The U.S. Equal Employment Opportunity Commission

FY 2005 Annual Report on the Operations and Accomplishments of the Office of the General Counsel

Table of Contents

I. STRUCTURE AND FUNCTION OF THE OFFICE OF GENERAL COUNSEL

A. *Mission of the Office of General Counsel*

The Equal Employment Opportunity Act of 1972 amended Title VII of the Civil Rights Act of 1964 (Title VII) to provide for a General Counsel, appointed by the President and confirmed by the Senate for 4-year term, with responsibility for conducting the Commission's litigation program. Following transfer of enforcement functions from the U.S. Department of Labor to the Commission under a 1978 Presidential Reorganization Plan, the General Counsel became responsible for conducting Commission litigation under the Equal Pay Act of 1963 (EPA) and the Age Discrimination in Employment Act of 1967 (ADEA). With the enactment of the Americans with Disabilities Act of 1990 (ADA), the General Counsel became responsible for conducting Commission litigation under the employment provisions of that statute (Title I; effective July 1992).

The mission of EEOC's Office of General Counsel (OGC) is to conduct litigation on behalf of the Commission to obtain relief for victims of employment discrimination and ensure compliance with the statutes that EEOC is

charged with enforcing. Under Title VII and the ADA, the Commission can sue nongovernment employers with 15 or more employees. The Commission's suit authority under the ADEA (20 or more employees) and the EPA (no employee minimum) includes state and local governmental employers as well as private employers. Title VII, the ADA, and the ADEA also cover labor organizations and employment agencies, and the EPA prohibits labor organizations from attempting to cause an employer to violate the statute. OGC also represents the Commission on administrative claims and litigation brought by agency applicants and employees, and provides legal advice to the agency on employee-related matters.

B. *Headquarters Programs and Functions*

1. General Counsel

The General Counsel is responsible for managing, coordinating, and directing the Commission's enforcement litigation program. He or she also provides overall guidance and management to all the components of OGC, including field office legal units. The General Counsel recommends cases for litigation to the Commission and approves other cases for filing under authority delegated to the General Counsel under the Commission's 1996 National Enforcement Plan. The General Counsel also reports regularly to the Commission on litigation activities, including issues raised in litigation which may affect Commission policy, and advises the Chair and Commissioners on litigation strategy, agency policies, and other matters affecting the enforcement of the statutes within the Commission's authority.

2. Deputy General Counsel

The Deputy General Counsel serves as the alter ego of the General Counsel and as such is charged with the daily operations of OGC. The Deputy is responsible for overseeing all programmatic and administrative functions of OGC, including overseeing the litigation program. OGC functions are carried out through the operational program and service areas described below, which report to or through the Deputy.

3. Litigation Management Services

Litigation Management Services (LMS) oversees and supports the Commission's court enforcement program in the agency's field offices. Also, in conjunction with the Office of Field Programs (OFP), LMS oversees the integration of field office legal units into the investigative enforcement structure of the field offices. LMS staff provide direct litigation assistance to district offices as needed, draft guidance, develop training programs and materials, and collect and create litigation practice materials. In addition, LMS is responsible for maintaining and updating the Regional Attorneys' Manual. LMS also has an assistant general counsel for technology responsible for providing technical guidance and oversight to OGC headquarters and field offices on the use of technology in litigation and the development of OGC's computer systems. LMS and OFP staff make joint visits to field offices to provide technical assistance regarding the integration of the field legal and investigative units.

4. Systemic Litigation Services

Systemic Litigation Services (SLS) initiates, investigates, and litigates charges raising important legal and policy issues. Uniquely structured and staffed as an issue-oriented unit that combines investigation and litigation, SLS is able to select cases involving novel or emerging legal questions arising in favorable factual settings.

5. Internal Litigation Services

Internal Litigation Services represents the Commission and its officials on administrative claims and litigation brought by Commission applicants and employees, and provides legal advice to the Commission and agency management on employee-related matters.

6. Litigation Advisory Services

Litigation Advisory Services (LAS) evaluates field office suit recommendations in cases that require General Counsel or Commission authorization, and drafts litigation recommendations to the General Counsel for approval or submission to the Commission. LAS responds to Commissioner inquiries on cases under consideration for litigation, acting as OGC's liaison and contact point between the Commissioners and the field legal units or Systemic Litigation Services. LAS also performs special assignments as requested by the General

Counsel.

7. Appellate Services

Appellate Services (AS) is responsible for conducting all appellate litigation where the Commission is a party. AS also participates as Commission amicus curiae in United States courts of appeals, as well as federal district courts and state courts, in cases involving novel issues or developing areas of the law. AS represents the Commission in the United States Supreme Court through the Office of the Solicitor General. AS also makes recommendations to the Department of Justice in cases where the Department is defending other federal agencies on claims arising under the statutes the Commission enforces. In addition, AS reviews EEOC policy materials, such as proposed regulations and enforcement guidance drafted by the Commission's Office of Legal Counsel, prior to their issuance by the agency.

8. Research and Analytic Services

Research and Analytic Services (RAS) provides expert and analytical services for cases in litigation, assists EEOC attorneys in obtaining expert services from outside the agency, and provides technical support to field staff investigating charges of discrimination. RAS has a professional staff with backgrounds and advanced degrees in the social sciences, economics, statistics, and psychology who serve as testifying and consulting experts on cases in litigation. RAS also provides services to other agency offices, such as conducting social science research on issues related to civil rights enforcement, advising the agency on the collection of workforce data, and developing and maintaining special census files by geography, race/ethnicity and sex, and occupation.

9. Administrative and Technical Services Staff

OGC's Administrative and Technical Services Staff (ATSS) provides administrative and technical services to all headquarters components of OGC. ATSS also is responsible for preparing the OGC budget request to the Chair for the Office of Management and Budget and Congress as well as for handling various budget execution duties such as transferring funds to field offices and monitoring expenditures. ATSS maintains nationwide data on the Commission's litigation activities.

C. *Field Legal Units*

Field office legal units conduct Commission litigation in the geographic areas covered by the respective offices and provide legal advice and other support to field office enforcement units responsible for investigating charges of discrimination. Field attorney staff also participate in outreach efforts, and in most offices the legal unit is responsible for responding to Freedom of Information Act requests. Legal units are under the direction of regional attorneys, who manage staffs consisting of supervisory trial attorneys, trial attorneys, paralegals, and support personnel.

II. SUMMARY OF FISCAL YEAR 2005 ACCOMPLISHMENTS

A. *A Perspective: The Evolution of EEOC's Litigation Program*

Forty years ago, on July 2, 1965, the U.S. Equal Employment Opportunity Commission opened its doors for business. Under its original charter, EEOC lacked the authority to enforce the law through litigation in cases where the agency was unable to secure voluntary compliance. Between 1966 and 1971, numerous bills were introduced in Congress to modify EEOC's enforcement authority. Some of these proposals would have granted cease and desist authority to EEOC, while others would have eliminated EEOC altogether. During this period, statistics revealed a continuing high unemployment rate for minorities, and a significant wage gap between blacks and whites. By 1971, it was evident that the voluntary approach in Title VII was inadequate to the task of eliminating employment discrimination.

Ultimately, Congress passed the Equal Employment Opportunity Act of 1972, substantially expanding the coverage of Title VII and strengthening its enforcement mechanisms. Perhaps the most significant change in the 1972 amendments was the granting of litigation authority to EEOC. EEOC was empowered to file civil lawsuits after conducting an investigation, finding reasonable cause to believe discrimination had occurred, and attempting to secure voluntary compliance. The position of General Counsel became a presidential appointment, and the General Counsel was charged with conducting Commission litigation.

Under the original structure of EEOC's litigation program, Commission suits were brought by attorneys

assigned to five regional litigation centers, each headed by a regional attorney. In 1979, the litigation centers were dissolved and attorneys were assigned to district offices to enable them to work more closely with investigative staff in developing litigation. In 1999, trial attorneys were deployed to all area and most local offices to provide better support to investigative staff in those offices.

The Office of General Counsel has used a combination of enforcement tools and strategies to deter and remedy employment discrimination and bring justice and opportunity to workers in every region of the nation. We have brought cases intended to have an impact beyond the parties to the specific lawsuit and that will serve notice on entire industries of the need to reform their practices. We have brought relief to individuals who would not otherwise be able to pursue their rights due to cost. We have sought relief for disparate groups of people unable to join together in private class actions due to federal procedural restrictions. We have entered into consent decrees with carefully crafted and creative injunctive relief that will benefit individuals beyond those immediately affected by the litigation. Further, by publicizing our litigation and settlements, as well as through our attorneys' participation in agency outreach and education programs, we inform employees and employers of their rights and responsibilities and assist employers in developing "best practices" that will avoid future discrimination complaints. And by maintaining a credible court enforcement program, we encourage the voluntary resolution of EEOC charges through mediation, other early administrative settlements, and conciliation agreements.

B. *Getting Results: A Summary of District Court Litigation Activity*

OGC resolved 337 merits suits in fiscal year 2005. Merits suits include direct suits and interventions alleging violations of the substantive provisions of the Commission's statutes, and suits to enforce administrative settlements. These resolutions resulted in monetary relief of approximately $107.7 million.

The table below presents the top five cases resolved in FY 2005 by monetary recovery (figures are rounded).

Top Five Cases Resolved in FY 2005 By Money Recovered	
EEOC v. Abercrombie & Fitch Stores, Inc.	**$50 million**
EEOC v. Ford Motor Co.	**$10.2 million**
EEOC v. Home Depot, U.S.A., Inc.	**$5.5 million**
EEOC v. Dial Corp.	**$3.3 million**
EEOC v. Hamilton Sundstrand Corp.	**$1.2 million**

The 337 FY 2005 resolutions had the following characteristics:

- 259 contained claims under Title VII
- 41 contained claims under the ADA
- 44 contained claims under the ADEA
- 11 contained claims under the EPA
- 116 cases resulted in relief for multiple aggrieved individuals

The above claims exceed the number of suits resolved because cases sometimes contain claims under more than one statute. There were 17 of these "concurrent" suits among the FY 2005 resolutions.

OGC filed 383 merits suits in FY 2005. Of the suits filed, 379 were direct suits, 1 was an intervention, and 3 were actions to enforce conciliation agreements. OGC also filed 33 actions to enforce subpoenas issued during EEOC investigations.

These 383 suit filings had the following characteristics:

- 297 contained claims under Title VII
- 49 contained claims under the ADA
- 43 contained claims under the ADEA
- 13 contained claims under the EPA
- 139 cases sought relief for multiple aggrieved individuals

- 16 were concurrent suits

Monetary relief is just one indicator of the success of EEOC's litigation program. As the discussion in the following sections of this part of the Annual Report shows, we brought suit in a wide variety of cases this fiscal year, obtaining justice for thousands of victims of unlawful employment discrimination throughout the United States and opening up opportunities for countless job seekers and employees. A hallmark of all of EEOC's litigation is the effort, through appropriate injunctive and other affirmative relief, to change the employment practices that caused the discriminatory conduct.

C. *Eliminating Discrimination through Law Development*

OGC's appellate litigation program is the agency's primary vehicle of law development. Practicing before the federal courts of appeals of all circuits, in the Supreme Court in conjunction with the Solicitor General's Office of the Department of Justice, and on occasion in federal district courts and state courts, OGC appellate attorneys seek both through appeals in the agency's litigation and as amicus curiae in private suits to ensure that courts interpret employment discrimination laws to achieve the broad protection that Congress intended. In this section of the Annual Report, we highlight significant appellate cases decided or briefed during FY 2005.

1. Challenges to EEOC Authority

EEOC v. Peabody Western Coal Co., 400 F.3d 774 (9th Cir. 2005)

The Commission alleged in this Title VII suit against a coal mining operation that the company unlawfully discriminated on the basis of national origin by refusing to hire members of the Hopi and Otoe Indian tribes. The company mines coal on Navajo and Hopi reservations in northeastern Arizona pursuant to leases with the Navajo Nation which expressly require the company to give preference in employment to members of the Navajo Nation. The district court dismissed the suit, finding that the Navajo Nation was an indispensable party that could not be joined in the action because of sovereign immunity and that the legality of the Navajo employment preference is a nonjusticiable political question. On appeal, the Ninth Circuit agreed that the Navajo Nation was an indispensable party because "unless the Nation is [joined and] bound by res judicata," any declaratory and injunctive relief against Peabody "could be incomplete." The court also acknowledged that tribal sovereign immunity has required dismissal in private cases where an Indian tribe was an indispensable party. However, the court ruled that tribal sovereign immunity does not "act as a shield against the United States," including federal agencies such as the EEOC. The court held that the Commission's inability to state a claim against an Indian tribe under Title VII (which exempts Indian tribes) did not affect the district court's authority to join the Navajo Nation because the Commission did not seek affirmative relief against the Nation, but only to make it possible to accord complete relief for the company's statutory violations. The court also held that the Department of Interior's approval of the tribal preference provision in the mining leases did not create a nonjusticiable political question.

EEOC v. Caterpillar, Inc., 409 F.3d 831 (7th Cir. 2005)

The Commission alleged in this Title VII suit that the defendant, a manufacturer of heavy construction equipment, engaged in a pattern or practice of sexual harassment. The suit stemmed from an EEOC charge filed by a woman who claimed that her male supervisor made unwanted sexual comments and advances towards her, and that his comments included sexual references to other female employees. Following an investigation, the Commission made a reasonable cause finding that the company discriminated against the charging party and a class of female employees. The company sought to narrow the Commission's claim to only those allegations involving the single charging party on the grounds that neither the charge nor the Commission's administrative investigation addressed the broader claims. The district court denied the company's motion, but certified for immediate appeal the question of whether a trial court can review the scope of the Commission's investigation. Opposing the company's petition to the Seventh Circuit for permission to appeal, EEOC argued that Title VII does not authorize judicial scrutiny into the Commission's investigation so long as the Commission meets the administrative prerequisites to suit of a reasonable cause determination and conciliation efforts. The Seventh Circuit granted the company's petition and issued an opinion agreeing with the Commission that its investigation and subsequent cause determination are not judicially reviewable. The court made two important points: (1) an EEOC suit need not be closely related to the charge that kicked off the investigation because a charge only "incites the investigation" and the Commission can add to its suit additional violations found during the investigation; and (2) because a Commission suit cannot be limited to the allegations in the charge, a court "has no business" limiting the suit to claims a court has found to be supported by evidence obtained in the investigation.

EEOC v. Paul Hall Center and Seafarers Int'l Union, 394 F.3d 197 (4th Cir. 2005)

In this ADEA suit, the Commission alleged that the defendants discriminated on the basis of age in conducting an apprenticeship program for seafarers by maintaining until 2000 a maximum age limit of 25 for entry into the program, and by discouraging older applicants from applying after the age limit was removed. A 1996 EEOC regulation - 29 C.F.R. § 1625.21 - extended the age discrimination prohibitions of the ADEA to all apprenticeship programs. The defendants moved to dismiss EEOC's suit, arguing that age discrimination in apprenticeship programs is not covered by the ADEA. The district court denied the motion, but certified its order for interlocutory appeal, noting that the validity of EEOC's regulation posed a substantial legal question unresolved by existing law. The Fourth Circuit accepted the appeal, and following an oral argument by the Commission's General Counsel, affirmed the decision of the district court. The Fourth Circuit ruled that the Commission's regulation was a valid exercise of the agency's rulemaking authority which was not contrary to the terms of the statute and was therefore entitled to judicial deference under the Supreme Court's decision in Chevron v. Natural Res. Def. Council, Inc.

2. Liability and Proof Standards

Clark v. United Parcel Serv., Inc., 400 F.3d 341 (6th Cir. 2005)

The two plaintiffs in this Title VII suit alleged that a high-level supervisor subjected them to sexual harassment, and that several managers and supervisors witnessed the harassment but failed to report it. The district court held that, as a matter of law, the company was not vicariously liable for the harassment because it had a policy prohibiting sexual harassment and the plaintiffs were aware of the policy but did not follow the complaint procedure in the policy. After the plaintiffs appealed, the Commission filed a brief as amicus curiae arguing that the company could not establish the first prong of the Farragher/Ellerth affirmative defense if supervisory employees witnessed arguably harassing conduct and took no steps to prevent or correct it. The Sixth Circuit agreed, emphasizing that the first prong of the defense puts an affirmative duty on employers to prevent harassment once they know about it. The court stated that "regardless of whether the victimized employee actively complained, prong one . . . ensures that an employer will not escape vicarious liability if it was aware of the harassment but did nothing to correct it or prevent it from occurring in the future." The court agreed with the Commission that the company's policy could be found ineffective in practice if supervisory personnel charged with reporting incidents of harassment did nothing to prevent or correct the conduct they witnessed.

EEOC and Christopher v. National Educ. Ass'n - Alaska, 422 F.3d 840 (9th Cir. 2005)

The Commission filed a Title VII suit against a teachers' union alleging that three women working in the union office were subjected to a hostile work environment based on sex by the abusive, albeit nonsexual, behavior of a union official. The official engaged in a consistent pattern of abusive behavior, including constant yelling with profanity, shaking his fists in his employees' faces, hurling accusations about work problems, and stomping down the hallways, red-faced with rage. The district court granted summary judgment for the union on the ground that the Commission had failed to establish that the official's bullying conduct was because of sex, since he abused both men and women and there was no evidence that his behavior was "motivated by lust" or reflected "sexual animus toward women as women." On appeal, the Ninth Circuit reversed, holding that regardless of the harasser's motives, there was sufficient evidence of qualitative and quantitative differences in the harassment suffered by female and male employees to warrant a trial on the issue of sex discrimination. The court pointed out that the case "illustrate[d] an alternative motivational theory in which an abusive bully takes advantage of a traditionally female workplace because he is more comfortable when bullying women than when bullying men." The court concluded that "[t]here is no logical reason why such a motive is any less because of sex" than lust or animus. The court stressed that harassment need not be motivated by sexual desire, nor must plaintiffs show that the harasser "had a specific intent to discriminate against women or to target them 'as women,'" because "Title VII is aimed at the consequences or effects of an employment practice and not at the . . . motivation of co-workers or employers." In short, the court held that motivation is not the issue but rather whether the conduct "affected women more adversely than it affected men," a question to be decided by the jury in this case.

Olson v. Northern FS, Inc., 387 F.3d 632 (7th Cir. 2004)

The plaintiff filed suit under the ADEA alleging that he was fired because of his age, 59. The plaintiff had worked for defendant for over 40 years, selling at various times agricultural supplies, equipment, and buildings, and was selling agricultural buildings when defendant discontinued that part of its business. The plaintiff asked his employer what he should be doing and was told that because of his age he was "undesirable in the business world," regardless of his years of experience. Shortly afterwards, his employer hired a much younger and inexperienced employee into a sales position the plaintiff desired and then fired the plaintiff. The district court granted summary judgment to defendant, finding that the employer's comment was merely "a

stray remark" and insufficient evidence of discrimination under the "direct method" of proving age discrimination. The court further found that the plaintiff had failed to show he was "directly comparable" to the younger worker "in every material respect." After the plaintiff appealed, the Commission filed an amicus curiae brief arguing that the district court misunderstood the evidentiary demands of the Supreme Court's McDonnell Douglas proof framework, which is not meant to impose a rigid test on plaintiffs but instead is simply a tool designed to get at the critical question of intentional discrimination. The Commission also argued that the district court erred in disregarding a decisionmaker's remark showing age bias on the grounds that it was not "direct evidence" of discrimination. The Seventh Circuit reversed, holding that the district court had erred by rigidly adhering to one formulation of the prima facie case and thereby "skirt[ing] the ultimate question - whether age was a motivating factor" in the challenged decision. The court then concluded that the evidence presented - namely, the decisionmaker's remark, plaintiff's satisfactory job performance, and plaintiff's replacement by someone substantially younger with no sales experience - was "sufficient to let a jury decide whether [the plaintiff's] age actually played a role in Northern FS's decision to terminate his employment."

Miller v. Eby Realty Group, LLC., 396 F.3d 1105 (10th Cir. 2005)

The plaintiff in this ADEA suit alleged that he was fired as general manager of an entity that managed assisted living facilities because of his age, 56. The jury found for the plaintiff, and his employer appealed. The Commission filed a brief as amicus curiae arguing that the trial court had properly given the following instruction: "If you disbelieve defendant's proffered explanation for the termination, you may - but need not - infer that defendant's true motive was discriminatory." The Tenth Circuit affirmed the judgment, agreeing with the Commission's argument that the jury instruction was proper and that such an instruction is mandated where a rational juror could reasonably find the employer's explanation false and from that falsity could infer that the employer is lying to hide a discriminatory purpose.

Arbaugh v. Y&H, No. 04-944 (S. Ct.) (Brief as Amicus Curiae filed Aug. 1, 2005)

Background: After the plaintiff won her sexual harassment case before a jury, the defendant moved to dismiss the case for lack of subject matter jurisdiction (which can be raised at any point in the litigation) because it did not have 15 employees. The court dismissed plaintiff's case and the court of appeals affirmed. The Supreme Court granted certiorari review of the question whether Title VII's 15-employee requirement limits courts' subject matter jurisdiction or instead is relevant only to the merits of the claim asserted. EEOC, through the Solicitor General, filed a brief as amicus curiae.

Argued: (1) In finding the 15-employee requirement jurisdictional, the lower courts improperly conflated the questions whether a claim is meritorious and whether courts have subject matter jurisdiction to adjudicate the claim. The absence of a valid cause of action does not implicate subject-matter jurisdiction. If a complaint seeks recovery under a statute, the courts must entertain the suit. (2) Title VII expressly provides that federal courts have jurisdiction over Title VII claims and that provision does not turn in any way on whether the defendant employs 15 or more employees. The 15-employee requirement is in Title VII's definition of "employer," a term used in the provisions that establish the substantive rights of parties, not the jurisdiction of the courts. That makes this case closely analogous to Zipes v. Trans World Airlines, in which the Court held that Title VII's timely filing requirements are nonjurisdictional because the jurisdictional provision contains no reference to the timely-filing requirement, and the timely-filing provision makes no mention of jurisdiction. (3) Courts that have held the 15-employee requirement is jurisdictional have provided little if any reasoning. To the extent they have suggested that the requirement must be a jurisdictional issue because it relates to whether Title VII applies in a particular case or to a particular defendant, they are wrong. (In a FY 2006 decision, the Supreme Court agreed with the Commission, holding that the 15-employee requirement is an element of a Title VII claim and not jurisdictional. 2006 WL 397863 (S. Ct. Feb. 22, 2006).)

3. Coverage and Reasonable Accommodation under the ADA

Fiscus v. Wal-Mart Stores, Inc., 385 F.3d 378 (3d Cir. 2004)

The plaintiff alleged in this ADA suit that her employer failed to accommodate her disability (end stage renal failure) when it refused to allow her to perform kidney dialysis at the worksite and instead fired her. The district court entered summary judgment for defendant, holding that the plaintiff had not shown that she was substantially limited in any major life activity. The district court also concluded that, because the plaintiff had not specifically pled a substantial limitation in "caring for one's self" in her complaint, the court did not need to address this major life activity. After the plaintiff appealed, the Commission filed an amicus curiae brief arguing that eliminating waste from and cleansing the blood is a major life activity under the ADA. The Commission also argued that an ADA plaintiff does not have to aver in the complaint the major life activity in which the plaintiff is substantially limited. The Third Circuit reversed and remanded the case for trial, agreeing

with the Commission's arguments.

Emory v. AstraZeneca Pharmaceuticals LP, 401 F.3d 174 (3d Cir. 2005)

The plaintiff filed suit under the ADA alleging that his employer repeatedly failed to promote him from his custodian job, which he had held for more than 25 years, because of his disability (cerebral palsy), and failed to provide him reasonable accommodations necessary to perform the higher-paying jobs he applied for. The district court granted summary judgment to defendant, concluding that the plaintiff's many physical and mental limitations were not "substantial or severe." To reach this conclusion, the court relied to a great extent on the plaintiff's civic accomplishments, including his ability to "perform as a clown, counsel families as a mediator, and assist his community as a firefighter," and the facts that he had graduated from high school and earned positive performance evaluations. After the plaintiff appealed, the Commission filed a brief as amicus curiae arguing that the district court failed to analyze the evidence under the correct legal standards. The Third Circuit reversed, agreeing with the Commission that the plaintiff's impairments substantially limit him in the major life activities of performing manual tasks and learning. The Court stressed that the focus must be on the obstacles an individual confronts, not those he has overcome, so that the plaintiff's success in becoming a productive member of society does not negate the disability-related obstacles he has had to overcome nor undermine his proof of a significantly restricted ability to learn and to perform manual tasks.

EEOC and Keane v. Sears, Roebuck & Co., 417 F.3d 789 (7th Cir. 2005)

The Commission filed this ADA suit alleging that the defendant failed to provide a reasonable accommodation for an employee whose neuropathy in her legs caused her difficulty in walking to and from her work area in defendant's department store. The district court initially granted summary judgment to defendant, holding that the employee was not disabled. The Seventh Circuit reversed, highlighting evidence in the record that the employee was substantially limited in walking. While the case was on remand, the Supreme Court issued its decision in Toyota Motor Mfg. v. Williams, and the district court decided that the Court had raised the bar for establishing a substantially limiting impairment by indicating that an impairment must "severely restrict" the individual's ability to perform a major life activity. Under that standard, the district court again granted summary judgment to defendant, holding that the Commission had failed to show that the employee was substantially limited in walking. In addition, the court held that the Commission had presented insufficient evidence that the employee had notified her employer of her disability and need for accommodation, and that the employee was responsible for the breakdown in the interactive process. On appeal, the Commission urged the Seventh Circuit to hold that Toyota had not changed the meaning of "substantially limited," and that the Commission's evidence thus was still sufficient to establish a covered disability. The Commission also argued that it had presented sufficient evidence to support a failure to accommodate claim. The Seventh Circuit agreed in all respects, finding sufficient evidence for a reasonable jury to conclude that (1) the employee was substantially limited in the major life activity of walking; (2) the company was sufficiently aware of her disability to trigger the interactive process; (3) the company did not reasonably accommodate her; and (4) the company was responsible for the breakdown in the interactive process.

Rodriguez v. ConAgra Grocery Prods. Co., No. 04-11473 (5th Cir.) (Brief as Amicus Curiae filed Feb.16, 2005)

Background: The district court relied on its interpretation of the ADA to hold that an applicant does not state a claim under the Texas antidiscrimination statute when a prospective employer refuses to hire him based on his perceived failure to control an ordinarily controllable illness (in this case, diabetes). The plaintiff appealed and EEOC filed a brief as amicus curiae.

Argued: When an individual with a disability has not mitigated the symptoms of his impairment, discrimination based on the uncontrolled symptoms is the same as discrimination based on the disability itself. In holding that a plaintiff may not state a claim under the ADA unless he has successfully controlled a controllable illness, the district court impermissibly separated the symptoms of a disability from the disability itself. The ADA does not require plaintiffs to mitigate their symptoms. For plaintiffs who do not mitigate, their unmitigated symptoms are an integral part of their disability. An employment decision based on those unmitigated symptoms is disability-based discrimination. (In a FY 2006 decision, the Fifth Circuit agreed in part with the Commission, holding *inter alia* that an employer's admission that it withdrew a job offer because of its perception that the applicant suffered from uncontrolled diabetes amounted to an admission that it withdrew the offer because it regarded him as substantially limited by his diabetes. 2005 WL 3036318 (5th Cir. Nov. 14, 2005).)

4. Age Discrimination

Smith v. City of Jackson, 125 S. Ct. 1536 (2005)

This Supreme Court case, in which the government did not participate, involved Jackson, Mississippi's implementation of a new pay plan that tied an employee's wage to his tenure with the Jackson police department, with more senior employees receiving, on average, lower raises as a percentage of their prior salary. Plaintiffs alleged that the pay plan violated the ADEA under both disparate treatment and disparate impact theories. In support of their disparate impact claim, plaintiffs argued that because seniority is correlated with age the plan has an adverse effect on the raises of older employees. The district court granted summary judgment for the city on both theories. The Fifth Circuit affirmed summary judgment on the disparate impact claim, ruling that such claims are categorically unavailable under the ADEA. The court said that "the ADEA was not intended to remedy age-disparate effects that arise from the application of employment plans or practices that are not based on age."

The Supreme Court, however, held that disparate impact claims are cognizable under the ADEA. The Court agreed with EEOC's regulation recognizing such claims under the ADEA. Noting the identical language prohibiting discrimination in the ADEA and Title VII, the Court stated that the reasoning behind its decision in Griggs v. Duke Power Co., which recognized that Title VII is designed to remedy the consequences of employment practices, applies with equal force to discrimination under the ADEA. The Court, however, disagreed with EEOC's regulation insofar as it provides that Title VII's business necessity justification applies to disparate impact claims under the ADEA. The Court relied on "[t]wo textual differences between the ADEA and Title VII" in finding that "the scope of disparate-impact liability under ADEA is narrower than under Title VII." First, the ADEA's reasonable factor other than age provision precludes liability "if the adverse impact was attributable to a nonage factor that was 'reasonable.'" Second, the 1991 amendment to Title VII that modified the Court's holding in Wards Cove Packing v. Atonio left the ADEA untouched. Thus Wards Cove's pre-1991 interpretation of Title VII's identical language, narrowly construing the employer's exposure to disparate impact liability, remains applicable to the ADEA. Applying these standards, the Court concluded that the rationale for the city's pay plan was unquestionably reasonable, and affirmed the Fifth Circuit's dismissal of the plaintiffs' disparate impact claim.

EEOC v. Jefferson County Sheriff's Dep't, Kentucky Ret. Sys., and Commonwealth of Ky., 424 F.3d 467 (6th Cir. 2005)

In this ADEA case, argued by EEOC's General Counsel, the Sixth Circuit affirmed summary judgment against the Commission in its suit claiming that the State of Kentucky's employee benefit plan discriminated based on age by denying or paying fewer disability retirement benefits to older workers because of age. The court held that it was bound by its earlier decision in Lyon v. Ohio Educ. Ass'n and Professional Staff Union. In Lyon, the Sixth Circuit found no age discrimination in an early retirement plan that, like Kentucky's plan, determined benefits by crediting employees who retired before reaching normal retirement age with additional years of service (calculated based on the difference between the employee's age and normal retirement age), and paid fewer benefits to an older worker who retired with the same compensation and seniority as a younger employee who received more additional service credits. The Sixth Circuit acknowledged that the Kentucky plan disadvantaged older workers, but stated that it was compelled to affirm the district court's decision because the plan could not be distinguished from the plan upheld in Lyon. The court of appeals offered a number of criticisms of the Lyon decision, but nonetheless was bound to follow that precedent. (In FY 2006, the Sixth Circuit granted EEOC's motion for rehearing en banc.)

Meacham v. Knolls Atomic Power Lab., Nos. 02-7378 & 7474 (2d Cir.) (Brief as Amicus Curiae filed June 14, 2005)

Background: A Jury found for the plaintiffs in an ADEA case alleging the disparate impact of a reduction in force. The Second Circuit affirmed. The Supreme Court vacated and remanded in light of Smith v. City of Jackson (see above discussion). The Second Circuit solicited briefing on the impact, if any, of Smith on its prior decision in Meacham, and EEOC filed an amicus curiae brief.

Argued: (1) Smith clarified that ADEA disparate impact claims are viable, that the Wards Cove Court's interpretation of Title VII governs the interpretation of identical language in ADEA, and that the ADEA's reasonable factor other than age (RFOA) provision determines the lawfulness of an employer's challenged practice. (2) RFOA is an affirmative defense. (3) Consistent with Smith, an employer must prove that the practice was reasonably designed to further or achieve a legitimate business purpose and reasonably implemented for that goal. In addition, the employer's practice cannot unfairly impact older workers. (4) The existence of equally effective alternatives, at comparable cost, with less impact on older workers is relevant to evaluating the reasonableness of the employer's practice.

5. Retaliation

Jute v. Hamilton Sundstrand Corp., 420 F.3d 166 (2d Cir. 2005)

The plaintiff filed a Title VII suit alleging that her employer subjected her to various adverse employment actions over a 2-year period because she had been named as a witness in another employee's discrimination lawsuit. The district court found that being named as a witness was protected activity, but refused to consider any adverse action that occurred more than 300 days before the plaintiff filed her EEOC retaliation charge, or any adverse action occurring within the 300-day period but not identified in her charge. The court then concluded that the timely adverse actions were too remote in time from the protected activity and that only the claim that the plaintiff received a negative employment reference after filing her EEOC charge could meet the causal connection requirement. On this claim, however, the court ruled that the plaintiff was obliged to show that the negative reference caused or contributed to her rejection by the prospective employer, and found she had not made such a showing. After the plaintiff appealed, the Commission filed a brief as amicus curiae to argue that: (1) an employee who is named as a witness in a Title VII proceeding has engaged in protected activity under the participation clause of the statute's retaliation provision; (2) adverse employment actions occurring outside the charge-filing period, while not independently actionable, may be considered as relevant background evidence for timely claims; (3) a plaintiff may allege in court claims which were not explicitly raised in an administrative charge if they are "reasonably related" to the allegations in the charge; and (4) an employer who gives a retaliatory negative employment reference violates Title VII regardless of whether the negative reference caused or contributed to the loss of a particular job. The Second Circuit agreed on all four points, finding that the plaintiff had stated a claim of retaliation sufficient to survive summary judgment.

EEOC v. Navy Fed. Credit Union, Inc., 424 F.3d 397 (4th Cir. 2005)

The Commission filed suit under Title VII alleging that the defendant fired a supervisor because she objected to her employer's efforts to retaliate against one of her subordinates, who had complained about race discrimination. The district court granted summary judgment to defendant, holding that the supervisor had not opposed her employer's actions against her subordinate and, in any event, she could not reasonably have believed that any of those actions - subjecting the subordinate to heightened scrutiny, failing to resolve friction between the subordinate and a coworker, and rating the subordinate more positively than she deserved on a performance evaluation - were retaliatory conduct. The district court also held that the Commission had presented insufficient evidence to rebut the employer's assertion that the supervisor was fired because of problems with her supervisory and management skills. On appeal, the Fourth Circuit agreed with the Commission's arguments that there was sufficient evidence that the defendant discharged the supervisor because she opposed its scheme to retaliate against one of her subordinates for complaining of race discrimination. The court held that the supervisor's belief that her employer was retaliating against her subordinate was not only reasonable, but was correct, and that the Commission had presented sufficient evidence to raise a triable question on whether the asserted reasons for the supervisor's discharge were a pretext for retaliation.

EEOC v. SunDance Rehab. Corp., No. 04-4178 (6th Cir.) (Final Brief as Appellee filed June 30, 2005)

Background: EEOC filed this case alleging that defendant violated the antiretaliation provisions of the EPA, Title VII, the ADEA, and the ADA by requiring employees fired in a reduction in force to waive their rights to file an EEOC charge and to participate in EEOC proceedings as a condition of receiving severance pay. The district court granted EEOC's motion for summary judgment on liability and defendant appealed.

Argued: (1) The district court correctly ruled that defendant violated the antiretaliation provisions of the EPA, Title VII, the ADEA, and the ADA by conditioning an employment benefit on relinquishing protected statutory rights. The purpose of the antiretaliation rules is to preserve unfettered access to statutory remedial mechanisms. Defendant's policy uses economic inducements and the threat of retribution to deter employees from filing EEOC charges or participating in EEOC investigations. (2) That defendant never had to offer severance pay in the first place is irrelevant, since the Supreme Court has held that once an employer chooses to bestow an employment benefit, it must do so in a nondiscriminatory manner. (3) The law does not necessarily require an employee to first have engaged in protected activity for an employer to violate the antiretaliation rules. The Supreme Court and the Sixth Circuit have recognized that employer policies can themselves be "facially discriminatory." Also, the Seventh Circuit has ruled that an employer's practice of conditioning grievance proceedings on an employee's willingness to forego filing an EEOC charge is per se retaliatory. This Seventh Circuit case is on all fours with the factual scenario presented here. (4) The "interference" provision in the ADA and ADEA texts on waivers explicitly proscribes employer conduct tending to threaten or interfere with an employee's prospective exercise of protected EEO rights. (5) The problematic portions of defendant's severance agreement violate public policy.

6. Mandatory Arbitration

Campbell v. General Dynamics Gov't Sys. Corp., 407 F.3d 546 (1st Cir. 2005)

After the plaintiff brought an ADA suit, his employer moved to compel arbitration under the Federal Arbitration Act, pursuant to the company's dispute resolution policy. The employer had notified its employees in a mass e-mail that it was implementing the policy, and the plaintiff argued that he was not bound by the policy because he did not receive sufficient notice of its terms. The plaintiff stated in an affidavit that he had no memory of receiving the e-mail or seeing a copy of the policy. The district court denied the defendant's motion to compel arbitration, holding that the defendant failed to provide the plaintiff with sufficient notice of the policy to charge him with knowledge of its contents. After the defendant appealed, the Commission filed a brief as amicus curiae, arguing that the district court had correctly decided that the arbitration policy was unenforceable against the plaintiff. Agreeing with the Commission, the First Circuit affirmed the district court's denial of the defendant's motion to compel arbitration. The court said that e-mail may be an acceptable means of forming a mandatory arbitration agreement, but ruled that both the form and the content of the e-mail in this case were insufficient to put the recipient on notice of the existence of such an agreement.

D. *Bringing Justice and Opportunity to the Workplace through a Nationwide Litigation Program*

EEOC's Office of General Counsel functions as a national law firm, working collaboratively to maximize our impact on eliminating employment discrimination. We maintain a presence in all areas of the country, taking on cases arising under all statutes EEOC is charged to enforce. By successfully resolving lawsuits brought on behalf of groups of individuals, or even one person, we obtain justice for victims of discrimination and open up opportunities to future applicants and employees. For the 6-year period ending in 2005, we successfully resolved 92.7% of our lawsuits, exceeding our goal of maintaining a success rate of at least 90% over rolling 6-year periods. In this section of the Annual Report, we discuss cases illustrating EEOC's efforts to address the discrimination issues arising in today's workplaces.

1. Denial of Equal Employment Opportunities Because of Race or National Origin

Access to employment opportunities without the taint of racial prejudice, enabling particularly black Americans to overcome the vestiges of racial injustice and provide decently for one's family, was the main promise of the employment provisions of Title VII. Forty years after the Commission opened its doors, we have seen significant progress towards the fulfillment of this promise, but many of our cases demonstrate that our work is not over.

In one of the Commission's largest Title VII cases in recent history, the agency alleged that nationwide retailer Abercrombie & Fitch engaged in a pattern or practice of race, color, national origin, and sex discrimination in the recruitment, hiring, assignment, promotion, and discharge of blacks, Hispanics, Asians, and women. EEOC v. Abercrombie & Fitch Stores, Inc. (N.D. Cal. Apr. 14, 2005). The suit was based on evidence that the retailer centered its marketing efforts around an "image" or "look" that it called "Classic All-American," and consequently targeted its recruitment efforts at primarily white high schools and colleges, channeled minority hires to stock and night crew positions rather than sales associate positions, maintained a 60%/40% ratio of male to female employees, failed to hire and promote minorities and women into management positions, and discharged minorities and women when corporate representatives believed they were "overrepresented" at particular stores.

The case was consolidated with two private class actions and resolved through a 6-year consent decree, which enjoins the company from discrimination and requires specific steps to increase job opportunities for minorities and women. For example, the company's marketing materials will reflect diversity as reflected by the major racial/ethnic minority populations of the United States, and the company will create an Office of Diversity headed by a Vice President reporting directly to the company's Chief Executive Officer or Chief Operating Officer, to be staffed by 25 full-time diversity recruiters. In consultation with an industrial organizational psychologist, the company will develop a recruitment and hiring protocol requiring that it affirmatively seek applications from qualified African Americans, Asian Americans, and Latinos of both genders. In addition, the company will advertise for in-store employment opportunities in periodicals or other media that target African Americans, Asian Americans, and/or Latinos of both genders, attend minority job fairs and recruiting events, and use a diversity consultant to aid in identifying sources of qualified minority candidates. The decree also establishes benchmarks for the selection of African Americans, Asian Americans, Latinos, and women into specific positions, and the company's compliance with the decree will be overseen by a court-appointed monitor. The company will establish a settlement fund of $40 million for a class of African Americans, Asian Americans, Latinos, and women who applied or were discouraged from applying for positions and were not hired, or who were employed in a store for any length of time. In addition, counsel for the private class suits

will receive fees and expenses.

In another nationwide Title VII action, the Commission alleged that Ford Motor Co. and the United Automobile Workers union used a written test (which was discontinued in 2004) for skilled trades apprentice positions that had a disparate impact on black applicants. EEOC v. Ford Motor Co. and United Auto. Workers of Am. (S.D. Ohio Jun. 16, 2005). The case was consolidated with a private class action, and was resolved through a consent order agreed to during the conciliation of 13 EEOC charges. The order provides that an industrial organizational psychologist selected by the parties will design and validate an apprenticeship selection instrument(s) consistent with the Uniform Guidelines on Employee Selection Procedures and professional standards within the field of industrial organizational psychology. The settlement also provides that the company will select 280 class members for apprentice positions. The class consists of current and former employees of African descent who took the Apprentice Training Selection System test over an 8-year period, and were not placed on an apprenticeship eligibility list. The 13 charging parties will receive $30,000 each, and approximately 3,400 additional class members will receive $2,400 each, for a total recovery of approximately $8.55 million. In addition, counsel for the private class will receive fees and expenses.

In EEOC v. EGW Temps., Inc. (W.D.N.Y. Sept. 1, 2005), the Commission found evidence that a Buffalo, New York employment agency coded and referred applicants based on their race and sex, and that some of the agency's client-employers made requests for individuals of a particular race or gender. Under a consent decree, the employment agency will pay $285,000 into a Claim Fund to be distributed among qualified claimants identified by the Commission, and three clients - Sorrento Cheese, Inc., Festival Salad Corp., and James Desiderio, Inc. - will pay $50,000 in administrative costs. In view of the employment agency's role as a gatekeeper for many jobs at various companies, the decree includes specific requirements to prevent the recurrence of race- and sex-based exclusion of applicants and to open up employment opportunities for black and female applicants. The agency is prohibited from using use race or sex in making employment referrals, and will retain an outside contractor to provide annual training regarding lawful interviewing, screening, and hiring procedures. The agency will also publish and implement an antidiscrimination policy and procedure explaining prohibited conduct, describing the internal complaint process, protecting confidentiality of individuals who file complaints, and providing for the prompt, thorough, and effective investigation of complaints.

In EEOC v. Central Park Lodges Long Term Care, Inc., d/b/a Linden Grove Health Care Ctr. (W.D. Wash. May 13, 2005), the Commission found evidence of widespread racial discrimination at a nursing facility in Puyallup, Washington. The all-white care management team, after meeting with a white resident's family members, prepared a care plan for the resident incorporating the family's request that no "colored girls" work with the resident. A white charge nurse then posted a note at the work station ordering that "[n]o caregivers of color" were to treat that resident. A black licensed practical nurse (LPN) complained to the director of nursing services (DNS) that the care plan and the note were illegal. Subsequently, the DNS removed the note and reassigned the LPN and several black nurses' aides to hallways where they would not come into contact with the patient. These incidents occurred in an environment in which management tolerated frequent use of racial slurs by residents and employees. For example, when a resident's family member referred to a black employee as a "slave" in the presence of the DNS, the DNS downplayed the gravity of the comment and told her to ignore it. In addition, management usually assigned nursing staff to shifts by race, with most of the blacks on the night shift and most of the whites on the more desirable day and evening shifts; black and white employees were also assigned to separate lunchtimes and lunchrooms. Some of the claimants intervened in the Commission's suit and the court certified for monetary relief a Fed. R. Civ. P. 23 class of 150 current and former nonwhite caregivers. A consent decree provides for a total of $500,000 for the eight class representatives and other eligible claimants and attorney's fees and costs, and prohibits future race discrimination and retaliation.

Several suits seeking relief for individual victims demonstrate the persistence of racially tainted hiring and promotion decisions in America's workplaces. EEOC v. Raytheon Tech. Servs. (D. Haw. Nov. 5, 2004) (company that performs civilian base operations support services under a contract with the U.S. Air Force on Johnson Atoll, 700 miles southwest of Honolulu, failed to hire black applicant as a painter despite his 20 years of experience and certification by the Navy and the Department of Labor as a journeyman painter, instead hiring five Asian/Pacific Islanders for painter jobs; consent decree required company to pay $165,000); EEOC v. Wyeth Pharm. (E.D. Pa. Nov. 8, 2004) (global pharmaceutical company in Pennsylvania failed to promote black employee into a newly created senior credit analyst position because of her race, instead promoting less experienced white employee without announcing the job; settlement requires that company pay $95,000 to employee, increase her annual salary, and post job announcements on its internal Web site).

In EEOC v. Idaho Power Co. (D. Idaho Nov. 24, 2004), EEOC alleged that an Idaho power company failed to hire an Hispanic/Native American applicant for a meter specialist position because of his race, national origin,

and age, 57, instead hiring nine other applicants who could not match his 23 years of meter reading and customer service experience and who were significantly younger. A consent decree requires the company to pay $175,000, prohibits future discrimination, and requires the company to notify the Idaho Commission on Hispanic Affairs of vacancies for meter specialist positions.

Once hired, employees still may face racial barriers to employment opportunities. In EEOC v. American Home Furnishings, Inc. (D. Ariz. Mar. 18, 2005), EEOC alleged that a retail furniture chain denied a black employee a promotion to a management position in its Tucson, Arizona store because of her race. At trial, EEOC presented evidence that the employee had excellent credentials and that two managers recommended her for the position to the company's Vice President for Stores in Albuquerque, New Mexico. The Vice President, who knew the employee's race, deviated from his normal practice of accepting local managers' recommendations without interviewing candidates, and interviewed her himself. The Vice President then told the Tucson managers he did not agree with their recommendation and asked if there were other employees interested in the position. The Tucson Store Manager identified a white sales associate who had much less experience, and the Vice President promoted her without an interview. The jury returned a verdict for EEOC, awarding the black employee $5,000 in backpay, $30,000 in compensatory damages, and $85,000 in punitive damages. In EEOC v. Indiana Ins. Co. (M.D. Tenn. Dec. 30, 2004), a Tennessee insurance company denied a 49-year-old black senior claims representative a promotion to a supervisor position, instead selecting a less qualified 28-year-old white employee. The consent decree requires the company to pay $178,065 and prohibits future race and age discrimination.

2. Race and National Origin Harassment

A working environment tainted with racial or ethnic prejudice can burden the terms and conditions of one's employment as surely as any other adverse employment action. In EEOC v. Consolidated Freightways Corp. (W.D. Mo. Jan. 21, 2005), a freight carrier subjected black dockworkers at its Kansas City, Missouri facility to hangman's nooses and racist graffiti in the workplace, physical assaults by white coworkers, threats of violence, vandalism of property, and harsher discipline than white coworkers. The company failed to investigate reported incidents of harassment and took no meaningful remedial action. A consent decree provides a total of $2,750,000 to 12 victims. While the company has filed for bankruptcy protection and is liquidating, EEOC expects to recover 13%-20% of the face value of the claims.

In EEOC v. Hamilton Sundstrand Corp. (D. Colo. May 19, 2005), a global supplier of aerospace and industrial products subjected Hispanic employees at a Colorado facility to ethnic slurs and racial epithets, and physical threats. In addition, an anonymous employee posted and circulated documents promoting discrimination based on race and national origin. An Hispanic employee reported numerous incidents to supervisors and to the Human Resources Department using complaint procedures, but the company took no corrective action and the harassment escalated. Under a consent decree, 12 victims will share $1.25 million, and the company is prohibited from future discrimination. In EEOC v. The Denver Publ'g Co. d/b/a The Rocky Mountain News (D. Colo. June 14, 2005), a Denver, Colorado newspaper allowed a white pressroom employee to direct racial epithets at black employees on a daily basis; the company will pay $375,000 into a settlement fund to be distributed among 10 victims.

EEOC's docket of racial and ethnic harassment cases demonstrates how we can - and do - pursue relief for multiple victims of a hostile work environment, without any requirement of meeting class action certification rules, and obtain broad-based equitable relief calculated to prevent future harassment. In EEOC v. Western Casework Corp. (D. Nev. July 20, 2005), a cabinetry supplier in Las Vegas, Nevada subjected Hispanic employees to insults, ethnic epithets, and physical and verbal assaults. Under a consent decree, the company will pay up to $600,000 to six identified victims and a class of current and former Hispanic employees. The company will also post notices at each facility informing employees of the resolution of the lawsuit and of their right to file a charge with the EEOC. The company will hire an EEO consultant approved by EEOC to develop and implement discrimination and harassment policies and procedures, and will provide mandatory EEO training to managerial and human resources staff and to hourly staff once a year for 3 years. The company will offer separate training sessions for staff in English and in Spanish.

Similarly, in EEOC v. J.W. Aluminum Co. (D.S.C. Mar. 10, 2005), a manufacturer of aluminum sheets and foil in rural South Carolina subjected black employees to racist slurs and graffiti, and other racially-charged conduct. Graffiti remained on the bathroom walls continuously for 7 years, and the slurs became less frequent but did not cease after a workplace training session on racial harassment. A consent decree provides $225,000 to 27 victims, prohibits future discrimination, and requires the company to implement a harassment policy that includes a prohibition of all forms of racial graffiti and a thorough investigation of complaints. The company also must report to EEOC semiannually on complaints of race discrimination and harassment and on all instances where racial graffiti is discovered.

In a case brought against an upstate New York a computer parts manufacturer, EEOC alleged that Native American employees were subjected to frequent name-calling, war whoops, and other derogatory statements (comments about being "on the warpath" and about scalpings, alcohol abuse, and living in tepees). The employees complained to several supervisors and the Human Resources Department, and the offending employees were occasionally warned, but the hostile environment continued. A consent decree provides a total of $200,000 to victims and enjoins future national origin discrimination. Further, the company must actively recruit Native Americans for available positions, implement and publish a policy and procedure for addressing national origin harassment and retaliation that includes an effective complaint procedure, and report to EEOC on complaints of retaliation and harassment based on Native American heritage. EEOC v. Dielectric Labs., Inc. (N.D.N.Y. Nov. 17, 2004).

While racial and ethnic harassment often takes the form of verbal slurs and offensive written or graphic displays, disparaging comments about an individual's foreign accent can also give rise to a hostile environment based on national origin. In EEOC v. Northwestern Human Servs. (E.D. Pa. Dec. 8, 2004), a Philadelphia social service organization subjected a Program Manager from Ghana who speaks accented English to a hostile work environment. The employee had many years of experience with the company and was responsible for several programs for the mentally disabled. He was placed under a new supervisor, who constantly made negative comments about his and other Africans' accents and ability to speak English. A month after complaining to upper management, he received two disciplinary warnings, and 2 weeks after he complained again he was fired. Under a consent decree, the company will pay the employee $86,000 and is enjoined from engaging in national origin harassment or retaliation.

In the wake of the terrorist attacks of 9/11 and the subsequent conflicts in Afghanistan and Iraq, the EEOC has litigated a number of suits alleging that individuals of Middle Eastern origin or of the Muslim faith were subjected to a hostile work environment. For example, managers at a luxury hotel in Manhattan began calling Arab and Muslim employees "Osama," "Al Qaeda," and "Taliban," and gave them keys in holders with labels such as "bin Laden" in place of their names. Although the hotel had promulgated an employee handbook containing an antidiscrimination policy, none of the victims had received the handbook or were aware of the policy. The hotel ignored some of the complaints about the harassment and failed to adequately investigate others. Under a consent decree in EEOC v. Plaza Operating Partners Ltd. d/b/a The Plaza Hotel, Fairmont Hotels and Resorts, Inc. (S.D.N.Y. June 8, 2005), the defendants will provide $525,000 to 12 victims and are prohibited from future discrimination. In addition, defendants will implement an antidiscrimination policy and provide extensive training to all managers and supervisors and to all Human Resources staff at 14 hotels throughout the United States. A summary of the policy will be posted on employee bulletin boards at each hotel, distributed to all employees, and translated into languages other than English upon request. New employees at the hotels will be given a 30-minute oral presentation on the policy as well as a copy of it during initial orientation.

In EEOC v. Pesce, Ltd. (S.D. Tex. Mar. 5, 2005), an owner of an upscale seafood restaurant in Houston told the restaurant's Egyptian-born General Manager after the 9/11 attacks that his name and appearance might scare customers and might explain a decline in earnings in the weeks following the terrorist attacks. The owner repeatedly suggested that the manager could "pass for Hispanic" and should change his name to "something Latin." The owner discharged the manager 2 months after the attacks, telling him that "things just weren't working out." Under a consent decree, the restaurant will pay the manager $150,000.

3. Denial of Equal Employment Opportunities Because of Sex

Women's access to employment opportunities continues to be obstructed by sex bias in some workplaces, particularly in jobs traditionally held by men. In a case brought against a nationwide manufacturer of household products, the Commission alleged that Dial Corporation's use of a physical "work tolerance" test for production operator positions at a food processing plant in Iowa intentionally discriminated against female applicants and also had a disparate impact on women. EEOC v. Dial Corp. (S.D. Iowa Sept. 29, 2005). At trial, EEOC presented the testimony of an expert witness that 97% of men pass the test while only 40% of women succeed, that the test is more difficult than the job, that the scoring is subjective, and that the test does not accomplish its stated objective of reducing injuries. EEOC also presented testimony from 10 of approximately 40 unsuccessful female applicants, focusing on their experience in performing jobs that require heavy lifting. The company presented two expert witnesses, who testified that the production operator job is in the 99th percentile of all jobs in the economy with respect to the physical strength required, that the test is very like the job and therefore is content valid, and that the test had in fact reduced injuries.

The jury returned a verdict for EEOC, finding that the company's continued use of the work tolerance test since April 2001 (when the company became aware of the test's disparate impact on women) constituted intentional sex discrimination against women. The court later ruled that the test had had a disparate impact on

women since its inception in January 2000. The judgment provides approximately $3.38 million in backpay, benefits, prejudgment interest, and compensatory damages to 52 class members. It also prohibits the company from implementing any preemployment screening device for 5 years without first consulting EEOC, and provides job offers with rightful place wages to all class members.

In EEOC v. Continental Conveyor & Equip. Co. (E.D. Ky. Oct. 13, 2004), EEOC alleged that a manufacturer of underground mining equipment failed to hire female applicants for shop floor positions at its Salyersville, Kentucky facility because of their sex. The company employed approximately 200 workers at the facility. Men held the jobs on the plant floor, while all the female employees worked in office secretarial positions. A woman who applied repeatedly for plant jobs over a 6-month period was told each time that the company was not hiring or that no current employee had recommended her. Under a consent decree, the company will pay a total of $53,000 to three female applicants. In addition, the company will make good faith efforts to recruit and hire women for shop floor hourly positions by notifying its employees in writing of its efforts to increase female and minority applicants and hires. The company also agreed to expand its recruitment efforts of female and minority applicants, including notifying several named outside sources prior to acceptance of applications at the plant. The company will report to EEOC on applicants and hires during the term of the decree.

The same theme was repeated in other cases. In one case, we found evidence that a beer distributer failed to hire female applicants into sales representative positions because of their sex. A woman with relevant driving and sales experience and a Class A commercial driver's license was rejected two different times with no interview. The company instead hired several male applicants whose applications reflected less relevant experience and did not indicate whether they had class A commercial drivers licenses. The company had never hired a woman as a sales representative. A consent decree provides $50,000 to the applicant, enjoins the company from sex discrimination in hiring, and requires the company to report to the EEOC on all applications received, including the sex of the applicant and what action was taken on each application. EEOC v. Ideal Distrib. Co. (M.D. Tenn. Nov. 29, 2004). In another case, we found evidence that a nationwide over-the-road trucking company had a policy of not allowing female employees to receive over-the-road truck driving training from male instructors. Because the company had few female instructors, female drivers had to wait longer than males to receive mandatory training. A consent decree provided a total of $235,000 to female driver applicants and for costs associated with training and compliance with the decree. The decree, which covers all of the company's facilities nationwide, requires the company to implement a new driver assignment policy that ensures gender neutral training assignments. EEOC v. Gordon Trucking, Inc. (W.D. Wash. Oct. 6, 2004).

A woman's decision to disclose her pregnancy can be fraught with concern over a potential employer's negative reaction. For example, in EEOC v. Johnson Int'l, Inc. (E.D. Wis. Dec. 27, 2004), a global financial services company failed to hire a woman for an executive vice president position after learning of her pregnancy. The woman had signed a written employment contract, subject to a drug test and credit and criminal record background checks. After she disclosed her pregnancy to her new boss, the company conducted a number of additional reference checks and ultimately revoked the job offer. Under a consent decree, the company will pay $450,000 and is prohibited from making employment decisions based on pregnancy.

Sometimes the denial of equal opportunity is as direct as paying women less than men for performing the same work. In Revolution Studios and Smile Prods., LLC (S.D.N.Y. Aug. 5, 2005), film companies paid 19 female musicians less than 19 male musicians for performing in the film *Mona Lisa Smile*. The women mimed playing in an all-female jazz band and the men mimed playing in an all-male jazz band in different scenes in the movie. All of the women were professional musicians and five were members of the Screen Actors Guild (SAG). Several of the men were actors and the rest were professional musicians (four were SAG members). The film companies paid the women $400 for a 12-hour workday while paying the men $517.05, and paid the women $53.23 an hour for overtime while paying the men $68.94. The consent decree provides for the 19 claimants to share $66,500.

Occasionally, EEOC comes across cases that serve as a reminder that the discrimination laws protect not only historically disadvantaged or excluded groups, but all workers. In EEOC v. Pass & Seymour, Inc., and Kennmark Group, Ltd. (W.D. Tex. June 24, 2005),

the Human Resources Manager for an electrical products manufacturer instructed the onsite manager for an employment agency to hire primarily women, restricting men to about 25% of the assembler positions even though men constituted about half of the applicant pool. In addition, she instructed another onsite manager not to hire men because women "had better dexterity" and "smaller hands." Under consent decrees with the manufacturer and the employment agency, $475,000 will be distributed among 216 men, $25,000 will go to a civil rights advocacy group, the manufacturer will provide EEO training to human resources and management

employees involved in recruiting and hiring, and both entities are enjoined from future gender discrimination.

4. Sexual Harassment

Sexual harassment can occur in any work environment, from the fields to the factory floor to the boardroom. EEOC resolved several cases this year highlighting the particular vulnerability of female migrant workers in agricultural settings. In EEOC v. Rivera Vineyards, Inc. (C.D. Cal. June 15, 2005), EEOC alleged that a large grower and packer of table grapes in Coachella Valley, California engaged in a pattern or practice of sexually harassing female workers and making segregated job assignments based on sex, and retaliated against women who complained about harassment. According to the suit, male supervisors targeted female migrant workers for sexual comments, unwelcome rubbing and touching, offers of better assignments in exchange for sex, and in at least one instance, forced submission to sexual intercourse. Also, the company admitted that only men had been hired into the more desirable year-round positions (including pruning, girdling, irrigation, and vine tying). Women were employed only in seasonal positions (including picking and packing) available from about February to June. When women resisted or reported sexual harassment, the company retaliated against them by sending them home or laying them off. Under a consent decree, the company will pay in installments an amount totaling over $1 million for distribution to eligible claimants determined by EEOC.

In EEOC v. Harris Farms, Inc. (E.D. Cal. Jan. 21, 2005), a large agribusiness near Fresno, California subjected a female farmworker to a sexually hostile work environment, retaliated against her for complaining about harassment, and constructively discharged her. At trial, the farmworker testified that her supervisor raped her several times and then threatened her and made sexually offensive comments for years afterwards. When she reported an incident where her supervisor physically attacked her after he saw her talking to another male employee, the supervisor was directed to work away from her. However, he spread rumors about her, described sexual acts between them, and joked about how the company had done nothing to punish him. After investigating later complaints about coworkers spreading sexually offensive rumors and her former supervisor (who had retired) threatening her, the company gave the farmworker a final warning letter and suspended her for 1 day. Due to the retaliatory warning and suspension, and the company's failure to protect her, she resigned. Following 23 days of trial, the jury returned a verdict for the Commission and the intervening farmworker, awarding almost $1 million (which includes $500,000 in punitive damages subject to Title VII's $300,000 damages cap).

The failure to establish, or adequately implement, a sexual harassment policy has been a factor in a number of EEOC's harassment suits against agribusinesses. For example, in EEOC v. Highland Fruit Growers, Inc. (E.D. Wash. Feb. 14, 2005), EEOC alleged that a supervisor at a fruit packing and distribution company subjected female fruit sorters and packers at its Yakima, Washington facility to sexual comments, coerced one worker into a sexual relationship, and terminated women for opposing the harassment. The company had no sexual harassment policy and took no corrective action in response to complaints by the women. Under a consent decree, four women will receive a total of $150,000, and the company is enjoined from future discrimination and will retain a consultant to conduct an internal audit of its antidiscrimination policies and help prepare new policies (in English and Spanish) with a reporting mechanism.

In EEOC v. Produce, Inc., and Six L's Packing Co. (M.D. Fla. Nov. 30, 2004), EEOC alleged that a national produce company subjected three female employees at its Immokalee, Florida vegetable grading and packing facility to offensive verbal and physical conduct by two supervisors and discharged one worker for rejecting the sexual advances of her supervisor. The company's sexual harassment policy was written only in English even though its workforce was comprised largely of immigrants of Haitian or Hispanic origin who read little or no English. The company circulated other workplace rules and regulations in Creole, Spanish, and English. The suit was resolved through a consent decree providing a total of $206,000 to the three women and a positive letter of reference to the woman who was discharged. The decree enjoins sex discrimination and retaliation, and requires distribution of a harassment and retaliation policy and annual reporting on sexual harassment and retaliation complaints at the company's Florida locations.

Teenagers are another group particularly vulnerable to sexual harassment. Many of EEOC's suits involving the harassment of young women occur in the setting of restaurants and retail establishments, typical part-time jobs for teens. At a Burger King franchise in Missouri, we found evidence that a restaurant manager subjected female employees, most of them teenagers, to repeated groping, sexual comments, and demands for sex. The women complained to their first line supervisors and to a district manager, but no action was taken until they learned how to contact the corporate office. Under a consent decree, the company will pay a total of $400,000 to seven women, and is prohibited from future sex discrimination and from rehiring the restaurant manager. In addition, the company, which operates 37 Burger King restaurants in 4 states, will distribute its sexual harassment policy, complaint procedure, and hotline information to all current employees and new hires at its restaurants. The company also will display in all restaurants a new poster containing information about its

sexual harassment policy; place the hotline number and an explanation of the sexual harassment policy on all employee paychecks; and require managers to attend sexual harassment training. EEOC v. Midamerica Hotels Corp. d/b/a Burger King (E.D. Mo. Dec. 7, 2004).

At another chain restaurant in Missouri, the General Manager subjected female food servers, including three teenagers, to vulgar sexual comments and conduct. Under a consent decree, the company will pay a total a total of $250,000 to eight women. The decree prohibits sex discrimination and rehiring the General Manager, and requires the company to post its sexual harassment policy at six Missouri locations and to provide sexual harassment training to all employees at these restaurants, including the Area Director. EEOC v. Bob Evans Farms, Inc. (E.D. Mo. Jan. 19, 2005). At a McDonald's franchise in Arkansas, EEOC alleged that an assistant manager subjected female employees, most of them high school students, to physical sexual advances, sexually explicit remarks, and requests to engage in sexual activity. Under a consent decree, the company will pay nine women a total of $190,000, expunge adverse comments by the assistant manager from their personnel records, and place a letter in the assistant manager's personnel file indicating that he is ineligible for rehire. EEOC v. McDonald's of Cabot (E.D. Ark. Dec. 16, 2004).

Teenage boys were the victims in a case against a large movie theater chain. A 29-year-old male concessions manager in the chain's Raleigh, North Carolina theater subjected the 16- and 17-year-old boys he supervised to offensive verbal and physical sexual conduct over a 9-month period. The manager had previously served more than 2 years in prison after being convicted of two counts of taking indecent liberties with a minor. Several of the boys complained about the manager, but the theater failed to take corrective action. The manager was finally discharged only when he violated the company's "no call/no show" rule, occasioned by his arrest for failing to register as a sex offender. Under a consent decree, 14 victims will share $765,000 and the company is prohibited from future discrimination. In addition, the company will take the following actions at 13 theaters in North Carolina and Virginia: revise its sexual harassment policy, provide a copy to all new employees, display an 11- by 17-inch poster summarizing the policy, provide sexual harassment training to all new employees at the time of hire and annually to all managers and employees, and report semiannually to the EEOC on complaints of sexual harassment by employees, including the identities of the complainant and alleged harasser and the action taken by the company. EEOC v. Carmike Cinemas, Inc. (E.D.N.C. Sept. 26, 2005).

In some cases, sex harassment takes the form of hostility towards pregnant women in the workplace. When the President/CEO of a Reston, Virginia-based provider of online banking software learned that a Regional Sales Manager was pregnant, he regularly made inappropriate and offensive comments, including saying that women could not be in sales after giving birth and offering to bet that the manager would not make any sales after giving birth. Under a consent decree, the company will pay the manager $59,000 and is prohibited from future sex discrimination. EEOC v. InteliData Techs. Corp. (E.D. Va. May 19, 2005)

While most harassment of women is characterized by explicit sexual touching and remarks, harassment based on sex can also take the form of hostility toward the presence of women in the workplace. In EEOC v. Clifford B. Finkle Jr., Inc. (D.N.J. May 16, 2005), a Clifton, New Jersey-based trucking company failed to take any action in response to a female trucker's complaints that her truck had been repeatedly sabotaged. A male coworker told her he had witnessed her male supervisor and another male coworker sabotaging her truck and overheard them calling her "the bitch." The company did not conduct an investigation until after she filed a discrimination charge, only then concluding that the conduct had occurred and firing both perpetrators. Under a consent decree, the female trucker received $225,000. The decree enjoins future sex discrimination and requires that the company create policies prohibiting harassment and retaliation and disseminate them to all employees, provide annual training on Title VII's requirements to all employees and supervisors, and provide training to all managers, supervisors, and Human Resources employees on how to investigate complaints of discrimination.

EEOC's docket of sexual harassment cases demonstrates our ability to pursue relief for multiple victims of a hostile work environment, obtaining large monetary recoveries as well as broad-based equitable relief calculated to prevent future harassment. EEOC v. Fred Fuller Oil Co. (D.N.H. July 5, 2005) (New Hampshire convenience store to pay $780,000 to five women harassed by owner and will contract with consultant to develop EEO and harassment policies and complaint procedures and provide training to all supervisors and managers); EEOC v. Hannah Motors Co. (W.D. Wash. Mar. 30, 2005) (Washington State car dealership to pay $575,000 to two women harassed by its General Sales Manager); EEOC v. U.S. Contractors, Ltd. (S.D. Tex. Dec. 27, 2004) (Texas chemical manufacturer to pay $530,000 to six women harassed while working on construction project and is enjoined from sex discrimination and retaliation); EEOC v. Ryder Integrated Logistics (D. Del. Nov. 4, 2004) (Delaware warehousing and distribution facility of nationwide truck rental company to pay $510,000 to six women harassed by supervisor and is subject to extensive affirmative relief if facility reopens); EEOC v. Eldorado Stone Operations, LLC (W.D. Wash. Dec. 2, 2004) (Washington State

stone veneer manufacturer to pay total of $475,000 to two women harassed by their supervisor and four other employees (two men and two women) fired for supporting them; company is enjoined from future discrimination and must adopt new procedures for complaints of sex discrimination and retaliation).

5. Disability Discrimination

Fifteen years after passage of the Americans with Disabilities Act, individuals with disabilities continue to face substantial barriers to employment. Many barriers are attitudinal, founded on myths, fears, and stereotypes about disability, while others result from ignorance of the law and in particular the obligation to provide reasonable accommodations to qualified individuals with disabilities. A number of cases illustrate that some employers make employment decisions based on unfounded fears that an individual with a disability poses a safety threat.

In a nationwide case, the Commission found evidence that Northwest Airlines applied an unwritten "zero tolerance" policy to exclude applicants with insulin dependent diabetes and with seizure disorders requiring antiseizure medication from equipment service employee (ESE) and aircraft cleaner positions. EEOC v. Northwest Airlines, Inc. (D. Minn. Jan. 12, 2005). The airline believed that such individuals were at risk of a sudden loss of consciousness and thus posed a safety hazard because the positions sometimes require driving vehicles on airport ramps and working at unprotected heights. The case was resolved through an agreed order that will pay a total of $510,000 to 28 claimants denied ESE or aircraft cleaner positions. The order prohibits the airline from applying a zero tolerance policy to applicants for ESE or aircraft cleaner positions who have a diagnosis of diabetes requiring insulin or an epilepsy/seizure disorder requiring antiseizure medication.

The order also requires that the airline make individualized assessments of future applicants' ability to perform ESE and aircraft cleaner jobs. The airline will examine work restrictions recommended for such applicants by contract physicians and will not give conclusive weight to the recommendations. The airline will consider input offered by applicants, including an applicant's experience in prior comparable positions, and will inform the applicant of any essential job function(s) that it believes the applicant cannot safely or adequately perform and give the applicant an opportunity to provide additional information regarding his or her ability to safely and adequately perform the essential job functions, with or without an accommodation. The airline will disqualify only those applicants who cannot perform the essential functions of the positions with or without a reasonable accommodation or who pose a direct threat to the health or safety of themselves or others.

In EEOC v. E.I. Du Pont De Nemours & Co. (E.D. La. Oct. 20, 2004), a chemical plant fired a lab clerk with scoliosis of the lumbar spine and lumbar disc disease because the company believed it was unsafe for her to walk anywhere at the plant. The company had required her to undergo a functional capacity examination because her supervisor believed her difficulty in walking might be a danger to herself and others during an emergency evacuation. Following the examination, the company concluded that it was unsafe for her to walk at all on the plant site. The company argued that evacuating in an emergency was an essential function of her job and that she was unable to perform that function. At trial, EEOC presented testimony from an ADA accessibility expert who said that the lab clerk could safely evacuate the plant. EEOC also presented testimony from an occupational rehabilitation expert, who said that the lab clerk could perform the essential functions of her job and that evacuating a facility in an emergency was not an essential job function. EEOC also called company managers who testified that the lab clerk did not pose a direct threat, that the functional capacity examination was not job related because it tested areas that were not part of the lab clerk job, and that the company did not consider an accommodation for the employee following the examination. The jury returned a verdict for the Commission, awarding $91,000 in backpay, $200,000 in frontpay, and $1 million in punitive damages (which are subject to a $300,000 cap).

In EEOC v. Park Nicollet Health Sys. f/k/a Health Sys. Minn. (D. Minn. May 18, 2005), EEOC alleged that a health care system in Minnesota refused to provide reasonable accommodations for a doctor with viral encephalitis and fired her. A board-certified family practitioner, she began working for the clinic in 1991. In 1995, she contracted viral encephalitis, which caused brain damage leaving her cognitively impaired and subject to seizures. Following treatment, she returned to her practice with some restrictions, which the clinic accommodated by modifying her duties and reducing her schedule. After 4 years of successful practice with these accommodations, she took a medical leave of absence to evaluate her condition, which then included frequent migraine headaches, nausea, and vomiting. After an 8-month leave, during which she completed a medical evaluation and 3 months of vocational rehabilitation, her doctors recommended that she return to work with restrictions similar to those she had been working under since contracting viral encephalitis. Fearing she could not safely perform her job, the clinic sent her for evaluation by a nationally renown independent review program which evaluates doctors with health problems. Although the program recommended that she be permitted to return to work with the same restrictions noted by her own doctors, the clinic refused. Under a consent decree, the clinic will pay $155,000 and is enjoined from discriminating against any employee on the

basis of disability.

Several cases featured employers that failed to take advantage of technological tools that enable individuals with disabilities to work on an equal footing with their peers. In EEOC v. EchoStar Communications Corp. (D. Colo. May 6, 2005), a blind applicant for a customer service representative job was told it would not do him any good to put in an application because the company was not set up to handle blind people. After he filed his EEOC charge, the company called the applicant back for an interview, but gave him a braille test that had three times as many questions as the written test given to sighted applicants. At trial, the Commission produced evidence that the applicant had been trained to perform customer service jobs with the aid of screen-reading technology (JAWS), which translates text into speech. The company, however, never attempted to install the technology and did not consider whether other accommodations could be made that would enable the applicant to do the job. The company also failed to contact the State Division of Vocational Rehabilitation, even though the company was aware that that agency often paid some or all of the costs of implementing adaptive technology. An expert presented by EEOC testified about how JAWS works and about the expert's installation of screen-reading software in many business call centers. The jury returned a verdict for EEOC and the applicant (who intervened in EEOC's suit), awarding $2,000 in backpay, $5,000 in compensatory damages, and $8 million in punitive damages. The applicable ADA damages cap is $300,000.

In a very similar case, also in Colorado, a job placement company referred a blind applicant to a telemarketing company for approval and training as a customer service representative. When the Project Manager asked the applicant how he could do the job without seeing the prompts on the computer screen, the applicant explained that JAWS software, which he had used in previous customer service jobs and was available on the Internet, would allow him to do the job. The telemarketing company's Information Technology Director was consulted and reported that JAWS could not read a customer's name in time for the applicant to greet the customer without losing the call. Although the applicant told the Project Manager that he had arranged for his vocational rehabilitation counselor to be available throughout the day to assist with any questions about JAWS, the manager, without giving any reason, simply told him that the company had decided not to download JAWS. The applicant used JAWS in similar jobs both before and after applying with the company and never experienced a time lag in the computer reading the information off the screen. This was confirmed by an expert from Beyond Sight, who said that the company should have contacted a specialist instead of relying on an IT person with no experience installing or using the software.

Under a consent decree, the company will pay $50,900 and is prohibited from future disability discrimination. The company also will designate a senior-level employee to discuss employee complaints or concerns about discrimination and guide the company in making determinations on reasonable accommodation requests at each of its seven call centers. Further, in consultation with state vocational rehabilitation services professionals, the company will make its best efforts to hire qualified blind or visually impaired customer service representatives at each of its call centers, and in its semiannual reports to EEOC will describe its recruiting efforts and identify the state vocational rehabilitation employees with whom it has worked. EEOC v. Protocol Communications a/k/a Canicom, Inc., and Southside Pers. Servs., Inc., d/b/a United Pers., Inc. (D. Colo. Jan. 5, 2005).

A recurring issue is the failure of employers to provide necessary leave for medical treatment and recovery as a reasonable accommodation. Often this results from an inflexible adherence to leave policies. In EEOC v. Chicago Horticultural Soc'y (N.D. Ill. July 27, 2005), the horticultural society that operates the Chicago Botanic Garden fired its gift shop merchandiser when she needed time off for surgical treatment of her multiple sclerosis. One month into her leave of absence, the society hired a permanent replacement, and when she attempted to return to work after a little more than 3 months of leave, the society fired her, telling her that its leave policy had a 3-month maximum and that it had no available jobs in the gift shop. The society did not modify its leave policy as a reasonable accommodation and did not explore job opportunities outside the gift shop. Under a consent decree, the society will pay $95,000 and is enjoined from future disability discrimination and from failing to make reasonable accommodations for individuals with disabilities.

A similar recurring issue is the firing of employees who take leave as a reasonable accommodation. A long-term supervisor at a plumbing installation company had his leg amputated due to complications from diabetes. The company agreed to hold his job open for him during his recovery, and following a second surgery, convalescence, and obtaining a prosthesis, the plumbing supervisor was able to return to work after approximately 6 months. He then learned that the company had filled his position several months earlier without informing him. Under a consent decree, the company will pay $112,500 and is enjoined from disability discrimination and retaliation. The decree also contains extensive affirmative relief, including annual training on disability discrimination. At the training, the company president will speak about the importance of preventing disability discrimination, the legal consequences faced by companies that tolerate such misconduct, and the evaluation of managers based on their enforcement of company disability discrimination policies. EEOC

v. Tucker Plumbing, Inc. (D. Ariz. Nov. 30, 2004).

Similarly, in EEOC v. THC-Chicago, Inc., d/b/a Kindred Pharmacy Servs. (E.D. Wis. July 15, 2005), a business providing pharmacy services to nursing homes and health centers refused to allow a pharmacy manager to return to his job after a leave of absence for cancer treatment. After several months on leave, he contacted the company about returning to work part-time and was told he could not return until he had a release allowing him to return full-time. He obtained the release the same day, and only then did the company tell him it had permanently promoted the former assistant pharmacy manager into his position. Under a consent decree, he will receive $100,000 and the company is prohibited from disability discrimination. In EEOC v. Apria Healthcare Group, Inc. (D. Mo. Mar. 31, 2005), a home healthcare provider fired a quality assurance coordinator after she suffered a flare up of her bipolar disorder. One day after she told her supervisor she would need an accommodation, she became acutely depressed and suicidal and left the office to go to the hospital. Her doctor requested a several-week leave of absence. After 2 weeks of leave, she brought her supervisor a release from her psychiatrist, but her supervisor did not permit her to return to work until 2 weeks later. Shortly after returning, she left work early to see her doctor, and when she called in sick the next day she was fired for "job abandonment." Under a consent decree that prohibits disability discrimination and retaliation, the company will pay the employee $60,000 and provide her with a letter of apology and positive employment reference.

Employers sometimes fail to recognize their obligation to assist employees with disabilities in transferring to vacant positions as a reasonable accommodation when they can no longer perform their jobs due to disability. In EEOC v. Autoliv A S P, Inc. (D. Utah Apr. 13, 2005), a production employee at an air bag component manufacturer who sustained severe work-related injuries affecting her cervical spine and both elbows was fired under a company policy limiting light duty assignments to 120 days. The employee applied for several vacant jobs for which she was qualified, but was not selected. The company made no efforts to assist her in obtaining a reassignment, and Human Resources managers admitted that employees on light duty were never hired into vacant positions. Under a consent decree, the company will pay $70,000 and is enjoined from discriminating on the basis of disability. The decree requires the company to revise and implement its policies and procedures regarding its obligations under the ADA, including the obligation to provide reasonable accommodations for qualified individuals with disabilities. The revised policies will not set fixed cutoff dates for qualified individuals with disabilities to return to their positions after entering a light- or transitional-duty program. Reasonable accommodation will include reassignment into an existing vacant position that the employee desires and is qualified to perform with or without an accommodation.

The common theme for these and most of the Commission's cases involving individuals with disabilities is removing barriers to employment. Further illustrating this theme, the Commission resolved a class claim on behalf of 12 applicants with learning disabilities who were screened out of unskilled automobile manufacturing jobs by a preemployment test. The parties entered into a settlement providing each applicant an opportunity to take the test with the assistance of a reader and conditional job offers (subject only to a physical examination) to those who pass the test and complete the rest of the selection process (background check, drug test, etc.). The applicants will receive a total of from $52,000 to $126,000 depending on their success in completing the hiring process. In the future, the manufacturer will provide a reasonable accommodation to enable all reading-disabled applicants to take the test. EEOC v. Daimler Chrysler Corp. (E.D. Mich. Feb. 18, 2005).

The inappropriate administration of medical examinations also screens out qualified individuals with disabilities. In EEOC v. Jack of All Trades Pers. Servs., Inc. (W.D. Tex. Feb. 9, 2005), a temporary employment agency based in Waco, Texas subjected applicants to medical examinations before making job offers and then refused to place them based on their examination results or because of their disabilities. For example, the agency rejected an applicant for a clerical position because the agency's doctor said she was overweight and had a 10-pound lifting restriction. Under a consent decree, the rejected applicant and 17 other individuals will receive a total of approximately $154,000. The agency agrees not to make disability-related inquiries of applicants or require applicants to submit to medical examinations prior to assigning them to a particular client with a specific starting date.

6. Age Discrimination

Employers frequently cite a need to "downsize" or "restructure" in support of decisions to layoff or fire older workers. In EEOC v. Warfield-Rohr Casket Co., Inc. (D. Md. Feb. 25, 2005), EEOC alleged that a Maryland-based wholesaler of burial caskets and funeral supplies discharged a 56-year-old casket trimmer because of his age. Following a 4-day trial, the jury returned a verdict for EEOC, awarding nearly $400,000 in backpay and liquidated damages. The casket trimmer had worked for the company for 29 years, the last 18 in a supervisory capacity. The company retained the only other casket trimmer, a 33-year-old hired 2 years

earlier and trained by the 56-year-old casket trimmer. The company presented testimony from current and former employees that the 56-year-old's performance had declined over the years, and, in support of a cost justification for reducing its workforce, introduced financial statements showing that sales had fallen from $10 million to $8 million over a 2-year period. However, EEOC presented testimony that the company's owner asked the casket trimmer a few weeks before his discharge when he planned to retire. When the casket trimmer responded that he planned to work until age 65, the owner replied: "We'll see about that." EEOC also presented evidence that the owner told the casket trimmer he was too old and made too much money, and that the other trimmer could give him more years.

Similarly, when a Chicago-based restaurant supply company eliminated 3 of 17 sales representative positions, it told a 64-year-old sales representative that he was selected for layoff because it expected him to retire in 8 months when he reached age 65, and that it wanted to keep younger sales representatives who had a future with the company. Company records on sales and gross profit margins belied its later claim that the employee was selected because his sales performance was marginal. Under a consent decree, the employee will receive $162,000 and the company is enjoined from future age discrimination. EEOC v. Central Foodservices Co. (N.D. Ill. Mar. 28, 2005). In EEOC v. Housing Auth. of the City of San Antonio (W.D. Tex. May 23, 2005), a city office laid off a 51-year-old training manager during a reorganization and replaced him with a 30-year-old coworker who had less experience and lacked the 51-year-old's certification as a vocational education teacher. The city paid $130,000 to resolve EEOC's age discrimination claim.

Age discrimination often packs a "one-two punch" for affected employees: once laid off, the older worker faces age-based barriers to securing a new job. In EEOC v. Protis Executive Innovations, Inc. (S.D. Ind. Mar. 18, 2005), we found evidence that a recruitment and placement agency for professional positions coded applications by age and denied referrals to applicants age 40 and older. EEOC's administrative investigation identified various age-related comments in the company's database, and a number of former employees said they had been instructed not to refer older applicants to particular clients. Under a consent decree, the agency will pay $150,000 to affected individuals identified by the Commission and is permanently enjoined from engaging in any act or practice in its recruitment and referral processes that has the purpose or effect of discriminating on the basis of age, including the use of codes to identify applicants' ages. The agency also must keep records of any age discriminatory requests from clients and report the requests to the EEOC. The agency must inform such clients in writing that both the client and the agency are prohibited under federal law from discriminating against job candidates on any protected basis, that the agency will not discriminate against job candidates on any protected basis, and that the agency will cease making referrals to the client unless it receives a written commitment of nondiscrimination from the client.

Employers sometimes run afoul of the law in adopting early retirement benefit plans that treat older workers less favorably than younger workers. EEOC has filed suit against multiple school districts in Minnesota, alleging that their early retirement incentive plans, adopted pursuant to a Minnesota State statute, provided lesser benefits to older workers based on their ages. In EEOC v. Independent Sch. Dist. No. 2174 of Pine River, Minn. (D. Minn. July 7, 2005), the school district's early retirement incentive plan provided full benefits (5 day's pay for each year of service to a maximum of 75 days and 25% pay for unused leave) for teachers with 15 years of service who retired between ages 52 and 58, but reduced these benefits by 10% for each year after age 58 that an employee worked, and eliminated the benefits entirely for employees retiring at age 66 or older. EEOC moved for partial summary judgment on liability, and the court joined for decision motions to dismiss by the school district and five other Minnesota school districts, in which the school districts argued that the extension of the ADEA to cover state and local governments is unconstitutional. The court held that because the plan computed benefits based solely on the age of retiring teachers it was facially in violation of the ADEA. On the constitutionality issue, the court rejected the school districts' argument that the extension of the ADEA to cover state and local governments was not a valid exercise of Congress's powers under the Commerce Clause, and held that because EEOC - an agency of the federal government - was the plaintiff, sovereign immunity was not at issue.

Three similar cases against other Minnesota school districts were resolved this year. The method for calculating benefits differed in the respective early retirement plans, but each plan reduced benefits based on age. EEOC v. Independent Sch. Dist. No. 2134 of Wells, Minn. (D. Minn. July 11, 2005); EEOC v. Independent Sch. Dist. No. 482 of Little Falls, Minn. (D. Minn. Mar. 7, 2005); EEOC v. Independent Sch. Dist. No. 2144 of Lindstrom, Minn. (D. Minn. Jan. 14, 2005). In each case, the aggrieved individuals were paid the money they lost due to the reduced benefits, plus interest, and a consent decree was entered prohibiting the school district from implementing or administering any retirement incentive plan that reduces benefits based on age or on an employee's continued employment beyond his or her date of first eligibility.

7. Religious Discrimination

The clash of religious beliefs sometimes leads to discrimination. In EEOC v. Desert Schs. Fed. Credit Union (D. Ariz. Mar. 8, 2005), the Commission alleged that a credit union in Arizona failed to promote employees to management and mortgage specialist positions because of their religion (non-Latter Day Saints (LDS)) and/or race (black), instead selecting less qualified individuals who were white and/or LDS. We further alleged that the credit union subjected non-LDS employees to less favorable terms and conditions of employment and a hostile work environment, including constant talk about the Church of the Latter Day Saints and ostracization. Under a consent decree, four individuals will share $65,000 and the credit union is enjoined from future discrimination. In addition, the credit union's Vice President of Human Resources will send letters of apology to each of the four claimants on behalf of the entire management team and will issue a statement to all employees regarding the credit union's respect for the religious freedom and cultural diversity of its employees.

In EEOC v. Norwegian Am. Hosp. (N.D. Ill. Jan. 24, 2005), a Director of Midwife Services at a Chicago hospital disciplined a Muslim nurse midwife for failing to participate in Christmas activities in 2000, and thereafter disciplined her for errors for which other nurse midwives were not disciplined and repeatedly scheduled her to work on Friday, her holy day. Following the terrorist attacks in September 2001, the Director intensified his harassment, urging the nurse midwife to attend that year's Christmas party and questioning the sincerity of her religious beliefs. He also bought a $100 raffle ticket in her name and repeatedly sought reimbursement from her, even though she had told him that her religion forbids gambling. After futile complaints and continued discipline, the nurse midwife was fired. Under a consent decree, the hospital will pay $40,000 and is prohibited from engaging in religious discrimination or retaliation.

One employer assumed an employee's religious beliefs would inhibit the successful performance of his job. When the head of sales of an aerospace manufacturing facility in Texas learned that a successful regional sales director was a Mormon, he told the sales director that his Mormon faith hurt his ability to sell jets because he could not drink and smoke with customers. After the sales director reported these comments to Human Resources, he was fired. Under a consent decree, the company will pay the sales director $159,000 and provide him a positive letter of reference. EEOC v. Bombardier Aerospace Corp. (N.D. Tex. Apr. 15, 2005).

Many religious discrimination cases highlight the tension between employers' appearance standards and religious requirements regarding attire or grooming. In EEOC v. Blockbuster, Inc. (D. Ariz. June 8, 2005), a manager at a nationwide video chain told a Jewish employee in the company's Phoenix, Arizona store that wearing his yarmulke violated the company's dress code, which prohibited headwear, and that he had to remove the yarmulke or leave. Two months later, upon receiving the employee's charge of discrimination, the company told him he could resume wearing his yarmulke. Under a consent decree, the company will pay the employee $50,000 and send him a letter of apology. In addition, the decree requires accommodation of religious beliefs, training, and a modification to the company's Employee Handbook to provide for exceptions to its Dress and Grooming Standards to accommodate employees' religious beliefs. Similar cases successfully resolved this year include EEOC v. Russell Enters., L.L.C., d/b/a McDonald's (E.D. Va. Aug. 5, 2005) (McDonald's franchise in rural Virginia discharged Muslim employee who wore a beard for religious reasons, refusing to make exception to its dress code requiring employees to be clean-shaven) and EEOC v. Red Robin Gourmet Burgers, Inc. (W.D. Wash. Sept. 7, 2005) (Bellevue, Washington location of restaurant chain fired adherent of an ancient Egyptian faith whose religious wrist tattoos conflicted with the company's Uniform/Appearance policy prohibiting visible body piercings and tattoos).

Religious discrimination cases also frequently involve employers' refusal to provide accommodations that will allow employees to observe the Sabbath or engage in other practices required by their faiths. In EEOC v. Oberto Sausage Co. (W.D. Wash. July 1, 2005), a manufacturer of processed meat snacks in Kent, Washington hired six Muslim packers, all Somali with limited English skills, for the day shift (7 a.m. to 3:30 p.m.). The Somali employees took 2- to 5-minute breaks throughout the workday for some of the five Muslim daily prayers without objection. Before the month of Ramadan began in 2003, the company announced that it was switching to a 12-hour-day shift (6:00 a.m. to 6:00 p.m.). The Somali employees (and a translator) met with supervisors to request a few (3-5) minutes off to pray and break their fast at sunset during the month of Ramadan. The company refused, even though the employees agreed to have the time taken out of their regular breaks or to clock out for the short time period involved. After Ramadan began, the Somali employees took 2- to 4-minute breaks each day at sunset. The company warned and then fired them, even though the breaks did not affect production. Under a consent decree, the company will pay a total of $362,000 and is enjoined from engaging in religious discrimination. A similar issue was presented in EEOC v. AFG Indus., Inc. (E.D. Tenn. Sept. 29, 2005) (glass manufacturer in Tennessee refused to allow Seventh Day Adventist Saturdays off to observe Sabbath, even though he offered to use vacation days and two other employees volunteered to switch days; resolved for $45,000 and injunction).

8. Retaliation

In multiple cases, the Commission has found evidence of employer hostility towards those who exercise their rights under its statutes, including the right to report discriminatory practices to an employer, file a charge of discrimination, or participate in a Commission proceeding. The Commission is vigilant in preserving unfettered access to civil rights enforcement mechanisms, because any interference with such access poses a serious threat to the ability of the Commission to carry out its mission and has a chilling effect on the exercise of individuals' rights to equal employment opportunities.

This fiscal year, the Commission resolved a case in which a national home improvement chain engaged in systemic retaliation throughout its Colorado locations against workers who reported discriminatory conduct. In EEOC v. Home Depot, U.S.A., Inc. (D. Colo. Sept. 30, 2005), the Commission alleged that managers subjected female employees to sexually offensive comments and unwelcome sexual advances, and made derogatory comments about the competence and work habits of women, blacks, and Hispanics. Discriminatory treatment in various terms and conditions of employment - such as assignments, pay, discipline, and promotions - contributed to a hostile work environment for women and minorities. Employees who complained about discrimination were subjected to adverse terms and conditions of employment, including disparaging comments about their performance, excessive scrutiny of their work, demotion, and discharge.

Under a consent decree, the company will pay $5,500,000 to affected individuals and up to an additional $130,000 for administrative and monitoring expenses. The decree prohibits the creation or toleration of a hostile work environment, and prohibits retaliation against employees who report or complain about what they perceive as unlawful discrimination. The company will modify its policies and procedures regarding harassment/hostile work environment and retaliation and will distribute and otherwise effectively disseminate the policies to all employees. Written notification of every complaint must be sent to Human Resources and to the Consent Decree Coordinator. The company will investigate all complaints and prepare a summary of the investigation and any remedial action taken or proposed. When evaluating managers' performance and setting their compensation, the company will consider the managers' compliance with EEO policies and procedures. The decree also requires extensive training. A senior level employee with experience in human resources management will function as the Consent Decree Coordinator. Among other responsibilities, the coordinator will oversee the investigation of internal complaints, respond to inquiries from the Commission, and answer employees' questions on the company's EEO policies.

In EEOC v. Federal Express Corp. (M.D. Fla. Dec. 22, 2004), EEOC alleged that the company disciplined a senior manager because he made a report of discrimination to the company's legal department, and that the adverse working conditions forced him to resign. After the senior manager complained that a vice president's decision to rescind offers of promotion the manager had made to two minority employees was racially motivated, the manager was severely disciplined and subjected to heightened scrutiny of his work, restricted e-mail access, and computer and telephone monitoring. Following a 4-day trial, the jury returned a verdict for the Commission and the intervening manager, awarding the manager $201,000 in backpay and interest and $1,370,000 in compensatory damages (most of which are subject to Title VII's $300,000 damages cap).

Other cases demonstrate hostility towards those who protest discrimination against themselves or others. EEOC v. Comcast Corp. (D. Del. Oct. 27, 2004) (alleging race and sex discrimination in failure to promote black woman to Director of Human Resources and retaliatory discharge for her complaints of race and sex discrimination; resolved for $350,000 and injunctive relief) and EEOC v. Comcast Corp. (D. Del. Oct. 27, 2004) (related case alleging discharge of Vice President in retaliation for her support of black woman's internal race and sex discrimination complaint; resolved for $350,000 and injunctive relief); EEOC v. Bank of Okla. (N.D. Okla. Mar. 8, 2005) (alleging discharge of Sales Manager/Senior Vice President in retaliation for statements supporting a female Regional Manager/Senior Vice President's sexual hostile work environment claim; resolved for $262,500); EEOC v. Mount Carmel, LLC (E.D. Wis. Oct. 7, 2004) (alleging discharge of Assistant Administrator at a nursing home in retaliation for participating in internal investigation of a sexual harassment complaint against nursing home's CEO; resolved for $257,500 and injunctive relief); EEOC v. Alltel Telecom Info. Servs., Inc. (E.D. Va. Apr. 18, 2005) (alleging discharge of a senior network technician and the only black employee in company's 11-employee Richmond, Virginia facility in retaliation for complaining about company's failure to comply with mediation agreement settling employee's earlier race discrimination charge; resolved for $137,000 and injunctive relief).

E. *Outreach: Educating the Public*

The Commission is committed to educating employees, employers, and other stakeholder groups about the agency's work and the laws it enforces. Each year, attorneys are actively involved in informing the public about the laws prohibiting employment discrimination as part of the agency's efforts to prevent discrimination before it occurs. In fiscal year 2005, legal staff participated in almost 900 outreach events addressing more than 60,000 individuals. Following are examples of the breadth of our outreach and educational efforts.

To reach the greatest number of individuals, legal units work in partnership with community groups and stakeholder organizations to hold ongoing educational programs. For example, the New York District Office has partnered with the Restaurant Opportunities Center for several presentations related to discrimination in the restaurant industry. The Detroit District Office has worked with the NAACP to participate in several informational sessions during which legal staff are available to answer questions pertaining to employment discrimination. The New York District Office held a Low Wage Worker Forum, assembling multiple organizations to speak on employment rights.

A main goal of the Commission's educational efforts is to make contact with groups and individuals whose knowledge about EEOC and the civil rights laws is limited. For example, the supervisory trial attorney from Miami gave a litigation update and discussed EEOC issues of interest to migrant farmworkers at a presentation before Florida Rural Legal Services. A trial attorney from Birmingham participated in a discussion of HIV/AIDS at the National Family and Child Education Conference sponsored by the Bureau of Indian Affairs. A trial attorney from St. Louis spoke to Catholic Charities Refugee Services.

This year, Commission attorneys made many other presentations to community-based organizations. For example, a trial attorney from Chicago spoke at a "Help Rally" hosted by the Community Mission in Action Committee. At an event sponsored by the National Asian Pacific American League Consortium, the regional attorney from San Francisco discussed discrimination cases filed on behalf of Asian Pacific Americans. A trial attorney from Philadelphia participated in "Law Day at the Plaza," an outreach event sponsored by the Association of Black Women Lawyers of New Jersey and Bethany Baptist Church. A trial attorney from San Francisco presented a talk on xenophobia in the workplace for the Refugee Works Employment Training Institute. A trial attorney from St. Louis presented a talk on issues affecting individuals with mental illness, an event co-sponsored by the National Alliance for the Mentally Ill and a local bar association. The supervisory trial attorney from Phoenix gave a speech on the EEOC's work to the Tucson Urban League. A trial attorney from New York provided an overview of the EEO laws at a Legal & Lending Neighborhood Clinic. A trial attorney from New York provided an overview of the EEOC at a community forum at the Arab American Family Support Center.

Many of our outreach efforts focused on the Americans with Disabilities Act, the newest and most complex of the laws we enforce. For example, a trial attorney from Milwaukee taught a workshop on the ADA at a conference held by the National Association of Human Rights Workers. The regional attorneys from Miami and Detroit gave presentations at the National Association of ADA Coordinators Conference. The regional attorney from Indianapolis presented a workshop for small businesses on understanding the ADA. The regional attorney from Denver discussed the ADA with the Multiple Sclerosis Society of Colorado. The regional attorney from Cleveland discussed the relationship of the ADA to other federal laws at a program sponsored by ADA-Ohio. A trial attorney from St. Louis gave several presentations on the ADA for Paraquad. The supervisory trial attorney from Denver spoke about reasonable accommodation at an ADA celebration sponsored by Living Independently for Today and Tomorrow. A trial attorney from New York spoke at a conference of State and Municipal Offices for People with Disabilities.

The Commission's attorneys also frequently met with employer groups to share information about rights and responsibilities under the federal discrimination laws and the Commission's work. The General Counsel met with the Equal Employment Advisory Council to discuss EEOC litigation, and made four presentations at events sponsored by management-side law firms. The regional attorney from Philadelphia provided an overview of discrimination law for human resources professionals at an event sponsored by the MidAtlantic Employers Association. Trial attorneys from Chicago and St. Louis gave updates on the Commission's work at four separate presentations before the Council on Education in Management. At separate conferences of the Society of Human Resources Management, the regional attorney from Phoenix discussed hiring pitfalls and attorneys from Dallas discussed sexual harassment. Attorneys from Miami provided an overview of the EEOC at a seminar sponsored by the Association of Labor Relations Professionals of Puerto Rico. A trial attorney from Phoenix conducted a seminar on sexual harassment for human resources professionals at an event sponsored by the Arizona governor's office. A trial attorney from Memphis discussed harassment with a group of credit union managers. A trial attorney from New York spoke about age discrimination in retirement benefits at two seminars sponsored by Hometown Firetown Services for Volunteer Fire Fighters.

This year, the Office of General Counsel participated in many events supporting the Commission's Youth@Work initiative, an educational effort directed at teens and their employers. Attorneys from the Commission's offices in New York, Memphis, Philadelphia, and St. Louis appeared at local high schools for Youth@Work events designed to provide an overview of the Commission. The Phoenix regional attorney gave interviews to two television stations about the Commission's Youth@Work Initiative, and the Milwaukee regional attorney spoke to the editor of the *Journal of the Wisconsin Restaurant Association*. Commission attorneys also participated in events at local colleges, universities and law schools. For example, the General

Counsel made presentations at the University of Memphis and South Texas University law schools, and an Assistant General Counsel spoke to a group of college students from Kent State University about the EEOC's work. Appellate attorneys spoke to law students at Hofstra University about why EEOC still matters today. The regional attorney from Detroit discussed the EEOC's work with a labor relations class at Wayne State University. Trial attorneys from San Antonio gave several presentations about employment discrimination to St. Mary's University law students. A trial attorney from Memphis provided an overview of the EEOC for a group of graduate students at Webster University.

The Commission's attorneys also maintain ties to national and local bar groups. To give only a few examples, the General Counsel spoke at meetings of the Minnesota, Colorado, and District of Columbia bar associations, as well as the American Bar Association and Federal Bar Association, on various topics. An Assistant General Counsel was the keynote speaker at the American Bar Association's annual advanced employment law conference. A trial attorney from Dallas discussed recent Supreme Court decisions at a seminar for the Oklahoma Employment Lawyers Association. The regional attorney from Houston gave a presentation to Houston Management Labor Firm, a group of labor lawyers. The supervisory trial attorney from Milwaukee is Chair of the Wisconsin State Bar Diversity Outreach Committee. The regional attorney from Detroit is the Chair Elect for the American Trial Lawyers' Employment Rights Section and the Public CLE Chair for the ABA Labor and Employment Section CLE Committee. The regional attorney from Indianapolis is on the Executive Council of the Labor and Employment Section of both the Indiana State Bar Association and the Indianapolis Bar Association. Many Commission attorneys are active members of National Employment Lawyers Association and its local affiliates.

The Office of General Counsel frequently uses the media to spread the word about our accomplishments, to educate the public on the discrimination laws, and to identify current trends and issues affecting employees and employers. The regional attorney from New York gave multiple interviews to national publications this year, including speaking to *Newsday* about the EEOC's charge processing procedures, to the *New York Times* about sexual harassment, to the *Wall Street Journal* about retaliation, to *Reuters* about sex discrimination, to the *Washington Post* about pregnancy discrimination, and to the *Associated Press* about English-only rules. The regional attorney from Milwaukee gave an interview to a *FOX* news program about pregnancy discrimination, and appeared on two local news programs to discuss a sexual harassment case. A Detroit newspaper serving Arab Americans ran an article about religious discrimination drafted by the regional attorney from Detroit. The regional attorney from Phoenix gave television and newspaper interviews about English-only rules and an accent discrimination case. A supervisory trial attorney from Seattle gave an interview to Voice of America about religious discrimination. A trial attorney from San Francisco gave a radio interview about the EEOC's work for an ethnic-oriented radio station in Honolulu. An Assistant General Counsel appeared on the *Entrepreneur Magazine* radio show to discuss workplace harassment. The regional attorney from Chicago gave an interview to National Public Radio about the Commission's age discrimination suit against Sidley Austin. The regional attorney from Memphis appeared on a local television program to discuss the 40th anniversary of the Civil Rights Act.

III. Litigation Statistics

A. *Overview of Suits Filed*

In FY 2005, the field legal units filed 383 merits lawsuits: 379 direct suits, 1 intervention, and 3 actions to enforce conciliation agreements. (Merits suits include direct suits and interventions alleging violations of the substantive provisions of the Commission's statutes and suits to enforce administrative settlements.) One hundred and thirty-nine of the suits sought relief for multiple aggrieved individuals. The field legal units also filed 33 actions to enforce subpoenas issued during EEOC investigations.

Merit Filings in FY 2005	
	Count
Direct	**379**
Intervention	**1**
Administ. Enf.	**3**
Total	**383**
244 Individual Suits	

139 Class Suits

1. Litigation Workload

The FY 2005 litigation workload (merits cases active at the start of the fiscal year plus merits cases filed during the fiscal year) remained substantial with 944 suits in total.

Litigation Workload

	Active	Filed	Workload
FY 2005	561	383	944

2. Filing Authority

With the adoption of the National Enforcement Plan in February 1996, the Commission delegated litigation filing authority to the General Counsel in all but a few areas; in July 1996, the General Counsel redelegated much of his authority to the regional attorneys. Approximately 85% of the cases filed in FY 2005 were authorized by the regional attorneys under their redelegated authority.

FY 2005 Suit Authority

	Count	Percent
Regional Attorney	323	84.3%
Commission	51	13.3%
General Counsel	9	2.4%
Total	383	100%

3. Statutes Invoked

Of the 383 merits suits filed, 73.1% were filed solely under Title VII, 12% were filed under the ADA, 9.9% were filed under the ADEA, 0.5% were filed under the EPA, and 4.5% were concurrent cases filed under more than one statute.

Merit Filings in FY 2005 By Statute

	Count	Percent
Title VII	280	73.1%
ADA	46	12.0%
ADEA	38	9.9%
EPA	2	0.5%
Concurrent	17	4.5%
Total	383	100%

4. Bases Alleged

As shown in the next table, sex discrimination (46.9%) and retaliation (35.8%) were the bases alleged most often in suits filed on the merits. Race (21.1%), disability (12.8%), age (11.2%), and national origin discrimination (7.8%) were the next most frequently alleged bases. Note: Total count exceeds suits filed (383) because suits often contain multiple bases.

Bases Alleged in Suits Filed

	Count	Percent
Sex	180	46.9%
Retaliation	137	35.8%
Race	81	21.1%
Disability	49	12.8%
Age	43	11.2%
National Origin	30	7.8%
Religion	15	3.9%
Equal Pay	13	3.4%

5. Issues Alleged

Discharge was an issue in over 61% of the merits suits filed in FY 2005 when constructive discharge is included. Harassment of all varieties was an issue in 44.6% of suits filed and sexual harassment was an issue in 25.8% of suits filed.

Issues Alleged in Suits Filed		
	Count	Percent
All Discharge	235	61.4%
Const. Discharge	65	17.0%
All Harassment	171	44.6%
Sex Harassment	99	25.8%
Hiring	46	12.0%
Promotion	34	8.9%
Wages	17	4.3%
Reas. Accom. (Disability)	15	9.0%
Reas. Accom. (Religion)	9	2.3%

B. *Suits Filed by Bases and Issues*

1. Sex Discrimination

As shown below, 63.3% of cases with sex as a basis alleged some form of harassment; 43.8% of the cases with sex as a basis alleged some form of discharge.

Sex Discrimination Issues		
	Count	Percent
Harrassment	114	63.3%
All Discharge	79	43.8%
Wages	12	6.7%
Hiring	11	6.1%
Terms/Conditions	11	6.1%

2. Race Discrimination

As shown below, cases with race as a basis had a higher percentage of harassment alleged (46.9%) than any other issue; race cases alleging discharge were second (41.9%).

Race Discrimination Issues		
	Count	Percent
Harassment	38	46.9%
All Discharge	34	41.9%
Promotion	15	18.5%
Terms/Cond.	12	14.8%

3. National Origin Discrimination

As shown in the next table, harassment was the most frequently alleged issue in suits with national origin as a basis (43.3%), followed by discharge at 40%.

National Origin Discrimination Issues		
	Count	Percent
Harrassment	13	43.3%
All Discharge	12	40.0%
Terms/Cond.	6	20.0%
Hiring	3	10.0%

4. Religious Discrimination

As shown below, discharge was the issue most often alleged with religion as a basis (86.6%) with reasonable accommodation next at 60%.

Religious Discrimination Issues		
	Count	Percent
All Discharge	13	86.6%
Reas. Accom.	9	60.0%
Discipline	2	13.3%
Terms/Cond.	2	13.3%

5. Disability Discrimination

As the following table indicates, discharge was the most frequently alleged issue with disability as a basis (43.1% of all suits filed). Reasonable accommodation was the issue next most often alleged (25.9%). Hiring was the issue in 20.7% of the cases filed with disability as a basis.

Disability Discrimination Issues		
	Count	Percent
All Discharge	25	43.1%
Reas. Accom.	15	25.9%
Hiring	12	20.7%
Harassment	6	10.3%

6. Age Discrimination

As shown below, discharge was the most frequently alleged issue with age as a basis (38.9%). Hiring and promotion, at 19.4% each, were the next most frequent issues.

Age Discrimination Issues		
	Count	Percent
All Discharge	14	38.9%
Hiring	7	19.4%
Promotion	7	19.4%
Layoff	4	11.1%

7. Retaliation

Discharge was alleged in 71.5% of the suits filed with retaliation as a basis.

Retaliation Issues		
	Count	Percent
All Discharge	98	71.5%
Harassment	22	16.1%
Terms/Conditions	21	15.3%

C. *Bases Alleged in Suits Filed from FY 2001 through FY 2005*

As the following table indicates, during the past 5 fiscal years, from FY 2001 through FY 2005, suits alleging discrimination on the basis of sex, female (excluding pregnancy) ranged from 30% to 43.5% of suits filed each year by the EEOC. Race discrimination claims ranged from 15% to 21%; national origin claims from 7.5% to 10.5%; religion claims from 4% to 6%; disability claims from 12% to 16.5%; age claims from 7% to 12%; and retaliation claims from 33% to 38%.

Bases Alleged in Suits Filed FY 2001 - 2005 Percent Distribution									
FY	Sex(F)	Sex(P)	Sex(M)	Disab.	Age	Retal.	Relig.	Nat. Or.	Race
2001	30.4%	1.0%	2.1%	16.5%	9.8%	32.7%	4.4%	7.5%	20.9%
2002	38.8%	4.8%	6.0%	12.1%	10.2%	35.8%	6.0%	7.8%	15.4%
2003	43.5%	3.1%	1.9%	12.7%	7.5%	36.3%	5.5%	10.5%	17.7%
2004	42.7%	6.3%	3.4%	11.8%	11.8%	37.9%	4.2%	9.7%	15.3%
2005	34.9%	8.1%	3.9%	12.8%	11.2%	35.8%	3.9%	7.8%	21.1%

D. *Suits Resolved*

In FY 2005, the Office of General Counsel resolved a total of 337 merits lawsuits, yielding $107,730,867 in monetary relief.

1. Types of Resolutions and Success Rate

As the table below indicates, of the 337 resolutions of merits suits, 79.8% were by consent decree, 7.7% by settlement agreement, 5.1% by favorable court order, 5.6% by unfavorable court order, and 1.8% were voluntarily dismissed. Of the 337 merits resolutions, 116 sought relief for multiple aggrieved individuals. The percentage of merits suits successfully resolved in FY 2005 was 92.6% (includes consent decrees, settlement agreements, and favorable court orders).

Types of Resolutions		
	Count	Percent
Consent Decree	269	79.8%

Settlement Agreement	**26**	**7.7%**
Favorable Court Order	**17**	**5.1%**
Unfavorable Court Order	**19**	**5.6%**
Voluntary Dismissal	**6**	**1.8%**
Total	**337**	**100%**

2. Statutes Invoked

Of the 337 merits suits resolved during the fiscal year, 71.8% were filed solely under Title VII, 11.9% were filed under the ADA, 11.3% were filed under the ADEA, and 5% were concurrent suits filed under more than one statute.

FY 2005 Resolutions by Statute		
	Count	**Percent**
Title VII	**242**	**71.8%**
ADA	**40**	**11.9%**
ADEA	**38**	**11.3%**
Concurrent	**17**	**5.0%**
Total	**337**	**100%**

As shown below, Title VII suits accounted for more than 94% of all monetary relief obtained and ADA suits accounted for 3.2% of monetary relief obtained. ADEA suits accounted for $2 million in recoveries, 1.9% of all monetary relief obtained.

FY 2005 Monetary Relief by Statutes		
Statute	**Relief (Millions)**	**Relief Percent**
Title VII	**$101.3**	**94.1%**
ADA	**$3.5**	**3.2%**
ADEA	**$2.0**	**1.9%**
Concurrent	**$0.9**	**0.8%**
Total	**$107.7**	**100%**

3. Bases Alleged

As shown in the following table, sex was a basis in 45.9% of the suits resolved while race was a basis in 17.8% of the resolutions. Retaliation was a basis in 35.3% of the suits resolved, age in 13%, and disability in 11.5%. Note: Total count exceeds suits resolved (337) because suits often contain multiple bases.

Bases Alleged in Suits Resolved		
	Count	**Percent**
Sex	**155**	**45.9%**
Retaliation	**119**	**35.3%**
Race	**60**	**17.8%**
Age	**44**	**13.0%**

Disability	**41**	**12.2%**
National Origin	**31**	**9.2%**
Religion	**19**	**5.6%**
Equal Pay	**11**	**3.2%**

4. Issues Alleged

As shown below, the most frequent issue alleged in suits resolved involved some form of discharge (61.1%). Harassment of some kind was as an issue in 47.5% of the suits resolved and sexual harassment was an issue in 29% of suits resolved.

Issues Alleged in Suits Resolved

	Count	Percent
All Discharge	**206**	**61.1%**
All Harassment	**160**	**47.5%**
Sex Harassment	**98**	**29.1%**
Hiring	**41**	**12.2%**
Terms/Conditions	**40**	**11.9%**
Wages	**22**	**6.5%**
Promotion	**20**	**5.9%**
Reasonable Accom. (Disability)	**16**	**4.7%**
Reasonable Accom. (Religion)	**9**	**2.7%**

E. *Resources*

1. Staffing

Since FY 2001, OGC's field staff has decreased from 383 to 311, with attorney staff decreasing from 248 to 203. The following shows field and headquarters staffing numbers for the last 5 years.

style="border: solid 1px black; border-collapse: collapse;"

OGC Staffing (On Board)

Year	HQ	All Field	Field Attorneys*
2001	**81**	**383**	**248**
2002	**79**	**353**	**229**
2003	**86**	**332**	**210**
2004	**83**	**318**	**208**
2005	**77**	**311**	**203**

***Includes Regional Attorneys, Supervisory Trial Attorneys, and Trial Attorneys**

2. Litigation Budget

In FY 2005, the litigation support budget was $3.65 million. From FY 2001 through FY 2004 the litigation support funding ranged from $2.86 to $3.45 million. The following table shows litigation support figures for the last 5 years.

Litigation Support Funding (Millions)

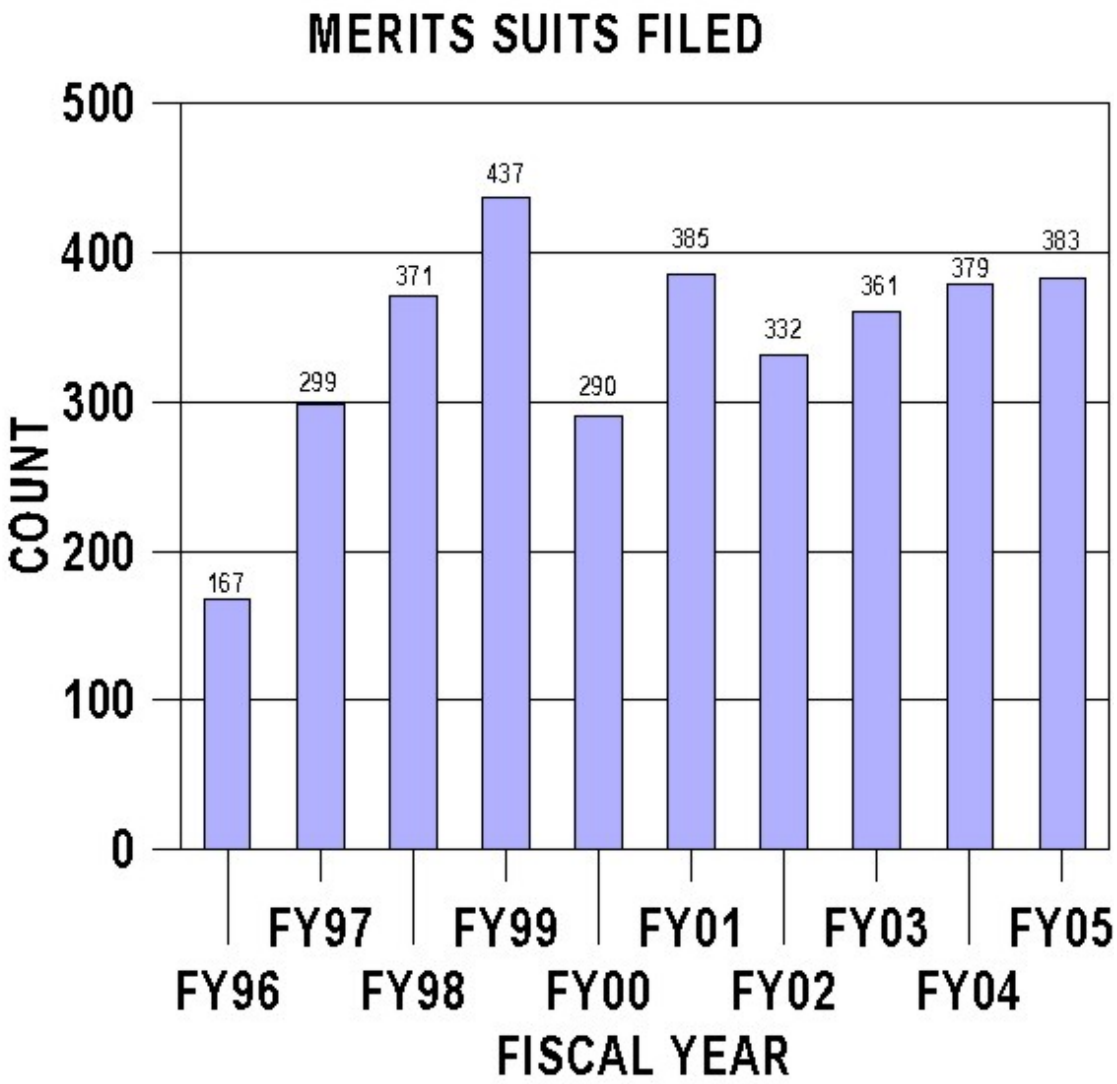
FY	FUNDING
2001	$3.45
2002	$2.86
2003	$3.30
2004	$3.36
2005	$3.65

F. *Historical Summary: Tables and Charts*

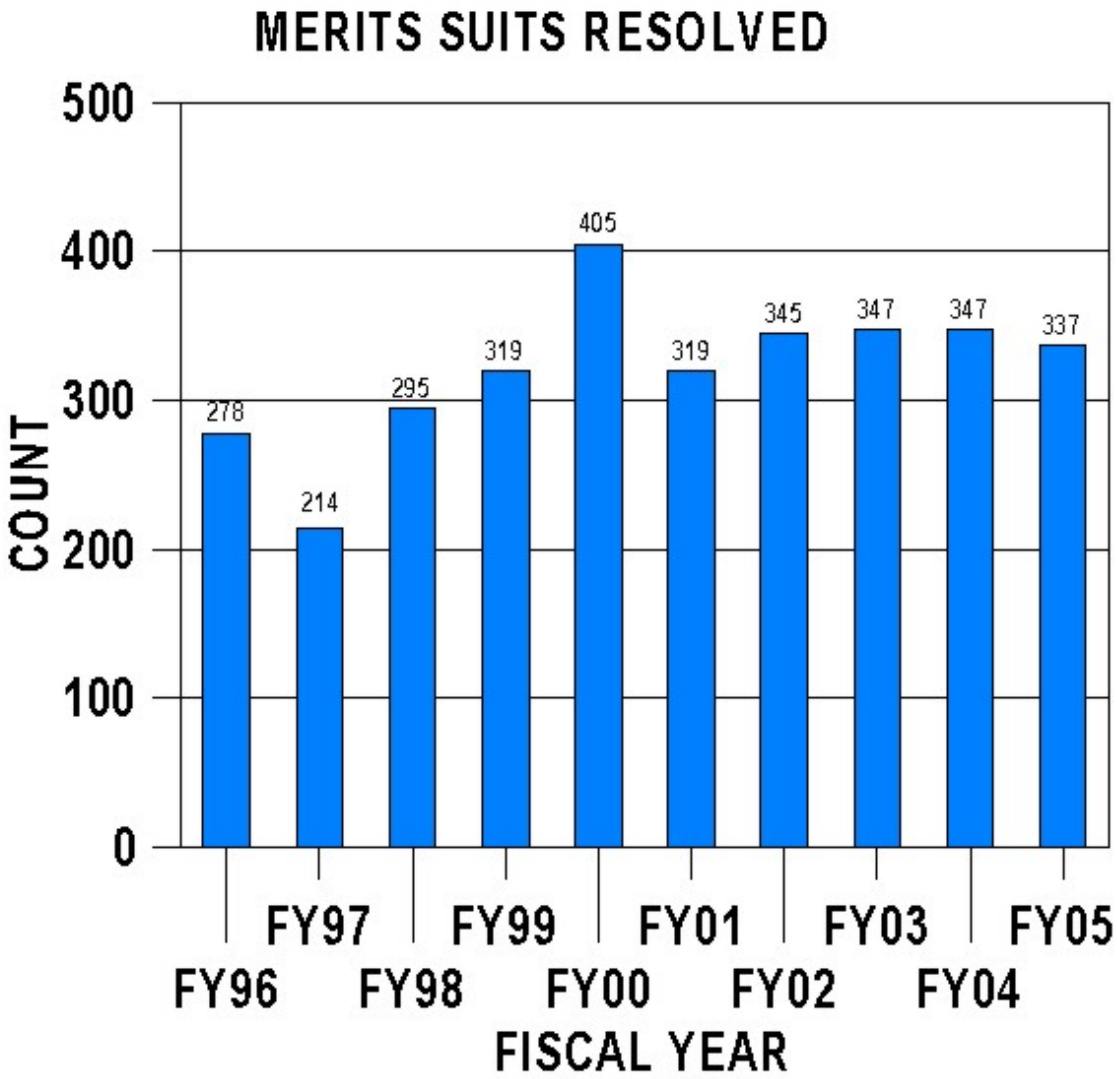
EEOC 10-Year Litigation History: FY 1996 - FY 2005

	FY96	FY97	FY98	FY99	FY00	FY01	FY02	FY03	FY04	FY05
ALL SUITS FILED	193	330	411	464	328	430	364	393	415	417
MERITS	167	299	371	437	290	385	332	361	379	383
TITLE VII	106	174	235	325	222	269	246	277	280	281
ADA	38	79	79	51	23	62	41	46	42	46
ADEA	13	36	36	41	27	31	29	21	40	38
EPA	1	0	2	3	3	5	2	0	1	2
CONCUR.	9	10	19	17	15	17	14	17	16	16
SUBPOEN. & PRELIM. RELIEF	26	31	40	27	38	45	32	32	36	34
ALL RESOLUTIONS	296	245	331	349	438	360	373	378	376	370
MERITS	278	214	295	319	405	319	345	347	347	337
TITLE VII	175	122	181	192	305	219	247	256	264	242
ADA	52	45	69	65	52	42	61	48	38	40
ADEA	35	35	35	41	35	34	20	28	28	38
EPA	0	0	1	0	4	6	3	2	0	0
CONCUR.	16	12	9	21	9	18	14	13	17	17
SUBPOEN. & PRELIM. RELIEF	18	31	36	30	33	41	28	31	29	33
RELIEF	$50.8	$114.7	$95.5	$98.4	$49.8	$51.2	$52.8	$148.7	$168.1	$107.7
TITLE VII	$18.8	$95.0	$62.0	$49.2	$35.1	$29.8	$29.0	$87.2	$157.9	$101.3
ADA	$2.5	$1.1	$2.4	$2.9	$3.0	$2.2	$12.0	$2.6	$2.5	$3.5
ADEA	$10.5	$18.0	$29.5	$42.5	$11.2	$3.1	$1.4	$57.7	$5.4	$2.0
EPA	$0.0	$0.3	$0.7	$0.3	$0.2	$0.3	$0.1	$0.01	$0.0	$0.0
CONCUR.	$19.0	$0.3	$0.9	$3.5	$0.3	$15.8	$10.3	$1.20	$2.3	$0.9

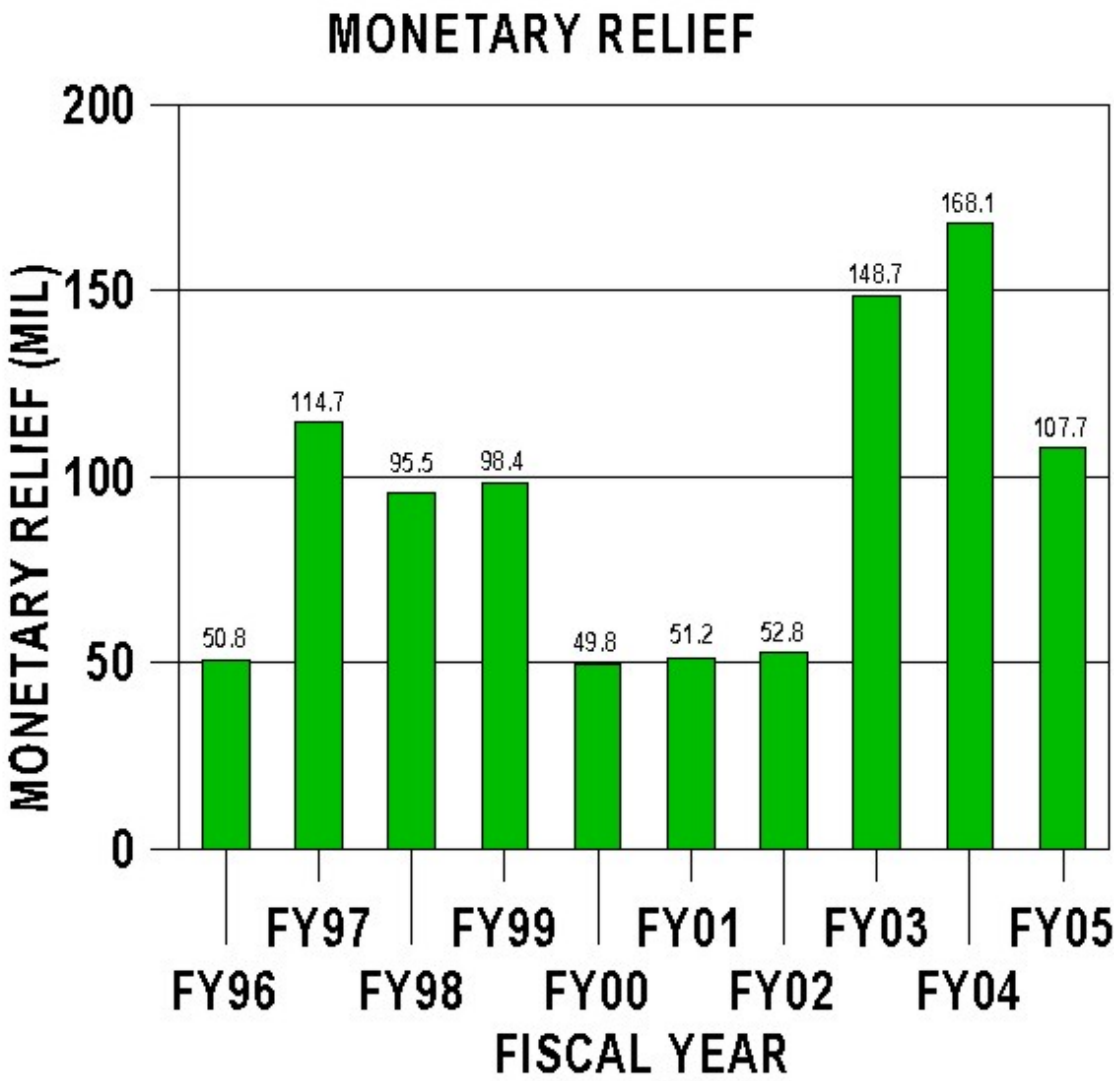
The chart below shows the merits suits filed for FY 1996 through FY 2005.



The chart below shows merits suits resolved for FY 1996 through FY 2005.



The chart below shows the monetary relief for FY 1996 through FY 2005.



This page was last modified on April 13, 2006.

Return to Home Page