

PRACTITIONERS' NOTES

FORTY-THREE AND COUNTING: EEOC'S CHALLENGES AND SUCCESSES AND EMERGING TRENDS IN THE EMPLOYMENT ARENA

*Naomi C. Earp**

*"Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly."*¹

I. INTRODUCTION

In the years before and immediately after the passage of Title VII of the Civil Rights Act of 1964, discrimination was blatant and pervasive, as evidenced by sex-segregated job ads, race-segregated employment facilities, unequal pay and promotion opportunities for women and minorities, biased selection procedures, and mandatory retirement policies. Today, discrimination has become more subtle,² and thus more

* Chair, U.S. Equal Employment Opportunity Commission. The author gratefully acknowledges research assistance by Lisa Schnall and Frances Ma and feedback by Diane Fredericks, Charles Robbins, Jerome Scanlan, and EEOC's Office of Legal Counsel.

1. Martin Luther King, Jr., Letter from Birmingham Jail (Apr. 16, 1963), in MARTIN LUTHER KING, JR., I HAVE A DREAM 83-100 (James M. Washington ed., 1992).

2. See, e.g., Devah Pager & Lincoln Quillian, *Walking the Talk? What Employers Say Versus What They Do*, 70 AM. SOC. REV. 355, 362 (June 2005) (finding that employers were more likely to offer call back interviews to White applicants with or without criminal records than to Black applicants with or without criminal records). Thirty-four percent of White non-felon applicants and seventeen percent of White ex-felon applicants received call back interview offers, compared to fourteen percent of Black non-felon applicants and five percent of Black ex-felon applicants. *Id.*; see also JENNY BUSSEY & JOHN TRASVIÑA, RACIAL PREFERENCES: THE

difficult to prove.³ As a result, the U.S. Equal Employment Opportunity Commission (“EEOC”) is arguably more vital and relevant today than when it was first established in 1964.

This article addresses the EEOC’s challenges and successes, and identifies several emerging trends in the employment arena. Current demographical changes—the graying of the workforce and the increased gender and ethnic diversity of the workforce—provide the Commission with unique challenges, but also unique opportunities for growth and progress. Ultimately, to create and maintain fair and inclusive workplaces, I believe that employers and employees must exercise diligence and vigilance in their conduct. Employers must be cautious and methodical in handling employee requests and complaints, and employees must be cautious and methodical in identifying and reporting harassment and discrimination. By working responsibly and collaboratively, employers and employees can establish and maintain a respectful work environment in which all participants enjoy the freedom to compete and succeed.

TREATMENT OF WHITE AND AFRICAN AMERICAN JOB APPLICANTS BY TEMPORARY EMPLOYMENT AGENCIES IN CALIFORNIA (Dec. 2003), *available at* <http://www.impactfund.org/DRC%20December%202003%20Report.pdf> (reporting that temporary employment agencies in California disproportionately preferred White applicants over slightly more qualified Black applicants in a 2003 tester study); Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Brendan Really More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (Sept. 2004) (stating that resumes with White-sounding names had a fifty percent higher call-back rate than equivalent resumes with Black-sounding names in a study of the Boston and Chicago labor markets conducted between 2001 and 2002). *See generally* MALCOLM GLADWELL, *BLINK* 77-88 (2005) (describing a Race Implicit Association Test (Race IAT) that requires takers to categorize words and pictures as either “European American or Bad” or “African American or Good.”). More than 80% of people who take the Race IAT are deemed to have pro-White associations. *Id.*

3. Surmounting summary judgment motions and achieving favorable rulings from courts in employment discrimination cases has become increasingly difficult, and victory in trial court does not guarantee success on appeal. *See, e.g.*, THEODORE EISENBERG & STEWART J. SCHWAB, *DOUBLE STANDARD ON APPEAL: AN EMPIRICAL ANALYSIS OF EMPLOYMENT DISCRIMINATION CASES IN THE U.S. COURT OF APPEALS* (2001), *available at* <http://www.findjustice.com/civil-just/schwab-report.htm> (calculating a fifty-six percent appellate success rate for private plaintiffs who prevailed at trial and a six percent appellate success rate for private plaintiffs who lost at the trial level); EEOC, *A Study of the Litigation Program, FY 1997-2001*, <http://www.eeoc.gov/litigation/study/study.html> (noting the sixteen percent success rate for employment discrimination cases brought by the private bar at the appellate level).

II. CHALLENGES

1. Harassment

The EEOC has more than forty years of experience battling race, national origin, and religion-based harassment and more than twenty-five years battling sexual harassment. Despite the Commission's efforts, including litigation, outreach, and education, such conduct persists.

i. Race Harassment

Some recent cases litigated by the Commission involve conduct that is blatant and unfortunately all too familiar: the presence of nooses and use of racial slurs in the workplace.⁴

Even young workers are not immune from harassment based on race. One recent case involved a nineteen-year-old Black woman whose male supervisor allegedly subjected her and other non-White employees to racial comments and slurs, boasted about his skinhead activities, stated that he believed that Whites were the superior race, flashed White power signs, claimed that he had a Confederate flag hanging outside his home, displayed his tattoos (which included a swastika and White Power gang symbols), and announced that he wanted to have a picture of a black lynching victim tattooed to his forehead.⁵ According to the Charging Party, when she reported the supervisor's conduct to an

4. See, e.g., Press Release, EEOC, EEOC Obtains \$1 Million for Black Man Choked With Hangman's Noose by White Co-Workers (Mar. 21, 2006), available at <http://www.eeoc.gov/press/3-21-06.html> (announcing the settlement of a case in which co-workers and managers called a Black employee a "monkey" and the N-word and choked him with a noose); Press Release, EEOC, Lithia Car Dealership to Pay \$562,500 for Race Bias Against Black Salesman Targeted by Manager (Mar. 16, 2006), available at <http://www.eeoc.gov/press/3-16-06.html> (discussing a case in which a manager allegedly informed a Black employee that he would not tolerate "B-P" ("black people") and stated that he'd previously terminated "some of you people"). The harassment increased after the employee filed an internal complaint. *Id.*; see also Press Release, EEOC, Cracker Barrel to Pay \$2 Million for Race and Sexual Harassment at Three Illinois Restaurants (Mar. 10, 2006), available at <http://www.eeoc.gov/press/3-10-06b.html> (describing a case in which Black employees were reportedly referred to as "spear chucking porch monkey," "you people," and "ghetto"; required to wait on Black customers whom White servers refused to assist; and assigned to serve customers in the smoking sections); Press Release, EEOC, Consolidated Freightways to Pay \$2.75 Million for Racial Harassment of African Americans (Jan. 12, 2005), available at <http://www.eeoc.gov/press/1-12-05.html> (resolving a case in which twelve Black dockworkers were subjected to nooses, assault, intimidation, racially offensive graffiti, and property damage).

5. Press Release, EEOC, EEOC and Carl's Jr. Settle Racial Harassment, Retaliation Case (Dec. 14, 2005) (on file with author).

Assistant Manager, the manager said that he was aware of the supervisor's attitude and admitted that he, himself, was racist.⁶ The Charging Party was suspended and then terminated shortly after she reiterated her concerns to the Assistant Manager and the District Manager.⁷

In another case, an eighteen-year-old Black male was repeatedly harassed by his White male supervisor, who directed racial slurs at him, told racially offensive jokes, hid his safety gloves, placed stink bombs under his work station, and told him that vending machines do not take "crack money."⁸ The Charging Party also stated that he was terminated because of his race.⁹ The Commission's investigation revealed a pattern of discrimination and harassment against Black employees at that facility.¹⁰

ii. Sexual Harassment

Films such as *9 to 5*, *Disclosure*, and most recently, *North Country*, publicized the issue of workplace sexual harassment.¹¹ Sexual harassment remains a very real, very disturbing problem in workplaces nationwide. In fiscal year 2007, 12,510 sexual harassment charges were filed with the Commission and local Fair Employment Practices Agencies ("FEPAs").¹²

Certain groups appear particularly vulnerable to such conduct. A substantial proportion of sexual harassment charges filed between 1992 and 2003 came from minority women.¹³ During that period, the number of sexual harassment charges increased 22%.¹⁴ The number of such

6. *Id.*

7. *Id.*

8. Press Release, EEOC, EEOC Settles Racial Discrimination Lawsuit Against Thyssenkrupp Elevator (Oct. 28, 2005) (on file with author).

9. *Id.*

10. *Id.*

11. See, e.g., Alison Neumar Lara, *A Case That Changed the Culture*, CHI. TRIB., Nov. 2, 2005, at 1 (describing the significance of *Jenson v. Eveleth Mines*, the first class action sexual harassment lawsuit).

12. EEOC, Sexual Harassment Charges, <http://www.eeoc.gov/stats/harass.html> (last visited Feb. 26, 2008).

13. See NAT'L P'SHIP FOR WOMEN & FAMILIES, *WOMEN AT WORK: LOOKING BEHIND THE NUMBERS 40 YEARS AFTER THE CIVIL RIGHTS ACT OF 1964*, at 6 (July 2004) [hereinafter *WOMEN AT WORK*], available at http://www.nationalpartnership.org/site/DocServer/portals_p3_library_CivilRightsAffAction_WomenAtWorkCRA40.pdf?docID=590. In comparison, the percentage of sexual harassment charges filed by White women during that period increased only five percent. *Id.*

14. *Id.*

charges filed by Hispanic women increased 120%, while the number of sexual harassment charges filed by Black women increased 42%.¹⁵ In comparison, the number of such charges filed by White women during that time span rose only 5%.¹⁶

Young workers, as well, appear particularly susceptible to sexual harassment.¹⁷ Many are entering the workplace for the first time, and are uncertain about their employment rights and responsibilities. Although generally such cases involve male harassers and female victims,¹⁸ the Commission has also filed lawsuits in cases involving female harassers and male victims¹⁹ and cases in which the harasser and the victim are the same sex.²⁰

Finally, certain Commission offices have observed regional trends in sexual harassment charge filings. Commission offices in California, for example, have filed a number of lawsuits in the past few years on behalf of migrant farm workers who alleged that they were sexually harassed by their supervisors. Some victims were subsequently retaliated against when they attempted to complain.²¹ Some of these

15. *Id.*

16. *Id.*

17. *See, e.g.*, Jane M. Von Bergen, *Young Workers Face Old Woe: Harassment*, PHILA. INQUIRER, June 7, 2005, at A1 (describing several examples of harassment against teen workers and providing strategies to address and prevent such conduct). *See generally* Naomi C. Earp, *Teens at Work—What Employers Need to Know*, DRI JOB DESCRIPTION 33-35 (Summer 2004) (detailing recent EEOC cases involving young workers and outlining strategies for employers seeking to promote positive work experiences for teens).

18. *See, e.g.*, Kim Bell, *Teens Told to Speak Out Against Harassment*, ST. LOUIS POST-DISPATCH, June 25, 2006, at B1 (summarizing recent EEOC cases involving female teen workers).

19. *See, e.g.*, Press Release, EEOC, Taco Bell to Pay \$68,250 for Sex Harassment of Minor (Feb. 23, 2006) (on file with author) (describing a case involving a male teen subjected to sexual harassment by his older female supervisor).

20. *See, e.g.*, Press Release, EEOC, Pand Enterprises To Pay \$90,000 To Young Men Who Were Sexually Harassed By Male Supervisor (Mar. 10, 2006) (resolving a case in which a male supervisor subjected male employees to unwelcome groping and sexual remarks and reduced an employee's hours in retaliation for his opposition to the supervisor's conduct), *available at* <http://www.eeoc.gov/press/3-10-06a.html>; Press Release, EEOC, Carmike Cinemas To Pay \$765,000 To Settle Rare Case of Male-on-Male Teen Harassment (Sept. 27, 2005) (settling a case in which a male supervisor, a convicted sex offender, subjected fourteen male employees to unwanted sexual touching, comments, and advances), *available at* <http://www.eeoc.gov/press/9-27-05.html>; Press Release, EEOC, 'Babies R Us' to Pay \$205,000, Implement Training Due to Same-Sex Harassment of Male Employee (Jan. 15, 2003), *available at* <http://www.eeoc.gov/press/1-15-03.html> (detailing a case in which male employees subjected a male cashier to derogatory comments and conduct based on his failure to conform to societal gender stereotypes).

21. *See, e.g.*, Press Release, EEOC, Rivera Vineyards Settles EEOC Suit Alleging Sexual Harassment, Retaliation, Job Segregation (June 15, 2005), *available at* <http://www.eeoc.gov/press/6-15-05.html> (reporting a \$1 million settlement for a class of Latino farm workers who stated they were subjected to unwanted sexual conduct and remarks, restricted

cases go beyond the EEOC's jurisdiction over sexual harassment and involve particularly egregious conduct, such as rape.

These trends are particularly troubling because young workers and workers with limited English proficiency may be reluctant to complain about harassment, either because they are unaware of their employment rights, unfamiliar with the EEOC, dependent on their paychecks, or fearful of retaliation or, in the case of undocumented workers, deportation.

iii. Religion/National Origin

The number of religion-based charges received by the Commission increased 107% between fiscal years 1992 and 2007.²² The number of national origin-related charges has also increased—though not as dramatically—during the same time period.²³ In the wake of the September 11, 2001 attacks, the Commission and state and local FEPAs have observed an increase in charges of religion and/or national origin-based harassment and discrimination made by individuals who are or are perceived to be Muslim, Arab, South Asian, or Sikh.²⁴ Specifically, between September 11, 2001 and March 11, 2008, the Commission received 1016 charges alleging post-9/11 backlash employment

from certain positions based on their gender, and terminated when one employee reported the harassment); Press Release, EEOC, Jury Orders Harris Farms to Pay \$994,000 in Sexual Harassment Suit by EEOC (Jan. 21, 2005), *available at* <http://www.eeoc.gov/press/1-21-05.html> (resolving a case in which a female Mexican immigrant reported that her supervisor raped, sexually harassed, and intimidated her to the point that she was forced to resign); Press Release, EEOC, EEOC and DeCoster Farms Settle Complaint for \$1,525,000 (Sept. 30, 2002), *available at* <http://www.eeoc.gov/press/9-30-02-b.html> (settling a case in which female employees, particularly Mexican and Hispanic workers, stated that their supervisors sexually assaulted and harassed them and threatened to retaliate against them if they reported the conduct); Press Release, EEOC, EEOC and Tanimura & Antle Settle Sexual Harassment Case in the Agricultural Industry (Feb. 23, 1999), *available at* <http://www.eeoc.gov/press/2-23-99.html> (announcing a \$1.9 million settlement in a case in which female employees alleged that managers and supervisors subjected them to sexual harassment and retaliated against them and at least one male employee for complaining about the harassment). *See generally* Cindy O'Hara, Senior Trial Attorney, EEOC, Best Practices for Migrant Workers (Apr. 26-28, 2000), *available at* http://migration.ucdavis.edu/cf/more.php?Id=80_0_2_0 (providing an overview of EEOC and federal employment statutes and identifying education and outreach, enforcement, and litigation as best practices to protect migrant workers from harassment and discrimination).

22. EEOC, Charge Statistics, <http://www.eeoc.gov/stats/charges.html> (last visited Feb. 26, 2008).

23. *Id.*

24. EEOC, Questions and Answers About the Workplace Rights of Muslims, Arabs, South Asians, and Sikhs under the Equal Employment Opportunity Laws, <http://www.eeoc.gov/facts/backlash-employee.html> (last visited May 14, 2002).

discrimination.²⁵ Many of these charges included allegations of harassment or termination.²⁶

The charges and resulting lawsuits have arisen from a variety of establishments across the nation, including a New York hotel, a Texas restaurant, an Illinois hospital, and a North Carolina medical practice.²⁷ In one case, an Egyptian Muslim employee was frequently referred to as “Mrs. Osama bin Laden” by a co-worker.²⁸ The co-worker also made anti-Arab remarks, including commenting that Arabs and Muslims were “stupid” and “crazy.”²⁹ The employee, who had worked at the company for almost twenty years, complained repeatedly to no avail, and was allegedly terminated for reporting the harassment.³⁰ In another case, a class of Muslim, Arab, and South Asian employees was subjected to offensive comments about their religion and/or national origin, were called “terrorist,” “Osama,” “Al Qaeda,” “Taliban,” and “dumb Muslim,” and were cursed at and accused of destroying the World Trade Center and the country.³¹ Managers also wrote “Osama,” “Binladin [sic],” “Alkada [sic],” and “Taliban” instead of the employees’ names on

25. EEOC, FACT SHEET: BACKLASH EMPLOYMENT DISCRIMINATION CHARGES RELATED TO THE EVENTS OF 9/11/2001, at 1 (2008).

26. *See id.* (noting that of the 1012 charges resolved between September 11, 2001 and March 11, 2008, 603 charges allege discharge and 427 charges allege harassment). Four charges remained unresolved as of March 11, 2008. *Id.*; *see also* EEOC, Questions and Answers About the Workplace Rights of Muslims, Arabs, South Asians, and Sikhs Under the Equal Employment Opportunity Laws, <http://www.eeoc.gov/facts/backlash-employee.html> (last visited May 14, 2006).

27. *See, e.g.*, Press Release, EEOC, The Plaza Hotel to Pay \$525,000 For Post-9/11 Backlash Discrimination Against Employees (June 8, 2005) (resolving a case in which employees alleged they were harassed based on their Muslim religion and/or their Arab and South Asian national origins), *available at* <http://www.eeoc.gov/press/6-8-05.html>; Press Release, EEOC, Egyptian Manager Fired Because of National Origin, EEOC Says in Post-9/11 Backlash Discrimination Lawsuit (July 10, 2003) (announcing a lawsuit on behalf of an Egyptian manager who reported he was harassed and eventually discharged because of his national origin), *available at* <http://www.eeoc.gov/press/7-10-03.html>; Press Release, EEOC, EEOC Sues Chicago Area Hospital for Post-9/11 Backlash Discrimination (Apr. 7, 2003) (discussing a case in which a supervisor allegedly subjected a Muslim employee to harassment, discipline, retaliation, and termination because of her religion), *available at* <http://www.eeoc.gov/press/4-7-03.html>; Press Release, EEOC, EEOC and North Carolina Medical Practice Reach \$35,000 Settlement in Post-9/11 Backlash Discrimination Claim (Nov. 13, 2002) (settling a case filed on behalf of an Islamic employee who was harassed because of her religion and her relationship with a Muslim man whom her co-workers perceived as Middle Eastern or Arab), *available at* <http://www.eeoc.gov/press/11-13-02.html>.

28. Press Release, EEOC, Poggenpohl U.S. to Pay \$162,500 to Settle National Origin and Religious Discrimination Lawsuit (June 29, 2004).

29. *Id.*

30. *Id.*

31. Press Release, EEOC, The Plaza Hotel to Pay \$525,000 for Post-9/11 Backlash Discrimination Against Employees (June 8, 2005), *available at* <http://www.eeoc.gov/press/6-8-05.html>.

work-related documents.³² In a third case, the Commission filed a lawsuit on behalf of an East Indian Muslim employee who alleged that he was repeatedly referred to as “Taliban” by employees and two managers and asked “[w]hy don’t you go back to where you came from?”³³ When the employee complained about the harassment to management, they reportedly responded, “[d]on’t let it bother you.”³⁴ According to the lawsuit, management described the employee as “a Muslim extremist” shortly before firing him.³⁵

Since September 11, 2001, the EEOC has hosted a Commission meeting on “Employment Discrimination in the Aftermath of September 11”³⁶ and continued to conduct outreach and education programs regarding religion and national origin-based discrimination for employers and employees, as well as for the Muslim, Arabic, Middle Eastern, South Asian, and Sikh communities.

2. Systemic Discrimination

Since the early 1970s, the EEOC has investigated and litigated cases of systemic or class-wide litigation.³⁷ While pleased with systemic successes, the Commission continues to perceive systemic discrimination as an ongoing challenge. In April 2006, the Commission unanimously approved recommendations presented by the EEOC’s Systemic Task Force, led by Commissioner, now Vice Chair, Leslie E. Silverman.³⁸ The Systemic Initiative ensures that the EEOC has a coordinated, strategic approach to systemic cases. Specifically, the Commission endorsed the staffing of systemic cases based on a national law firm model, technology enhancements, and targeted partnership and

32. *Id.*

33. Press Release, EEOC, EEOC Sues Houston-Area Car Dealership for Post-9/11 Backlash Discrimination (Aug. 25, 2004) (on file with author).

34. *Id.*

35. *Id.*

36. EEOC, Overview of EEOC’s Meeting on Discrimination After September 11 (Dec. 11, 2001), <http://www.eeoc.gov/abouteeoc/meetings/12-11-01.html>.

37. See, e.g., Focusing Enforcement Efforts on Systemic Discrimination, *available at* <http://www.eeoc.gov/abouteeoc/35th/1970s/focusing.html> (last visited Mar. 13, 2008).

38. See COMMISSIONER LESLIE E. SILVERMAN ET AL., SYSTEMIC TASK FORCE REPORT (2006), *available at* http://www.eeoc.gov/abouteeoc/task_reports/systemic.pdf; Press Release, EEOC, EEOC Makes Fight Against Systemic Discrimination a Top Priority (Apr. 4, 2006), *available at* <http://www.eeoc.gov/press/4-4-06.html>; see also Insider Interview, *EEOC Task Force Focuses on Combating Systemic Discrimination*, FED. EMP. L. INSIDER (M. Lee Smith Publishers LLC, Brentwood, Tenn.), Mar. 2006, at 2-4 (discussing the Systemic Task Force’s findings and recommendations).

outreach efforts related to systemic issues.³⁹ Pursuant to the Initiative, each of the Commission's fifteen districts has developed a plan for tackling systemic discrimination, identifying the types of discrimination they will focus on, and outlining the steps they will take to address it.⁴⁰

The Systemic Initiative is off to a promising start. In fiscal year 2007, the EEOC filed fourteen lawsuits with at least twenty known class members, compared to eleven such lawsuits in fiscal year 2006.⁴¹ Furthermore, in fiscal year 2007, the EEOC resolved twenty cases with at least twenty class members, compared to seven such resolutions in fiscal year 2006.⁴² In one recent case, the EEOC recovered twenty-million dollars on behalf of a class of African-American retail management and pharmacy employees allegedly denied assignments and promotions based on their race.⁴³ Employers should expect to see a renewed focus on systemic litigation and investigations as the Commission continues to examine industries, regions, and communities for evidence of widespread discrimination.

3. Race Discrimination

Race remains the most frequently cited basis in discrimination charges, as it has since the Commission's inception.⁴⁴ In fiscal year 2007, 37% of charges alleged race discrimination or harassment.⁴⁵ The EEOC has litigated cases involving race-based selection processes, in which minority candidates are prevented from applying or are removed from the pool of viable selectees.⁴⁶ In other cases, minorities have been denied promotions or certain assignments.⁴⁷

39. Press Release, EEOC, EEOC Makes Fight Against Systemic Discrimination a Top Priority (Apr. 4, 2006), available at <http://www.eeoc.gov/press/4-4-06.html>.

40. Silverman, *supra* note 38.

41. EEOC, PERFORMANCE AND ACCOUNTABILITY REPORT FY 2007 (2007), available at http://www.eeoc.gov/abouteeoc/plan/par/2007/strategic_plan.html.

42. *Id.*

43. Tucker v. Walgreen Co., No. 05-440-GPM, 2007 WL 2915578 (S.D. Ill. Oct. 5, 2007); Press Release, EEOC, EEOC and Walgreens Resolve Lawsuit, (July 12, 2007), available at <http://www.eeoc.gov/press/7-12-07.html>.

44. EEOC, Charge Statistics, <http://www.eeoc.gov/stats/charges.html> (last visited Feb. 26, 2008).

45. *Id.*

46. See, e.g., Press Release, EEOC, Georgetowne Place to Pay \$650,000 to Settle EEOC Race Discrimination Lawsuit (June 22, 2005), available at <http://www.eeoc.gov/press/6-22-05.html> (announcing the settlement of a case in which the hiring manager allegedly directed subordinates to code job applications submitted by minorities and refused to hire minorities for a period of at least nine years).

47. Press Release, EEOC, FedEx Freight to Pay \$500,000 for Racial Bias (Oct. 24, 2005)

In some instances, employers appear to purposefully disregard or reject minority applicants based on their race. Several private studies have identified race-based barriers to minority employment, finding that minority candidates with conviction records and candidates with names that are likely to indicate that they are minorities are correspondingly much less likely to receive call-backs.⁴⁸ Other employers may possess implicit or unconscious biases regarding race.⁴⁹

In April 2006, the Commission issued a new Compliance Manual section on race and color discrimination.⁵⁰ The Compliance Manual addresses Title VII coverage; evaluation of employment decisions; recruitment, hiring, and promotion; diversity and affirmative action; harassment, bias, and retaliation; and remedies. The Manual also identifies best practices for employers seeking to promote equal employment opportunity and prevent discrimination and harassment based on race and color.

In February 2007, the Commission launched the E-RACE (Eradicating Racism and Colorism from Employment) Initiative, an outreach, education and enforcement campaign implemented to advance the statutory right to a workplace free of race and color discrimination.⁵¹ Under the E-RACE Initiative, the Commission will: identify specific issues, criteria and barriers that contribute to race and color discrimination in the workplace; explore strategies to improve the administrative processing and litigation of race and color discrimination claims; and enhance public awareness of the persistence of race and color discrimination in employment.⁵² The Commission will also seek

(resolving a case in which a trucking company allegedly denied promotions and assignments to qualified Black employees because of their race), *available at* <http://www.eeoc.gov/press/10-24-05.html>.

48. *See supra* note 2.

49. *See, e.g.*, Pamela Babcock, *Detecting Hidden Bias*, HUM. RESOURCE MAG., Feb. 2006, *available at* <http://www.shrm.org/hrmagazine/articles/0206/0206cover.asp>; *see also* GLADWELL, *supra* note 2, at 77-88 (describing a Race Implicit Association Test (Race IAT) that requires takers to categorize words and pictures as either "European American or Bad" or "African American or Good."). More than 80% of people who take the Race IAT are deemed to have pro-White associations. *Id.*; *see also* IAT, Project Implicit, www.implicit.harvard.edu (containing the Implicit Association Test for public usage).

50. 1 EEOC COMPL. MAN. (CCH) § 15 (APR. 19, 2006) (discussing race and color discrimination), *available at* <http://www.eeoc.gov/policy/docs/race-color.html>; EEOC, Questions and Answers About Race and Color Discrimination in Employment, http://www.eeoc.gov/policy/docs/qanda_race_color.html (last visited May 16, 2006).

51. EEOC, Meeting of February 28, 2007 to Launch E-RACE Initiative, <http://www.eeoc.gov/abouteeoc/meetings/2-28-07/index.html> (last visited Apr. 10, 2007).

52. EEOC, The E-RACE Initiative, <http://www.eeoc.gov/initiatives/e-race/index.html> (last visited Jan. 30, 2008).

to strengthen partnerships with employee advocates, state and local human rights commissions, HR professionals, and employer groups to address racial disparities in the workforce and promote meaningful participation by and inclusion of employees of all races.⁵³

III. SUCCESSES

1. *Enforcement and Litigation*

One obvious starting point in any discussion of the EEOC's successes is with the numbers. Since 1992, the EEOC has filed 6230 lawsuits and obtained substantial monetary relief for victims of discrimination: more than \$1.1 billion through litigation and more than \$3.1 billion through settlements, voluntary conciliations, and other efforts.⁵⁴

2. *Improved Business Practices and Partnerships*

The EEOC's efforts have also resulted in improved business practices, with enhanced emphasis placed on fair hiring and promotion practices, development of effective EEO policies, and regular EEO training for managers and employees.⁵⁵ The Commission recently launched the Freedom to Compete Initiative and Award to encourage and reward employers who implement workplace practices and activities that promote and achieve equal employment opportunity.⁵⁶

In addition, one of the Commission's strategic objectives—proactive prevention—relies in part on employers' and employees' participation in outreach and educational events designed to both instill an understanding of appropriate workplace conduct and to prevent discrimination and harassment from occurring.

53. See EEOC, E-RACE Goals and Objectives, <http://www.eeoc.gov/initiatives/e-race/goals.html> (last visited Jan. 30, 2008).

54. EEOC, EEOC Litigation Statistics, <http://www.eeoc.gov/stats/litigation.html> (last visited Feb. 26, 2008).

55. See EEOC, BEST PRACTICES OF PRIVATE SECTOR EMPLOYERS, http://www.eeoc.gov/abouteeoc/task_reports/prac2.html (last visited Dec. 22, 2007).

56. EEOC, Facts About the Freedom to Compete Initiative, *available at* <http://www.eeoc.gov/initiatives/compete/index.html> (last visited Aug. 31, 2006); EEOC, The Freedom to Compete Award, <http://www.eeoc.gov/initiatives/compete/award/index.html> (last visited Oct. 2, 2006).

3. Mediation

In addition to enforcement, litigation, and outreach efforts, the Commission has established a successful mediation program. First implemented in 1991 on a pilot basis in four field offices,⁵⁷ mediation programs now constitute integral components of all field and district offices. Between April 1999, when EEOC's National Mediation Program⁵⁸ was launched, and September 30, 2007, the Commission conducted more than 98,700 mediations.⁵⁹ Nearly 70% of those cases were successfully resolved in an average time of eighty-seven days—approximately half the time it takes to resolve a charge through the investigative process.⁶⁰

Contrary to popular belief, the benefits achieved through mediation may be non-monetary. In fact, since the program's inception, approximately half of the settlements reached through mediation have involved non-monetary benefits.⁶¹ Furthermore, approximately 15% of charges settled through mediation involved solely non-monetary benefits.⁶² Employers and charging parties alike have expressed satisfaction with the mediation process: according to one independent study, 96% of employers and 91% of charging parties would use the mediation program again if necessary.⁶³

IV. TRENDS

1. Retaliation Charges on the Rise

Some potential plaintiffs may choose not to avail themselves of internal or external grievance mechanisms out of fear of retaliation.

57. The pilot offices were the Houston, New Orleans, Philadelphia, and Washington Field Offices. EEOC, History of the EEOC Mediation Program, <http://www.eeoc.gov/mediate/history.html> (last visited Jan. 9, 2008).

58. EEOC, Mediation, <http://www.eeoc.gov/mediate/index.html> (last visited Jan. 9, 2008).

59. EEOC, EEOC Mediation Statistics FY 1999 through FY 2007, available at http://www.eeoc.gov/mediate/mediation_stats.html (last visited Jan. 9, 2008).

60. *Id.*

61. EEOC, Questions and Answers About Mediation, http://www.eeoc.gov/mediate/mediation_qa.html (last visited Mar. 21, 2005).

62. *Id.*

63. E. PATRICK MCDERMOTT ET AL., AN EVALUATION OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION MEDIATION PROGRAM (2000), available at <http://www.eeoc.gov/mediate/report/index.html> (last modified Oct. 2, 2000); see also EEOC, Studies of the Mediation Program, <http://www.eeoc.gov/mediate/mcd-intro.html> (last visited Nov. 19, 2003).

Indeed, since 1992, the number of retaliation charges filed with the EEOC has more than doubled, increasing to 26,663 from 11,096.⁶⁴ In fiscal year 2007, 32.3% of the charges filed with the Commission included a claim of retaliation.⁶⁵ Furthermore, in fiscal year 2007, retaliation overtook gender as the second-most frequent basis in charge filings.⁶⁶ The increase in retaliation charge filings proves troubling not only because retaliation is prohibited by federal law, but also because such conduct may have a chilling effect on workers who wish to enforce their civil rights.

The legal landscape regarding retaliation continues to evolve. In *Burlington Northern & Santa Fe Railway Co. v. White*,⁶⁷ the Supreme Court affirmed the Commission's longstanding policy on retaliation in holding that "materially adverse" employment actions that "could . . . dissuade a reasonable worker" from reporting discrimination represent unlawful acts of retaliation.⁶⁸ The effect of this ruling remains to be seen. Employers should exercise caution and avoid reprisal against charging parties and participants in Commission investigations.

2. Age/Generational Trends

With teenagers entering the work force, baby boomers approaching retirement age, and retirees returning to work, generational issues have become increasingly prevalent in recent years.

i. Youth: Youth@Work

Every year, millions of teenagers work part-time after school or part- or full-time during the summer months.⁶⁹ In addition to the ever-important paycheck, these jobs provide youth with invaluable

64. EEOC, Charge Statistics, <http://www.eeoc.gov/stats/charges.html> (last visited Feb. 26, 2008).

65. *Id.*

66. *Id.*

67. 126 S. Ct. 2405 (2006).

68. *Id.* at 2409; see also Jess Bravin & Ben Winograd, *High Court Draws Line on Bosses' Retaliation*, WALL ST. J., June 23, 2006, at A2; Linda Greenhouse, *Supreme Court Gives Employees Broader Protection Against Retaliation in Workplace*, N.Y. TIMES, June 23, 2006, at A22.

69. See, e.g., DEP'T OF LABOR, REPORT ON THE YOUTH LABOR FORCE 30 (rev. Nov. 2000) (stating that 2.9 million youth aged fifteen to seventeen worked during school months between 1996 and 1998), available at <http://www.bls.gov/opub/rylf/rylfhome.htm>; DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION STUDY (2005) (calculating that between seven and eight million youth aged sixteen to nineteen worked during the summer of 2005), available at <http://data.bls.gov>.

employment experience and skills. However, as recent workforce entrants, teenagers may be unaware of their rights and responsibilities and unsure of how to respond to improper conduct, such as discrimination or harassment.

Accordingly, in September 2004, the EEOC launched the Youth@Work Initiative, a national outreach and education campaign designed to educate young workers about their workplace rights and responsibilities and help employers create positive work experiences for youth.⁷⁰ The Initiative has three main components: free outreach events, partnerships with business leaders, and a website. To date, more than 3800 Youth@Work events have been hosted nationwide, reaching more than 212,000 students, employers, and educators. The Commission has formed national Youth@Work partnerships with the National Restaurant Association, the National Retail Federation, and the National Education Association, as well as countless local partnerships, and anticipates forming additional partnerships in the future.⁷¹

ii. Baby Boomers and Boomerangers

Another key demographic also continues to exert its influence over the American workplace: the baby boomer. Born between 1946 and 1964, the first round of baby boomers are rapidly approaching retirement, rest, and relaxation.⁷²

There's just one catch—many baby boomers aren't interested in retiring. Surveys show that more than 80% expect to work past age sixty-five; and, more than half would like to change careers.⁷³ Having

70. See Press Release, EEOC, EEOC Launches 'Youth@Work' Initiative to Educate Teen Employees About Their Rights and Responsibilities (Sept. 21, 2004), available at <http://www.eeoc.gov/press/9-21-04a.html>; EEOC, Youth@Work, <http://www.eeoc.gov/initiatives/youth/index.html> (last visited Oct. 6, 2005); see also EEOC, Youth@Work Website, <http://youth.eeoc.gov> (last visited Oct. 6, 2005).

71. Press Release, EEOC, EEOC and National Restaurant Association Partner to Address Employment Issues Affecting Teens (Nov. 30, 2004), available at <http://www.eeoc.gov/press/11-30-04.html>; Press Release, EEOC, National Retail Federation Partners with EEOC to Educate Teens on their Employment Rights (June 29, 2005), available at <http://www.eeoc.gov/press/6-29-05a.html>; Press Release, EEOC, National Education Association Partners with EEOC to Address Employment Issues Affecting Teens (Nov. 17, 2005), available at <http://www.eeoc.gov/press/11-17-05.html>; Karen A. Davis, *Campaign Informs Young Workers of Their Rights*, PROVIDENCE J. June 14, 2006, at D1 (describing a partnership between EEOC and the Rhode Island Commission for Human Rights that resulted in the creation of placards with information about teens' workplace rights). The placards will be posted in local buses for a year. *Id.*

72. Jerry Adler, *The Boomer Files: Hitting 60*, NEWSWEEK, Nov. 14, 2005, at 50.

73. *Id.*

finally ascended the corporate hierarchy, this generation is now willing to trade the prestigious title, the corner office, and the hefty paycheck for work they find interesting, important, and inspiring.⁷⁴ However, not all baby boomers have the luxury of choosing whether or not to retire. Some must remain employed to support themselves, their children, or their parents.

In addition to baby boomers, “boomerangers” round out the mature worker demographic. Boomerangers are retirees who have returned to the workplace. Some return out of economic necessity, while others return to pursue a second career or to develop new areas of interest and expertise after the thrill of retirement fades.

Employers should take full advantage of both the reluctance of baby boomers to exit and the willingness of retirees to reenter the labor force. Mature workers possess an in-depth knowledge of industry practices and trends and a familiarity with client preferences and idiosyncrasies, two extremely marketable qualities in today’s competitive job market.

Employers should also be aware of the potential for conflict regarding management style, technology, and workplace attire between older and younger employees, who may possess diverging perspectives on such issues.⁷⁵ By pursuing a proactive approach that leverages the many talents that young workers, baby boomers and boomerangers offer, employers enjoy the potential to improve the bottom line, enhance employee satisfaction, and retain top talent.

3. Disability

Presently, approximately fifty million Americans have a disability covered by federal employment statutes.⁷⁶ Contrary to popular belief,

74. See, e.g., Daniel McGinn, *Second Time Around*, NEWSWEEK, June 19, 2006, at 46.

75. See, e.g., Hanah Cho, *Young Workers Reaching for Management*, BALT. SUN, June 28, 2006, at 1D (noting the discomfort experienced by older employees who report to younger managers and providing recommendations for resolving potential conflicts); *Survey Hints at ‘Compatibility Issues’ Between Older, Younger Employees*, DAILY LAB. REP., Apr. 27, 2006, at A6 (reporting the results of a recent study, which found that younger employees fail to utilize the expertise of older employees and revealed that most workers do not believe that their younger or older co-workers, respectively, are inspiring or innovative); Bob Brody, *From New Kid on the Job to Tribal Elder*, NEWSWEEK, Jan. 16, 2006, at 18 (providing a first-hand account of intergenerational differences in work habits and style).

76. Department of Labor, *Frequently Asked Questions*, <http://www.dol.gov/odep/faqs/people.htm> (last visited July 5, 2006).

many disabilities may not be immediately apparent.⁷⁷ In addition, certain conditions that might not otherwise qualify as disabilities may cause potentially disabling complications.⁷⁸ The name of a condition, by itself, is not necessarily determinative of whether the condition is a disability under the Americans with Disabilities Act (“ADA”).⁷⁹ Rather, courts generally determine disability coverage on a case-by-case basis. Consequently, employers should carefully consider disability-related requests to determine whether individuals are covered by relevant laws and whether reasonable accommodations are available.

i. Intersection of Age and Disability Claims

Over the past few years, the Commission has observed an increase in claims alleging both age and disability discrimination. As statistics demonstrate, this trend will likely continue. First, the age-related numbers: in 2004, individuals aged fifty-five and older accounted for more than 15% of the civilian labor force.⁸⁰ By 2014, this group is projected to represent more than 21% of the civilian labor force.⁸¹ Now, the disability statistics: according to the 2002 Census, 18.1% of Americans reported that they had a disability.⁸² However, narrowing the field to examine only individuals aged fifty-five to sixty-four, the percent reporting a disability rises to 28.1.⁸³ The percent increases even further for individuals aged sixty-five to sixty-nine; among that group, 38.4% reported a disability.⁸⁴

77. Certain medical conditions such as diabetes, for example, cannot be ascertained through visual inspection. Diabetes is a disability under the ADA if it substantially limits, has substantially limited, or is regarded as substantially limiting one or more major life activities.

78. Obesity, for example, is not a protected basis under federal employment law. However, individuals who are severely obese (defined as having a body weight more than 100% above the norm) may be covered under the ADA if the obesity substantially limits, has substantially limited, or is regarded as substantially limiting a major life activity. Furthermore, obesity may cause conditions such as diabetes, osteoarthritis, or carpal tunnel syndrome that may be disabilities if they substantially limit, have substantially limited, or are regarded as substantially limiting a major life activity.

79. 42 U.S.C. §§ 12101-213 (2000); *Graaf v. N. Shore Univ. Hosp.*, 1 F. Supp. 2d 318, 321-22 (S.D.N.Y. 1998) (holding debilitating but temporary back injury not covered under the Act).

80. Press Release, Dep’t of Labor, Bureau of Labor Statistics, BLS Releases 2004-14 Employment Projections (Dec. 7, 2005), available at http://www.bls.gov/news.release/archives/ecopro_12072005.pdf.

81. *Id.*

82. U.S. CENSUS BUREAU, AMERICANS WITH DISABILITIES: 2002, at 3 tbl.A (2006), available at <http://www.census.gov/prod/2006pubs/p70-107.pdf>.

83. *Id.*

84. *Id.*

Employers should adopt proactive measures to prevent age and disability discrimination. They should train supervisors and employees regularly about relevant local, state, and federal requirements; promptly investigate and resolve complaints; and protect employees who complain about discrimination or harassment or participate in any internal or external investigation from retaliation. Employers should also ensure that hiring, promotion, and other opportunities remain open to applicants and employees and that selections are made without regard to irrelevant characteristics such as age or disability.

4. Gender

Gender continues to serve as one of the three most frequently cited bases in discrimination charges, along with race and retaliation.⁸⁵ Certain groups appear particularly vulnerable to gender-based discrimination or particularly likely to file gender-based charges. For example, some evidence suggests that Generation X and Y women are more likely to file charges alleging pregnancy discrimination.⁸⁶ Minority women appear particularly likely to file charges alleging gender-based harassment in general, and sexual harassment in particular.⁸⁷ Young workers and migrant farm workers also appear particularly vulnerable to sexual harassment.⁸⁸

i. Pregnancy Discrimination

Pregnancy discrimination charge filing has increased dramatically since 1992, despite the declining national pregnancy rate. In fiscal year 2005, the Commission and state and local FEPAs received 4730 charges alleging pregnancy discrimination, an increase of 37% from 1992.⁸⁹

85. EEOC, Charge Statistics, <http://www.eeoc.gov/stats/charges.html> (last visited Mar. 1, 2008). See generally Jennifer Gill, *Gender Issues*, INC. MAG., Apr. 2005, at 38, 40 (detailing the types of sex discrimination claims filed in 2004 and providing guidance to employers seeking to prevent discrimination).

86. See, e.g., Alison Grant, *Avoiding the Pregnant Pause*, CLEVELAND PLAIN DEALER, Jan. 23, 2006, at E1 (suggesting that Generation X employees desire greater work-life balance than their predecessors, rendering them more attuned to discrimination and more likely to file charges).

87. WOMEN AT WORK, *supra* note 13. See generally Rebecca R. Kahlenberg, *Challenges to Workplace Diversity*, WASH. POST, Dec. 18, 2005, at K1 (identifying stereotyping, racial jokes, the dearth of mentors and training and development opportunities, and inadequate recognition as obstacles to workplace success).

88. See *supra* Part II.1.ii.

89. EEOC, Pregnancy Discrimination Charges, <http://www.eeoc.gov/stats/pregnanc.html> (last visited Mar. 19, 2008).

During that time period, the national pregnancy rate decreased by approximately 9%.⁹⁰ More recent charge data demonstrates that pregnancy discrimination persists: in fiscal year 2007, the EEOC and FEPAs received a record 5587 pregnancy-based charges.⁹¹ Although the most common pregnancy-related complaint is termination, allegations also include failure to hire, promote, and accommodate, as well as challenges to leave and maternity policies.

A number of factors may account for the rise in pregnancy-related claims. First, the proportion of women in the workforce has increased relatively steadily—a trend that is expected to continue.⁹² In addition, women are remaining in the workforce during their pregnancies, and continuing to work while pregnant, for periods longer than their predecessors.⁹³ Second, a stagnant economy, overstretched workforce, and productivity pressures may render some employers reluctant to hire employees who will request maternity leave and flexible schedules, and potentially increase the company's health care costs.⁹⁴ Third, societal misperceptions regarding pregnancy and work ethic persist, suggesting that pregnancy detrimentally affects women's work abilities and commitment.⁹⁵ Fourth, some employers and managers may be unaware of the Pregnancy Discrimination Act ("PDA").⁹⁶ Finally, generational differences may also play a role, as members of Generation X and Y transition into the workplace, aware of their legal rights and determined to maintain work-life balance to a greater extent than previous generations.⁹⁷

To counteract this trend, employers, employees, and applicants should review relevant federal laws—in particular, the PDA and the

90. WOMEN AT WORK, *supra* note 13, at n.62.

91. EEOC, Pregnancy Discrimination Charges, <http://www.eeoc.gov/stats/pregnanc.html>.

92. See DEP'T OF LABOR, WOMEN'S BUREAU, WOMEN IN THE LABOR FORCE IN 2005, available at <http://www.dol.gov/wb/factsheets/Qf-laborforce-05.htm> (predicting that women will account for 51% of the increase in labor force growth between 2004 and 2014).

93. See WOMEN AT WORK, *supra* note 13, at 13 (comparing the decade before the Pregnancy Discrimination Act was passed, when more than half of all working women quit their jobs due to pregnancy, to the early 1990s, when 27% of working women quit due to pregnancy).

94. Grant, *supra* note 86, at E1; Stephanie Armour, *Pregnant Workers Report Growing Discrimination*, USA TODAY, Feb. 17, 2005, at 1B.

95. Armour, *supra* note 94, at 1B.

96. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. 2000e (2000)); see Amy Joyce, *More Women Fight Back Against Anti-Pregnancy Bias at Work*, WASH. POST Dec. 31, 2005, at D1 (referring to a "knowledge vacuum" created when employers fail to include information about pregnancy discrimination when training employees about discrimination); Grant, *supra* note 86, at E1 (suggesting that employers may mistakenly assume that the Family and Medical Leave Act covers all pregnancy-related workplace issues).

97. See Grant, *supra* note 86.

Family and Medical Leave Act (“FMLA”).⁹⁸ They should also familiarize themselves with state laws, union contracts, and the Americans with Disabilities Act, which may provide greater coverage than the PDA and FMLA.⁹⁹ Employees should communicate with their supervisors regarding maternity leave and temporary transfer of work responsibilities.

V. CONCLUSION

While much has been accomplished since the passage of the Civil Rights Act of 1964 and the creation of the EEOC, much work remains to be done. According to a national Gallup poll released in December 2005, 15% of survey participants believed they had been victims of workplace discrimination or unfair treatment in the previous twelve months.¹⁰⁰ Poll results found that 31% of Asian participants, 26% of Black participants, and 18% of Hispanic participants reported experiencing discriminatory treatment.¹⁰¹ However, while a sizeable percentage of Asian and Hispanic participants perceived themselves as victims of discrimination, comparatively few Asian and Hispanic individuals filed the EEOC charges in fiscal year 2005.¹⁰²

An increasingly diverse workforce and an expanding global labor market present new challenges and opportunities for the nation and for the Commission. As the American workplace continues to evolve, the EEOC will likewise continue to utilize its resources and expertise to promote equal employment opportunities and provide all workers with the freedom to compete, advance, and succeed.

98. 29 U.S.C. §§ 2601-54 (2000).

99. NAT’L P’SHIP FOR WOMEN & FAMILIES, STATE-BY-STATE GUIDE TO UNPAID, JOB-PROTECTED FAMILY AND MEDICAL LEAVE LAWS (2003), *available at* <http://www.nationalpartnership.org/site/DocServer/StateunpaidFMLLaws.pdf?docID=969>.

100. Press Release, EEOC, New Gallup Poll on Employment Discrimination Shows Progress, Problems 40 Years After Founding of EEOC (Dec. 8, 2005), *available at* <http://www.eeoc.gov/press/12-8-05.html>.

101. *Id.*

102. *Id.* (noting that only 3% of race charges filed in fiscal year 2005 were by Asian/Pacific Islanders). In FY 2005, national origin was cited as a basis in approximately 11% of charges. Hispanics filed half of the national origin-related charges. *Id.*