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Reinventing the EEOC

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REINVENTING THE EEOC

Nancy M. Modestit*

The Equal Employment Opportunity Commission (EEOC) has struggled to be a meaningful force in eradicating employment discrimination since its inception. The primary reasons for this are structural in nature. The EEOC was designed to react to discrimination complaints by investigating and conciliating all of the thousands of complaints filed annually. The EEOC has never been able to investigate all these complaints despite using the vast majority of its resources attempting to do so. The devotion of resources to managing and investigating the huge volume of complaints prevents the EEOC from taking more effective steps to eliminate discrimination. This article proposes a reinvention of the EEOC by making significant changes to the EEOC's organization and responsibilities. I advocate five fundamental changes. First, the EEOC should no longer be required to accept and investigate all complaints of discrimination. Instead, it should only investigate and litigate significant claims of discrimination. Second, the threat of EEOC litigation must be given greater force by allowing the EEOC to collect attorneys' fees and fines from employers when it prevails in litigation. Third, because its mediation program has been quite effective, the EEOC should partner with the federal courts to provide mediation in employment discrimination cases filed in federal court. Fourth, the EEOC should increase its information-gathering and analysis activities to better understand and combat current trends in employment discrimination. Finally, the EEOC needs to expand its discrimination prevention programs by providing significantly more information and training to employers to assist them in complying with federal laws.

"The definition of insanity is doing the same thing over and over and expecting different results."

- Albert Einstein

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THE EEOC is an agency that has failed in its mission to eradicate discrimination in the workplace. Even if its mission is impossible, as there are those who would argue that discrimination cannot be completely eliminated through existing legal systems,¹ the EEOC has failed to reach its potential in reducing workplace discrimination. In the early years of its existence, this was primarily blamed on its lack of power to enforce the federal antidiscrimination laws; its roles were limited to investigation and conciliation.² However, even after the EEOC obtained authority to enforce federal antidiscrimination laws by bringing suit against employers,³ the EEOC has still struggled to be a major force in ending workplace discrimination.

There are several ways in which the EEOC has not fulfilled its poten-

1. See Derrick Bell, *Racial Equality: Progressives' Passion for the Unattainable*, 94 VA. L. REV. 495, 517 (2008) (book review) (noting that "racial equality for blacks and other people of color is unattainable through law alone").

2. See Anne Noel Occhialino & Daniel Vail, *Why The EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L.J. 671, 672-73, 677 (2005) (discussing the congressional recognition of the flaws in the initial structure of the EEOC).

3. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4, 86 Stat. 103, 105 (codified as amended at 42 U.S.C. § 2000e-5(f) (2000)).

tial, including making missteps in its litigation department⁴ and overcommitting resources to manage the intake of discrimination charges.⁵ In addition, throughout much of its history, the EEOC has been hampered by poor management and excessive turnover in its most senior positions.⁶ All these things have led to a significant credibility crisis, with the public lacking confidence in the EEOC's abilities.⁷

Making the EEOC a force in eradicating employment discrimination will require more than mere tinkering. This Article proposes a complete restructuring of the EEOC to create an agency that focuses primarily on preventing discrimination and, in circumstances where prevention has failed, is structured to effectively enforce antidiscrimination laws. This Article will proceed in two parts. Part I will explain the history of the EEOC and the most significant reasons why the EEOC has failed to fulfill its potential. Part II will explain how the EEOC should be restructured, taking into account past problems with the EEOC and applying modern governance theories to avoid recreating structural conditions that have contributed to the failings of the EEOC.

I. THE HISTORY AND CURRENT STRUCTURE OF THE EEOC

In order to understand why the EEOC has failed in its mission and how it might effectively be restructured, the historical and current structure of the EEOC must be understood.

A. ORIGINAL RESPONSIBILITIES OF THE EEOC AND EARLY LEGISLATIVE CHANGES

The EEOC was created as part of the Civil Rights Act of 1964.⁸ Title VII of the Act focused on employment discrimination and established the EEOC as one of the federal agencies overseeing the implementation of Title VII.⁹ At its outset, the EEOC lacked any enforcement authority,

4. The most significant of these was the EEOC's decision under Clarence Thomas to litigate every claim that its investigators believed to be meritorious. See Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 14–15 (1996). The EEOC lacked the resources to litigate all such cases, with the result that it devoted limited resources to cases that had no significant precedential value, monetary value, or even involved significant numbers of employees. *Id.* at 21–22, 37, 64; see also Occhialino & Vail, *supra* note 2, at 684.

5. See Paul M. Igasaki, *Doing the Best with What We Had: Building a More Effective Equal Employment Opportunity Commission During the Clinton-Gore Administration*, 17 LAB. LAW. 261, 266–67 (2001) (noting that well into the 1990s, the goal of managing the intake and investigation of charges “took precedence over all [else]”).

6. See *infra* Part I.D.

7. See Igasaki, *supra* note 5, at 263–64 (noting “serious doubts” about the effectiveness of the EEOC and a need to restore credibility to it); EEOC, FISCAL YEAR 2009 CONGRESSIONAL BUDGET JUSTIFICATION 13 (2008), <http://www.eeoc.gov/plan/archives/budgets/2000budget/2009budget.pdf> [hereinafter 2009 BUDGET JUSTIFICATION] (2007 survey of the public found that only 47.8% of the public “had confidence in EEOC’s ability to enforce federal equal employment [opportunity] laws”).

8. See Civil Rights Act of 1964, Pub. L. No. 88-352, § 705, 78 Stat. 241, 258 (1964) (codified as amended at 42 U.S.C. § 2000e-4 (2006)).

9. *Id.* at 258–59.

being limited in its authority to investigating and engaging in conciliation efforts with employers.¹⁰ The EEOC lacked the power to bring suit; this authority was vested in the Attorney General.¹¹ The primary focus for the EEOC appeared to have been the investigation and conciliation of employment discrimination claims.¹² The EEOC was not given subpoena power or the power to sanction employers whom it found had engaged in discrimination.¹³

This complete absence of enforcement authority was partially remedied by the passage of the Equal Employment Opportunity Act of 1972.¹⁴ The Act gave the EEOC the authority to bring suit on behalf of employees as well as the power to bring suit on its own when lacking an employee-plaintiff.¹⁵ Other than these significant changes,¹⁶ the EEOC's powers and structural responsibilities have remained substantially the same,¹⁷ except as to the coverage of the anti-discrimination laws. While its *role* is the same, the coverage of federal antidiscrimination laws has expanded, and the EEOC now handles claims not only for the original coverage of Title VII¹⁸ but also for age discrimination,¹⁹ disability discrimination,²⁰ and genetic discrimination claims.²¹

B. INVESTIGATIVE ROLE BECOMES ALL-CONSUMING INTAKE UNIT ROLE

The initial role of the EEOC was supposed to involve investigating and conciliating claims of employment discrimination.²² However, from the beginning, the primary role of the EEOC has in fact been to process claims (charges) of employment discrimination rather than investigate or

10. *Id.*

11. *Id.* § 705.

12. This appears evident from the level of attention in the legislation devoted to the EEOC's role in investigation and conciliation. While the other roles of the EEOC were merely identified, the process of investigation and conciliation was spelled out in detail. Compare *id.* § 705, with *id.* §§ 700–10.

13. See *id.* §§ 710, 713.

14. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4, 86 Stat. 103, 104–05 (codified as amended at 42 U.S.C. § 2000e-5 (2006)).

15. *Id.*

16. One other additional responsibility that the EEOC obtained from the Equal Employment Opportunity Act of 1972 was the responsibility for handling federal employee claims of discrimination. See *id.* The role of the EEOC with respect to these claims is radically different than for claims by private-sector employees and is not the focus of this Article.

17. As discussed *infra* Part I.E.2, the EEOC did subsequently gain responsibility for developing a training program, but this training program consumes a tiny amount of the EEOC's budget and organization in relation to the EEOC's other responsibilities.

18. Race, sex, color, national origin, and religion. Equal Employment Opportunity Act of 1972 § 10.

19. Age Discrimination in Employment Act, 29 U.S.C. §§ 621–34 (2006).

20. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12117 (2006).

21. Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881, 914.

22. David L. Rose, *Twenty-Five Years Later: Where Do We Stand On Equal Employment Opportunity Law Enforcement?*, 42 VAND. L. REV. 1121, 1135–36 (1989).

conciliate them.²³ The reality of the EEOC as an intake and processing unit, rather than an investigative unit, began at its inception.²⁴ Congress greatly underestimated the number of charges that the EEOC would receive; thus, it lacked adequate resources to investigate all the charges and quickly found itself with a huge backlog of charges,²⁵ making effective investigation of the charges impossible. As a 1976 General Accounting Office report noted, most charges filed with the EEOC were not actually investigated.²⁶ Rather than full investigation of each charge, the EEOC was accepting the charges but ultimately closing out nearly half of all charges administratively.²⁷ Less than forty percent of all charges resulted in an EEOC determination as to whether discrimination had occurred.²⁸ The investigations that did take place were marred by a lack of expertise among the investigators,²⁹ and the agency was plagued with poor management,³⁰ which likely contributed to the reality of the EEOC accepting and processing charges of discrimination rather than effectively investigating them.³¹

Over the decades since the establishment of the EEOC, the backlog of charges from private sector employees has ebbed and flowed, but has never been eliminated.³² This backlog of charges has continued to keep the EEOC in the position where it is treading water—managing the huge number of claims without substantively investigating them.³³ In 1968, the average processing time for charges was sixteen months.³⁴ By 1977, five years after the expansion of Title VII to cover federal, state, and local government employees, there was a backlog of 94,700 charges for private sector employees, and the average processing time for charges was thirty-two months.³⁵

Against the background of a huge volume of charges and significant lag time between charge initiation and closure, the idea of investigating each charge was abandoned, and the EEOC began its first programmed efforts

23. See Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICK. L. REV. 305, 309–310, 326 (2001).

24. *Id.* at 326–27; Rose, *supra* note 22, at 1136–37.

25. See Rose, *supra* note 22, at 1136; Occhialino & Vail, *supra* note 2, at 673–75.

26. U.S. GOV'T. ACCOUNTABILITY OFFICE, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION HAS MADE LIMITED PROGRESS IN ELIMINATING EMPLOYMENT DISCRIMINATION, H.R. DOC. NO. 76-147, at 10–11 (1976).

27. See *id.* at 10–12.

28. *Id.*

29. See Rose, *supra* note 22, at 1136–37; Occhialino & Vail, *supra* note 2, at 673–74.

30. See Occhialino & Vail, *supra* note 2, at 674 (noting the excessive turnover at the highest levels of the EEOC as well as an internal memorandum from 1967 noting poor management).

31. See Rose, *supra* note 22, at 1136–37. Another factor in preventing the EEOC from effectively investigating charges throughout its history has been a lack of sufficient funding. See Green, *supra* note 23, at 346–50 (“Efforts by Congress to use its power in the appointment and funding process to stymie the EEOC are well known.”).

32. See Green, *supra* note 23, at 310–11.

33. *Id.*

34. See Occhialino & Vail, *supra* note 2, at 675.

35. *Id.* at 677–78.

to reduce the charge backlog.³⁶ This did in fact reduce the charge backlog without eliminating it,³⁷ but the backlog expanded again in the 1980s and 1990s,³⁸ in part due to a reversion in the 1980s to a goal of full investigations of all charges rather than using a prioritization system to determine which charges should be given more attention.³⁹

By the mid-1990s, the pendulum had once again swung away from full investigation of all charges and toward another programmed effort to reduce the backlog of charges.⁴⁰ It was during this time that the EEOC's current system developed. Since that time, charges have been categorized as A, B, or C as follows: A charges are those that appear to the EEOC to very likely indicate that the law has been violated and that indicate systemic discrimination.⁴¹ B charges might involve a violation of federal antidiscrimination laws but typically require more investigation.⁴² C charges clearly show a lack of merit or sometimes a lack of jurisdiction.⁴³

The category into which a charge is classified determines its fate.⁴⁴ A charges receive a full investigation, with a determination of whether "reasonable cause"⁴⁵ exists to believe discrimination occurred.⁴⁶ If reasonable cause is found, then the EEOC undertakes to conciliate the matter by negotiating with the employer.⁴⁷ If conciliation fails, then the EEOC may litigate the claim.⁴⁸ The EEOC attempts to resolve B charges via mediation.⁴⁹ If that resolution fails, either because the parties refuse to mediate or the mediation is unsuccessful, then the B charge is sent

36. See Rose, *supra* note 22, at 1150.

37. See Occhialino & Vail, *supra* note 2, at 681.

38. See *End of the 1980s Leaves EEOC to Face New Challenges*, EEOC, <http://eeoc.gov/eeoc/history/35th/1980s/end.html> (last visited July 21, 2010) [hereinafter *The 1980s*] (noting backlog increased in the 1980s); *New Enforcement Strategies to Address Discrimination in the Changing Workplace*, EEOC, <http://eeoc.gov/eeoc/history/35th/1990s/newenforcement.html> (last visited July 21, 2010) [hereinafter *The 1990s*] (noting backlog increased in the 1990s before the charge handling policy was revised).

39. See *The 1980s*, *supra* note 38 (noting change in charge handling policy in the 1980s).

40. See *The 1990s*, *supra* note 38 (noting new charge handling policy implemented to reduce backlog).

41. Green, *supra* note 23, at 327.

42. *Id.*

43. See *id.*

44. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-059, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: SHARING PROMISING PRACTICES AND FULLY IMPLEMENTING STRATEGIC HUMAN CAPITAL PLANNING CAN IMPROVE MANAGEMENT OF GROWING WORKLOAD 18 (2008) [hereinafter EEOC: PROMISING PRACTICES].

45. See NAT'L COUNCIL ON DISABILITY, PROMISES TO KEEP: A DECADE OF FEDERAL ENFORCEMENT OF THE AMERICANS WITH DISABILITIES ACT 171-74 (2000), <http://www.ncd.gov/newsroom/publications/2000/pdf/promises.pdf>.

46. Under its National Enforcement Plan, to the extent that resources permit, the EEOC will investigate charges that do not involve systemic discrimination but where "it appears more likely than not that discrimination has occurred." See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION NATIONAL ENFORCEMENT PLAN, VIII.A, <http://eeoc.gov/eeoc/plan/nep.cfm> (last visited Sept. 10, 2010).

47. See NAT'L COUNCIL ON DISABILITY, *supra* note 45, at 171-74.

48. See *id.*

49. See EEOC: PROMISING PRACTICES, *supra* note 44, at 18.

through the *A* charge process.⁵⁰ The charges where the EEOC determines that either it lacks jurisdiction or appear to be unsupported are categorized as *C* charges and dismissed without investigation.⁵¹

By 2001, this program for managing charges reduced the backlog to approximately 32,000 charges and the processing time to just over six months.⁵² However, these gains were short-lived. Between 2004 and 2007, the charge inventory grew again.⁵³ In this timeframe, the average amount of time needed to close a charge increased by 34 days—from 171 days to 205 days.⁵⁴ During fiscal year (FY) 2007, the EEOC had 127,710 charges pending in the private sector.⁵⁵ The Government Accountability Office (GAO) found two primary reasons for the increased backlog of charges: (1) a decrease in the number of EEOC investigators and (2) an increase in the proportion of *A* and *B* charges, which are more resource intensive than *C* charges.⁵⁶ While there was an increase in the number of mediations during this time (approximately five percent), the relative proportion of mediations compared to the remainder of the charges remained stable.⁵⁷ In its most recent report, for FY 2008, the EEOC notes that one of its greatest challenges is reducing the immense inventory of charges, which stands at approximately 75,000.⁵⁸

The EEOC itself recognizes that what can be termed its “intake role,” that is, its charge-handling obligations, has taken over the agency.⁵⁹ In a recent budget justification, the section entitled “Chair’s Priorities” begins with the statement that the “EEOC is first and foremost an enforcement agency responsible for accepting charges of employment discrimination from members of the public.”⁶⁰ In its Annual Report, the EEOC notes that charge processing is “its most important and resource-intensive activity.”⁶¹ To fulfill its primary role as intake unit, the EEOC’s first-listed priority is to hire staff to handle the growing volume of filed charges.⁶²

The budget numbers confirm these statements of commitment to the intake role. For FY 2008, the EEOC spent just over \$270 million on pri-

50. *See id.*

51. *See id.*

52. *See* EEOC, COMBINED ANNUAL REPORTS FISCAL YEARS 1999–2001 (OCTOBER 1, 1998, THROUGH SEPTEMBER 30, 2001), Private Sector Enforcement Highlights, http://archive.eeoc.gov/abouteeoc/annual_reports/annrep99-01.html#enforcement (last visited Oct. 18, 2010).

53. *See* EEOC: PROMISING PRACTICES, *supra* note 44, at 23.

54. *Id.* at 23, 29.

55. *Id.* at 24. This number includes charges filed during FY 2007, 85,509, as well as charges that were not closed from previous years. *Id.* at 24–25.

56. *Id.* at 26–27.

57. *Id.* at 31.

58. *See* EEOC, FY 2008 PERFORMANCE AND ACCOUNTABILITY REPORT 42 (2008), <http://archive.eeoc.gov/abouteeoc/plan/par/2008/par2008.pdf> [hereinafter 2008 REPORT].

59. *See* 2009 BUDGET JUSTIFICATION, *supra* note 7, at 3.

60. *Id.*

61. 2008 REPORT, *supra* note 58, at 42.

62. 2009 BUDGET JUSTIFICATION, *supra* note 7, at 3.

vate sector enforcement of federal antidiscrimination laws.⁶³ Of this \$270 million, approximately \$162 million was spent on administrative charge processing.⁶⁴ This made its intake role responsible for more than half (sixty percent) of its total private sector enforcement budget.⁶⁵ This percentage of total enforcement budget has remained remarkably consistent in recent years.⁶⁶

Even as the EEOC devotes huge resources toward its intake role, the value of this service has been questionable. Professor Selmi posits that, in essence, the EEOC's intake role has made it an expensive and cumbersome processor of discrimination claims, "a large number of . . . [which it] determines have no merit."⁶⁷ In addition, he argues, the EEOC's intake role may produce a net detriment by deterring private attorneys from taking some cases.⁶⁸ By giving individuals the (inaccurate) perception that the EEOC will handle all charges of discrimination,⁶⁹ the EEOC potentially reduces the likelihood that the individual will obtain representation with an attorney.⁷⁰ If the EEOC then issues a "no-cause" determination,⁷¹ the individual is left with no remedy from the EEOC and a claim that private attorneys may not want to pursue, with the result that some meritorious claims will be lost.⁷²

By perceiving its primary role as an intake unit and devoting a huge percentage of its resources to that function, the EEOC overcommits resources to managing the intake of such claims.⁷³ Processing claims does not reduce discrimination in the workplace. This quasi-enforcement role of the EEOC must be eliminated.

C. LIMITED EFFECTIVENESS OF LITIGATION ROLE IN ENFORCING ANTIDISCRIMINATION LAWS

While the EEOC spends far too much of its resources on its role as an

63. See EEOC, FISCAL YEAR 2010 CONGRESSIONAL BUDGET JUSTIFICATION 12 (2009), <http://www.eeoc.gov/eeoc/plan/upload/2010budget.pdf> (last visited Sept. 10, 2010) [hereinafter 2010 BUDGET JUSTIFICATION].

64. *Id.*

65. See *id.*

66. See 2009 BUDGET JUSTIFICATION, *supra* note 7, at 17 (for FY 2007, total private sector enforcement budget of just under \$270 million; administrative charge processing budget of about \$161 million); EEOC, FISCAL YEAR 2008 CONGRESSIONAL BUDGET JUSTIFICATION § II.A (2007), <http://archive.eeoc.gov/abouteeoc/plan/2008budget/index.html#Table2> [hereinafter 2008 BUDGET JUSTIFICATION] (for FY 2006, total private sector enforcement budget of nearly \$268 million; administrative charge processing budget of about \$157 million); EEOC, FY 2007 PERFORMANCE BUDGET § III.A (2006), <http://archive.eeoc.gov/abouteeoc/plan/2007budget/index.html#Table2> [hereinafter 2007 PERFORMANCE BUDGET] (for FY 2005, total private sector enforcement budget of about \$265 million; administrative charge budget of nearly \$177 million).

67. See Selmi, *supra* note 4, at 22, 64.

68. *Id.* at 44.

69. See *id.* at 57.

70. *Id.* at 43.

71. *Id.* at 9.

72. *Id.* at 43–44.

73. See Igasaki, *supra* note 5, at 266–67.

intake unit, this is not its only responsibility.⁷⁴ In addition to its powers of investigation and its responsibility of engaging in conciliation efforts as ways of reducing discrimination, the EEOC does have other enforcement powers.⁷⁵ Unlike other federal agencies,⁷⁶ the EEOC is not able to directly sanction employers who violate the federal laws it is charged with administering.⁷⁷ Instead, the EEOC is limited to more indirect enforcement efforts. Its strongest enforcement power is the EEOC's ability to bring suit against an employer on behalf of an individual or class of individuals.⁷⁸ In addition, the EEOC uses softer techniques, such as information gathering via the EEO-1 reports,⁷⁹ as well as its investigative powers, to obtain evidence about violations of law that it can then seek to remediate via lawsuit or conciliation with an employer.⁸⁰ While the EEOC's investigative power might seem significant, it is substantially limited because it can only subpoena documents when a charge of discrimination has been filed.⁸¹

Because the EEOC's enforcement powers are limited,⁸² it is critical for the EEOC to effectively wield them. However, the effectiveness of the EEOC's use of its most obvious direct enforcement power, litigation, has been severely limited.⁸³ There are three different aspects to the EEOC's ineffective use of litigation as an enforcement tool: (1) the litigation program has been relatively small in scale;⁸⁴ (2) there are indications that the EEOC's litigation program has had little impact;⁸⁵ and (3) given the huge

74. See 42 U.S.C. § 2000e-5 (2006).

75. See *id.*

76. The Occupational Safety and Health Administration, for instance, has the authority to investigate and impose sanctions on employers for violating federal employee safety laws. See 29 U.S.C. §§ 657–658 (2006).

77. See 42 U.S.C. § 2000e-5.

78. 42 U.S.C. § 2000e-5(f).

79. The EEO-1 reports must be filed annually by all employers who have at least 100 employees, or are a federal contractor with at least 50 employees and a contract of \$50,000 or more. The report provides information about the race, sex, and ethnicity of employees in each of the employer's job categories. See EEOC, ANSWERS TO EEO-1 FILING QUESTIONS OFTEN ASKED BY EMPLOYERS, <http://www.eeoc.gov/employers/eeo1survey/faq.cfm> (last visited Aug. 3, 2010). The EEOC is empowered directly by statute to require employers to provide reports to it as are "reasonable, necessary, or appropriate" to enforcing Title VII. 42 U.S.C. § 2000e-8.

80. See *id.*

81. See *EEOC v. Shell Oil Co.*, 466 U.S. 54, 65 (1984) ("In construing the EEOC's authority to request judicial enforcement of its subpoenas, we must strive to give effect to Congress' purpose in establishing a linkage between the Commission's investigatory power and charges of discrimination. If the EEOC were able to insist that an employer obey a subpoena despite the failure of the complainant to file a valid charge, Congress' desire to prevent the Commission from exercising unconstrained investigative authority would be thwarted.")

82. See 42 U.S.C. § 2000e-5.

83. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/T-HRD-93-30; EEOC: AN OVERVIEW 12 (1993) (statement of Linda G. Morra, Dir. Educ. & Emp. Issues, Human Resources Div.), available at <http://archive.gao.gov/d45t15/149741.pdf>.

84. See 2010 BUDGET JUSTIFICATION, *supra* note 63, at 12.

85. See *Selmi*, *supra* note 4, at 50–51; EEOC: AN OVERVIEW, *supra* note 83, at 12 (commenting that in the 1990s, the EEOC litigated less than 1% of the charges that it investigated).

number of cases brought by private attorneys, one queries whether the EEOC's small litigation program makes any significant incremental differences in promoting a discrimination-free workplace.⁸⁶

First, the EEOC's litigation program has historically been much smaller in scale than its intake efforts and remains so even today.⁸⁷ For FY 2008, the litigation program received less than one-third the funding that the EEOC allotted to its intake role, with \$162 million budgeted for administrative charge processing and only \$57 million for its litigation program.⁸⁸ In FY 2007, the numbers were nearly the same.⁸⁹ The EEOC budgeted \$161,259,000 for its administrative charge processing efforts and \$56,223,000 for litigation, which gave litigation barely one-third the funding of administrative charge processing.⁹⁰

Second, the impact of the EEOC's litigation efforts has been at best mixed. In the early years of Title VII, the EEOC did not even have the authority to bring suit.⁹¹ That power lay with the Department of Justice, which brought several major lawsuits that resulted in significant consent decrees.⁹² And once the EEOC obtained authority to bring suit, it focused on individual claims rather than class actions or cases involving systemic discrimination.⁹³ In the years after obtaining the power to bring suit, the EEOC litigated only a tiny proportion of cases that it was unable to resolve by conciliation.⁹⁴ This continued even into the 1990s, where a GAO report indicated that the EEOC litigated less than one percent of the charges that it investigated.⁹⁵ In the years following the EEOC gaining the power to bring suit, the EEOC initiated only one case using its power to bring suit directly (via a commission charge rather than relying on an individually filed charge).⁹⁶ And the number of litigated cases has decreased in recent years.⁹⁷ In 1989, the EEOC was involved in 599 law-

86. See Selmi, *supra* note 4, at 52, 64 (suggesting that a private system would be more effective).

87. See EEOC: AN OVERVIEW, *supra* note 83, at 12 (noting that the EEOC processed over 68,000 claims in FY 1992 but only litigated 447); 2010 BUDGET JUSTIFICATION, *supra* note 63, at 12 (for FY 2010, the EEOC requested about \$200 million for administrative charge processing and only about \$60 million for litigation).

88. See 2010 BUDGET JUSTIFICATION, *supra* note 63, at 12.

89. See 2009 BUDGET JUSTIFICATION, *supra* note 7, at 17.

90. See *id.*

91. See Rose, *supra* note 22, at 1135.

92. See *id.* at 1145 (discussing lawsuits involving the steel and trucking industries).

93. See *id.* at 1149–1151 (noting that in the 1970s, the focus was on individual claims, and as of 1981, the EEOC had filed only one suit involving systemic discrimination).

94. Herbert Hill, *The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law*, 2 INDUS. REL. L.J. 1, 60 (1977).

95. See EEOC: AN OVERVIEW, *supra* note 83, at 12.

96. Hill, *supra* note 94, at 61.

97. Compare Mary Kathryn Lynch, *The Equal Employment Opportunity Commission: Comments on the Agency and Its Role in Employment Discrimination Law*, 20 GA. J. INT'L & COMP. L. 89, 99 (1990), with EEOC, EEOC LITIGATION STATISTICS, FY 1997 THROUGH FY 2009, <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm> (last visited Sept. 10, 2010).

suits, either by bringing suit or intervening in the litigation.⁹⁸ By 2009, that number had dropped to 314.⁹⁹ As to adverse impact claims, *no* such claims were brought by the EEOC during the majority of the 1980s, which was apparently due to the political beliefs of then-Commissioner Clarence Thomas.¹⁰⁰ It was not until the 1990s that the EEOC began to critically examine its litigation efforts in an attempt to have a significant impact on discrimination and “deter discrimination beyond the litigants in any one case.”¹⁰¹

Furthermore, what limited success the EEOC enjoyed in its early litigation efforts¹⁰² was devalued by notable cases where the EEOC was sanctioned for its litigation efforts. In its first systemic discrimination case, the EEOC mismanaged the litigation by allowing an attorney with significant ties to an outside organization (the National Organization for Women) to manage the case, to the point that the district court found that the EEOC’s attorney had a serious conflict of interest.¹⁰³ In commenting on the EEOC’s litigation, which involved several different lawsuits filed against Sears, one judge stated: “This Court is impressed with Sears’ contention that the EEOC has engaged in a pattern of misconduct over the past six years which amounts to a display of general ‘bad faith’ on behalf of the EEOC sufficient to warrant dismissal of this cause.”¹⁰⁴

Other litigation efforts around this time also resulted in sanctions against the EEOC. For example, the EEOC was found to have brought a class action in bad faith in *EEOC v. Datapoint Corp.*¹⁰⁵ and was sanctioned by the court, which awarded attorneys’ fees in excess of \$66,000 to the employer.¹⁰⁶ Another court, in awarding attorneys’ fees to an employer, considered the EEOC’s prosecution of a meritless claim so bad as to be “poison of bad faith.”¹⁰⁷ An EEOC attorney was fined \$500 for filing a class action claim without an actual employee or applicant on whose basis the suit was brought.¹⁰⁸ More recently, in 2010, the EEOC was ordered to pay almost \$4.5 million in attorneys’ fees to a trucking company it had sued on behalf of female drivers whom the EEOC claimed had been sexually harassed.¹⁰⁹ The judge justified the award by noting that the EEOC’s actions were “unreasonable” and suggested that

98. See Lynch, *supra* note 97, at 99.

99. See EEOC LITIGATION STATISTICS, *supra* note 97.

100. See Rose, *supra* note 22, at 1158–59 (discussing the lack of adverse impact cases from 1983–89 and then-Chairman Thomas’s objections to adverse impact claims).

101. See Igasaki, *supra* note 5, at 262, 265–66, 268 (describing the development of a task force to redefine the litigation, and other, efforts of the EEOC).

102. Former Commissioner Paul Igasaki referred to the EEOC’s litigation efforts before the 1990s as “uneven” and being of “limited scope.” Igasaki, *supra* note 5, at 264.

103. See *EEOC v. Sears, Roebuck & Co.*, 504 F. Supp. 241, 249–50 (N.D. Ill. 1980).

104. *EEOC v. Sears, Roebuck & Co.*, 490 F. Supp. 1245, 1253–54 (M.D. Ala. 1980).

105. 457 F. Supp. 62, 68 (W.D. Tex. 1978).

106. *Id.* at 69.

107. *EEOC v. Shoney’s, Inc.*, 542 F. Supp. 332, 337 (N.D. Ala. 1982).

108. *EEOC v. Waterfront Comm’n of N.Y. Harbor*, 665 F. Supp. 197, 200 (S.D.N.Y. 1987).

109. *EEOC v. CRST Van Expedited, Inc.*, No. 07-CV-95-LRR, 2010 WL 520564, at *20 (N.D. Iowa Feb. 9, 2010).

the EEOC's conduct in the case was motivated by a desire to obtain media coverage.¹¹⁰ These types of missteps hamper the EEOC's litigation efforts by damaging the EEOC's reputation, creating an incentive for employees to prefer private lawyers and for employers to resist settlement and conciliation efforts because of the perception that the EEOC litigation may be deemed frivolous.

Another indicia of the lack of success of the EEOC's litigation program is the results it achieves. Professor Selmi's detailed study of the EEOC conducted in the 1990s concluded that while EEOC litigation had a higher success rate than private litigation, it resulted in smaller awards for the litigants.¹¹¹ Selmi also assessed the impact of the EEOC's litigation efforts as measured by the effect of the EEOC litigation on advancing and developing antidiscrimination laws in the courts and noted that the EEOC had rarely been a party to the major Supreme Court cases in this area.¹¹² Selmi concluded that private attorneys could effectively enforce anti-discrimination laws without the EEOC, with the caveat that some low-dollar-value cases may not be brought.¹¹³

The EEOC's own assessment of the effectiveness of its litigation outcomes does not refute Selmi's findings. Its General Counsel's Office compared the EEOC's and private attorneys' loss rates when a case was decided by a court before a trial was conducted.¹¹⁴ The EEOC found that its loss rate was 5.9% as compared to 13.2% for private attorneys. The win rate for the EEOC at trial was 50.8% as compared to 38.3% for private attorneys.¹¹⁵ While the review suggests that the EEOC is achieving superior results to private attorneys, it fails to address the issue of the amount of recovery, which was Selmi's primary focus.¹¹⁶ Furthermore, the better success rate of the EEOC may be explained partially by the EEOC's ability to select the cases to pursue in litigation after a complete investigation, including obtaining information obtained directly from the employer.¹¹⁷ Such information obtained directly from the employer is not likely to be available to private attorneys, which negatively affects their ability to assess the merits of a claim before filing suit. Thus, it is to be expected that the EEOC would have a better success rate in litigation because of its ability to select only the most meritorious cases.

Using another measure, the results of its litigation program as compared to its own alternative dispute resolution (ADR) program, the

110. *Id.* at *9 & n.4.

111. Selmi, *supra* note 4, at 23–24 (noting that the dollar recovery for those represented by private litigants was higher than the EEOC-litigated cases, even when accounting for the costs of attorneys' fees).

112. *See id.* at 24.

113. *See id.* at 39.

114. 2008 REPORT, *supra* note 58, at 23–24.

115. *Id.*

116. *See* Selmi, *supra* note 4, at 23–24.

117. Under 42 U.S.C. § 2000e-9, the EEOC has the authority to obtain information from employers using subpoenas. 42 U.S.C. § 2000e-9 (West 2010); 29 U.S.C. § 161 (West 2010).

EEOC's litigation program is also not terribly effective. As compared to its mediation program, in terms of the dollar compensation obtained relative to cost, the EEOC's litigation program's value is far less. In FY 2007, the EEOC obtained over \$124 million for victims of discrimination through its mediation program,¹¹⁸ which cost approximately \$22 million to operate.¹¹⁹ Thus, for every dollar spent on mediation, the EEOC secured over five dollars for employees, for a recovery ratio of 1:5. By contrast, in FY 2007, the EEOC secured approximately \$55 million for victims of discrimination through claims resolved by the litigation program.¹²⁰ The litigation program cost \$56 million to operate, giving a return of less than one dollar to employees for every dollar spent, or a recovery ratio of 1:1.¹²¹

While these ratios have varied somewhat from year to year, mediation has been remarkably more successful in dollars spent to dollars recovered than litigation.¹²² In FY 2006, the ratio for the litigation department was its worst in recent years, with just under \$56 million in costs¹²³ and only \$44 million recovered—a recovery ratio of less than 1:1.¹²⁴ The mediation budget for that year was only \$22 million,¹²⁵ yet the program recovered \$109 million for victims of discrimination,¹²⁶ for a recovery ratio of 1:4.

The litigation program did better in FYs 2003–2005. For FY 2005, it recovered \$106 million¹²⁷ with a budget of only \$39 million,¹²⁸ improving its recovery ratio to 1:3. In FY 2004, the budget for litigation was nearly \$49 million¹²⁹ and recovered dollars amounted to \$160 million,¹³⁰ also within this recovery ratio of 1:3. For FY 2003, the EEOC remained in

118. EEOC, FISCAL YEAR 2007 PERFORMANCE AND ACCOUNTABILITY REPORT: STRATEGIC PLAN OVERVIEW (2007), http://www.eeoc.gov/eeoc/plan/archives/annualreports/par/2007/strategic_plan.html [hereinafter 2007 REPORT].

119. 2009 BUDGET JUSTIFICATION, *supra* note 7, tbl.2.

120. 2007 REPORT, *supra* note 118.

121. 2009 BUDGET JUSTIFICATION, *supra* note 7, tbl.2.

122. The numbers for FY 2006: \$44 million recovered by litigation, \$109 million by mediation. Costs for FY 2006, \$21,975,000 for the mediation program, and \$55,854,000 for litigation. See EEOC, PERFORMANCE AND ACCOUNTABILITY REPORT FY 2006: STRATEGIC OBJECTIVE 1 (2006), <http://www.eeoc.gov/eeoc/plan/archives/annualreports/par/2006/objective1.html> [hereinafter 2006 REPORT] (amounts recovered); 2008 BUDGET JUSTIFICATION, *supra* note 66, tbl.2 (cost).

123. 2008 BUDGET JUSTIFICATION, *supra* note 66.

124. See 2006 REPORT, *supra* note 122; 2008 BUDGET JUSTIFICATION, *supra* note 66, tbl.2.

125. 2008 BUDGET JUSTIFICATION, *supra* note 66.

126. 2006 REPORT, *supra* note 122.

127. EEOC, PERFORMANCE AND ACCOUNTABILITY REPORT FY 2005: STRATEGIC OBJECTIVE 1, http://www.eeoc.gov/eeoc/plan/archives/annualreports/par/2005/mda_objective1.html [hereinafter 2005 REPORT].

128. 2007 PERFORMANCE BUDGET, *supra* note 66, tbl.2.

129. EEOC, FY 2006 PERFORMANCE BUDGET tbl.2 (2005), <http://www.eeoc.gov/eeoc/plan/archives/budgets/2006budget/index.html> [hereinafter 2006 PERFORMANCE BUDGET].

130. EEOC, PERFORMANCE AND ACCOUNTABILITY REPORT FY 2004: STRATEGIC OBJECTIVE 1 (2004), http://www.eeoc.gov/eeoc/plan/archives/annualreports/par/2004/mda_objective1.html [hereinafter 2004 REPORT].

this range, with a recovery of \$149 million¹³¹ and a budget of just over \$55 million.¹³² During this same time frame, FYs 2003–2005, the mediation program always exceeded the recovery ratio of the litigation program, with ratios ranging from a high of 1:7 in FY 2005¹³³ to a low of 1:5 in FY 2003.¹³⁴

This is not to say that the EEOC's litigation program has been a complete failure. Indeed, it has enjoyed some notable successes, even amidst some of the more embarrassing failures of the early years. For instance, EEOC litigation resulted in bringing the entire steel industry under a consent decree to achieve racial desegregation.¹³⁵ Much more recently, the EEOC obtained a consent decree with Walgreens to eliminate racial discrimination in its retail management and pharmacy jobs.¹³⁶ And in 2008, the EEOC announced a \$27 million consent decree entered into with Sidley Austin, a large law firm, to resolve systemic age discrimination against partners in the firm.¹³⁷ However, the EEOC has not had any industry-wide successes in recent years.¹³⁸

D. MANAGEMENT PROBLEMS

Undoubtedly, there have been times when the EEOC has not suffered from poor management. However, it is clear that throughout its existence, the EEOC has been hampered in its effectiveness by management issues. In the early years of its existence, there was significant turnover at the highest levels of the EEOC, contributing to a lack of effective management.¹³⁹ In 1998 and in 2010, the EEOC experienced problems with filling its most senior positions; the EEOC has twice nearly lost its ability to conduct official business because it lacked sufficient commissioners to

131. EEOC, FY 2003 PERFORMANCE AND ACCOUNTABILITY REPORT (2003), <http://www.eeoc.gov/eeoc/plan/archives/annualreports/par/2003/> [hereinafter 2003 REPORT].

132. EEOC, FY 2005 PERFORMANCE BUDGET tbl.2 (2004), <http://www.eeoc.gov/eeoc/plan/archives/budgets/2005budget.html> [hereinafter 2005 PERFORMANCE BUDGET].

133. For FY 2005, the EEOC mediation program recovered \$115 million for victims of discrimination at a cost of just over \$16 million. See 2005 REPORT, *supra* note 127; 2007 PERFORMANCE BUDGET, *supra* note 66, tbl.2 (cost).

134. For FY 2003, the EEOC's mediation program recovered \$116 million at a cost of \$22 million. See 2005 PERFORMANCE BUDGET, *supra* note 132, tbl.2 (cost); 2003 REPORT, *supra* note 131 (amount recovered). The EEOC's performance in FY 2004 was closer to FY 2003 than FY 2005, with \$112 million recovered at a cost of nearly \$20 million. See 2006 PERFORMANCE BUDGET, *supra* note 129, tbl.2 (cost); 2004 REPORT, *supra* note 130 (amount recovered).

135. See Casey Ichniowski, *Have Angels Done More? The Steel Industry Consent Decree*, 36 INDUS. & LAB. REL. REV. 182 (1983) (describing the decree, events leading to it, and effect of the decree).

136. 2007 REPORT, *supra* note 118.

137. 2008 REPORT, *supra* note 58.

138. The EEOC reports annually to Congress on its programmatic successes. In none of its recent reports has it mentioned any industry-wide efforts. See 2008 REPORT, *supra* note 58; 2007 REPORT, *supra* note 118; 2006 REPORT, *supra* note 122; 2005 REPORT, *supra* note 127, app. B; 2004 REPORT, *supra* note 130; 2003 REPORT, *supra* note 131.

139. Hill, *supra* note 94, at 74–75.

do so.¹⁴⁰ Another factor leading to management problems early in the EEOC's existence was the lack of specific responsibilities for the commissioners themselves and, potentially caused by this, significant personal fighting among commissioners during meetings.¹⁴¹ High staff turnover was a problem within the agency.¹⁴² In addition, during these early years there were allegations of significant financial mismanagement and improper handling of discrimination charges, including improper closures of charges, in the EEOC's district offices.¹⁴³

GAO reports from the 1970s to 2006 articulate significant management problems. In the late 1970s, financial mismanagement was so atrocious that Congress called upon the GAO to investigate the EEOC, and the GAO issued a scathing report noting numerous accounting and possibly criminal violations.¹⁴⁴ The Acting Chairman of the EEOC acknowledged the serious financial mismanagement.¹⁴⁵ In the late 1980s and early 1990s, the GAO noted that there were indications that the EEOC investigators were not actually investigating claims that they should have investigated.¹⁴⁶ Instead, they were issuing "no cause" determinations in order to close more files and improve their performance rating.¹⁴⁷ More recently, in a 2005 report, the EEOC itself informed the GAO that it could not comply with certain mandatory self-assessments in part because of "management challenges."¹⁴⁸

Focusing on its most resource-intensive role, the intake unit, a 2008 GAO report noted management failures as indicated by certain key data. Specifically, the EEOC lacked systemic processes to identify effective management of the workload of investigators,¹⁴⁹ who comprise between one-fourth and one-third of the EEOC's total workforce.¹⁵⁰ The GAO

140. See Reginald E. Jones, *Are We Witnessing a Kinder, Gentler EEOC? The EEOC's Task Force Report on Best Private Sector EEO and Diversity Practices and Other Agency Trends*, 14 LAB. LAW. 317, 318–20 (1998) (discussing the lack of sufficient commissioners in 1998); Kevin McGowan, *EEOC Seeks to Rebuild Internally While Awaiting New Agency Leadership*, 10 DAILY LAB. REP. (BNA) S-33 (Jan. 19, 2010) (describing situation in 2010).

141. See Hill, *supra* note 94, at 75, 77.

142. *Id.* at 75.

143. *Id.* at 79.

144. See generally U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/AFMD-82-72, CONTINUING FINANCIAL MANAGEMENT PROBLEMS AT THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (1982), available at <http://archive.gao.gov/f0102/118663.pdf>.

145. *Id.* app. I.

146. EEOC: AN OVERVIEW, *supra* note 83, at 9.

147. See EEOC: AN OVERVIEW, *supra* note 83, at 12 (referencing the high rate of "no cause" determinations and noting that a 1988 report concluded that part of the reason for the high rate was improper closure of files).

148. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-10, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: ACTIONS TAKEN, BUT AGENCY RESTRUCTURING EFFORTS COULD BENEFIT FROM A MORE SYSTEMATIC CONSIDERATION OF ADVISORY PANEL'S RECOMMENDATIONS 3 (2005).

149. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-589, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: SHARING PROMISING PRACTICES AND FULLY IMPLEMENTING STRATEGIC HUMAN CAPITAL PLANNING CAN IMPROVE MANAGEMENT OF GROWING WORKLOAD 37 (2008).

150. See *id.* at 27 (noting total number of non-supervisory investigators between 2004–2008); see also *id.* at 1 (noting the total number of personnel at the EEOC in 2008).

found that there was no correlation between workload of investigators and their ability to close charges in a timely manner.¹⁵¹ Another management failure was the EEOC's inability to complete a human capital plan for more than four years after it was initially required.¹⁵² A third management problem was at the highest levels. According to senior officials, the full Commission failed to take action in a timely manner to approve (or reject) funding for any commitment of funds in excess of \$100,000, which, among other things, delayed efforts on the human capital plan.¹⁵³ These management failures have contributed to the EEOC's ineffectiveness. Furthermore, they are indicative of the need for a complete overhaul of the agency. Making a few changes will not change the culture of the agency. A complete restructuring is needed to revitalize management.

E. LIMITED ROLE IN PROACTIVELY PREVENTING DISCRIMINATION

The primary focus of the EEOC, as discussed above, is on responding to discrimination in the workplace by administratively processing charges of discrimination, investigating them, and litigating them. These are reactive programs in the sense that they respond to claims of discrimination and attempt to remedy those situations. The theory is that this reactive role deters subsequent discrimination. That is not the complete extent of the EEOC's work, however. The EEOC also has some programs designed to proactively prevent (and eliminate) discrimination in the workplace. There are two types of these programs: non-fee-based programs and fee-based programs. Both these programs are quite modest in scale and, as a result, have little hope of significantly decreasing discrimination in the workplace.

1. *General Outreach Efforts: Non-Fee Programs*

The original text of Title VII of the Civil Rights Act of 1964 did not focus much attention on outreach and educational assistance by the EEOC. However, in the Civil Rights Act of 1991, Congress attempted to make this more of a priority for the EEOC.¹⁵⁴ As to victims of discrimination, the EEOC was encouraged to engage in outreach, including outreach to non-English speakers.¹⁵⁵ As to employers, the Act provided the EEOC with the power "to furnish to persons subject to this subchapter such technical assistance as they may request to further their compliance with this subchapter or an order issued thereunder."¹⁵⁶

In keeping with these statutory mandates, the EEOC has undertaken some outreach and educational efforts¹⁵⁷ as well as some initiatives de-

151. *Id.* at 34.

152. *Id.* at 39.

153. *Id.* at 42.

154. *See* 42 U.S.C. §2000e-4(h)(1) (West 2010).

155. *See id.* § 2000e-4(h)(2).

156. *Id.* § 2000e-4(g)(3).

157. One recent outreach effort was focused on educating Arabs and Muslims about employment discrimination after September 11, 2001. *See* News Release, EEOC, EEOC

signed to decrease employment discrimination.¹⁵⁸ The primary outreach and educational efforts appear to be focused on providing information to employers and employees. As the EEOC's website states: "EEOC's outreach programs provide general information about the EEOC, its mission, the employment discrimination laws enforced by EEOC and the charge and complaint process."¹⁵⁹ The "general information" referenced appears to be any information available on the website,¹⁶⁰ which includes¹⁶¹ an overview of the federal anti-discrimination laws,¹⁶² an explanation of the types of employer actions that constitute unlawful discrimination,¹⁶³ and an overview of complaint filing and processing procedures.¹⁶⁴

The EEOC also undertakes hands-on outreach. For instance, in Houston, Texas, the EEOC has worked with nongovernmental entities to get information to Hispanic workers about federal antidiscrimination laws.¹⁶⁵ There have also been periodic initiatives undertaken by the EEOC directed at raising awareness of some potential victims of discrimination, such as the EEOC's Youth@Work initiative¹⁶⁶ and its E-Race initiative.¹⁶⁷

In addition to providing information that appears primarily directed to potential victims of discrimination so that they understand their rights,¹⁶⁸ the EEOC also provides assistance to employers to comply with the laws.

to Receive 'Friend in Government' Award from American-Arab Anti-Discrimination Committee, 2004 WL 2212953, at *1-2 (Oct. 1, 2004) (discussing outreach program).

158. An ongoing initiative is the EEOC's E-Race initiative, which is focused on reducing the most common type of discrimination (race-based). See *E-RACE Goals and Initiatives*, EEOC, <http://www.eeoc.gov/eeoc/initiatives/e-race/goals.cfm> (last visited Oct. 25, 2010).

159. See *No-Cost Outreach Programs*, EEOC, <http://archive.eeoc.gov/outreach/nocost.html> (last modified Mar. 4, 2009).

160. The EEOC also conducts in-person outreach, sometimes working with other entities such as nonprofits. See Shannon Gleeson, *From Rights to Claims: The Role of Civil Society in Making Rights Real for Vulnerable Workers*, 43 LAW & SOC'Y REV. 669, 673-74, 692 (2009) (describing outreach efforts).

161. The website also includes more technical legal information such as the text of federal anti-discrimination laws and regulations, as well as the EEOC's legal guidance and compliance manual, all of which appear to be directed primarily at lawyers rather than laypersons. See *Laws, Regulations and Policy Guidance*, EEOC, <http://archive.eeoc.gov/policy/index.html> (last visited Oct. 25, 2010).

162. See *Federal Equal Employment Opportunity (EEO) Laws*, EEOC, http://archive.eeoc.gov/abouteeo/overview_laws.html (last modified Apr. 20, 2004).

163. See *Prohibited Employment Policies/Practices*, EEOC, <http://eeoc.gov/laws/practices/> (last visited Oct. 25, 2010); *Discrimination by Type*, EEOC, <http://eeoc.gov/laws/types> (last visited Oct. 25, 2010).

164. See *Filing a Charge*, EEOC, <http://eeoc.gov/facts/howtofil.html> (last modified June 10, 1997).

165. See Gleeson, *supra* note 160, at 692.

166. Naomi C. Earp, *Forty-Three and Counting: EEOC's Challenges and Successes and Emerging Trends in the Employment Arena*, 25 HOFSTRA LAB. & EMP. L.J. 133, 145-46 (2007) (describing Youth@Work initiative).

167. See *E-RACE Goals and Initiatives*, *supra* note 158 (describing outreach efforts to potential victims of race discrimination).

168. For example, the EEOC initiative undertaken post-9/11 to address discrimination against Arabs and Muslims appears primarily directed at outreach efforts to potential victims of discrimination. See News Release, EEOC, *supra* note 157 (identifying numerous

One of the sections of the EEOC's website focuses solely on employers.¹⁶⁹ It includes information about employer obligations under antidiscrimination laws¹⁷⁰ and what to expect when a charge of discrimination is filed.¹⁷¹

The EEOC's website is not the only means by which the EEOC provides information to employers and employees. EEOC personnel also speak at panel presentations as well as other events and conferences, providing information in those contexts.¹⁷² However, unless it is charging a fee, the EEOC does little in terms of education and outreach to employers beyond providing information and designating a person in each field office to be a liaison to small businesses.¹⁷³

2. Fee-Based Programs

As part of the Civil Rights Act of 1991, the EEOC was also directed to create a technical assistance and training institute to assist employers in complying with the federal antidiscrimination laws.¹⁷⁴ In 1992, the institute became fee-based when Congress passed the EEOC Education, Technical Assistance, and Training Revolving Fund Act.¹⁷⁵ This law explicitly required that fees be charged for training, education, and technical assistance provided to employers and that the fees bear a "reasonable relationship" to the costs of the assistance provided.¹⁷⁶ It funded the institute with \$1 million initially, to be placed in a revolving fund that would be replenished out of the fees charged to users.¹⁷⁷ Pursuant to this legislative mandate, the EEOC created its "Training Institute."¹⁷⁸ The Training Institute conducts seminars and conferences and also does in-house training at an employer's business location.¹⁷⁹

The Training Institute has not been without problems, however. A performance audit performed in FY 2007 found numerous deficiencies, including a lack of vision for the future of the program, failure to keep pace

outreach efforts aimed at educating victims of discrimination but only once mentioning providing assistance to employers in preventing it).

169. See *Employers*, EEOC, <http://eeoc.gov/employers/> (last visited Oct. 25, 2010).

170. See *2010 EEO-1 Survey*, EEOC, <http://www.eeoc.gov/employers/eeo1survey/> (last visited Oct. 25, 2010) (explaining the annual filing requirements for large employers and federal contractors).

171. See *EEOC Investigations—What an Employer Should Know*, EEOC, <http://archive.eeoc.gov/employers/investigations.html> (last modified Mar. 3, 2003).

172. For instance, the EEOC recently held a public hearing in D.C. regarding age discrimination during the current economic downturn. See Steve Vogel, *Age Discrimination Claims Jump, Worrying EEOC, Worker Advocates*, WASH. POST, July 16, 2009, at A21.

173. See *Small Business Liaisons*, EEOC, <http://eeoc.gov/employers/contacts.cfm> (last visited Oct. 25, 2010).

174. 42 U.S.C. § 2000e-4(j) (West 2010).

175. Pub. L. No. 102-411, 106 Stat. 2102 (1992).

176. *Id.* § 2(A)(iii).

177. *Id.* §§ 2(A), 4.

178. The Training Institute has its own website. See EEOC TRAINING INSTITUTE, <http://www.eetraining.eeoc.gov/viewpage.aspx?ID=030b9cb8-8e56-433c-a410-cc94ccb64b3a> (last visited Oct. 25, 2010).

179. The current offerings are available at the Training Institute website. See *id.*

with technological changes, and funding problems.¹⁸⁰ The size of the Training Institute is also very small; it has only eight full-time staff.¹⁸¹ The EEOC's full-time equivalent (FTE) personnel for FY 2007 were 2,157,¹⁸² which indicates the relative lack of importance of this aspect of the EEOC's operations. The Training Institute's budget is likewise miniscule compared to the EEOC's total budget, with the Training Institute's total costs for FY 2007 at less than \$1 million,¹⁸³ while the EEOC's total budget stood at over \$328 million.¹⁸⁴ With a tiny budget, an inadequate staff, and a lack of vision, the effectiveness of this training and educational program is questionable at best.

F. PUTTING IT TOGETHER: A TIME FOR CHANGES

These numerous failings make the EEOC an agency ripe for reinvention. Making changes in the manner in which the EEOC operates, rather than significant structural changes, has been tried and has shown little evidence of success. For instance, in 2001, the agency was required to submit to the Office of Management and Budget (OMB) its internal workforce analysis and plans to restructure the agency to make it more effective and efficient.¹⁸⁵ The EEOC failed to submit its restructuring plan on time and eventually brought in outside consultants to create one.¹⁸⁶ Even with this outside assistance, it failed to submit the required plan.¹⁸⁷ Ultimately, it decided to streamline some operations by closing some offices and outsourcing some call center operations.¹⁸⁸ However, the EEOC never created a complete restructuring plan, and, as late as 2005, it failed to submit any plans to reorganize its headquarters.¹⁸⁹ The GAO report outlining both the situation and the EEOC's numerous failings illustrates the incredible difficulties of changing the EEOC through incremental means guided by the Agency itself.¹⁹⁰

However, the current administration appears to be willing to embrace new ideas and has appointed those with significant knowledge of the theory of administrative law within the administration.¹⁹¹ And perhaps most

180. EEOC, PERFORMANCE AUDIT OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S EDUCATION, TRAINING AND TECHNICAL ASSISTANCE PROGRAM REVOLVING FUND FY 2007, EXECUTIVE SUMMARY, http://eeoc.gov/eeoc/oig/audit_revolvefund.cfm [hereinafter 2007 PERFORMANCE AUDIT] (last visited Oct. 25, 2010).

181. *Id.*

182. 2009 BUDGET JUSTIFICATION, *supra* note 7, tbl.1.

183. *See* 2007 PERFORMANCE AUDIT, *supra* note 180.

184. 2009 BUDGET JUSTIFICATION, *supra* note 7, tbl.1.

185. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 148, at 1, 29 (describing the OMB requirements).

186. *See id.* at 14.

187. *Id.*

188. *See id.* at 17.

189. *See id.* at 18, 27.

190. *See generally id.*

191. *See* Jonathan Weisman & Jess Bravin, *Obama's Regulatory Czar Likely to Set a New Tone*, WALL ST. J., Jan. 8, 2009, at A4, available at <http://online.wsj.com/article/SB123138051682263203.html> (commenting on the selection of Cass Sunstein to head the White House Office of Information and Regulatory Affairs).

importantly, the EEOC is in the midst of experiencing epic turnover. A 2008 GAO report indicates that by 2012, *all* of the EEOC's senior executives and managers "will be retirement eligible," if not having already retired.¹⁹² The EEOC is currently in the process of hiring a significant number of new employees as the current administration has increased its budget significantly.¹⁹³ And the EEOC has had two new Commission positions filled in 2010.¹⁹⁴ This provides an opportunity to use the wholesale replacement of employees and managers as a means of changing the management culture and bringing in managers who embrace a new, reinvented EEOC.

II. REINVENTING THE EEOC: LEARNING FROM THE PAST AND USING MODERN GOVERNANCE THEORIES TO GUIDE THE RESTRUCTURING

There are five specific ways in which the EEOC should be restructured: (1) the EEOC should no longer be statutorily required to accept, investigate, and conciliate all charges of discrimination and should instead devote resources only to significant claims; (2) the EEOC should be authorized through Title VII amendment to conduct investigations of employer practices, to allow the EEOC to recover attorneys' fees when it prevails in litigation, and to impose fines on employers in cases where the EEOC prevails in litigation; (3) the EEOC should be statutorily authorized to develop a partnership with the federal courts under which the EEOC would provide mediation services to litigants in employment discrimination claims; (4) the EEOC should increase its information-gathering and analysis activities to better identify trends in employment discrimination and address those trends; and (5) the EEOC should devote significantly greater resources to assisting employers with compliance by providing information and conducting training.

These proposals were developed with the goal of creating an optimal federal antidiscrimination agency. For each proposal, I analyze where the EEOC has failed and explain how the proposal avoids these pitfalls. The proposals were also developed in consideration of modern regulatory theories; for each proposal, relevant theoretical justifications are also assessed. In order to understand the regulatory theory involved, a brief overview is necessary.

192. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 149, at 1.

193. McGowan, *supra* note 140, at 1 (noting the need to hire more than 100 new employees in 2010).

194. Press Release, U.S. EEOC, Chai Feldblum Sworn in as a Commissioner of the Equal Employment Opportunity Commission (Apr. 7, 2010), <http://www.eeoc.gov/eeoc/newsroom/release/4-7-10a.cfm> (noting that Jacqueline Berrien was sworn in as Chair of the Commission, and Chai Feldblum as a commissioner, on April 7, 2010).

A. MODERN THEORIES OF EFFECTIVE AGENCIES: GOVERNANCE, NOT TRADITIONAL REGULATION

There are a number of scholars who have critiqued the traditional regulatory model for having structural failures¹⁹⁵ that have contributed to the failure to achieve agency goals.¹⁹⁶ These structural failings include excessive centralization, which creates a one-size-fits-all approach that may not be effective in all situations and locations.¹⁹⁷ Another structural flaw is the difficulty of cross-agency cooperation in an era of multiple potential regulators.¹⁹⁸ A third is the failure of agencies to consider the economic impact of their oversight on those affected.¹⁹⁹ Areas where failure has been identified most commonly include the environmental regulatory area.²⁰⁰ Failure of the regulatory process in the workplace has also been addressed by scholars; however, they primarily focus on safety and health issues rather than antidiscrimination laws.²⁰¹

The flaws with the traditional regulatory model have led to a variety of suggested changes. While critiques of the traditional regulatory model are widespread and have been present for decades, suggested improvements have often merely tinkered with the system, adding features such as consideration of costs and benefits of regulation²⁰² or the interests of all parties directly regulated by the agency.²⁰³ At times, critique has led

195. This is to be distinguished from situational failures of the regulatory process such as a flawed decision by a particular agency not to impose sanctions on a particular entity that is violating the law, or a decision by the legislature not to regulate in a particular area of law at all.

196. See, e.g., Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 3–5 (1997); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 344 (2004); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1805 (1975).

197. See Richard B. Stewart, *Reconstitutive Law*, 46 MD. L. REV. 86, 99–100 (1986).

198. See Keith Cunningham-Parmeter, *A Poisoned Field: Farmworkers, Pesticide Exposure, and Tort Recovery in an Era of Regulatory Failure*, 28 N.Y.U. REV. L. & SOC. CHANGE 431, 451–53 (2004) (discussing the failure of effective regulation of pesticide exposure for farm workers).

199. See Robert W. Hahn et al., *Empirical Analysis: Assessing Regulatory Impact Analyses: The Failure of Agencies to Comply with Executive Order 12,866*, 23 HARV. J.L. & PUB. POL'Y 859, 860–61, 863 (2000) (noting the failure of agencies to conduct effective cost-benefit analyses even when they have annual costs of more than \$100,000,000).

200. See, e.g., Neil Gunningham & Darren Sinclair, *Regulatory Pluralism: Designing Policy Mixes for Environmental Protection*, 21 L. & POL'Y 49, 50 (1999) (discussing the failures of regulation of environmental protection on a national and international level); Richard B. Stewart, *The Future of Environmental Regulation: United States Environmental Regulation: A Failing Paradigm*, 15 J.L. & COM. 585, 585, 587 (1996).

201. See, e.g., David C. Vladeck, *The Failed Promise of Workplace Health Regulation*, 111 W. VA. L. REV. 15, 18 (2008). But see Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 329–30, 335–36 (2005) (discussing the failures of regulation as to a variety of aspects of the workplace, including preventing discrimination, promoting a safe workplace, and ensuring compliance with wage-hour laws).

202. See, e.g., CASS R. SUNSTEIN, *THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION* 3–5, 8 (2002); Susan Rose-Ackerman, *Progressive Law and Economics—And the New Administrative Law*, 98 YALE L.J. 341, 341–42 (1988).

203. See, e.g., Stewart, *supra* note 197, at 102.

to deregulation in a particular area, such as with airline deregulation.²⁰⁴ However, a wholesale reconsideration of the administrative system has also been suggested, with many scholars concluding that the administrative branch of government should be moving toward a governance model and away from a traditional regulatory model.²⁰⁵ While it is impossible to effectively explain governance theories in only a few pages, an overview of some of the ideas generated by these theorists will provide a foundation for the application of governance theories that underlie the proposed changes to the EEOC.

In one of the early explorations of a wholesale change of the regulatory system, Ian Ayres and Jon Braithwaite advocated moving from traditional regulation to what they termed "responsive regulation."²⁰⁶ Responsive regulation contains several key features.²⁰⁷ First, Ayres and Braithwaite argue that agencies need "big sticks"; that is, significant power to punish bad behavior.²⁰⁸ This power to reactively punish should not be the primary focus of an agency; instead, the focus should be on preventing unwanted behavior and persuading corporate actors to engage in desirable behavior.²⁰⁹ As the authors state: "[t]he trick of successful regulation is to establish a synergy between punishment and persuasion," neither approach being fully successful on its own.²¹⁰ Using a punishment approach will undermine voluntary self-compliance in some circumstances, while some entities will not comply unless the costs of noncompliance are sufficient.²¹¹ Thus, they articulate what is termed "TFT," short for "tit-for-tat," under which regulators assume voluntary compliance until faced with violations.²¹² A second component to their concept of responsive regulation is the enforcement pyramid.²¹³ Regulators start with the least-punitive approach, that is, persuasion, and then escalate the response to violations bit-by-bit until the regulated entity complies.²¹⁴ Drawing heavily on economic and game theory as well as sociological research, their vision is of a regulator who begins with a presumption of trust and uses

204. See Michael E. Levine, *Revisionism Revised? Airline Deregulation and the Public Interest*, 44 *LAW & CONTEMP. PROBS.* 179, 179-80 (1981). Some of the suggested changes to the traditional model devolve from purely political positions, as with the generalized Republican push for deregulation. See Lobel, *supra* note 196, at 354. This is not what I mean by a more modern approach to regulation.

205. See, e.g., Freeman, *supra* note 196, at 4; Lobel, *supra* note 196, at 344.

206. IAN AYRES & JON BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 3-4 (Donald R. Harris et al. eds., 1992).

207. See *id.* at 5-6.

208. See *id.* at 19.

209. *Id.*

210. *Id.* at 25. Ayres & Braithwaite use game theory and sociological research to support this approach. *Id.* The fundamental idea is that at times, individuals are motivated by rational self-interest, by which legal compliance is secured best by deterring bad behavior (punishment model), while at other times, individuals are motivated by other factors such as a desire to do the "right thing," by which legal compliance is best secured using voluntary approaches. See *id.* at 20, 22, 24-25.

211. See generally *id.* at 19-53.

212. *Id.* at 19, 21-22.

213. *Id.* at 20.

214. *Id.* at 35.

the fear of substantial punishments, not minor fines, to cajole compliance on an individual level and to create a culture of compliance on an industry level.²¹⁵

Furthermore, Ayres and Braithwaite advocate for a tripartite structure of regulation, giving private interest groups an active role in regulation to act as guardians against agency capture and to assist in ensuring that the interests of the public are not lost.²¹⁶ Another key aspect to their model involves enforced self-regulation by companies, where companies create the applicable rules, the agency approves the rules, and then the agency has oversight authority focusing on ensuring that the compliance group within the company is functioning effectively and, if not, the agency sanctions the company.²¹⁷

Jody Freeman subsequently articulated a somewhat similar model of administration, calling it collaborative governance.²¹⁸ Freeman's model "views the administrative process as a problem-solving exercise in which parties share responsibility for all stages of the rule-making process, in which solutions are provisional, and in which the state plays an active, if varied, role."²¹⁹ There are five key features of Freeman's model:²²⁰ (1) a "problem-solving orientation" of the agency, using collaboration and face-to-face discussions to achieve quality solutions;²²¹ (2) broad participation in the administrative process, both in formulating questions and identifying problems as well as in suggesting appropriate action and resolutions;²²² (3) provisional solutions and a commitment to revisiting issues in light of the changing societal context and scientific developments;²²³ (4) oversight functions located in entities other than the agency itself, including non-traditional arrangements such as self- and third-party monitoring;²²⁴ and (5) flexible agency roles such as facilitator of multi-party negotiations to resolve problems, information provider, and consensus builder, in addition to the traditional role of enforcer.²²⁵

As is evident from quick comparison of the features of responsive regulation and collaborative governance, they share certain core ideas. Recognizing these similarities, as well as drawing on the works of other scholars in this field, Orly Lobel recently synthesized the works of these scholars into a new governance model that shifts the core concepts of regulation in the following ways.²²⁶ First, rather than relying on experts to make top-down decisions, the governance model is participatory and

215. See generally *id.* at 50–53.

216. See *id.* at 54–60.

217. *Id.* at 106–07.

218. Freeman, *supra* note 196, at 4–6.

219. *Id.* at 6.

220. See *id.* at 22.

221. *Id.* at 22–27.

222. *Id.* at 22, 27–28.

223. *Id.* at 22, 28–29.

224. *Id.* at 22, 30–31.

225. *Id.* at 22, 31–33.

226. See Lobel, *supra* note 196, at 344.

collaborative in nature.²²⁷ For example, instead of experts deciding on the substantive law and then delivering services, affected parties have a significant voice in determining substance as part of an ongoing dialogue with the agency.²²⁸ Third-party agents, including private sector and non-profit entities, can be involved in the delivery of governmental services.²²⁹ Second, in lieu of a uniform approach, the governance model embraces a multiplicity of approaches; it recognizes that not all situations are alike and that diversity is helpful in achieving the administrative agency's goals.²³⁰ Third, governance promotes decentralization of decision-making and provision of services at the locality level rather than by a centralized authority.²³¹ Fourth, the regulatory view of separate domains involving discrete areas of law is replaced by a holistic, broader perspective, encouraging consideration of related fields of authority and law to better determine appropriate action.²³² Fifth, governance models stress flexibility of approach and the use of noncoercive tactics (so-called "soft law") rather than relying solely on government enforcement standards or rules.²³³ Sixth, the governance model replaces ideas of infallibility and inflexibility of regulatory regimes with their opposites, celebrating change, responsiveness to change, and a recognition that trial and error is inevitable, especially given constant social change.²³⁴ Seventh, in order to prevent problems potentially caused by deregulation and decentralization, the governance model adds the concept of orchestration; that is, one of the roles of an administrative agency is to coordinate efforts at the local, state, and national levels to ensure coherence and find the appropriate level (local, state, or national) at which decisions should be made.²³⁵ Not all these ideas are relevant to the EEOC. However, at least one governance concept supports each of the following proposals.

B. EXPLANATION AND ANALYSIS OF PROPOSED CHANGES TO THE EEOC

1. *Proposal One: Eliminating Charge Investigation and Focusing on Significant Litigation*

First, as others have articulated before me, the EEOC's charge-processing obligations need to be eliminated.²³⁶ This will allow the

227. *Id.*

228. *Id.* at 378.

229. *Id.* at 374-75. Lobel discusses participatory and collaborative features separately. *See id.* at 348. I find them so intertwined that they are more readily understood together.

230. *Id.* at 379-81.

231. *Id.* at 381.

232. *Id.* at 385-86.

233. *Id.* at 388-89.

234. *Id.* at 395-96.

235. *Id.* at 400.

236. *See Selmi, supra* note 4, at 3 (suggesting that the EEOC's charge-processing functions are an expensive way of screening out non-viable claims and that they should be eliminated); *Green, supra* note 23, at 311-14 (advocating the use of mandatory mediation as a potential solution to the problem of insufficient resources to investigate and resolve charges effectively).

agency to focus its limited resources²³⁷ on more effective techniques of combating and eliminating discrimination. Claims by employees of discrimination should be treated as other federal civil rights claims are and should be brought in federal courts without first mandating the EEOC administrative process.

This elimination of an incredibly expensive function is the foundation of all that follows. The elimination of the administrative charge-processing role is justified because of all the problems with it identified in Section I.A above: it is costly and has never been and cannot be done effectively. From a pragmatic perspective, the EEOC does not need to investigate all claims of discrimination any longer. In the wake of the Civil Rights Act of 1991, with the allowance of compensatory damages and jury trials,²³⁸ the increased incentives for private attorneys to undertake the cause of investigating and representing victims of discrimination suggest that the EEOC's efforts are not needed in many cases.²³⁹ As Professor Selmi found in his research, private attorneys appear to do a better job recovering damages for their clients than do EEOC attorneys.²⁴⁰ In addition, there are non-profit entities that also represent victims who may not have access to an attorney.²⁴¹ In short, there is no real need for the EEOC to attempt to investigate all the individual claims that involve settled issues of law—these can be handled by other groups in society. Furthermore, the ability and need for the EEOC to act as an investigator in all cases is questionable at best. The agency itself recognizes this in its systemic tracking system under which some charges filed with it will not be investigated at all.²⁴²

Modern governance models support the goal of investigating and litigating only significant claims. Specifically, leaving enforcement in the

237. The EEOC has never been funded at a level that would allow full investigation of all charges filed with it. See Kathryn Moss et al., *Unfunded Mandate: An Empirical Study of the Implementation of the Americans with Disabilities Act by the Equal Employment Opportunity Commission*, 50 U. KAN. L. REV. 1, 104 (2001) (noting that “[t]he history of the EEOC . . . can be seen as a series of attempts to deal with the inescapable fact that the Agency lacked the resources to do the job it had been assigned to do”).

238. 42 U.S.C. § 1981a(a)(1), (c)(1) (2006).

239. See Selmi, *supra* note 4, at 3–4.

240. See *id.* at 23.

241. There are numerous legal aid organizations that provide assistance with claims of employment discrimination. See, e.g., *Employment Law Project*, THE LEGAL AID SOCIETY, <http://www.legal-aid.org/en/civil/civilpractice/employmentlawproject.aspx> (last visited Oct. 21, 2010) (describing the New York Legal Aid Society's Employment Law Project, which provides assistance on employment issues including discrimination claims); *About*, THE LEGAL AID SOCIETY—EMPLOYMENT LAW CENTER, <http://www.las-elc.org/about.html> (last visited Oct. 21, 2010) (describing the San Francisco area Legal Aid Society's Employment Law Center, which provides counseling on employment discrimination as well as conducting employment discrimination litigation); *Free & Low Cost Legal Services in Utah*, “AND JUSTICE FOR ALL” (2008), <http://andjusticeforall.org/Legal%20Aid%20Resource%20Guide.pdf> (describing available legal aid in Utah, including the Utah Legal Services, which provides representation and counseling in the area of employment discrimination); *About Us*, LEGAL AID SOCIETY OF ROANOKE VALLEY, <http://lasrv.org/AboutUs.cfm?pageName=AboutUs> (last visited Oct. 21, 2010) (describing the Roanoke Legal Aid Society's mission, which includes representing individuals in employment discrimination cases).

242. See *supra* notes 199–202 and accompanying text.

hands of private parties is consistent with the governance concept of devolving government involvement to the entities best equipped to handle it and, where enforcement is effective in private hands, leaving it there.²⁴³ In this situation, much of Title VII enforcement is at least as effective in the hands of private attorneys as it is with the EEOC.

In addition to the practical impossibility of investigating all charges and the growth of private attorney representation, which indicates a decreased need for EEOC investigation, governance theory suggests that by focusing attention, even if limited, on all claims, the EEOC hampers its mission. This occurs because those who are regulated, employers, perceive the agency as nit-picking when it uses resources to address all complaints of discrimination.²⁴⁴ As a result, employers lose respect for the agency and are less inclined to comply with the agency.

An example of a situation that would lead to employer disgruntlement with the EEOC may help illustrate the problem. Assume an employee claims a co-worker does not like him because of his religion. The co-worker has never expressed by words or actions anything about the employee's religion, but the employee is convinced that the co-worker is harboring ill will. The co-worker has no authority over the employee and has no say in the employee's job responsibilities. The co-worker is admittedly antisocial. He does not talk to people at work other than to respond to work-related questions. The employee is convinced that this unwillingness to socialize with co-workers is, when directed at him, because of religion, even though the co-worker is universally antisocial. The employee files a charge of discrimination with the EEOC. The EEOC must accept the charge. Even if the EEOC ultimately decides that there is no basis for the charge, it must devote sufficient attention to it to make this determination. The employer is aware of the charge and that it is pending with the EEOC. In the eyes of the employer, any attention by the EEOC to this charge is too much attention—why is it, thinks the employer, that the EEOC is not focusing on meritorious claims?

The EEOC needs the authority to decide which claims to accept and which ones to allow private attorneys to handle. At present, it has to accept them all, contributing to the employer perception that the EEOC wastes employers' time and that it is insignificant to have an EEOC charge pending. This perception detracts from the EEOC's ability to create a meaningful system of preventing or remediating discrimination.²⁴⁵ From the employee's perspective, the EEOC's current structure and practice may mislead the employee by appearing to promise an investiga-

243. See Freeman, *supra* note 196, at 30–31.

244. See AYRES & BRAITHWAITE, *supra* note 206, at 50–53.

245. The EEOC itself has recognized the need to focus greater resources outside of its intake role. When it adopted its National Enforcement Plan, it identified a three-pronged approach to eliminating discrimination. The first prong identified was engaging in education and outreach. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION NATIONAL ENFORCEMENT PLAN, *supra* note 46.

tion of every charge.²⁴⁶

I propose to redefine the EEOC's charge processing role to become an investigator and litigator of only significant claims. The EEOC would no longer intake all complaints of discrimination. Title VII would need to be amended to make this change.²⁴⁷ Shedding the charge-processing role will eliminate a significant set of responsibilities for the agency. It will not have to provide personnel to assist in filing complaints.²⁴⁸ It will not have to manage a huge volume of complaints.²⁴⁹ It will not have to produce and mail thousands of right-to-sue letters that currently are required to trigger an employee's right to bring suit in court.²⁵⁰

The EEOC should focus on investigating and litigating significant claims. Significant claims are those claims involving novel and important legal issues, such as claims that have potential to develop the law. Significant claims also include those of systemic discrimination as well as discrimination that is endemic in a particular industry or field, even if only a single person is affected in any given workplace. This is consistent with the EEOC's own articulation of appropriate use of its resources.²⁵¹ Furthermore, the EEOC should not focus on claims where it lacks the capacity to effectively investigate. Instead, the EEOC should limit the number of its cases so that it can provide sufficient resources to do the job properly when it elects to do so.²⁵²

Limiting the EEOC's litigation to significant claims is necessary for many of the reasons described above. In addition to these rationales, the reality is that the EEOC has already tried other systems, and they have failed. The EEOC has tried twice to investigate and litigate all meritorious claims, with the result that it has become completely overwhelmed by the sheer numbers involved.²⁵³ Recognizing this, the EEOC has been moving in the direction I advocate. This process began in the mid-1990s, when the EEOC created a National Enforcement Plan (NEP) as well as

246. See Moss et al., *supra* note 237, at 3–4 (suggesting that employees are misled because while only a small number of charges actually receive an investigation, the administrative system suggests that all individual claims will receive one).

247. Title VII currently establishes basic requirements to file a charge of discrimination and requires the EEOC to investigate all charges filed. 42 U.S.C. § 2000e-5(b) (2006).

248. While this may seem to be a simple task because the charge filed with the EEOC is a prerequisite to sue in court, filing a charge properly is complex enough to fill 29 C.F.R. § 1601.6 through § 1601.14. U.S. EEOC Procedure for the Prevention of Unlawful Employment Practices, 29 C.F.R. §§ 1601.6–.14 (2008).

249. In FY 2009, there were over 93,000 charges filed with the EEOC. See *Charge Statistics FY 1997 Through FY 2009*, EEOC, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Sept. 10, 2010).

250. See U.S. EEOC Notice of Right to Sue: Procedure and Authority, 29 C.F.R. § 1601.28 (2008).

251. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION NATIONAL ENFORCEMENT PLAN, *supra* note 46.

252. The EEOC was recently hit with a \$4.5 million attorneys' fees award in a case where the court repeatedly denounced the agency for its failure to investigate the allegations before filing suit. *EEOC v. CRST Van Expedited, Inc.*, No. 07-CV-95-LRR, 2010 WL 520564, *7–8, *20 (N.D. Iowa Feb. 9, 2010). Perhaps if the agency were not overwhelmed with the number of claims it must handle, it could have avoided this costly error.

253. See *supra* Part I.B.

Local Enforcement Plans (LEPs) for each field office.²⁵⁴ The NEP articulated a litigation strategy focused on three categories of cases: (1) cases involving legal violations that have a potential impact beyond the immediate parties (but not limited to systemic discrimination); (2) cases with the potential to develop the law in the direction consistent with eliminating discrimination; and (3) cases involving the EEOC policies or practices, such as cases testing EEOC regulations or guidance.²⁵⁵ As is evident, the NEP has significant overlap with my proposal to limit EEOC litigation to significant claims. The goal of the LEPs was to develop a "strategic, focused enforcement plan."²⁵⁶ This effort was hampered by lack of coordination on both a national and local level.²⁵⁷ The EEOC's field offices appeared to differ with respect to what the focus of enforcement should be.²⁵⁸ In addition, the LEPs were overly focused on how each office would manage its inventory of charges.²⁵⁹

While the NEP and LEPs have moved the EEOC in the direction I advocate, they have not solved the EEOC's problems, and more permanent structural changes are needed to effectuate long-term change. The current triage process for handling charges could be changed by EEOC management at any time. In fact, it has been changed several times over the course of the EEOC's existence.²⁶⁰ As discussed in Part I, the EEOC has gone back and forth over time as to how to manage its intake role, without success.²⁶¹ It is time to change the EEOC's role permanently to eliminate this function.

As to the downsides of removing the current statutory mandate that the EEOC accept, investigate, and conciliate all charges filed with it, the benefits of the charge processing system in its current state appear to be threefold: (1) it provides information about systemic discrimination to the EEOC to investigate and potentially litigate; (2) it may screen out some non-meritorious claims; and (3) as to charges where the parties agree to mediate, the EEOC has been quite successful in resolving charges. All these benefits can be captured without the cost of the cumbersome, complex, and expensive charge management system.

First, as discussed in Part II.B.4, modern governance theory suggests that the EEOC should update and expand its information-gathering function.²⁶² The data gathered can be used to determine what companies are

254. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION NATIONAL ENFORCEMENT PLAN, *supra* note 46.

255. *Id.*

256. See EEOC, PRIORITY CHARGE HANDLING TASK FORCE LITIGATION TASK FORCE REPORT (Mar. 1998), http://www.eeoc.gov/eeoc/task_reports/charge_handling.cfm (Section IV).

257. *Id.* (Section III).

258. *Id.* (noting the need for change so that "LEPs of all field offices, when taken as a whole . . . set forth a comprehensive national law enforcement program").

259. *Id.* (Section V).

260. See *supra* Part I.B.

261. See *supra* Part I.

262. See *supra* Part II.B.4.

investigated for potential systemic discrimination. In addition to this source of information, the EEOC could also establish an online and/or phone-operated system to allow those with information about systemic discrimination to report it. Rather than being legally obligated to sift through tens of thousands of charges and categorize each one, the EEOC would be able to self-select the complaints it investigates and direct its attention to areas that are most important.

Second, the benefit of screening out nonmeritorious cases is questionable at best. This is because the EEOC cannot bar a plaintiff from seeking redress through the courts; all it can do is issue a right-to-sue letter and inform the plaintiff that the EEOC does not believe that there is a claim.²⁶³ Employees are still free to sue in federal court if they wish.²⁶⁴ Furthermore, this role of telling employees that they lack a viable claim will end up being filled by private attorneys in the absence of the EEOC. Because these claims are taken on a contingency basis, plaintiffs' lawyers are incentivized to screen out nonmeritorious claims and refuse to take them. Employees will still be able to bring suit in federal court, but the number of those who will seems unlikely to be much different whether a plaintiff's lawyer, an EEOC employee, or no one (as is frequently the case now for claims that do not get investigated) tells them that they do not have a viable claim.

Third, the EEOC's mediation role will be preserved in a slightly different form, as discussed in Part II.B.3, maintaining this effective program.

2. *Proposal Two: Promote Effective Self-Regulation by Developing Model Policies and Conducting Training and Outreach*

With significant resources made available by eliminating charge processing, the question inevitably becomes how those resources should be allocated. The EEOC should use these resources to assist employers in creating effective self-regulatory regimes. Thus, the second component to the restructured EEOC is the development of a large section of the agency devoted to (1) providing information and (2) conducting outreach and training for employers.

The rise of self-regulation as an integral part of the administrative enforcement of employee rights is evident.²⁶⁵ It is one of the hallmark features of modern governance theories.²⁶⁶ But a crucial concern that arises in self-regulatory systems is the need to ensure that the self-regulation is effective.²⁶⁷ There are two components to this. First, the employer has to adopt appropriate policies and practices.²⁶⁸ Second, there needs to be

263. See 42 U.S.C. § 2000e-5 (2006).

264. *Id.*

265. See CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE* 77–78 (2010).

266. See AYRES & BRAITHWAITE, *supra* note 206, at 131–32.

267. See ESTLUND, *supra* note 265, at 99 (noting that Wal-Mart had adopted policies and practices that indicated compliance with legal standards but failed to enforce them).

268. See *id.* at 75–104 (providing examples of employer-created policies and practices to comply with workplace laws).

some mechanism to provide oversight.²⁶⁹

In the area of employment discrimination, Professor Estlund has posited that a system of enforced self-regulation, which she refers to as co-regulation, currently exists.²⁷⁰ Employers are encouraged to self-regulate and to create antidiscrimination policies and practices because of Supreme Court cases that have created defenses to discrimination claims for employers who have such policies and practices.²⁷¹ Employers' self-regulation is overseen by the courts, as the employers' policies and procedures must be effective in order for the defense to be applicable.²⁷²

The EEOC should become an active participant in the enforced self-regulation of employers. The EEOC can become an effective participant by assisting employers in developing policies and procedures that are the heart of employer self-regulation. In addition, where self-regulation fails, the EEOC must be enabled to become a more powerful force in enforcement.

The EEOC already provides some assistance to employers in the development and implementation of effective antidiscrimination policies and procedures, but this is insufficient. At present, the EEOC does not offer to employers examples of good personnel policies and practices that are consistent with federal antidiscrimination laws and promote the EEOC's goal of eradicating employment discrimination.²⁷³ The EEOC should provide examples of sound employer policies and practices.²⁷⁴ I envision the EEOC providing several types of information in this category. First, and most basic, the EEOC should develop a sample equal employment opportunity policy. While the EEOC has posters covering the basics of federal antidiscrimination laws,²⁷⁵ this effort should be expanded. Most mid-sized and large employers have employee handbooks. Employees are encouraged or, in some instances, required to read these handbooks. Employers do not require or encourage employees to read the posters

269. See AYRES & BRAITHWAITE, *supra* note 206, at 104–06 (advocating having a corporate compliance officer who would be responsible for reporting violations to the government); ESTLUND, *supra* note 265, at 75–130 (identifying different manners of enforcing the self-regulation).

270. See ESTLUND, *supra* note 265, at 83–88.

271. See *id.* at 86–87 (discussing the effects of *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998), *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999)).

272. See *id.* at 88. Professor Estlund acknowledges that it is not yet clear whether this oversight is effective, as courts could cursorily assess the employer's policies and practices.

273. The EEOC website offers limited guidance to employers on what constitutes prohibited discrimination: that is, what cannot be done. It does not, however, provide specific positive guidance on what employers should be doing. See, e.g., *Policy Guidance Documents Related to Age Discrimination*, EEOC, http://eeoc.gov/laws/types/age_guidance.cfm (last visited Oct. 21, 2010) (providing general policy guidance on age discrimination in employment but failing to provide model policies or practices for employers).

274. I am not the only former employer representative to note that the EEOC needs to provide greater assistance to employers in order to assist them in complying with the law. Former Commissioner Reginald Jones has also noted this need. See Jones, *supra* note 140, at 320.

275. See *Publications Request Form*, EEOC, <http://www.eeoc.gov/eeoc/publications> (last visited Oct. 21, 2010).

that line the walls of break rooms. It would be fairly easy for the EEOC to develop sample equal employment opportunity policies. This type of policy was one of the very first policies that I, as an attorney in private practice, advised clients to include in their handbook. Not all employers have attorneys to advise them to do so, and even if there is a human resources officer, it is not certain that person will have the expertise to draft such a policy. It was my experience that many policies seemed to be e-mailed from company to company. Some were good; others were not. The EEOC could make immediate change by providing a sample policy on its website that employers could at least use as a good basis for their own policy. Other federal agencies provide this type of assistance: for instance, the Occupational Safety and Health Administration (OSHA) provides many sample policies to employers.²⁷⁶

Second, the EEOC should develop frequently asked questions (FAQs) for employers to address common scenarios employers face²⁷⁷ and provide guidance on how employers should handle such scenarios.²⁷⁸ For instance, there is a body of research indicating that applicants with non-white-sounding names are less likely to receive an interview than applicants with white-sounding names.²⁷⁹ The EEOC could explain different ways that employers could avoid this type of bias in a FAQ section devoted to hiring. Other common hiring issues include such problems as employers not knowing what questions to ask and what questions they should not ask of applicants.

While the EEOC has provided guidance on this topic, the guidance is not in a location or format helpful to employers. For instance, the EEOC website provides an overview of what is illegal for employers to do.²⁸⁰ The page is overwhelming and poorly organized. It starts with an explanation of what is illegal in the hiring process, moves into unlawful behav-

276. See, e.g., *Hazard Communication HAZCOM Programs*, OSHA, <http://www.osha.gov/dsg/hazcom/solutions.html> (last visited Oct. 21, 2010) (providing sample Hazard Communication Plan for bloodborne pathogens).

277. The EEOC has developed some FAQs. However, the FAQs are focused on very specific types of discrimination and are for the benefit of employees. See, e.g., *Youth at Work Religious Discrimination—FAQs*, EEOC, <http://www.eeoc.gov/youth/religion2.html> (last visited Oct. 21, 2010).

278. The EEOC did focus on developing an understanding and providing examples of employer “best practices” in the 1990s. However, the results of the EEOC’s work, including examples of employers’ practices that promote diversity in the workplace and prevent discrimination, are not included directly on its website. Instead, they are located in a task force report (which can be obtained on the website, but is difficult to locate, and the material is not presented in a readily-usable format). See *Best Practices of Private Sector Employers*, EEOC, http://www.eeoc.gov/eeoc/task_reports/best_practices.cfm (last visited Oct. 21, 2010). The results are also available in a law review article written by a Commissioner. See generally Jones, *supra* note 140 (describing the EEOC’s work and providing concrete examples of best practices). In addition, the EEOC decided to use the results in its presentations. See *id.* at 337.

279. See, e.g., Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 1011 (2004).

280. See *Prohibited Employment Policies/Practices*, EEOC, <http://eeoc.gov/laws/practices/index.cfm> (last visited Sept. 10, 2010).

ior in the terms and conditions of employment, and then discusses discharge and discipline. After that, it goes back to terms and conditions with a focus on harassment and then moves to pre-employment questioning. There appears to be no rational organizational effort. Furthermore, the content is extremely limited, with much of the substance stating repetitively that it is illegal to discriminate. There appears to have been no attempt to provide specific examples of lawful versus unlawful conduct.²⁸¹ Employers are forced to resort to paying attorneys for answers to basic questions because the EEOC has failed to provide this information to the public in a useful manner.²⁸²

Beyond such basic information, the EEOC can also promote diversity in employment by providing accessible, useful guidance on employer best practices. Identifying these best practices is something the EEOC has done in the past and could replicate at present. For instance, in 1997, the EEOC created a task force devoted to defining and identifying such best practices in employment.²⁸³ The task force released a report on these best practices.²⁸⁴ The failure on the part of the EEOC was not the work it did²⁸⁵ but instead what it did with that work—it failed to proactively disseminate the information in the report to employers to enable them to change workplace policies and procedures.²⁸⁶ The next step, taking the information obtained and converting it into useful material for employers, is essential to the success of any EEOC program to decrease employment discrimination in the workplace. More recently, the EEOC did create a “Best Practices” webpage focusing on preventing discrimination against those persons who have caregiving (family) responsibilities.²⁸⁷ The information on the page is helpful and understandable. However, the page is buried in the EEOC website and is extremely difficult to locate.²⁸⁸ The lack of readily-available positive examples of best practices

281. *See id.*

282. *See* Susan Bisom-Rapp, *Discerning Form From Substance: Understanding Employer Litigation Prevention Strategies*, 3 EMP. RTS. & EMP'T POL'Y J. 1, 14–34 (1999) (discussing the extent to which employers rely upon lawyers to advise them on complying with antidiscrimination laws).

283. *See* Press Release, U.S. EEOC, Commission Releases Task Force Report on “Best” Private Sector EEO Efforts (Dec. 22, 1997), <http://www.eeoc.gov/eeoc/newsroom/release/12-22-97.cfm>.

284. *See id.*

285. The report is quite detailed and contains useful information about the concept of best practices, as well as specific examples of what employers have been doing that have proven to be effective. *See Best Practices of Private Sector Employees*, *supra* note 278.

286. It is not clear what the EEOC did with the report, other than posting it on its website, and issuing a press release, but it could not have done very much to publicize it. In the years immediately following the EEOC's release of the task force report, I assisted employers in designing, modifying, and conducting litigation involving their employment policies. Despite being active in the area and attending conferences focusing on employment discrimination laws, I do not recall knowing about it until I began researching this Article.

287. *See Employer Best Practices for Workers with Caregiving Responsibilities*, EEOC, <http://www.eeoc.gov/policy/docs/caregiver-best-practices.html> (last visited Oct. 21, 2010).

288. It is not listed among the materials listed to assist employers. It can be found if one knows it exists by doing a search of the website using “best practices”; however, this is

may be contributing to the development of a defensive strategy by employers to limit the viability of discrimination claims. Without best practices, employers turn to defensive strategies to deter employment discrimination claims.²⁸⁹

Providing these types of information to employers would make the EEOC more of a partner with employers, in preventing discrimination, rather than only being seen by employers as an employee-advocating agency. However, merely providing information is only the first step in expanding its partnership with employers. I also propose that the EEOC should greatly expand its employer-training program. As discussed in Part I.E., the EEOC is currently authorized to have a fee-based training program.²⁹⁰ This program is tiny.²⁹¹ The program should be greatly expanded and fees should be significantly reduced. The program should be expanded to create a group of full-time attorneys who oversee a staff of employees that conduct training programs nationwide. The first targeted audience should be smaller employers covered by the federal antidiscrimination laws. Large employers should be a lesser concern, simply because of the reality that many larger employers do have sufficient resources to obtain counsel from private attorneys to comply with federal antidiscrimination laws.²⁹² Smaller employers lack the finances to pay for private attorneys and also frequently lack a human resources department.²⁹³

These training programs should have three components: (1) educating attendees on federal antidiscrimination laws; (2) training attendees to present information at their own workplaces; and (3) offering open question and answer sessions. Through these training programs, the EEOC will gain valuable insight into the kinds of problems that employers are handling on a day-to-day basis, which can be used to shape future training programs as well as the FAQs that the EEOC puts on its website.

As experience presenting at several such training programs in the private sector (provided by large law firms) makes clear, when the training is

of little use to an employer who is browsing the website looking for guidance on complying with the antidiscrimination laws.

289. See generally Bisom-Rapp, *supra* note 282, at 3 (describing the increasing use of defensive strategies by employers and positing that such strategies may conceal discrimination).

290. See *supra* Part I.E.

291. See *supra* Part I.E.2; 2009 BUDGET JUSTIFICATION, *supra* note 7.

292. Bisom-Rapp, *supra* note 282, at 14–16.

293. The EEOC recognizes this fact. Its website informs small businesses that if they have questions not answered on the website, they can contact a small business liaison. See *Employers*, EEOC, <http://eeoc.gov/employers/index.cfm> (last visited Sept. 10, 2010). However, there are only fifty such liaisons nationwide. See *Small Business Liaisons*, EEOC, <http://eeoc.gov/employers/contacts.cfm> (last visited Sept. 10, 2010). Given that, as of 2006, there were more than five million businesses in the U.S. with fewer than twenty employees, each liaison would be responsible for approximately 100,000 businesses. See *Statistics of U.S. Businesses*, U.S. CENSUS BUREAU (2007), <http://www.census.gov/econ/susb/> (providing the most recent data on small businesses in the United States). It is doubtful that these liaisons can effectively assist a significant number of the businesses for which they are responsible.

free, there is no lack of attendees. At the outset, these training programs should be conducted free of charge to get the word out that they are valuable and useful. After the programs become accepted and space becomes limited, the EEOC should impose charges on employers, using a sliding scale based on an employer's size.

Another possible means for the EEOC to assist employers is to provide hands-on assistance. Using its data from the EEO-1 surveys, the EEOC can identify workplaces that do not have a workforce that mirrors the available labor pool.²⁹⁴ These employers can be contacted and notified of the discrepancy. The EEOC can provide its suggested policies and practices for improving workplace diversity to these employers. It can also offer personalized assistance. This type of assistance, having the potential to be very labor-intensive, and thus expensive, should be directed toward specific industries that the EEOC is targeting to improve labor participation rates of underrepresented groups.²⁹⁵

Combining information-providing and training directed at those with the ability to prevent discrimination from occurring—employers—will result in increased compliance with federal antidiscrimination laws in a more effective manner than the current EEOC approach, which is primarily reactive in nature. It will decrease the need for costly litigation to deter discrimination and help ensure that the EEOC is not operating in an information vacuum when it comes to employer concerns.

3. *Proposal Three: Increase EEOC Enforcement Powers*

Turning to the enforcement and oversight component of self-regulation, as noted in Part I, *supra*, the EEOC has always had limited enforcement authority.²⁹⁶ To ensure effective self-regulation, the EEOC needs to have sufficient clout to be able to spur recalcitrant employers to comply with the law.

In order to obtain employer cooperation and ensure effective self-regulation, the EEOC needs to engender greater fear in employers of EEOC litigation. The EEOC has no real powers it can use against employers other than its limited subpoena power²⁹⁷ and the ability to litigate cases.²⁹⁸ Employers already face the threat of document production requests (akin to the subpoena power) and the overall threat of litigation

294. This mirrors what the Occupational Safety and Health Administration recently did when it notified employers who had high levels of workplace injuries of their high levels, made suggestions for preventing injuries, and offered assistance to any employer who was interested. See News Release, OSHA, U.S. Labor Department's OSHA Notifies 15,000 Workplaces Nationwide of High Injury and Illness Rates (Mar. 9, 2010), http://osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=17238.

295. OSHA maintains a policy of providing compliance assistance to any employer who requests it, but it gives priority to small employers in industries where workplace hazards are particularly high. See OSHA's FIELD OPERATIONS MANUAL 2-2 (2009), http://osha.gov/OshDoc/Directive_pdf/CPL_02-00-148.pdf.

296. See 42 U.S.C. § 2000e-5(b)-(d) (2006).

297. See *id.* § 2000e-9; 29 U.S.C. § 161 (2006).

298. See § 2000e-5 (establishing enforcement powers of the EEOC).

from private sector attorneys;²⁹⁹ EEOC litigation is no worse than litigation from private sector attorneys for reasons discussed below. This means that the EEOC has no significant leverage against employers to ensure cooperation.

In addition to its current authority to subpoena records and litigate cases, the restructured EEOC needs to have the authority (1) to investigate employer policies and practices to determine whether there is unlawful discrimination present and (2) to obtain attorneys' fees and fines against employers who engage in unlawful discrimination.

As to the first point, the EEOC already has some investigative authority.³⁰⁰ It can issue subpoenas seeking information relevant to a charge filed with the agency.³⁰¹ However, this subpoena power is limited to obtaining information regarding existing charges of discrimination; the EEOC lacks the power to issue subpoenas absent such a charge.³⁰² Thus, unlike OSHA,³⁰³ the EEOC is unable to proactively investigate.³⁰⁴ This limits the EEOC's ability to control its own enforcement efforts.³⁰⁵ By contrast, OSHA has developed its own priority system for enforcing federal workplace safety laws.³⁰⁶ The EEOC can only react and select among existing charges to investigate.³⁰⁷ While there may at times be charges that correspond with the EEOC's desired enforcement efforts, there is no guarantee that this is reality.

This limited investigative power also means that employers who do not have charges pending against them are insulated from EEOC investigation.³⁰⁸ While some such employers may not need to be investigated, as the lack of charges indicates a lack of unlawful discrimination, this is not necessarily true of all employers.³⁰⁹ Some employers may not have charges brought against them despite engaging in unlawful discrimination.³¹⁰ For instance, an employer with a workforce that contains workers who lack knowledge of their rights (the classic example being undocumented workers) may have no charges pending due to the lack of

299. See 42 U.S.C. § 1981(a) (2006).

300. See § 2000e-5.

301. See § 161; § 2000e-9; *EEOC v. Shell Oil Co.*, 466 U.S. 54, 65 (1984) (holding that a charge is a "jurisdictional prerequisite" for an EEOC-issued subpoena).

302. See § 161; § 2000e-9; *Shell Oil Co.*, 466 U.S. at 65.

303. See OSHA Authority for Inspection, 29 C.F.R. § 1903.3(a) (2010) (compliance officer entitled to inspect during reasonable working hours; no requirement of a complaint being filed).

304. *Shell Oil Co.*, 466 U.S. at 64–65.

305. *Id.*

306. See U.S. DEP'T OF LABOR, OSHA INSPECTIONS 3 (2002), <http://www.osha.gov/Publications/osha2098.pdf> (describing OSHA's priorities in conducting inspections).

307. See *Shell Oil Co.*, 466 U.S. at 64–65.

308. They are not entirely insulated, as commissioners have the authority to bring a charge. See 42 U.S.C. § 2000e-5(b) (2006).

309. See generally Bisom-Rapp, *supra* note 282, at 3 (describing the increasing use of defensive strategies by employers and positing that such strategies may conceal discrimination).

310. *Id.*

knowledge or fear of reporting discrimination.³¹¹ Thus, employers may have facially discriminatory policies that are never revealed and changed.

Perhaps most importantly, however, because I am advocating that the entire charge processing system be dismantled, the EEOC's investigative powers need to be decoupled from that charge processing system. In lieu of investigations that are reactive and limited to existing charges, I propose that Title VII be amended to allow the EEOC to undertake investigations where (1) a complaint has been filed with a court or (2) there is a reasonable basis to believe that a violation of federal employment discrimination laws has occurred. This expands the EEOC's authority in a limited way to allow it to focus on situations where a person may not feel able to file a claim.³¹²

Where a complaint has been filed with a court, the EEOC still needs to be able to investigate to determine whether the individual claim might, in fact, prove to implicate more employees than the individual bringing suit. A single employee may challenge an employer's practice that can affect thousands of employees.³¹³ The EEOC needs to be able to investigate and, if necessary, bring suit on behalf of affected individuals who have not yet sued.

In addition to investigation in response to a court-filed complaint, the EEOC also needs to be able to investigate when it has a reasonable basis to believe that the federal antidiscrimination laws have been violated in order to uncover discrimination where employees are unwilling or unable to file a claim in federal court. The EEOC may obtain information from the EEO-1 forms³¹⁴ that may indicate unlawful discrimination is occurring.³¹⁵ It may also receive information from employees, via the online or phone complaint line, who have not filed suit, as discussed above, that indicates unlawful discrimination. The EEOC should be empowered to investigate these situations to determine whether it should bring suit on its own. This type of investigative authority is similar to the investigative authority of OSHA. OSHA conducts programmed (planned) inspections of workplaces based on OSHA's determination of the degree of hazards

311. For a discussion of some of the impediments to these workers filing charges of discrimination, see Gleeson, *supra* note 160, at 669–75.

312. At present, the EEOC has a limited ability to investigate without an individual filing a charge of discrimination. Commissioners may file charges, and then the EEOC is able to investigate. See § 2000e-5. However, Commissioner's charges are very rare, as is to be expected when the authority lies with the most senior official in the Agency. LESLIE E. SILVERMAN, SYSTEMIC TASK FORCE REPORT TO THE CHAIR OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION 10 (Mar. 2006), http://www.eeoc.gov/eeoc/task_reports/upload/systemic.pdf. My recommendation would expand this system so no such charge would be needed; all the EEOC would need is reasonable grounds to believe federal antidiscrimination laws have been violated.

313. For instance, the EEOC is currently investigating UPS's policy of prohibiting facial hair for employees who have contact with the public. Two individuals, in separate cases, challenged the policy. The EEOC is seeking information that might lead to a class action lawsuit. See *EEOC v. United Parcel Serv., Inc.*, 587 F.3d 136, 137–38 (2d Cir. 2009).

314. See discussion *infra* Part II.B.5.

315. *EEO-1 Form*, EEOC, http://www.eeoc.gov/employers/eeo1/eeo1_2007_d.pdf (last visited Sept. 10, 2010).

in the workplaces.³¹⁶ While the EEOC is focused on less-tangible hazards in the workplace, the same concepts can be used to develop its investigative priorities.

In either of these scenarios, once the EEOC has investigated, if it determines that bringing suit is appropriate, it should be able to do so. The EEOC currently has this authority,³¹⁷ so no structural change is necessary as to the right to bring suit.

However, the current threat of EEOC litigation is insufficient. The power that the EEOC needs to add to its arsenal is the power to obtain attorneys' fees and penalties from employers who engage in unlawful discrimination. At present, the EEOC has the power to obtain remedies for victims of discrimination.³¹⁸ These remedies are identical to the remedies available to victims of discrimination in lawsuits brought by private attorneys.³¹⁹ Thus, the EEOC's threat of litigation is not likely to be of concern to an employer. In fact, an employer may be less likely to fear the EEOC litigation units because they are unable to recover attorneys' fees,³²⁰ which is a significant cost imposed on employers who lose in claims involving private attorneys.³²¹ In addition, the data on amounts of recovery indicate that private attorneys recover more money for their clients than the EEOC does.³²² In sum, the EEOC's threat is of litigation that costs less than litigation by a private sector attorney.

This situation needs to be reversed. I propose that Title VII be amended as follows. First, the provision on attorneys' fees³²³ should be revised to affirmatively allow the EEOC to recover attorneys' fees. There is precedent for government attorneys to recover attorneys' fees.³²⁴ Attorneys' fees have been recovered by the Environmental Protection Agency for government lawyers working on violations of federal environmental laws.³²⁵

Because attorneys' fees are already available to private attorneys representing victims of discrimination,³²⁶ merely adding the EEOC's attorneys' fees onto the recovery will not create the necessary effect. More is needed. One obvious option is to restructure the EEOC to give it the power to determine whether discrimination has occurred at the adminis-

316. See U.S. DEPT OF LABOR, *supra* note 306, at 3–4 (discussing priorities for conducting programmed inspections).

317. See § 2000e-5.

318. *Id.*

319. See 42 U.S.C. § 1981(a) (2006).

320. § 2000e-5(k) (prohibiting the EEOC from recovering attorney's fees).

321. § 2000e-5.

322. See *Selmi*, *supra* note 4, at 23.

323. § 2000e-5(k).

324. See *United States v. Dico, Inc.*, 266 F.3d 864, 876–78 (8th Cir. 2001); *United States v. Chapman*, 146 F.3d 1166, 1175–77 (9th Cir. 1998); *United States v. Gurley*, 43 F.3d 1188, 1199–1200 (8th Cir. 1994).

325. *Id.*

326. § 2000e-5.

trative level and to order appropriate relief.³²⁷ This would make the EEOC more like other administrative agencies, such as OSHA,³²⁸ and obviously increase the EEOC's enforcement powers but at a high cost. However, as one of the main problems noted above is the volume of claims the EEOC must manage at present, adding an investigative/hearing component to the EEOC seems imprudent given the EEOC's inability to manage its current responsibilities. This leads me to propose a different solution. In litigation by the EEOC, in addition to the remedies available to the plaintiff, provision should be made for civil fines to be levied against the employer, payable to the EEOC. Civil fines are found in other areas of employment law, such as for violations of the Fair Labor Standards Act,³²⁹ hiring unauthorized workers under the Immigration Reform and Control Act of 1986,³³⁰ and violating the Occupational Safety and Health Act.³³¹ Fines and attorneys' fees together would give the EEOC greater clout when it litigates employment discrimination claims.

4. *Proposal Four: Partnering with the Federal Courts*

The fourth aspect to the restructuring of the EEOC is the development of a partnership with the federal courts to implement a unique mediation system. This partnership would be one whereby the EEOC provides mediation services in employment discrimination cases.³³² Under the new structure of the EEOC, the mediation program would become an option upon a party filing suit in federal court. Once a complaint is filed, each party would receive a standard letter informing them of the mediation option with the EEOC.³³³ Both parties would need to opt into the mediation session. Having the EEOC provide mediation services would also help mitigate the impact of the potential increase in the number of employment claims that would need to be adjudicated by the federal courts.

There are also substantive reasons for the EEOC to maintain its mediation role. First, retention of that role would allow the EEOC to still engage in conciliation efforts, which are a part of its mandate under Title

327. This approach was discussed in the 1980s as the federal courts experienced a significant increase in the number of employment discrimination claims. However, even at that time, the EEOC doubted its ability to undertake this role. See Lynch, *supra* note 97, at 103.

328. See 29 U.S.C. §§ 657–60 (2006) (granting OSHA the authority to investigate and issue citations for violations of the Occupational Health and Safety Act and establishing administrative procedure within OSHA for employers to challenge the citations).

329. *Id.* § 216(a), (e) (2006).

330. 8 U.S.C. § 1324a (2006).

331. 29 U.S.C. § 666(a)–(c) (2006).

332. The EEOC once suggested that the federal courts should consider greater use of ADR in employment discrimination cases. See Lynch, *supra* note 97, at 103. My proposal would bring together the benefits of ADR with the expertise of the EEOC in discrimination claims to benefit parties, the courts, and the EEOC.

333. This is very similar to the current process at the EEOC. Once a charge is identified as a candidate for mediation, the parties receive an invitation to mediate. Both parties must agree for the mediation to take place. See *Facts About Mediation*, EEOC, <http://eeoc.gov/eeoc/mediation/facts.cfm> (last visited Sept. 10, 2010).

VII.³³⁴ With the demise of its charge-processing role, the EEOC's conciliation efforts would be very limited without the mediation partnership.

Second, the mediation program has been highly successful. The mediation program is significant in scope, with more than 12,000 mediations conducted in FY 2008.³³⁵ This number represents approximately 12% of all charges received.³³⁶ Participants report positively on the experience, with 96% of employers and 91% of employees who used it indicating that they would use it again.³³⁷ More than 90% of employers who elect not to use the EEOC's mediation services cite the most important reason for this decision as being unrelated to the EEOC mediation program; instead, the reason is the employer's perception that the case lacks merit.³³⁸ The success rate for the EEOC's mediation program is also quite positive, with more than 70% of all mediations resolving the claim.³³⁹

A third reason to create an EEOC partnership with the federal courts under which the EEOC would provide mediation services is pragmatic in nature. If there is an expansion of claims filed in the federal courts due to the termination of the EEOC's charge-intake program, this mediation partnership can help offset the increased load.

Governance theory supports this partnership with the federal courts, based on the idea that cross-governmental collaboration may more fully address problems than any one federal agency can.³⁴⁰ While the focus of governance theory is on collaboration by different agencies to provide responses more holistically,³⁴¹ the theory supports the use of non-traditional approaches to reach a better result for all parties.³⁴² Given the strongly positive results that the EEOC has been achieving with its mediation program and the ongoing push toward moving cases from litigation into ADR,³⁴³ this partnership has great promise.

5. *Proposal Five: Information Gathering and Analysis*

The fifth aspect to the EEOC's revised structure is an expanded program focusing on obtaining detailed statistical information about the na-

334. 42 U.S.C. § 2000e-5 (2006).

335. See *EEOC Mediation Statistics FY 1999 through FY 2008*, EEOC, http://www.eeoc.gov/eeoc/mediation/mediation_stats.cfm (last visited Sept. 10, 2010).

336. The EEOC received 95,402 private sector charges in FY 2008. See 2008 REPORT, *supra* note 58.

337. See *Facts About Mediation*, *supra* note 333.

338. See E. Patrick McDermott et al., *An Investigation of the Reasons for the Lack of Employer Participation in the EEOC Mediation Program*, EEOC, <http://archive.eeoc.gov/mediate/study3/chapter4.html> (last modified Dec. 2, 2003).

339. This percentage reflects the success rate beginning with FY 2005. The mediation success rate rose steadily from 65% to 70% from FY 1999 to FY 2004; since FY 2006 it has remained essentially flat at 72%. See *EEOC Mediation Statistics FY 1999 through FY 2008*, *supra* note 335.

340. See Lobel, *supra* note 196, at 385-88.

341. *Id.*

342. See *generally id.* at 388.

343. See Jones, *supra* note 140, at 320-323 (former Commissioner of the EEOC noting the need to increase the use of ADR and congressional agreement to increase the EEOC's budget to allow for greater use of it).

tion's workforce. The EEOC has not required any particular records or form of recordkeeping of employers under Title VII despite its statutory authority to do so.³⁴⁴ At present, the EEOC only requires information from large employers—those with at least 100 employees and those with at least 50 employees who are government contractors.³⁴⁵ These employers must provide an annual EEO-1 report.³⁴⁶ For each type of position, which includes categories such as professional, sales, service workers, administrative support workers, the employer must identify the number of employees by race, ethnicity and sex.³⁴⁷

The EEOC should focus on this information-gathering power to allow it to identify indications of systemic discrimination in the workforce. The EEO-1 has been used for this purpose in the past.³⁴⁸ However, the information obtained is limited, and, when the form was most recently revised, the information required was not expanded but limited.³⁴⁹

The need for good information is essential to the EEOC's operations. It is especially important in light of my recommendation that the EEOC no longer accept charges of discrimination. The EEOC will need to rely on information generated in these reports in order to identify situations where systemic discrimination may be occurring. Given the ease with which information can be obtained, compiled, and submitted, information should also be gathered from smaller employers so that all employers covered by Title VII provide at least the basic EEO-1 data.

In addition, the type of information obtained should be expanded beyond the current basics of number of employees by race, ethnicity, and sex in each job category. The next most-obvious area of information to include would be employee terminations as well. Other possibilities in-

344. See EEOC Records to Be Made or Kept, 42 C.F.R. § 1602.12 (2010) (noting that the EEOC does not require particularized records or recordkeeping); 42 U.S.C. § 2000e-8(c) (2006) (requiring that “[e]very employer, employment agency, and labor organization subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder.”)

345. EEOC Requirement for Filing of Report, 29 C.F.R. § 1602.7 (2010).

346. See *id.* Unions file an annual EEO-3 report and state governments file an EEO-4 report; all reports require similar information.

347. The annual EEO report was held to be constitutional and a lawful exercise of delegated authority by the EEOC in *United States v. State of New Hampshire*, 539 F.2d 277, 280 (1st Cir. 1976). While that case addressed the validity of the EEO-4 report, the rationale behind it would encompass the EEO-1 as well. For the sample, blank EEO-1 report, see *EEO-1 Form*, *supra* note 315. While the EEO-1 clearly seeks sex and race information, it is limited in the information on ethnicity and national origin. Employees have to be categorized as one of the following: White, Hispanic, Black, Asian, Native American, Hawaiian/Pacific Islander, or multi-racial.

348. See Commissioner Stuart J. Ishimaru, Remarks at the Meeting on Operations in Wake of Hurricane Katrina Revisions to EEO-1 Report (Nov. 16, 2005), available at <http://www.eeoc.gov/eeoc/meetings/archive/11-16-05/ishimaru.html> (noting the use of the data by the EEOC and, at times, by the U.S. Department of Justice).

349. See *id.* at 2 (commenting on the use of the “two or more” race category in the new form).

clude (1) data on salaries by race and sex and (2) data on applicants by race and sex. Here, in the rule-promulgation situation, is the opportunity to draw upon governance theory to improve over the traditional regulator models of producing regulations. Collaborative efforts in rulemaking are the touchstone. This would entail the EEOC engaging all parties—the public, employers, employees, and discrimination law experts—to begin a dialogue on what information would best enable the EEOC to identify and assist employers in eradicating discrimination without being unduly burdensome on employers, particularly small companies.

Governance theory also suggests that this situation may be one where flexibility is warranted. Rather than engaging in the typical one-size-fits-all approach, flexibility in application should be given consideration, allowing different information to be provided by different types and locations of employers.³⁵⁰ It may be more effective for the EEOC to obtain different types of information from different employers about different types of jobs as the types of systemic discrimination vary greatly by industry and also by job type. This area is also one in which enforced self-regulation may be appropriate, where the nation's largest employers, faced with the potential for the EEOC to mandate significantly greater information flow from private-sector employers, voluntarily agree to provide substantial information.³⁵¹

III. CONCLUSION

The EEOC has long been criticized about its operations. In order for it to become an effective agency in the struggle against employment discrimination, the EEOC needs to undergo significant structural changes. By eliminating the extremely expensive and nearly useless function of charge processing, significant resources can be devoted to more effective efforts in combating employment discrimination. Providing meaningful assistance in developing employer policies and practices will decrease discrimination that charge processing never could. Ferreting out hidden discrimination will be helped by increasing the EEOC's information gathering abilities and requiring employers to provide more data on employees to the agency. And where discrimination exists because prevention fails, primary responsibility for enforcing the laws needs to reside with the multitude of private attorneys general. Providing greater access to mediation in the court process will assist in reducing the burden on the federal courts. This is not to say that the EEOC should retain no role in the litigation arena. For significant claims, the EEOC should be involved in litigation, and, to increase its effectiveness, the EEOC needs to be able to use increased threats of sanctions that will help it persuade wayward employers to engage with the agency in remediating unlawful discrimination.

350. See Lobel, *supra* note 196, at 379–80.

351. See *id.* at 388–92.

