

# **ADVANCING OPPORTUNITY**



## **A REVIEW OF THE SYSTEMIC PROGRAM OF THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**July 7, 2016**

## Message from Chair Jenny R. Yang

For over 50 years, the U.S. Equal Employment Opportunity Commission (“EEOC” or “Commission”) has worked to ensure equal opportunity and freedom from discrimination in the nation’s workplaces. Tackling systemic discrimination -- where a discriminatory pattern or practice or policy has a broad impact on an industry, company or geographic area -- is central to the mission of EEOC. Systemic discrimination creates barriers to opportunity that cause widespread harm to workers, workplaces, and our economy. EEOC’s efforts to address systemic discrimination are critical to remove these barriers and to promote workplace practices that fully utilize the talents of the American workforce.

Recognizing that the “Commission cannot effectively combat discrimination without a strong nationwide systemic program,” EEOC undertook an extensive examination of its systemic enforcement efforts in 2005.<sup>1</sup> The Task Force concluded that although the agency had “pockets of systemic expertise in the field and in headquarters,”<sup>2</sup> EEOC needed to expand this capacity across all its field offices and needed to provide adequate resources to support this work. The Task Force issued 100 recommendations, many of which focused on a national, strategic approach to identifying systemic issues and the hiring and training of staff dedicated to systemic work across the agency. In April 2006, a unanimous Commission adopted the recommendations of its Systemic Task Force<sup>3</sup> and the agency initiated a comprehensive effort to implement these recommendations to build support and capacity in the field and in headquarters for a “coordinated, strategic and nationwide systemic program.”<sup>4</sup>

In 2012, the Commission, in its Strategic Plan<sup>5</sup> and Strategic Enforcement Plan (SEP)<sup>6</sup> reaffirmed the agency’s commitment to the goals set forth by the Systemic Task Force. EEOC’s

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<sup>1</sup> EEOC Chair Cari M. Dominguez established a Systemic Task Force in 2005, chaired by Commissioner Leslie E. Silverman and comprised of field and headquarters staff, to examine how the agency could more effectively combat systemic discrimination.

<sup>2</sup> *Systemic Task Force Report to the Chair of the Equal Employment Opportunity Commission*, [http://www.eeoc.gov/eeoc/task\\_reports/systemic.cfm](http://www.eeoc.gov/eeoc/task_reports/systemic.cfm) (hereinafter “Task Force Report”).

<sup>3</sup> The Commission adopted the Systemic Task Force Report through a series of resolutions and Chair Directives issued on April 4, 2006. *See Meeting of April 4, 2006 to Consider Recommendations of Systemic Task Force Report*, <http://www.eeoc.gov/eeoc/meetings/archive/4-4-06/motions.html>.

<sup>4</sup> *Id.*

<sup>5</sup> *U.S. Equal Employment Opportunity Commission Strategic Plan FY 2012 – 2016*, [https://www.eeoc.gov/eeoc/plan/strategic\\_plan\\_12to16.cfm](https://www.eeoc.gov/eeoc/plan/strategic_plan_12to16.cfm).

Strategic Plan included a specific performance measure for the agency to prioritize systemic cases<sup>7</sup> and to ensure that resolutions of charges and lawsuits include targeted equitable relief to prevent future violations. In the agency's SEP, the Commission emphasized that EEOC's systemic work must be "strategic, nationwide, coordinated and adequately resourced."<sup>8</sup> The SEP identified six national priority areas to focus the agency's work, identifying key areas for systemic enforcement to increase the impact of the agency's efforts across the country. The SEP also directed the agency to implement an integrated approach through collaboration and coordination among offices and program areas to implement a national law enforcement model.

In November 2013, at the request of the Commission's former Chair, the late Jacqueline Berrien, I undertook a review of the EEOC's systemic program to assess where the agency is today in implementing the Systemic Task Force Report's recommendations.<sup>9</sup> The review considered progress, challenges, and opportunities for EEOC's systemic program since the 2006 Systemic Report. This included an analysis of data on the agency's systemic work and extensive input and feedback from a wide range of internal and external stakeholders who have a deep understanding of the challenges and complexities of systemic investigations and litigation.<sup>10</sup>

This review demonstrates that in the past decade, EEOC has made substantial progress in building a systemic program that is strategic, nationwide, coordinated, and supported across the agency. The Commission has undertaken a strategic approach to advancing equal opportunity in the workplace guided by the Commission's Strategic Plan and SEP. To promote broad

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<sup>6</sup> *U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2013 – 2016*, <http://www.eeoc.gov/eeoc/plan/sep.cfm>.

<sup>7</sup> *Id.* at 19.

<sup>8</sup> *Id.* at 8.

<sup>9</sup> The agency owes much to the leadership of the late Jacqueline A. Berrien who served as Chair of EEOC from 2010-2014. She devoted her career to dismantling barriers to opportunity and provided strong support for EEOC's systemic program.

<sup>10</sup> I extend my deep appreciation to many EEOC staff and external stakeholders for their contributions to this review. In particular, I would like to recognize a number of EEOC staff who made significant contributions to this review, including Antoinette Eates who led the review and collection of feedback and data in FY2014 and 2015, Cathy Ventrell-Monsees for drafting and editing, Christopher Lage for his extensive input on our litigation efforts, Janet Cook Canary for her detailed input on our administrative enforcement, and Timothy Riera for his insight and field experience with our systemic program. I would also like to thank all those who reviewed and provided feedback, including Cynthia Pierre, Robert Weisberg, Marla Stern, Michael Whitlow, John Schmelzer, Robin Esak, Union President Gabrielle Martin, and the following members of the Committee of Advisors for Systemic Enforcement (CASE): Mary O'Neill, Elizabeth Cadle, Mindy Weinstein, Ronald Edwards, Kelly Trindel, Jerome Scanlan, and Arlean Nieto.

compliance, the agency has pursued an integrated strategy that emphasizes prevention through guidance, education and outreach, as well as robust enforcement, addressing both systemic issues as well as individual issues raised in charges of discrimination.

In the last 10 years, EEOC has addressed discriminatory policies, practices and patterns of discrimination affecting tens of thousands of workers across the country. EEOC's systemic program has opened up job opportunities for women in traditionally male industries, for African Americans and Latinos barred by background checks, for workers with disabilities screened out by medical inquiries, and for older workers shut out by stereotyping. EEOC has worked to remove discriminatory obstacles to equal opportunity and to institute promising practices in thousands of workplaces. As a direct result of EEOC systemic investigations and lawsuits over the past decade, more than 70,000 workers have received jobs, wages, and benefits and many more have benefited from positive changes in workplace practices.

Overall, the agency has implemented the key recommendations of the 2006 Systemic Report and significantly strengthened its capacity to address systemic discrimination. The commitment of EEOC staff throughout the agency has been integral to the program's success. EEOC now has capacity to investigate and litigate systemic cases in every district. Investments in staffing, training, and technology have built this capacity and resulted in a 250 percent increase in systemic investigations in the past five years. Coordination of systemic investigations and cases has significantly increased, with staff regularly sharing information and strategies on systemic cases and partnering across offices on lawsuits. Notably, EEOC tripled the success rate for conciliation of systemic matters from 21 percent to 64 percent over the past decade, and EEOC's litigation program has achieved a remarkable 94 percent success rate in its systemic cases over the past 10 years.

To document the impact of EEOC systemic efforts to advance workplace opportunity and to promote transparency about the agency's work, we are pleased to present this review of EEOC's systemic work over the past 10 years. This review highlights areas of progress and lessons learned from the agency's successes and challenges since the 2006 Systemic Task Force Report.

## **Executive Summary**

### Background

From the fall of 2013 through August 2014, Commissioner Jenny R. Yang and her staff conducted a review of EEOC's systemic program since the implementation of the 2006 Systemic Task Force Report. They interviewed a broad range of EEOC staff and outside experts with experience in systemic enforcement, and examined data and programmatic activities related to EEOC's systemic efforts.

EEOC's Committee of Advisors for Systemic Enforcement ("CASE") served as a key source of information. The Systemic Task Force recommended creating CASE, which is comprised of staff with systemic expertise from across the country who serve to evaluate and make recommendations for EEOC's systemic program. Additionally, all 15 District Directors responded to a survey to assess specific components of their systemic work, including staffing, infrastructure, training, resources, and workload management. A focus group of Regional Attorneys provided their offices' experiences supporting systemic investigations and litigating systemic cases. Commissioner Yang and her staff also had extensive discussions with EEOC's field staff about their experiences with systemic investigations and litigation. In addition, they met with a wide array of external stakeholders with expertise in systemic work to understand their perspectives about EEOC's work, progress, and challenges.

They specifically asked internal and external stakeholders how EEOC could strengthen its systemic program. They sought input on the actions EEOC could take to better address the most significant and persistent problems in the workplace today to promote broad compliance. They also studied EEOC's infrastructure and data on the systemic program to identify strengths and gaps. In August 2014, Commissioner Yang shared her preliminary findings with EEOC senior leadership and requested their feedback, which is incorporated into this review.

In September 2014, Commissioner Yang became Chair of EEOC. Since that time, the agency has taken additional steps to strengthen its systemic program, particularly with respect to infrastructure, coordination, and training, as discussed in Part II of this review. These efforts implemented recommendations from staff as part of this review, from CASE, and from the Systemic Task Force.

### Summary of Key Findings

Overall, EEOC has made considerable progress in achieving a truly nationwide, coordinated, and strategic systemic program.

1. EEOC has the capacity in every district to undertake systemic investigations and litigation, and all districts have initiated systemic investigations and lawsuits.

2. Coordination of systemic investigations and cases has significantly increased, with staff regularly sharing information and strategies on systemic cases and partnering across offices on lawsuits to support a nationwide or multi-facility focus.
3. EEOC has developed national strategies on specific priority issues that have enabled the agency to better identify the strongest cases and provide a model for other key areas.
4. Investments in hiring and training staff focused on systemic work have produced a 250 percent increase in systemic investigations in the past five years.
5. More than 80 percent of systemic resolutions in fiscal year 2015 raised national priority issues identified in the SEP.
6. Concerted efforts to reach voluntary resolutions of systemic investigations have resulted in the conciliation success rate tripling from 21 percent in fiscal year 2007 to 64 percent in fiscal year 2015.
7. The systemic litigation program has achieved significant impact, with a 10-year success rate of 94 percent for systemic lawsuits.
8. EEOC tripled the amount of monetary relief recovered for victims in the past five fiscal years from 2011 through 2015, compared to the relief recovered in the first five years after the Systemic Task Force Report.

Moving forward, EEOC is working to enhance the effectiveness of its systemic efforts by identifying areas where the most significant problems exist and rooting out the causes of persistent discrimination as well as emerging forms of discrimination. We are also exploring infrastructures to implement national and integrated strategies on key issues to leverage the agency's resources most effectively. To create sustainable advancements in equal opportunity and help prevent discrimination, the agency is also studying the promising forms of remedial relief for inclusion in its resolutions to ensure they will have a tangible impact in reducing future violations. Finally, EEOC will augment its investments in the staffing, infrastructure and technology needed to further strengthen its systemic program to ensure its continued success.

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## **I. Systemic Enforcement Produces Lasting Changes that Promote Equality of Opportunity for All in the Workplace.**

### **A. Systemic Discrimination Refers to Patterns, Practices and Policies.**

Systemic discrimination “is bias that is built into systems, originating in the way work is organized”<sup>11</sup> and “refers to structures that shape the work environment or employment prospects differently for different types of workers.”<sup>12</sup> It includes patterns of behavior that develop within organizations that disadvantage certain employees and become harmful to productivity. EEOC defines “systemic discrimination as pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location.”<sup>13</sup> Systemic discrimination typically affects large numbers of employees or applicants directly impacted by a policy or practice, but systemic investigations and litigation do not necessarily require large numbers of affected individuals.<sup>14</sup>

The objective of systemic enforcement is to break down the barriers to opportunity,<sup>15</sup> bring justice to those harmed, and prevent future harm to other workers. By addressing the root causes of discrimination that perpetuate and foster discriminatory practices, systemic enforcement seeks to dismantle the policy or practice that causes or facilitates discriminatory decisions and conduct. Research also documents that systemic enforcement by government agencies can have a strong deterrent effect on the practices and policies of employers beyond those subject to a specific enforcement action.<sup>16</sup>

EEOC’s systemic cases have sought to dismantle practices and policies that discriminate based on disability, sex, race, retaliation, age, national origin, religion and genetic information.

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<sup>11</sup> Pauline T. Kim, *Addressing Systemic Discrimination: Public Enforcement and the Role of the EEOC*, 95 BOSTON UNIV. L. REV. 1133, 1136 (2015).

<sup>12</sup> *Id.*

<sup>13</sup> *Systemic Task Force Report* at [http://www.eeoc.gov/eeoc/task\\_reports/systemic.cfm](http://www.eeoc.gov/eeoc/task_reports/systemic.cfm) at 1.

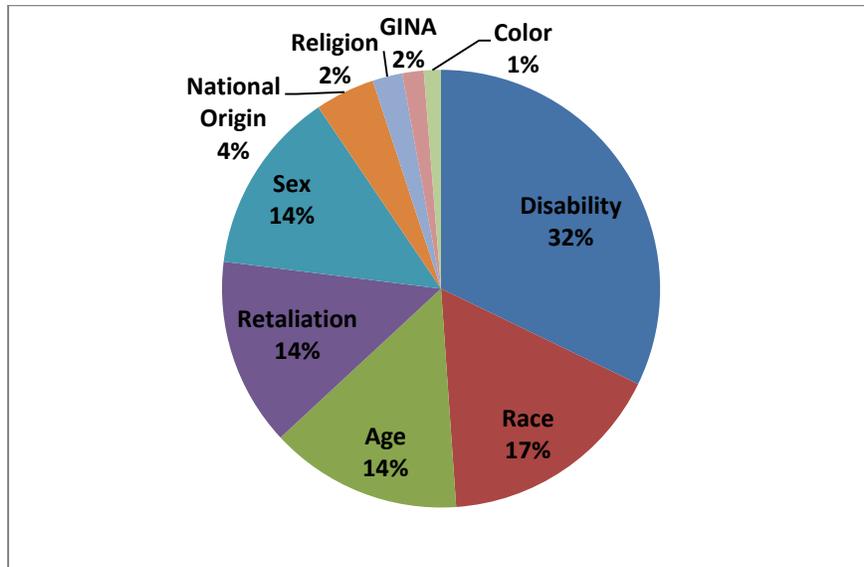
<sup>14</sup> *See* Kim, *supra* note 11, at 1139.

<sup>15</sup> *See* H.R. Rep. No. 92-238 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2149-50. (“Unrelenting broad-scale action against patterns or practices of discrimination is . . . critical in combating employment discrimination. The Committee believes these powers should be exercised by the Commission as an integral and coordinated part of the overall enforcement effort.”). *See also*, Kim, *supra* n. 15.

<sup>16</sup> *See, e.g.*, David Weil, [Improving Workplace Conditions through Strategic Enforcement, A Report to the Wage and Hour Division](#) at 11 (May 2010).

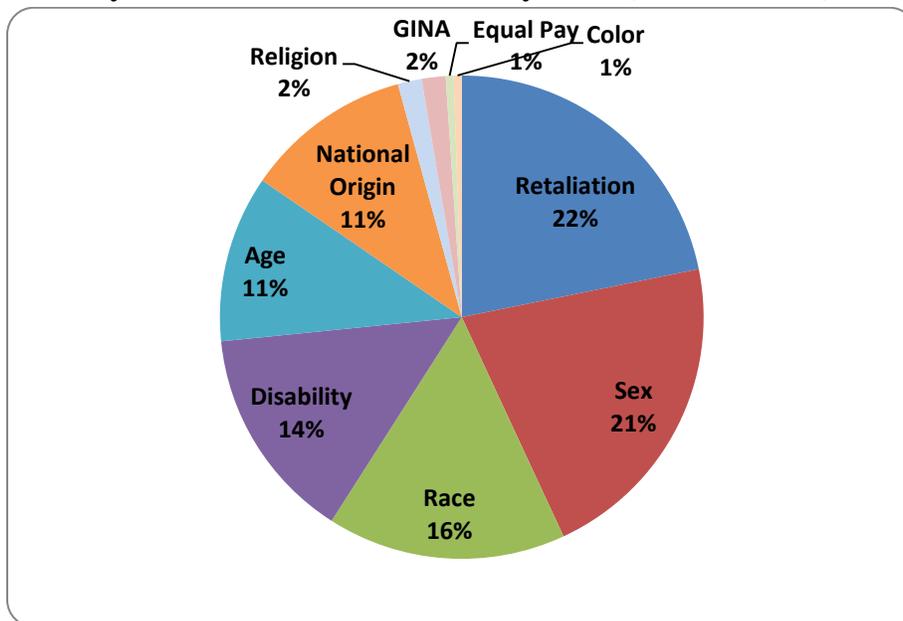
Furthermore EEOC's systemic cases have sought to expand opportunities for many workers across the country, as the charts below illustrate.

**Successful Conciliations of Systemic Investigations by Basis (FY 2011-2015)<sup>17</sup>**



**Figure 1**

**Systemic Lawsuit Resolutions by Basis (FY 2011-2015)**

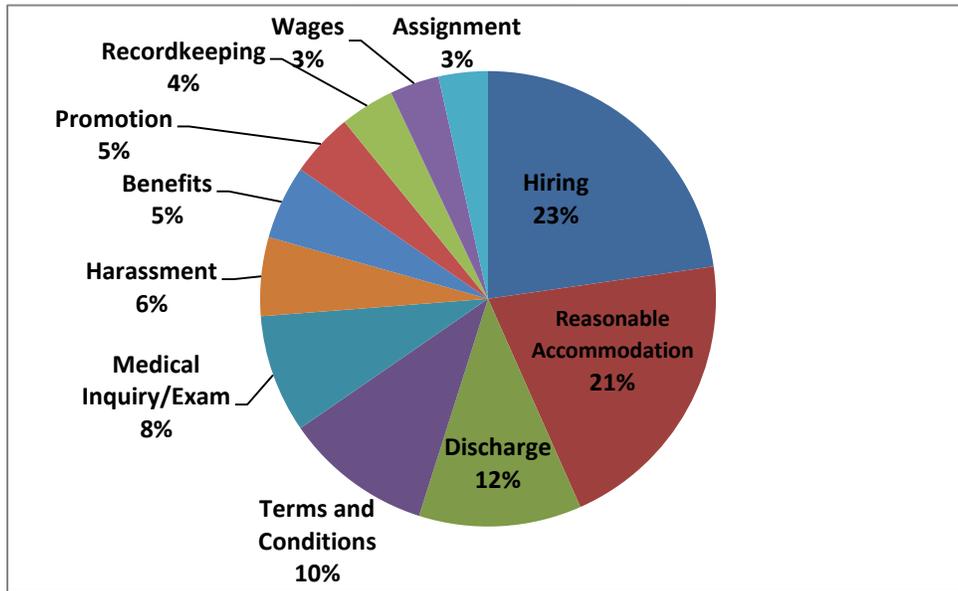


**Figure 2**

<sup>17</sup> Data is provided for the last five fiscal years in Figures 1-4 for the bases and issues alleged to allow for comparison. Some cases contain multiple bases.

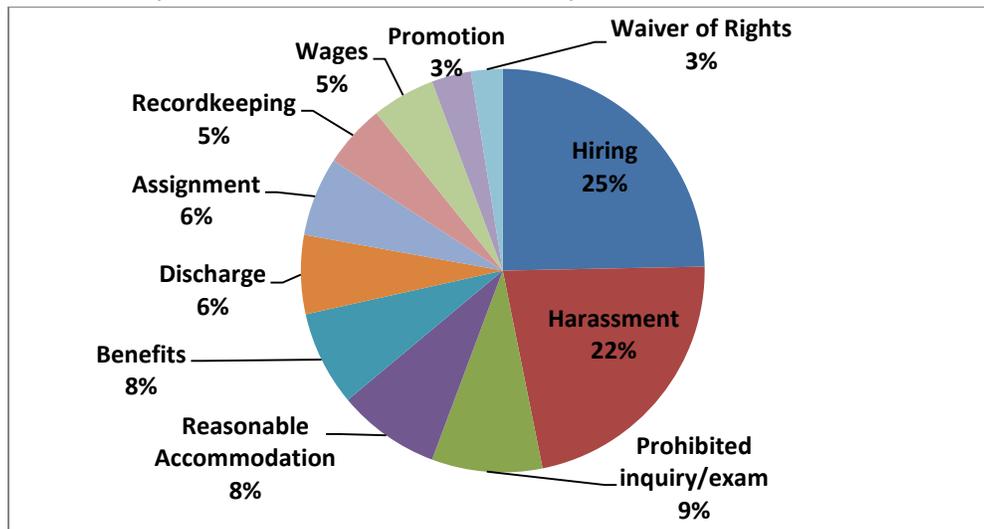
Through successful systemic conciliation and litigation, the agency has challenged a wide range of issues and obtained significant changes in practices and policies in many workplaces.

**Successful Conciliations of Systemic Investigations by Issue (FY2011-2015)**<sup>18</sup>



**Figure 3**

**Systemic Lawsuit Resolutions by Issue (FY2011-2015)**



**Figure 4**

<sup>18</sup> The data in Figures 3-4 represent the significant systemic issues raised in conciliations of investigations and in lawsuits resolved in fiscal years 2011 through 2015. Some cases contain multiple significant issues.

In the past 10 years, EEOC's systemic program has directly benefited over 71,000 individuals who received monetary relief through conciliations, consent decrees, and settlements.<sup>19</sup> The resolution of systemic cases also benefits untold numbers of workers and employers through changes to employment practices, increasing public awareness, and prompting changes in industry standards.<sup>20</sup>

**B. EEOC is Uniquely Equipped to Advance Equal Opportunity through Integrated Enforcement, Including Systemic Investigations, Litigation, Guidance, Outreach, and Research.**

EEOC's 2006 Systemic Report explained that the agency is well-situated to combat systemic discrimination in several ways. From the thousands of charges of discrimination employees file with EEOC each year, which has ranged from 75,000 to nearly 100,000 in the past 10 years, the agency can identify systemic practices and policies in the investigation of such charges. EEOC's nationwide presence also makes it uniquely situated to address patterns and practices across the country or in specific regions.

Congress and the Supreme Court have also recognized EEOC's authority to conduct systemic investigations and litigation to further the public's interest. Congress specifically authorized EEOC to use Commissioner Charges,<sup>21</sup> directed investigations<sup>22</sup> and subpoena power to investigate workplace discrimination,<sup>23</sup> and to initiate systemic litigation after conciliation fails, including through pattern or practice lawsuits.<sup>24</sup> The Supreme Court has acknowledged

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<sup>19</sup> See Table 5, *infra* at 30.

<sup>20</sup> See, e.g., *Fiscal Year 2015 Performance & Accountability Report*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 35 (2015), <http://www.eeoc.gov/eeoc/plan/upload/2015par.pdf>.

<sup>21</sup> The 1972 Amendments to Title VII changed the standards for Commissioner Charges to eliminate the "reasonable cause" requirement, and to specify that a Commissioner Charge need only meet the same requirements as a charge filed by a member of the public. 42 U.S.C. § 2000e- 5(b). See Pub. L. No. 88-352, §706(a), 78 Stat. 241, 259 (1964).

<sup>22</sup> Directed investigations are initiated by EEOC field office directors under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* (1967), and the Equal Pay Act (EPA), 29 U.S.C. §206(d) (1963), under the provisions of Section 11 of the Fair Labor Standards Act, 29 U.S.C. §211.

<sup>23</sup> See 42 U.S.C. § 2000e-9, incorporating the procedures of section 11 of the National Labor Relations Act, 29 U.S.C. § 161.

<sup>24</sup> 42 U.S.C. §§ 2000e-5 & 6.

EEOC's statutory authority to bring suit to vindicate the public interest, in particular when it seeks to secure relief for a group of aggrieved individuals.<sup>25</sup>

EEOC's 2012 Strategic Plan and Strategic Enforcement Plan emphasize the agency's commitment to strategically deploy its resources where it can have the greatest impact in advancing opportunity. This strategic approach furthers both the development of strong systemic cases and efficient handling of individual charges to serve the public better. Systemic investigations and lawsuits effectively use government resources because they address significant legal issues, broad policies, or have a wide influence on an industry, occupation or geographic area. Without systemic enforcement, many discriminatory systems and structures would persist –leading to more harm to individuals subject to such discriminatory practices and potentially more individuals filing charges of discrimination against their employers. Research studies also document that systemic enforcement is a greater driver of employer compliance than individual investigations or cases.<sup>26</sup>

In sum, EEOC can protect many more workers from discrimination through systemic enforcement than it can by investigating or litigating individual charges one by one. EEOC often receives charges from many workers alleging similar discrimination by one employer. In addition, an individual charge of discrimination can lead to an investigation that reveals other workers were harmed. Bringing one systemic action that changes the unlawful practice and provides remedies to the many workers harmed is more efficient than undertaking one individual investigation or lawsuit at a time that may not fully resolve the issue underlying the discrimination.

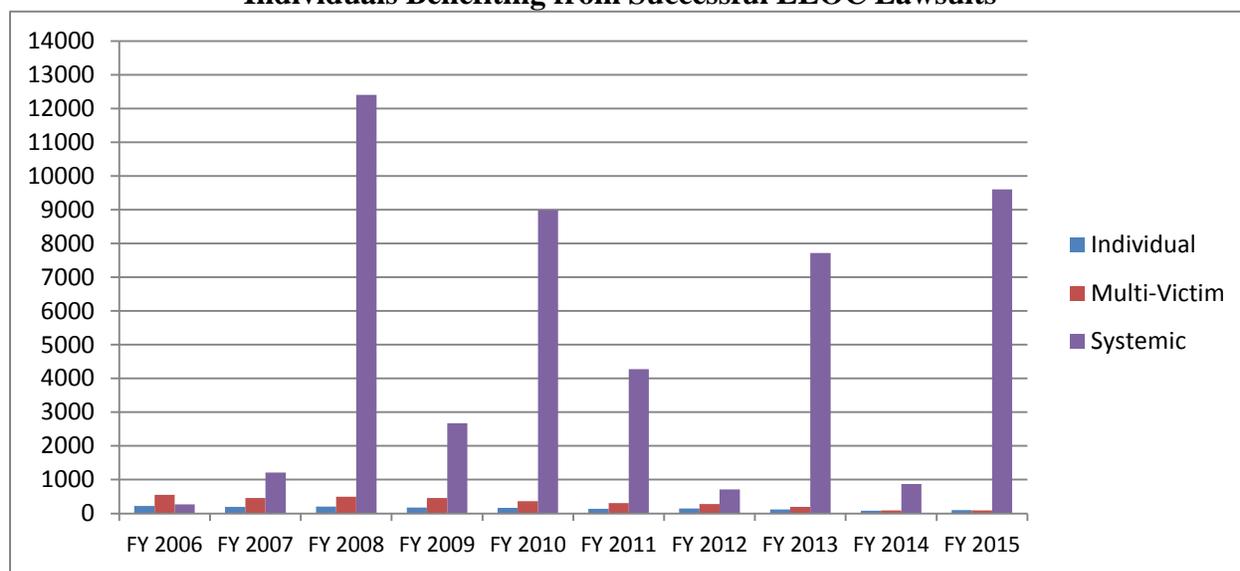
As the agency's work over the past decade has shown (see Table 1 below), significantly more individuals directly have benefited from EEOC systemic lawsuits than through individual or small multi-victim suits brought by EEOC.

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<sup>25</sup> See *General Tel. Co. of the Northwest Inc. v. EEOC*, 446 U.S. 318, 324 (1980) (“Given the clear purpose of Title VII, the EEOC’s jurisdiction over enforcement, and the remedies available, the EEOC need look no further than § 706 for its authority to bring suit in its own name for the purpose, among others, of securing relief for a group of aggrieved individuals.”); see also, *EEOC v. Waffle House*, 534 U.S. 279, 291 (2002) (“The statute clearly makes the EEOC the master of its own case and confers on the agency the authority to evaluate the strength of the public interest at stake.”)

<sup>26</sup> See Skaggs, S., *Producing Change or Bagging Opportunity? The Effects of Discrimination Litigation on Women in Supermarket Management*. AM. J. OF SOC. 1134, 1148-1182 (2008) (Investigative and litigation efforts that stress class and industry focus had positive impact on the employment of women managers).

## Individuals Benefiting from Successful EEOC Lawsuits<sup>27</sup>



**Table 1**

Systemic enforcement is a core component of EEOC’s integrated strategy to advance opportunity in the workplace, along with the issuance of policy and guidance, outreach, research, and the investigation, mediation, and litigation of individual charges. These components complement and support each other. For example, as the agency was investigating numerous charges alleging discrimination from background screens, EEOC issued an updated policy statement in 2012 on the use of criminal conviction background screens. The updated guidance brought heightened attention to the issue and contributed to significant changes in employer policies and state and local laws limiting the use of such screens. A year after EEOC issued this guidance, a survey of nearly 600 HR professionals reported that just 32 percent of their organizations had applied EEOC’s updated guidance to their hiring process.<sup>28</sup> After extensive outreach by EEOC and the filing of two lawsuits in June 2013 challenging the use of background screens as discriminatory,<sup>29</sup> the same survey of HR professionals conducted one year later reported that 88 percent of employers had adopted EEOC’s guidance.<sup>30</sup>

<sup>27</sup> “Multi-victim” cases are those cases with fewer than 20 identified victims that do not challenge a discriminatory policy or pattern or practice.

<sup>28</sup> [http://www.gjp.org/wp-content/uploads/EmployeeScreenIQ\\_Survey\\_Results\\_20141.pdf](http://www.gjp.org/wp-content/uploads/EmployeeScreenIQ_Survey_Results_20141.pdf) at 5.

<sup>29</sup> <https://www.eeoc.gov/eeoc/newsroom/release/6-11-13.cfm>.

<sup>30</sup> *Id.*

Another core component of EEOC's integrated strategy is its leadership and guidance to federal agencies on all aspects of the federal government's equal employment opportunity program, including the agency's adjudicatory responsibilities in the federal sector. For example, the Commission issued a series of federal sector decisions finding that discrimination based on gender identity and sexual orientation is covered as a form of sex discrimination under Title VII.<sup>31</sup> In private sector cases, EEOC has taken positions consistent with these federal sector precedents,<sup>32</sup> and courts have also recognized the significance of these federal sector precedents.<sup>33</sup>

Outreach and research are also critical components of the Commission's integrated approach. As one example, the SEP identified preventing harassment through systemic enforcement and targeted outreach as one of the agency's national priorities, recognizing that both strategies working in concert will have greater impact in promoting compliance. In January 2015, the Commission held a public meeting focused on preventing and addressing workplace harassment, and launched a Select Task Force on the Study of Harassment, co-chaired by Commissioners Chai R. Feldblum and Victoria A. Lipnic, to identify effective strategies for

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<sup>31</sup> The decisions applied Supreme Court precedent to analyze the evolving jurisprudence on Title VII protections against discrimination based on sexual orientation and gender identity. In *Macy v. DOJ*, the Commission held that intentional discrimination against a transgender individual because that person's gender identity is, by definition, discrimination based on sex and therefore violates Title VII. *See Macy v. DOJ, EEOC DOC 0120120821, 2012 WL 1435995, at \*1-2. (April 20, 2012).* Applying *Macy*, the Commission has also held that an employer's restrictions on a transgender woman's ability to use a common female restroom facility constitutes disparate treatment, *Lusardi v. Dep't of the Army, EEOC DOC 0120133395, 2015 WL 1607756, at \*1,4,7 (Mar. 27, 2015)*; that intentional misuse of a transgender employee's new name and pronoun may constitute sex-based discrimination and/or harassment; *Jameson v. U.S. Postal Service, EEOC Appeal No. 0120130992, 2013 WL 2368729 (May 21, 2013)*; and that an employer's failure to revise its records pursuant to changes in gender identity stated a valid Title VII sex discrimination claim, *Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120133123, 2014 WL 1653484 (Apr. 16, 2014)*. In *Baldwin v. Dep't of Transportation, EEOC Appeal No. 0120133080 (July 15, 2015)*, the Commission held that a claim of discrimination on the basis of sexual orientation necessarily states a claim of discrimination on the basis of sex under Title VII.

<sup>32</sup> *See EEOC v. Lakeland Eye Clinic*, No. 8:14-cv-2421-T35 (M.D. Fla. Consent decree entered Apr. 9, 2015) (new employer policy prohibiting transgender discrimination); *EEOC v. Scott Med. Health Ctr.*, No. 2:16-cv-00225-CB (W.D. Pa. filed Mar. 1, 2016); *EEOC v. Pallet Cos. d/b/a/ IFCO Sys. NA, Inc.*, No. 1:16-cv-00595-RDB (D. Md. filed Mar. 1, 2016); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 2:14-cv-13710-SFC-DRG (E.D. Mich. filed Sept. 25, 2015); *EEOC & Broussard v. First Loan Tower LLC*, No. 2:15-cv-01161-CJB-SS (E.D. La. filed Sept. 16, 2015).

<sup>33</sup> *See Fabian v. Hosp. of Central Connecticut*, No. 3:12-cv-1154, 2016 WL 1089178, at \*11 (D. Conn. Mar. 18, 2016) (quoting from *Macy* in its discussion of why transgender discrimination constitutes discrimination "because of sex" under Title VII); *Isaacs v. Felder Servs., LLC*, 2015 WL 6560655, at \*3 (M.D. Ala. Oct. 29, 2015) (stating that *Baldwin* "persuasively" explains the basis for concluding that sexual orientation discrimination is prohibited under Title VII); *Videckis v. Pepperdine Univ.*, 2015 WL 8916764, at \*8 (C.D. Cal. Dec. 15, 2015) (same).

preventing harassment in the workplace. After extensive research and study, the co-chairs of the Select Task Force issued a report in June 2016 that includes recommendations and tools to aid in designing effective anti-harassment policies; developing training curricula and creating an organizational culture in which harassment is not tolerated.<sup>34</sup> The report also recommended further research on the causes and effects of harassment based on race, disability, age, and religion. EEOC will use the report to inform significant outreach to educate employers and employees about strategies for preventing harassment with the goal of significantly reducing harassment in the workplace.

## **II. EEOC's Progress in Implementing the Recommendations of the 2006 Systemic Task Force Report**

The 2006 Systemic Task Force Report recommended four goals to strengthen the agency's capacity and success in investigating and litigating systemic cases --- to build a systemic program that is: 1) nationwide, 2) coordinated, 3) adequately resourced, and 4) that the agency support a culture valuing systemic work. The Commission's 2012 Strategic Enforcement Plan recommitted to these four goals and added an additional one – that the program also be strategic by focusing systemic investigations and litigation on national and local priority issues. Over the past 10 years, EEOC has made steady progress to achieve each of these goals.

### **A. Building Capacity for a Nationwide Systemic Program**

A key recommendation of the 2006 Systemic Task Force Report was to make systemic enforcement a nationwide program with capacity and activity in each district. Prior to 2006, EEOC had an established history of successful systemic work in several district offices, but it did not have this capacity nationwide. At that time, the agency had a systemic unit in its headquarters Office of General Counsel (OGC), which was disbanded in 2006.<sup>35</sup> The Task Force recommended increased systemic capacity in the field with additional support from headquarters.

Significantly, EEOC now has a nationwide systemic program, having developed the capacity to undertake systemic investigations and litigation in field offices that previously did not have the ability to do so. Every district has had active systemic investigations since fiscal year 2007 and active systemic litigation since fiscal year 2012.<sup>36</sup>

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<sup>34</sup> See *Select Task Force on the Study of Harassment in the Workplace*, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic, [https://www.eeoc.gov/eeoc/task\\_force/harassment/report.cfm](https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm).

<sup>35</sup> <http://www.eeoc.gov/eeoc/meetings/archive/4-4-06/motions.html>.

<sup>36</sup> Successful systemic investigations and lawsuits by each of EEOC's districts are cited throughout this report. To illustrate an example of systemic work in each district office, see the following cases:

## B. Coordination in Systemic Efforts across the Agency

One of the cornerstone recommendations of the 2006 Systemic Report was to adopt a “national law firm” model for litigating systemic cases that would increase collaboration among legal units and capitalize on attorneys’ expertise. This approach contemplated that systemic lawsuits would be staffed based on the needs of the case, meaning that case assignments would be made without regard to where the case is filed. The Systemic Task Force recommended that staffing decisions for a case should be driven by an attorney’s expertise, while also building expertise among less experienced attorneys, with active coordination and support by OGC headquarters.

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Atlanta District: *EEOC v. Hamilton Growers*, No. 11-134 (M.D. Ga. consent decree entered Dec. 10, 2012) (discharge of 450 African American farm workers based on race and national origin).

Birmingham District: *EEOC v. Signal Int’l, LLC*, No. 12-CV-557 (E.D. La. order entered Dec. 18, 2015) (national origin discrimination of 476 Indian nationals).

Charlotte District: Systemic conciliation provided conditional job offers to 318 non-Hispanic workers.

Chicago District: *EEOC v. Yellow Freight Sys., Inc.*, No. 09-CV-7693 (N.D. Ill. consent decree entered Sept. 25, 2012) (racial harassment of 309 workers).

Dallas District: *EEOC v. Sara Lee Food Service*, No. 14-58 (E.D. Tex. consent decree entered Dec. 18, 2015) (racial harassment of 74 workers).

Houston District: Successful conciliation against a large national retailer resulted in changes to its arrest and conviction policy that adversely impacted African Americans in hiring, promotion and discharge decisions.

Indianapolis District: *EEOC v. Renhill Staffing*, No. 08-cv-82 (N.D. Ind. consent decree entered Apr. 15, 2008) (failure to refer based on race and age for 764 individuals).

Los Angeles District: *EEOC v. Global Horizons*, No. 11-CV-257 (D. Haw. judgment entered Dec. 19, 2014 & consent decrees entered against co-defendants) (national origin discrimination against 546 Thai nationals).

Memphis District: *EEOC v. Paramount Staffing, Inc.*, No. 06-2624 (W.D. Tenn. consent decree entered Aug. 19, 2010) (failure of temp agency to refer 800 African American applicants for jobs).

Miami District: *EEOC v. It’s Just Lunch*, No. 13-22495 (S.D. Fla. consent decree entered May 31, 2011) (failure to hire 201 males as sales representatives).

New York District: Conciliation agreement with a utility company resolving claims of sexual harassment and discrimination for about 300 women. See <https://www.eeoc.gov/eeoc/newsroom/release/9-9-15.cfm>.

Philadelphia District: *EEOC v. Verizon Maryland, Inc.*, No. 11-CV-1832 (D. Md. consent decree entered Jul. 6, 2011) (800 individuals with disabilities discriminated by inflexible attendance policies).

Phoenix District: *EEOC v. Patterson-UTI Drilling Company LLC*, No. 09-CV-7693 (D. Colo. consent decree entered Apr. 15, 2015) (more than 1000 African Americans, Native Americans, Hispanics, Asian Americans subjected to pervasive harassment, denied training and promotions, and disproportionately disciplined and demoted).

San Francisco District: *EEOC v. 3M Co.*, No. 11-2408 (D. Minn. consent decree entered Sep. 19, 2011) (290 workers terminated in a reduction in force based on age).

St. Louis District: *EEOC v. New Prime Trucking, Inc.* No.6:11-CV-03367 (consent decree entered May 27, 2016) (64 women discriminated by same-sex training policy).

OGC has made significant progress in embracing a “national law firm” model as large-scale systemic cases typically involve some form of partnership among district offices. The partnership models vary, based on the scope of the case and the litigation needs. Use of a national law firm model has enabled attorneys throughout the agency to gain more exposure and expertise in systemic litigation and has resulted in a greater sense of common ownership of the agency’s systemic program.

The Commission, through the SEP, reframed the “national law firm” model to one of a “national law enforcement agency”<sup>37</sup> to emphasize the integration of administrative and legal enforcement, research, policy development, outreach and adjudications across the private, public and federal sectors. The SEP re-affirmed the recommendation of the Systemic Task Force to strengthen coordination between the Office of Field Programs (OFP) and OGC through regular and frequent discussions of pending investigations and cases, sharing of strategies, and partnering across offices to support large cases.

Within OFP, the systemic investigation program has also embraced a national and coordinated approach throughout the agency’s 15 districts. Lead systemic investigators and coordinators in each office and the National Systemic Program Manager regularly share information and strategies to better coordinate investigations. As the agency builds a culture of “One EEOC” to integrate all of our efforts across program areas as directed by the agency’s SEP, we are fostering increased collaboration and coordination of our systemic efforts across districts as well.

## **C. Ensuring that Systemic Enforcement is Adequately Resourced**

### **1. Staffing and Infrastructure to Support Systemic Enforcement**

The most significant progress toward building national capacity is the development of the skills and expertise to investigate and litigate systemic cases in every district. Based on recommendations in the 2006 Systemic Report and by CASE, EEOC created and has hired lead systemic investigators<sup>38</sup> and social science research analysts<sup>39</sup> assigned to every district, and a

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<sup>37</sup> “[A]n integrated approach envisions collaboration and coordination among staff, offices, and program areas and promotes the sharing of information and strategies to implement a national law enforcement model. SEP, *supra* note 6.

<sup>38</sup> Lead systemic investigators work exclusively on systemic investigations and mentor other investigators conducting systemic investigations in their districts.

<sup>39</sup> Expert social scientists and labor economists assist investigators in requesting and analyzing relevant data to investigate systemic charges and also provide statistical and analytical support to the investigation.

national systemic investigations program manager in headquarters.<sup>40</sup> These staff are dedicated to systemic work. They have the expertise and training to effectively manage complex investigations, to analyze relevant data, and to develop statistical evidence. The agency also created a systemic coordinator responsibility for management staff in each district.<sup>41</sup>

As recommended by the 2006 Systemic Report, EEOC has also invested in training for its investigative, research, and legal staff to enhance their systemic expertise. The training strengthens staff's ability to identify systemic issues and practices and to coordinate the development of systemic cases. In most years since 2008, EEOC has provided systemic training to lead systemic investigators and systemic coordinators. The agency's Office of Research and Information Planning (ORIP) has also convened meetings of systemic staff, academic researchers and economists to study data, trends and emerging issues. The Office of General Counsel (OGC) has conducted multi-day systemic litigation training, and established advisory teams to recommend strategies on challenging issues in systemic cases. Since fiscal year 2010, the agency has provided national webinars on specific topics related to the systemic work of the agency. In June 2016, the agency convened a two-day Advanced Systemic Institute to discuss strategies for identifying complex and emerging issues and remedies that work to bring lasting changes to the workplace.

These investments in staff and training focused on developing and coordinating systemic work contributed to a 250 percent increase in systemic investigations in the past five years, as compared to the first five years after the Systemic Task Force report.

Early in 2015, after the Joint Labor-Management Council (JLMC) worked with several offices to conduct pilot programs to study the use of systemic units, each district office created an infrastructure to support improved identification and coordination of systemic investigations in their offices. Under these structures, most districts investigate systemic discrimination through a systemic unit<sup>42</sup> or through a systemic team. In some offices with well-established systemic capacity, all investigators are developing systemic cases.

A systemic unit is generally comprised of several investigators working under the same supervisor. Often the supervisor is the systemic coordinator for the district and concentrates on

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<sup>40</sup> The headquarters systemic investigations program manager functions as the national coordinator for systemic investigations to identify issues for coordinated strategies, develop and organize training, prioritize resources among the district offices, and provide substantive and technical assistance.

<sup>41</sup> Systemic coordinators typically occupy positions such as deputy director, area director, enforcement manager or supervisor, and serve as a resource to ensure quality and coordinate systemic investigations.

<sup>42</sup> Some units also focus on investigating high priority cases with strategic impact that may not be systemic in nature.

overseeing systemic investigations. A systemic team may be composed of investigators, social scientists, and attorneys working under different supervisors. Thus far, the team approach has been effective in developing complex cases, and the agency will continue to evaluate the structures in place to ensure there is sufficient support to develop quality and coordinated systemic investigations.

Systemic investigations are staffed based on the needs of the case and the structure in the district. An attorney is usually assigned to systemic investigations and provides legal advice, as needed. Investigators may also work with an expert social scientist in developing a systemic case. All district offices also have regular reviews of the systemic investigations in their district with oversight by high level managers such as the regional attorney and district director. Offices work in partnership with each other on large systemic investigations that cross several jurisdictions, allowing investigators from several offices to work together.

## **2. Investments in Technology to Support Systemic Work**

The Systemic Task Force Report made several recommendations to enhance litigation-related technology. Those recommendations seem modest now, in light of the advances in technology, as well as in e-discovery and litigation support software over the past decade.

In 2010, the Office of General Counsel (OGC) assigned litigation support services staff to aid litigation efforts through the use of technology. This staff in OGC manages and trains attorneys and paralegals on Concordance and CaseMap software, which allows legal staff to manage voluminous case documents and information. In addition, the litigation support staff processes e-discovery, consults on the e-discovery process, handles digital media forensics and contracts with e-discovery vendors. In 2015, the staff completed its expansion of the agency's CaseWorks system, which provides a central shared source of litigation support tools that facilitate the collection and review of electronic discovery and enable collaboration in the development of cases for litigation. The agency has invested in training and resources to ensure its attorneys are equipped to handle e-discovery and to utilize technology to effectively manage a large volume of data and evidence.

EEOC has leveraged technology to facilitate cross-district communication and sharing of data and other information in its systemic investigations, as recommended in the 2006 Systemic Report. Specifically, investigative staff can access EEO-1 data easily to understand the workforce demographics of an employer, industry or region to inform the investigation and identify potential systemic issues, such as barriers to hire that lead to occupational segregation. In addition, the agency created a software application to better coordinate the investigation of multiple charges filed against the same employer involving similar issues. Another important technology upgrade enabled staff to easily upload the allegations of a charge into the agency's charge management system to facilitate identification of information in charges across the

agency to determine if they are related to a pending investigation. Prior to this upgrade, an investigator would often have to contact one or more field offices to request copies of the actual charge to see if they were related.

In 2015, EEOC began its development of a Digital Charge System for all charges, including systemic investigations, with pilots in 11 offices. The first phase of the Digital Charge System enables employer respondents and EEOC staff to transmit and receive charge and investigative documents digitally. By January 2016, all 53 of EEOC's offices had implemented this first phase of the Digital Charge System. The agency plans to expand the system to allow charging parties to send and receive documents concerning their charges of discrimination by the end of fiscal year 2016. The system provides online access to charge information for EEOC staff and will facilitate collaboration and partnering on investigations, including systemic cases.

The agency is significantly upgrading our technology infrastructure to leverage our resources, use staff time effectively, and make information available across the agency. As the agency moves forward with its online systems and cloud storage of systemic files, along with updated analytical software, investigative and legal teams will be able to access and manage the information and share their work much more easily regardless of their location or the location of the investigation. This innovation will be of particular importance for systemic teams.

### **3. Providing Adequate Resources for the Systemic Program**

To maximize its effectiveness, EEOC is deploying its resources to those efforts that promote broad compliance and enhance its service to the public. The agency is improving procedures and making needed investments in training and infrastructure to ensure the quality and success that the Commission expects in the pursuit of strong systemic cases.

EEOC is undertaking a national effort to streamline its operations to ensure timely investigation of charges, including systemic investigations. Reducing delays in the investigation of all charges benefits both employers and employees, and avoids evidence becoming stale or witnesses becoming unavailable, which can make cases more costly and difficult for all parties. The agency is striving to communicate with employers early in investigations to understand how employment data is stored in order to efficiently obtain and evaluate the information needed to assess whether a violation may have occurred. To ensure effective and timely conciliations, staff across the agency are carefully following the Supreme Court's guidance in *EEOC v. Mach Mining*.<sup>43</sup>

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<sup>43</sup> 135 S. Ct. 1645 (2015).

The agency has also invested in technology upgrades to free up investigator time to focus on timely investigations, while also providing the public with on demand access to our services. For example, EEOC's Digital Charge System, discussed above, should produce substantial savings in staff time by reducing administrative burdens on staff, and savings in agency expenditures for printing and postage. EEOC is also developing an online system that should streamline intake procedures to facilitate more focused and efficient intake interviews. In addition the agency is revising training programs to leverage online learning and reduce the time and costs of travel for training.

#### **4. Committee of Advisors for Systemic Enforcement (CASE)**

To continually evaluate and strengthen the agency's systemic program, the Commission created the Committee of Advisors for Systemic Enforcement, known as CASE, based on the recommendation of the 2006 Systemic Task Force Report. CASE launched in January 2008 and evaluates staffing, procedures, and systems and identifies areas for improvement. The first two CASE teams assessed the agency's overall effectiveness in combating systemic discrimination and served as a resource on systemic matters to make recommendations to strengthen the program. The current CASE team commenced its term in January 2016 and will build upon previous CASE recommendations to ensure a national strategy for systemic enforcement.

CASE's recommendations have been instrumental in promoting increased national coordination and resourcing of systemic investigations, emphasizing that every systemic investigation is to be viewed as an EEOC investigation, rather than viewed as one office's responsibility. CASE has repeatedly noted the importance of hiring dedicated systemic staff, updating resources, providing ongoing training for staff, and improving technology. Many of CASE's recommendations have been implemented, as described in the previous sections.

#### **D. Agency-Wide Support for Systemic Enforcement as a Priority for EEOC**

To implement one of the major recommendations of the Systemic Task Force Report, the Commission issued a resolution in 2006 to promote "a culture at all levels of the agency that supports the identification, investigation and litigation (when necessary) of systemic cases."<sup>44</sup> Through its Strategic Plan, Strategic Enforcement Plan, and performance plans, the agency had demonstrated a strong commitment to systemic enforcement as one of the agency's top priorities.

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<sup>44</sup> See Meeting of April 4, 2006, *supra* note 3.

## 1. Fostering a Culture That Supports Systemic Work

The agency has made substantial progress in promoting systemic work as a priority within the agency and building a culture of support for the program. Significantly, the performance measures in the Commission’s 2012 Strategic Plan were designed to incentivize effective investigations and conciliations, including systemic work. These metrics also replaced a measure in the previous Strategic Plan that had the unintended effect of incentivizing case closures over the development of strong investigations and litigation that take more time and effort. Specifically, the Strategic Plan included a measure to “provide an incentive for the EEOC to conduct systemic investigations when it finds evidence of widespread discriminatory practices,”<sup>45</sup> and a measure to increase the percentage of resolutions (conciliation or consent decree) that contain targeted equitable relief. The agency has met or exceeded its targets for both metrics since adopting its Strategic Plan.

### a. Percent of Systemic Lawsuits in Active Litigation Docket

In 2013, as required by its Strategic Plan, the Commission established a baseline measure of 20 percent for the proportion of systemic cases in its litigation docket, and set annual goals that gradually increased to 22-24 percent in fiscal year 2016. This is a significant increase from the 13 percent of systemic lawsuits in the active docket in 2008. As the table below demonstrates, the agency’s proportion of systemic cases<sup>46</sup> has been within or above this range, reaching a high of 25 percent in fiscal year 2014.

**Percent of Systemic Lawsuits in Active Litigation Docket**

Fiscal Year	Percent Systemic
2013	23%
2014	25%
2015	22%

**Table 2**

### b. Metric for Targeted Equitable Relief

EEOC’s Strategic Plan also set a metric for obtaining targeted equitable relief (TER), which is relief obtained in resolution of a charge that explicitly addresses the discriminatory employment practices at issue in a case, and provides remedies to the victims of discrimination,

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<sup>45</sup> [https://www.eeoc.gov/eeoc/plan/strategic\\_plan\\_12to16.cfm](https://www.eeoc.gov/eeoc/plan/strategic_plan_12to16.cfm) Performance Measure 4 at 18-19.

<sup>46</sup> These data represent active systemic cases as percentage of all active merits cases on the last day of the fiscal year.

and seeks to prevent similar violations in the future. The agency established a baseline of 64 percent of conciliations and lawsuit resolutions containing TER in fiscal year 2013. Based on charge and lawsuit data, the agency also developed goals to increase resolutions with TER to 65–70 percent by fiscal year 2016. For fiscal year 2015, the agency exceeded this target with 81.2 percent of conciliation and lawsuit resolutions obtaining TER, which is 1,270 out of a total of 1,565 resolutions. The percentage of resolutions obtaining TER has increased steadily over the past three years, as reflected in the chart below.

**Resolutions<sup>47</sup> with Targeted Equitable Relief**

Fiscal Year	Percent of Resolutions
2013	64%
2014	73.5%
2015	81.2%

**Table 3**

EEOC will continue to promote the inclusion of TER benefits in these agency resolutions, while also studying the most effective forms of targeted equitable relief as discussed in Part V.

## **2. Strategic Use of Commissioner Charges and Directed Investigations**

Commissioner Charges<sup>48</sup> and directed investigations<sup>49</sup> allow EEOC to investigate the full spectrum of potential violations when the agency learns of a problem or there is reason to believe that discrimination may be more widespread or of a different nature than an individual charge alleges. The 2006 Systemic Report recommended increased use of Commissioner Charges and directed investigations as important tools for pursuing systemic investigations that had been severely underutilized by the agency.<sup>50</sup> EEOC’s 2012 Strategic Enforcement Plan also

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<sup>47</sup> For the purpose of measuring targeted equitable relief, resolutions include conciliations, settlements, consent decrees and judgments.

<sup>48</sup> Congress authorized EEOC to use Commissioner Charges under Title VII, 42 U.S.C. § 2000e- 5(b), the ADA, and GINA. *See* 29 C.F.R. §§ 1601.1, and 1601.11 (2015).

<sup>49</sup> Directed investigations are initiated by EEOC field office directors under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* (1967), and the Equal Pay Act (EPA), 29 U.S.C. §206(d) (1963), under the provisions of Section 11 of the Fair Labor Standards Act, 29 U.S.C. §211.

<sup>50</sup> The 2006 Systemic Task Force report found: “As a result of decreased efforts to identify systemic discrimination in a proactive way, there has been a precipitous decline in the number of Commissioner Charges, from an average of nearly 40 per year in the 1990s to only several in the past few years. The decline in Commissioner Charges followed, and possibly was an unintended consequence of, the

encourages the use of Commissioner Charges and directed investigations as effective tools to identify and investigate systemic practices and policies.

In the last five fiscal years, more than 75 percent of Commissioner Charges have been opened during the investigation of a charge filed by an individual where the evidence suggested a broader policy or practice that raised additional issues or affected other workers. For example, in a nationwide investigation of about 40 charges, EEOC obtained evidence that the same “no fault-attendance” policies were in effect at all Verizon affiliates. Because the individual charges did not cover all of Verizon’s many related entities, a Commissioner Charge was approved naming all Verizon affiliates and alleging that these attendance policies resulted in violations of the Americans with Disabilities Act (ADA) at the affiliates. The Commissioner Charge ensured that the agency identified and remedied the full scope of a practice. EEOC secured a consent decree providing \$20 million for hundreds of current and former employees harmed by the attendance policy.

During this same time period, approximately 75 percent of Commissioner Charges have focused on discrimination in hiring, as victims typically lack information about a discriminatory hiring policy or practice. Hiring or nonselection remains one of the most difficult issues for workers to challenge in a private action, as an applicant is unlikely to know about the effect of hiring tests or assessments, or have the resources to challenge them. For example, in the investigation and conciliation of a Commissioner’s Charge, EEOC found that four of the assessments a national retailer used to screen applicants for hire violated Title VII and the ADA. The successful conciliation resulted in the employer discontinuing its use of the tests and performing a validity study for the assessments, as well as providing \$2.8 million to those denied hire due to the allegedly discriminatory screens.

The Commission has utilized its statutory authority to issue Commissioner Charges judiciously, as the Systemic Task Force recommended, as reflected in the chart below.

**Commissioner Charges Approved**

<b>Fiscal Year</b>	<b>Charges<sup>51</sup></b>
2002	5
2003	1

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Commission’s 1995 adoption of the Priority Charge Handling Procedures (PCHP).”  
[http://www.eeoc.gov/eeoc/task\\_reports/systemic.cfm](http://www.eeoc.gov/eeoc/task_reports/systemic.cfm) at 4.

<sup>51</sup> The chart provides data of Commissioner Charges in the year they were approved by Commissioners, based on records of the Commission’s Executive Secretariat. This review does not include data on directed investigations that are also systemic investigations due to inconsistencies in the coding of such charges.

2004	2
2005	4
2006	11
2007	24
2008	18 <sup>52</sup>
2009	19
2010	15
2011	19
2012	12
2013	23
2014	11
2015	13

**Table 4**

The investigation of Commissioner Charges is a highly effective tool for determining whether discrimination is likely to have occurred. Since 2006, EEOC has found reasonable cause to believe discrimination occurred in 81 percent of Commissioner Charges investigated (cause found in 84 out of a total of 104 investigations).

**E. Implementing a Strategic Approach to Systemic Enforcement**

EEOC’s Strategic Plan requires the “agency to prioritize the systemic cases it chooses to litigate and to bring fewer individual and small class claims of discrimination.”<sup>53</sup> The agency’s SEP directed agency staff to refine their selection of systemic cases to be “strategic” by specifically focusing on six national priority issues outlined in the SEP and local priority issues in their District Complement Plans. In fiscal year 2015, more than 80 percent of EEOC’s systemic investigations and lawsuits raised SEP issues including hiring, systemic harassment, immigrant and vulnerable workers, equal pay, leave policies, and access to the legal system.

The agency is continuing to refine the identification of systemic issues within the SEP priorities by analyzing data, selection practices, and trends across industries, as well as based on the charges it receives. We are also working to strengthen relationships with community organizations that can identify patterns of discrimination and barriers to opportunity affecting their communities, particularly where individuals may be fearful of reporting issues to a government agency. Enhancing these significant partnerships with organizations that represent

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<sup>52</sup> Where Commissioner Charges identified multiple and related respondents alleged to have undertaken the same discriminatory practice in the charge, they are counted as one charge.

<sup>53</sup> [https://www.eeoc.gov/eeoc/plan/strategic\\_plan\\_12to16.cfm](https://www.eeoc.gov/eeoc/plan/strategic_plan_12to16.cfm) at 19.

vulnerable workers and underserved communities also furthers the agency's Strategic Plan objective of targeted outreach to these communities.

EEOC is also sharpening its strategic approach to pursuing systemic investigations and litigation enforcement on the agency's priority issues by developing national strategies on key issues under the SEP. Building teams across the agency extends EEOC's collective expertise on specific issues, rather than relying solely on the particular office where a charge may have been filed. Investigators are thoughtfully considering the scope of an investigation, recognizing that in some cases a nationwide investigation is appropriate, while in others a regional or narrower focus could have significant impact and enable the agency to use its resources efficiently.

### **III. The Impact of EEOC's Systemic Program in Changing Employer Practices and Policies**

EEOC's systemic program has brought about significant improvements to workplace policies and practices, benefiting employees and employers alike, through successful resolutions of systemic investigations<sup>54</sup> and lawsuits. EEOC has successfully challenged persistent discriminatory practices that denied opportunities based on race, sex, national origin, religion, age, disability and genetic information. The agency has also adapted its enforcement efforts to address newly recognized forms of systemic discrimination, such as human trafficking.<sup>55</sup>

#### **A. Recruitment and Hiring**

Through EEOC's systemic investigations and litigation, employers have agreed to change hiring and recruiting practices that limited the opportunities of minorities,<sup>56</sup> women,<sup>57</sup> individuals

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<sup>54</sup> The confidentiality provisions of Title VII preclude EEOC from publicizing details about conciliations unless the employer consents to public disclosure. Therefore, the agency cannot provide citations to successful conciliations, unless they were public conciliations.

<sup>55</sup> See *EEOC v. Global Horizons*, Civil Action No. 11-CV-257 (D. Hawaii judgment entered Dec. 19, 2014 & consent decrees entered against co-defendants); *EEOC v. Signal Int'l, LLC*, No. 12-CV-557 (E.D. La. order entered Dec. 18, 2015) (Indian nationals recruited to work at Mississippi and Texas shipbuilding plant; order provides approximately \$5 million to 476 men, and CEO letter of apology); *EEOC v. Hill Country Farms, Inc., d/b/a Henry's Turkey Serv.*, No. 11-CV-41 (S.D. Iowa; judgment upon jury verdict entered Jun. 11, 2013) (jury verdict of \$240 million reduced due to statutory caps on damages; judgments provided \$3.4 million for 32 men).

<sup>56</sup> *EEOC v. Scrub, Inc.*, No. 09-CV-4228 (N.D. Ill. consent decree entered Nov. 9, 2010 alleging refusal to hire black applicants as janitors at Chicago airport, decree provided \$3 million to 539 black applicants, job offers, and hiring goals); *EEOC v. Lawler Foods, Inc.*, No. 14-3588 (S.D. Tex. consent decree entered Apr. 22, 2016) (alleging refusal to hire African American applicants as commercial bakery workers, decree provided more than \$1 million and new recruitment methods).

with disabilities, and older workers.<sup>58</sup> Because most employers do not overtly express discrimination during the selection process, most applicants are unaware when they have been denied hire because of discrimination. Through its investigations, EEOC is uniquely situated to identify systemic hiring and recruitment issues and to address and remedy potentially discriminatory hiring practices in conciliations and lawsuits.

EEOC's systemic investigations have also led to changes in hiring assessment screens that discriminated based on race, sex and disability. In a public conciliation with Target Corporation,<sup>59</sup> EEOC found that four hiring assessments formerly used by the retailer were not job-related and consistent with business necessity as required by Title VII and the ADA. Target agreed to pay \$2.8 million to resolve a Commissioner's charge of discrimination alleging the assessments affected thousands of applicants and agreed to ensure that future hiring screens were validated to prevent discrimination against future applicants.

EEOC has successfully challenged criminal background screens as discriminatory based on race, reaching voluntary resolutions through conciliations and litigation. In a public conciliation with Pepsi Beverages,<sup>60</sup> Pepsi agreed to end its policy of relying on arrests pending prosecution or convictions for minor offenses unrelated to the jobs sought that disproportionately screened out African American applicants. The resolution provided for implementation of a new policy, hiring for up to 305 qualified applicants who had been denied positions under the discriminatory policy, and \$3.13 million in relief for African American applicants.

Background checks can have a profound impact on the employment of long-term employees as well as applicants. Approximately 90 employees who worked at BMW's South Carolina plant were fired when BMW's criminal background screening policy was applied to evaluate them for rehire. EEOC alleged that 80 percent of the incumbent workers disqualified

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<sup>57</sup> *EEOC v. PMT Corp.*, No.14-CV-00599 (D. Minn. consent decree entered March 4, 2016 providing \$1,020,000 to older and female applicants who were allegedly rejected for sales positions based on sex or age and to a former human resources employee who notified EEOC that she believed PMT was engaging in discriminatory practices, plus compliance monitoring by EEOC for the next four years, revisions to hiring practices to ensure merit review, regular reporting to EEOC, extensive training for all employees involved in the hiring process, and retaining an external human resources consultant to review and recommend changes to their workplace policies.)

<sup>58</sup> *Id.*; see also *EEOC v. Allstate Insurance Co.*, No. 04-CV-1359 (E.D. Mo. consent decree entered Sep. 14, 2009) (alleging reorganization plan barring rehire of former employees adversely affected older former employees; decree provided \$4.8 million for 92 individuals).

<sup>59</sup> <https://www.eeoc.gov/eeoc/newsroom/release/8-24-15.cfm>.

<sup>60</sup> <https://www.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm>.

from rehire as a result of applying the background screen were African American. One woman who had worked at the plant for 14 years was denied rehire because the background screen revealed she had a misdemeanor conviction that was over 20 years old and carried a fine of only \$137. EEOC succeeded in securing offers of rehire for the discharged workers and job offers for up to 90 African American applicants denied positions due to the background screen, plus \$1.6 million in relief.<sup>61</sup>

In a series of cases challenging the use of tests<sup>62</sup> that disproportionately excluded African American applicants, EEOC reached agreements with companies to provide back pay for the denial of jobs, opportunities for hire, and the development of fair tests and screens.

EEOC cases challenging systemic barriers to hire have opened up job opportunities for women denied jobs such as truck drivers,<sup>63</sup> dockworkers,<sup>64</sup> uniform delivery drivers,<sup>65</sup> laborers,<sup>66</sup> order-fillers,<sup>67</sup> auto sales representatives,<sup>68</sup> and tire-changers.<sup>69</sup> EEOC has successfully

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<sup>61</sup> *EEOC v. BMW Mfg. Co.*, No. 13-CV-1583 (D.S.C. consent decree entered Sep. 8, 2015) (alleging criminal background check disproportionately screened out black employees at South Carolina plant).

<sup>62</sup> *See, e.g., EEOC v. Ford Motor Co.*, No. 07-CV-703 (S.D. Ohio consent order entered Dec. 20, 2007) (alleging aptitude test for entrance into skilled-trade apprenticeship program with car manufacturer disproportionately screened out black candidates; decree provided \$2.3 million for 666 rejected candidates, retention of industrial psychologist to develop fair selection process). A few years earlier, EEOC resolved a related case involving the same test for \$8.55 million to approximately 3,400 individuals and 280 placements into apprentice positions. *EEOC v. Ford Motor Co.*, No. 1:04-CV-00845 (S.D. Ohio June 16, 2005).

<sup>63</sup> *EEOC v. New Prime Trucking, Inc.* Civil Action No.6:11-CV-03367 (consent decree entered May 27, 2016) (court order prohibiting use of same-sex training policy for drivers, granting priority hiring consideration to class of 64 women, and making them immediately eligible for benefits, plus \$3.1 million in lost wages and damages).

<sup>64</sup> *EEOC v. Pitt Ohio Express*, No. 06-CV-747 (N.D. Ohio Aug. 8, 2006) (N.D. Ohio consent decree entered Jan. 22, 2009) (alleging large scale refusal to hire women as truck drivers and dockworkers at Ohio terminals; decree provided \$2.4 million for 230 women, 40 job offers).

<sup>65</sup> *EEOC & Serrano v. Cintas*, No. 04-CV-40132 (E.D. Mich. consent decree entered Nov. 25, 2015) (alleging large scale refusal to hire women as uniform delivery drivers at Michigan facilities; decree provided \$1.5 million for 800 women, outside expert to revalidate hiring criteria & interview guides).

<sup>66</sup> *EEOC v. Presrite*, No. 11-cv-260 (N.D. Ohio consent decree entered Apr. 30, 2013) (alleging metal forging company failed to hire a class of women into entry-level laborer and operative jobs based on their sex; \$700,000 settlement fund and priority consideration for jobs to at least 40 women).

<sup>67</sup> *EEOC v. Wal-Mart Stores, Inc.*, No. 01-CV-339 (E.D. Ky. consent decree entered Mar. 1, 2010) (alleging systematic failure to hire women for order-filler jobs at a Kentucky distribution center; five-year decree provided \$11.7 million to 4,000 women, 150 job offers).

challenged the practice of major restaurants that refused to hire African Americans<sup>70</sup> and Hispanics for front of the house positions.<sup>71</sup>

As a result of systemic investigations and lawsuits, staffing agencies have agreed to discontinue the practice of referring applicants based on client preferences for employees of a certain race, color, sex, national origin, age or absence of disability, and to provide job placement and resume assistance for persons who had not been previously referred for employment.<sup>72</sup> Employment by staffing agencies has grown seven times more rapidly than overall employment growth, which makes compliance by staffing agencies critical to ensuring equal opportunity for all workers.<sup>73</sup>

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<sup>68</sup> *EEOC v. Jeff Wyler Chevrolet, Inc.*, No. 03-CV-662 (S.D. Ohio consent decree entered Apr. 2, 2007) (alleging systematic failure to hire qualified women for auto sales jobs; decree provided \$2.3 million to 39 women).

<sup>69</sup> *EEOC v. Mavis Discount Tire, Inc.*, No. 12-741 (S.D.N.Y. consent decree entered Mar. 24, 2016) (alleging systematic failure to hire qualified women for field positions, as managers, mechanics and tire changers; decree provided \$2.1 million to 46 women); *EEOC v. Les Schwab Tire Centers*, No. 06-CV-45 (W.D. Wash. consent decree entered Mar. 10, 2010) (alleging systematic failure to hire qualified women for tire changing jobs; decree provided \$2 million to 279 women).

<sup>70</sup> *EEOC v. McCormick & Schmicks*, No. 08-CV-984 (D. Md. consent decree entered Sep. 12, 2014) (alleging refusal to hire black employees in front-of-the-house restaurant jobs at Baltimore locations; decree provided \$1.3 million for 200 individuals, hiring goals, revised advertisements and work assignment procedures).

<sup>71</sup> One conciliation agreement provided \$1 million to class members, training to all human resource and management staff, and the employer agreed to recruit females and Hispanics.

<sup>72</sup> *EEOC v. Source One Staffing, Inc.*, Civil Action No. 15-cv-1958 (N.D. Ill. consent decree entered May 6, 2015) (alleging failure to refer applicants for "temp to hire" jobs based on sex, unlawful pre-employment medical inquiries; resolved for \$800K for more than 7300 individuals); *EEOC v. Renhill Staffing*, No. 08-cv-82 (N.D. Ind. consent decree entered Apr. 15, 2008) (alleging failure to refer to temp jobs based on race and age, resolved for \$575K for 764 individuals); *EEOC v. Paramount Staffing*, No. 06-cv-2624 (W.D. Tenn. Aug. 19, 2010) (alleging failure to refer black applicants and preferential referrals of Hispanic applicants for temp jobs, resolved for \$585K for 800 individuals); *EEOC v. Real Time Staffing Corp.*, No. 13-cv-2761 (W.D. Tenn. consent decree entered Dec. 5, 2014) (alleging failure to refer black applicants and preferential referrals of Hispanic applicants for temp jobs, resolved for \$580K for 60 individuals).

<sup>73</sup> <https://americanstaffing.net/posts/2015/10/22/steady-growth-continues>.

## **B. Systemic Harassment**

Harassment based on race, sex, disability, age, national origin, and religion continues to be a persistent problem in the workplace, which is why addressing systemic harassment through systemic enforcement and targeted outreach is a national priority for the agency. In one of EEOC's largest harassment cases, *EEOC v. Patterson-UTI Drilling Company LLC*,<sup>74</sup> EEOC alleged that African Americans, Native Americans, Hispanics, Asian Americans, and biracial individuals at a multi-state oil drilling company were subjected to pervasive racial and ethnic slurs, assigned to the lowest level jobs, denied training and promotions, disproportionately disciplined and demoted, and were retaliated against. In 2015, EEOC reached a settlement with the employer for \$14.5 million for more than 1000 employees, which includes a claims fund plus benefits obtained in separate conciliation agreements on related charges of discrimination, as well as significant changes to the employer's practices.

EEOC has vigorously litigated race harassment cases seeking relief for African American workers subjected to racially hostile displays such as nooses and racist graffiti, as well as those disciplined more severely than their peers of other races. In *EEOC v. Yellow Freight Sys., Inc.*,<sup>75</sup> the agency resolved such a case for \$11 million for 309 employees, plus an independent review of discipline and work assignment procedures. In *EEOC v. Roadway Express*,<sup>76</sup> EEOC secured \$10 million for 259 black employees, new anti-harassment policies, and consultants to examine discipline and assignment procedures.

EEOC's systemic program has also successfully challenged widespread sexual harassment of teenagers employed in fast food chains<sup>77</sup> and obtained significant revisions to company policies to better protect employees from such conduct.

## **C. Pay and Promotion**

Ensuring equal pay and promotional opportunities continue to be priorities for EEOC's systemic program. Employees are often unaware of potentially discriminatory pay practices,

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<sup>74</sup> No. 15-cv-600 (D. Colo. consent decree entered Apr. 15, 2015).

<sup>75</sup> No. 09-CV-7693 (N.D. Ill. consent decree entered Sept. 25, 2012).

<sup>76</sup> *EEOC v. Roadway Exp., Inc.*, No. 06-CV-4805 (N.D. Ill. consent decree entered Dec. 20, 2010).

<sup>77</sup> *EEOC v. Carrols Corp.*, No. 98-CV-1772 (N.D.N.Y. consent decree entered Jan. 10, 2013, provided \$2.5 million for 79 women); *EEOC v. Sonic Drive In*, No. 09-CV-953 (D.N.M. consent decree entered Jun. 14, 2011, providing \$2 million to 79 female employees).

making such practices particularly difficult for them to challenge. EEOC's investigatory authority makes the agency uniquely situated to address these policies and practices.

In a systemic investigation of 78 charges of race discrimination alleging a range of practices, including denials of promotions, unfavorable job assignments, and harassment, EEOC reached a conciliation agreement with an employer that provided \$21.3 million to over 200 African American employees in the fall of 2013. The agreement required the employer to post vacancies and promotional opportunities, to appoint an EEO Coordinator to oversee the creation and distribution of new anti-discrimination policies, and to conduct EEOC-approved training to all management and staff members.

In a case alleging that a national restaurant chain denied over 3,000 women jobs, assignments, and promotion opportunities, EEOC's systemic lawsuit resulted in changes in promotional and assignment practices to require objective and job-related selection criteria in a consent decree providing over \$19 million in relief.<sup>78</sup> In resolving a lawsuit alleging denials of promotion for 10,000 African American management and pharmacy employees at Walgreens,<sup>79</sup> EEOC secured \$25.3 million in relief for these employees as well as promotion goals. In addition, in *EEOC v. Woodward Governor Co.*, the agency successfully concluded a systemic case seeking relief for 259 African American, Hispanic and female employees denied equal pay, promotional opportunities and training, allegedly based on race and national origin, and recovered \$5 million in damages for the victims of these practices.<sup>80</sup>

#### **D. Policies Failing to Accommodate Individuals with Disabilities**

In a developing area of law under the ADA, EEOC is addressing an increasingly common barrier to the employment of individuals with disabilities, namely policies that operate inflexibly to deny individuals with disabilities reasonable accommodations. Often employers fail to engage in the ADA's interactive process. These inflexible policies serve as systemic barriers to the employment of workers with disabilities – by terminating workers who otherwise could have returned to work after obtaining needed leave without undue hardship to the employer.

In a systemic lawsuit against Verizon, EEOC challenged an attendance policy that penalized employees if they accumulated a specific number of “chargeable absences” that

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<sup>78</sup> *EEOC v. Outback Steakhouse of Florida, Inc.*, No. 06-CV-1935 (D. Colo. consent decree entered Dec. 29, 2009).

<sup>79</sup> *EEOC v. Walgreen Co.*, No. 07-CV-172 (S.D. Ill. consent decree entered Mar. 24, 2008).

<sup>80</sup> No. 06-CV-50178 (N.D. Ill. consent decree entered Feb. 16, 2007).

could lead to disciplinary consequences including termination. The policy made no exception for individuals with disabilities whose disability might cause absences. EEOC asserted that Verizon disciplined or terminated employees rather than providing them with reasonable accommodations. In settling the lawsuit, Verizon agreed to revise its attendance plans, leave policies, and ADA policy to include reasonable accommodations for persons with disabilities, including excusing certain absences. EEOC also secured \$20 million in relief for 800 individuals, alleging they had been fired as a result of this policy.<sup>81</sup>

In a systemic lawsuit against Lowe's, EEOC alleged that Lowe's violated the ADA by failing to provide reasonable accommodations to individuals with disabilities and firing them when their medical leaves of absence exceeded Lowe's maximum leave policy. Lowe's settled the case with EEOC in May 2016 and agreed to retain a consultant with ADA experience to review and revise company policies, implement effective training for both supervisors and staff on the ADA, develop a centralized tracking system, and regularly report compliance to EEOC.<sup>82</sup> The settlement provides \$8.6 million in relief to affected workers.

EEOC sued United Airlines challenging a policy that required individuals with disabilities to compete for vacant positions instead of offering those positions as a reasonable accommodation.<sup>83</sup> The Seventh Circuit agreed with EEOC that the accommodation of a job transfer is mandatory absent undue hardship.<sup>84</sup>

In a systemic investigation, Pactiv, LLC agreed to conciliate a claim that its nationwide policy of issuing attendance points for medical related absences and not allowing leave as a reasonable accommodation allegedly violated the ADA. The conciliation agreement provided for \$1.7 million to those disciplined or discharged under the policy, proactive measures to prevent future discrimination, ADA training, and periodic reporting to EEOC on its compliance efforts.<sup>85</sup>

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<sup>81</sup> *EEOC v. Verizon Maryland, Inc.*, No. 11-CV-1832 (D. Md. consent decree entered Jul. 6, 2011) (alleging large scale denial of reasonable accommodation, discipline and discharge based on inflexible attendance policies; three-year consent decree provided \$20 million to 800 individuals with disabilities and revised policies to require accommodation).

<sup>82</sup> *EEOC v. Lowe's Home Centers, Inc.*, No.16-3041 (C.D. Cal. Consent decree entered May 12, 2016).

<sup>83</sup> *EEOC v. United Airlines*, 693 F.3d 760 (7th Cir. 2012). The case resulted in a new company policy on reassignment and \$1 million for 35 employees. *EEOC v. United Airlines*, No. 10-CV-1699 (N.D. Ill. consent decree entered Jun. 8, 2015).

<sup>84</sup> *Id.*

<sup>85</sup> <https://www.eeoc.gov/eeoc/newsroom/release/11-5-15a.cfm>.

In many other lawsuits and conciliations, EEOC has successfully challenged fixed leave policies, punitive attendance policies, and 100 percent restriction-free policies<sup>86</sup> to ensure that reasonable accommodations are available for individuals with disabilities. Indeed, as a result of the increasing number of charges filed in this area, the EEOC issued a technical assistance document addressing frequent issues arising in charges and litigation to assist employers in understanding the issues to promote compliance with the ADA.<sup>87</sup>

#### **E. Access to the Legal System.**

On many occasions, EEOC has taken action to remove barriers to individuals' access to the legal system. These barriers can take many forms, including widespread retaliatory employment actions against those who take the step of reporting unlawful discrimination, threats of harm against individuals who act as witnesses in EEOC proceedings, or employment agreements that interfere with the right to file a charge or communicate with EEOC.

In one suit against a nationwide grocery store, EEOC found a pattern of retaliation against employees who complained of discrimination, including harder assignments, denials of promotion, and discharge. EEOC settled the case and obtained \$8.9 million for 168 employees, plus intensive training for company employees and four years of monitoring to ensure compliance.<sup>88</sup> In another case, EEOC obtained a judgment that a labor contractor's repeated threats to deport guest farmworkers constituted a pattern or practice of unlawful retaliation.<sup>89</sup> In

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<sup>86</sup> *EEOC v. Interstate Distributor Co.*, Civil Action No. 12-CV-2591 (D. Colo. consent decree entered Nov. 8, 2012) (alleging large scale denial of reasonable accommodation and discharge based on inflexible leave policy and 100% restriction-free requirement; consent decree provided \$4.9 million for 427 individuals with disabilities, revised leave & ADA policies); *EEOC v. Supervalu, Inc. et al.*, Civil Action No. 09-CV-5637 (N.D. Ill. consent decree entered Jan. 14, 2011) (alleging large scale denial of reasonable accommodation and discharge based on inflexible leave policy and 100% restriction-free policy; consent decree provided \$3.2 million to 110 individuals with disabilities and extensive injunctive relief). In the *Supervalu* case, the court later held the company in contempt for violating the consent decree, by failing to provide accommodations to several employees who attempted to return to work from medical leaves of absence, and awarded additional damages. *See also EEOC v. Sears Roebuck & Co.*, No. 04-7282 (N.D. Ill. Sep. 29, 2009) (alleging large scale denial of reasonable accommodation and discharge based on inflexible workers' compensation leave exhaustion policy; consent decree provided \$6.2 million for around 400 individuals with disabilities).

<sup>87</sup> EMPLOYER-PROVIDED LEAVE AND THE AMERICANS WITH DISABILITIES ACT (May 9, 2016), <https://www.eeoc.gov/eeoc/publications/ada-leave.cfm>.

<sup>88</sup> *EEOC v. Albertsons, Inc.*, No. 06-CV-1273 (D. Colo. consent decree entered Dec. 14, 2009) (alleging widespread race harassment and retaliation).

<sup>89</sup> *EEOC v. Global Horizons*, 2014 WL 1118009 (D. Haw. Mar. 19, 2014).

two other cases, EEOC obtained preliminary injunctive relief after discovering that the employer was instilling extreme fear among charging parties or witnesses through acts such as bribes, vandalism, solicitation to commit criminal acts, and death threats.<sup>90</sup> Recently, EEOC has also challenged the use of employment agreements that materially interfere with the right to file a charge or participate in an EEOC proceeding as an unlawful pattern or practice of resistance to Title VII rights.<sup>91</sup> As these cases illustrate, the agency's efforts to eliminate structural barriers to accessing the legal system are a critical component of its systemic enforcement program.

## **F. Protecting Immigrant, Migrant and Other Vulnerable Workers**

EEOC has made protecting immigrant, migrant and other vulnerable workers a national priority because many of these workers are unable or afraid to assert their rights under federal law. EEOC's suit against *Henry's Turkey Service* seeking relief for 32 intellectually disabled men at a turkey evisceration plant in Iowa made world headlines when a jury awarded them \$240 million in 2013.<sup>92</sup> EEOC advocated on behalf of these vulnerable workers who were subjected to years of confinement, abuse, deplorable conditions, and reduced pay after the sister of one of the men filed a charge of discrimination on his behalf. Their story has been described as a "catalyst for change" and a "watershed moment for disability rights in the workplace," and has been featured in the book "The Boys in the Bunkhouse: Servitude and Salvation in the Heartland."<sup>93</sup>

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<sup>90</sup> *EEOC v. Pitre Inc.*, No. 11-CV-875 (D.N.M. order issued Jan. 26, 2012) (granting preliminary injunction in systemic harassment suit based on testimony of numerous witnesses of extreme fear of being blacklisted in car dealership industry, evidence that charging party lost a subsequent job after employer spoke to defendant, and evidence of vandalism and death threats); *EEOC v. Evans Fruit*, 2010 WL 2594960 (E.D. Wash. Jun. 24, 2010) (granting temporary restraining order in systemic harassment suit based on employer's offer to pay witnesses, threats and intimidation tactics, and solicitation of accomplices to commit criminal acts against charging parties and witnesses).

<sup>91</sup> *EEOC v. Doherty*, 126 F. Supp. 3d 1305 (S.D. Fla. 2015) (in denying motion to dismiss, court found EEOC had stated a viable claim under section 707 of Title VII).

<sup>92</sup> *EEOC v. Hill Country Farms, Inc., d/b/a Henry's Turkey Serv.*, No. 11-CV-41 (S.D. Iowa judgment upon jury verdict entered Jun. 11, 2013) (Jury verdict reduced due to statutory caps on damages; judgments provided \$3.4 million for 32 men).

<sup>93</sup> See Dan Barry, *BOYS IN THE BUNKHOUSE: SERVITUDE AND SALVATION IN THE HEARTLAND* (Harper Collins ed. 2016); Dan Barry, *The Boys in the Bunkhouse*, N.Y. Times (March 9, 2014), [http://www.nytimes.com/interactive/2014/03/09/us/the-boys-in-the-bunkhouse.html?\\_r=0](http://www.nytimes.com/interactive/2014/03/09/us/the-boys-in-the-bunkhouse.html?_r=0).

EEOC prevailed in cases seeking relief for hundreds of Indian<sup>94</sup> and Thai<sup>95</sup> workers recruited to work in the United States who were subjected to unfavorable work conditions, threats of violence and deportation. In another case,<sup>96</sup> EEOC won increases in wages, benefits and promotion opportunities for 149 Hispanic warehouse workers in New York City who had been denied equal pay and opportunities.

EEOC fought hard to protect the rights of farmworker women who alleged sexual harassment and retaliation against Evans Fruit.<sup>97</sup> The case ultimately settled and has had a far reaching impact. The PBS documentary “Rape in the Fields,” highlighted the case, and this documentary has also been used as a training tool across the country to prevent harassment of farmworkers.<sup>98</sup>

### **G. Mandatory Retirement and Benefits**

In several cases, EEOC has successfully challenged retirement and benefit systems that discriminate based on age. In *EEOC v. Sidley Austin*,<sup>99</sup> the agency challenged a law firm’s policy of forcing out older partners based on age, ultimately resolving the suit through a consent decree providing \$27.5 million to 32 former partners. The case contributed to major revisions to law firm policies to eliminate or limit mandatory retirement.

In *EEOC v. Baltimore County*,<sup>100</sup> the Fourth Circuit agreed with the Commission that the Maryland county’s pension system treated older new-hires less favorably because of their age by

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<sup>94</sup> *EEOC v. Signal Int’l, LLC*, No. 12-CV-557 (E.D. La. order entered Dec. 18, 2015) (Indian nationals recruited to work at Mississippi and Texas shipbuilding plant; order provides approximately \$5 million to 476 men, and CEO letter of apology).

<sup>95</sup> *EEOC v. Global Horizons*, No. 11-CV-257 (D. Haw. judgment entered Dec. 19, 2014 and consent decrees entered against co-defendants) (Thai nationals recruited to work on Hawaii farms under H2A visa program; judgment and series of decrees provided \$12.8 million for 546 employees, multiple job offers, and revised contracts with labor contractors).

<sup>96</sup> *EEOC v. B & H Foto*, No. 07-CV-9241 (S.D.N.Y. consent decree entered Mar. 17, 2009) (decree provided \$4.3 million for 149 workers, wage equalization).

<sup>97</sup> *EEOC v. Evans Fruit Co.*, Nos. 10-CV-3033, 11-CV-3093 (E.D. Wash. settlement agreement entered Jan. 28, 2016) (sexual harassment and retaliation of 20 female farmworkers).

<sup>98</sup> See <https://www.eeoc.gov/eeoc/newsroom/release/1-28-16.cfm>; <http://www.pbs.org/wgbh/frontline/film/rape-in-the-fields/>.

<sup>99</sup> No. 05-CV-208 (N.D. Ill. consent decree entered Oct. 5, 2007).

<sup>100</sup> *EEOC v. Baltimore Cty.* 747 F.3d 267 (4th Cir. 2014).

requiring them to make larger contributions than younger new-hires for the same benefits. Similarly, in *EEOC v. Minnesota Dep't of Corrections*,<sup>101</sup> the Eighth Circuit ruled that an early retirement incentive plan that included an age 55 “cliff” – foreclosing any retirement incentive to individuals once they reach this age – was inconsistent with the purposes of the ADEA. Following that decision, EEOC resolved a series of similar suits against other Minnesota state agencies.<sup>102</sup>

In a series of suits against New York municipal volunteer fire departments, EEOC challenged the denial of service credit for volunteer firefighters who worked past the entitlement age for retirement benefits.<sup>103</sup> EEOC also reached conciliation agreements in four systemic ADEA investigations alleging that employers stopped allowing volunteer firefighters to accrue points for performing certain duties when they reached age 55 or 60. In all of these cases, the retirement benefits plans reduced the employees’ retirement benefits based solely on age. EEOC secured agreements that increased monthly benefits at retirement, provided awards of monetary benefits for current retirees and family members of deceased retirees, and required the employers to change their policies to bring them into compliance with the ADEA.

#### **IV. Success of EEOC Systemic Investigations and Lawsuits**

EEOC has dramatically increased the number of systemic resolutions over the years. In addition to obtaining substantial injunctive relief to remedy discriminatory practices, the agency has consistently recovered monetary benefits for thousands of victims of systemic discrimination every year, as the table below demonstrates.

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<sup>101</sup> *EEOC v. Minn. Dept. of Corr.* 648 F.3d 910 (8th Cir. 2011).

<sup>102</sup> *EEOC v. Minnesota Board of Public Defense*, Civil Action No. 12-cv-205 (D. Minn. consent decree entered Apr. 26, 2012); *EEOC v. Minnesota Dep't of Commerce*, Civil Action No. 11-cv-2746 (D. Minn. consent decree entered Nov. 9, 2011); *EEOC v. Minnesota Dep't of Natural Res.*, No. 11-cv-2745 (D. Minn. consent decree entered Nov. 7, 2011).

<sup>103</sup> *EEOC v. Bayville Fire Co.*, No. 07-cv-4472 (E.D.N.Y. consent decree entered Apr. 8, 2010); *EEOC v. Brentwood Fire Dep't*, No. 09-cv-3298 (E.D.N.Y. consent decree entered Mar. 14, 2011); *EEOC v. Village of Minneola*, No. 08-cv-973 (E.D.N.Y. consent decree entered Jan. 20, 2010); *EEOC v. Selden Fire Dist.*, No. 08-cv-3974 (E.D.N.Y. consent decree entered Apr. 16, 2010); *EEOC v. Eaton's Neck Fire Dist.*, No. 08-cv-5089 (E.D.N.Y. consent decree entered Oct. 30, 2009); *EEOC v. Oyster Bay Fire Dep't*, No. 09-cv-3297 (E.D.N.Y. consent decree entered Sep. 16, 2011); *EEOC v. Amityville Fire Dep't*, No. 09-cv-3742 (E.D.N.Y. consent decree entered Mar. 15, 2011); *EEOC v. Village of N. Syracuse*, No. 12-cv-1465 (N.D.N.Y. consent decree entered Apr. 3, 2013).

**Combined Resolutions of Systemic Investigations<sup>104</sup> and Systemic Lawsuits**

Fiscal Year	Total Resolutions	Individuals Receiving Monetary Relief	Monetary Relief
2006	15	271	\$ 5.99 million
2007	83	1,225	\$22.21 million
2008	137	13,568	\$81.81 million
2009	162	3,333	\$59.03 million
2010	193	9,662	\$71.43 million
2011	265	4,389	\$76.76 million
2012	263	4,440	\$52.70 million
2013	330	16,224	\$59.61 million
2014	277	2,241	\$22.96 million
2015	296	16,003	\$80.28 million
Total	2,021	71,356	\$532.78 million

**Table 5**

**A. Systemic Investigations Resolved**

EEOC resolves many systemic investigations through successful settlements or conciliations prior to litigation. These resolutions have resulted in significant changes in workplace policies and practices that benefit thousands of workers, even beyond those who recover monetary relief. Through these voluntary resolutions, EEOC has recovered \$132.3 million for victims of discrimination over the last five years – almost triple the \$45.17 million recovered during the previous five years, as the chart below demonstrates.

**Systemic Investigations Resolved**

Fiscal Year	Systemic Investigations Resolved	Individuals Receiving Monetary Relief <sup>105</sup>	Monetary Relief <sup>106</sup>
2006	8	0	0
2007	59	13	\$1.65 million
2008	118	1,162	\$17.47 million

<sup>104</sup> Systemic investigations typically include multiple charges.

<sup>105</sup> The figures in the table do not include individuals benefited only by non-monetary relief, such as a reasonable accommodation, reassignment, or training.

<sup>106</sup> For purposes of reporting monetary relief obtained through administrative resolutions, EEOC’s Office of Field Programs includes the salary for one year of anyone hired or reinstated as a monetary recovery.

2009	140	657	\$13.84 million
2010	165	675	\$12.21 million
2011	235	109	\$9.76 million
2012	240	3,727	\$35.42 million
2013	300	8,507	\$39.84 million
2014	260	1,365	\$13.38 million
2015	268	6,404	\$34.51 million

**Table 6**

Equally significant is EEOC’s increasing success rate in conciliating systemic investigations. EEOC tripled the success rate of systemic conciliations from 21.4 percent in FY2007 to 64.2 percent in FY2015, demonstrating the agency’s strong commitment to voluntary resolutions.

Because conciliation is a predicate to an EEOC lawsuit, the agency’s rising success rate in resolving discrimination charges through conciliation necessarily means that it files fewer systemic lawsuits. The Commission endeavors to resolve systemic investigations through conciliation wherever possible as evidenced by its increasing rate of successful conciliations. Maintaining a strong systemic litigation program also helps incentivize resolution of systemic investigations through the conciliation process, as employers recognize the value of early resolution compared to litigation.

**B. Systemic Lawsuits Resolved**

From 2006 through 2015, EEOC’s systemic litigation program has provided nearly \$355 million in monetary relief to more than 48,000 workers over the past decade, plus significant changes in workplaces policies and practices that benefit many more thousands of workers.

**Systemic Lawsuits Resolved**

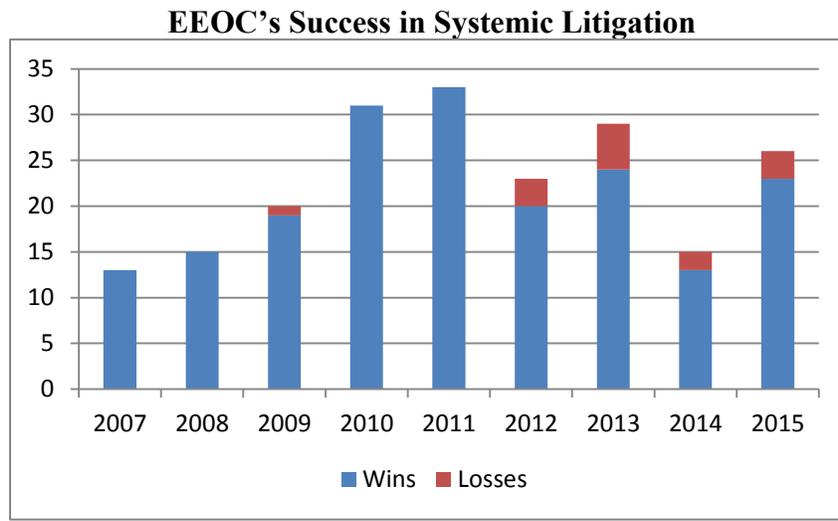
Fiscal Year	Number Resolved	Individuals Benefited	Monetary Relief
2006	7 <sup>107</sup>	271	\$ 5.99 million
2007	24	1,212	\$20.56 million
2008	19	12,406	\$64.34 million
2009	22	2,676	\$45.19 million
2010	28	8,987	\$59.22 million

<sup>107</sup> This figure is likely an undercount because EEOC’s data system does not capture some systemic cases filed prior to FY 2006.

2011	30	4,280	\$67 million
2012	23	713	\$17.28 million
2013	30	7,717	\$19.77 million
2014	17	876	\$ 9.58 million
2015	28	9,599	\$45.77 million

**Table 7**

EEOC’s systemic suits have generally been resolved by consent decrees providing for substantial monetary and injunctive relief. From fiscal year 2007 through fiscal year 2015, EEOC achieved a favorable outcome in 192 of 205 systemic suit resolutions, or approximately 94 percent of systemic resolutions. In a small number of cases, EEOC received adverse judgments or sought voluntary dismissal. The chart below depicts the number of wins and losses by fiscal year.



**Table 8**

**C. Overcoming Challenges to EEOC’s Systemic Enforcement.**

In recent years, employers have increasingly raised procedural challenges in EEOC’s lawsuits, primarily by claiming EEOC failed to conciliate properly or to investigate claims sufficiently prior to the agency filing suit. These procedural challenges delayed, in some cases by many years, a court’s consideration of the actual claims of discrimination at issue. For example, in *EEOC v. Mach Mining*, EEOC filed suit in 2011 seeking relief for women denied positions by an operator of coal mines that had never hired a woman for a mining position. More than four years later, in January 2016, after procedural challenges by the employer and a Supreme Court

decision making clear that such challenges could not be used to dismiss EEOC cases,<sup>108</sup> the district court ordered that the case may proceed.<sup>109</sup>

Circuit courts addressing these procedural challenges have returned the focus of the cases to the merits of the discrimination claims. Following the Supreme Court's decision in *Mach Mining*, the Ninth Circuit held that EEOC need not identify or conciliate on behalf of specific individuals, but rather satisfies the statutory pre-suit obligation when it conciliates for an "identified class of individuals" prior to bringing suit."<sup>110</sup> The court explicitly rejected the Eighth Circuit's ruling in *EEOC v. CRST Van Expedited, Inc.*,<sup>111</sup> as pre-dating and contrary to the Supreme Court's decision in *Mach Mining*. The Second Circuit in *EEOC v. Sterling Jewelers, Inc.*<sup>112</sup> likewise rejected the *CRST* ruling, holding that a court may not review the sufficiency of EEOC's systemic investigation, citing to the Supreme Court's *Mach Mining* decision. Most recently, the Fifth Circuit in *EEOC v. Bass Pro Outdoor World L.L.C.*<sup>113</sup> joined the circuit courts rejecting the *CRST* ruling, and held that a court may not review the manner in which EEOC chooses to investigate or conciliate systemic discrimination claims.

For the most part, since the Supreme Court's decision in *Mach Mining*, the courts have rejected these procedural challenges. Nonetheless, for many years, the collateral and extended litigation over pre-suit procedures has led to excessive delays in justice for the victims of discrimination. In addition, such procedural challenges divert government resources from prosecuting discriminatory practices.

Another frequent challenge by employers in systemic cases concerns the scope of information and evidence related to potential systemic discrimination. During the course of an

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<sup>108</sup> In *EEOC v. Mach Mining*, 135 S. Ct. 1645 (2015), the Supreme Court ruled that the scope of judicial review of EEOC's conciliation efforts is limited to whether EEOC informed the employer about the specific allegation and whether EEOC tried to engage the employer in some form of discussion. The decision also clarified that the appropriate remedy for any defect in conciliation efforts is a stay, rather than dismissal. The Court's decision strikes a balance between review of agency action and the public interest in ensuring that victims of discrimination have their day in court.

<sup>109</sup> *EEOC v. Mach Mining*, 2016 WL 212799 (S.D. Ill. Jan. 19, 2016).

<sup>110</sup> *EEOC & Arizona ex rel. Horne v. GEO Group, Inc.*, \_\_ F.3d \_\_, 2016 WL 945634, \*7 (9th Cir. 2016).

<sup>111</sup> 679 F.3d 657 (8th Cir. 2012). The Eighth Circuit ruled that EEOC must "reasonably investigate" class allegations of sexual harassment, including by putting an employer on notice of the nature, scope and size of the class and by discovering individuals for whom it seeks relief in a lawsuit during its administrative investigation.

<sup>112</sup> 801 F.3d 96 (2d Cir. 2015).

<sup>113</sup> 2016 WL 3397696 15-20078 (5<sup>th</sup> Cir. June 17, 2016).

investigation, EEOC may uncover evidence suggesting a broader policy or practice affecting individuals in addition to the charging party. Employers often resist requests for information from EEOC seeking to obtain evidence of patterns, practices and policies claiming that production would be unduly burdensome. Most courts have rejected unupportable assertions of undue burden.<sup>114</sup> Courts have overwhelmingly recognized EEOC's interest in obtaining information relevant to potential systemic discrimination, according great deference to the agency's judgment on the nature and scope of information necessary to the systemic investigation. Although EEOC's subpoenas in systemic investigations are regularly enforced, these types of challenges cause considerable delay in the investigations and divert resources away from remedying discrimination.

Employers have also challenged EEOC's authority to prosecute pattern or practice suits under section 706 of Title VII. In *EEOC. Bass Pro Outdoor World, L.L.C.*<sup>115</sup> and *Serrano & EEOC v. Cintas Corp.*,<sup>116</sup> the Fifth and Sixth Circuits ruled that EEOC may use the pattern or practice proof framework when bringing suit under section 706 of Title VII and need not rely on section 707, which does not authorize compensatory and punitive damages. The significance of these rulings is that the agency may seek the full panoply of monetary relief for victims of a pattern or practice of discrimination. These decisions avoid the anomalous result that a victim of an individual instance of discrimination would be entitled to greater relief than victims of structural discrimination.

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<sup>114</sup> See, e.g., *EEOC v. Aerotek, Inc.*, 815 F.3d 328 (7th Cir. 2016) (rejecting undue burden argument and permitting EEOC to obtain information concerning discriminatory client requests not recorded in staffing company's database where evidence showed such requests were recorded in the database); *EEOC v. McLane Cos.*, 804 F.3d 1051 (9th Cir. 2015) (permitting EEOC to obtain names, social security numbers, addresses and telephone numbers for individuals subject to a strength test in an expanded investigation of an individual sex discrimination charge); *EEOC v. UPMC*, 471 F. App'x 96 (3d Cir. 2012) (permitting the EEOC to discover the identity of all employees fired after 14 weeks of medical leave, noting that the Commission may expand its investigation to include additional claims so long as they might cast light on the underlying charge); *EEOC v. Konica Minolta Bus. Solutions*, 639 F.3d 366 (7th Cir. 2011) (enforcing subpoena relating to applicants for sales personnel at four facilities, where charge contained alleged class allegations of discrimination); *EEOC v. Schwan's Home Serv.*, 644 F.3d 742 (8th Cir. 2011) (enforcing subpoena of list of employees participating in management development program, where EEOC expanded investigation of sex discrimination charge).

<sup>115</sup> 2016 WL 3397696 15-20078 (5<sup>th</sup> Cir. June 17, 2016).

<sup>116</sup> 699 F.3d 884 (6th Cir. 2013).

## V. The Future of EEOC's Systemic Program

### A. Changes in the Legal Landscape Heighten the Importance of EEOC's Systemic Work.

EEOC has made substantial progress in dismantling systemic discrimination over its 50-year history. Yet, significant barriers to equality persist today in workplaces across the country. In the last decade, EEOC's systemic program has become even more critical to ensure meaningful civil rights protections, as significant changes in the legal landscape have made it more difficult for workers to pursue claims in court, to come together as a group or class,<sup>117</sup> and to challenge a discriminatory pattern or practice.<sup>118</sup>

Mandatory arbitration policies shield many industries and their employment practices from public scrutiny by requiring individuals to submit their claims to private arbiters rather than public courts.<sup>119</sup> By taking discrimination claims out of the public view, forced arbitration can prevent employees from learning about similar concerns shared by others in their workplace and can impede the development of the law. It can also weaken an employer's incentive to proactively comply with the law, when organizations are not held publically accountable for violations of anti-discrimination laws.

Forced arbitration can also deter workers from bringing discrimination claims to EEOC, leaving significant violations in entire segments of the workforce unreported.<sup>120</sup> An increasing

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<sup>117</sup> See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013).

<sup>118</sup> See *Dukes v. Wal-Mart Stores, Inc.*, 564 U.S. 338 (2011); Margo Schlanger & Pauline Kim, *The Equal Employment Opportunity Commission and Structural Reform of the American Workplace*, 91 WASH. U. L. REV. 1519, 1541 (2014) ("Because the Supreme Court's recent opinion in *Wal-Mart* appears to make it more difficult to certify employment discrimination class actions, the EEOC's efforts in seeking relief for groups of workers will gain in significance.").

<sup>119</sup> See J. Silver-Greenberg and R. Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES, Oct. 31, 2015, at A1; J. Silver-Greenberg and M. Corkery, *In Arbitration, a 'Privatization of the Justice System'*, N.Y. TIMES, Nov. 1, 2015, at A1; M. Corkery and J. Silver-Greenberg, *In Religious Arbitration, Scripture Is the Rule of Law*, N.Y. TIMES, Nov. 2, 2015, at A1. In a 2016 survey by Carlton Fields of 381 large companies operating in 25 industries, 66.7% of the companies surveyed "used arbitration clauses to offset the risks and costs of high-stakes class actions" with 39.2% precluding class actions. <http://classactionsurvey.com/pdf/2016-class-action-survey.pdf> at 22.

<sup>120</sup> See, e.g., Janna Giesbrecht-McKee, Comment, *The Fairness Problem: Mandatory Arbitration in Employment Contracts*, 50 WILLAMETTE L. REV. 259 (2014); Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis & Yuxiang Liu, *'Whimsy Little Contracts' With Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 MARYLAND L. REV. 1 (2015).

number of arbitration policies added bans on class actions that prevent individuals from joining together to challenge practices in any forum,<sup>121</sup> after the Supreme Court upheld such bans in the context of consumer and commercial agreements.<sup>122</sup> This trend hinders EEOC's ability to detect and remedy potential systemic violations.

Even when workers can pursue class actions, they must overcome challenges in certifying a class after the Supreme Court's decision in *Dukes v. Wal-Mart Stores, Inc.*<sup>123</sup> changed the standards for courts to certify class actions. Commentators have noted that these trends "significantly impede the private enforcement of many federal statutes"<sup>124</sup> and heighten the necessity of systemic enforcement by EEOC.<sup>125</sup>

EEOC can bring litigation regardless of arbitration bans on class actions<sup>126</sup> and can seek relief for all employees affected by an employer's discriminatory practices under a different standard than the procedural requirements for certification of private class actions.<sup>127</sup> There is a growing awareness of the need for EEOC to "play a greater role in addressing systemic

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<sup>121</sup> A 2015 study found that the number of companies using arbitration to preclude class actions increased by 250 percent in just two years (43% of the companies surveyed in 2014 had class waivers compared to 16 percent in 2012). *More Companies Block Employees From Filing Suits*, Wall Street Journal (March 31, 2015).

<sup>122</sup> See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013).

<sup>123</sup> 564 U.S. 338 (2011).

<sup>124</sup> Case Comment, *Class Actions – Class Arbitration Waivers – American Express Co. v. Italian Colors Restaurant*, 127 HARV. L. REV. 278, 284 (2013).

<sup>125</sup> See Schlanger & Kim, *supra* note 118; Melissa Hart, *Civil Rights and Systemic Wrongs: The Future of Employment Discrimination Class Actions*, 32 BERKELEY J. LAB & EMP. L. 455, 475 (2011); Angela D. Morrison, *Duke-ing Out Pattern or Practice After Wal-Mart: The EEOC as Fist*, 63 AM. U. L. REV. 87, 92 (2013).

<sup>126</sup> *EEOC v. Waffle House*, 534 U.S. 279 (2002).

<sup>127</sup> Class actions by private individuals are subject to the requirement of Rule 23 of the Federal Rules of Civil Procedure. The Supreme Courts has ruled that EEOC cases are not subject to Rule 23's class certification requirements, because EEOC litigates in its own name on behalf of the public's interest. See *General Tel. Co. of the Northwest Inc. v. EEOC*, 446 U.S. at 326 ("[t]he EEOC is not merely a proxy for the victims of discrimination and that [its] enforcement suits should not be considered representative actions subject to Rule 23.")

discrimination . . . and to more aggressively pursue cases involving broad-based discrimination.”<sup>128</sup>

## **B. Moving Forward**

After a decade of investments in strengthening EEOC’s nationwide systemic program, EEOC has a solid foundation to build upon as it continues its work to remove persistent and emerging barriers to opportunity. The agency’s Strategic Plan and Strategic Enforcement Plan chart a course for targeted and integrated enforcement strategies. Moving forward, EEOC will focus on three key areas in order to expand the agency’s impact and better serve the public: 1) executing national strategies to address persistent and emerging systemic issues; 2) advancing solutions that promote lasting opportunity in the workplace; and 3) strengthening the agency’s technology and infrastructure.

### **1. Executing National Strategies to Address Persistent or Emerging Systemic Barriers**

The agency is developing new approaches to more proactively address areas where significant employment problems persist and where government enforcement is most needed.<sup>129</sup> Guided by the EEOC’s Strategic Enforcement Plan (SEP), the agency has focused attention on six national priority areas as well as local office priorities. Within those priority areas, the agency is working to identify emerging trends as well as persistent employment practices that raise concerns of systemic discrimination.

EEOC’s Research and Data Plan, approved by the Commission in 2015, recognizes that EEOC’s charge data provide an important source of information to explore the characteristics of industries that appear to have higher levels of certain allegations than comparative industries. Charges of discrimination inform EEOC about discriminatory practices by certain employers, but often some issues are unreported or under-reported when workers face barriers to reporting violations or may not be aware of a broader pattern or practice of discrimination.<sup>130</sup> Thus, it is important for EEOC to consider additional sources of information in identifying issues where government enforcement is most needed.

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<sup>128</sup> See Schlanger & Kim, *supra* note 118 at 1520.

<sup>129</sup> The Systemic Task Force noted that “there has been a significant decrease in proactive efforts to identify systemic discrimination through research and analysis.” Systemic Task Force Report, *supra* note 2 at 4.

<sup>130</sup> Some research indicates that incoming complaints do not necessarily reflect where the most severe or entrenched problems lie. See, e.g., David Weil, [Improving Workplace Conditions Through Strategic Enforcement, A Report to the Wage and Hour Division](#) at 11 (May 2010).

The demographic information that EEOC has collected for over 50 years on its EEO-1 form provides valuable data that can assist in identifying patterns of occupational segregations and potential barriers to hire. Research on emerging practices provides another source of information about systemic areas of concern. For example, EEOC's Research and Data Plan identifies the need for research on screening devices, tests, and other practices to identify barriers to opportunity as well as promising selection practices that rely on job-related criteria. Such research will help the agency focus its enforcement efforts in ensuring that selection practices are related to performance of the job.

EEOC is analyzing its available data and sharing its knowledge across the agency to integrate its outreach and enforcement efforts. This allows EEOC to better understand the causes of frequent violations in order to address the root of the problem. It also enables the agency to provide compliance resources to assist employers in better understanding problem areas and to help industries that experience a higher rate of violations.

To develop national strategies focused on significant persistent or emerging systemic issues, EEOC has created teams of staff across program offices with expertise on specific issues. The agency's Strategic Enforcement Plan created teams to develop integrated and comprehensive strategies for addressing the SEP priorities. In addition, several agency-wide teams have contributed to advancing and coordinating strategies in the development of the agency's efforts with respect to LGBT coverage, background screens and ADA leave policies. The agency's National Systemic Coordinator, as well as systemic coordinators and lead systemic investigators, and research analysts in field offices, also play an important role in sharing knowledge and coordinating strategies throughout the agency. Moving forward, the agency is building on this team approach to ensure that regular communication channels exist to foster a concerted and coordinated approach on key systemic issues as they emerge. Teams of internal experts will also serve as resources to other staff within the agency on specific issues as well as on enforcement techniques and strategies. In addition, the agency is investing in technological tools to facilitate the sharing of knowledge and experiences across the agency to strengthen its systemic capacity and issue expertise.

## **2. Advancing Solutions that Promote Lasting Opportunity in the Workplace.**

EEOC is also studying the types of remedial provisions that work to advance opportunity and reduce discrimination in the workplace. The agency is exploring approaches to relief where the interests of the employees, employer, and EEOC align to result in lasting improvements to workplace practices and policies.

The agency is evaluating the effectiveness of the remedial relief in consent decrees, conciliations, and other settlements, with the goal of identifying evidence-based solutions, including successes documented by employers and research from academics that have resulted in expanding opportunity in the workplace. This effort is underway on several fronts within the agency, including under the agency's Research and Data Plan, which seeks to assist employers and measure the EEOC's impact in addressing and remedying discrimination. In addition, the results of this research will inform the training EEOC provides to both employers and its own staff, as well as informing the relief the agency requests in conciliation, settlements, and lawsuits.

The Select Task Force on Harassment led by Commissioners Chai Feldblum and Victoria Lipnic undertook a significant effort towards identifying strategies that work to prevent harassment in the workplace.<sup>131</sup> The Select Task Force consisted of a broad range of outside experts impaneled to examine harassment in our workplaces – its causes, its effects, and what can be better done to prevent it. The report of Co-Chairs Feldblum and Lipnic documents the significant harm and cost of harassment to workers subjected to it, and the substantial direct costs employers incur in addressing harassment complaints.<sup>132</sup> The report also includes detailed recommendations and helpful tools to aid in designing effective anti-harassment policies; developing training curricula; implementing complaint, reporting, and investigation procedures; creating an organizational culture in which harassment is not tolerated; ensuring employees are held accountable; and assessing and responding to workplace “risk factors” for harassment.

One of the key conclusions of the report is the recognition that the interests of EEOC in ending harassment in the workplace may align with the interests of employers in productive and engaged workers. This suggest opportunities for innovative approaches in resolutions of cases to prevent discrimination as well as harassment.

### **3. Investing in EEOC's Infrastructure to Strengthen Systemic Enforcement**

Continued investment in training, technology, and staffing for systemic enforcement is critical to an effective systemic program. EEOC is committed to building on the solid foundation of the current program to ensure the quality and success that the Commission expects in the pursuit of strong systemic cases.

As new and complex systemic practices emerge in the workplace, EEOC must equip its staff to effectively tackle such issues. In June 2016, the agency convened an Advanced Systemic

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<sup>131</sup> See *supra* note 34.

<sup>132</sup> *Id.* at 17-20.

Institute to examine emerging and complex systemic issues and to provide investigators, research analysts and attorneys with strategies for investigating, litigating, and resolving systemic cases. The agency is also providing systemic training for all staff who conduct intake to enable them to better identify systemic practices and policies during intake and investigations.

EEOC is also investing in technology to enhance our digital charge system and build a digital workplace to enable staff to readily access information across the agency. Staff with expertise in systemic cases are helping to design features for the digital charge system to improve management of voluminous systemic documents. To better support the work of systemic staff, the agency is allocating resources for the hardware and software needed for complex investigations and litigation where analyses require specialized software and high performing computers.

## **Conclusion**

Ten years after committing to make systemic enforcement a top agency priority, EEOC has built a strong systemic program that is nationwide, strategic, and coordinated. In that time, the agency's efforts have improved workplace practices and policies and benefited thousands of workers across the country. Yet, persistent as well as emerging barriers to opportunity remain and the need for concerted strategies and promising solutions has increased. This heightened demand necessitates both a strategic and prudent approach by EEOC given our finite resources. EEOC is committed to leveraging its resources to support systemic work, strengthening our capacity to succeed in our systemic efforts, and amplifying the impact of all of our work in ensuring lasting equal opportunity in the workplace.