

## EEOC Burnishes Systematic Successes and Intentions

By Kristin L. Bauer, Paul Patten, Jennifer L. Seda and F. Christian Chrisbens

Equal Employment Opportunity Commission Chair Jenny R. Yang has issued a [report on the EEOC's Systemic Discrimination efforts](#) over the last 10 years. The Report contains insights on the type of employer vulnerabilities the EEOC exploits and the agency's aims for growth in new areas.

### Big Picture

Not only does the EEOC prioritize large nationwide systemic matters, it rewards investigators who latch on to systemic issues and encourages district offices to bring fewer individual and small class claims of discrimination.

While the EEOC still has success tackling intentional discrimination (*e.g.*, harassment, hiring, and promotion cases), much of the EEOC's focus is on more nuanced forms of discrimination (*e.g.*, Americans with Disabilities Act cases where an employer does not properly accommodate employees and disparate impact cases where there is no intentional discrimination, but a rule or a test disproportionately excludes females or racial minorities).

Systemic harassment claims (now, often based on race or national origin) drive eight-figure settlements and enhance cases where the EEOC challenges other practices, such as promotion. In the Report, the EEOC mentions no tangible success during the last five years in systemic pay discrimination cases. This may change because the EEOC has hired social science analysts at each of its district offices and plans on collecting pay data from employers as part of employers' EEO-1 filing obligations in 2018. For more on this, see our article, [EEOC to Publish Update to EEO-1 Pay Data Reporting Proposal](#).

The EEOC believes that employers too often ignore its pronouncements. Therefore, the EEOC considers the best way to obtain compliance is to leverage its resources by making an example of certain employers through systemic enforcement and lawsuits.

The latest documents from the EEOC are on [harassment avoidance, LGBT \(lesbian, gay, bisexual, and transgender\) rights](#), and the [intersection of the ADA and leaves of absence](#).

## Background

The EEOC defines systemic discrimination as pattern or practice, policy, or class cases where the discrimination has a broad impact on an industry, profession, company, or geographic location. In 2006, the EEOC initiated an effort to improve its systemic discrimination efforts. At that time, it had pockets of systemic expertise and successes at some of its district offices. The EEOC's goal was to build on this expertise and establish a comprehensive, nationwide systemic discrimination program. Chair Yang's Report measures the EEOC's successes over the past 10 years and provides a view of the EEOC's systemic program going forward.

## Numbers

Chair Yang reports:

- The number of systemic investigations conducted by the EEOC increased 250% in the past five years.
- The EEOC has a 94% success rate in its systemic discrimination lawsuits over the last 10 years.
- The agency has tripled the success rate for conciliation (pre-lawsuit resolution) of systemic matters from 21% in 2007 to 64% in 2015.
- The EEOC has tripled the amount of monetary relief recovered for individuals from fiscal years 2011 through 2015 as compared to that recovered in the first five years after beginning its systemic initiative in 2006.
- Over the past 10 years, 70,000 individuals have received jobs, wages, and benefits as a result of EEOC systemic investigations and lawsuits. The agency notes that the number of individuals obtaining such relief dwarfs the relief obtained from individual investigations and lawsuits.

In terms of where the EEOC has been successful, the Report provides the following regarding systemic enforcement efforts by basis:

	<b>Successful Conciliations (top 6)</b>	<b>Lawsuit Resolutions (top 6)</b>
Disability	32%	14%
Retaliation	14%	22%
Sex	14%	21%

**Successful Conciliations (top 6) Lawsuit Resolutions (top 6)**

Race	17%	16%
Age	14%	11%
National Origin	4%	11%

The Report provides the following regarding systemic success by issue:

	<b>Successful Conciliations (top 5)</b>	<b>Lawsuit Resolutions (top 5)</b>
Hiring	23%	25%
Harassment	(not in top 5)	22%
Reasonable Accommodation	21%	8%
Discharge	12%	6%
Terms & Conditions	10%	(not in top 5)
Medical Inquiry/Exam	8%	(not in top 5)
Benefits	(not in top 5)	8%
Promotion	5%	xx

This EEOC-provided data does not define “successful.” Moreover, this data does not appear to be based on dollars recovered or number of alleged victims obtaining monetary or job relief.

**Reported Sustained Successes**

Beyond the broader raw numbers, the Report highlights specific successes where the EEOC obtained significant monetary relief. The word “million” appears in the Report 79 times.

Based on the Report, the EEOC has had high-value successes in the following areas:

- **Traditional Title VII disparate treatment hiring.** These include matters where the EEOC alleged an employer discriminated by not hiring women, African-Americans, or Hispanics. The EEOC also highlights certain matters where it alleged discriminatory promotion (but only one in the last five years).
- **Hostile work environment.** The EEOC references five matters where harassment was a component of the claim that each settled for between \$8.9 million and \$21.3 million. These matters alleged the hostile work environment was directed against employees because of their race or national origin.
- **ADA reasonable accommodations: rigid maximum leave/no-fault attendance policies and 100% healed practices.** The EEOC provides examples of several seven- and eight-figure settlements where it alleged an employer disciplined or terminated disabled employees pursuant to leave or attendance policies instead of providing a reasonable accommodation to the disabled employees. The Report points out that the EEOC has succeeded in “many other lawsuits and conciliations” on these same issues. The Report also contains a reminder that earlier this year, the EEOC issued an ADA resource document on leave and attendance practices to promote employer compliance with the ADA.
- **Terms and conditions of employment.** Here, the EEOC notes successes in obtaining significant relief for immigrants, migrant workers, and disabled adults who it says were subject to substandard working conditions, threats, and intimidation. Sometimes these cases also contain a hostile work environment component.
- **Staffing firms.** The EEOC lists a number of favorable settlements where the staffing agencies allegedly had a practice of referring applicants based on client preferences for employees of a certain race, color, sex, national origin, age, or absence of disability.

The EEOC also reported significant success in narrower niche areas, *e.g.*, Age Discrimination in Employment challenges to public employer pension benefit plans.

## Looking Forward

Having developed expertise in the categories listed above, the EEOC likely will continue to pursue these types of cases in the future.

The Report provides clues to the agency’s intentions in aspirational statements and disclosures about the EEOC’s investments and nationwide teams.

- **Pay Discrimination.** While the EEOC specifies no successes in the past five years, it has assigned social science analysts to each district office who will be available to consider complex “pay gap” issues. Moreover, although not mentioned in the Report, the EEOC plans to gather pay data from employers required to file EEO-1 reports beginning in 2018 and to use that data to analyze charges and employer trends.
- **Background checks.** The EEOC reports only a few successes in challenging criminal background checks. However, the Report reiterates the EEOC’s commitment to scrutinizing background checks for unlawful disparate impact against racial minorities. The Report lists only three agency-wide teams: one of those teams is focused on background checks (the other two are focused on LGBT coverage and ADA leave policies).
- **Tests.** Like the EEOC’s challenges to background checks, the EEOC’s concern with tests and assessments is that these selection criteria have an unlawful disparate impact. The Report lists only one recent success challenging an employer’s use of a test as a selection device. However, it makes several references to the EEOC’s interest in scrutinizing tests and assessments.

The Report may not disclose all of the EEOC’s works in progress. Certain process improvements at the EEOC and the Digital Charge program are expected to allow the EEOC’s investigators more time to focus on developing cases and less time performing administrative duties. With additional time, the EEOC may develop new theories and we may see EEOC investigations and lawsuits with different focuses.

Please contact Jackson Lewis if you have any questions about the Report or the EEOC.

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