehensive Enforcement Program, intake staff are expected to inquire about potential class issues on a regular basis.[56]

Recommendation 5.28: EEOC's emphasis on class and systemic charges is entirely appropriate given the Agency's budget constraints and its mission to eradicate employment discrimination. EEOC, in fact, must make a substantial commitment to address systemic discrimination, a strategy by which it can use its limited resources for maximum effect, as long as meritorious individual charges are not neglected as a result.

To assist with the pursuit of this goal, the Office of Research and Information Planning at headquarters should provide commissioners with regular reports identifying areas where there may be discriminatory trends, based on EEO-1 data, for their review to determine if a commissioner charge or systemic investigation should be initiated. In addition, both enforcement and legal staff in the district offices should be required to use EEO-1 data on a regular basis to determine areas where potential commission-initiated charges may exist and to assess areas where systemic charges should be pursued. Intake staff should also be responsible for determining when an individual charge should be broadened if there is evidence that there may be more victims.

Finding 5.29: In the past, district offices had systemic units designated to identify and investigate systemic charges, including commissioner charges, directed charges, and third-party

[54] *See* chap. 5, p. 159.

[55] *See* chap. 5, p. 162.

[56] *See* chap. 5, pp. 164–65.

charges. However, in at least some district offices the existence and staff of such units dwindled when district offices were given the authority to reassess and restructure their programs.[57]

Recommendation 5.29: District offices must have some discretion to decide what format to use regarding systemic and class cases, based on staffing patterns and charge inventory. However, because the Agency has emphasized widespread discrimination as a priority issue, it is imperative that district offices have adequate staff and resources dedicated to this function. Commissioner charges and systemic/class cases cannot be initiated if there is not staff incentive or requirement to do so. The Office of Field Programs should assess, through EEO-1 data and the Charge Data System, the jurisdictions where these types of charges are most likely to exist. OFP can then establish procedural and staffing guidelines for systemic units in the corresponding district offices.

Charge Resolutions

Finding 5.30: The 1995 Priority Charge Handling Procedures ended the use of substantive "no cause" letters of determination in cases where investigation has not proven that discrimination has occurred. Use of a short-form determination letter simply stating that the investigation failed to disclose a violation replaced the more detailed substantive letter. Some experts outside the Agency find this problematic because it does not give adequate detail to the charging party to let him or her know precisely why the charge was dismissed or whether it would be a waste of time to go to court.[58]

Recommendation 5.30: A charging party has the right to know why his or her charge is dismissed as no cause. EEOC staff should, therefore, be required to inform the charging party of how the determination was reached. EEOC staff should be required to conduct predetermination interviews with charging parties, as some district offices are currently doing. Charging parties should also be given a final opportunity to provide any additional information before having their cases dismissed.

Charge Processing Time

Finding 5.31: EEOC guidelines state that the investigation of a charge should generally be completed within 120 days from the time the charge is initially categorized. However, tight resources have required that this goal be amended. Data from the Agency's Charge Data System indicate that, in fact, the average processing time for a charge is approximately 325 days, but has declined since charge prioritization procedures were implemented.[59]

Recommendation 5.31: EEOC should continue to strive toward the goal of 120-day processing time for charges. As enforcement staff become more adept at identifying and resolving non-meritorious charges and more proficient at conducting investigations, the inventory should become more under control, and this goal should be realized. In addition, the mediation program, when implemented to its fullest capacity, should assist with the reduction in processing time.

Litigation

Finding 5.32: It appears that, in recent years, EEOC has made major strides toward using litigation as an enforcement tool. However, given the Agency's limited resources and the amount of staff time and energy required for litigation, the degree to which litigation can and should be relied on for enforcement is limited. The volume of EEOC's litigation appears to be less than one would expect to truly enforce the precepts of the NEP and for a maximum use of litigation as an enforcement tool. Limited resources could also continue to hamper the Agency's ability to litigate larger class or systemic cases in numbers commensurate with their importance.

Prior to the Agency's most recent administrations, litigation efforts were largely concentrated on individual cases of discrimination as opposed to larger, systemic cases with the potential to provide relief for numerous individuals. The Agency was criticized by many scholars for failing to concentrate its resources on larger cases that could have broader legal implications and more extensive benefits. By litigating systemic cases, EEOC has the opportunity to address a

[57] *See* chap. 5, pp. 165–66.

[58] *See* chap. 5, p. 172.

[59] *See* chap. 5, p. 174.

variety of employer practices that may be difficult to address in private class action litigation.[60]

Recommendation 5.32: When allocating funds to EEOC, Congress should keep in mind its intent when it gave the Agency litigation authority in 1972. To have an effective litigation program and to become the primary agency charged with dealing with employment discrimination, Congress should provide funds accordingly. EEOC should have the staff resources to initiate large-scale litigation efforts on all developing areas of law rather than on just those that are politically relevant or those that can fit nicely into its emaciated budget. Systemic and class charges, in particular, require expenditures that are often beyond the Agency's means.

Nonetheless, EEOC should continue to focus its efforts on larger systemic cases and cases that can provide relief for numerous aggrieved individuals. By doing so, the Agency can achieve greater impact for its limited resources. EEOC legal staff, however, must simultaneously continue to give attention to those individual cases that address issues identified in the National and Local Enforcement Plans that have the potential to substantially further an undeveloped area of law or that address issues particularly serious or egregious in nature.

As one way to combat the resource limitations on its litigation program, EEOC should consider alternative sources of monetary support. For example, EEOC may want to consider establishing a revolving litigation fund, with interest, which is built upon money obtained through successful litigation. Employers that fail to reach a settlement through conciliation, and that are then found in violation of the law in an EEOC-filed court proceeding, should be required to pay reparations to EEOC, as deemed reasonable by the court, based on the amount garnered on behalf of the charging party. EEOC would then be able to sustain its litigation program through its successes, and legal staff would have greater incentive to actively pursue the most meritorious cases. However, Congress could not use the establishment of such a fund as an excuse to cut overall EEOC funding because there should be some safeguard in place to compensate for unfriendly court circuits and unforeseen negative trends in charge inventory.

Finding 5.33: Although headquarters review is required for cases the district offices choose to litigate, regional attorneys have the responsibility for developing the litigation docket in their offices. Under a redelegation of authority, regional attorneys were given the ability to determine, with exception, which cases to pursue in court. Those cases that remain in the domain of OGC include expensive cases, cases addressing novel issues, issues of public controversy on which the EEOC needs to make a statement, cases affecting many individuals, and cases involving the Americans with Disabilities Act.[61]

Recommendation 5.33: The redelegation of authority for litigation is one example where EEOC headquarters appears to have achieved a balance between district office oversight and autonomy. The redelegation should remain in effect as long as district offices prove their ability to select the most appropriate and diverse cases for litigation. EEOC's Office of General Counsel should, however, continue to monitor closely the dockets of the district offices and rescind authority where it is evident that regional attorney discretion is not conducive to the maintenance of a successful litigation program.

Finding 5.34: Many legal scholars have argued that EEOC should not litigate cases that the private bar is able to handle, but instead should focus its litigation efforts on cases where private litigation may not be effective because of lack of information or costs of preparation. To compensate for the Agency's inability to litigate the high numbers of cases necessary, due to its limited resources, it has been suggested that the Agency develop legal referral systems to assure charging parties access to the private bar. District offices have thus been instructed to develop relationships with the private bar and establish referral programs. This will allow the Agency to concentrate its resources on cases that are related to NEP priorities.[62]

Recommendation 5.34: The Agency should continue in the development of its attorney referral program so that individual cases that are not within the Agency's budget or that are not defined as a priority can still receive fair treatment by a member of the private bar. EEOC legal staff should be made available to offer guid-

[60] *See* chap. 5, pp. 178–79.

[61] *See* chap. 5, p. 177.

[62] *See* chap. 5, pp. 180–81.

ance to private attorneys, to the extent that it is needed. The Agency should also continue its collaboration with organizations such as the American Bar Association and the National Employment Lawyers Association. However, not all individual cases should be referred to the private bar. Individual cases can have far-reaching impact and, therefore, EEOC should continue to litigate individual cases where (1) there is the possibility to further define the law, (2) they have the potential for broader impact, or (3) they aid an individual who the private bar cannot or will not assist.

Benefits

Finding 5.35: EEOC reaped a record $307.3 million in benefits through the administrative process and litigation in fiscal year 1999. Benefits obtained by EEOC investigators during the administrative process totaled $210 million, an increase of 25 percent from the previous fiscal year. Benefits received through the mediation program, which is included in the $210 million, totaled $58 million. Litigation benefits totaling $96.9 million came largely from $46.9 million recovered under Title VII and $43.3 million under the Age Discrimination in Employment Act.[63]

Recommendation 5.35: EEOC should continue pursuing benefits of this magnitude on behalf of charging parties. In upcoming years, with increased charge projections and an anticipated larger litigation docket, the Agency should strive to simultaneously increase benefits and diversify the statutes under which benefits are attained.

CHAPTER 6. EMPLOYMENT RIGHTS ENFORCEMENT BY STATE, LOCAL, AND TRIBAL GOVERNMENTS

Tribal Employment Rights Offices (TERO)

Finding 6.1: TEROs negotiate agreements with employers concerning Indian preference and compliance with Indian preference rules in order to prevent discrimination. TEROs have 30 days to resolve a complaint, and if it is not resolved, it will forward the charge to EEOC for processing. Very few complaints, however, are forwarded to EEOC. Most TEROs use a mediation process for resolving complaints of discrimination, similar to the mediation process at EEOC. Through the mediation process, TERO staff attempt to educate employers concerning Indian culture and beliefs and provide sensitivity training. In addition, most TEROs have the ability to conduct investigations and impose sanctions on employers for noncompliance with tribal ordinances.[64]

Recommendation 6.1: EEOC should enhance and expand its utilization of TEROs in various processes. TEROs should be used as a primary mediation resource for outside/contract mediators. EEOC should establish standards to certify those TEROs that are qualified to conduct investigations and use them as resources in investigating charges of discrimination. Further, EEOC should formally involve TEROs in outreach and education activities, especially those activities focused on employers, and establish TEROs as major resources to interact with underserved communities for disseminating information on employment-related issues.

Finding 6.2: In addition to the underutilization of TEROs in its charge process and technical assistance and outreach activities, EEOC has not included TEROs in formal Agency documents, policy guidance, budget requests, or on its Web site. The State and Local Handbook contains no information on TEROs, and the Compliance Manual contains only one policy statement concerning Native Americans and American Indians. There is an EEOC reference guide and EEOC participant workbook for TERO directors; however, those documents have not been updated since they were developed in the mid-1980s.[65]

Recommendation 6.2: Although EEOC states that it will work more with the TEROs in addressing workplace discrimination, EEOC should include the role and responsibilities of the TEROs in its policy guidance and expand knowledge of the TEROs throughout its outreach efforts. TEROs should be incorporated and not just highlighted in major planning documents. In addition, the State and Local Handbook and Compliance Manual should be expanded to include information and guidance on TEROs.

Further, information on TEROs and fair employment practices agencies (FEPAs) should be added to EEOC's Web site. In particular, the Web site should include contact information for

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[63] *See* chap. 5, p. 185.

[64] *See* chap. 6, p. 193.

[65] *See* chap. 6, p. 201.

FEPAs and TEROs as well as information on their responsibilities.

Applicability of Federal Civil Rights Laws to Indian and Non-Indian Employers and Employees

Finding 6.3: Both Title VII and the ADA specifically exempt tribes from the definition of employer. The Age Discrimination in Employment Act and the Equal Pay Act do not specifically exclude Indian tribes from their reach. However, there are conflicting judicial interpretations of the Title VII exemption, and there are areas where EEOC jurisdiction on reservations is unclear. Compounding this problem, EEOC has been silent on the issue of jurisdiction in its Compliance Manual policy statements.

In addition, the EEOC policy guidance on Indian preference does not address certain issues, such as whether the term "employment practice" includes other terms, conditions, or privileges of employment. Thus, it is unclear if other issues such as compensation, benefits, assignments, and training are included in Indian preference rules. Further, it has been argued that because preference based on tribal affiliation is permissible under the 1994 amendments of the Indian Self-Determination and Education Assistance Act of 1975, there is potential for conflict with the EEOC guidelines.[66]

Recommendation 6.3: EEOC needs to review and update its current policy guidance on Indian preference to ensure completeness and accuracy. In addition, EEOC needs to develop formal policy concerning EEOC's jurisdiction over tribal reservations and clearly define for enforcement staff how these issues should be treated.

Finding 6.4: Because of the lack of EEOC guidance, the ambiguity of the laws, and the disagreement among the district courts, the Council for Tribal Employment Rights (CTER) would like to develop a series of tribal Native American work force protection laws that would protect the civil rights of Indians and non-Indians working on reservations, and has requested funding from the Administration for Native Americans (ANA) of the U.S. Department of Health and Human Services. This legislation would provide civil rights protections to tribes and tribal enterprises that are not available under existing civil rights laws. CTER recommends that several federal agencies assist in the development of this legislation, including EEOC, Office of Federal Contract Compliance Programs, the Bureau of Indian Affairs (BIA), and the National Labor Relations Board (NLRB).[67]

Recommendation 6.4: The Commission supports the passage of legislation that would clarify the applicability of Title VII with respect to Native American-owned businesses and both Native American and non-Native American employees. Such legislation must ensure that all stakeholders would be afforded equal protection under the laws. EEOC, OFCCP, BIA, NLRB, and ANA all should provide resources and funding of the development of this legislation. The legislation should be drafted with the input of these federal agencies, CTER, tribal governments, businesses, and other affected parties.

Interaction between EEOC and TEROs

Finding 6.5: EEOC spends little time monitoring the work of TEROs. In addition, there is little high-level interaction between EEOC headquarters and the TEROs or with the Council for Tribal Employment Rights. According to the president of CTER, when EEOC commissioners asked for TERO input, no actions were taken to address the issues. A former official at CTER stated that TEROs have been the "stepchildren" of EEOC when compared with FEPAs and other EEOC programs.[68]

Recommendation 6.5: EEOC must make TEROs an integral working aspect of its enforcement activities, or else the Agency runs the risk of virtually ignoring an entire underserved population. EEOC needs to have more interaction with TEROs, both at headquarters and at the local level. TEROs need to be included in the development of programs, policies, and initiatives that involve state and local programs and agencies. The same type of monitoring and review that is done for FEPAs should be done for TEROs to enhance and strengthen their involvement with the Agency.

Training

Finding 6.6: For both FY 2000 and FY 2001, EEOC plans to provide training to TEROs; how-

[66] *See* chap. 6, p. 196.

[67] *See* chap. 6, p. 198.

[68] *See* chap. 6, p. 199.

ever, EEOC does not discusses these plans in detail in its budget requests and planning documents. Training for TEROs is not conducted regularly. Although some EEOC district offices are proactive in providing training for TERO staff, there is no consistency across the country in the types of training and the frequency with which it is offered.[69]

Recommendation 6.6: EEOC should develop a strategic training program for both TEROs and FEPAs. Funding should be earmarked specifically for annual training conferences and training courses. Headquarters EEOC should work with district offices and individual FEPAs and TEROs to determine the training needs of the various offices and agencies.

Strategic Planning and Budgeting

Finding 6.7: TERO appropriations are not a separate item in EEOC's budget. TERO funding comes from the budget for state and local programs. Thus, Congress does not specifically appropriate money for EEOC's TERO contracts. As such, not all TEROs are funded by EEOC. In FY 1999, EEOC funded only 64 of the more than 100 TEROs in the nation.[70]

Recommendation 6.7: TEROs should be in EEOC's budget request as a separate item under state and local programs, with detailed information on how funds will be allocated to improve or enhance the TERO programs. EEOC must identify in detail areas where allocations to TEROs can be most effectively spent.

Fair Employment Practices Agencies (FEPA)

Finding 6.8: The structure and implementation of the EEOC/FEPA program is much more formal and documented than the EEOC/TERO program. The statutory and congressionally mandated "partnership" between EEOC and FEPAs has become a visible, integral component of the EEOC complaint process. However, while the relationship between EEOC and FEPAs has evolved and improved over the years, and the interaction and working relationship between the state and local agencies and EEOC has been characterized as very good, some FEPAs indicate that the relationship is not always handled as an equal partnership.[71]

Recommendation 6.8: EEOC needs to solicit and implement FEPAs' suggestions, and promote more coordination between EEOC and FEPAs in charge processing. A task force or steering committee comprising both EEOC and FEPA staff (including FEPA directors and investigators and EEOC state and local coordinators) should be established to analyze the differences among EEOC and FEPAs in regard to charge intake, investigation, mediation, and other aspects of charge processing. This task force should identify the "best practices" of the FEPAs and provide recommendations for improving charge processing both in the FEPAs and EEOC. To the extent possible under differing jurisdiction and local laws, EEOC and the FEPAs should find ways to share enforcement strategies and should periodically review enforcement programs of the various agencies to identify differences, strengths, and weaknesses.

FEPA Workload

Finding 6.9: In FY 1999, 92 FEPAs were under contract with EEOC. During that year, FEPAs received 59,092 charges of discrimination that were dual-filed with EEOC. However, the number of charges received and investigated varies greatly by FEPA. In particular, local agencies, such as city human rights offices, have fewer resources and a smaller jurisdiction, so they do not handle as many cases as state FEPAs.

Overall, FEPAs resolve approximately 50 percent of their total caseload (including charges received and backlogged charges) each year. Over the same time, the average age of charges has decreased from almost 18 months to just under 12 months.

Several FEPAs stated that EEOC should use the case processing capabilities of the FEPAs more intensely than it currently does, and that it would be more efficient and cost effective for FEPAs to handle individual discrimination cases than it is for EEOC to handle such cases. Others noted that they are capable of handling more cases than they do currently.[72]

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[69] *See* chap. 6, p. 201.

[70] *See* chap. 6, p. 201.

[71] *See* chap. 6, pp. 201–02, 207–208.

[72] *See* chap. 6, pp. 205–07, 215.

Recommendation 6.9: EEOC should completely utilize FEPAs in its charge processing. EEOC should conduct a study to assess the number of charges handled by FEPAs by resources and geographic location. The findings from this study should be used to reallocate resources among FEPAs and EEOC district offices. In addition, such a study can support an increase in appropriations, especially an increase in payment for services based on the number of charges.

Training from EEOC

Finding 6.10: While several FEPAs noted that EEOC has done a good job of training FEPA staff, others were unaware of EEOC training opportunities. One FEPA staff person noted that EEOC does not offer training comparable to that offered by the U.S. Department of Housing and Urban Development (HUD) which includes an annual training budget of $20,000 in its contracts with state and local agencies. Comparatively, EEOC offers training to FEPAs only when funding is available. Thus, the implementation of training has varied from district to district, with some FEPAs receiving very little training. Further, although EEOC holds an annual conference for FEPAs, under the EEOC contract funding is available for only one staff person from each FEPA to attend.[73]

Recommendation 6.10: Appropriations under the State and Local Program should be earmarked to support annual training programs for FEPA staff. In particular, training should be provided on charge intake and investigations. In addition, funding should be provided for EEOC to establish a national training academy for EEOC, FEPA, and TERO investigators.

Monitoring and Coordination between EEOC and FEPAs

Finding 6.11: Although EEOC staff are required to review FEPA operations, there is no consistency in FEPA monitoring among EEOC's district offices. For example, one FEPA director stated that there is no real coordination between his agency and other EEOC district offices and other FEPAs outside his region. Further, there is inadequate sharing of information on what other FEPAs and EEOC offices are doing with regard to a specific employer.[74]

Recommendation 6.11: EEOC should do more monitoring of FEPA practices and conduct on-site visits of FEPAs to facilitate more of an exchange of information. In addition, EEOC district offices that have geographical challenges with respect to FEPAs under their jurisdiction should be given a proportional increase in their travel budget that would allow them to visit the FEPAs in their districts more often.

Finding 6.12: EEOC provides assistance, as needed, but does not get involved in the investigative process of the FEPAs. FEPAs are not required to conduct investigations in a particular manner. In addition, dual-filed cases are not prioritized as category A, B, or C by most FEPAs. Because FEPAs are free to develop their own methods for investigating and resolving charges of discrimination, there may be differences in the ways cases are handled and closed.[75]

Recommendation 6.12: EEOC must ensure consistency in charge handling by both its district offices and the contracting FEPAs. EEOC should assess the practices used by FEPAs in their charge processing activities, including prioritization of charges. Because a variety of FEPA practices also could be instructive for EEOC, EEOC and the FEPAs should jointly develop methods for charge handling to ensure consistency across agencies and offices.

Funding for FEPAs

Finding 6.13: Perhaps no other area has been adversely affected by budget constraints as the payment allocated for FEPAs. During the past five years, funding for the State and Local Program has not increased significantly, and the amount paid per investigation to FEPAs has not increased since fiscal year 1994. Currently, FEPAs receive only $500 per investigation, which is $300 less than what was paid to contract mediators when funds were available for that program. This amount of funding is insufficient to cover the full cost of processing a charge, particularly when expenses for travel, court reporters, etc., are incurred during investigations.[76]

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[73] *See* chap. 6, pp. 208–09.

[74] *See* chap. 6, p. 214.

[75] *See* chap. 6, pp. 205–06.

[76] *See* chap. 6, p. 210.

Recommendation 6.13: Additional funds for the FEPA program should be allocated first to provide an increase in the FEPA payment for charge resolutions. The Commission recommends that EEOC and Congress factor in the cost to FEPAs to investigate and close charges when considering appropriations for the State and Local Program in future years. When it submits its budget requests to Congress, EEOC should specifically request appropriations which will allow an increase in the per-charge reimbursement for charges processed by FEPAs.

Second, in addition to the per-charge increase, EEOC should increase the number of charges it accepts from FEPAs. Third, when additional funds are approved for EEOC's mediation program, EEOC should integrate FEPA mediation resources into its pool of mediators. As such, EEOC should request approval from Congress to contract with FEPAs for mediation services at the same rate it does with other mediators.

Contracting Issues

Finding 6.14: Several FEPA directors stated that there were substantial delays in getting their final contracts from EEOC. Therefore, they have no idea how many charges they will be reimbursed for handling. The delay in receiving the final contract is combined with insufficient knowledge of how many cases have been accepted by EEOC for contract credit throughout the year. Other FEPA staff noted that it is difficult to get revisions made to their contracts with EEOC, and it is even more difficult to get the contracts revised for a greater number of charges. Another concern of FEPA staff is that EEOC continues to establish contracts with new FEPAs, which results in the inability to increase contracts with existing FEPAs.[77]

Recommendation 6.14: The FEPA contracts should be reviewed and established for the following fiscal year prior to the middle of the current fiscal year. This will enable both agencies time to evaluate the needs to run the FEPA program successfully. Other tools, such as grants and formal co-sponsorship agreements for specific projects, should be considered and, where feasible, used.

Charge Data System

Finding 6.15: EEOC plans to update FEPAs' computer equipment used for the Charge Data System over the next few years. Although some FEPA staff stated that the CDS is useful and suits their purposes, others identified specific problems with the system. For example, because of the limitations of the CDS some FEPAs are developing or using two case tracking systems.[78]

Recommendation 6.15: One of the top priorities at EEOC should be to correct problems with the Charge Data System. Appropriations that are used to upgrade FEPAs' charge data system equipment and for the maintenance of computer equipment could be better used to upgrade EEOC's system which can be used by both EEOC and FEPAs. Improving the CDS would eliminate duplication and expenditures to maintain two tracking systems. EEOC should solicit the input of FEPAs when upgrading the CDS.

Criticisms of the EEOC/FEPA Relationship

Finding 6.16: Several groups and organizations have identified deficiencies plaguing FEPAs, including a lack of funds, weak civil rights laws, and inconsistent approaches to resolving complaints of discrimination. Other studies have found inconsistencies between FEPAs and EEOC in the handling of charges of discrimination. Many of the FEPAs' problems have been attributed to severe budget cuts, overworked staff, lack of staff expertise or training, and insufficient funds to carry out their responsibilities efficiently and effectively.[79]

Recommendation 6.16: The appropriations for FEPAs under the EEOC State and Local Program need to be increased so that the quality of FEPAs' charge processing abilities is equivalent to that of EEOC's. Federal and state funds are needed for the hiring of quality and diverse staff, staff training, vigorous enforcement and proactive approaches to combating employment discrimination, and the development of guidelines for conducting investigations and making determinations of probable cause.

Further, a comprehensive review of FEPA activities must be done. The U.S. Commission on Civil Rights, GAO, or EEOC should conduct a review of the FEPAs with respect to funding,

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[77] *See* chap. 6, pp. 212–13.

[78] *See* chap. 6, p. 214.

[79] *See* chap. 6, pp. 215–17.

complaint processing, and the need for stronger laws. Such a review should include a detailed analysis of the quality of complaint investigations, budgetary constraints, and related issues for at least a random sample of FEPAs, if not all FEPAs. This review should result in findings and recommendations aimed at improving the efficiency of individual FEPAs as well as the overall processing of charges of employment discrimination by civil rights enforcement agencies.

Finally, as recommended above, a FEPA/EEOC task force must be established to review processes across EEOC district offices and FEPAs. Input from both EEOC and FEPA staff is necessary to ensure more consistent and effective charge handling by the various enforcement agencies across the country.

CHAPTER 7. EEOC'S TECHNICAL ASSISTANCE, OUTREACH, AND EDUCATION ACTIVITIES

The Importance of Technical Assistance and Outreach

Finding 7.1: Technical assistance and outreach are recognized as important components of EEOC activity to achieve its mission of eradicating employment discrimination. EEOC is required to conduct education and outreach by statute. The EEOC chairperson and commissioners recognize it as a tool for preventing and remedying discrimination and have given it a high priority. Planning and budget documents, including the National and Local Enforcement Plans, the Comprehensive Enforcement Program, various fiscal years' budget requests, and Annual Performance Plans written to comply with the Government Performance and Results Act (GPRA), describe many proposed technical assistance and outreach activities. An EEOC management directive gives responsibility for aspects of technical assistance and outreach programs to various headquarters offices as well as to all district, local, and area offices.[80]

Recommendation 7.1: The EEOC chairperson, commissioners, and headquarters and field office staff must repeatedly emphasize the importance of technical assistance and outreach and use the existing office structure and planning documents to enhance this component of EEOC activity.

The Continuing Struggle for Technical Assistance and Outreach Resources

Finding 7.2: Congress established the Revolving Fund to pay the cost of education, technical assistance, and training related to fair employment laws. As a result, EEOC's efforts divide into fee-based and free components. "Technical assistance" is provided for a fee that is deposited in the Revolving Fund. It involves specialized and in-depth training services mostly for employers. "Outreach" is provided free of charge to more general audiences and includes information available through printed materials, speeches, workshops, and presentations produced with appropriated funds.

Having provided the Revolving Fund to support technical assistance, Congress has all but abandoned EEOC efforts to conduct outreach. Congress restricted the Revolving Fund so that fees can only be charged to offset, and cannot exceed, the costs of education, technical assistance, and training provided with the fund. Thus, the Revolving Fund cannot support the costs of the free outreach program. At the same time, however, Congress mandated that EEOC reach out to communities that have been underserved, while giving district offices very limited budgets of $15,000 per office. Congress has not been forthcoming with appropriated funds to support comprehensive plans for outreach. It did not support an FY 1996 budget request for $500,000 to expand outreach. As a result, plans to develop sustained outreach products, such as videos, public service announcements, and information packets, were reduced to reviewing the currency of existent information pieces.[81]

Recommendation 7.2: Congress should consider ways to increase funding for EEOC's free outreach program, whether through additional appropriations or through a modification of the Revolving Fund so that a percentage of the Revolving Fund can be used for free outreach. Perhaps funding could be allocated for specific initiatives. At the same time, EEOC must justify, through its budget requests, the need for additional funds and articulate a clear plan for its outreach activities.

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[80] *See* chap. 7, pp. 220–24.

[81] *See* chap. 7, pp. 221–23.

Headquarters Management of Technical Assistance and Outreach

Finding 7.3: Headquarters gives district offices autonomy in conducting technical assistance and outreach, but uses a number of management tools to track their activities. These include the district office outreach goals expressed in Local Enforcement Plans, management of the Revolving Fund, a database for tracking technical assistance, technical assistance program evaluation, and training of outreach staff.[82]

Recommendation 7.3: EEOC must create a central technical assistance and outreach office at headquarters to provide direction, consistency, and coordination of these efforts.

Finding 7.4: Headquarters has directed district offices to provide two annual Technical Assistance Program Seminars (TAPS), but has given very little guidance on developing an outreach program, other than requiring them to identify underserved communities and seek input from advocacy groups and stakeholders. District offices describe their plans for outreach in the LEPs. However, LEPs were first submitted in 1996–1997 with broad-ranging plans, but without a proposed budget or timeline for completion. For FY 2000, headquarters asked only that revised LEPs describe outreach plans for the next two years, and district offices reported making few revisions to the 1996–1997 plans. In addition, a national plan for outreach has not emerged.[83]

Recommendation 7.4: EEOC has established commendable goals and management tools for managing technical assistance and outreach, however, these tools need to be strengthened. The broad-ranging outreach activities that district offices included in their LEPs were very good and should be continued. Headquarters, however, should require that district offices develop a plan with options pegged to a timeline and budget to demonstrate to Congress the effect of appropriations, or lack of them, on outreach. Headquarters should give district offices assistance in developing proposed timelines and budgets for various outreach activities, such as developing videos.

Finding 7.5: Congress provided a one-time transfer of $1 million to establish the Revolving Fund. Headquarters has tried to ensure that Revolving Fund moneys are efficiently spent, cost effective, and targeted as Congress intended. To best target technical assistance and outreach activities, EEOC hired a consultant for advice. The Agency also consults stakeholders and requires district offices to do the same. In managing the fund, headquarters sets the fees for TAPS and reviews and approves proposals for customer-specific training to ensure uniformity of cost throughout the nation. Because TAPS are considered expensive, headquarters has formed a task force to find ways to reduce the cost. Under headquarters management, the fund has become increasingly solvent even as the activities it has supported have been expanded. Nonetheless, district office staff expressed concerns about the fund's ability to support travel to remote areas of the district and whether the recipients of technical assistance under the Revolving Fund are a broad-based audience.[84]

Recommendation 7.5: EEOC must continue to ensure that its procedures for managing the Revolving Fund enhance its technical assistance and outreach program. Headquarters should quickly complete its reviews of proposals for customer-specific training. It should carefully monitor participants in Revolving-Fund-supported technical assistance to ensure that audiences are broad based according to geography, size of business, and other appropriate criteria. It must keep the fund solvent.

Finding 7.6: The Revolving Fund-supported technical assistance programs—TAPS and customer-specific training—are evaluated systematically. Headquarters developed an evaluation form, provides it to all registrants, and tabulates responses. District office staff may review these evaluations to gauge the success of their programs. Although these evaluations give the participants' ratings of how well the content of the program meets employers' needs, they do not indicate whether employers changed their behaviors or company policies as a result of the program. EEOC staff believe that the TAPS are effective, and that employers are taking preventive measures after attending TAPS, but no follow-up has been done.[85]

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[82] *See* chap. 7, pp. 224–26.

[83] *See* chap. 7, pp. 225–26, 237.

[84] *See* chap. 7, pp. 226–27.

[85] *See* chap. 7, p. 229.

Recommendation 7.6: EEOC headquarters is to be applauded for its efforts to evaluate TAPS systematically. At the same time, the evaluation program could be strengthened. It could, for example, include a follow-up to determine whether or not employers have changed policies as a result of attending TAPS sessions. EEOC should also consider developing other measures of TAPS effectiveness. For example, EEOC could assess whether participants are less likely to be respondents to charges or whether there is increased diversity reported on EEO-1 forms of participants.

Finding 7.7: Outreach staff have had very little training. It is only recently that headquarters and each district office have had outreach coordinators. The first national training conference for outreach staff was in 1997. Subsequent training conferences have not been held annually because of budget cuts. Apart from the sporadic conferences, the exchange of ideas among outreach coordinators has been promoted through a newsletter describing field office outreach activities and through a monthly conference call with the coordinators.[86]

Recommendation 7.7: EEOC should conduct annual training for outreach coordinators. Congress should provide funding to EEOC to support an annual training conference for staff engaged in outreach.

District Office Technical Assistance and Outreach

Technical Assistance Program Seminars

Finding 7.8: Each district office offers two or more TAPS each year that are geared toward private employers and state and local agencies and are supported by the Revolving Fund.

In planning TAPS, EEOC appears to be responding to its audience. When seminars were heavily oversubscribed, and some applicants could not be accommodated, EEOC increased the number of TAPS. When full-day programs were unaffordable for underserved groups, district offices began offering less expensive half-day events. When stakeholders needed technical assistance on broader-based employment laws than those EEOC enforces, district offices expanded the programs to include presentations from other federal agencies. District offices have also varied the locations of TAPS to attract more participants.[87]

Recommendation 7.8: EEOC should continue to develop TAPS that respond to the needs of its audience, nonetheless maintaining a focus on the laws that EEOC enforces.

Finding 7.9: TAPS are marketed to employers, labor law attorneys, human relations and personnel directors, and labor relations people. The audiences are becoming broader over time, including small and medium-sized employers, not just large ones.[88]

Recommendation 7.9: EEOC should continue marketing TAPS to employers, attorneys, human relations and personnel directors, and labor relations advocates. It should also consider broadening TAPS audiences to include supervisors and educators offering training for managers and supervisors.

To expand its reach, EEOC should use its Charge Data System to identify groups that could most benefit from TAPS, for example small or mid-sized businesses or state and local governments, and market the programs accordingly.

Finding 7.10: The content of TAPS is tailored to areas of public interest. Popular topics are sexual harassment, the Americans with Disabilities Act, alternative dispute resolution, and governmentwide sessions on employment law. Some programs have included workshops of case scenarios for role playing, although most of those have concerned ADA issues.[89]

Recommendation 7.10: EEOC should continue to develop TAPS with sensitivity toward its audience's needs and interests. At the same time, coverage of the laws that EEOC enforces should be comprehensive and must be balanced with more popular topics. TAPS should focus on NEP and LEP issues, the latter of which are area specific, and on case law developments.

District office efforts to develop role plays to engage attendees in active participation are to be commended. Similar material should be developed for other laws that EEOC enforces.

Customer-specific Training

Finding 7.11: Like TAPS, customer-specific training is fee based and supported by the Re-

[86] *See* chap. 7, pp. 229–30.

[87] *See* chap. 7, pp. 231–32.

[88] *See* chap. 7, p. 232.

[89] *See* chap. 7, p. 233.

volving Fund. However, customer-specific training or customized technical assistance is conducted on-site at the invitation of the employer. EEOC developed the capacity to respond to employers' requests for specialized training only in FY 1998. The process of negotiating customized training is long and does not always come to fruition. EEOC can spend time and energy developing the program, and then the company has the option to change its mind about having the program. When this happens, the time spent designing the training, which should have been supported by the fee, is not paid, and the Revolving Fund is not reimbursed.[90]

Recommendation 7.11: EEOC should carefully track employers' requests for customized training, the costs associated with the development of customized training, the numbers of sessions that are completed successfully and abandoned without being completed, and the effects of these on the viability of the Revolving Fund.

Free Outreach

Finding 7.12: EEOC staff clearly see outreach as any means to educate charging parties, employers and other respondents, or practicing attorneys about the civil rights statutes EEOC enforces. Numerous staff identified the routine activities of charge processing as a form of outreach. Charge intake procedures such as providing fact sheets or pamphlets and responding to inquiries, on-site investigation, mediation, working cases jointly with private attorneys, litigating, and publicizing litigation outcomes, are all regarded as ways to educate charging parties, employers, and attorneys about fair employment.[91]

Recommendation 7.12: EEOC staff should recognize their routine activities as related to outreach so that they can take advantage of every opportunity to educate employers, charging parties, and the public about fair employment laws. Intake counseling should be especially recognized as a form of technical assistance, given the Agency's emphasis on customer service.

At the same time, district office staff must not limit outreach to everyday activities but seek to develop and implement a comprehensive outreach program. This plan should be designed to capitalize on routine enforcement activities as a form of outreach. It should also provide for the design and execution of outreach projects that are not part of everyday enforcement activities.

Finding 7.13: Giving presentations, responding to questions, and providing handouts are common outreach activities. Audiences for outreach presentations consist of private and government employers as well as attorneys, and representatives of labor organizations, human resource associations, advocacy groups, and media.[92]

Recommendation 7.13: EEOC should place greater emphasis on outreach that establishes contact with potential charging parties. District offices need to find more and better ways of reaching the public, for example, through holding town meetings, as some district offices are doing; using community centers, adult learning programs, and religious organizations to promote knowledge of EEOC; or gaining respondents' cooperation in providing handouts to employees.

Finding 7.14: District offices engage in outreach with private attorneys by responding to telephone inquiries concerning legal issues, maintaining professional contacts, speaking before bar associations, and, in rare instances, working closely with inexperienced attorneys on fair employment suits.[93]

Recommendation 7.14: EEOC must expand its outreach to private attorneys, particularly in ways that encourage them to represent charging parties and serve as pro bono mediators. This should be done in conjunction with the development of the attorney referral list.

Finding 7.15: One component of district office outreach programs is contacting community organizations and advocacy groups. Some district offices have tried to establish two-way relationships that not only provide information, but seek it as well by soliciting input on fair employment issues and ways to reach underserved groups.[94]

Recommendation 7.15: Headquarters EEOC should encourage district offices to more actively involve community organizations and advocacy

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[90] *See* chap. 7, pp. 234–35.

[91] *See* chap. 7, pp. 235–36.

[92] *See* chap. 7, p. 238.

[93] *See* chap. 7, pp. 238–39.

[94] *See* chap. 7, pp. 239–40.

groups in promoting EEOC's mission. All district offices should move beyond merely contacting these groups to provide information about EEOC toward actively involving them in identifying concerns about employment discrimination and promoting solutions, for example, by co-sponsoring outreach events and filing third-party charges.

Finding 7.16: Although TAPS are evaluated systematically, outreach is not. Yet commissioners and district office staff view outreach efforts as effective within current budgetary constraints. District staff gauge success by the number of charges filed, especially from underserved communities, awareness of fair employment laws, the number of requests for customer-specific training, the number of TAPS participants, communications with stakeholders, and joint outreach activities with community organizations. In addition, some district offices have organized advisory councils to provide feedback on areas where EEOC is not appropriately serving the community.[95]

Recommendation 7.16: EEOC should establish a method to evaluate outreach, whether by measures of performance or feedback from stakeholders. District office staff have identified a good list of measures of success for their outreach programs, some of which could be formalized and tracked. Program evaluations could be used to justify the need for additional outreach resources, including appropriations. The Automated Outreach System should also be used to evaluate participation rates and trends and to track overall satisfaction rates based on feedback surveys.

Finding 7.17: Only recently have outreach duties become so focused that each district office now has a program analyst whose primary duty is to conduct outreach. In the typical office structure, the program analysts' duties involve making presentations, coordinating staff volunteers for conducting outreach, maintaining contacts with advocacy groups and business organizations, aggressively seeking out organizations that may serve as vehicles for further outreach, and submitting quarterly reports of outreach activities to headquarters. The program analyst often has the responsibility of identifying underserved areas and communities, too.

Program analysts spend most or all of their time on outreach and technical assistance. Other staff voluntarily assist with technical assistance, but spend only modest amounts of time in this capacity. The CEP states that outreach and education are joint responsibilities of both enforcement and legal staff. Although district offices may wish to increase the staff time devoted to outreach, doing so would reduce the enforcement staff's time spent on processing charges and could create another backlog of unprocessed charges. The role of enforcement staff in outreach is clearly defined, so that, for example, investigators do not engage in outreach when in the field, but may inform the program analyst of any employers' inquiries.[96]

Recommendation 7.17: EEOC should evaluate the current responsibilities of program analysts and determine what activities district offices could perform with additional staff resources for outreach and the anticipated effects of conducting more outreach. Congress should provide EEOC with appropriate, additional staff and funding resources to perform outreach, including adequate support staff to schedule outreach sessions.

EEOC outreach staff should explore additional ways in which outreach could be conducted by other staff such as attorneys and investigators in the course of their everyday activities. For example, investigators could provide a packet of materials to respondents when they conduct investigations.

District offices should share their innovative ideas, strategies, and office structures for conducting outreach. Headquarters should provide forums by which district offices can exchange these ideas.

Special Outreach Efforts

Outreach to Small and Mid-sized Businesses

Finding 7.18: EEOC implemented a Small and Mid-Sized Businesses Initiative to increase these business owners' access to information about antidiscrimination laws and to promote voluntary compliance. The initiative has largely involved having representatives of small businesses speak at commission meetings and providing fact sheets and other information on the EEOC Web site. Small business representatives

[95] *See* chap. 7, pp. 240–41.

[96] *See* chap. 7, pp. 241–45.

revealed vast needs for information and assistance and identified a number of concerns that EEOC has tried to address. For example, small business representatives asked that EEOC appoint liaisons in each district office to focus specifically on small business concerns, and the program analysts who serve as outreach coordinators assumed this role.

The business owners asked for short presentations, possibly through chambers of commerce, where employers may obtain information about EEOC and the statutes it enforces. District office staff have since reported more technical assistance to small businesses, some of which involved working through chambers of commerce. EEOC recognized the need for more affordable half-day TAPS to reach small businesses, but half-day TAPS are neither common, nor widespread across district offices.

Further, the lack of participation in mediation by small businesses indicated a need for technical assistance and outreach to explain EEOC's ADR program. EEOC's promotion of mediation since February 1999 has been nationwide, although without any specific targeting to small business owners. Further, the business representatives asked for a customer service initiative, which was announced in 1999 with an agenda of addressing the concerns the business owners had raised. The first named goal in the Comprehensive Enforcement Program was excellence in customer service, but the document discussed customer service only with respect to charging parties, not employers or small businesses.

Finally, a primary concern of small business representatives was that the information on the Web site, although praised as valuable, was not targeted to human resource professionals or business owners, and as such did not sufficiently address needs of business owners, particularly concerning how to prevent discrimination. The business owners asked that the information be rewritten in plain English. A transformation into more user-friendly language was reportedly occurring in October 1999, but it is unclear whether EEOC will augment the Web site with information on how to prevent discrimination. The district office training modules abound with information and examples that could provide practical information to employers through pamphlets or the Internet.[97]

Recommendation 7.18: EEOC should continue addressing the concerns of small and mid-sized businesses. It should continue to seek input from them at commission meetings. The Agency should try to offer more free outreach through local chambers of commerce and more half-day TAPS in district offices. It should ensure that mediation is promoted within the small business community. The Customer Service Initiative should address service to employers as well charging parties.

Information provided on the Web site should be written at a level appropriate for the audience. Also EEOC should augment its Web site with practical information on ways of preventing discrimination. District office training modules may provide a resource for developing information to appear there.

EEOC should direct some outreach to small businesses in rural communities where job opportunities may not be as prevalent. The Agency should advise small businesses on practices that could be discriminatory but may be troublesome because of their size, for example, practices regarding religious accommodation of Sabbath observances.

Finding 7.19: Despite the Small and Mid-Sized Business Initiative, small businesses appear to be receiving very little of EEOC's outreach and technical assistance according to data recorded in EEOC's Automated Outreach System.[98]

Recommendation 7.19: EEOC should monitor the success of its Small Business Initiative. The Automated Outreach System provides an estimate of the number of representatives of small business that the Agency reaches. The proportions of employers that are small businesses and of respondents that are small businesses as measured in the Charge Data System could provide benchmarks to determine whether EEOC is reaching a reasonable portion of the small business community through its outreach. Furthermore, the Agency must make full use of the nationwide Small Business Development Centers (SBDCs), located in every state as well as Small Business Administration (SBA) district

[97] *See* chap. 7, pp. 245–46.

[98] *See* chap. 7, p. 250.

offices to disseminate information to business owners.

Outreach to Underserved Areas and Groups

Finding 7.20: EEOC's effort to reach underserved areas and groups began in FY 1995 or FY 1996. District offices identified the underserved first by looking at geographic areas, then by examining industries using EEO-1 reports. Newspaper articles, knowledge of the community, public events, and input from stakeholder organizations and advocacy groups are other methods used to identify the underserved.

Apart from remote or less urban geographic areas, the underserved groups that district offices have identified include low-wage workers and farm workers. For example, several field offices joined together in an effort to reach low-wage workers and brought national attention to their concern by conducting a commission meeting in the area.[99]

Recommendation 7.20: District offices should continue using innovative methods to identify and bring attention to underserved communities and areas. Headquarters should provide opportunities for district offices to share their experiences so that all district offices can benefit from using the most effective ones.

EEOC should develop a means to evaluate the effectiveness of the Agency's outreach, education, and technical assistance programs to underserved groups. The Agency should establish an advisory committee of community representatives to assist in the development of standards to evaluate the effectiveness of these efforts. Staff should prepare reports of the evaluations for the commissioners' review on an annual basis.

Finding 7.21: The usual technical assistance and outreach efforts, such as by advertising TAPS, have not been very successful in reaching underserved areas. Co-sponsoring seminars with community-based organizations has proven to be a better way to reach them.[100]

Recommendation 7.21: Congress should provide sufficient appropriated funds for EEOC outreach so that district offices can co-sponsor fair employment seminars with community-based organizations in underserved areas. Allocations should include sufficient travel funds for remote and distant areas.

Finding 7.22: Outreach to minority groups has emphasized Hispanics, Asian Americans, and Native Americans because they often do not understand their rights and are uncomfortable filing charges. Multilingual outreach, hiring multilingual investigators and program analysts, contact with ethnic media, multilingual educational materials, and working with community organizations are factors EEOC has emphasized for reaching them.[101]

Recommendation 7.22: EEOC should form task forces to examine alternate ways of reaching these groups and to consider ways that the Agency can hire more multilingual investigators and program analysts or others with a cultural understanding of these groups. For example, the task force might draft proposals for temporary employment or intern programs for persons from underserved groups or communities to assist with outreach, thereby acquiring both job skills and knowledge of EEOC laws while promoting an awareness of EEOC laws in the course of their employment.

Finding 7.23: It is not clear what special efforts are made to reach African Americans. As EEOC focuses more effort on reaching underserved groups and on developing class cases and cases that change or clarify law, the concerns of African Americans, whose cases are not generally vehicles for further developing law, may be ignored. If African Americans are most often left to seek private attorneys to pursue their charges, frustration with EEOC will grow.[102]

Recommendation 7.23: EEOC must make a special effort to ensure that the rights of African Americans to fair employment are not ignored in the effort to reach underserved groups. Assistance to African Americans may include helping them to prepare documentation of discrimination and providing attorney referrals. District offices should renew efforts to work with African American advocacy groups and community leaders.

Finding 7.24: Outreach to women will occur as part of a headquarters initiative on the Equal Pay Act proposed in fiscal years 2000 and 2001. The initiative is to expand opportunities for

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[99] *See* chap. 7, pp. 250–52.

[100] *See* chap. 7, p. 251.

[101] *See* chap. 7, pp. 253–54.

[102] *See* chap. 7, p. 254.

women and minorities and close the male-female wage gap. It is unclear whether Congress will honor the Agency's request for additional staff and funding to support this initiative.[103]

Recommendation 7.24: The Commission on Civil Rights supports EEOC's Equal Pay Initiative and recommends that Congress approve the request so that efforts to enhance outreach on the EPA can proceed. If and when the initiative takes place, EEOC should collaborate with women's groups and the Department of Labor's Women's Bureau to make it most effective.

EEOC Outreach with or for Fair Employment Practices Agencies

Finding 7.25: EEOC does not appear to have made any concerted effort to include the fair employment practices agencies (FEPAs) in its technical assistance and outreach programs or to participate in their annual programs. FEPAs are invited to participate in TAPS and an annual training conference that headquarters holds for FEPA staff, but EEOC and the FEPAs are not encouraged to work together and rarely do.[104]

Recommendation 7.25: EEOC should use FEPA, and also Tribal Employment Rights Organization (TERO), resources to reach underserved populations in areas where EEOC presence is limited. For example, the Agency should provide FEPAs and TEROs with outreach materials and modules so that they can conduct presentations and distribute information just like district offices.

As part of its annual conference for FEPAs, EEOC should hold a workshop on the role FEPAs can play in EEOC's technical assistance and outreach. The workshop should involve EEOC district office staff, as well as FEPA staff, and should discuss the types of joint projects that would enhance both the FEPAs' and EEOC's goals and the advantages and barriers to their working together. EEOC should compile a summary report of issues that arise in the workshop so that any barriers to district offices and FEPAs collaboration can be eliminated.

Finally, EEOC's future performance plans should include specific steps for providing outreach to FEPAs and TEROS and for partnering with FEPAs and TEROs to conduct outreach to the general public.

Educational Materials

The Internet and Other Written Communication

Finding 7.26: EEOC launched a Web site on the Internet in February 1997. General Agency information, including biographies of the commissioners, phone numbers of field offices, text of the laws EEOC enforces, press release, fact sheets, and information on TAPS, is found there. Since then, the Web site has been restructured for faster and easier access to information with the result that the site receives more than 100,000 hits per week. Despite the fact that the site has been hailed as a highly valuable information resource, some small business owners have complained that the information is not targeted to human resource professionals of businesses.[105]

Recommendation 7.26: EEOC must continue to develop its Web site, using it to provide up-to-date information on fair employment laws. The Agency must recognize the needs of its audience for practical information on preventing discrimination, rather than just legal information, and should present information accordingly.

Finding 7.27: EEOC has fact sheets on the Internet and printed as flyers to distribute at technical assistance and outreach sessions and to persons making inquiries about charges. The fact sheets address employment discrimination on most bases of the laws EEOC enforces. However, currently, none of the headquarters fact sheets concern the Equal Pay Act. One district office developed its own fact sheet on the EPA and another office uses another organization's fact sheet.[106]

Recommendation 7.27: EEOC should immediately develop a fact sheet concerning discrimination under the EPA, particularly given the Equal Pay Initiative. The fact sheet should be posted on the Web site and made available to district offices for dissemination. In doing so, the Agency should consult with women's groups and the Department of Labor's Women's Bureau.

Finding 7.28: Although EEOC has fact sheets, brochures, and booklets, only the fact

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[103] *See* chap. 7, p. 254.

[104] *See* chap. 7, pp. 254–55.

[105] *See* chap. 7, pp. 255–56.

[106] *See* chap. 7, p. 256.

sheets are available in languages other than English, and the only other language they are in is Spanish. A general brochure about filing a charge of job discrimination is available in Braille, large print, audio tape, and electronic file. Efforts to translate EEOC publications into languages other than English need to be proofread by someone knowledgeable about the vocabulary of equal employment opportunity procedures and laws, and EEOC is still seeking people fluent in the appropriate languages to perform the proofreading.[107]

Recommendation 7.28: EEOC should increase its efforts to produce fact sheets, brochures, and booklets in languages other than English and in Braille, large print, audio tape, and electronic file formats.

Finding 7.29: In addition to the educational materials provided by headquarters, district offices have developed fact sheets, pamphlets, newsletters, and other innovative handouts, many of which bear the address and names of contact persons in their local offices. Some of these provide jurisdictional information, explain differences between federal and state laws and local ordinances, or give differences between enforcement procedures of various agencies.[108]

Recommendation 7.29: Headquarters should maintain a library of information resources that are available to both field offices and FEPAs and TEROs. This library should contain a collection of templates for fact sheets, brochures, and pamphlets that district and area offices can have printed with their local addresses and telephone numbers and examples of educational materials used in all the field offices. A bibliography of these resources should be compiled and distributed to all field offices, FEPAs and TEROs.

District and area offices that have not done so should consider developing fact sheets, pamphlets, newsletters, or other outreach handouts that may better address local situations and aid complainants in filing charges or employers in implementing nondiscriminatory policies and procedures.

Finding 7.30: EEOC's Compliance Manual provides extensive technical information on the Agency's enforcement activities and equal employment law. Large employers, employment rights organizations, attorneys, and others with a desire to remain current on employment discrimination law and policy can subscribe to a service providing updates for this resource. Yet at least some of the materials in this three volume set are outdated or obsolete.[109]

Recommendation 7.30: EEOC should review its Compliance Manual and take whatever action is necessary to ensure that all volumes of it are current. For example, the Field Coordination Programs Unit in EEOC's Office of Field Programs should review and update all materials in volume I. Appropriate offices or units should review and update other volumes, under the joint direction of Office of Field Programs and Office of Legal Counsel. EEOC should designate a staff person or unit to coordinate this effort to update and maintain the currency of the Compliance Manual.

In addition, EEOC should review both the content and dissemination of the Compliance Manual as a technical resource for outreach. To determine whether the Compliance Manual should be promoted as a resource for outreach, EEOC should study whether subscribers to the manual find it useful; whether it is widely available, for example, in public libraries or through organizations such as FEPAs that might be willing to provide access for the public. EEOC should explore ways in which the Web site might increase access to the Compliance Manual, for example, by providing information on how to purchase a copy or other places where the manual is available for viewing.

Videos

Finding 7.31: EEOC plans to develop sustained outreach products, such as videos, have not materialized because of lack of resources. Once developed, videotapes can be shown at no cost, providing inexpensive outreach.[110]

Recommendation 7.31: EEOC should develop a comprehensive national plan for the development and use of videos, whether they are for intake, mediation, or outreach to employers and/or charging parties. The Agency should review its inventory of videotapes at headquarters and in district offices in terms of purpose, con-

[107] *See* chap. 7, p. 257.

[108] *See* chap. 7, p. 257–58.

[109] *See* chap. 7, p. 259.

[110] *See* chap. 7, p. 259.

tent, language, and audience. It should also compile a list of district offices' proposals to develop videos and the needs for these or any other videos addressing underserved communities, non-English-speaking groups, or special initiatives. Proposals should indicate any plans to involve community organizations or educational institutions in the design or production of videos. For example, using students of historically black colleges or universities to design and produce a video is an excellent way of teaching young people about discrimination apart from leaving a product that can be viewed by others again and again. The national plan should prioritize proposed videos according to appropriate needs or issues. Congress should provide funding for EEOC to develop videos according to a comprehensive national plan.

Using the Mass Media

Finding 7.32: EEOC headquarters and district office staff spoke of using the media through newspapers, advertising, radio, television, including cable television, and the Internet for outreach. District office staff agreed that some media are better than others for certain groups. However, which media were best with which groups was not always clear. At the same time, media use must be carefully planned and strategically executed. In some instances, EEOC's use of the media has not been targeted to either the appropriate audience or the level of understanding of the audience.[111]

Recommendation 7.32: EEOC should compile a manual for outreach containing information on the various media and which are most effective with various groups. In compiling this manual, EEOC should draw upon experiences of district office staff as well as the existing body of social science research. In addition, EEOC should provide media training for all headquarters and district office staff engaged in outreach so that they can appeal to specific audiences within their jurisdictions. The training should be conducted by media professionals.

EEOC should carefully plan the use of the media to inform members of the general public of their rights, how to exercise those rights, and the role of EEOC in protecting and enforcing those rights.

EEOC should also consider developing national public service announcements as part of its overall technical assistance effort. To ensure that the announcements cover all geographical areas, EEOC headquarters should work closely with field offices, FEPAs, TEROs and other community organizations to develop the program.

Finding 7.33: EEOC field offices use the news media to report results of cases or settlements because of its suspected deterrent effect on discrimination. They must establish contacts in the media and distribute press releases when important EEOC resolutions occur. One district office recently expanded its media contact list with good results—coverage in several different news media.[112]

Recommendation 7.33: District office staff must review their media lists to ensure that they are as broad and up to date as possible, including a multitude of contacts for print, television, and radio. Special attention should be paid to outreach using Spanish-language radio and ethnic-oriented media.

[111] *See* chap. 7, p. 259.

[112] *See* chap. 7, pp. 259–60.

Statement of Chairperson Mary Frances Berry, Vice Chairperson Cruz Reynoso, and Commissioners Christopher F. Edley, Jr., Yvonne Y. Lee, Elsie M. Meeks, and Victoria Wilson

In this report, the Commission examines, for the first time since 1987, the organization and structure of the EEOC, and its efforts to carry out its mandate. Recognizing the effect of fair employment on the American economy and global competitiveness, the Commission acknowledges the need to continue to monitor enforcement of our fair employment laws.

In view of the large volume of charges EEOC has received during the past few years, the report evaluates the Agency's charge prioritization and investigative procedures to determine whether or not the Agency has been effective at reducing its case backlog. We found that through mediation and litigation the Agency has addressed the increased volume of charges, and we have found areas needing improvement.

This Commission recognizes that there are multiple components to the effective fulfillment of EEOC's mission, many of which are predicated on internal initiative and operational procedures, but some of which are contingent upon adequate resources. Ultimately, if employment discrimination is to be eradicated, there must be a comprehensive effort on the part of Congress and the President to ensure that EEOC has the resources and tools it needs.

The report is in no way concerned with recommending for or against a policy of comparable worth. It does, however, acknowledge that wage disparities continue to exist which present troublesome enforcement problems. EEOC enforcement efforts could benefit from more concrete guidelines and procedures for investigating charges of wage discrimination. In addition, the report emphasizes the need for increased training for EEOC staff in identifying and responding to wage discrimination claims and for more research on discrimination in the payment of wages.

We cannot emphasize too strongly the report's recommendations for increasing the infusion of needed resources into the Agency so that the EEOC can accomplish its mission. While management reforms may promote efficiency and productivity, the EEOC can only perform its most essential functions with funding levels that address workload demands. It is disturbing that even with recent budget increases the Agency's resources are clearly insufficient to meet its responsibilities.

We believe that among improvements that would make it more possible for EEOC to perform its statutory mandate is greater attention by the President and the Senate to filling top management positions of political appointees when vacancies arise. This recommendation applies in and out of season no matter which political party is in power. The Agency should not be forced to operate under temporary leadership for long periods of time as has occurred at various points in its history.

The report emphasizes that technical assistance and outreach are critical components and serve two functions at EEOC. They serve to educate the public and employers about their rights and responsibilities and to identify areas where discrimination is occurring. The EEOC is obliged to uncover practices and policies that may go unnoticed for lack of knowledge about the laws available to protect individuals from discrimination and to help employers avoid discriminatory practices. This is the best way to eradicate discrimination and reduce the Agency's complaint workload in the long run.

The EEOC has addressed many of the problems the Commission pointed out 12 years ago. However, the recommendations in this report are aimed at further strengthening the capacity of EEOC to help end employment discrimination wherever and whenever it exists.

Dissenting Statement of Commissioners Carl A. Anderson and Russell G. Redenbaugh

The Commission's report on EEOC enforcement of federal equal employment laws is a backdoor endorsement of the "comparable worth" scheme of federally imposed wage guidelines. The report goes far beyond the scope of the Commission's statutory reports, which are intended to examine enforcement of existing laws. It calls for major new initiatives—such as the Paycheck Fairness Act, the Fair Pay Act, and the EEOC's Equal Pay Initiative—without having given Commissioners the opportunity of a larger discussion of these measures. Our specific concerns with the report, and the reasons we have voted to reject it, include the following:

The Misguided Demand for Comparable Worth

The fundamental and essential work of the EEOC is to enforce the law of the land, which is equal pay for equal work. In contrast, this report advocates (particularly in the discussion buried in appendix A) measures like the Fair Pay Act that would require equal pay for "dissimilar work of similar value." Our objection to the report's endorsement of "comparable worth," a proposal that would signal a major legal and political shift, is not to deny either that discrimination exists or that EEOC plays an important role in enforcing antidiscrimination laws. That is, however, exactly where the focus of the EEOC should remain—on enforcing existing laws and addressing actual cases of discrimination.

Widely discredited in the 1980s, even by our own Commission, and rejected by courts nationwide, comparable worth is social engineering masquerading as "pay equity." It aims to eliminate disparities in pay between men and women performing work that is different in content but deemed to be "equivalent" in value based on some common rating system that would be devised by federal bureaucrats. The comparable worth concept rejects any appropriate role for the market in determining the value of a job. It makes an impossible demand for equal outcomes and absolute statistical proportionality in all professions, and it is centered around a misguided portrayal of women as victims who must be saved by government-sponsored preference programs.

In 1985, based on the findings of a two-day consultation held in June 1984, this Commission issued a major report: *Comparable Worth: An Analysis and Recommendations*. The 1985 report urged Congress and the federal civil rights enforcement agencies, including the EEOC, to "reject comparable worth and rely instead on the principle of equal pay for equal work." The 1984 hearings elicited extensive testimony from a range of expert witnesses (including economists, sociologists, and legal experts) from the academic community, labor relations consulting firms, law firms, and advocacy groups. As then-Chairman Clarence M. Pendleton, Jr., described the endeavor:

> [P]rofessional and academic experts on both sides of the issue were given an equal opportunity to present their views. Of the 16 witnesses who testified during the 2-day consultation, 8 generally supported implementation of the comparable worth theory and 8 generally were opposed to it. This is a marked improvement over prior Commission consultations, which were often marred by a decidedly one-sided presentation of the issues, with few persons invited to appear who did not already share the Commission's views on the role of government or on race and gender preferences. That practice did no credit either to the Commission or to the process of an open, unbiased, and factual inquiry.

In terms of procedure, the present report, like so many others in recent years, reverts to the one-sided "fact finding" of the past. It dismisses the case against comparable worth, which is just as strong today as it was 15 years ago:

First, wage guidelines represent a radical departure from our economic system's method of setting wages, since jobs with similar descriptions often can command very different salaries. Even jobs with identical descriptions in different companies and in different circumstances often can command different salaries. For example, a quarterback for Dallas might be paid less than a quarterback for Green Bay. Also, a guard does not make as much as a defensive back or a quar-

terback—even when they are all on the same team. The problem with comparable worth is that it would overturn the notion of the market as the arbiter of prices and wages, without any proof of market failure.

Second, the comparable worth concept relies on misleading statistics to justify preferential treatment in the workplace. It tends to disregard the tremendous strides women have made in the workplace and to devalue the choices that many women make about work and their personal lives which may result in lower wages and lower rates of advancement. To paraphrase George Gilder in his work, *Men and Marriage*, the danger of comparable worth is that it collapses the thousand-fold considerations of which career to choose and which job to take into just one or two dimensions, removing the whole process from the marketplace into the political arena.

Third, there are better tools than comparable worth that are already available to address discrimination or other barriers in the workplace. The Equal Pay Act of 1963 and Title VII of the 1964 Civil Rights Act both prohibit discrimination based on sex. As the nation's leading civil rights enforcement agency, the EEOC itself is responsible for enforcing these laws.

The last half of the 20th century brought countless improvements for women in the workplace. Along with the enactment of civil rights legislation, there was a difference in expectations for women, leading them to invest to a greater degree in education and to invest more continuous years in the work force. As a result, women have experienced strong wage growth relative to their male counterparts. Nevertheless, as a result of many factors, women sometimes still earn less than men do in similar positions. The present report accepts the specious claim that "women still earn a mere 75 cents on the dollar" for each dollar a man earns. It also takes the side of those who argue that any "unexplained" portion of the wage discrepancy must be attributed to sex discrimination, even though there is no evidence to support that claim. As the Commission found during its exploration of the wage gap 15 years ago,

> Scholars, whatever their views on comparable worth, acknowledge that no purely statistical analysis, or any other method, can isolate the portion of the wage gap attributable to discrimination.

Current assessments of the gender wage gap tend to be based on the sole comparison of aggregate full-time women's salaries versus aggregate full-time men's salaries—the percentage difference between men's and women's earnings. This is extremely misleading. While our laws require equal pay for "substantially" equal work, the pay gap is not a measure of similar men and women. When differences in education, years in the workplace, and number of children are taken into account, the 25 percent pay gap diminishes significantly, to about 5 or 10 percent. A study by Cornell University's Francine Blau found that women made 88 cents on the dollar, without even accounting for age, number of children, and well-defined job categories. Erica Groshen of the New York Federal Reserve, taking all the above differences into account, shows that women made 99 percent of men's salaries. The estimates may vary, but all the available data show that women continue to narrow the pay gap with men. Our concern with the present report is that it selectively manipulates statistics so as to exaggerate the wage gap in order to justify wage guidelines and additional government interference in employer decisions.

Rather than comparing average annual wages, the report would have done well to look at women's average hourly wages. These were 84 percent of men's in 1999, up from 82 percent in 1998. Hourly wages provide a better measure of comparison, especially considering that full-time women's hours are 92 percent of men's, one reason for the lower annual wage earnings number.

Despite their avowed purpose of achieving "pay equity," wage guidelines have not worked in many locations in which they have been tried. Iowa, Minnesota, the United Kingdom and Ontario, Canada, all provide separate examples showing the limitations of comparable worth systems. According to Diana Furchtgott-Roth, a resident fellow at the American Enterprise Institute who has studied all of these cases, "wage guidelines work against women's interests." This is why: evidence shows that if employers are forced to raise the wages of women above their productive rate, fewer are hired.

Even some advocates of comparable worth, such as Heidi Hartmann, director of the Institute for Women's Policy Research, have testified that comparable worth reduces job growth. In a recent statement submitted during Senate hearings on comparable worth, Ms. Hartmann wrote

that employment declined in Iowa and Washington State after "pay equity" was put into effect. In Minnesota, job growth was diminished. In other words, schemes such as comparable worth, which purport to help women in the workplace, could very well end up limiting women's opportunities.

According to all of the available evidence, the wage gap has been shrinking over time and is expected to diminish further as increasing numbers of women invest in higher education, move into higher-paying professions, and rise to positions of leadership in their careers. With respect to the efficacy or desirability of comparable worth, the conclusions reached as a result of this Commission's fact finding back in 1984 remain every bit as valid today:

> Not every claim of discrimination, nor for that matter every purported remedy for discrimination, is valid. Public policy makers must make principled judgments on the merits of such claims and must not yield to political expediency or attractive sloganeering.
>
> There will be cases when, in the face of urgent claims for a purported theory of discrimination or of relief, the proper, reasonable answer is to say, "no." The claims for implementation of comparable worth are clearly such a case. Sex-based wage discrimination is a serious matter. However, there *are* currently existing ways to remedy it, and the implementation of the unsound and misplaced concept of comparable worth would be a serious error.

The problems with comparable worth generally, and with current legislative proposals in particular, have been explored by a number of experts. For example, in a study entitled, "Comparable Worth: The Bad Idea That Will Not Die" (National Legal Center for the Public Interest, 1999), Roger Clegg sums up the legal, policy and economic objections to comparable worth in this way: "Those who promise 'greater equity' and 'fairness' by taking power from entrepreneurs and giving it to trial lawyers and bureaucrats are cheating American workers."

EEOC Resources and Reform: The Cart before the Horse

In those sections of the report that focus on EEOC's current enforcement activities, the staff of our Commission should be commended for providing a comprehensive and clearly written analysis of both progress and problems at the EEOC. The report does set forth a number of sound and noteworthy recommendations, particularly in regard to improving EEOC accountability, priority setting, fiscal responsibility, and customer service. However, the report to a large degree puts the cart before the horse: it tends to make recommended reforms contingent upon substantial budget increases, instead of the other way around.

In fiscal year 1999, the EEOC received the largest increase in the agency's history—a 15 percent increase (or $37 million) for a total budget that year of $279 million. Since then, the agency has continued to seek hefty new budget increases without being able to show Congressional oversight that it has taken the necessary steps to better prioritize its activities and reduce its backlog of cases. Instead of insisting on improvements under current budget levels, our Commission report calls for sharply increased funding for the EEOC without a concomitant emphasis on reform.

For example, in seeking the historic increase in fiscal year 1999, the EEOC set specific goals to address Congressional concerns. It agreed that the new money would be directed to helping actual victims of discrimination by addressing the agency's case backlog—which is perhaps the clearest measure of how well EEOC is doing in enforcing the law. While the EEOC has in fact made some progress, it has not been able to meet its own enforcement goals. As the report explains:

> One of the agency's GPRA [Government Performance and Results Act] goals was to reduce inventory to 28,000 by July 2000, as well as to make sure charges are processed within 180 days. But due to limited funding, the agency goal is now to reduce inventory to 32,000 cases by the end of fiscal year 2000 and the 180-day goal no longer exists. There are some 360-day goals, and as the agency gets greater control of the inventory, the 180-day goal will come eventually.

Despite Congressional and public concern about EEOC's backlog and the average processing time for resolving charges, our report contains no strong, clear demand for EEOC to resolve these problems. Instead, the report centers its criticism on EEOC's "emaciated budget." It fails to acknowledge that many of EEOC's deficiencies—e.g., insufficient use of state and community resources, a lack of self-assessment

mechanisms, a lack of public participation in EEOC's policy process, insufficient use of the agency's Charge Data System—are all examples of problems that have nothing to do with funding.

The Call for a More Aggressive (and Overworked) EEOC

The report complains that "one of the main obstacles that [EEOC] still faces is that funding has not increased at rates commensurate with responsibilities." At the same time, however, several of the findings and recommendations call for increasing EEOC's responsibilities: "EEOC must employ its formal rule-making powers more frequently . . . EEOC must become more active in the development of regulations . . . EEOC should have the staff resources to initiate large-scale litigation efforts on all developing areas of law rather than on those that are politically relevant or those that can fit nicely into its emaciated budget."

As we mentioned previously, the report also calls for passage of a number of legislative initiatives, such as the Paycheck Fairness Act and the Fair Pay Act, as well as legislation "aimed at addressing job discrimination on the basis of parental status" and legislation "aimed at protecting workers from unfair and harmful employment practices [such as 'emotional abuse'] that go hand in hand with discrimination." Aside from the policy concerns that these kinds of recommendations raise, it is just not clear how all the new programs and initiatives listed in this report can possibly help address EEOC's workload problems. It is more than likely that they would only add to the agency's load and prevent the agency from ever being able to reduce its backlog of cases.

The report contains several other recommendations that would result in increased government intervention in the workplace. The recommendations dealing with EEOC "technical assistance, outreach and education efforts," for example, all sound good on their face. Education and outreach can be worthy initiatives—but if they translate into an increased number of self-initiated investigations and "on-site visits" by an overbearing EEOC, they can be extremely counterproductive. The report rightly emphasizes the need for the EEOC to become more responsive to its customers, but asking the agency to "place greater emphasis on outreach that establishes contact with potential charging parties" is a step in the wrong direction.

The Political Attack

The report also contains a politicized component that has no place in the objective, fact-finding purpose of an enforcement report. Several of the critical references to past administrations and to the current Congress are simply unnecessary and not helpful to the discussion. For example, in addition to the complaints about insufficient funds from the current Congress, the report blames "the policies and practices developed during the 12 years of the Reagan-Bush administration" for the way "EEOC continued to drift into inconsequentiality" and for the "obstacles" that remain. But other than a vague reference to "policies and practices that narrowed EEOC's enforcement of the antidiscrimination laws," the report fails to specify just how the Reagan and Bush administrations contributed to the agency's "drift." In any event, considering the report's own finding that the EEOC's "drift" has been due in large part to the "enormous backlog of charges," it is worth noting that the greatest increase in the EEOC's backlog appears to have occurred during the present administration. As the report confesses, "By the mid-1990s, the backlog of charges had increased to more than 100,000."

It is interesting that the report's subtitle speaks of "Overcoming the Past" and "Focusing on the Future." This is a theme that the report carries beyond its assessment of EEOC's enforcement efforts to a discussion of the agency's current leadership and personnel. Specifically, the report demands that Congress and the President fill any EEOC vacancies "as quickly as possible" especially "given the potential for a change in administration as a result of upcoming elections . . ." In other words, not content with advocating the implementation of controversial policies like comparable worth, the report appears to call for the preemptive appointment, before the elections, of individuals who would be inclined to support such policies.

Conclusion

The EEOC already has more than enough to do in the enforcement of laws against discrimination in the workplace. In fact, the agency is so

far behind in keeping up with its present workload that, despite much effort, there is still a backlog of 40,000 cases and an average lag time of 265 days in getting a charge resolved.

These problems are serious, but the legislative and policy changes recommended in this report will not enhance the EEOC's ability to address them. The implementation of comparable worth, for example, can produce obviously foolish outcomes—for instance, forcing a company to pay paralegals the same wage as truck drivers because, in some bureaucrat's judgment, the two jobs are "worth" the same, the market be damned. Clearly, the key is to get the EEOC to better allocate its resources by helping actual victims of discrimination rather than casting about for "potential charging parties." There is, unfortunately, still plenty of disparate treatment on the basis of race, sex, color, religion, national origin, age and disability; and the EEOC's job is to fight it. It should focus on that job. To our disappointment, many of the recommendations of this report would only blur rather than sharpen that focus.

August 3, 2000

APPENDIX A

Title VII of the Civil Rights Act of 1964[1]

Title VII of the Civil Rights Act of 1964 states:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[2]

The Civil Rights Act of 1964 was first proposed by President John F. Kennedy as H.R. 7152 and then rewritten in committee before being introduced to the floor of the U.S. House of Representatives.[3] As reported to the House, the bill called for an agency with conciliatory power rather than strong enforcement authority. The House legislation prohibited discrimination on the basis of race, color, religion, or national origin. After an amendment was incorporated adding "sex" to the protected classes, H.R. 7152 passed.[4] After many debates and amendments, the Senate passed the House bill.[5] President Lyndon Johnson signed the legislation on July 2, 1964, and the act went into effect one year later.[6] The following sections briefly describe the prohibitions against certain kinds of discrimination under Title VII.

Race Discrimination

Little interpretive guidance on race can be found in traditional primary sources due to the unusual nature of Title VII's journey through Congress and the extensive number of amendments made.[7] However, some members of the U.S. Senate did provide explanatory memoranda. These members, writing in favor of passage of Title VII, noted that the right to vote means little if a person is denied the employment needed to economically sustain one's self.[8] The memoranda contain tables demonstrating the disparate impact of unemployment rates on blacks. The members stated that the gap in employment among races was both a national and personal problem.[9] The failure to offer employment to blacks would be an economic loss for the country because if persons were denied employment, their purchasing power would decrease which would result in a lower gross national product. Further, the members noted that when persons are denied employment, the country pays the added costs of unemployment compensation, disease, and crime.[10] Occupational shortages could be eliminated and national prosperity could increase by offering job training for skilled employment and eliminating discrimination.[11]

To address the need of eradicating discrimination, the U.S. Equal Employment Opportunity Commission (EEOC) was created. The purpose of EEOC was to "investigate complaints concerning the existence of discrimination in business establishments, labor unions, and employment agencies."[12] The members noted that the Commission's task was to correct abuse rather than force employers or labor unions to maintain racial balances.[13] The members' comments end with

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[1] These appendices are intended to provide a brief explanatory background of the laws and are not exhaustive analyses of the laws or legislative history.

[2] 42 U.S.C. § 2000e-2(a) (1994).

[3] Mack A. Player, *Employment Discrimination Law* (St. Paul, MN: West Publishing Co., 1988), p. 201.

[4] Ibid.

[5] Ibid.

[6] Ibid., p. 202.

[7] Ibid.

[8] Civil Rights Act of 1964, Pub. L. No. 88-352, 1964 U.S.C.A.A.N. (Vol. No. 2 Stat. 2487) 2513.

[9] *See* 1964 U.S.C.A.A.N. 2514.

[10] *Id.* at 2515.

[11] *Id.*

[12] *Id.*

[13] *Id.* at 2516.

the stated belief that all inequality based on race must be removed in order to maintain a democratic society.[14]

Racial Harassment

Racial harassment falls within the language of Title VII, which offers protection against an environment of harassment.[15] In an oft-cited passage from *Rogers v. EEOC*[16] that established the premise that racial discrimination in employment is unlawful, the court stated:

> [E]mployees' psychological as well as economic fringes are statutorily entitled to protection from employer abuse, and that the phrase "terms, conditions, and privileges of employment" in Section 703 is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.[17]

Although the *Rogers* case was based on the issue of national origin discrimination, the court's decision can be applied more broadly to racial discrimination. In fact, the court found that the language used in Section 703(a)(1) demonstrated Congress' intention to define discrimination in the broadest of possible terms.[18] Thus, although the petitioner argued that the employee's claim was not covered under Section 703(a)(1) because it alleged discrimination against the petitioner's patients and not the employee, the court concluded that this type of discrimination may have been a sophisticated attempt to maneuver around the requirements of Title VII.[19] The court stated that a working environment laden with discrimination directed at minority group employees resulted in discriminatory treatment of the plaintiff and, thus, the plaintiff was entitled to protection under Title VII.[20]

The Supreme Court subsequently defined harassment in *Meritor Savings Bank v. Vinson*, stating:

> [H]arassment [which is] sufficiently severe or persuasive "to alter the conditions of [the victim's] employment and create an abusive working environment," (citation omitted) . . . is actionable under Title VII because it affects a "term, condition, or privilege" of employment.[21]

Although *Meritor* specifically addressed sexual harassment, its definition has been interpreted to include racial harassment. For example, in *Harris v. Forklift Systems, Inc.*,[22] the Supreme Court stated that there are similarities between sexual harassment and racial harassment, and Title VII does not distinguish between bases of discrimination.

Based on recent research, while there are no leading Supreme Court cases dealing specifically with racial harassment, some circuit and district court decisions are consistently cited in racial harassment cases. In *De Grace v. Rumsfeld*,[23] the First Circuit held that when an employee is discharged due to absenteeism motivated by a racially hostile work environment, the employer cannot claim that the decision was free from discrimination based on race if the employer failed to take reasonable measures to prevent or correct the unlawful behavior. The *De Grace* court noted that an employer that has taken reasonable steps to prevent or correct harassment by a nonsupervisory employee has not violated Title VII and cannot be charged with discrimination if he or she acted in good faith.[24] Thus, the plaintiff claiming that he was afraid to return to work needed to show that his fear was a determinative or "but for" factor in his decision to be absent in order to succeed in his claim.[25]

In *EEOC v. Murphy Motor Freight Lines, Inc.*,[26] the court held that two conditions must be met for racial harassment to be considered a Title VII violation. First, more than a few isolated harassment incidents must have occurred, and the harassment cannot be casual, accidental, or sporadic.[27] Second, the employer must have failed to take reasonable steps to prevent the

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[14] *Id.* at 2517.

[15] *See* Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971).

[16] *Id.*

[17] *Id.* at 238.

[18] *Id.*

[19] *Id.* at 239.

[20] *Id.*

[21] 477 U.S. 57, 67.

[22] 510 U.S. 17, 25–26 (1993).

[23] 614 F.2d 796, 804 (1st Cir. 1980).

[24] *Id.*

[25] *Id.* at 806.

[26] EEOC and Wells (Intervenor) v. Murphy Motor Freight Lines, Inc., 488 F. Supp. 381, 384–85 (D. Minn. 1980).

[27] *Id.* at 384.

harassment.[28] In granting the EEOC injunctive relief for all of the racial harassment that occurred within the defendant's company, the court added that strong steps are needed to sensitize or discipline prime offenders in harassment situations.[29]

In *Snell v. Suffolk County*,[30] the court held that once an employer is aware of a racially hostile atmosphere, the employer has an obligation to take reasonable measures to remedy the situation. The court noted that whether an employer has fulfilled its obligation depends on the facts of each case, including gravity of harm, the nature of the work environment, and the resources of the employer.[31] The court in *Hunter v. Allis-Chalmers Corporation*,[32] appears to have gone further than *Snell* by holding that an employer may be held liable if, in "the exercise of reasonable care [he] should have known about the campaign of harassment," and failed to take reasonable steps to prevent the acts.[33]

The court in *Davis v. Monsanto Chemical Co.*,[34] expanded upon previous decisions that identified a two-part test for determining whether a racially hostile environment exists.[35] First, the plaintiff must be able to demonstrate that the "alleged racial harassment constituted an unreasonably abusive or offensive work-related environment or adversely affected the reasonable employee's ability to perform tasks required by the employer."[36] To establish an adverse effect, the employee only need demonstrate that the harassment made his or her job more difficult to perform.[37] If the first condition is satisfied, the plaintiff must then demonstrate that the employer accepted the situation. The employee must be able to show that the employer "knew or should have known of the alleged conduct and failed to take prompt remedial action" in order to find the employer liable.[38]

National Origin Discrimination

Another core element of Title VII prohibits discrimination on the basis of national origin.[39] However, there is little information on the meaning of the term "national origin" in the legislative history of Title VII. In fact, the Supreme Court in *Espinoza v. Farah Mfg. Co.* characterized the legislative history surrounding national origin as "quite meager."[40]

References to national origin in the context of Title VII are sporadic and relatively insignificant in relation to the extensive consideration given to the problems of discrimination on the basis of race.[41] Debates in the House of Representatives did not provide a clear definition or discuss the purpose of adding national origin to the statute. Instead, members of Congress only stated their understanding of what national origin meant and when national origin may be a bona fide occupational qualification. For example, Congressman Roosevelt stated:

> May I just make it very clear that "national origin" means national. It means the country from which you or your forebears came from. You may come from Poland, Czechoslavakia, England, France or any other country. It has nothing to do with broad terms such as the gentleman has referred to (Anglo-Saxon made by Mr. Dowdy).[42]

Congressman Dent explained his definition of national origin as one that has nothing to do with color, religion, or the race of an individual, because a person may have migrated from Great Britain and still be a person of color.[43] To some of the legislators who enacted Title VII, national origin only meant the nation of one's birth or the nations of birth of one's ancestors. This understanding of national origin merges one's national origin, or country of birth, with the national ori-

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[28] *Id.* at 385.

[29] *Id.*

[30] 782 F.2d 1094, 1103 (2d Cir. 1986).

[31] *Id.* at 1104.

[32] 797 F.2d 1417, 1421 (7th Cir. 1986).

[33] *Id.*

[34] 858 F.2d 345, 349 (6th Cir. 1988).

[35] *See* Erebia v. Chrysler Plastics Products Corp., 891 F.2d 1212 (6th Cir. 1989).

[36] *Davis*, 858 F.2d at 349.

[37] *Id.*

[38] *Id., citing* DeGrace v. Rumsfeld, 614 F.2d 796, 805.

[39] 42 U.S.C. 2000(e) (1994).

[40] 414 U.S. 86, 88–89 (1973).

[41] Juan F. Perea, "Ethnicity and Prejudice: Reevaluating 'National Origin' Discrimination," *William and Mary Law Review*, vol. 35 (Spring 1994), p. 817.

[42] 110 CONG. REC. 2548 (1965).

[43] 110 CONG. REC. 2549.

gin characteristics of one's ancestry.[44] The meager legislative history has permitted judges great discretion to decide what, if any, aspects of ethnic identity will be protected by the prohibition of discrimination based on national origin.[45]

This discretion manifests itself in the threshold judicial decisions regarding whether a trait may function at all as a proxy for national origin and, if so, whether a trait is a close enough proxy to merit protection.[46] Judges are free to impose their own value preferences, consciously or unconsciously, according to their views of the consistency of particular traits with their notions of American identity.[47] Many courts have, therefore, adhered to the plain meaning of the statutory language and considered national origin in Title VII to only mean discrimination based on nation of one's birth or nation of birth of one's ancestors.[48]

Religious Discrimination and Accommodation

Title VII also makes it unlawful for employers to discriminate against current or prospective employees on the basis of religion.[49] In 1972, Congress amended Title VII to include a second obligation to ensure against religious discrimination in the workplace. Under Section 701(j), not only was prima facie religious discrimination outlawed, but employers were required to "reasonably accommodate the religious practices of current and prospective employees, unless the employer demonstrates that accommodation would lead to an undue hardship on the conduct of its business."[50] Religious discrimination thus became the only class of discrimination under the act that required a two-fold responsibility by the employer.

Discrimination on the basis of religion can occur in instances of adverse impact or disparate treatment.[51] In *Griggs v. Duke Power Co.*, the Supreme Court unanimously held that discrimination can result from neutral employment policies and practices that are applied evenhandedly to employees and potential employees, but which have the effect of disproportionate exclusion of any classification listed under Title VII.[52] Disparate impact refers to the effect of a neutral practice on a group and, if impact is established and the issue cannot be justified as job related and consistent with business necessity, the employer is required to stop the practice. Accommodation theory, on the other hand, recognizes that a particular practice may adversely affect an individual and allows the employer to maintain the practice, in general, but to deviate from it for the affected individual unless doing so would cause undue hardship.[53]

When Title VII was originally enacted, it did not impose a duty on employers to reasonably accommodate the religious beliefs and practices of employees. EEOC articulated the duty through regulations[54] and, in doing so, looked to mitigate the impact of facially neutral employment policies on employees with sincere convictions about working on a Sabbath day or other religious issues that affect their ability to work.[55]

EEOC's reasonable accommodation guidelines were developed without a clear Congressional mandate on the subject, and it is unclear how far Congress originally intended for Section 703 to extend. Because Congress failed to speak on the religious accommodation issue when it enacted the Civil Rights Act of 1964, the Supreme Court concluded that there was no Congressional intent to make the EEOC guidance a law with force and sought to invalidate it. In 1971, the Supreme Court stated in *Dewey v. Reynolds Metal Co.* that "in the legislative history of the Act it is stated [that the] internal affairs of employers and labor organizations must not be interfered with except to the limited ex-

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[44] Perea, "Ethnicity and Prejudice," p. 821.

[45] Juan F. Perea, "Los Olvidados: On the Making of Invisible People," *New York University Law Review*, vol. 70 (October 1995), p. 985.

[46] Ibid., pp. 985–86.

[47] Ibid., p. 986.

[48] Ibid.

[49] 42 U.S.C. § 2000e-2(a) (1994).

[50] "Guidelines on Discrimination Because of Religion," 29 C.F.R. § 1605.2(b)(1).

[51] EEOC, *Compliance Manual*, "Religious Accommodation," § 628.4(c)(1).

[52] 401 U.S. 424 (1971); *see also* EEOC, *Compliance Manual*, "Theories of Discrimination," § 604.1(b).

[53] Ellen J. Vargyas, legal counsel, U.S. Equal Employment Opportunity Commission, letter to Ruby G. Moy, staff director, U.S. Commission on Civil Rights, July 7, 2000 (re: draft report), p. 72.

[54] 31 Fed. Reg. 8370 (1966) (codified at 29 C.F.R. § 1605.1(a)(2) (1967)).

[55] Player, *Employment Discrimination Law*, pp. 224–25.

tent that correction is required in discrimination practices."[56] The Court further concluded:

> Nowhere in the legislative history of the Act do we find any Congressional intent to coerce or compel one person to accede to or accommodate the religious beliefs of another. The requirement of accommodation to religious beliefs is contained only in the EEOC Regulations, which in our judgment are not consistent with the Act.[57]

The *Dewey* Court recognized the distinction between religious discrimination and the failure to reasonably accommodate the religious beliefs of employees. The Court, however, disagreed with the EEOC policy guidance that imposed the duty of employers to reasonably accommodate.[58] The Court stated:

> The fundamental error of *Dewey* . . . is that they equate religious discrimination with failure to accommodate. We submit these two concepts are entirely different. The employer ought not to be forced to accommodate each of the varying religious beliefs and practices of his employees.[59]

In *Dewey*, the Court was also concerned that the EEOC guidelines would violate the Establishment Clause of the First Amendment.[60] The Court stated:

> To construe the Act as authorizing the adoption of Regulations which would coerce or compel an employer to accede to or accommodate the religious beliefs of all of his employees would raise grave constitutional questions of violation of the Establishment Clause of the First Amendment. It is settled that the Government, in it relations with religious believers and non-believers, must be neutral.[61]

The Court was concerned that the EEOC policy guidance forced employers to comply with regulations that violated their own constitutional right to religious freedom. Although Congress delegated in the Civil Rights Act the primary responsibility for preventing and eliminating employment discrimination to EEOC, it was not until after the Supreme Court's decision in *Dewey* that Congress accepted the EEOC policy guidance and made reasonable religious accommodation the law.[62]

Later in the case of *Trans World Airlines, Inc. v. Hardison*,[63] the Supreme Court held that the reasonable accommodation provision must be narrowly construed. In this case, where the issue was observance of the Sabbath on Saturday, the Court ruled that the duty under Title VII to accommodate an employee's religious needs does not require the employer to take steps inconsistent with otherwise valid workplace agreements, such as a seniority system for work schedules.[64] Further, the Court stated that to require an employer to bear more than a de minimis cost in order to give an employee his Sabbath day off results in an undue hardship for the employer under the EEOC guidelines.[65]

Sex Discrimination

The category of sex was added to Title VII at the last minute[66] by the act's opponents in an attempt to defeat it.[67] Despite the efforts of its opponents, the bill passed, thereby creating protection for women against discrimination based on sex, but the legislative history provides little assistance as to the parameters of discrimination based on sex as it is defined in Title VII.[68] Title VII can be extended to many forms of sex discrimination, two of which will be discussed below: sexual harassment and pregnancy discrimination.

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[56] 402 U.S. 690 (1971).

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] 42 U.S.C. § 2000e-j (1994).

[63] 432 U.S. 63; 97 S. Ct. 2264.

[64] 432 U.S. 63 at 78–79.

[65] *Id.* at 81, 85.

[66] Meritor Savings Bank v. Vinson, 477 U.S. 57, 63 (1986).

[67] Barbara Lindemann Schlei and Paul Grossman, *Employment Discrimination Law* (Washington, DC: American Bar Association, Section of Employment and Labor Law, Bureau of National Affairs, 1983). *See also* 110 CONG. REC. 2581 (1964).

[68] Sarah L. Sanville, "Employment Law—Employer Liability for Third-Party Sexual Harassment: Does *Costilla* Take the Hoot Out of Hooters?" *William Mitchell Law Review*, vol. 25 (1991), p. 353; Robin Applebaum, "The 'Undifferentiating Libido': A Need for Federal Legislation to Prohibit Sexual Harassment by a Bisexual Sexual Harasser," *Hofstra Labor Law Journal*, vol. 14 (1997), p. 603.

Sexual Harassment

Sexual harassment was not officially recognized as a Title VII prohibition until 1976, when the courts first began to characterize it as sex discrimination.[69] In *Williams v. Saxbe*, the District Court for the District of Columbia held that sexual propositions by employers demanded in exchange for employment decisions, or "quid pro quo," constituted sexual harassment. Four years later, EEOC issued guidelines defining sexual harassment,[70] which included a second form of sexual harassment termed "hostile environment harassment." The EEOC defined hostile environment harassment as a situation in which harassing conduct by supervisors or co-workers has the effect of "unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment."[71]

Since then, legal precedents have defined the issues of sexual harassment applying Title VII according to the courts' interpretations of Congressional intent.[72] In *Meritor Savings Bank v. Vinson*, the Supreme Court officially recognized EEOC's guidelines[73] and held that "without question, when a supervisor sexually harasses a subordinate because of that subordinate's sex, that supervisor 'discriminates' on the basis of sex," recognizing the existence of a hostile work environment.[74] Therefore, harassment that interferes with specific working conditions, terms, or the work environment has been interpreted to constitute sexual discrimination prohibited by Title VII of the Civil Rights Act of 1964.

Pregnancy Discrimination

In response to Supreme Court decisions which did not interpret Title VII to include pregnancy discrimination, Congress passed the Pregnancy Discrimination Act, an amendment to Section 701 of Title VII.[75] It provides that

> the terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .[76]

The legislative history of the act makes clear that it was meant to clarify Title VII, not add to it, by providing that pregnant women be treated no differently from other workers:

> We recognize that enactment of [the act] will reflect no new legislative mandate of the Congress nor effect changes in practices, costs, or benefits beyond those intended by Title VII of the Civil Rights Act. On the contrary, the narrow approach utilized by the bill is to eradicate confusion by expressly broadening the definition of sex discrimination in Title VII to include pregnancy-based discrimination.[77]

Congress passed the act in response to the Supreme Court case of *General Electric Co. v. Gilbert*.[78] In *Gilbert*, the Supreme Court upheld General Electric's disability insurance plan, even though it excluded coverage for women with pregnancy-related disabilities. The Court held that the exclusion was based on pregnancy, not sex, and was therefore not precluded by Title VII. However, Congress felt that the Court had misinterpreted the purpose of Title VII, which included protection against discrimination for pregnancy as a condition limited exclusively to women.[79]

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[69] Williams v. Saxbe, 413 F. Supp. 654, 658 (D.D.C. 1976).

[70] 29 C.F.R. 1604.11 (1998).

[71] Ellen Frankel Paul, "Overview: Civil Rights in the 1990s, Title VII and Employment Discrimination," *Yale Law and Policy Review*, vol. 8 (1990), p. 333, *citing* EEOC, "Guidelines on Discrimination Because of Sex," 29 C.F.R. § 1604.11 (1980).

[72] John W. Whitehead, "Eleventh Hour Amendment or Serious Business: Sexual Harassment and the United States Supreme Court's 1997–1998 Term," *Temple Law Review*, vol. 71 (Winter 1998), p. 787. "Faced with a variety of sexual harassment suits brought under Title VII, however, the Supreme Court has applied the statute according to its interpretation of Congressional intent." Ibid.

[73] *Meritor*, 477 U.S. at 66–67; Applebaum, "The 'Undifferentiating Libido,' " p. 605; Leah R. McCaslin, "*Harris v Forklift Systems, Inc.*: Defining the Plaintiff's Burden in Hostile Environment Sexual Harassment Claims," *Tulsa Law Journal*, vol. 29 (1994), p. 764.

[74] *Vinson*, 477 U.S. at 64 (*quoting* 42 U.S.C. 2000e-2(a)(1) (1994)).

[75] 42 U.S.C. § 2000e-(k) (1994).

[76] *Id.*

[77] H.R. REP. NO. 95-948, 95th Cong., 2d Sess. 3-4 (1978), *reprinted in* U.S.C.C.A.N. 4751-52.

[78] 429 U.S. 125 (1976).

[79] H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 3 (1978), *re-*

Congress believed that pregnancy discrimination was the equivalent of sex discrimination because the ability to become pregnant was based on sex, i.e., because it is limited to women.[80] Therefore, prohibition against discrimination based on sex required that pregnant women be treated the same as other employees on the basis of their ability or inability to work.[81] According to Rep. Hawkins, "[t]oday, we have the opportunity to insure that genuine equality in the American labor force is more than an illusion and that pregnancy will no longer be the basis of unfavorable treatment of working women."[82]

To demonstrate how seriously Congress was committed to equal treatment of women regarding any conditions related to pregnancy, it provided that women could not be fired or not hired because they had had abortions (although employers are not required to pay for abortions that are not required to save the life of the mother).[83] Protection is measured against the benefits provided by specific employers to other people of similar ability or inability to work.[84] In other words, if employers do not provide disability benefits or paid sick leave to other employees, they need not provide them for pregnant workers.[85] However, employers cannot stop providing benefits solely to evade the requirements of the Pregnancy Discrimination Act.[86] Medical benefits must be provided for pregnant employees if employers provide coverage for other medical conditions.[87] In addition, other employment policies cannot adversely affect pregnant women. These policies include:

> refusal to hire or promote pregnant women; termination of pregnant women; mandatory leave for pregnant women arbitrarily established at a certain time during their pregnancy and not based on their inability to work; reinstatement rights, including credit for previous service and accrued retirement benefits; and accumulated seniority.[88]

Thus, the Pregnancy Discrimination Act was intended to ensure that pregnant women were not discriminated against on the basis of sex, but were treated equally to employees of like ability, including in the distribution of benefits.

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printed in U.S.C.C.A.N. 4751. "In enacting Title VII, Congress mandated equal access to employment and its concomitant benefits for female and male workers. However, the Supreme Court's narrow interpretations of Title VII tend to erode our national policy of nondiscrimination in employment." *See also* Statement of Senator Williams, chief sponsor of Senate bill, Senate Floor Debate, 123 CONG. REC. 29385 (1977). "The bill before us will overcome the Court's decision [in *Gilbert*] and provide important protection for women affected by pregnancy . . . ." *See also* Statement of Senator Mathias, Senate Floor Debate, 123 CONG. REC. 29663 (1977). "The major purpose of this legislation is to overrule the Supreme Court's decision in [*Gilbert*], thereby removing a major obstacle to women's efforts for equality in the job market." *See also* Statement of Senator Bayh, Senate Floor Debate, 123 CONG. REC. 29641 (1977). "This legislation was made necessary by an unfortunate decision rendered by the Supreme Court in the case of *Gilbert v. General Electric.*"

[80] H.R. REP. NO. 95-948, 95th Cong., 2d Sess. 3 (1978), *reprinted in* U.S.C.C.A.N. 4751.

[81] Statement of Senator Williams, Senate Floor Debate, 123 CONG. REC. 29385 (1977); Statement of Representative Hawkins, House Floor Debate of Conference Committee Report, 124 CONG. REC. 38573 (1978).

[82] Statement of Representative Hawkins, House Floor Debate, 124 CONG. REC. 21435 (1978).

[83] H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 7 (1978), *reprinted in* U.S.C.C.A.N. 4755. However, "if a woman suffers complications from an abortion, medical payments and disability or sick leave benefits for the treatment of the complications would be covered." *Id.*

[84] Statement of Representative Hawkins, House Floor Debate of Conference Committee Report, 124 Cong. Rec. 38573 (1978). *See also* Statement of Senator Cranston, Senate Floor Debate, 123 CONG. REC. 29663 (1977). "[The PDA's] basic standard is comparability among employees."

[85] H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 5 (1978), *reprinted in* U.S.C.C.A.N. 4753.

[86] *Id.*

[87] H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 6 (1978), *reprinted in* U.S.C.C.A.N. 4754.

[88] *Id.*

APPENDIX B

The Equal Pay Act and Related Issues[1]

The Equal Pay Act of 1963 (EPA) prohibits wage discrimination on the basis of sex.[2] The act has four exceptions in which an employer is permitted to pay unequal wages for equal work. The act provides that the differences in wages must be based on one or more of the statutory exceptions: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any factor other than sex."[3] This language recognizes that there are many factors in which an employer measures the relationship between jobs that would establish a valid basis for a difference in pay between employees of the opposite sex.[4] Particularly, these four exceptions were anticipated by the legislature to be valid defenses to a charge of discrimination.[5]

The Equal Pay Act was enacted just a year before to Title VII of the Civil Rights Act of 1964. When Title VII was proposed, it was recognized that there could be potential conflict between the two statutes. The EPA, however, prohibits sex discrimination only on the basis of wage differences between employees performing equal work, while Title VII has a much broader scope. Nonetheless, some senators feared that Title VII might be interpreted to restrict or nullify the Equal Pay Act.[6] This concern led to an amendment that was incorporated into Section 703(h) of Title VII, providing:

> It shall not be unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of Section 6(d) of the Fair Labor Standards Act of 1938 as amended [by the Equal Pay Act].[7]

Ultimately, the EPA provides factors or exceptions for an employer's valid wage discrimination between employees of the opposite sex. Thus, the modern-day Equal Pay Act can be seen as merely providing factors that would establish a legal basis for a difference in pay found between employees of the opposite sex. Courts have construed these EPA exceptions as affirmative defenses to a charge of discrimination under Title VII.

Judicial Interpretation of the EPA

As intended by Congress, courts have upheld a violation of pay discrimination where an employer pays an employee a rate less than the rate at which the employer pays wages to employees of the opposite sex for equal work on jobs that demand equal skill, effort, and responsibility, and which are performed under similar work conditions.[8] However, as will be discussed below, courts have sometimes varied in their interpretations of the statute.

The Equal Pay Act expressly states that an "employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency.[9] The Equal Pay Act prohibits any labor organization from causing or attempting to cause an employer to violate the act. Courts have disagreed on whether the definition of "employer" is sufficiently broad to permit an employee to sue individuals such as managers and supervisors who control some aspect of the plaintiff's condition of employment, in addition

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[1] These appendices are intended to provide a brief explanatory background of the laws and are not exhaustive analyses of the laws or legislative history.

[2] 29 U.S.C. § 206(d)(1) (1994).

[3] *Id.*

[4] *Id.*

[5] *See* H.R. Rep. No. 88-309, at 689 (1963), *reprinted in* 1963 U.S.C.C.A.N. 689.

[6] *See generally* Francis J. Vaas, "Title VII: Legislative History," *Boston College Industrial and Commercial Law Review*, vol. 7 (1966), p. 431.

[7] 42 U.S.C. § 2000e-2(h) (1994) (incorporation of the four affirmative defenses into Title VII by the Bennett Amendment).

[8] Corning Glass Works v. Brennan, 417 U.S. 188, 205–208 (1974).

[9] 29 U.S.C. § 206(d)(2) (1994).

to being permitted to sue the corporate employer.[10] Under Title VII, recent cases have shown a trend not to hold individuals liable.[11]

In accordance with the statute, courts have required an opposite-sex comparator performing substantially the same job.[12] The statute further requires that the comparison made be between persons working at the same "establishment."[13] Courts have generally upheld this interpretation holding that comparisons made between different facilities of the same employer are not valid even where the comparison may be valid under Title VII.[14] Courts have also applied the exceptions to the "physically separated" test for an "establishment" where "(1) an employer's operations are integrated and (2) the administration of its various separate facilities is centralized."[15] Court interpretations, however, have varied as to what circumstances constitute a functionally cohesive unit and when the single-facility rule may not apply.[16]

In *Shultz v. Wheaton Glass Co.*, the Third Circuit recognized that "Congress in prescribing 'equal' work did not require that the jobs be identical, but only that they must be substantially equal."[17] In *Schultz*, it was argued that female selector-packers did not perform certain tasks that the male selector-packers performed, in particular 16 additional job functions, which served as justification for the wage differential.[18] However, on appeal, the court found that the additional tasks were not performed by *all* male selector-packers, and the company failed to prove that the discrimination in wages paid to female selector-packers was based on any factor other than sex.[19] The burden of proof was met when it was demonstrated that male selector-packers earned 10 percent more than their female counterparts although both performed "identical work."[20]

Corning Glass Works v. Brennan was another pivotal case in many respects.[21] The case was based on the fact that the company's daytime inspectors, who were all women, were paid significantly less than night inspectors, who were all men. The employer attempted to remedy this disparity by opening the night shift to women and later by paying the same wage to all newly hired inspectors, regardless of sex or shift.[22] "Red circling" rates were established to preserve the higher rates of employees hired prior to the new agreement when working as inspectors on the night shift. The Supreme Court ruled that the employer had violated the Equal Pay Act by paying lower wages to female day inspectors, and the employer had not corrected its violation by permitting women to work the night shift or by equalizing the wage rates.[23] The Court ruled that even though the higher paying classification was no longer sex segregated, the wages of the females performing equal work remained unlawfully depressed and had to be raised to the higher level.[24]

In *Corning Glass*, the Supreme Court also provided guidance with respect to the practice of red-circling pay rates.[25] EEOC interpretive guidance on the matter states that an employer's policy of temporarily preserving the higher wage of an employee who is displaced into a lower classification constitutes a legitimate factor "other than sex" thereby giving adequate justification for a pay disparity.[26] The Supreme Court held in *Corning Glass* that it is not a defense to a violation of unequal pay where the employer had red circled the higher rates being paid to existing male employees, but paid all new hires, male and female, at a lower rate.[27] The Court reasoned that equalization of the rates on the effective date of the act would have placed all

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[10] *See* Barbara Lindemann and Paul Grossman, *Employment Discrimination Law* (Chicago: American Bar Association, 1996, second printing 1997), vol. 1, pp. 491–92.

[11] Ibid.

[12] Ibid., pp. 491–94.

[13] 29 U.S.C. § 206(d)(1) (1994).

[14] *See* Lindemann and Grossman, *Employment Discrimination Law*, pp. 491–94

[15] Ibid.

[16] Ibid.

[17] 421 F.2d 259, 265 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970).

[18] *Id.* at 266–67.

[19] *Id.*

[20] *Id.*

[21] 417 U.S. 188 (1974).

[22] *Id.*

[23] *Id.* at 203–09.

[24] *Id.* at 205–06.

[25] *Id.* at 208–09.

[26] 29 C.F.R. § 1620.26.

[27] 417 U.S. 188, 209 (1974).

employees at the higher red-circle rate.[28] Thus, as noted in the statute, the practice of red-circling pay rates is a defense only where it is shown that it constitutes a legitimate factor other than sex.[29]

The Supreme Court in *Corning Glass* provided particular clarity for what constitutes work "performed under similar working conditions."[30] The Court held:

> Congress' intent . . . was to use these terms [skill, effort, responsibility, and working conditions] to incorporate into the new federal Act the well-defined and well-accepted principles of job evaluation so as to ensure that wage differentials based upon bona fide job evaluation plans would be outside the purview of the Act. The House Report emphasized: "This language recognizes that there are many factors which may be used to measure the relationships between jobs and which establish a valid basis for a difference in pay. These factors will be found in a majority of the job classification systems. Thus, it is anticipated that a bona fide job classification program that does not discriminate on the basis of sex will serve as a valid defense to a charge of discrimination." It is in this light that the phrase "working conditions" must be understood. . . .[31]

The Equal Pay Act statute requires that jobs that are subject to a comparison under the act involve "equal skill, effort, and responsibility."[32] The Ninth Circuit, in *Forsberg v. Pacific Northwest Bell Telephone Co.*, emphasized the equivalency of the jobs being compared,[33] while other circuits have focused on overall job content.[34] Although the emphasis may be inconsistent, court analysis is often guided by the same principles found in the statute.[35] When comparing volume of work associated with two jobs, sometimes courts will treat it as an issue of "effort" while other courts analyze it as "responsibility."[36] A court may determine that the plaintiff has failed to prove his or her case where one job involves additional duties, or where the work is more difficult. The courts have reached different results due to the case-by-case nature of this question.

Where "a position entailing real supervisory responsibility is not comparable to, but is paid less than, the positions nominally subordinate to it," some courts have held that there was an Equal Pay Act violation even though the jobs by definition are not equivalent.[37] This is in stark contrast with what the statute expressly imposes.

There has been a great deal of litigation under the catchall defense where pay differentials are based on any other factor than sex. One major issue is whether the "any factor other than sex" defense encompasses literally "any" factor or whether it is limited to those factors traditionally and rationally used in job evaluation systems.[38] This issue remains unsettled as reflected by the courts' varied decisions.

"Comparable Worth" in Relation to the EPA and Title VII

Over the last few decades, those who would like to narrow the wage gap between men and women have argued for a different way of handling the problem: comparable worth. However, the notion of comparable worth was rejected by Congress in the Equal Pay Act,[39] and has generally not been accepted by the federal courts.[40] EEOC has taken the position that the comparable worth theory is not cognizable under Title VII as currently drafted.[41]

Comparable worth is a theory that goes beyond comparing jobs on the basis of job titles and duty descriptions. Instead, it attempts to compare work on the basis of its intrinsic worth to employers. Because society has undervalued

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[28] *Id.* at 208–09.

[29] *Id.* at 209–10.

[30] 417 U.S. 188 (1974).

[31] *Id.* at 201.

[32] 29 U.S.C. § 206(d)(1) (1994).

[33] 840 F.2d 1409, 1415–1416 (9th Cir. 1988).

[34] Lindemann and Grossman, *Employment Discrimination Law*, p. 502.

[35] Ibid., pp. 502–03.

[36] Ibid., pp. 506–07.

[37] Ibid., p. 507.

[38] Ibid.

[39] Robert J. Arnold and Donna M. Ballman, "AFSCME v. Washington: The Death of Comparable Worth?" *University of Miami Law Review*, vol. 40 (1996), p. 1047. *See also* 108 CONG. REC. 14, 767–68 (1962).

[40] *See,* e.g., AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985) and Spaulding v. University of Wash., 740 F.2d 686 (9th Cir. 1984).

[41] Ellen J. Vargyas, legal counsel, U.S. Equal Employment Opportunity Commission, letter to Ruby G. Moy, staff director, U.S. Commission on Civil Rights, July 7, 2000 (re: draft report), p. 73.

work performed by women, and women's and men's occupations are segregated, they are difficult to compare based on their basic characteristics. By evaluating the worth of their work to employers, male and female workers can be compensated more equitably for dissimilar work of similar value.

Judicial Treatment of Comparable Worth Theory

In the case of *Corning Glass Works v. Brennan*, the Supreme Court made a decision that would affect the future treatment of comparable worth theory.[42] The Court decided that equal work within the confines of the Equal Pay Act referred to substantially equal work. This interpretation was necessary because the Equal Pay Act never defined "equal work," but required that equal pay be given to jobs of "equal skill, effort, responsibility" that were subject to similar working conditions.[43]

The case of *County of Washington v. Gunther*[44] did not directly address comparable worth, but it provided a narrow judicial interpretation of the Bennett Amendment to Title VII.[45] The employer had set the wage scale for female guards, but not for male guards, at a level lower than its own job evaluation study warranted. The Court held that the fact that female guards did not perform work equal to that of the male guards did not bar a finding of discrimination.[46]

Commentators have noted that the victory provided by *Gunther* was a shallow one, because it was such a narrow decision:

> By so closely tailoring its opinion and relying upon the employers' failure to pay employees according to its own evaluations of the employee's worth, the *Gunther* Court refrained from directly reviewing the merits of a case in the context of the theory of comparable worth.[47]

Lower courts agreed and did not extend *Gunther* to recognize comparable worth suits.[48] After *Gunther*, the requirements of a prima facie case for comparable worth became extremely difficult to prove.

Later, in *Spaulding v. University of Washington* the Ninth Circuit reasoned that extending Title VII to incorporate the comparable worth theory would plunge future court interpretations "into uncharted and treacherous areas."[49] The court further stated that where the plaintiffs' sex discrimination claim is a claim of disparity between only comparable jobs, the law does not allow for disparate impact theory.[50] The Ninth Circuit cemented its disapproval of comparable worth theory in *AFSCME v. Washington*.[51] In that case, the court held that employers could base wages on the competitive market, absent a discriminatory motive, thereby limiting the possibility to use the comparable worth concept in Title VII cases.[52]

These cases have led to the opinion by some legal scholars that courts will never recognize comparable worth unless forced to do so by Congress.[53] According to one commentator,

> courts have consistently refused to acknowledge the doctrine of comparable worth as a viable legal theory under both disparate treatment and disparate impact claims. While disparate treatment cases require direct or circumstantial proof of discriminatory motives, the disparate impact theory only requires that the practice have a detrimental effect on a group in the workforce. Neither has been ultimately successful in gaining judicial acceptance of the comparable worth theory.[54]

Part of the problem extends from the fact that courts do not want to engage in their own comparable worth evaluations, and therefore usually only consider claims in which employers have conducted internal job evaluation studies

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[42] 417 U.S. 188 (1974).

[43] 29 U.S.C. § 206-262 (1994).

[44] 452 U.S. 161; 101 S. Ct. 2242.

[45] 42 U.S.C. § 2000e-2(h) (1982).

[46] *Gunther*, 452 U.S. 161, 180–81.

[47] Arnold and Ballman, "The Death of Comparable Worth?" pp. 1057–58.

[48] Lindemann and Grossman, *Employment Discrimination Law*, p. 533.

[49] 740 F.2d 686 (9th Cir. 1984) *cert. denied*, 469 U.S. 1036 (1984).

[50] *Id.* at 706.

[51] *Id.* at 1401.

[52] *Id.* at 1408.

[53] Rhonda Jennings Blackburn, "Comparable Worth and the Fair Pay Act of 1994," *Kentucky Law Journal*, vol. 84 (1996), pp. 1279–80. *See also* Sandra J. Libeson, "Reviving the Comparable Worth Debate in the United States: A Look Toward the European Community," *Comparative Labor Law*, vol. 16 (1995), p. 373.

[54] Blackburn, "Comparable Worth and the Fair Pay Act of 1994," p. 1286.

which reveal equal intrinsic worth of jobs that are differentially compensated.[55] Such evaluation studies are rare because of the potential liability they impose on employers.[56] Therefore, comparable worth is not generally a legally valid claim under Title VII. As a result of the state of the law, EEOC has not actively pursued comparable worth claims.

Differences between Comparable Worth and EPA/Title VII Claims

While the Equal Pay Act and Title VII cover many forms of wage discrimination, they do not address all of women's claims about workplace wage problems. For example, the Equal Pay Act only covers claims for women who are "paid a lower rate than men who are employed in the same establishment and who are engaged in substantially similar work."[57] While the act does a fairly good job of protecting women who are in traditionally male jobs, it is difficult for women who are in traditionally underpaid female occupations to compare their jobs with the jobs men have traditionally performed.[58]

Further, the Equal Pay Act is problematic because it does not address sex segregation, which is often the cause of the wage gap between men and women. It prevents lower paid employees from challenging the wage gap unless higher paid employees work in the same locale (this prevents employees in a particular office for addressing wage gaps for equal work in a large company with many different offices), and the exceptions to the wage disparity operate to the disadvantage of women (for example, the exception allowed for wage disparities caused by seniority systems often disadvantage women because they are often forced to take time off to care for children and family).[59]

Title VII is also unable to fully protect women suffering from wage discrimination. Claims under Title VII are difficult to prove because "the burden of persuasion in a disparate treatment claim rests at all times on the plaintiff" and it is difficult for plaintiffs to prove intentional discrimination.[60] Employers can also easily justify practices challenged under disparate impact charges. As long as comparable worth is ignored as a claim under Title VII, it will be difficult to address the wage gap:

> Both the EPA and Title VII have been ineffective in eliminating wage disparity between men and women because neither statute allows a plaintiff to state a claim based on a "comparable worth" theory. Comparable worth is a method of ranking jobs based on objective factors and paying comparable salaries to comparably rated jobs. Thus, if the skill, working conditions, and intellect required for a job traditionally held by women are the same as those required for a job traditionally held by men, then employees in each position should receive the same salary. Court have refused, however, to engage in comparable worth analyses when deciding wage disparity cases under the EPA or Title VII.[61]

Despite the recognition that Title VII and the Equal Pay Act do not include comparable worth and, therefore, do not address all aspects of wage disparity, some scholars claim that comparable worth should be considered a valid legal claim because it is within the Congressional intent of Title VII:

> Because the language of Title VII is directed expressly toward wage discrimination, and just discriminatory hiring practices, courts should construe the statute broadly to reach all forms of wage discrimination. Thus, this broad prohibition and far-reaching remedial purpose of Title VII should enable female workers to sue the concept of comparable worth to challenge sex-based wage discrimination.[62]

These scholars argue that the courts are frustrating Congressional intent, because Congress has expressed great disappointment in the wage disparity facing women.[63] Therefore, the Equal Pay Act and Title VII preclude many women from filing discrimination claims to narrow the wage gap.

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[55] Libeson, "Reviving the Comparable Worth Debate in the United States," pp. 371–72.

[56] Ibid.

[57] 29 U.S.C. § 206-262 (1994).

[58] Arnold and Ballman, "The Death of Comparable Worth?" pp. 1048–49.

[59] B. Tobias Isbell, "Gender Inequality and Wage Differentials Between the Sexes: Is It Inevitable or Is There an Answer?" *Washington University Journal of Urban and Contemporary Law*, vol. 50 (1996), pp. 378–79.

[60] Ibid., p. 389.

[61] Ibid., pp. 372–73.

[62] Arnold and Ballman, "The Death of Comparable Worth?" p. 1068.

[63] Ibid.

The Fair Pay Act

There have been recent attempts to expand the reach of the Equal Pay Act through the proposal of additional legislation. The Fair Pay Act was first proposed by Rep. Eleanor Holmes Norton (D-DC) in the summer of 1994.[64] The impetus behind the proposed Fair Pay Act appears to have been the recognition that current equal pay legislation fails to address the wage differentials in jobs segregated by sex.[65] Members of Congress reintroduced the bill in 1999 as an amendment to the Fair Labor Standards Act of 1938, thereby amending the Equal Pay Act.[66] However, as of yet, the Fair Pay Act remains unpassed.

The purpose of the act is to prohibit discrimination in the payment of wages on account of sex, race, and national origin by remedying wage differentials for work in equivalent jobs.[67] The bill asserts that such discrimination has been said to depress wages, prevent maximum utilization of labor resources, burden commerce, and constitute an unfair method of competition.[68] Further, it is asserted that such discrimination has played a role in maintaining a segregated work force.[69]

The Fair Pay Act requires "equal pay for equivalent jobs" by prohibiting employers from discriminating against employees within an establishment in a job that is dominated by employees of a particular sex, race, or national origin by paying a rate lower than employees in another job that is dominated by employees of the opposite sex, or of a different race, or national origin for work on equivalent jobs.[70] The proposed act states:

> The term "equivalent jobs" means jobs that may be dissimilar, but whose requirements are equivalent, when viewed as a composite of skills, effort, responsibility and working conditions.[71]

Ultimately, its enactment is intended to redress the concentration of women in historically underpaid, traditionally female occupations by allowing them to assert claims based on the equivalent nature of their jobs to higher paid, male-dominated jobs.

The persistence of the wage gap can be traced to "the prevalence of occupational segregation by sex and race."[72] This segregation is "both horizontal (the crowding of women into low-paying occupations such as clerical work, health care, and service work) and vertical (stratification of male-dominated occupations by gender, with women occupying the bottom rungs of the workforce hierarchy)."[73] A comparable worth scheme which addresses wage differentials that exist for work in equivalent jobs is proposed by the Fair Pay Act as a remedy for occupational segregation.

It is contended that "[n]early all of the difference in pay between men and women is due to women being disproportionately represented in lower paying occupations and in lower paying firms within occupations."[74] One reason for the disparate wage levels of female-dominated occupations might be due to market conditions, rather than discrimination.[75] However, the National Committee on Pay Equity estimates the unexplained portion of the pay disparity that is attributed to wage discrimination costs women

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[64] *See* H.R. 4803, 103d Cong. (1994).

[65] *Id.* at § 2.1 (*amending* 6 of the Fair Labor Standards Act of 1938).

[66] *See* H.R. 1271, 106th Cong. (1999). *See also* S. 702, 106th Cong. (1999).

[67] H.R. 1271, 106th Cong. § 2.1 (1999).

[68] *Id.* at § 2.2.

[69] *Id.* at § 2.3 (1999).

[70] S. 702, 106th Cong. § 3(a) (1999).

[71] *Id.*

[72] *See* Marion Crain, "Confronting the Structural Character of Working Women's Economic Subordination: Collective Action vs. Individual Rights Strategies," *Kansas Law Journal*, vol. 3 (Spring 1994), p. 26 (*citing* U.S. Department of Labor, Bureau of Labor Statistics, *Usual Weekly Earnings of Wage and Salary Workers: Third Quarter 1993*, October 28, 1993). Wage disparity continued on strictly racial lines with black women earning 90 percent of black men's wages, while Hispanic women received 92 percent of Hispanic men's wages. Ibid.

[73] *See* Crain, "Confronting the Structural Character of Working Women's Economic Subordination," p. 27. Horizontal stratification affects roughly three-fifths of all working women who occupy jobs that are at least 75 percent female. Female sex-segregated jobs include secretaries, bookkeepers, nursing aides, cashiers, textile sewing machine operators, and waitpersons. Ibid., p. 33, n. 7.

[74] *See* Keith W. Chauvin and Ronald A. Ash, "Gender Earnings Differentials in Total Pay, Base Pay, and Contingent Pay," *Industrial and Labor Relations Review*, vol. 47 (1994), p. 635 (citations omitted).

[75] *See* "Bill Seeks Pay Equity for Women, Minorities," *Daily Labor Report*, July 21, 1994, p. D-8.; *see also* Linda Chavez, "Fair Pay or Foul Play?" *USA Today*, Aug. 3, 1994, p. 9A.

approximately $100 billion per year.[76] Thus, whether the reason for the disparate wage levels of female-dominated occupations is market conditions or wage discrimination, legislation that aims to eliminate such a wage discrepancy between males and females is necessary. The Fair Pay Act does not propose to eliminate the sex discrimination, but instead hopes to correct the pay inequities that persist based on the concentration of women in certain fields.

This proposed legislation also intends to provide further clarification to carry out the intent of Congress to implement the holding of *County of Washington v. Gunther*, in which the Supreme Court held that Title VII's prohibition against discrimination in compensation also applies to jobs that do not constitute "equal work" as defined in Section 6(d) of the Fair Labor Standards Act of 1938 (the Equal Pay Act).[77]

The Supreme Court's recognition in *Gunther* that a Title VII claim could proceed despite the unequal nature of the female and male guard positions, has been interpreted by Rep. Norton, sponsor of the Fair Pay Act, as well as approximately 37 co-sponsors of the bill as having a broad scope that includes cases in which wage disparities exist between jobs that are gender-segregated.[78] These members of Congress recognize that the Equal Pay Act's "equal pay for equal work" is narrow and sometimes misleading.[79]

[76] *See* Martha Burk, "After 30 Years, Let's Enforce Pay Equality," *USA Today*, July 21, 1994, p. 8A.

[77] County of Washington v. Gunther, 452 U.S. 161 (1981). *See also* H.R. 1271, 106th Cong. § 2.7 (1999).

[78] *See* Libeson, "Reviving the Comparable Worth Debate in the United States," p. 358.

[79] Ibid.

APPENDIX C

The Age Discrimination in Employment Act[1]

The Age Discrimination in Employment Act (ADEA) was enacted by Congress in 1967 to promote the employment of workers aged 40 and above based on their abilities and to prevent discrimination based on their age.[2] Before the ADEA's enactment several bills were introduced in both the House and the Senate to bar age discrimination in employment, in addition to the significant legislation to bar discrimination in employment on the basis of race, religion, color, or sex.[3] Furthermore, at the time the ADEA was enacted there were 24 states that had already enacted age discrimination legislation. While the effectiveness of these state laws was difficult to measure, they reflected the need for federal legislation.[4]

The ADEA's policies combined the provisions enacted under Title VII[5] and the Fair Labor Standards Act.[6] Through this combination, the ADEA prohibits discriminatory discharges and hirings, discriminatory compensation, terms, privileges, or conditions of employment, denials of benefits and harassment, and any act to reduce the wage rate in order to comply with the ADEA.[7] The ADEA also prohibits any retaliation for filing a charge or participating or testifying in an investigation, proceeding, or litigation under the ADEA.[8] Printing or publicizing a notice of employment that indicates a preference, limitation, specification, or discrimination based on age is also prohibited.[9]

In the beginning, ADEA was enforced by the Department of Labor. Section 3 of the original ADEA bill authorized the Secretary of Labor to carry out a program of education and information to reduce age barriers for older workers, publish the findings of the program, foster the development of public and private agencies to expand employment opportunities, and to sponsor and assist state and community informational and educational programs.[10] However, Congress transferred the enforcement responsibilities from the Department of Labor to the U.S. Equal Employment Opportunity Commission (EEOC), pursuant to the Reorganization Plan No. 1 of 1978, which became effective on July 1, 1979.[11]

According to one commentator, regarding the legislative history of the ADEA, Congress' goal in enacting the ADEA was to outlaw only arbitrary discrimination and not to prohibit all consideration of age and age-related criteria in employment.[12] He maintains that this is evident in the statutory defenses allowed under the ADEA which include bona fide occupational qualification, bona fide seniority systems and employee benefit plans, reasonable factor other than age, and good cause.[13] This commentator also argues that the purpose of the legislation was to promote employment of older workers based on their ability through education and information designed to help employers and employees address the real problems and dispel those that are

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[1] These appendices are intended to provide a brief explanatory background of the laws and are not exhaustive analyses of the laws or legislative history.

[2] Pub.L. No. 90-202 § 2, 81 Stat. 602 (codified as amended at 29 U.S.C. § 621 (1994)). The act has been amended over the years regarding, among other issues, the ceiling age for coverage. In 1986, Congress eliminated the age ceiling.

[3] 29 U.S.C. § 631(a)(1994).

[4] H.R. Rep. No. 805, 990th Cong., 1st Sess. 2 *reprinted* in 1967 U.S.C.A.A.N., 2213–15

[5] 42 U.S.C. § 2000e (1994).

[6] 29 U.S.C. §§ 201–219 (1994).

[7] 29 U.S.C. § 623(a), (b) and (d) (1994).

[8] 29 U.S.C. § 623(d) (1994).

[9] 29 U.S.C. § 623(e) (1994).

[10] Pub. L. No. 90-202 § 3, 81 stat 602 (codified as amended at 29 U.S.C. § 623 (1994)).

[11] 42 U.S.C. § 2000e-5 (1994).

[12] Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993); *see also* Pontz, Evan, "What a Difference ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act," *North Carolina Law Review*, vol. 74 (1995), pp. 267, 272.

[13] 507 U.S. 604 (1993); *see also* Pontz, "What a Difference ADEA Makes," pp. 274–76.

illusory.[14] These goals would not be reflected through the use of prohibitions.[15]

The conflict over whether the ADEA was intended to include liability based upon disparate impact are reflected in split circuit court decisions on the issue. The discussion centers around the comparisons made between the usage of disparate impact in Title VII claims and the potential usage under the ADEA. The situation is further confused by the fact that the issue of disparate impact under the ADEA has not been addressed by the Supreme Court. However, in *Hazen Paper Co. v. Biggins*,[16] the Supreme Court held that there is no disparate treatment under the ADEA when the motivating factor is one other than the employee's age.[17]

In *Biggins*, the complainant was fired a few weeks short from the vesting of his pension, and as a result, sued under the ADEA.[18] The Court held that an employment decision based on years of service is distinct from age.[19] In dicta the Court stated the "ADEA is intended to proscribe only employer actions that rest on stereotypical notions that competence or productivity decline with age."[20] The notion of an employer's alleged policy of targeting for termination those about to reach pension-vesting milestones as valid under disparate treatment does not necessarily apply to a disparate impact theory.[21] Based, in part, on this statement the first, seventh, and 10th circuits have held that the ADEA does not recognize a disparate impact analysis[22] while the second, eighth, and ninth circuits[23] hold that it does.[24]

EEOC has argued the availability of disparate impact in all circuits as well as in lower courts.[25] EEOC's legal arguments in these cases are a good indication that EEOC believes the ADEA allows for disparate impact claims. EEOC's views are supported in the lower courts where there have been some applications of disparate impact theories for Title VII claims and ADEA claims,[26] including a policy of not hiring teachers with more than five years of experience and using a computer program to measure performance that led to the termination of 10 of 27 older workers, but only one of 25 younger ones.[27]

Affirmative Defenses

A Bona Fide Occupational Qualification (BFOQ) defense acknowledges that age was used in the decision of an employment action, practice, or policy but that it was "reasonably necessary to the normal operation of the business."[28] This is a narrowly construed exception and determinations are made on a case-by-case basis. The Supreme Court has decided three cases defining standards for evaluating a BFOQ defense. In *Trans World Airlines, Inc. v. Thurston*,[29]

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[14] 507 U.S. 604 (1993); *see also* Pontz, "What a Difference ADEA Makes," p. 273.

[15] 507 U.S. 604 (1993); *see also* Pontz, "What a Difference ADEA Makes," p. 273.

[16] 507 U.S. 604 (1993).

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] Barbara Lindemann and Paul Grossman, *Employment Discrimination Law* (Washington, DC: American Bar Association) (1997), p. 598; EEOC v. Westinghouse Elec. Corp., 725 F.2d 211 (3d Cir. 1983).

[21] Lindemann and Grossman, *Employment Discrimination Law*, p. 598.

[22] EEOC v. Francis W. Parker School, 41 F.3d 1073 (7th Cir. 1994) *cert denied*, 525 U.S. 1142 (1995). *See also* Ellis v. United Airlines, 73 F.3d 999 (10th Cir. 1996) *cert. denied* 517 U.S. 1245 (1996) (holding that the Supreme Court's decision in Biggins suggested that a disparate impact claim is unavailable under the ADEA).

[23] *See* EEOC v. Local 350, Plumbers & Pipefitters, 998 F.2d 641 (9th Cir. 1992) (amended 1993).

[24] *See* Barbara Berish Brown, "Annual Review of Major Developments in Equal Employment," *National Employment Law Institute Employment Discrimination Law Update*, Aug. 5, 1999. *See also* Pontz, "What a Difference ADEA Makes," p. 267, 287 n. 122 (stating the fifth, 10th, and D.C. circuits have reserved the issue). The third and sixth districts have not taken a definitive position on the issue of disparate impact. Ellen J. Vargyas, legal counsel, U.S. Equal Employment Opportunity Commission, letter to Ruby G. Moy, staff director, U.S. Commission on Civil Rights, July 7, 2000 (re: draft report), p. 74 (hereafter cited as Vargyas letter).

[25] *See*, e.g., EEOC v. Newport Mesa Unif. Sch. Dist., 893 F. Supp. 927 (C.D. Cal. 1995); EEOC v. Sears Roebuck & Co., 883 F. Supp. 211 (N.D. Ill. 1995); EEOC v. Governor Mifflin Sch. Dist., 623 F. Supp. 734 (E.D. Pa. 1985). EEOC has argued that the disparate impact theory is valid under the ADEA since 1979. EEOC's regulation on disparate impact (29 C.F.R. § 1625.7(d)) has been in place for more than 20 years. Vargyas letter, p. 74.

[26] Lindemann and Grossman, *Employment Discrimination Law*, p. 598.

[27] Ibid., p. 597 nn. 304–05, 308.

[28] Ibid., p. 615.

[29] Trans World Airlines v. Thurston, Inc., 469 U.S. 111 (1985) (allowing captains with "flight engineer" status to

Trans World Airlines (TWA) had a policy that enabled 60-year-old captains who were displaced for reasons other than age to "bump" less senior flight engineers to obtain "flight engineer" status[30] but did not afford captains disqualified for age the same option. The Court rejected this policy and determined that it was facially discriminatory.[31] In *Western Air Lines, Inc. v. Criswell*,[32] the Court held that "the BFOQ exception did not permit the mandatory retirement of flight engineers at age 60."[33]

In each case, the Court applied a two-prong test to determine the validity of the BFOQ. The first prong required the defendant to establish that the challenged policy was "reasonably necessary to the essence of [the employer's] business."[34] The Court focused primarily on the job from which the employee was excluded. An important consideration in this analysis is the factor of safety in the workplace. If there is a great possibility for harm, then the Court is more likely to allow stringent job qualifications. The second prong provides that the employer must establish that "it is essentially compelled to rely on age as the determinative criterion for its employment policy or practice."[35] Within this prong there are two ways for the employer to demonstrate it has met this criteria: (1) there exists a substantial basis for believing that all employees above a certain age lack the qualifications required for the particular position; and (2) that it is highly impractical for an employer to test each individual to see if he or she has the qualifications.[36] In establishing these criteria the Court has determined that economic factors normally will not establish a BFOQ.[37]

Remedies

The ADEA provides several remedies, including injunctive relief, back or front pay, liquidated damages, attorney's fees, and costs.[38] Injunctive relief is available when a plaintiff "demonstrate[s] a substantial likelihood of succeeding on the merits and irreparable harm if the relief sought is not granted."[39] Injunctive relief can be denied where a substantial monetary relief has been awarded and will serve as a deterrent.[40]

The preferred remedy of an ADEA violation is reinstatement. While the ADEA has authorized courts with the power to reinstate an employee, there are circumstances when the remedy may not be appropriate. If the employee claims that reinstatement would promote hostilities in the workplace, then the court must carefully scrutinize the claim of hostility as whether "the friction arising from the litigation process itself is not alone sufficient to deny employment."[41]

Back and front pay are also remedies under the ADEA. Back pay consists of what the plaintiff would have received if he or she had not been discriminated against. This can include "most wages, pension, insurance, vacation, profit sharing, accrued sick leave, and other economic benefits of employment."[42] Front pay is a substitute for what an employee would have earned in the future if he or she had not been discriminated against. Front pay is an appropriate remedy when reinstatement is found to result in hostility in the workplace.[43]

Liquidated damages are awarded when an employee can show that the employer's violation of the ADEA was willful. The term "willful" was defined by the Supreme Court in *Trans World Airlines v. Thurston*[44] as when the employer

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continue working past age 60).

[30] *Id.*

[31] *Id.*

[32] Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985).

[33] Lindemann and Grossman, *Employment Discrimination Law*, p. 616.

[34] Ibid., p. 615, *quoting* Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 413–14 (1985)), *accord* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 122 (1985).

[35] Lindemann and Grossman, *Employment Discrimination Law*, p. 616.

[36] Ibid., pp. 616–17 (quoting *Criswell*, 472 U.S. at 422–23).

[37] The Older Workers Benefits Protection Act (OWBPA) of 1990 allowed "age-based reductions in employee benefit plans...justified by significant cost considerations . . . where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker. . . ." The OWBPA covers all employee benefit plans no matter when they were adopted and the burden of proof that such plans are lawful is on the employer. The OWBPA provides exceptions to the cost-justification scheme whereby employers may reduce employee benefits.

[38] Lindemann and Grossman, *Employment Discrimination Law*, p. 632.

[39] Ibid.

[40] Ibid.

[41] Dickerson v. Deluxe Check Printers, Inc., 703 F.2d 276, 281 (8th Cir. 1983).

[42] Lindemann and Grossman, *Employment Discrimination Law*, pp. 636–37.

[43] Ibid.

[44] 469 U.S. 111 (1985).

"knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA."[45]

Compensatory damages for emotional distress or pain and suffering are not available under the ADEA. However, both punitive and compensatory damages may be recovered on the basis of a pendent state law claim.[46]

Finally, a plaintiff who prevails in an ADEA claim is entitled to reasonable attorney's fees and costs. However, damage awards received by a plaintiff, including back pay and liquidated damages, from an ADEA claim are subject to income taxation.[47]

Waivers Under the ADEA

Under the ADEA, waivers of rights created by the act are subject to the "knowing and voluntary" common law standard.[48] In 1990, with the enactment of the Older Workers Benefits Protection Act (OWBPA), Congress statutorily defined the "knowing and voluntary" rule.[49] The OWBPA amended the ADEA in two respects. First, the OWBPA clarifies that age discrimination in virtually all forms of employee benefits is unlawful.[50] Second, the OWPBA ensures that older workers will not be coerced or manipulated into waiving their rights to seek legal relief under the ADEA.

Title I of OWBPA has four purposes. First, it states the ADEA "covers virtually all employee benefits and employee benefit plans."[51] Second, it clarifies the affirmative defenses available under the ADEA. Third, OWBPA states that the employer bears the burden of proof for the affirmative defenses. Fourth, "the bill rejects any distinction between discriminatory provisions that predate the ADEA and those that were enacted after the passage of the Act."[52]

Under OWBPA there are listed requirements that must be satisfied before a court may proceed to determine factually whether the execution of a waiver was "knowing and voluntary."[53] These requirements are (1) the waiver must be part of a written agreement; (2) the waiver must specifically refer to the rights and claims arising under the ADEA; (3) the waiver may not affect any rights or claims that arise after the date of the agreement; (4) consideration must be provided for the waiver; (5) the individual must be given 21 (or in some instances 45) days within which to consider the agreement; (6) the individual must be given seven days within which to revoke the agreement; and (7) the worker must be advised to consult with an attorney.[54]

In 1998, the Supreme Court resolved the question of waivers under the ADEA. In *Oubre v. Entergy Operations, Inc.*, the Court held that an individual is not required to return ("tender back") consideration for a waiver in order to allege a violation of the ADEA.[55]

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[45] *Id.* at 126.

[46] Lindemann and Grossman, *Employment Discrimination Law*, pp. 644–45.

[47] Commissioner v. Schleier, 515 S.U.S. 323 (1995).

[48] Matthew T. Schaefer, "*Wamsley v. Champlin Refining & Chemicals, Inc.*: A Flawed Interpretation of the Waiver Provisions of the Older Workers Benefit Protection Act," *Capital University Law Review*, vol. 24 (1995), pp. 257, 263.

[49] Ibid.

[50] Pub. L. No. 101-433, 104 Stat. 1509 (codified as amended at 29 U.S.C. § 621 (1994 and Supp. III 1997)).

[51] *Id.*

[52] *Id.*

[53] Schaefer, "A Flawed Interpretation of the Waiver Provisions," pp. 257, 267.

[54] Ibid., pp. 257, 263. *See also* Pub. L. No. 101-433, 104 Stat. 1509 (codified as amended at 29 U.S.C. § 621 (1994 and Supp. III 1997)).

[55] 522 U.S. 422 (1998).

APPENDIX D

Chronology of Events Related to EEOC Enforcement Activities

Date	*Event*
June 10, 1964	The Equal Pay Act of 1963, enacted on June 10, 1963, went into effect prohibiting discrimination on the basis of gender in compensation for substantially similar work under similar conditions.
July 2, 1964	The Equal Employment Opportunity Commission was created by Title VII of the Civil Rights Act of 1964, which also required employers to maintain records relevant to the determination of unlawful employment practices.
July 2, 1965	The enforcement provisions of the Title VII of the Civil Rights Act of 1964 took effect.
Dec. 15, 1967	Enactment of the Age Discrimination in Employment Act of 1967, prohibiting employment discrimination against persons 40 years of age or older. It took effect 180 days later and has since been amended by the Older Workers Benefit Protection Act and the Civil Rights Act of 1991.
1972	The Equal Employment Opportunity Act of 1972 gave EEOC the power to file lawsuits against private employers, employment agencies, and unions when conciliation failed, and to file systemic suits against private employers. This amendment also extended EEOC's jurisdiction to all educational institutions and state and local governments, and broadened Title VII coverage to include employers of 15 or more employees and unions with 15 or more members.
1978	The Reorganization Plan of 1978 transferred enforcement authority of EPA and ADEA to EEOC from the Department of Labor.
1978	The Pregnancy Discrimination Act amended Title VII to ensure that pregnant women be treated no differently from other workers, by declaring that pregnancy discrimination was equivalent to sex discrimination because the ability to bear children is limited to women.
Mar. 19, 1990	EEOC issued policy guidance on sexual harassment updating its 1980 guidelines in response to *Meritor Savings Bank v. Vinson* (106 S. Ct. 2399, 40 EPD para. 36,159 (1986)).
Nov. 21, 1991	Enactment of the Civil Rights Act of 1991, which amended the Civil Rights Act of 1964, provided for damages in cases of intentional employment discrimination, and clarified provisions regarding disparate impact actions, and which took effect upon its date of enactment.
July 26, 1992	Title I of the Americans with Disabilities Act became effective for employers with 25 or more employees.

Oct. 14, 1992	Passage of the EEOC Education, Technical Assistance, and Training Revolving Fund Act of 1992 amending Title VII to create a revolving fund to provide education, technical assistance, and training related to the laws the EEOC administers and transferring $1,000,000 to that fund.
July 26, 1994	Title I of the Americans with Disabilities Act became effective for smaller employers—those with 15 or more employees.
April 19, 1995	Charge prioritization procedures adopted by the EEOC that focused the Agency resources on charges with the most potential for cause findings or for the greatest enforcement impact.
April 19, 1995	Commissioners delegated certain litigation authority to EEOC's general counsel.
February 1996	Implementation of the National Enforcement Plan which identified national priority issues for EEOC's enforcement program.
July 15, 1996	Effective date of when EEOC's general counsel redelegated authority to regional attorneys to bring suit on behalf of the Commission.
Feb. 25, 1997	EEOC launched Internet Web site.
May 11, 1997	EEOC organization, mission, and functions were revised.
Sept. 30, 1997	Mediation pilot programs running in all district offices despite lack of funding.
March 1998	Priority Charge Handling Task Force and Litigation Task Force Report issued.
Oct. 23, 1998	Ida L. Castro sworn in as the chairperson of the EEOC.
Dec. 10, 1998	EEOC announced Ida L. Castro's Small Business Initiative to bolster the access of small and medium-sized businesses to information about antidiscrimination laws and to promote voluntary compliance.
Feb. 11, 1999	EEOC expanded mediation to a nationwide program.
Mar. 1, 1999	EEOC issued guidance on reasonable accommodation under the Americans with Disability Act.
Mar. 23, 1999	Chairperson Ida L. Castro announced EEOC's new Customer Service Initiative.
May 1999	A draft of the Comprehensive Enforcement Program was circulated among district directors and regional attorneys with instructions to begin implementing its provisions.
July 18, 1999	EEOC released guidance on Standards for Liability of Harassment by supervisors.

July 27, 1999	EEOC issued instruction to field offices on analyzing ADA charges in light of Supreme Court decisions about whether medication or other mitigating measures must be considered in assessing whether a person's condition is a disability.
Oct. 28, 1999	Chairwoman Ida L. Castro implemented the Comprehensive Enforcement Program of focusing resources and integrating working relationships of staff within the field offices, districts and agencywide.
Mar. 6, 2000	Comprehensive Enforcement Program revised.
February 2000	EEOC proposed the Equal Pay Initiative to expand opportunities for women and minorities and close the wage gap affecting millions of families dependent on their wages. This initiative was included in the President's budget request for both FY 2000 and FY 2001.

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Persons and Organizations Contacted

U.S. Equal Employment Opportunity Commission

U.S. Equal Employment Opportunity Commission
Headquarters
1801 L Street, NW
Washington, DC 20507

Baltimore District Office
10 South Howard Street, 3rd Floor
Baltimore, MD 21202

Birmingham District Office
1900 Third Avenue, North, Suite 101
Birmingham, AL 35203-2397

Chicago District Office
500 West Madison, Suite 2800
Chicago, IL 60661

Dallas District Office
207 South Houston Street, 3rd Floor
Dallas, TX 75202-4726

Detroit District Office
477 Michigan Avenue, Room 865
Detroit, MI 48226

Los Angeles District Office
255 East Temple Street, 4th Floor
Los Angeles, CA 90012

New Orleans District Office
701 Loyola Avenue, Suite 600
New Orleans, LA 70113-9936

New York District Office
7 World Trade Center, 18th Floor
New York, NY 10048-0948

Philadelphia District Office
21 South Fifth Street
The Borse, Suite 400
Philadelphia, PA 19106-2515

Phoenix District Office
3300 North Central Avenue, Suite 690
Phoenix, AZ 85012

Seattle District Office
909 First Avenue, Suite 400
Seattle, WA 98104-1061

St. Louis District Office
Robert A. Young Building
1222 Spruce Street, Room 8.100
St. Louis, MO 63103

State and Local Agencies

Alaska State Commission for Human Rights
Paula M. Haley, Executive Director
800 A Street, Suite 204
Anchorage, AK 99501-3669

Alexandria Office of Human Rights
Robert M. Steindler, Administrator
110 North Royal Street, Suite 201
Alexandria, VA 22314

Baltimore Community Relations Commission
Alvin O. Gillard, Director
10 North Calvert Street, Suite 915
Equitable Building
Baltimore, MD 21202

Dade County Equal Opportunity Board
Marcos Regalado, Director
111 Northwest First Street, Suite 650
Miami, FL 33128-1965

District of Columbia Office of Human Rights
Donald Stocks, Acting Director
441 Fourth Street, NW, Suite 970 North
Washington, DC 20001

Howard County Office of Human Rights
Rufus F. Clanzy, Administrator
6751 Columbia Gateway Drive, 2nd Floor
Columbia, MD 21046

Industrial Commission of Utah
Joseph Gallegos, Director
Anti-Discrimination and Labor Division
160 East 300, South, 3rd Floor
Post Office Box 146630
Salt Lake City, UT 84114-6630

Maryland Commission on Human Relations
Henry Ford, Executive Director
6 St. Paul Street, Suite 900
Baltimore, MD 21202

Nevada Equal Rights Commission
William H. Stewart, Administrator
1515 East Tropicana Avenue, Suite 590
Las Vegas, NV 89119

Prince George's County Human Relations Commission
Dr. William Welch, Executive Director
Tawanda Smith, Deputy Director
1400 McCormick Drive, Suite 245
Largo, MD 20774

Seattle Office for Civil Rights
Germaine Covington, Director
Barbara Osinski, Enforcement Manager
700 Third Avenue, Suite 250
Seattle, WA 98104

St. Louis Civil Rights Enforcement Agency
Jacqueline Lester, Executive Director
Jacqueline Carr, Deputy Director
906 Olive Street, Suite 100
St. Louis, MO 63101

Texas Commission on Human Rights
William H. Hale, Executive Director
6330 Highway 290, East, Suite 250
Austin, TX 78711

Tribal Employee Rights Offices

Cherokee Nation of Oklahoma
Tribal Employment Rights Office
Larry D. Ketcher, TERO Administrator
Post Office Box 948
Tahlequah, OK 74465-0948

Four Tribes Consortium of Oklahoma
Tribal Employment Rights Office
Jeff Foster, Executive Director
Post Office Box 1193
Andarko, OK 73005

Gila River Indian Community
Tribal Employment Rights Office
Joseph Manuel, Director
Post Office Box 97
Sacaton, AZ 85247

Oglala Sioux Tribe
Tribal Employment Rights Office
Donald Twiss, Director
Post Office Box 379
Pine Ridge, SD 57770

Seminole Tribe of Florida
Tribal Employment Rights Office
Steven D. Bowers, Director
6300 Stirling Road
Hollywood, FL 33024

Southern Ute Tribe
Tribal Employment Rights Office
Annabelle J. Cantsee, Director
Post Office Box 737
Ignacio, CO 81137

Tohono O'Odham Nation
Tribal Employment Rights Office
Marlo Norris-Enos, Director
Post Office Box 40
Sells, AZ 85634

Organizations and Advocates

100 Black Men of America, Inc.
Thomas Dortch, President
Chandler Building
3710 Peachtree Street, NE, Suite 600
Atlanta, GA 30308

A. Philip Randolph Institute
Norman Hill, President
1441 I Street, NW, Suite 300
Washington, DC 20005

African American Union
Albert Meeks, President
209B Morgan Street, NW
Washington, DC 20001

Alliance for Justice
Nan Aron, President
2000 P Street, NW, Room 712
Washington, DC 20036

American Alliance For Rights and Responsibilities
Roger Conner, Executive Director
Center for Community Interest
1146 19th Street, NW, Suite 250
Washington, DC 20036

American Arab Anti-Discrimination Committee
Naili Asali, Chairperson
4201 Connecticut Avenue, NW, Suite 300
Washington, DC 20008

American Association for Affirmative Action
Ruth Jones, President
3905 Vincennes Avenue, Suite 304
Indianapolis, IN 46268

American Association of Blacks in Energy
Cade Erskine, Chairman
927 15th Street, NW, Suite 200
Washington, DC 20005

American Association of Retired Persons
Horace Deets, Executive Director
Michelle C. Pollak, Legislative Representative
601 E Street, NW
Washington, DC 20049

American Association of University Women
Patricia Stroud
Legal Advocacy Fund Manager
1111 16th Street, NW
Washington, DC 20036

American Association of University Professors
Mary Burgan, General-Secretary
1012 14th Street, NW, Suite 200
Washington, DC 20005

American Association on Mental Retardation
M. Doreen Croser, Executive Director
444 North Capitol Street, NW, Suite 846
Washington, DC 20001

American Baptist Churches USA
Curtis Ramsey Lucas, Director Legislative Advocacy
110 Maryland Avenue, NE, Suite 504
Washington, DC 20002-5694

American Bar Association
Jim Alfini, Chair
Section of Dispute Resolution
740 15th Street, NW
Washington, DC 20005

American Civil Liberties Union
Ira Glasser, Executive Director
132 West 43rd Street
New York, NY 10036

American Civil Liberties Union
Laura Murphy, Director
122 Maryland Avenue, NW
Washington, DC 20002

American Civil Rights Union
Robert Carseson
1229 Rosecrans Street, Suite 325
San Diego, CA 92106

American Enterprise Institute
Diana Furchtgott-Roth
1150 17th Street, NW
Washington, DC 20036

American Federation of Government Employees
Bobby Harnage, National President
80 F Street, NW
Washington, DC 20001

American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)
Richard Womack
815 16th Street, NW, Room 410
Washington, DC 20006

American Federation of Teachers
Sandra Feldman, President
555 New Jersey Avenue, NW
Washington, DC 20001

American GI Forum of the United States
Antonio Gil Morales, Executive Director
2711 West Anderson Lane, Suite 205
Austin, TX 78757-1121

American Jewish Committee
David Harris, Executive Director
Jeffrey P. Sinensky, Legal Director
Richard Foltin, Legislative Director and Counsel
165 East 56th Street
New York, NY 10022-2746

American Jewish Congress
Phil Baum, Executive Director
15 East 84th Street
New York, NY 10028

American Muslim Council
Abduraham Alamoudi, Executive Director
Imad Malik
1212 New York Avenue, NW, Suite 400
Washington, DC 20005

American Veterans Committee
Gus Tyler, National Chairman
6309 Bannockburn Drive
Bethesda, MD 20817

Americans for Indian Opportunity
LaDonna Harris, President and Founder
681 Juniper Hill Road
Bernalillo, NM 87004

Anti-Defamation League
Abraham Foxman, National Director
823 United Nations Plaza
New York, NY 10017

Arab American Institute
Dr. James Zogby, President
918 16th Street, NW, Suite 601
Washington, DC 20006

Arkansas State Conference of NAACP
Dale Charles, Director
1124 Martin Luther King Drive
Little Rock, AR 72202

Arrow, Inc.
Hazel Elbert, Executive Director
1000 Connecticut Avenue, Room 1204
Washington, DC 20036

Asian-American Free Labor Institute
Jim Baker, Acting Executive Director
1925 K Street, NW, Suite 301
Washington, DC 20006

Asian American Journalists
Sandra Michioku, Executive Director
1765 Sutter Street, Suite 1000
San Francisco, CA 94115

Asian American Legal Defense and Education Fund
Margaret Fung, Executive Director
Stanley Mark
99 Hudson Street, 12th Floor
New York, NY 10013

Asian Law Caucus
Angelo Ancheta, Executive Director
720 Market Street, Suite 5000
San Francisco, CA 94102

Asian Law Center
Hina Shaw, Esq.
720 Marker Street, Suite 240
San Francisco, CA 94102

Asian Pacific American Legal Center
1145 Wilshire Boulevard, 2nd Floor
Los Angeles, CA 90017

Association for Women in Development
666 11th Street, NW, Suite 450
Washington, DC 20001

Association for Women in Science
Penelope Kengel-Flom, President
1522 K Street, NW, Suite 820
Washington, DC 20005

Black Leadership Forum, Inc.
Dr. Joseph Lowery, Chairman
1090 Vermont Avenue, NW, Suite 1100
Washington, DC 20005

Black Legislative Caucus
Willie Perkins, President
400 High Street, Room 305
Jackson, MS 39201

Blacks in Government
Gerald R. Reed, President
1820 11th Street, NW
Washington, DC 20001

Bureau of Indian Affairs
Iris Winston
1849 C Street, NE, Suite 4640
Washington, DC 20240

Business and Professional Women/USA
Audrey Tayse Hynes, Executive Director
2012 Massachusetts Avenue, NW
Washington, DC 20036

Center for Civil and Human Rights
Garth Meintjes, Director
Notre Dame Law School
Notre Dame, IN 46556

Center for Equal Opportunity
Linda Chavez, President
Roger Clegg
815 15th Street, NW, Room 928
Washington, DC 20005

Center for Human Rights
and Constitutional Law Foundation
265 South Occidental Boulevard
Los Angeles, CA 90057

Center for New Black Leadership
Phyllis Berry Myers
202 G Street, NE
Washington, DC 20002

Center for Women Policy Studies
Leslie Wolfe, President
1211 Connecticut Avenue, NW, Suite 312
Washington, DC 20036

Chicago Lawyers' Committee for Civil Rights
Cynthia A. Wilson, Director
Employment Opportunity Project
100 North LaSalle Street, Suite 600
Chicago, IL 60602-2403

Church Women United
Ann Delore
110 Maryland Avenue, NE, Suite 100
Washington, DC 20002

Citizens for Civil Rights
Post Office Box 2461
West Lafayette, IN 47996

Citizens' Commission on Civil Rights
Corrine Yu, Director
2000 M Street, NW, Room 400
Washington, DC 20036

Coalition for Citizens with Disabilities
Mark Smith, Executive Director
754 North President Street, Suite 2
Jackson, MS 39202

Commission for Social Justice
Vincent Romano, President
219 E Street, NE
Washington, DC 20002

Congress of Racial Equality
Roy Innis, Chairman
30 Cooper Square
New York, NY 10003

Congressional Black Caucus Foundation
Ramona Edelin, Executive Director
1004 Pennsylvania Avenue, SE
Washington, DC 20003

Congressional Hispanic Caucus Institute
504 C Street, NE
Washington, DC 20002

Cornell University
Institute for Women and Work
Dr. Francine Moccio, Director
16 East 34th Street
New York, NY 10036

Council of Seventh Day Adventist Church
Mitchell Tyner, General Counsel
12501 Old Columbia Pike
Silver Spring, MD 20904

Council for Tribal Employment Rights
Conrad Edwards, Director
23830 Pacific Highway South, Suite 203
Kent, WA 98032

Cuban-American Legal Defense
and Education Fund
Graciela Beecher, Chairperson
2904 Shawnee Street
Fort Wayne, IN 46807

Cuban-American National Council
Augustin De Goytisolo, Chairman
1223 Southwest Fourth Street, 3rd Floor
Miami, FL 33135

U.S. Department of Labor, Women's Bureau
Delores L. Crockett, Acting Director
200 Constitution Avenue, NW, Room S3002
Washington, DC 20210

Duke University Law School
Professor Donald Horowitz
Post Office Box 90360
Durham, NC 27706

Employment Law Center
Joannie Chang, Esq.
1663 Mission
San Francisco, CA 94103

Employment Policy Foundation
Ed Potter, President
1015 15th Street, NW, Suite 1200
Washington, DC 20005

Epilespy Foundation of America
Paulette Maehara, Chief Executive Officer
4351 Garden City Drive
Landover, MD 20785

Equal Employment Advisory Council
Ann Elizabeth Reesman, General Counsel
1015 15th Street, NW
Washington, DC 20005

Ethics and Public Policy Center
R. Alexander Acosta
1015 15th Street, NW
Washington, DC 20005

Federation of Organization for Professional Women
Viola Young-Horvath, Executive Director
1825 I Street, NW, Suite 400
Washington, DC 20006

Friends Committee on National Legislation
Joe Volk, Executive Secretary
245 Second Street, NE
Washington, DC 20002

General Accounting Office
Division of Education and Employment Issues
Carlotta C. Joyner
441 G Street, NW
Washington, DC 20548

George Mason University
Professor Nelson Lund
3401 North Fairfax Drive
MS-1G3
Arlington, VA 22201

Harvard University
Professor Abigail Thernstrom
Cambridge, MA

Hispanic Association on Corporate Responsibility
Richard Bela, President
1730 Rhode Island Avenue, NW, Suite 505
Washington, DC 20036

Hispanic Elected Local Officials Caucus
Mary Gordon, Manager
1301 Pennsylvania Avenue, NW
Washington, DC 20004

Hispanic National Bar Association
Loretta Gutierrez Nestor, Executive Director
Post Office Box 66105
Washington, DC 20003

Hispanic Policy Development Project
Siobhan Oppenheimer-Nicolau, President
36 East 22nd Street, 9th Floor
New York, NY 10010

Human Rights Campaign
Elizabeth Birch, Executive Director
919 18th Street, NW, Room 800
Washington, DC 20006

Institute for Justice
Clint Bolick
1717 Pennsylvania Avenue, NW, Suite 200
Washington, DC 20006

Institute for Puerto Rican Policy, Inc.
Angelo Falcon, President
286 Fifth Avenue, 3rd Floor
New York, NY 10001-4512

Institute for Women's Policy Research
Heidi Hartman, Director of Research
Vicky Lovell, Study Director
1400 20th Street, NW, Suite 104
Washington, DC 20036

International Association of Machinists
and Aerospace Workers
George Kourpias, International President
9000 Machinists Place
Upper Marlboro, MD 20772-4588

International Association of Official Human Rights
Agencies
William Hale, President
444 North Capitol Street, NW, Suite 408
Washington, DC 20001

International Union of United Auto Workers
Joe Davis, Director
8000 East Jefferson Avenue
Detroit, MI 48214

Jackson, Lewis, Schnitzler & Krupman
Christopher G. Bell
1350 I Street, NW, Suite 510
Washington, DC 20005

Jewish Labor Committee
Lenore Miller, President
25 East 21st Street, 2nd Floor
New York, NY 10010

Joint Center for Political and Economic Studies
Eddie Williams, President
1090 Vermont Avenue, NW, Room 1100
Washington, DC 20005-4961

Jones, Day, Reavis & Pogue
Glen Nager
51 Louisiana Avenue, NW
Washington, DC 20001-2113

Labor Council for Latin American
Advancement
Henry Gonzalez, National President
815 16th Street, NW, Suite 310
Washington, DC 20006

Labor Policy Association
Jeff McGuiness
1015 15th Street, NW
Washington, DC 20005

Lawyers' Committee for Civil Rights Under Law
Barbara Armwine, Executive Director
1450 G Street, NW, Suite 400
Washington, DC 20005

Leadership Conference on Civil Rights
Wade Henderson, Executive Director
1629 K Street, NW, Suite 1010
Washington, DC 20006

League of United Latin American Citizens
Belen Robles, President
One State National Plaza
221 Northwest Kansas, Suite 1200
El Paso,TX 79901

League of United Latin American Citizens
Brent Wilkes, Executive Director
1133 20th Street, NW, Suite 750
Washington, DC 20036

League of Women Voters of the United States
Becky Cain, President
1730 M Street, NW, 10th Floor
Washington, DC 20036

Legal Services for the Elderly
Jonathan Weiss, Director
130 West 42nd Street, 17th Floor
New York, NY 10036

Lincoln Institute for Research and Education
A. Parker, President
1001 Connecticut Avenue, NW, Suite 1135
Washington, DC 20036

Martin Luther King Commission
Tracy Steele, Director
1400 West Capitol
Little Rock, AR 72201

Meikle John Civil Liberties Institute
Ann Ginger, Executive Director
Post Office Box 673
Berkeley, CA 94701

Mexican American Legal Defense and
Educational Fund
Antonia Hernandez, President
634 South Spring Street, 11th Floor
Los Angeles, CA 90014

Mexican American Ministry
Dora Falcon
Dogde City, KS

Mexican-American Women's
National Association
Elisa Sanchez, National President
1725 K Street, NW, Suite 501
Washington, DC 20006

Migrant Legal Action Program
Honorable Armando Rodriguez, Chairperson
Post Office Box 53308
Washington, DC 20009

Minority Business Enterprise Legal Defense
and Education Fund
Parren Mitchell, Chairperson
900 Second Street, NW, Suite 8
Washington, DC 20002

National Association for the Advancement
of Colored People
Legal Defense and Education Fund, Inc.
Elaine Jones, Director
99 Hudson Street, 16th Floor
New York, NY 10013

National Alliance of Postal and Federal Employees
James McGee, National President
1628 11th Street, NW
Washington, DC 20001

National Asian Pacific American Legal Consortium
Karen Narasaki, Executive Director
Aryani Ong
1140 Connecticut Avenue, NW, Suite 1200
Washington, DC 20036

National Association for the Advancement
of Colored People
Kweisi Mfume, President
Dennis Courtland Hayes, General Counsel
4805 Mt. Hope Drive
Baltimore, MD 21215-3297

National Association for the Advancement
of Colored People
1630 Lapeyrouse
New Orleans, LA 70116

National Association for Women in Education
Lynn Gangone, Executive Director
1325 18th Street, NW, Suite 210
Washington, DC 20036

National Association of Black Journalists
Will Sutton, President
15 South McDowell Street
Raleigh, NC

National Association of Colored Women's Club
Patricia Fletcher, President
5808 16th Street, NW
Washington, DC 20011

National Association of Hispanic Journalists
Patrick Salazar, Executive Director
1193 National Press Building
Washington, DC 20045

National Association of Human Rights Workers
Mary Snead, President
Post Office Box 4490
Columbia, SC 29240

National Association of Minority Contractors
Samuel Carradine, Executive Director
666 11th Street, NW, Suite 520
Washington, DC 20001

National Association of Women Business Owners
Susan Tuller, President
1100 Wayne Avenue, Suite 830
Silver Spring, MD 20910

National Association of Women Judges
Esther Ochsman, Executive Director
815 15th Street, NW, Room 601
Washington, DC 20005

National Association of Workforce Development
Paul Mendez, Executive Director
1620 Eye Street, NW, Lower Level 30
Washington, DC 20006-4005

National Bar Association
Lawrence Boze, President
1225 11th Street, NW
Washington, DC 20001

National Black Caucus of State Legislatures
Ivan Lenier, Interim Executive Director
444 North Capital Street, NW, Room 662
Washington, DC 20001

National Caucus and Center on Black Aged
1424 K Street, NW, Suite 500
Washington, DC 20005-2407

National Chamber Litigation Center
Stephen Bokat, Executive Vice President
1615 H Street, NW, Suite 230
Washington, DC 20062

National Committee on Pay Equity
Susan Bianchi-Sand, Executive Director
1126 16th Street, NW, Suite 411
Washington, DC 20036

National Conference of Black
Michelle Kourouma, Executive Director
1422 West Peachtree Street, NW, Suite 800
Atlanta, GA 30309

National Conference of Puerto Rican Women
Vanny Marrero, National President
5 Thomas Circle, NW
Washington, DC 20005

National Congress of American Indians
Jack Jackson, Jr., Goverment Affiars Liason
1301 Connecticut Avenue, NW, Suite 200
Washington, DC 20036

National Council on the Aging
409 Third Street, SW
Washington, DC 20024

National Council of Jewish Women
Susan Katz, Executive Director
53 West 23rd Street
New York, NY 10010

National Council of La Raza
Raul Yzaguirre, President
1111 19th Street, NW, Suite 1000
Washington, DC 20036

National Council of Negro Women, Inc.
Dr. Jane Smith, National President
633 Pennsylvania Avenue, NW
Washington, DC 20004

National Council of Senior Citizens
Ron Hicks
8403 Colesville Road, Suite 1200
Silver Spring, MD 20910-3314

National Education Association
Dr. Robert Chase, Director
1201 16th Street, NW
Washington, DC 20036

National Employment Lawyers Association
Terisa Chaw, Executive Director
600 Harrison Street, Suite 535
San Francisco, CA 94107

National Image, Inc.
Thomas Gomez, President
930 West Seventh Avenue, Suite 139
Denver, CO 80204

National Industrial Council
Mark Stuart, Executive Director
Employer Associations
1331 Pennsylvania Avenue, NW, Suite 600
Washington, DC 20004-1706

National Legal Aid and Defender Association
Clinton Lyons, Executive Director
1625 K Street, NW, Suite 800
Washington, DC 20006

National Newspaper Publishers Association
Yvonne Cooper, Executive Director
3200 13th Street, NW
Washington, DC 20010

National Organization for Women
Patricia Ireland
1000 16th Street, NW, Suite 700
Washington, DC 20036

National Partnership for Women and Families
Judith Lichtman, President
Jocelyn Frye, Director of Legal and Public Policy
1875 Connecticut Avenue, NW, Suite 710
Washington, DC 20009-5728

National Policy Association
Anthony Quainton, President
1424 16th Street, NW, Suite 700
Washington, DC 20036

National Rainbow Coalition
Reverend Jessie Jackson, President
1002 Wisconsin Avenue, NW
Washington, DC 20007

National Urban Coalition
Dr. Ramona Edelin, President
727 15th Street, NW, Suite 900
Washington, DC 20002

National Urban League, Inc.
Hugh Price, President
1111 14th Street, NW
Washington, DC 20005

National Women's Law Center
Judy Applebaum, Vice President
Director of Employment Opportunity
11 Dupont Circle, NW, Suite 800
Washington, DC 20036

Native American Rights Fund
Keith Harper
Lorna Babe
1712 N Street, NW
Washington, DC 20036

Older Women's League
Deborah Briceland-Betts, Executive Director
666 11th Street, NW, Suite 700
Washington, DC 20001

Operation Push: People United to Serve Humanity
Reverend Willie Barrow, Chairman
930 East 50th Street
Chicago, IL 60615

Organization of Chinese Americans
Daphne Kwok, Executive Director
1001 Connecticut Avenue, NW, Suite 707
Washington, DC 20036

Organization of Chinese American Women
Pauline W. Tsui, Acting Executive Director
4641 Montgomery Avenue, Suite 208
Bethesda, MD 20814

People for the American Way
Carole Shields, President
2000 M Street, NW
Washington, DC 20036

Poverty and Race Research Action Council
Chester Hartman, Executive Director
1711 Connecticut Avenue, NW, Suite 207
Washington, DC 20009

Public Citizen Litigation Group
David Vladeck, Director
1600 20th Street, NW
Washington, DC 20009

Puerto Rican Legal Defense and Education Fund
Juan Figueroa, President
99 Hudson Street
New York, NY 10013

Society for Human Resources Management (SHRM)
Isa Campbell
1800 Duke Street
Alexandria, VA 22314

Society of Professionals in Dispute Resolution
Employment Section
Robert Perkovich
Post Office Box 146759
Chicago, IL 60614-6759

Southern Christian Leadership Conference
Jackson Chapter
Stephanie Parker-Weaver, Executive Director
Representative Jim Evans, Chair
809 North State Street
Jackson, MS 39202

Southern Poverty Law Center, Inc.
Edward Ashworth, Executive Director
400 Washington Avenue
Montgomery, AL 36104

Southern Regional Council
Lottie Shackleford, President
133 Carnegie Way, Suite 900
Atlanta, GA 30303-1024

The Heritage Foundation
Mark Wilson
214 Massachusetts Avenue, NE
Washington, DC 2002

The Manhattan Institute
Walter Olson
52 Vanderbilt Avenue
New York, NY 10017

Tomas Rivera Center
Dr. Harry Pachon, President
Steele Hall
241 East 11th Street, 3rd Floor
Clarement, CA 91711-6194

Trial Lawyers for Public Justice
Arthur Bryand, Executive Director
1717 Massachusetts Avenue, NW, Suite 800
Washington, DC 20036

Tucson Indian Center
Jacob Bernal
Post Office Box 2307
Tucson, AZ 85702

United Church of Christ
Commission for Racial Justice
Reverend Henry Simmons, Chairperson
700 Prospect Avenue
Cleveland, OH 44115

United Mine Workers of America
Cecil Roberts, President
900 15th Street, NW
Washington, DC 20005

United Steel Workers of America
Committee on Civil Rights
George Becker, International President
5 Gateway Center, Suite 1201
Pittsburg, PA 15222

Univerity of Maryland- Baltimore Campus
Policy Scienes Graduate School
Professor George LaNoue
1000 Hilltop Circle
Administration Building
Baltimore, MD 21250

University of Michigan
Center for Education of Women
Carol Hollenshead, Director
330 East Liberty Street
Ann Arbor, MI 48104

Urban Institute
William Gorham, President
Craig G. Coelen, Senior Vice President
Bob Planansky
2100 M Street, NW
Washington, DC 20037

U.S. Business and Industrial Council
Allen Tonelson
910 16th Street, NW, Suite 300
Washington, DC 20006

U.S. Chamber of Commerce
Randy Johnson, Director of Labor Policy
1615 H Street, NW, Room 645
Washington, DC 20062

Utah Advisory Committee
Michael Martinez, Esq.
4479 Gordon Lane
Murray, Ut 84107

Utah Federation of Business and Professional Women
Julie Davis

Utah Women's Lobby
Kathleen Mason

W.E. Upjohn Institute for Employment Research
Susan Housman
300 South Westnedge Avenue
Kalamazoo, MI 49007-4686

Women Employed/Women Employed Institute
Anne Ladky, Executive Director
22 West Monroe, Suite 1400
Chicago, IL 60603

Women's American Organization
for Rehabilitation Through Training
Roseanna Abramson, Executive Director
315 Park Avenue, South
New York, NY 10010

Women's International League
for Peace and Freedom
Marilyn Clement, Executive Director
1213 Race Street
Philadelphia, PA 19107

Women's Legal Defense Fund
Judith Lichtman, President
1875 Connecticut Avenue, NW, Suite 710
Washington, DC 20009

Women's Research and Education Institute
Betty Dooley, President
1750 New York Avenue, NW, Room 350
Washington, DC 20006

Urban League

Akron Community Service Center and Urban League
Bernett Williams, President
250 East Market Street
Akron, OH 44308

Madison County Urban League
Saundra J. Hudson, President
210 William Street
Alton, IL 62002

Urban League of Northeaster New York
Aaron Dare, President
95 Livingston Avenue
Albany, NY 12207

Urban League of Madison County, Inc.
William Raymore, President
1210 West 10th Street
Post Office Box 151566
Anderson, IN 46015

Northern Virginia Urban League
George H. Lambert, Jr., President
1315 Duke Street
Alexandria, VA 22314

Atlanta Urban League
Lyndon A. Wade, President
100 Edgewood Avenue, NE, Suite 600
Atlanta, GA 30303

Quad County Urban League
Theodia Gillespie, President
808 East Galena, Suite B
Aurora, IL 60505

Austin Area Urban League
Herman L. Lessard, President
1825 East 38½ Street
Austin, TX 78722

Baltimore Urban League
Roger I. Lyons, President
512 Orchard Street
Baltimore, MD 21201

Broome County Urban League
Tonya Robinson, Chief Operating Officer
43045 Carroll Street
Binghamton, NY 13901

Birmingham Urban League
Elaine S. Jackson, Executive Director
1717 Fourth Avenue, North
Birmingham, AL 35202-1269

Urban League of Eastern Massachusetts
Joan Wallace-Benjamin, President
88 Warren Street
Roxbury, MA 02119

Southwestern Michigan Urban League
Terri Benton Ollie, President
172 West Van Buren
Battle Creek, MI 49017

Buffalo Urban League
Brenda McDuffie, President
15 East Genesee Street
Buffalo, NY 14203

Canton Urban League, Inc.
Joseph N. Smith, Executive Director
1400 Sherrick Road, SE
Canton, OH 44707-3533

Urban League of Central Carolinas, Inc.
Madine Hester Fails, President
740 West Fifth Street
Charlotte, NC 28202

Urban League of Long Island
Theresa Sanders, President
219 Carleton Avenue
Central Islip, NY 11722

Chattanooga Area Urban League
Warren E. Logan, Jr., President
Post Office Box 11106
730 Martin Luther King Boulevard
Chattanooga, TN 37403

Urban League of Champaign County
John Tracy Parsons, President
314 South Neil
Champaign, IL 61820

Chicago Urban League
James W. Compton, President
4510 South Michigan Avenue
Chicago, IL 60653

Trident Urban League
Maxine S. Martin, President
535 King Street
Charleston, SC 29403

Urban League of Greater Cincinnati
Sheila J. Adams, President
3458 Reading Road
Cincinnati, OH 45229

Urban League of Greater Cleveland
Myron F. Robinson, President
1255 Euclid Avenue, Suite 205
Cleveland, OH 44115

Columbus Urban League
Samuel Gresham, President
788 Mount Vernon Avenue
Columbus, OH 43203-1408

Urban League of Pikes Peak Region
Jerome W. Page, President
125 North Parkside Drive
Colorado Springs, CO 80909-1979

Dallas Urban League
Beverly K. Mitchell-Brooks, President
4315 South Lancaster, Suite 700
Dallas, TX 75216

Columbia Urban League
James T. McLawhorn, Jr., President
1400 Barnwell Street
Columbia, SC 29250

Dayton Urban League
Willie F. Walker, President
United Way Building
184 Salem Avenue, Room 200
Dayton, OH 45406

Metro Columbus Urban League, Inc.
Kenneth B. Crooks, Jr., President
802 First Avenue
Columbus, GA 31901

Urban League of Metropolitan Denver
Michael Hancock, President
5900 East 39th Avenue
Denver, CO 80207

Detroit Urban League
N. Charles Anderson, President
208 Mack Avenue
Detroit, MI 48201

Urban League of Shenango Valley
James A. Long, President
601 Indiana Avenue
Farrell, PA 16121

Urban League of Union County
Ella S. Teal, President
272 North Broad Street
Elizabeth, NJ 07207

Urban League of Flint
Leisa Richardson, President
5005 Cloverlawn Drive
Flint, MI 48504

Lorain County Urban League
Delbert L. Lancaster, President
401 Board Street
Robinson Building, Suites 204 and 206
Elyria, OH 44035

Urban League of Broward County
Donald E. Bowen, President
11 Northwest 36th Avenue
Fort Lauderdale, FL 33311

Urban League for Bergen County
Jennie Smith-Campbell, President
106 Palisade Avenue
Englewood, NJ 07631

Fort Wayne Urban League
Angelo V. Fleming, President
227 East Washington Boulevard
Fort Wayne, IN 46802

Urban League of Northwest Indiana, Inc.
Eloise Gentry, President
3101 Broadway
Gary, IN 46408

Urban League of Greater Hartford
James Willingham, President
1229 Albany Avenue, 3rd Floor
Hartford, CT 06112

Grand Rapids Urban League
Walter M. Brame, President
745 Eastern Avenue, SE
Grand Rapids, MI 49503

Houston Area Urban League
Sylvia K. Brooks, President
1301 Texas Avenue
Houston, TX 77002-3508

The Urban League of the Upstate
William B. Whitney, President
15 Regency Hill Drive
Greenville, SC 29603

Indianapolis Urban League
Sam H. Jones, President
850 Meridian Street
Indianapolis, IN 46204

Urban League of Metropolitan Harrisburg
Rodney N. Brooks, President
2107 North Sixth Street
Harrisburg, PA 17110

Urban League of Greater Jackson
Beneta D. Burt, President
3405 Medgar Evers Boulevard
Jackson, MS 39213

Jacksonville Urban League
Richard D. Danford, Jr., President
903 West Union Street
Jacksonville, FL 32204

Urban League of Lancaster County
Phyllis L. Campbell, President
502 South Duke Street
Lancaster, PA 17602

Urban League of Hudson County
Elnora Watson, President
779 Bergen Avenue
Jersey City, NJ 07306

Greater Lansing Urban League, Inc.
Cleophus Boyd, President
304 North Chestnut Street
Lansing, MI 48933

Urban League of Kansas City
William H. Clark, President
1710 Paseo
Kansas City, MO 64108

Urban League of Lexington-Fayette County
Porter G. Peeples, President
167 West Main Street, Room 406
Lexington, KY 40507

Knoxville Area Urban League
Rosemary Durant-Giles, President
1514 East Fifth Avenue
Post Office Box 1911
Knoxville, TN 37917-1911

Los Angeles Urban League
John W. Mack, President
3450 Mount Vernon Drive
Los Angeles, CA 90008

Massillon Urban League, Inc.
Reverend Beverly Lewis, Interim President
325 Third Street, SE
Massillon, OH 44646-6703

Louisville Urban League
Benjamin K. Richmond, President
1535 West Broadway
Louisville, KY 40203

Memphis Urban League
Herman C. Ewing, President
413 North Cleveland Street
Memphis, TN 38104-7012

Urban League of Greater Madison
Stephen H. Braunginn, President
151 East Gorham
Madison, WI 53703

Urban League of Greater Miami
T. Willard Fair, President
8500 Northwest 25th Avenue
Miami, FL 33147

Marion Urban League, Inc.
Cleo Richardson, Executive Director
1221 West 12th Street
Marion, IN 46953

Milwaukee Urban League
Kenneth F. Little, President
2800 West Wright Street
Milwaukee, WI 53210

Minneapolis Urban League
Clarence Hightower, President
2000 Plymouth Avenue, North
Minneapolis, MN 55411

Morris County Urban League
William D. Primus, Executive Director
240 Ridgedale Avenue
Cedar Knolls, NJ 07927

Urban League of Greater New Orleans
Edith Gee Jones, President
1929 Bienville Street
New Orleans, LA 70112

Urban League of Greater Muskegon
Gloria W. Gardner, President
425 Catawba Avenue
Muskegon, MI 49442-5140

New York Urban League
Dennis M. Walcott, President
204 West 136th Street
New York, NY 10030

Nashville Urban League
Rhonda Cantrell Dunn, Executive Director
1219 Ninth Avenue, North
Nashville, TN 37208

Urban League of Essex County
Eugene Campbell, President
508 Central Avenue
Newark, NJ 07107-1430

Urban League of Hampton Roads
Creamer Bazzell, Interim Executive Director
840 Church Street, Suites H, I, and J
Norfolk, VA 23510

Metropolitan Orlando Urban League
Shirley J. Boykin, President
2512 West Colonial Drive
Orlando, FL 32804

Bay Area Urban League
Stanley Hall, President
2201 Broadway
Oakland, CA 94612

Tri-County Urban League
Laraine E. Bryson, President
317 South MacArthur Highway
Peoria, IL 61605

Urban League of Oklahoma City
Valerie Thompson, Interim President
3017 Martin Luther King Avenue
Oklahoma City, OK 73111

Urban League of Philadelphia
Robert W. Sorrell, President
251-53 South 24th Street
Philadelphia, PA 19103-5529

Urban League of Nebraska
George H. Dillard, President
3022-24 North 24th Street
Omaha, NE 68110

Phoenix Urban League
George Dean, President
1402 South Seventh Avenue
Phoenix, AZ 85007

Urban League of Pittsburgh
Esther L. Bush, President
1 Smithfield Street, 3rd Floor
Pittsburgh, PA 15222-2222

Pontiac Area Urban League
James C. Graham, Jr., Executive Director
295 West Huron Street
Pontiac, MI 48341

Monmouth County Urban League
Frank Lomax, President
170 Broad Street, Suite 101
Red Bank, NJ 07701

Urban League of Portland
Duane Bosworth, Board Chairperson
10 North Russell Street
Portland, OR 97227

Urban League of Greater Richmond, Inc.
Margo T. Clarke, Interim President
101 East Clay Street
Richmond, VA 23219

Urban League of Rhode Island
Dennis Langley, Executive Director
246 Prairie Avenue
Providence, RI 02905

Urban League of Riverside and San Bernardino Counties
Norm Martin, Board Chairperson
2060 University Avenue, Suite 106
Riverside, CA 92507

Urban League of Rochester
William G. Clark, President
265 North Clinton Avenue
Rochester, NY 14605

Pinellas County Urban League
James O. Simmons, President
333 31st Street
St. Petersburg, FL 33713

Sacramento Urban League
James Shelby, President
4900 Broadway, Suite 1600
Sacramento, CA 95820

San Diego Urban League
John W. Johnson, President
720 Gateway Center Drive
San Diego, CA 92102

Urban League Metropolitan St. Louis
James H. Buford, President
3701 Grandel Square
St. Louis, MO 63108

Urban League of Metropolitan Seattle
James Kelly, President
105 14th Avenue
Seattle, WA 98122

St. Paul Urban League
Willie Mae Wilson, President
401 Selby Avenue
St. Paul, MN 55102

Urban League of South Bend and St. Joseph County
Gladys Muhammed, Interim Administrator
Post Office Box 4043
South Bend, IN 46634

Springfield Urban League, Inc.
Howard R. Veal, President
100 North 11th Street
Post Office Box 3865
Springfield, IL 62708

Urban League of Onondaga County
Eloise Dowdell-Curry, President
324 University Avenue, Suite 301
Syracuse, NY 13210

Urban League of Springfield
Henry M. Thomas, President
756 State Street
Springfield, MA 01109

Tacoma Urban League
Thomas Dixon, President
2550 South Yakima Avenue
Tacoma, WA 98405

Springfield Urban League and Community Center
Donna Brino-Blackwell, President
521 South Center Street
Springfield, OH 45506

Tallahassee Urban League
Reverend Ernest Ferrell, President
923 Old Bainbridge Road
Tallahassee, FL 32301

Urban League of Southwestern Connecticut
Charles D. Shepherd, President
46 Atlantic Street
Stamford, CT 06901

Tampa/Hillsborough Urban League, Inc.
Joanna N. Tokley, President
1405 Tampa Park Plaza
Tampa, FL 33605

Greater Toledo Urban League
Johnny Mickler, President
606 Madison Avenue, Suite 1525
Toledo, OH 43604

Warren-Trumbull Urban League
Thomas S. Conley, Interim President
290 West Market Street
Warren, OH 44481

Urban League of Metropolitan Trenton
Paul P. Pintella, President
235 East Hanover Street
Trenton, NJ 08616

Greater Washington Urban League
Maudine R. Cooper, President
3501 14th Street, NW
Washington, DC 20010

Tucson Urban League
Raymond Clarke, President
2305 South Park Avenue
Tucson, AZ 85713

Lake County Urban League
Patricia Handy, Interim Administrator
122 Madison Street
Waukegan, IL 60085

Metropolitan Tulsa Urban League
Millard L. House, President
240 East Apache Street
Tulsa, OK 74106

Urban League of Westchester County
Ernest S. Prince, President
61 Mitchell Place
White Plains, NY 10601

Youngstown Area Urban League
Wm. Ronald Miller, President
1350 Fifth Avenue, Suite 300
Youngstown, OH 44504

Urban League of Wichita, Inc.
Otis G. Milton, President
1802 East 13th Street
Wichita, KS 67214

National Urban League
Hugh B. Price, President and Chief Executive Officer
120 Wall Street
New York, NY 10005

Metropolitan Wilmington Urban League
c/o ARISE International
DeChanta Knox, Interim President
1308 Delaware Avenue, Suite 301
Wilmington, DE 19806

National Urban League
Milton J. Little, Executive Vice President and
Chief Operating Officer
120 Wall Street
New York, NY 10005

Winston-Salem Urban League
Delores J. Smith, President
201 West Fifth Street
Winston-Salem, NC 27101

Affiliate Development, Programs and Policy
National Urban League
Annelle Lewis, Vice President
120 Wall Street
New York, NY 10005

Research and Public Policy
William Spriggs, Director
1111 14th Street, NW, Suite 1001
Washington, DC 20005

Attorneys and Law Firms

Jamil Akhtar, Esq.
755 West Big Beaver Road, Suite 414
Troy, MI 48084

Alan Banov, Esq.
1899 L Street, NW, Suite 1250
Washington, DC 20036-3805

Thomas F. Bello, Esq.
387 Forest Avenue
Staten Island, NY 10301

Charles E. Berg, Esq.
8 Cliff Street
Plymouth, MA 02169

Thomas D. Bouslog, Esq.
1110 West Lake Cook Road
Buffalo Grove, IL 60089-1944

James S. Brewer, Esq.
818 Farmington Avenue
West Hartford, CT 06119-1506

Lai Lee Chan, Esq.
805 Third Avenue, 6th Floor
New York, NY 10022

Barbara J. Collins, Esq.
21 Oak Street, Suite 207
Hartford, CT 06106

Frances Dunseath, Esq.
441 Wolf Ledges Parkway
Akron, OH 44311

Steven. Eckhaus, Esq.
230 Park Avenue, Suite 2525
New York, NY 10169-2500

David C. Feola, Esq.
441 Wolf Ledges Parkway
Akron, OH 44311

David M. Fish, Esq.
950 Third Avenue, Suite 1500
New York, NY 10022

Fred L. Gibson, Esq.
38600 Van Dyke Avenue
Sterling Heights, MI 48312

M. Douglas Haywoode, Esq.
128 East 31st Street
New York, NY 10016

William J. Kelleher, Esq.
100 Merrick Road
Rockville Centre, NY 12603

Nira T. Kermisch, Esq.
36 Main Street, West
Rochester, NY 14614

David H. Locks, Esq.
5901 North Cicero
Chicago, IL 60646

Donna Marianetti, Esq.
30 West Broad Street
Rochester, NY 14614

James G. McIntyre, Esq.
828 North State Street
Jackson, MS 39202

Irving Meyer, Esq.
650 South Grand Avenue
Los Angeles, CA. 90017

Richard S. Missan, Esq.
805 Third Avenue, 6th Floor
New York, NY 10022

George R. Osborne, Esq.
257 Central Park, West.
New York, NY 10024-4103

C. Waverly Parker, Esq.
314 Madison Road
Stanardsville, VA 22973-2932

Eleanor Jackson Piel, Esq.
36 West 44th Street
New York, NY 10036

Roger W. Rizk, Esq.
756 Tyvola Road, Suite 146
Charlotte, NC 28217

William A. Roy, Esq.
82 Hopmeadow Street
Post Office Box 2002
Simsbury, CT 06070-7603

David Scott, Esq.
1740 Broadway
New York, NY 10019

David J. Sleight, Esq.
420 Main Street
1812 Liberty Building
Buffalo, NY 14202

Richard J. Stockham, Esq.
2001 Park Place, Suite 825
Birmingham, AL 35203

Theodore Q. Thompson, Esq.
10 North Main Street
Ambler, PA 19002

Ruby Washington
1025 Fillmore Street
San Francisco, CA 94115

Eleanor S. Weiner, Esq.
667 Shunpike Road
Green Village, NJ 07935-3021

James F. Willeford, Esq.
201 St. Charles Avenue, Suite 3907
New Orleans, LA 70170-3907

Ronnie L. Williams, Esq.
Post Office Box 40322
Mobile, AL 36640

James H. Wilson, Esq.
2001 Park Place
Birmingham, AL 35203

Charles Wilson, Esq.
3103 Airport Boulevard
Mobile, AL 36606-3664

Jeffrey Scott Winder, Esq.
1113 Field Avenue
Metairie, LA 7001-3222

Alan Lescht & Associates, P.C.
Alan Lescht, Esq.
1300 19th Street, NW, Suite 408
Washington, DC 20036

Ashcraft & Gerel, LLP
H. Vincent McKnight, Jr., Esq.
2000 L Street, NW, Suite 400
Washington, DC 20036

Ashman & Stein
Carey M. Stein, Esq.
150 North Wacker Drive, Suite 3000
Chicago, IL 60606

Blood, Perkins & Warnick, P. C.
Drew A. Perkins, Esq.
159 North Walcott, Suite 330
Casper, WY 82601

Boothby & Yingst
Robert A. Yingst, Esq.
9047-4 US 31 North
Berrien Springs, MI 49103-1665

Brown & Calhoun
Andrew J. Ostrowski, Esq.
2080 Linglestown Road, Suite 201
Harrisburg, PA 17110

Brown & Calhoun
Serratelli Schiffman, Esq.
2080 Lingleswtown Road, Suite 201
Harrisburg, PA 17110

Bryan & Jupiter P.C.
Terrel J. Broussard, Esq.
650 Poydras Street
New Orleans, LA 70136-6101

Butler, Rubin, Saltarelli & Boyd
Kevin Jason O' Brien, Esq.
Susan Ann Payne, Esq.
Three First National Plaza, Suite 1800
Chicago, IL 60602

Regional Chicago (EEOC) District Office
John C. Hendrickson, Esq.
500 West Madison Street, Suite 2800
Chicago, IL 60661

Cohen & Kandell
Allan Gordon Cohen, Esq.
150 West Flager Street, Suite 2600
Miami, FL 33130

Cohen & Wolf, P.C.
Monte E. Frank, Esq.
158 Deer Hill Avenue
Danbury, CT 06810

Cunningham & Stripling
Laura Ann Heisz, Esq.
Pulley Roberts, Esq.
8117 Preston Road
800 Preston Commons, West
Dallas, TX 75225

Dickerson & Reilly
Bradford D. Conover, Esq.
Louis A. Zayas, Esq.
780 Third Avenue
New York, NY 10017

Drinker, Biddle & Reath, LLP
David F. Abernethy, Esq.
Julianne L. Peck, Esq.
One Logan Square
18th and Cherry Streets
Philadelphia, PA 19103-6996

Eardley Law Offices, P.C.
Eugenie Bauman, Esq.
800 Monroe Avenue, NW, Suite 312
Grand Rapids, MI 49503

Emmanuel, Sheppard & Condon PA
Warren Ralph Todd, Esq.
30 South Spring
Post Office Drawer 1271
Pensacola, FL 32596

Ernest T. Rossieello & Associates
Sandra G. Quello, Esq.
300 West Washington Street, Suite 1004
Chicago, IL 60606

Ernest T. Rossiello & Associates
Melinda Higgins Brom, Esq.
Elena M. Dimploulos, Esq.
Annice M. Kelly, Esq.
300 West Washington Street, Suite 1004
Chicago, IL 60606

Farren & King
Susan King Shaw, Esq.
94 Prospect Street
Post Office Box 1989
New Haven, CT 06521-1989

Fitzpatrick & Associates
Robert Fitzpatrick, Esq.
1875 Connecticut Avenue, NW, Suite 1140
Washington, DC 20009

Flanagan, Bilton & Brannigan
Dean H. Bilton, Esq.
200 East Randolph Drive, Suite 6900
Chicago, IL 60601

Flemming, Hovenkamp & Grayson
John L. Grayson, Esq.
3850 One Houston Center
Houston, TX 77010

Fox, Rothschild, O'Brien & Frankel, LLP
Steven K. Ludwig, Esq.
2000 Market Street
Philadelphia, PA 19103

Freking & Betz
Randolph H. Freking, Esq.
215 East Ninth Street, 5th Floor
Cincinnati, OH 45202

Friedberg & Benjamin
Randy M. Friedberg, Esq.
120 West 45th Street
New York, NY 10036

Futterman & Howard, Chtd.
Carol Rose Ashley, Esq.
Michael I. Behn, Esq.
122 South Michigan Avenue, Suite 1850
Chicago, IL 60603

Gallagher, Schoenfeld, Surkin & Chupein, P.C.
Ronald H. Surkin, Esq.
25 West Second Street
Post Office Box 900
Media, PA 19063

Gardiner, Koch & Hines
Thomas G. Gardiner, Esq.
53 West Jackson Boulevard, Suite 1550
Chicago, IL 60604-3606

Gleason, Dunn, Walsh & O'Shea
Ronald G. Dunn, Esq.
102 Hackett Boulevard
Albany, NY 12209

Goldman & Ehrlich
Gerlad A. Goldman, Esq.
Jonathan C. Goldman, Esq.
Arthur R. Ehrlich, Esq.
19 South La Salle Street, Suite 300
Chicago, IL 60603-1407

Goldstein & Roloff
Morris L. Hawk, Esq.
David E. Roloff, Esq.
526 Superior Avenue
East Cleveland, OH 44114-1401

Goodell, Stratton, Edmonds & Palmer
Harold S. Youngentob, Esq.
515 South Kansas Avenue
Topeka, KS 66603-3999

Grady & Hampton, P.A.
Stephen A. Hampton, Esq.
6 North Bradford Street
Dover, DE 19901

Gribbin, Burns & Eide
Thomas F. Burns, Esq.
16 East Kemp Street
Watertown, SD 57201

Gross, McGinley, LaBarre & Eaton, LLP
William J. Fries, Esq.
33 South Seventh Street
Post Office Box 4060
Allentown, PA 18105-4060

Hall, Monahan, Engle, Mahan & Mitchell
James A. Klenkar, Esq.
9 East Boscawen Street
Post Office Box 848
Winchester, VA 22604

Harper & Paul
Rosemarie Rhodes, Esq.
140 West Maplewood Avenue
Philadelphia, PA 19144

Hollowell, Peacock & Meyer
Deborah N. Meyer, Esq.
2840 Plaza Place, Suite 300
Raleigh, NC 27612

James L. Hicks & Associates
James L. Hicks, Esq.
27777 North Stemmons Freeway, Suite 1100
Dallas, TX 75202

Kelley, Drye & Warren LLP
Barbara E. Hoey, Esq.
101 Park Avenue
New York, NY 10178

Kennedy, Schwartz & Cure
Lauren Esposito, Esq.
113 University Place
New York, NY 10003

King, Minnig, Clexton & Feola, LLC
David C. Feola, Esq.
633 17th Street, Suite 1970
Denver, CO 80202

Kramer & Nierman
Edward G. Kramer, Esq.
3214 Prospect Avenue
East Cleveland, OH 44115

Lancaster & Eure, P.A.
Amy L. Sergent, Esq.
711 North Washington Boulevard
Sarasota, FL 34236

Law Offfice of Al Sturgeon
Irene Schrunk, Esq.
507 Seventh Street, Suite 540
Sioux City, IA

Law Office of H. Todd Bullard, Esq. P.C.
H. Todd Bullard, Esq.
31 West Broad Street, Suite 200
Rochester, NY 14614

Law Office of Pamela Hunter
Pamela A. Hunter, Esq.
715 East Fifth Street
Brown Bldg.
Charlotte, NC 28202

Law Office of Pantaleon Florez
Pantaleon Florez, Esq.
933 South Kansas Avenue
Topeka, KS 66612-1210

Law Office of Rohn & Cusick
Lee J. Rohn, Esq.
1101 King Street, Suite 2
Christiansted, St. Croix, VI 00820

Law Office of William Grande
William E. Grande, Esq.
300 Pearl Street, Suite 200
Buffalo, NY 14202

Law Offices of David W. Wolf
David W. Wolf, Esq.
225 South 15th Street
Philadelphia, PA 19102-3933

Law Offices of E.A. "Bo" Pollard
E.A. "Bo" Pollard, Esq.
907 Tahoe Boulevard, Suite 6
Incline Village, NV 89451-9432

Law Offices of Joseph W. Thomas
Joseph Winand Thomas, Esq.
650 Poydras Street
New Orleans, LA 70130-6101

Law Offices of Roger Evans
Roger Evans, Esq.
2708 Fairmont Street
Dallas, TX 75201

Law Offices of Thomas More Holland
Thomas More Holland, Esq.
437 Chestnut Street, Suite 406
Philadelphia, PA 19106

Law Offices of William Fenton Sink
William Fenton Sink, Esq.
735 Bishop Street, Suite 420
Honolulu, HI 96813

Leeds & Morelli
Fredric Ostrove, Esq.
1 Old Country
Carle Place, NY 11514-1801

Longeretta Law Firm
David A. Longeretta, Esq.
298 Genesee Street
Utica, NY 13502

Lorenzo & Capua
Paul A. Capua, Esq.
9192 Coral Way, Suite 201
Miami, FL 33134

Lovett & Gould
Jonathan Lovett, Esq.
1 Martine Avenue
White Plains, NY 10606-1934

Lysaght, Lysaght & Kramer, P.C
Suzanne Niedzwiecki-Lattime, Esq.
1983 Marcus Avenue
Lake Success, NY

Marx & Marx
Robert N. Marx, Esq.
400 Perimeter Center Terrace, NE, Suite 900
Atlanta, GA 30346

McElwee & McElwee
Christopher D. Lane, Esq.
Kimberly P. Reaves, Esq.
906 Main Street
North Wilkesboro, NC 28659

McKim, Steele, Brown, Welsh & Votre
Kenneth A. Votre, Esq.
9 Farm Springs Road
Farmington, CT 06032

McTeague, Higbee, MacAdam, Case, Watson & Cohen
Jeffrey Neil Young, Esq.
4 Union Park
Topsham, ME 04086

Meggesto, Crossett & Valerino
Kimberly Slimbaugh, Esq.
319 East Water Street
Syracuse, NY 13202

Moody & Anderson P.C.
Adrian J. Moody, Esq.
1616 Walnut Street, Suite 700
Philadelphia, PA

Nicolas Estiverne & Associates
Nicolas Estiverne, Esq.
2426 Louisiana Avenue
New Orleans, LA 70115-6034

Office of Todd J. Krouner
Todd J. Krouner, Esq.
919 Third Avenue
Chappaqua, NY 10022

Orloski, Hinga & Pandaleon
Richard J. Orloski, Esq.
111 North Cedar Crest Boulevard
Allentown, PA 18104

Powell & Anderson
Charles M. Powell, Esq.
Jerome Greenberg, Esq.
299 Broadway
New York, NY 10007

Powell & Associates
Jessie M. Cadet, Esq.
1920 Abrams Parkway, Suite 369
Dallas, TX 75214

Proskauer, Rose, Goetz & Mendelsohn LLP
Aaron J. Schindel, Esq.
1585 Broadway
New York, NY 10036

Ranni, Vassalle, Dussek & Dimartini, LLP
Joseph J. Ranni, Esq.
111 Broadway
New York, NY 10006

Reaud, Morgan & Quinn
John G. Werner, Esq.
Krista A. Zinser, Esq.
801 Laurel
Beaumont, TX 77701

Robertson, Beasley, Cowan & Ketcham
Matthew J. Ketcham, Esq.
Post Office Box 23
Fort Smith, AR 72902

Schenk, Annes, Brookman & Tepper. Ltd.
Andrew J. Annes, Esq.
311 South Wacker Drive, Suite 5125
Chicago, IL 60606-6622

Schermer, Cooper & Associates, P.C.
Oscar S. Schermer, Esq.
818 Market Street, 37th Floor
Philadelphia, PA 19107

Semon & Mondshein
Lee J. Mondshein, Esq.
7600 Jericho Turnpike
Woodbury, NY 11797

Shugart, Thomas & Kilroy, P.C.
P. John Brady, Esq.
James C. Sullivan, Esq.
R. Lawrence Ward, Esq.
120 West 12th Street
Kansas City, MO 64105

Shughart, Thomson & Kilroy
Anthony F. Rupp, Esq.
9225 Indian Creek Parkway, Suite 1100
Overland Park, KS 66210

Taber, Roundtree & Singleton, P. C.
Spence A. Singleton, Esq.
448 St. Luke's Drive
Montgomery, AL 36117

The Quinn Law Firm
Nancy Pulliam Quinn, Esq.
416 South Eugene Court
Greensboro, NC 27401

Thomas H. Roberts & Associates
Thomas H. Roberts, Esq.
101 South First Street
Richmond, VA 23219

Thorton & Tanenhaus
Fran L. Rudich, Esq.
521 Fifth Avenue, 27th Floor
New York, NY 10175

Tucker and Griffin & Associated
Margaret McLeod Cain, Esq.
307 West Rio Road
Charlottesville, VA 22901

Twiford, Webster & Gresham
Aleda Jane Heidelberg, Esq.
144 Sunflower Avenue
Drawer 760
Clarksdale, MS 38614

Van Syoc Law Offices
Clifford L. Van Syoc, Esq.
200 Lake Drive East, Suite 110
38th & Church Road
Cherry Hill, NJ 08002

Victor M. Glasberg & Associates
Victor M. Glasberg, Esq.
121 South Columbus Street
Alexandria, VA 22314

Vladeck, Waldman, Elias & Engelhard
Laura S. Schnell, Esq.
1501 Broadway, Suite 800
New York, NY 10036

Waide Law Office
Jim D. Waide, Esq.
332 North Spring Street
Tupelo, MS 38801

Weston, Hurd, Fallon, Paisley & Howley LLP
David Clifford Lamb, Esq.
Hilary S. Taylor, Esq.
2500 Terminal Tower
50 Public Square
Cleveland, OH 44113-2241

William L. McLaughlin Law Offices
William L. McLaughlin, Esq.
23 South Valley Road
Post Office Box 494
Paoli, PA 19301-0494

William Q. Bird & Associates, P.C.
Karen L. Allen, Esq.
14 17th Street, Suite 5
Post Office Box 7009
Atlanta, GA 30357

Wolf & Norris
Robert A. Wolf, Esq.
729 East Pratt Street, 7th Floor
Baltimore, MD 21202

Wolf, Norris, Block, Schorr & Solis-Cohen LLP
Robert A. Wolf, Esq.
1650 Arch Street, 22nd Floor
Philadelphia, PA 19103-2097

Women's Law Project
Terry L. Fromson, Esq.
125 South Ninth Street, Suite 401
Philadelphia, PA 19107-5125

Wright & Associates
Joseph T. Wright, Esq.
700 Lackawanna Avenue, Suite 203
Scranton, PA 18503

Yarbrough, Jameson & Gray
David A. Jameson, Esq.
520 20th Street
Gavelston, TX 77550

Fortune 500 and Businesses Contacted

3Com
Eric A. Benhamou, President
5400 Bayfront Plaza
Santa Clara, CA 95052

Abbott Laboratories
Miles D. White
100 Abbott Park Road
Abbott Park, IL 60064

Ace Hardware
David F. Hodnik
2200 Kensington Court
Oak Brook, IL 60523

Aetna
Richard L. Huber
151 Farmington Avenue
Hartford, CT 06156

AFLAC
Daniel P. Amos
1932 Wynnton Road
Columbus, GA 31999

AGCO
John M. Shumejda
4205 River Green Parkway
Duluth, GA 30096

Aid Association for Lutherans
John O. Gilbert
4321 North Ballard Road
Appleton, WI 54919

Air Products & Chemicals
Harold A. Wagner
7201 Hamilton Boulevard
Allentown, PA 18195

Airborne Freight
Robert S. Cline
3101 Western Avenue
Seattle, WA 98121

Airtouch Communications
Samuel Ginn
1 California Street
San Francisco, CA 94111

Albertson's
Gary G. Michael
250 Parkcenter Boulevard
Boise, ID 83726

Alcoa
Paul H. O'Neill
201 Isabella Street
Pittsburgh, PA 15241

Allegheny Teledyne
Richard P. Simmons
1000 Six PPG Place
Pittsburgh, PA 15222

Allegiance
Robert D. Walker
1430 Waukegan Road
McGaw Park, IL 60085

Allied Signal
Lawrence A. Bossidy
101 Columbia Road
Morristown, NJ 07962

Allmerica Financial
John F. O'Brien
440 Lincoln Street
Worcester, MA 01653

Allstate
Edward Liddy
2775 Sanders Road
Northbrook, IL 60062

Alltel
Joe T. Ford
1 Allied Drive
Little Rock, AR 72202

Amerada Hess
John B. Hess
1185 Sixth Avenue
New York, NY 10036

Ameren
Charles W. Mueller
1901 Chouteau Avenue
St. Louis, MO 63103

American Electric Power
E. Linn Draper Jr.
1 Riverside Plaza
Columbus, OH 43215

American Express
Harvey Golub
200 Vesey Street
New York, NY 10285

American Family Insurance Group
Harvey R. Pierce
6000 American Parkway
Madison, WI 53783

American Financial Group
Carl H. Lindner
1 East Fourth Street
Cincinnati, OH 45202

American General
Robert M. Devlin
2929 Allen Parkway
Houston, TX 77019

American Home Products
John R. Stafford
5 Giralda Farms
Madison, NJ 07940

American International Group
Maurice R. Greenberg
70 Pine Street
New York, NY 10270

American Standard
Emmanuel A. Kampouris
1 Centennial Avenue
Piscataway, NJ 08855

American Stores
Victor L. Lund
299 South Main Street
Salt Lake City, UT 84111

Amerisource Health
R. David Yost
300 Chester Field Parkway
Malvern, PA 19355

Ameritech
Richard C. Notebaert
30 South Wacker Drive
Chicago, IL 60606

AMP
Robert Ripp
470 Friendship Road
Harrisburg, PA 17111

AMR
Donald J. Carty
4333 Amon Carter Boulevard
Fort Worth, TX 76155

Anheuser-Busch
August A. Busch III
1 Busch Place
St. Louis, MO 63118

Anixter International
Robert W. Grubbs, Jr.
4711 Golf Road
Skokie, IL 60076

Anthem Insurance
L. Ben Lytle
120 Monument Circle
Indianapolis, IN 46204

Aon
Patrick G. Ryan
123 North Wacker Drive
Chicago, IL 60606

Apple Computer
Steven P. Jobs
1 Infinite Loop
Cupertino, CA 95014

Applied Materials
James C. Morgan
3050 Bowers Avenue
Santa Clara, CA 95054

Aramark
Joseph Neubauer
1101 Market Street
Philadelphia, PA 19107

Archer Daniels Midland
G. Allen Andreas
4666 Faries Parkway
Decatur, IL 62526

Arrow Electronics
Stephen P. Kaufman
25 Hub Drive
Melville, NY 11747

Ashland
Paul W. Chellgren
50 East River Center Boulevard
Covington, KY 41012

AT&T
C. Michael Armstrong
32 Sixth Avenue
New York, NY 10013

Atlantic Richfield
Michael R. Bowlin
515 South Flower Street
Los Angeles, CA 90071

Autoliv
Lars Westerberg
3350 Airport Road
Ogden, UT 84405

Automtic Data Processing
Arthur F. Weinbach
1 ADP Boulevard
Roseland, NJ 07068

Autozone
John C. Adams, Jr.
123 South Front Street
Memphis, TN 38103

Avery Dennison
Philip M. Neal
150 North Orange Grove Boulevard
Pasadena, CA 91103

Avista Corp
Thomas M. Matthews
1411 East Mission Avenue
Spokane, WA 99202

Avnet
Roy Vallee
2211 South 47th Street
Phoenix, AZ 85034

Avon Products
Charles R. Perrin
1345 Sixth Avenue
New York, NY 10105

B.F. Goodrich
David L. Burner
4020 Kinross Lakes Parkway
Richfield, OH 44286

Baker Hughes
Max L. Lukens
3900 Essex Lane
Houston, TX 77027

Ball
George A. Sissel
10 Longs Peak Drive
Broomfield, CO 80021

Bank of New York Co.
Thomas A. Renyi
1 Wall Street
New York, NY 10286

Bank One Corp.
John B. McCoy
1 First National Plaza
Chicago, IL 60670

Bankamerica Corp.
Hugh L. McColl, Jr.
100 North Tryon Street
Charlotte, NC 28255

Bank Boston Corp
Charles K. Gifford
100 Federal Street
Boston, MA 02110

Bankers Trust Corp.
Frank N. Newman
130 Liberty Street
New York, NY 10006

Barnes & Noble
Leonard Riggio
122 Fifth Avenue
New York, NY 10011

Baxter International
Harry M. Jansen Kraemer, Jr.
1 Baxter Parkway
Deerfied, IL 60015

BB & T Corp.
John A. Allison, IV
200 West Second Street
Winston-Salem, NC 27101

Bear Stearns
James E. Cayne
245 Park Avenue
New York, NY 10167

Becton Dickinson
Clateo Castellini
1 Becton Drive
Franklin Lakes, NJ 07417

Bell Atlantic
Ivan G. Seidenberg
1095 Sixth Avenue
New York, NY 10036

Bellsouth
F. Duane Ackerman
1155 Peachtree Street
Atlanta, GA 30309

Bergen Brunswig
Donald R. Roden
4000 Metropolitan Drive
Orange, CA 92868

Berkshire Hathaway
Warren E. Buffett
1440 Kiewit Plaza
Omaha, NE 68131

Best Buy
Richard M. Schulze
7075 Flying Cloud Drive
Eden Prairie, MN 55344

Bestfoods
Charles R. Shoemate
700 Sylvan Avenue
Englewood Cliffs, NJ 07632

Bethlehem Steel
Curtis H. Barnette
Eighth and Eaton Avenues
Bethlehem, PA 18016

BG & E
Christian H. Poindexter
39 West Lexington Street
Baltimore, MD 21201

Bindley Western
William E. Bindley
8909 Purdue Road
Indianapolis, IN 46290

BJ's Wholesale Club
John J. Nugent
1 Mercer Road
Natick, MA 01760

Black & Decker
Nolan D. Archibald
701 East Joppa Road
Towson, MD 21286

Boeing
Philip M. Condit
7755 East Marginal Way, South
Seattle, WA 98108

Boise Cascade
George J. Harad
1111 West Jefferson Street
Boise, ID 83702

Bristol-Myers Squibb
Charles A. Heimbold Jr.
345 Park Avenue
New York, NY 10154

Browning-Ferris Industries
Bruce E. Ranck
757 North Eldridge
Houston, TX 77079

Brunswick
Peter N. Larson
1 North Field Court
Lake Forest, IL 60045

Burlington Northern Santa Fe
Robert D. Krebs
2650 Lou Menk Drive
Fort Worth, TX 76131

Cablevision Systems
James Dolan
1111 Stewart Avenue
Bethpage, NY 11714

Campbell Soup
Dale F. Morrison
Campbell Place
Camden, NJ 08103

Cardinal Health
Robert D. Walter
5555 Glendon Court
Dublin, OH 43016

Carolina Power & Light
William Cavanaugh III
411 Fayetteville Street
Raleigh, NC 27601

Case
Jean-Pierre Rosso
700 State Street
Racine, WI 53404

Caterpillar
Glen A. Barton
100 Northeast Adams Street
Peoria, IL 61629

CBS
Mel Karmazin
51 West 52nd Street
New York, NY 10019

Cendant
Henry R. Silverman
9 West 57th Street
New York, NY 10019

Centex
Laurence E. Hirsch
2728 North Harwood
Dallas, TX 75201

Central & South West
Edgar R. Brooks
1616 Woodall Rodgers Freeway
Dallas, TX 75202

Champion International
Richard E. Olson
1 Champion Plaza
Stamford, CT 06921

Charles Schwab
C.R. Schwab and D.S. Pottruck
101 Montgomery Street
San Francisco, CA 94104

Chase Manhattan Corp.
Walter V. Shipley
270 Park Avenue
New York, NY 10017

Chevron
Kenneth T. Derr
575 Market Street
San Francisco, CA 94105

CHS Electronics
Claudio Osorio
2000 Northwest 84th Avenue
Miami, FL 33122

Chubb
Dean R. O'Hare
15 Mountain View Road
Warren, NJ 07061

CIGNA
Wilson H. Taylor
1650 Market Street
Philadelphia, PA 19192

Cinergy
James E. Rogers
139 East Fourth Street
Cincinnati, OH 45202

Circuit City Group
Richard L. Sharp
9950 Mayland Drive
Richmond, VA 23233

Cisco Systems
John T. Chambers
170 West Tasman Drive
San Jose, CA 95134

Citigroup
Sanford I. Weill and John S. Reed
153 East 53rd Street
New York, NY 10043

Clark USA
William Rusnack
8182 Maryland Avenue
St. Louis, MO 63105

CMS Energy
William T. McCormick, Jr.
330 Town Center Drive
Dearborn, MI 48126

CNF Transportation
Gregory L. Quesnel
3240 Hillview Avenue
Palo Alto, CA 94304

CNG
George A. Davidson, Jr.
625 Liberty Avenue
Pittsburgh, PA 15222

Coastal
David A. Arledge
9 Greenway Plaza
Houston, TX 77046

Coca-Cola
M. Douglas Ivester
1 Coca-Cola Plaza
Atlanta, GA 30313

Coca-Cola Enterprises
Henry A. Schimberg
2500 Windy Ridge Parkway
Atlanta, GA 30339

Colgate-Palmolive
Reuben Mark
300 Park Avenue
New York, NY 10022

Columbia Energy Group
Oliver G. Richard, III
13880 Dulles Corner Lane
Herndon, VA 20171

Columbia/HCA Healthcare
Thomas F. Frist, Jr.
1 Park Plaza
Nashville, TN 37203

Compaq Computer
Eckhard Pfeiffer
20555 State Highway
249, Houston, TX 77070

Comcast
Brian L. Roberts
1500 Market Street
Philadelphia, PA 19102

COMDISCO
John F. Slevin
6111 North River Road
Rosemont, IL 60068

Comerica
Eugene A. Miller
500 Woodward Avenue
Detroit, MI 48226

COMPUSA
James F. Halpin
14951 North Dallas Parkway
Dallas, TX 75240

Computer Associates Intl.
Charles B. Wang
1 Computer Associates Plaza
Islandia, NY 11788

Computer Sciences
Van B. Honeycutt
2100 East Grand Avenue
El Segundo, CA 90245

Conagra
Bruce Rohde
1 ConAgra Drive
Omaha, NE 68102

Conectiv
Howard E. Cosgrove
800 King Street
Wilmington, DE 19899

Conseco
Stephen C. Hilbert
11825 North Pennsylvania Street
Carmel, IN 46032

Consolidated Edison
Eugene R. McGrath
4 Irving Place
New York, NY 10003

Consolidated Stores
William G. Kelley
300 Phillipi Road
Columbus, OH 43228

Continental Airlines
Gordon M. Bethune
1600 Smith Street
Houston, TX 77002

Cooper Industries
H. John Riley, Jr.
600 Travis Street
Houston, TX 77002

Corning
Roger G. Ackerman
1 Riverfront Plaza
Corning, NY 14831

Corporate Express
Robert King
1 Environmental Way
Broomfield, CO 80021

Costco Cos.
James D. Sinegal
999 Lake Drive
Issaquah, WA 98027

Crown Cork & Seal
William J. Avery
1 Crown Way
Philadelphia, PA 19106

CSX
John W. Snow
901 East Cary Street
Richmond, VA 23219

Cummins Engine
James A. Henderson
500 Jackson Street
Columbus, IN 47203

CVS
Thomas M. Ryan
1 CVS Drive
Woonsocket, RI 02895

Dana
Joseph Magliochetti
4500 Dorr Street
Toledo, OH 43615

Danaher
George M. Sherman
1250 24th Street, NW
Washington, DC 20037

Darden Restaurants
Joe R. Lee
5900 Lake Ellenor Drive
Orlando, FL 32809

Dayton Hudson
Robert J. Ulrich
777 Nicollet Mall
Minneapolis, MN 55402

Dean Foods
Howard M. Dean
3600 North River Road
Franklin Park, IL 60131

Deere
Hans W. Becherer
1 John Deere Place
Moline, IL 61265

Dell Computer
Michael S. Dell
1 Dell Way
Round Rock, TX 78682

Delta Air Lines
Leo F. Mullin
1030 Delta Boulevard
Atlanta, GA 30320

Dillard's
William Dillard, II
1600 Cantrell Road
Little Rock, AR 72201

Dole Food
David H. Murdock
31365 Oak Crest Drive
Westlake Village, CA 91361

Dollar General
Cal Turner, Jr.
104 Woodmont Boulevard
Nashville, TN 37205

Dominion Resources
Thomas E. Capps
120 Tredegar Street
Richmond, VA 23219

Dover
Thomas L. Reece
280 Park Avenue
New York, NY 10017

Dow Chemical
William S. Stavropoulos
2030 Dow Center
Midland, MI 48674

DTE Energy
Anthony F. Earley, Jr.
2000 Second Avenue
Detroit, MI 48226

Duke Energy
Richard B. Priory
526 South Church Street
Charlotte, NC 28202

Dynegy
C.L. Watson
1000 Louisiana Street
Houston, TX 77002

E.I. Du Pont De Nemours
C.O. Holiday, Jr.
1007 Market Street
Wilmington, DE 19898

Eastman Chemical
Earnest W. Deavenport, Jr.
200 South Wilcox Drive
Kingsport, TN 37660

Eastman Kodak
George M.C. Fisher
343 State Street
Rochester, NY 14650

Eaton
Stephen R. Hardis
1111 Superior Avenue
Eaton Center
Cleveland, OH 44114

Edison International
John E. Bryson
2244 Walnut Grove Avenue
Rosemead, CA 91770

El Paso Energy
William A. Wise
1001 Louisiana Street
Houston, TX 77002

Electronic Data Systems
Richard H. Brown
5400 Legacy Drive
Plano, TX 75024

Eli Lilly
Sidney Taurel
Lilly Corporate Center
Indianapolis, IN 46285

EMC
Michael C. Ruettgers
35 Parkwood Drive
Hopkinton, MA 01748

Emerson Electric
Charles F. Knight
8000 West Florissant Avenue
St. Louis, MO 63136

Engelhard
Orin R. Smith
101 Wood Avenue
Iselin, NJ 08830

Enron
Kenneth L. Lay
1400 Smith Street
Houston, TX 77002

Entergy
J. Wayne Leonard
639 Loyola Avenue
New Orleans, LA 70113

Estee Lauder
Leonard A. Lauder
767 Fifth Avenue
New York, NY 10153

Exxon
Lee R. Raymond
5959 Las Colinas Boulevard
Irving, TX 75039

Fannie Mae
Franklin D. Raines
3900 Wisconsin Avenue, NW
Washington, DC 20016

Farmland Industries
Harry D. Cleberg
3315 North Oak Trafficway
Kansas City, MO 64116

Federal-Mogul
Richard A. Snell
26555 Northwestern Highway
Southfield, MI 48034

Federated Department Stores
James M. Zimmerman
7 West Seventh Street
Cincinnati, OH 45202

First Data
Ric Duques
5660 New Northside Drive
Atlanta, GA 30328

First Union Corp.
Edward E. Crutchfield
1 First Union Center
Charlotte, NC 28288

Firstar Corp.
Jerry A. Grundhofer
777 East Wisconsin Avenue
Milwaukee, WI 53202

First Energy
H. Peter Burg
76 South Main Street
Akron, OH 44308

Fleet Financial Group
Terrence Murray
1 Federal Street
Boston, MA 02110

Fleetwood Enterprises
Glenn F. Kummer
3125 Myers Street
Riverside, CA 92503-7638

Fleming
Mark Hansen
6301 Waterford Boulevard
Oklahoma City, OK 73118

Florida Progress
Richard Korpan
1 Progress Plaza
St. Petersburg, FL 33701

Flowers Industries
Amos R. McMullian
1919 Flowers Circle
Thomasville, GA 31757

Fluor
Phillip J. Carroll, Jr.
3353 Michelson Drive
Irvine, CA 92698

FMC
Robert N. Burt
200 East Randolph Drive
Chicago, IL 60601

Ford Motor
Jacques A. Nasser
American Road
Dearborn, MI 48121

Fort James
Miles L. Marsh
1650 Lake Cook Road
Deerfield, VA 60015

Fortune Brands
Thomas C. Hays
1700 East Putnam Avenue
Old Greenwich, CT 06870

Foster Wheeler
Richard J. Swift
Perryville Corporate Park
Clinton, NJ 08809

Foundation Health Systems
Jay M. Gellert
21650 Oxnard Street
Woodland Hills, CA 90505

FPL Group
James L. Broadhead
700 Universe Boulevard
Juno Beach, FL 33408

Fred Meyer
Robert G. Miller
3800 Southeast 22nd Avenue
Portland, OR 97202

Freddie Mac
Leland C. Brendsel
8200 Jones Branch Drive
McLean, VA 22102

Gannett
John J. Curley
1100 Wilson Boulevard
Arlington, VA 22234

Gap
Millard S. Drexler
1 Harrison Street
San Francisco, CA 94105

Gateway 2000
Theodore W. Waitt
4545 Towne Centre Court
San Diego, CA 92121

Genamerica
Richard A. Liddy
700 Market Street
St. Louis, MO 63101

General Dynamics
Nicholas D. Chabraja
3190 Fairview Park Drive
Falls Church, VA 22042

General Electric
John F. Welch, Jr.
3135 Easton Turnpike
Fairfield, CT 06798

General Mills
Stephen W. Sanger
1 General Mills Boulevard
Minneapolis, MN 55426

General Motors
John F. Smith, Jr.
100 Renaissance Center
Detroit, MI 48265

Genuine Parts
Larry L. Prince
2999 Circle 75 Parkway
Atlanta, GA 30339

Georgia-Pacific
A.D. Correll
133 Peachtree Street, NE
Atlanta, GA 30303

Giant Food
Richard Baird
6400 Sheriff Road
Landover, MD 20785

Gillette
Michael C. Hawley
Prudential Tower Building
Boston, MA 02199

Golden State Bancorp
Gerald J. Ford
135 Main Street
San Francisco, CA 94105

Golden West Financial Corp.
H.M. Sandler and M.O. Sandler
1901 Harrison Street
Oakland, CA 94612

Goodyear Tire
Samir G. Gibara
1144 East Market Street
Akron, OH 44316

GPU
Fred D. Hafer
300 Madison Avenue
Morristown, NJ 07962

Graybar Electric
Carl L. Hall
34 North Meramec Avenue
St. Louis, MO 63105

GTE
Charles R. Lee
1255 Corporate Drive
Irving, TX 75038

Guardian Life of America
Joseph D. Sargent
201 Park Avenue, South
New York, NY 10003

H.J. Heinz
William R. Johnson
600 Grant Street
Pittsburgh, PA 15219

Halliburton
Richard B. Cheney
3600 Lincoln Plaza
Dallas, TX 75201

Hannaford Bros.
Hugh G. Farrington
145 Pleasant Hill Road
Scarborough, ME 04074

Harcourt General
Richard A. Smith
27 Boylston Street
Chestnut Hill, MA 02467

Harris
Phillip W. Farmer
1025 West NASA Boulevard
Melbourne, FL 32919

Hartford Financial Services
Ramani Ayer
690 Asylum Avenue
Hartford, CT 06115

Hasbro
Alan G. Hassenfeld
1027 Newport Avenue
Pawtucket, RI 02862

Health South
Richard M. Scrushy
1 Health South Parkway
Birmingham, AL 35243

Hechinger
Mark Adams
1801 McCormick Drive
Largo, MD 20774

Hershey Foods
Kenneth L. Wolfe
100 Crystal A. Drive
Hershey, PA 17033

Hewlett-Packard
Lewis E. Platt
3000 Hanover Street
Palo Alto, CA 94303

Hilton Corporation
Barbara Spotts, Senior Director
of Diversity
9336 Civic Center Drive
Beverly Hills, CA 90210

Hilton Hotels
Stephen Bollenbach
9336 Civic Center Drive
Beverly Hills, CA 90210

Home Depot
Arthur Blank
2455 Paces Ferry Road, NW
Atlanta, GA 30339

Honeywell
Michael R. Bonsignore
Honeywell Plaza
Minneapolis, MN 55440

Hormel Foods
Joel W. Johnson
1 Hormel Place
Austin, MN 55912

Host Marriott
Terrence C. Golden
10400 Fernwood Road
Bethesda, MD 20817

Household International
William F. Aldinger, III
2700 Sanders Road
Prospect Heights, IL 60070

Houston Industries
Don D. Jordan
1111 Louisiana Street
Houston, TX 77002

Humana
Gregory H. Wolf
500 West Main Street
Louisville, KY 40402

IBP
Robert L. Peterson
515 IBP Avenue
Dakota City, NE 68731

Ikon Office Solutions
James J. Forese
70 Valley Stream Parkway
Malvern, PA 19355

IMC Global
Robert F. Fowler, Jr.
2100 Sanders Road
Northbrook, IL 60062

Inacom
Bill L. Fairfield
10810 Farnam Drive
Omaha, NE 68154

Ingersoll-Rand
James E. Perrella
200 Chestnut Ridge Road
Woodcliff Lake, NJ 07675

Ingram Micro
Jerre L. Stead
1600 East St. Andrew Place
Santa Ana, CA 92799

Integrated Health Services
Robert N. Elkins
10065 Red Run Boulevard
Owings Mills, MD 21117

Intel
Craig R. Barrett
2200 Mission College Boulevard
Santa Clara, CA 95052

International Paper
John T. Dillon
2 Manhattanville Road
Purchase, NY 10577

Interpublic Group
Philip H. Geier, Jr.
1271 Sixth Avenue
New York, NY 10020

Interstate Bakeries
Charles A. Sullivan
12 East Armour Boulevard
Kansas City, MO 64111

Intl. Business Machines
Louis V. Gerstner, Jr.
New Orchard Road
Armonk, NY 10504

ITT Industries
D. Travis Engen
4 West Red Oak Lane
White Plains, NY 10604

ITW
W. James Farrell
3600 West Lake Avenue
Glenview, IL 60025

J.C. Penney
James E. Oesterreicher
6501 Legacy Drive
Plano, TX 75024

J.P. Morgan & Co.
Douglas A. Warner, III
60 Wall Street
New York, NY 10260

John Hancock Mutual Life
Stephen L. Brown
John Hancock Place
Boston, MA 02117

Johnson & Johnson
Ralph S. Larsen
1 J & J Plaza
New Brunswick, NJ 08933

Johnson Controls
James H. Keyes
5757 North Green Bay Avenue
Milwaukee, WI 53201

Kellogg
Carlos M. Gutierrez
1 Kellogg Square
Battle Creek, MI 49016

Kelly Services
Terrence E. Adderley
999 West Big Beaver Road
Troy, MI 48084

Keycorp
Robert W. Gillespie
127 Public Square
Cleveland, OH 44114

Kimberly-Clark
Wayne R. Sanders
351 Phelps Drive
Irving, TX 75038

K-Mart
Floyd Hall
3100 West Big Beaver Road
Troy, MI 48084

KN Energy
Larry D. Hall
370 Van Gordon Street
Lakewood, CO 80228

Knight-Ridder
P. Anthony Ridder
50 San Fernando Street
San Jose, CA 95113

Kohl's
R. Lawrence Montgomery
N56 West 17000 Ridgewood Drive
Minomonee Falls, WI 53051

Kroger
Joseph A. Pichler
1014 Vine Street
Cincinnati, OH 45247

Lear
Kenneth L. Way
21557 Telegraph Road
Southfield, MI 48086

Leggett & Platt
Harry M. Cornell, Jr.
1 Leggett Road
Carthage, MO 64836

Lehman Brothers Holdings
Richard S. Fuld, Jr.
3 World Financial Center
New York, NY 10285

Lexmark International
Paul J. Curlander
740 New Circle Road, NW
Lexington, KY 40550

LG & E Energy
Roger W. Hale
220 West Main Street
Louisville, KY 40202

Liberty Mutual Group
Edmund Francis Kelly
175 Berkeley Street
Boston, MA 02117

Limited
Leslie H. Wexner
3 Limited Parkway
Columbus, OH 43230

Lincoln National
Jon Boscia
200 East Berry Street
Fort Wayne, IN 46802

Litton Industries
Michael R. Brown
21240 Burbank Boulevard
Woodland Hills, CA 91367

Lockheed Martin
Vance D. Coffman
6801 Rockledge Drive
Bethesda, MD 20817

Loews
James S. Tisch
667 Madison Avenue
New York, NY 10021

Longs Drug Stores
Robert M. Long
141 North Civic Drive
Walnut Creek, CA 94596

Lowe's
Robert L. Tillman
State Highway 268, East
North Wilkesboro, NC 28659

LTV
J. Peter Kelly
200 Public Square
Cleveland, OH 44114

Lucent Technologies
Richard A. McGinn
600 Mountain Avenue
Murray Hill, NJ 07974-0636

Lutheran Brotherhood
Robert P. Gandrud
625 Fourth Avenue, South
Minneapolis, MN 55415

Manpower
Mitchell S. Fromstein
5301 North Ironwood Road
Milwaukee, WI 53217

Marketspan
Robert B. Catell
1 MetroTech Center
Brooklyn, NY 11201

Marriott International
J. Willard Marriott, Jr.
10400 Fernwood Road
Bethesda, MD 20817

Marsh & Mc Lennan
A.J.C. Smith
1166 Sixth Avenue
New York, NY 10036

Masco
Richard A. Manoogian
21001 Van Born Road
Taylor, MI 48180

Mass. Mutual Life Insurance
Robert J. O'Connell
1295 State Street
Springfield, MA 01111

Mattel
Jill E. Barad
333 Continental Boulevard
El Segundo, CA 90245

May Department Stores
Eugene S. Kahn
611 Olive Street
St. Louis, MO 63101

Maytag
Leonard A. Hadley
403 West Fourth Street, North
Newton, IA 50208

MBNA
Alfred Lerner
1100 North King Street
Wilmington, DE 19884

Mc Donald's
Jack M. Greenberg
1 Kroc Drive
Oak Brook, IL 60523

McGraw-Hill
Harold McGraw, III
1221 Sixth Avenue
New York, NY 10020

MCI Worldcom
Bernard J. Ebbers
515 East Amite Street
Jackson, MS 39201

Mc Kesson HBOC
Mark A. Pulido
1 Post Street
San Fransciso, CA 94104

Mead
Jerome F. Tatar
Courthouse Plaza, NE
Dayton, OH 45463

Medpartners
Edwin M. Crawford
3000 Galleria Tower
Birmingham, AL 35244

Mellon Bank Corp.
Martin G. McGuinn
1 Mellon Bank Center
Pittsburgh, PA 15258

Mercantile Bancorp
Thomas H. Jacobsen
Mercantile Tower
St. Louis, MO 63166

Merck
Raymond V. Gilmartin
1 Merck Drive
Whitehouse Station, NJ 08889

Merisel
Dwight A. Steffensen
200 Continental Boulevard
El Segundo, CA 90245

Meritor Automotive
Larry D. Yost
2135 West Maple Road
Troy, MI 48084

Merrill Lynch
David H. Komansky
250 Vesey Street
New York, NY 10281

Metropolitan Life
Robert H. Benmosche
1 Madison Avenue
New York, NY 10010

Microage
Jeffrey D. McKeever
2400 South MicroAge Way
Tempe, AZ 85282

Micron Technology
Steven R. Appleton
8000 South Federal Way
Boise, ID 83707

Microsoft
William H. Gates
1 Microsoft Way
Redmond, WA 98052

Minnesota Mining & Mfg.
Livio D. DeSimone
3M Center Street
St. Paul, MN 55144

Mobil
Lucio A. Noto
3225 Gallows Road
Fairfax, VA 22037

Monsanto
Robert B. Shapiro
800 North Lindbergh Boulevard
St. Louis, MO 63167

Morgan Stanley Dean Witter
Philip J. Purcell
1585 Broadway
New York, NY 10036

Motorola
Christopher B. Galvin
1303 East Algonquin Road
Schaumburg, IL 60196

Mutual of Omaha Insurance
John William Weekly
Mutual of Omaha Plaza
Omaha, NE 68175

Nash Finch
Ron Marshall
7600 France Avenue, South
Edina, MN 55435

National City Corp.
David A. Daberko
1900 East Ninth Street
Cleveland, OH 44114

Nationwide Insurance Enterprise
Dimon R. McFerson
1 Nationwide Plaza
Columbus, OH 43215

Navistar International
John R. Horne
455 North Cityfront Plaza Drive
Chicago, IL 60611

NCR
Lars Nyberg
1700 South Patterson Boulevard
Dayton, OH 45479

Nebco Evans
John V. Holten
545 Steamboat Road
Greenwich, CT 06830

New Century Energies
Bill D. Helton
1225 17th Street
Denver, CO 80202

New York Life
Seymour G. Sternberg
51 Madison Avenue
New York, NY 10010

New York Times
Russell T. Lewis
229 West 43rd Street
New York, NY 10036

Newell
John J. McDonough
29 East Stephenson Street
Freeport, IL 61032

Niagara Mohawk Power
William E. Davis
300 Erie Boulevard, West
Syracuse, NY 13202

Nike
Philip H. Knight
1 Bowerman Drive
Beaverton, OR 97005

Nipsco Industries
Gary L. Neale
801 East 86th Avenue
Merrillville, IN 46410

Nordstrom
John Whitacre
1617 Sixth Avenue
Seattle, WA 98101

Norfolk Southern
David R. Goode
3 Commercial Place
Norfolk, VA 23510

Northeast Utilities
Michael G. Morris
107 Selden Street
Berlin, CT 06037

Northrop Grumman
Kent Kresa
1840 Century Park, East
Los Angeles, CA 90067

Northwestern Mutual Life
James D. Ericson
720 East Wisconsin Avenue
Milwaukee, WI 53202

Nucor
John D. Correnti
2100 Rexford Road
Charlotte, NC 28211

NWA
John H. Dasburg
5101 Northwest Drive
St. Paul, MN 55111

Occidental Petroleum
Ray R. Irani
10889 Wilshire Boulevard
Los Angeles, CA 90024

Office Depot
David I. Fuente
2200 Old Germantown Road
Delray Beach, FL 33445

OfficeMax
Michael Feuer
3605 Warrensville Center Road
Shaker Heights, OH 44122

Olsten
Edward A. Blechschmidt
175 Broad Hollow Road
Melville, NY 11747

Omnicom Group
John D. Wren
437 Madison Avenue
New York, NY 10022

Oracle
Lawrence J. Ellison
500 Oracle Parkway
Redwood Shores, CA 94065

Owens & Minor
G. Gilmer Minor, III
4800 Cox Road
Glen Allen, VA 23060

Owens Corning
Glen H. Hiner
1 Owens Corning Parkway
Toledo, OH 43659

Owens-Illinois
Joseph H. Lemieux
1 SeaGate
Toledo, OH 43666

Oxford Health Plans
Norman C. Payson, M.D.
800 Connecticut Avenue
Norwalk, CT 06854

Paccar
Mark C. Pigott
777 106th Avenue, NE
Bellevue, WA 98004

Pacific Life
Thomas C. Sutton
700 Newport Center Drive
Newport Beach, CA 92660

Pacificare Health Systems
Alan R. Hoops
3120 West Lake Center Drive
Santa Ana, CA 92704

Pacificorp
Keith McKennon
700 Northeast Multnomah Street
Portland, OR 97232

Paine Webber Group
Donald B. Marron
1285 Sixth Avenue
New York, NY 10019

Parker Hannifin
Duane E. Collins
6035 Parkland Boulevard
Cleveland, OH 44124

Peco Energy
Corbin A. McNeill, Jr.
2301 Market Street
Philadelphia, PA 19103

Pepsico
Roger A. Enrico
700 Anderson Hill Road
Purchase, NY 10577

Peter Kiewit Sons'
Kenneth E. Stinson
Kiewit Plaza
Omaha, NE 68131

Pfizer
William C. Steere, Jr.
235 East 42nd Street
New York, NY 10017

PG & E Corp.
Robert D. Glynn, Jr.
1 Market Street
San Francisco, CA 94105

Pharmacia & Upjohn
Fred Hassan
95 Corporate Drive
Bridgewater, NJ 08807

Phelps Dodge
Douglas C. Yearley
2600 North Central Avenue
Phoenix, AZ 85004

Philip Morris
Geoffrey C. Bible
120 Park Avenue
New York, NY 10017

Phillips Petroleum
Wayne W. Allen
Phillips Building
Bartlesville, OK 74004

Phoenix Home Life Mutual
Robert W. Fiondella
1 American Row
Hartford, CT 06102

Pitney Bowes
Michael J. Critelli
1 Elmcroft Road
Stamford, CT 06926

Pittston
Michael T. Dan
1000 Virginia Center Parkway
Richmond, VA 23058

PNC Bank
Thomas H. O'Brien
249 Fifth Avenue
Pittsburgh, PA 15222

PP&L Resources
William F. Hecht
2 North Ninth Street
Allentown, PA 18101

PPG Industries
Raymond W. LeBoeuf
1 PPG Place
Pittsburgh, PA 15272

Praxair
H. William Lichtenberger
30 Old Ridgebury Road
Danbury, CT 06810

Principal Financial
David J. Drury
711 High Street
Des Moines, IA 50392

Procter & Gamble
Durk I. Jager
1 P & G Plaza
Cincinnati, OH 45202

Progressive
Peter B. Lewis and Charles B. Chokel
6300 Wilson Mills Road
Mayfield Village, OH 44143

Provident Cos.
J. Harold Chandler
1 Fountain Square
Chattanooga, TN 37402

Prudential Of America
Arthur Ryan
751 Broad Street
Newark, NJ 07102

Public Service Enterprise Group
E. James Ferland
80 Park Plaza
Newark, NJ 07101

Publix Super Markets
Howard M. Jenkins
1936 George Jenkins Boulevard
Lakeland, FL 33815

Quaker Oats
Robert S. Morrison
321 North Clark Street
Chicago, IL 60610

Qualcomm
Irwin Mark Jacobs
6455 Lusk Boulevard
San Diego, CA 92121

Quantum
Michael A. Brown
500 McCarthy Boulevard
Milpitas, CA 95035

R.R. Donnelley & Sons
William L. Davis
77 West Wacker Drive
Chicago, IL 60601

Ralston Purina
W. Patrick McGinnis and J. Patrick Mulcahy
Checkerboard Square
St. Louis, MO 63164

Raytheon
Daniel P. Burnham
141 Spring Street
Lexington, MA 02421

Reebok International
Paul B. Fireman
100 Technology Center Drive
Stoughton, MA 02072

Regions Financial
Carl E. Jones, Jr.
417 North 20th Street
Birmingham, AL 35203

Reliance Group Holdings
Saul P. Steinberg
55 East 52nd Street
New York, NY 10055

Republic Industries
H. Wayne Huizenga and Steven R. Berrard
110 Southeast Sixth Street
Fort Lauderdale, FL 33301

Republic New York Corp.
Dov C. Schlein
452 Fifth Avenue
New York, NY 10018

Reynolds Metals
Jeremiah J. Sheehan
6601 West Broad Street
Richmond, VA 23230

Richfood Holdings
John E. Stokely
4860 Cox Road
Glen Allen, VA 23060

Rite Aid
Martin L. Grass
30 Hunter Lane
Camp Hill, PA 17011

RJR Nabisco Holdings
Steven F. Goldstone
1301 Sixth Avenue
New York, NY 10019

Rockwell International
Don H. Davis, Jr.
600 Anton Boulevard
Costa Mesa, CA 92626

Rohm & Haas
J. Lawrence Wilson
100 Independence Mall, West
Philadelphia, PA 19106

Ryder System
M. Anthony Burns
3600 Northwest 82nd Avenue
Miami, FL 33166

Ryerson Tull
George A. Ranney, Jr.
2621 West 15th Place
Chicago, IL 60608

Safeco
Roger H. Eigsti
Safeco Plaza
Seattle, WA 98185

Safeway
Steven A. Burd
5918 Stoneridge Mall Road
Pleasanton, CA 94588

Saks
R. Brad Martin
750 Lakeshore Parkway
Birmingham, AL 35211

Sara Lee
John H. Bryan
3 First National Plaza
Chicago, IL 60602

SBC Communications
Edward E. Whitacre, Jr.
175 East Houston
San Antonio, TX 78205

Schering-Plough
Richard Jay Kogan
1 Giralda Farms
Madison, NJ 07940

SCI Systems
Olin B. King
2101 West Clinton Avenue
Huntsville, AL 35807

Science Applications Intl.
J. Robert Beyster
10260 Campus Point Drive
San Diego, CA 92121

Seagate Technology
Stephen J. Luczo
920 Disc Drive
Scotts Valley, CA 95066

Sears Roebuck
Arthur C. Martinez
3333 Beverly Road
Hoffman Estates, IL 60179

Sempra Energy
Richard D. Farman
101 Ash Street
San Diego, CA 92101

Sempra Energy
Sam Cusano
Service Merchandise
7100 Service Merchandise Drive
Brentwood, TN 37027

Servicemaster
Carlos H. Cantu
1 ServiceMaster Way
Downers Grove, IL 60515

Shaw Industries
Robert E. Shaw
616 East Walnut Avenue
Dalton, GA 30720

Sherwin-Williams
John G. Breen
101 Prospect Avenue, NW
Cleveland, OH 44115

Shopko Stores
William J. Podany
700 Pilgrim Way
Green Bay, WI 54304

Silicon Graphics
Richard E. Belluzzo
2011 North Shoreline Boulevard
Mountain View, CA 94043

SLM Holding
Albert L. Lord
11600 Sallie Mae Drive
Reston, VA 20193

Smithfield Foods
Joseph W. Luter, III
200 Commerce Street
Smithfield, VA 23430

Smurfit-Stone Container
Ray M. Curran
150 North Michigan Avenue
Chicago, IL 60601

Sodexho Marriott Services
Charles D. O'Dell
9801 Washingtonian Boulevard
Gaithersburg, MD 20878

Solectron
Koichi Nishimura
777 Gibraltar Drive
Milpitas, CA 95035

Sonat
Ronald L. Kuehn, Jr.
1900 Fifth Avenue, North
Birmingham, AL 35203

Southern
A.W. Dahlberg
270 Peachtree Street, NW
Atlanta, GA 30303

Southtrust Corporation
Wallace D. Malone, Jr.
420 North 20th Street
Birmingham, AL 35203

Southwest Airlines
Herbert D. Kelleher
2702 Love Field Drive
Dallas, TX 75235

Sprint
William T. Esrey
2330 Shawnee Mission Parkway
Westwood, KS 66205

St. Paul Cos.
Douglas W. Leatherdale
385 Washington Street
St. Paul, MN 55102

Staples
Thomas G. Stemberg
1 Research Drive
Westborough, MA 01581

Starwood Hotels & Resorts
Barry S. Sternlicht
777 Westchester Avenue
White Plains, NY 10604

State Farm Insurance
Edward B. Rust, Jr.
1 State Farm Plaza
Bloomington, IL 61710

State Farm Insurance
Marshall N. Carter
State St. Corp.
225 Franklin Street
Boston, MA 02110

Suiza Foods
Gregg L. Engles
2515 McKinney Avenue
Dallas, TX 75201

Sun Healthcare Group
Andrew L. Turner
101 Sun Avenue, NE
Albuquerque, NM 87109

Sun Microsystems
Scott G. McNealy
901 San Antonio Road
Palo Alto, CA 94303

Sunoco
Robert H. Campbell
1801 Market Street
Philadelphia, PA 19103

Suntrust Banks
L. Phillip Humann
303 Peachtree Street, N.E
Atlanta, GA 30308

Supermarkets General Holdings
James Donald
200 Milik Street
Carteret, NJ 07008

Supervalu
Michael W. Wright
11840 Valley View Road
Eden Prairie, MN 55344

Sysco
Bill M. Lindig
1390 Enclave Parkway
Houston, TX 77077

Tandy
Leonard H. Roberts
100 Throckmorton Street
Fort Worth, TX 76102

Tech Data
Steven A. Raymund
5350 Tech Data Drive
Clearwater, FL 33760

Tele-Communications
C. Michael Armstrong
5619 DTC Parkway
Englewood, CO 80111

Temple-Inland
Clifford J. Grum
303 South Temple Drive
Diboll, TX 75941

Tenet Healthcare
Jeffrey C. Barbakow
3820 State Street
Santa Barbara, CA 93105

Tenneco
Dana G. Mead
1275 King Street
Greenwich, CT 06831

Texaco
Peter I. Bijur
2000 Westchester Avenue
White Plains, NY 10650

Texas Instruments
Thomas J. Engibous
8505 Forest Lane
Dallas, TX 75243

Texas Utilities
Erle Nye
1601 Bryan Street
Dallas, TX 75201

Textron
Lewis B. Campbell
40 Westminster Street
Providence, RI 02903

Thermo Electron
George N. Hatsopoulos
81 Wyman Street
Waltham, MA 02254

Tiaa-Cref
John H. Biggs
730 Third Avenue
New York, NY 10017

Time Warner
Gerald M. Levin
75 Rockefeller Plaza
New York, NY 10019

Times Mirror
Mark H. Willes
220 West First Street
Los Angeles, CA 90012

TJX
Bernard Cammarata
770 Cochituate Road
Framingham, MA 01701

Tosco
Thomas D. O'Malley
72 Cummings Point Road
Stamford, CT 06902

Toys "R" Us
Robert Nakasone
461 From Road
Paramus, NJ 07652

Transamerica
Frank C. Herringer
600 Montgomery Street
San Francisco, CA 94111

Tribune
John W. Madigan
435 North Michigan Avenue
Chicago, IL 60611

Tricon Global Restaurants
Andrall E. Pearson
1441 Gardiner Lane
Louisville, KY 40213

Truserv
Daniel A. Cotter
8600 West Bryn Mawr Avenue
Chicago, IL 60631

TRW
Joseph T. Gorman
1900 Richmond Road
Cleveland, OH 44124

Turner Corp.
Ellis T. Gravette, Jr.
375 Hudson Street
New York, NY 10014

TWA
Gerald Gitner
515 North Sixth Street
St. Louis, MO 63101

Tyson Foods
Wayne Britt
2210 West Oaklawn Drive
Springdale, AR 72762

U.S. Bancorp
John F. Grundhofer
601 Second Avenue, South
Minneapolis, MN 55402

U.S. Foodservice
James L. Miller
9755 Patuxent Woods Drive
Columbia, MD 21046

U.S. Industries
David H. Clarke
101 Wood Avenue, South
Iselin, NJ 08830

U.S. Office Products
Charles P. Pieper
1025 T. Jefferson Street, NW
Washington, DC 20007

UAL
Gerald Greenwald
1200 East Algonquin Road
Elk Grove Township, IL 60007

Ultramar Diamond Shamrock
Jean Gaulin
6000 North Loop 1604 West
San Antonio, TX 78249

Unicom
John W. Rowe
10 South Dearborn Street
Chicago, IL 60603

Union Camp
W. Craig McClelland
1600 Valley Road
Wayne, NJ 07470

Union Carbide
William H. Joyce
39 Old Ridgebury Road
Danbury, CT 06817

Union Pacific
Richard K. Davidson
1717 Main Street
Dallas, TX 75201

Unisource
Ray B. Mundt
1100 Cassatt Road
Berwyn, PA 19312

Unisys
Lawrence A. Weinbach
Township Line & Union Mtg. Roads
Blue Bell, PA 19424

United Auto Group
Marshall S. Cogan
375 Park Avenue
New York, NY 10152

United Healthcare
William W. McGuire
9900 Bren Road East
Minneapolis, MN 55343

United Parcel Service
James P. Kelly
55 Glenlake Parkway, NE
Atlanta, GA 30328

United States Filter
Richard J. Heckman
40-004 Cook Street
Palm Desert, CA 92211

United Stationers
Randall W. Larrimore
2200 East Golf Road
Des Plaines, IL 60016

United Technologies
George David
1 Financial Plaza
Hartford, CT 06101

Universal
Henry H. Harrell
1501 North Hamilton Street
Richmond, VA 23230

Unocal
Roger C. Beach
2141 Rosecrans Avenue
El Segundo, CA 90245

Unum
James F. Orr, III
2211 Congress Street
Portland, ME 04122

US Airways Group
Rakesh Gangwal
2345 Crystal Drive
Arlington, VA 22227

US West
Solomon D. Trujillo
1801 California Street
Denver, CO 80202

USAA
Robert T. Herres
9800 Fredericksburg Road
F-3-E
San Antonio, TX 78288

USG
William C. Foote
125 South Franklin Street
Chicago, IL 60606

USX
Thomas J. Usher
600 Grant Street
Pittsburgh, PA 15219

Utilicorp United
Richard C. Green, Jr.
20 West Ninth Street
Kansas City, MO 64105

Valero Energy
William E. Greehey
1 Valero Place
San Antonio, TX 78212

Venator
Roger N. Farah
233 Broadway
New York, NY 10279

Vencor
Edward Kuntz
400 West Market Street
Louisville, KY 40202

VF
Mackey J. McDonald
628 Green Valley Road
Greensboro, NC 27408

Viacom
Sumner M. Redstone
1515 Broadway
New York, NY 10036

W.W. Grainger
Richard L. Keyser
455 Knightsbridge Parkway
Lincolnshire, IL 60069

Wachovia Corp.
Leslie M. Baker, Jr.
100 North Main Street
Winston-Salem, NC 27150

Walgreen
L. Daniel Jorndt
200 Wilmot Road
Deerfield, IL 60015

Wal-Mart Stores
David D. Glass
702 Southwest. Eighth Street
Bentonville, AR 72716

Walt Disney
Michael D. Eisner
500 South Buena Vista Street
Burbank, CA 91521

Warner-Lambert
Lodewijk J.R. de Vink
201 Tabor Road
Morris Plains, NJ 07950

Washington Mutual
Kerry K. Killinger
1201 Third Avenue
Seattle, WA 98101

Waste Management
John E. Drury
1001 Fannin Street
Houston, TX 77002

Wellpoint Health Networks
Leonard D. Schaeffer
1 Wellpoint Way
Thousand Oaks, CA 91362

Wells Fargo
Richard M. Kovacevich
420 Montogomery Street
San Francisco, CA 94163

Wesco International
Roy W. Haley
4 Station Square
Pittsburgh, PA 15219

Western Digital
Charles A. Haggerty
8105 Irvine Center Drive
Irvine, CA 92618

Westvaco
John A. Luke, Jr.
299 Park Avenue
New York, NY 10171

Weyerhaeuser
Steven R. Rogel
33663 Weyerhaeuser Way, South
Federal Way, WA 98003

Whirlpool
David R. Whitwam
2000 M-63 North
Benton Harbor, MI 49022

Willamette Industries
Duane C. McDougall
1300 Southwest Fifth Avenue
Portland, OR 97201

Williams
Keith E. Bailey
1 Williams Center
Tulsa, OK 74172

Winn-Dixie Stores
A. Dano Davis
5050 Edgewood Court
Jacksonville, FL 32254

Xerox
Paul A. Allaire
800 Long Ridge Road
Stamford, CT 06904

Yellow
A. Maurice Myers
10990 Roe Avenue
Overland Park, KS 66211

York International
Robert N. Pokelwaldt
631 South Richland Avenue
York, PA 17403

Interview List*

U.S. Equal Employment Commission
1801 L Street, NW
Washington, DC 20507

Ida Castro, Chairwoman

Paul Igasaki, Vice Chairman

Deidre Flippen, Director
Office of Research and Information Programs

Pierrette Hickey, Director
Charge Data System Division
Office of Information Resource Management

Irene Hill, Attorney Advisor
Office of Field Programs

Steve Ichniowski, National ADR Coordinator
ADR Program

Dianna Johnston, Assistant Legal Counsel
Office of Legal Counsel

Peggy Mastrioanni, Associate Legal Counsel
Office of Legal Counsel

John Nickelson, Computer Specialist
Charge Data System Division
Office of Information Resource Division

Gregory Stewart, General Counsel
Office of General Counsel

Elizabeth Thornton, Director
Office Field Programs

Ellen Vargyas, Legal Counsel
Office of Legal Counsel

Baltimore District Office
City Crescent Building
10 South Howard Street
Baltimore, MD 21201

Michael Fetzer, Acting District Director

Barbara Veldhuizen, Deputy Director

Bob Brown, Mediator

Sandra Byrd, Supervisory Investigator

Judy Cassell, Charge Receipt Supervisor

Erica Cryor, Program Analyst

Monica Jackson, Investigative Support Assistant

Gerald Kiel, Regional Attorney

Chester Kleiman, Enforcement Manager

Suzanne Kotrosa, Investigator

Tammy Lawrence, Investigator

Judy Navarro, Investigator

Stephen O'Rourke, Supervisory Trial Attorney

Denise Purnell, State and Local Coordinator

Cecile Quinlan, Trial Attorney

Mildred Rivera, Trial Attorney

Wilma Scott, Supervisory Investigator

M. Patricia Tanner, Supervisory Systemic Investigator

Zetha Wofford, Investigator

Birmingham District Office
1900 3rd Avenue, North, Suite 101
Birmingham, AL 35203-2397

Cynthia Pierre, District Director

Eddy Abdulhaqq, Investigator
Pattern and Practice Unit

Pamela Agee, Trial Attorney

Mildred Byrd, Acting Regional Attorney

Roderick Childless, Investigator

Gaines Elenburg, Investigator

* This list does not include complainants interviewed for this report in order to protect their anonymity.

Emma Evans, Mediator

W.D. Files, Jr., Enforcement Manager

Allen Gosa, Intake Supervisor

Samuel Hall, Supervisory Investigator

Beverly Hinton, Outreach Program Analyst

Julia Hodge, Investigator

Charles Hullett, Investigator

Debra Leo, ADR Coordinator

Eunice Marrow, Senior Trial Attorney

Arthur McGee, Supervisory Investigator

Linda Ross, Investigative Support Assistant

Jill Vincent, Supervisory Trial Attorney

Chicago District Office
500 West Madison
Suite 2800
Chicago, IL 60661

John Rowe, District Director

Judy Bowman, Deputy Director

Judy Carson, Trial Attorney

Lynn Cousins, Investigator

Monique Dedusman, Investigator

Shirley Ellis, Enforcement Manager

John Henderickson, Regional Attorney

John Knight, Trial Attorney

Dallas District Office
207 South Houston Street, 3rd Floor
Dallas, TX 75202-4726

Thelma Taylor, District Director

Brian McGovern, Deputy Director

Suzanne Anderson, Senior Attorney

Donald Birdseye, Supervisory Investigator

Robert Canino, Regional Attorney

Toby Costas, Trial Attorney

Edward Elizondo, Outreach Program Analyst

Janet Elizondo, Enforcement Manager

Randy Garrett, Investigator

Cynthia Hawkins, Supervisory Investigator

Armando Matamoros, Investigator

Levi Morrow, Investigator

Janice Reed, Supervisory Investigator

Belinda Rodriguez, Investigative Support Assistant

Becky Shryock, Investigator

Gloria Smith, Mediator

Jean Stout, State and Local Coordinator

Sandra Taylor, Intake Supervisor

Carla Vogel, ADR Coordinator

Lillie Wilson, Investigator

New York District Office
7 World Trade Center, 18th Floor
New York, NY 10048-0948

Spencer Lewis, District Director

Richard Alpert, Deputy Director

Louis Graziano, Trial Attorney

Bill Lai, Supervisory Investigator

James Lee, Regional Attorney

Anthony Linsk, Investigator

Luis Quinto, Trial Attorney

Ann Schrage, Senior Investigator

Sandra Taylor, Acting Charge Receipt Supervisor

Phoenix District Office
3300 N. Central Avenue, Suite 690
Phoenix, AZ 85012

Charles Burtner, District Director

Lori Barreras, Supervisory Investigator

Antonio DeDios, State and Local Coordinator

Nancy Gratz, Investigative Support Assistant

Gloria Johnson, ADR Coordinator

Paul Manget, Enforcement Manager

Michelle Marshall, Trial Attorney

Lucy Orta, Investigator

Sandra Padegimas, Trial Attorney

Jose Robinson, Investigator

Barbara Rusden, Investigator

C. Emmanuel Smith, Attorney Supervisor

Richard Trujillo, Regional Attorney

Krista Watson, Charge Receipt Supervisor

Seattle District Office
909 First Avenue, Suite 400
Seattle, WA 98104-1061

Ed Hill, Enforcement Manager

Matt Clemon, Investigator

Janet Little, Investigator

St. Louis District Office
Robert A. Young Building
1222 Spruce Street, Room 8.100
St. Louis, MO 63103

Lynn Bruner, District Director

Richard Schuetz, Deputy Director

Scott Barnhart, State and Local Coordinator

Sharron Blalock, Acting Intake Supervisor

Althea Bolden, Enforcement Supervisor

Kathy Compton, Investigator

Mike Conley, Mediator

Harold Emde, Investigator

Carl Fricks, Enforcement Manager

John Fultz, Outreach Program Analyst

Donna Harper, Supervisory Trial Attorney

Robert Johnson, Regional Attorney

Maggie McFadden, Enforcement Supervisor
State and Local Coordinator

Felix Miller, Trial Attorney

Maria Schulte, Mediator

Inez Shiloh, Investigative Support Assistant

Rebecca Stith, Trial Attorney

State and Local Fair Employment Practices Agencies

Paula Haley, Executive Director
Alaska State Commission for Human Rights
800 A Street, Suite 204
Anchorage, AK 99501-3669

Robert Steindler, Administrator
Alexandria Office of Human Rights
110 North Royal Street, Suite 201
Alexandria, VA 22314

Walter Shook, Unit Supervisor
Baltimore Community Relations Commission
10 North Calvert Street, Suite 915
Equitable Building
Baltimore, MD 21202

Donald Stocks, Interim Director
District of Columbia Office of Human Rights
441 4th Street, NW, Suite 970 North
Washington, DC 20001

Rufus Clanzy, Administrator
Howard County Office of Human Rights
6751 Columbia Gateway Drive, 2nd Floor
Columbia, MD 21046

Joseph Gallegos, Director
Industrial Commission of Utah
Anti-Discrimination and Labor Division
160 East 300 South, 3rd Floor
Post Office Box 146630
Salt Lake City, UT 84114-6630

J. Neil Bell, Operations Manager
Maryland Commission on Human Relations
6 St. Paul Street, Suite 900
Baltimore, MD 21202

Henry Ford, Executive Director
Maryland Commission on Human Relations
6 St. Paul Street, Suite 900
Baltimore, MD 21202

William H. Stewart, Administrator
Nevada Equal Rights Commission
1515 East Tropicana Avenue, Suite 590
Las Vegas, NV 89119

Tawanda Smith, Deputy Director
Prince George's County Human Relations Commission
1400 McCormick Drive, Suite 245
Largo, MD 20774

Barbara Osinski, Enforcement Manager
Seattle Office for Human Rights
700 3rd Avenue, Suite 250
Seattle, WA 98104

Jacqueline Carr, Deputy Director
St. Louis Civil Rights Enforcement Agency
906 Olive Street, Suite 100
St. Louis, MO 63101

William Hale, Executive Director
Texas Commission on Human Rights
6330 Highway 290 East, Suite 250
Austin, TX 78711

Tribal Employment Rights Offices

Larry Ketcher, Administrator
Cherokee Nation of Oklahoma
Post Office Box 948
Tahlequah, OK 74465-0948

Joseph Manuel, Director
Gila River Indian Community
Post Office Box 97
Sacaton, AZ 85247

Don Ham, Compliance Officer
Gila River Indian Community
Post Office Box 97
Sacaton, AZ 85247

Marlo Norris-Enos, Director
Tohono O'Odham Nation
Post Office Box 40
Sells, AZ 85634

Verna Espuina, Administrative Specialist
Tohono O'Odham Nation
Post Office Box 40
Sells, AZ 85634

Williard Manuel, Compliance Officer
Tohono O'Odham Nation
Post Office Box 40
Sells, AZ 85634

Robert Six Killer, Compliance Officer
Tohono O'Odham Nation
Post Office Box 40
Sells, AZ 85634

Catherine Whitman, Administrative Assistant
Tohono O'Odham Nation
Post Office Box 40
Sells, AZ 85634

Organizations and Advocates

Michael Lewis
American Bar Association
Alternative Dispute Resolution Section
c/o Mediation Associates
1666 Connecticut Avenue, NW, Suite 500
Washington, DC 20009

Dianne Lipsey
ADR Vantage
1660 L Street, NW
Washington, DC 20036

Richard Foltin, Legislative Director and Counsel
American Jewish Committee
Office of Government and International Affairs
1156 15th Street, NW
Washington, DC 20005

Marc Stern, Executive Director
American Jewish Congress
15 East 84th Street
New York, NY 10028

Imaad Malik, Outreach Director
American Muslim Council
1212 New York Avenue, NW, Suite 400
Washington, DC 20005

Stanley Mark
Asian American Legal Defense and Education Fund
99 Hudson Street, 12th Floor
New York, NY 10013

Conrad Edwards, President
Council for Tribal Employment Rights
23830 Pacific Highway South, Suite 203
Kent, WA 98032

Suzanne Burnette, Attorney
U.S. Department of Labor, Women's Bureau
200 Constitution Avenue, NW, Room S3002
Washington, DC 20210

Cynthia Dawkins, Social Science Advisor
U.S. Department of Labor, Women's Bureau
200 Constitution Avenue, NW, Room S3002
Washington, DC 20210

Jane Walstedt, Social Science Advisor
U.S. Department of Labor, Women's Bureau
200 Constitution Avenue, NW, Room S3002
Washington, DC 20210

Donya Fernandez, Supervising Attorney
Employment Law Center
Legal Aid Society
Language Rights Project
1663 Mission
San Francisco, CA 94103

William McNeal
Employment Law Center
1663 Mission
San Francisco, CA 94103

Ed Valenzuela, President
Ganas Professional Service
909 East Loyola Drive
Tempe, AZ 85282

Barbara Gault, Associate Director of Research
Institute for Women's Policy Research
1400 20th Street, NW, Suite 104
Washington, DC 20036

Heidi Hartman, Director of Research
Institute for Women's Policy Research
1400 20th Street, NW, Suite 104
Washington, DC 20036

Vicky Lovell, Study Director
Institute for Women's Policy Research
1400 20th Street, NW, Suite 104
Washington, DC 20036

Cynthia Negrey, Study Director
Institute for Women's Policy Research
1400 20th Street, NW, Suite 104
Washington, DC 20036

Richard Seymour, Director
Lawyers Committee for Civil Rights Under Law
Employment Discrimination Project
1450 G Street, NW, Suite 400
Washington, DC 20005

Jonathan Weiss, Director
Legal Services for the Elderly
130 West 42nd Street, 17th Floor
New York, NY 10036

Tom Saenz, Los Angeles Regional Counsel
Mexican American Legal Defense and Education Fund
634 South Spring Street, 11th Floor
Los Angeles, CA 90014

Enrique Gallardo, Staff Attorney
Mexican American Legal Defense and Education Fund
634 South Spring Street, 11th Floor
Los Angeles, CA 90014

Carmen Joge, Policy Analyst
National Council of LaRaza
1111 19th Street, NW, Suite 1000
Washington, DC 20036

Paula Brantner, Senior Trial Attorney
National Employment Lawyers Association (NELA)
600 Harrison Street, Suite 535
San Francisco, CA 94107

Jocelyn Frye, Director of Legal and Public Policy
National Partnership for Women and Families
1875 Connecticut Avenue, NW, Suite 710
Washington, DC 20009-5728

Alfred Blumrosen, Thomas A. Cowan Professor of Law
Rutgers School of Law
Rutgers University
123 Washington Street
Newark, NJ 07102-3192

Mitchell Tyner, Associate General Counsel
Seventh Day Adventist Church
12501 Old Columbia Pike
Silver Spring, MD 20704

Randy Johnson, Vice President
U.S. Chamber of Commerce
Labor and Employee Benefits
1615 H Street, NW, Room 645
Washington, DC 20062

Michael Martinez, Director
Utah Advisory Committee
4479 Gordon Lane
Murray, UT 84107

Julie Davies
Utah Federation of Business and Professional Women

Nancy Kreiter, Research Director
Women Employed Institute
22 West Monroe, Suite 1400
Chicago, IL 60603

Attorneys

Donald Green, Esq.
Pepper, Hamilton, LLP
600 14th Street, NW, Suite 500
Washington, DC 20005

Daniel S. Press, Esq.
Van Ness-Feldman Law Firm
1050 Thomas Jefferson Street, NW
Washington, DC 20007

Amy Sergent, Esq.
Lancaster & Eure, PA
711 North Washington Boulevard
Sarasota, FL 34236

William Fenton Sink, Esq.
Law Offices of William Fenton Sink
735 Bishop Street, Suite 420
Honolulu, HI 96813

Fortune 500 and Other Businesses

Frank O' Mara, Vice President
Human Resources
Alltel Corporation
1 Allied Drive
Little Rock, AR 72202

Laura Brody, Director
Diversity and Development
Best Foods
700 Sylvan Avenue,
International Plaza
Englewood Cliffs, NJ 07632-9976

Donna Smith, Manager
Diversity Programs
Campbell Soup Company
Camden, NJ 08101

Henry Hammons, Manager
Employee, Compliance, and Selection
Chevron
6001 Bollinger Canyon Road, Room H-3192
San Ramon, CA 94583

David Colbert
Chevron
6001 Bollinger Canyon Road, Room H-3192
San Ramon, CA 94583

Barbara Lockes
Chevron
6001 Bollinger Canyon Road, Room H-3192
San Ramon, CA 94583

Bruce Rose, Vice President
Gas and Electric Division
Cinergy Corporation
139 East 4th Street
Cincinnati, OH 45202

Susan Bradley, General Manager
Diversity Performance
Cinergy Corporation
139 East 4th Street
Cincinnati, OH 45202

Dale Eimmester, Manager of Compliance Services
Cinergy Corporation
139 East 4th Street
Cincinnati, OH 45202

Brent Gambill, Senior Corporate Counsel
Cinergy Corporation
139 East 4th Street
Cincinnati, OH 45202

John Pauley, Senior Counsel
Cinergy Corporation
139 East 4th Street
Cincinnati, OH 45202

Melanie Penna, Vice President
Human Resources
Comcast Cable Communications, Inc.
1500 Market Street
Philadelphia, PA 19102-2148

Susan Pigott, Manager
Human Resources
Dean Foods
3600 North River Road
Franklin, IL 60131

Dennis Wells, Director
Corporate Employer and Labor Relations
Duke Energy
422 South Church Street
Charlotte, NC 28201

Luis Camardo, Manager
Equal Employment and Workplace Planning
Ford Motor Company
American Road
Dearborn, MI 48121-1899

J. Gordon Christy, Senior Attorney
Labor Law Practice
Ford Motor Company
American Road
Dearborn, MI 48121-1899

Chauncey Smith, General Manager
EEO Compliance and Diversity
H.J. Heinz Company
600 Grant Street
Pittsburgh, PA 15219

Faye Wilson, Senior Vice President
Value Initiatives
Home Depot
2455 Paces Ferry Road, NW
Atlanta, GA 30339

Jocelyn Hunter, Senior Corporate Council
Employee Relations
Home Depot
2455 Paces Ferry Road, NW
Atlanta, GA 30339

Ogden Reed, Legal Manager
Human Resources
Intel Corporation
4100 Sara Road, RR5-501
Rio Rancho, NM 87124

Gwendolyn Young, Vice President
National Bank of Kentucky
101 South 5th Street, 12th Floor
Louisville, KY 40201

Thomas Simmon, Assistant General Counsel
Office Max, Inc.
3605 Warrensville Center Road
Shaker Heights, OH 44122

Glenn Summers, Attorney
Peter Kiewit & Sons
1000 Kiewit Plaza
Omaha, NE 68131

Andrew Gold, Counsel
Labor, Employee Relations and Benefits Department
Pitney Bowes
1 Elmcroft Road, MC-6339
Stamford, CT 06926

Staci Beck, Employment Law Counselor
Service Master Company
1 Master Way
Downers Grove, IL 60515

Robert Bruce, Vice President
Labor and Employment Law Counselor
Service Master Company
1 Master Way
Downers Grove, IL 60515

Karen Hovorka, Director
Training and Administration
Service Master Company
1 Master Way
Downers Grove, IL 60515

Glenn Felton, Vice President and
Assistant General Counsel
Unumprovident Corporation
1 Fountain Square
Chattanooga, TN 37402

Veronica Black, Vice President
Group Executives
Wachovia
100 North Main Street
Winston Salem, NC 27101

Gar Brannon, Assistant Vice President
Wachovia
100 North Main Street
Winston Salem, NC 27101

Dan McNatt, Corporate Counsel
Wachovia
100 North Main Street
Winston Salem, NC 27101

Lela Merical Carter
Wells Fargo
1221 Broadway Street, Suite 240
Oakland, CA 94612

Barri Evans, Supervisor
Wells Fargo
633 Folsom
San Francisco, CA 94163

Elisa Harrison
Wells Fargo
100 West Washington
Phoenix, AZ 85003

U.S. COMMISSION ON CIVIL RIGHTS
Washington, DC 20425