

# Reducing Delay to Promote Civil Rights: How Administrative Judges at the EEOC Can Resolve Employment Discrimination Complaints in a Fair yet Efficient Manner



Applied Policy Project

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## **DISCLAIMER**

This report was prepared in partial fulfillment of the requirements for the Master's in Public Policy degree in the Department of Public Policy at the University of California, Los Angeles. It was prepared at the direction of the Department and of Administrative Judge Louis Garcia as a policy client. The views expressed herein are those of the authors and not necessarily those of the Department, the UCLA Luskin School of Public Affairs, UCLA as a whole, or the client.

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## EXECUTIVE SUMMARY

The Federal Government's administrative hearings process was originally conceived to allow federal employees to settle their employment discrimination claims in a quicker, less formal, and less expensive manner than traditional litigation proceedings. However, the system is failing to reach its goals: as the workload for administrative judges continues to increase, federal employees are often forced to wait years before they can resolve their complaints. Our client, Louis Garcia, an Administrative Judge at the EEOC, asked us to address the following issue:

*Given the increased demand for hearings, and the additional time it takes to resolve complaints, how can an administrative judge at the EEOC adopt a system for managing his/her caseload in a fair, yet efficient manner, to ultimately ensure that employees are not disadvantaged when seeking this form of administrative relief?*

To better understand this problem, we reviewed quantitative data, conducted qualitative assessments, reviewed scholarly sources, and analyzed information published by the federal government in annual public records and agency reports. Our studies revealed that administrative judges at the EEOC have been experiencing a growing backlog of unresolved complaints; as the number of requests for hearings continues to increase, the number of complaints resolved each year continues to decline, creating an inventory of unresolved cases. We discovered three key underlying issues contributing to the problem and created three categories of alternatives to address each underlying issue: (1) changes in individual case processing; (2) changes in regional practices; and (3) policy advocacy. After evaluating a total of nine policy alternatives, we recommend that our client adopts five policy options to tackle the three underlying problems.

(1) Problem: Individual Case Processing System

*Option 1: Recruit judicial law clerks*

(2) Problem: Regional Practices

*Option 2: Streamline case distribution*

*Option 3: Request for relevant technological advances*

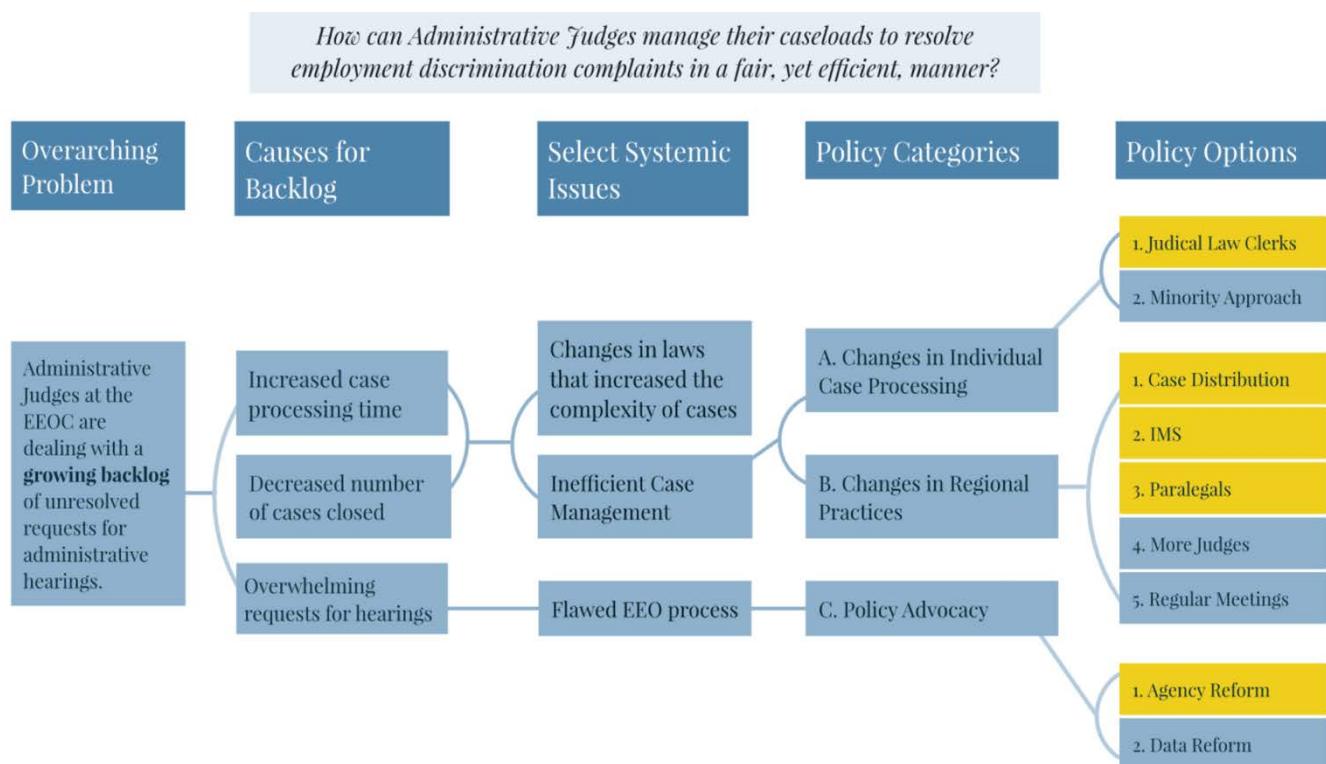
*Option 4: Hire paralegals*

(3) Problem: A flawed systemic EEO process

*Option 5: Identify "problem agencies" and request their reform*

As the Federal Government is the largest employer in the country, this project is directly relevant to the tens of thousands of federal employees filing employment discrimination complaints each year and is indirectly relevant to the millions of federal employees who may need to vindicate their rights in the future. Moreover, we hope that our project will not only prove useful for our client and other administrative judges at the EEOC, but also for judges and professionals across all levels of government who may experience backlog issues and hope to improve their ability to resolve complaints in a fair yet efficient manner.

Our report proceeds in the following fashion. Part I and II provide a brief introduction and overview of the problem, our client, and relevant background information. In Part III, we discuss our research methodologies and limitations. In Part IV, we discuss the problem and some of its underlying causes, and in Part V, we outline the evaluative criteria that we use. Lastly, in Part VI we conduct an analysis, and in Part VII, we provide our recommendations and conclusions (see Chart 1).



**Chart 1:** This chart provides a broad overview of the structure and organization of this policy project.

## **Glossary of Terms, Abbreviations, and Acronyms**

**Administrative Hearings** - Administrative hearings (“hearings”) are similar to trials in federal district court. Once an agency finishes the investigative process and renders a tentative decision on the merits of the claim, the federal employee may request a hearing or decision on their case from an administrative judge at the EEOC. For this project, the term “hearings” refers to the overall judicial resolution process and not necessarily a specific component of trial.

**Complainant** - A Federal employee who files an employment discrimination complaint and requests a hearing from an administrative judge (used synonymously with “plaintiff”).

**Equal Employment Opportunity (EEO) Process** - The administrative process that federal employees must follow to resolve their employment discrimination claims. For the purposes of this report, the EEO process consists of four stages: (1) an “informal” complaint stage, (2) a “formal” complaint stage, (3) the administrative hearings stage, and (4) the appeals stage (if applicable).

**Decision** - A decision by an administrative judge at the EEOC is a written resolution of the case. A decision may be issued prior to or after

**Discovery** - The term ‘discovery’ refers to the stage of a case where the parties may obtain additional evidence from either side to fully develop the record. It occurs prior to hearings and is initiated at the request of either party. Parties are allowed to engage in discovery to reasonably develop the evidence on issues pertinent to the case. The administrative judges must set the timeline for discovery, and approve the scope of discovery requests and proceedings. (See 29 C.F.R. § 1614.109(b)).

**Discrimination** - Employment discrimination is treating an employee less favorably than their peers because of their membership in a protected group or status.

**Dismissal** - Dismissing a case is equivalent to throwing it out. Administrative judges at the EEOC may dismiss a claim at the request of either party or upon their own prerogatives. (See 29 C.F.R. §1614.107).

**Mediation** - Mediation is an informal and confidential resolution process where a neutral third-party meets with both parties of a case to discuss the issues at-hand and help them find

a mutually beneficial outcome without needing to proceed through formal litigation or courtroom proceedings.

**Prima Facie** - Plaintiffs have the initial burden of establishing a *prima facie* case of discrimination and must produce evidence tending to show that they were discriminated against. Generally a *prima facie* complaint is one that “on its face” raises an inference that discrimination has occurred. A *prima facie* case is neither necessary nor sufficient for ultimately proving liability at trial.

**Protected Group / Status** - Federal legislation prohibits employers (including federal agencies) from discriminating against employees on the basis of the following protected statuses: race, color, national origin, sex, religion, retaliation, disability, age, and genetic information.

**Theories of Causation / Discrimination** - An employee’s theory of discrimination / causation shows how the employee believes they were discriminated against. In employment discrimination law more broadly, there are roughly five theories of discriminatory treatment: (1) individual disparate treatment, (2) disparate impact, (3) harassment / hostile work environment, (4) failure to accommodate, and (5) retaliation.

**Summary Judgment** - Administrative judges may issue a decision without a hearing when they find that there are no genuine issues of material fact in dispute. See 29 C.F.R. § 1614.109(g) and Rule 56 of the Federal Rules of Civil Procedure. The party requesting a motion for summary judgment bears the burden of demonstrating the absence of a dispute in material fact and must produce evidence that would preclude a fact-finder (the judge) from finding in-favor of the non-moving party. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). A fact is material if it has the potential to affect the outcome of the case. See *Celotex v. Catrett*, 477 U.S. 317, 322-23 (1986). When making summary judgment decisions, the Administrative Judge will weigh all the evidence in favor of the non-moving party. If a case can only be resolved by weighing conflicting evidence, issuing a decision without holding a hearing is not appropriate.

Administrative Judges may “properly consider issuing a decision without holding a hearing only upon a determination that the record has been adequately developed for summary disposition.” See *Petty v. Department of Defense*, EEOC Appeal No. 01A24206 (July 11, 2003).

## I. INTRODUCTION

### A. Policy Issue

The Federal government is the largest employer in the country, employing close to 3 million people annually. Federal employees experiencing discriminatory treatment in the workplace must follow the Federal Equal Employment Opportunity Program (EEO), as adopted by their respective agency, to vindicate their rights under the law. As part of this process, employees may request a hearing and decision on the merits of their complaint from an administrative judge at the U.S. Equal Employment Opportunity Commission (EEOC).

Administrative hearings are an important mechanism for allowing federal employees to vindicate their workplace rights. By providing access to an independent judge, administrative hearings are supposed to allow federal employees to capitalize on the advantages of the civil judicial resolution process, without imposing some of the additional burdens that are traditionally associated with formal court proceedings, such as cost and the increased length of time it takes to litigate issues in court. Over the years, however, the administrative hearings process for adjudicating claims has been less-than-ideal. As the number of requests for hearings continues to increase, the number of complaints resolved each year continues to decline, thereby forcing employees to wait upwards of two years for a decision on their case. This report investigates the sources of these delays and offers recommendations for reducing them. Specifically, our report focuses on the following question: *Given the requests for hearings and the time it takes to resolve claims, how can an administrative judge at the EEOC manage his or her caseload to process claims in a fair, yet efficient, manner?*

### B. Project Goals, Overview, and Importance

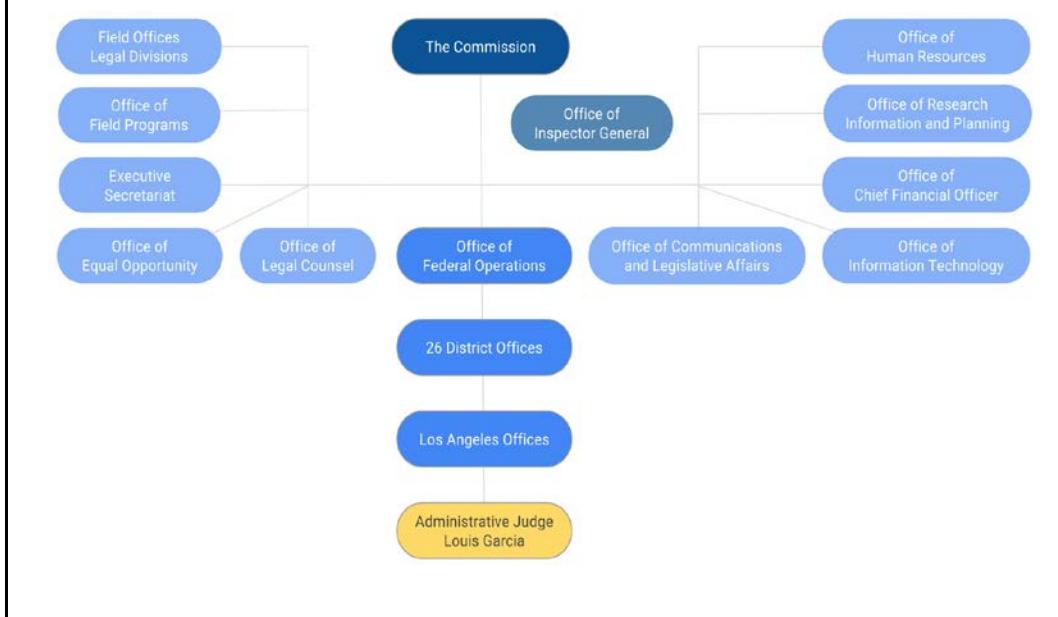
The goal of our project is to propose a set of actionable recommendations that administrative judges may implement within the existing EEOC organizational framework to resolve complaints in an efficient, yet fair manner, to ultimately ensure that judges are not overburdened and parties are not disadvantaged when seeking this form of relief.

This policy project implicates and addresses broader societal concerns about equal access to the law, civil rights, and the efficient use of government services and resources. As freedom from workplace discrimination is a fundamental human and civil right, this project has far reaching implications not only for federal employees, but also for the

broader workforce. Our analysis of the problem highlights the different ways in which rights may be diminished, and our analysis and recommendations provide promising ideas for reform. This policy project extends beyond the confines of employment discrimination and intersects with government administration and the use of public goods. In an increasingly regulated society, citizens lose faith in their government when they are forced to deal with excessive red tape and required to wait several years before they can access a public service; the same holds true as much for federal employees as it does for employees in the non-profit, public or private sector. The administrative frameworks in diverse fields, such as immigration, disability, social security, and veterans benefits, are all hampered in their ability to serve the public because of backlog issues.<sup>1</sup> Therefore, this policy project will offer valuable lessons for federal and state administrative judges, scholars, legal practitioners, agency officials, and anyone else facing backlog issues or invested in government administration, transparency, and public service.

## C. Client

Figure 1. **Broad Organizational Structure of the U.S. EEOC and Client**



<sup>1</sup> See e.g., Arthur R. Andrew, "The Massive Increase in the Immigration Court Backlog: Its Causes and Solutions," Center for Immigration Studies, July 24, 2017, accessed February 25, 2018, <https://cis.org/Report/Massive-Increase-Immigration-Court-Backlog>; Leo Shane, "Once a Fixed Issue: The VA Disability Claims Backlog is on the Rise Again," Military Times: Pentagon & Congress, March 24, 2017, accessed February 10, 2018, <https://www.militarytimes.com/news/pentagon-congress/2017/03/24/once-a-fixed-issue-the-va-disability-claims-backlog-is-on-the-rise-again/>.

Our client is Louis Garcia, an Administrative Judge stationed in the EEOC's Los Angeles District Office in Downtown Los Angeles.<sup>2</sup> The EEOC's Office of Federal Operations (OFO) in Washington, DC oversees administrative judges, who are assigned to 1 of 26 regional/district offices throughout the country (see Figure 1). Each district office handles claims from federal employees and agencies within their assigned geographical area. The Los Angeles District Office receives complaints from all federal agencies in California, Nevada, and Hawaii, as well as from the civilian employees of the military in Japan, Korea and the Pacific Islands.

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<sup>2</sup> The Los Angeles District Office was originally our client, but due to unanticipated conflicts, the Los Angeles District Office withdrew from participating and Administrative Judge Louis Garcia agreed to serve as our client in his own personal capacities.

## II. BACKGROUND AND CONTEXT

This project involves interrelated concepts about the federal equal employment opportunity process, the form and function of administrative judges, and key substantive provisions of employment discrimination law and motion. Therefore, before describing the policy problem in more depth, we first provide a brief overview of: (a) the federal sector EEO process, (b) a primer on relevant aspects of employment law, and (c) a brief overview of the judicial process for resolving claims.

### A. The Federal Sector Equal Employment Opportunity Process

Federal employees experiencing discriminatory treatment at work may use the federal government's equal employment opportunity (EEO) process to vindicate their rights.<sup>3</sup> All federal agencies have an equal employment opportunity office to oversee and implement their EEO programs.<sup>4</sup> According to the Supreme Court of the United States, the Federal Government's EEO process for resolving claims was originally designed to provide employees a "quicker, less formal, and less expensive resolution of disputes within the Federal Government and outside of court."<sup>5</sup> Currently, the EEO process consists of four stages:

- (1) The informal or "pre-complaint" stage;
- (2) The formal investigative stage;
- (3) The **administrative hearings stage**; and,
- (4) The appeals stage.<sup>6</sup> (See Appendix 2.)

At the outset, employees must contact an EEO counselor in their agency within 45 days of experiencing discrimination, thereby triggering the "pre-complaint" stage.<sup>7</sup> After this initial contact, an EEO counselor will meet with employees to discuss their issue and try to "informally resolve the matter."<sup>8</sup> EEO counselors also provide employees with information

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<sup>3</sup> See 29 C.F.R. §1614.102 (a).

<sup>4</sup> See 29 C.F.R. §1614.102 (a)

<sup>5</sup> *West v. Gibson*, 527 U.S. 212, 219 (1999).

<sup>6</sup> The American Federation of Government Employees, "AFGE's Guide to Fighting Employment Discrimination," 2015, accessed on February 25, 2018, [https://www.afge.org/globalassets/documents/wfp/convention-2015----fighting-discrimination-book\\_4-print.pdf](https://www.afge.org/globalassets/documents/wfp/convention-2015----fighting-discrimination-book_4-print.pdf).

<sup>7</sup> 29 C.F.R. §1614.105(a)(1).

<sup>8</sup> 29 C.F.R. §1614.105(a).

about their rights and responsibilities throughout the EEO process, “including their right to request a hearing after an investigation by the agency.”<sup>9</sup>

Once the informal meeting ends, employees have 15 days to file a formal complaint, thereby triggering the second stage.<sup>10</sup> After receiving the formal allegations, the agency will “review the complaint and decide whether or not the case should be dismissed.”<sup>11</sup> Agency officials have the discretion to dismiss complaints for various procedural reasons (e.g., failure to bring a timely complaint) or substantive reasons (e.g., complaint fails to state a claim).<sup>12</sup> If the agency decides against dismissing a claim, however, it must launch and complete a formal investigation into the matter within 180 days of receiving the complaint.<sup>13</sup>

Following the investigation, the agency will issue a preliminary decision on the merits of the claim, at which point the employee may either: (1) accept the agency’s decision, or (2) request a hearing or decision from an administrative judge at the EEOC.<sup>14</sup> If employees request a hearing, the agency will refer the complainant to the relevant EEOC district office that has jurisdiction over that particular geographical area.<sup>15</sup> After the administrative judge receives a complaint and renders a decision (discussed more below), the employee and the agency may either accept the judge’s recommendation or file an appeal with the EEOC’s Office of Federal Options.<sup>16</sup>

## B. Brief Primer on Employment Discrimination Law

Administrative judges at the EEOC enforce Federal employment discrimination statutes, including Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act (ADA), the Equal Pay Act, the Rehabilitation Act, and the Age Discrimination in Employment Act (ADEA).<sup>17</sup> These statutes prohibit employers from discriminating against employees on account of a protected basis, including, race, color, religion, sex, national

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<sup>9</sup> 29 C.F.R. §1614.105(b)(1).

<sup>10</sup> 29 C.F.R. §1614.105(c)

<sup>11</sup> U.S. EEOC, “Overview of the Federal Sector EEO Complaint Process,” accessed on February 25, 2018, [https://www.eeoc.gov/federal/fed\\_employees/complaint\\_overview.cfm](https://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm).

<sup>12</sup> 29 C.F.R. § 1614.107(a).

<sup>13</sup> U.S. EEOC, “EEOC Management Directive 110, Chapter 5, Section II (A)(1)” August 5, 2015, accessed February 2, 2018, <https://www.eeoc.gov/federal/directives/mdi110.cfm>.

<sup>14</sup> 29 C.F.R. § 1614.108(f).

<sup>15</sup> Interview with Administrative Judge 22(a)(7).

<sup>16</sup> *Ibid.*

<sup>17</sup> 29 C.F.R. § 1614.101(b).

origin, age, disability or genetic information.<sup>18</sup> Employment discrimination cases generally involve three overarching concepts: (1) the employee's protected status; (2) an adverse employment action; and (3) a theory of harm or discriminatory treatment / causation.<sup>19</sup> (See Glossary of Terms for relevant definitions.)

Since each statute prohibits discrimination based on specific characteristics, an employee must identify with a protected class, group, or characteristic to seek remedies under any given statute.<sup>20</sup> (For instance, the ADEA prohibits discrimination against employees who are at-least 40-years-old; the employee must therefore be 40 or older to file a claim under the ADEA). Moreover, employment discrimination statutes forbid employers from taking specific forms of action against employees as it pertains to their protected status.<sup>21</sup> (For instance, Title VII prohibits discriminatory treatment in hiring, promotion, compensation, discharge, terms/conditions of employment, referral to employment, classification of membership, admission to apprenticeship training programs, and employment advertising). Therefore, in order to qualify for a statute's protections, the employer's conduct must fall within the conduct either proscribed or prohibited by the relevant statute.<sup>22</sup>

Lastly, in terms of theories of discrimination, employees must advance specific legal theories to show how they were harmed.<sup>23</sup> While each statute differs, generally employees may allege that an employer subjected them to individual disparate treatment, disparate impact, a hostile work environment, and/or retaliation.<sup>24</sup> Each theory triggers a different set of substantive and evidentiary requirements for not only alleging an initial *prima facie* case of discrimination, but also for successfully proving liability at a hearing.

Employees may (and often do) allege multiple theories of harm and on the basis of numerous protected statuses (i.e., my employer discriminated against me because I'm a 65-year-old Latino female when he failed to accommodate my disability, subjected me to a hostile work environment, and treated me differently than my coworkers); therefore,

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<sup>18</sup> 29 CFR §1614.101(a).

<sup>19</sup> The American Federation of Government Employees, “AFGE’s Guide to Fighting Employment Discrimination,” 2015, accessed on February 25, 2018. [https://www.afge.org/globalassets/documents/wfp/convention-2015---fighting-discrimination-book\\_4-print.pdf](https://www.afge.org/globalassets/documents/wfp/convention-2015---fighting-discrimination-book_4-print.pdf).

<sup>20</sup> *Ibid.* at 5-7.

<sup>21</sup> Michael Rusie, “The Meaning of Adverse Employment Actions in the Context of Title VII Retaliation Claims,” at 382-385, *Washington University Journal of Law & Policy*, Vol. 9, (2009).

<sup>22</sup> *Ibid.*

<sup>23</sup> AFEG, “Guide,” at 8-14.

<sup>24</sup> *Id.*

adjudicating employment discrimination claims requires a careful and intricate weaving of facts, law, and legal analysis.

## C. The Administrative Hearings and Judicial Resolution Process

Once an employee requests a hearing on the merits of her complaint, she will undergo the federal sector hearings process to resolve her claim before an administrative judge at the EEOC.<sup>25</sup> While the trajectory of any given case may vary, the hearings process can consist of the following stages: an initial conference, settlement discussion, discovery proceedings, pre-hearing conferences, a formal hearing, and a judicial decision (see Figure 2). This process is modeled after and holds very closely to the format for resolving legal disputes in Federal District Court.<sup>26</sup> Cases do not always close as a result of a formal hearing, however; in fact, every judge that we interviewed conducted only between 3-5 hearings per year.

Typically, an administrative judge may close a case by issuing one of the following: (1) a decision on the merits following an evidentiary hearing, (2) a ruling on motions for summary judgment, (3) a dismissal of the complaint for a procedural reason (such as timeliness, lack of jurisdiction, or as a sanction) or substantive reason (such as failure to state a claim), (4) settlement or alternative dispute resolution, and/or (5) withdrawal by the Complainant.<sup>27</sup> Each case presents unique facts, issues, and ambiguities and administrative judges must “issue a variety of orders designed to ensure the fair and expeditious processing of [a] case, analyze the applicable law and the evidence, and issue a decision.”<sup>28</sup>

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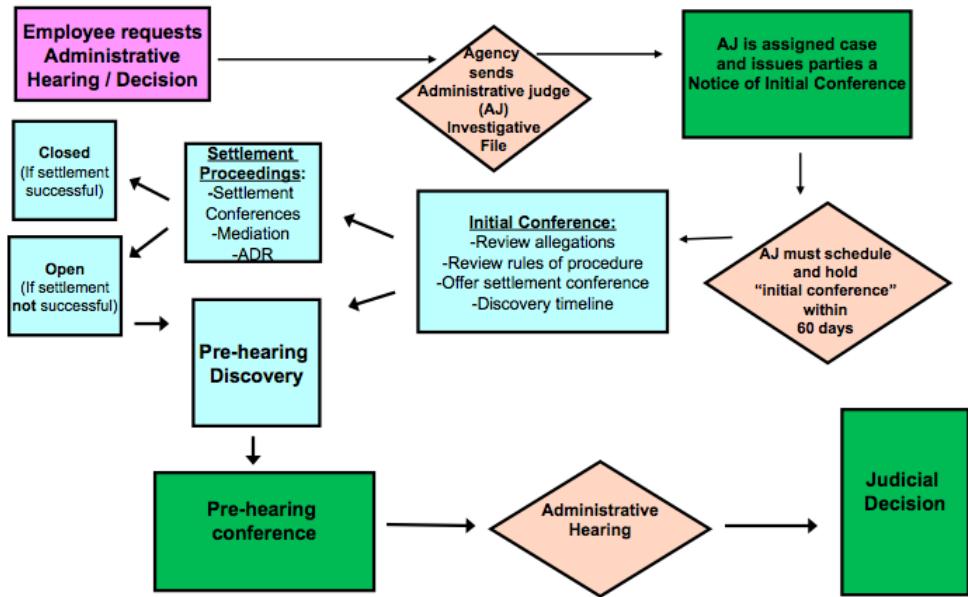
<sup>25</sup> 29 C.F.R. § 1614.109(a).

<sup>26</sup> The hearings process is governed by 29 C.F.R. §1614 and EEO MD-110.

<sup>27</sup> U.S. EEOC, “Frequently Asked Questions About the Federal Sector Hearings Process,” accessed on February 25, 2018, [https://www.eeoc.gov/federal/fed\\_employees/faq\\_hearing.cfm](https://www.eeoc.gov/federal/fed_employees/faq_hearing.cfm).

<sup>28</sup> *Ibid.*

**Figure 2. Administrative Hearings Process**



Administrative judges at the EEOC not only render decisions about the merits (or lack thereof) of any given complaint, but also develop the hearing record as part of the overall EEO process.<sup>29</sup> As part of developing the record, administrative judges must ensure that all the necessary evidence is appropriately entered into evidence. In doing so, they must rule on the legality of various substantive and procedural motions and pleadings submitted by both parties throughout the course of a proceeding.

<sup>29</sup> See 29 C.F.R. §1614.109(a), stating, “Upon appointment, the Administrative judge shall assume full responsibility for the adjudication of the complaint, including overseeing the development of the record.”

### **III. Methodology**

To understand the problem, we first assessed quantitative data about the composition of cases from the EEOC's annual Performance Accountability Report(s), as well as the EEOC's Annual Report(s) on the Federal Workforce. Using these sources, we examined relevant trends in employment discrimination cases over the last 10-12 years, including, but not limited to, the rate at which employees filed claims; the types of claims alleged; the rate at which judges resolved cases; and the agencies that received the most complaints.

We then interviewed five administrative judges at the EEOC to obtain qualitative assessments about these trends and learn more about the judicial resolution process. We also studied the results of 11 interviews with federal employees about the EEO process conducted by the RAND Corporation in 2015. We then used data from these qualitative interviews, as well as information from relevant agency reports, public records, and literature reviews to understand the sources of the problem and recommend potential solutions.

#### **Limitations**

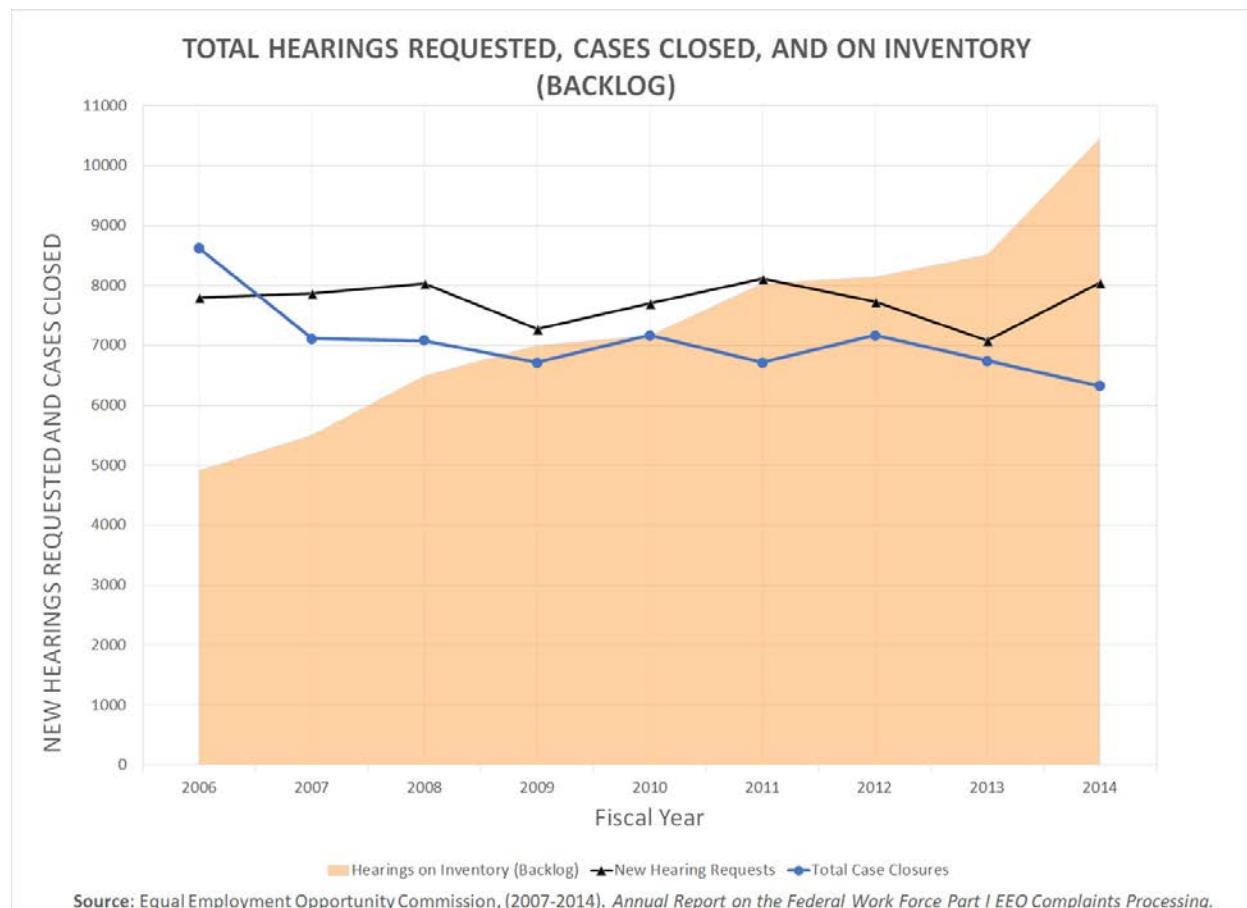
Our goal was to complete this policy project in a thorough and comprehensive manner. While our report incorporates an extensive amount of research, writing, and analysis, the following data would be useful for a subsequent report on this policy project:

- Comparative data about regional district offices. Possessing information about the extent to which regional offices are experiencing backlog issues, receive an increased amount of complaints, or adopt idiosyncratic procedures for managing or resolving complaints would be extremely helpful. Not having this information required us to use nationwide data to make assessments about the issue as our client experiences it. As opposed to drawing from national information, data about regional offices in particular would allow future projects to contextualize and accurately assess the backlog issue and lead to a broader range of potential solutions.
- Diverse range of qualitative assessments. Having information from agency investigators, lawyers, complainants, and certain other departments within the EEOC, such as the Office of Information Technology, would have been useful. Obtaining this information was relatively difficult given concerns for confidentiality and privacy surrounding employment discrimination complaints. This additional data would

have allowed us to form a more complete picture of the EEO process from the experiences of multiple people, as well as enable us to assess the costs and feasibility of some of our recommendations.

## IV. UNDERSTANDING THE PROBLEM AND POTENTIAL CAUSES

According to the EEOC's annual empirical data about nationwide trends in judicial caseloads, administrative judges have been dealing with a growing backlog of unresolved complaints since fiscal year 2006 (see "Hearings on Inventory" in Figure 3). Our analyses indicate that the following factors may have contributed to the backlog of complaints: (A) the **overwhelming requests for new administrative hearings** each year (see "New Hearing Requests" in Figure 3); and (B) the **increase in the amount of time it takes to resolve claims** (see "Total Case Closures" in Figure 3).



**Figure 3:** The graph shows the total number of new hearings requests and total case closures each year on the left primary axis and hearings on inventory on the right secondary axis. Cases closed remains under the requests received in addition to the decrease in number of cases closed each year. This results in the total number of hearings on inventory to rise.

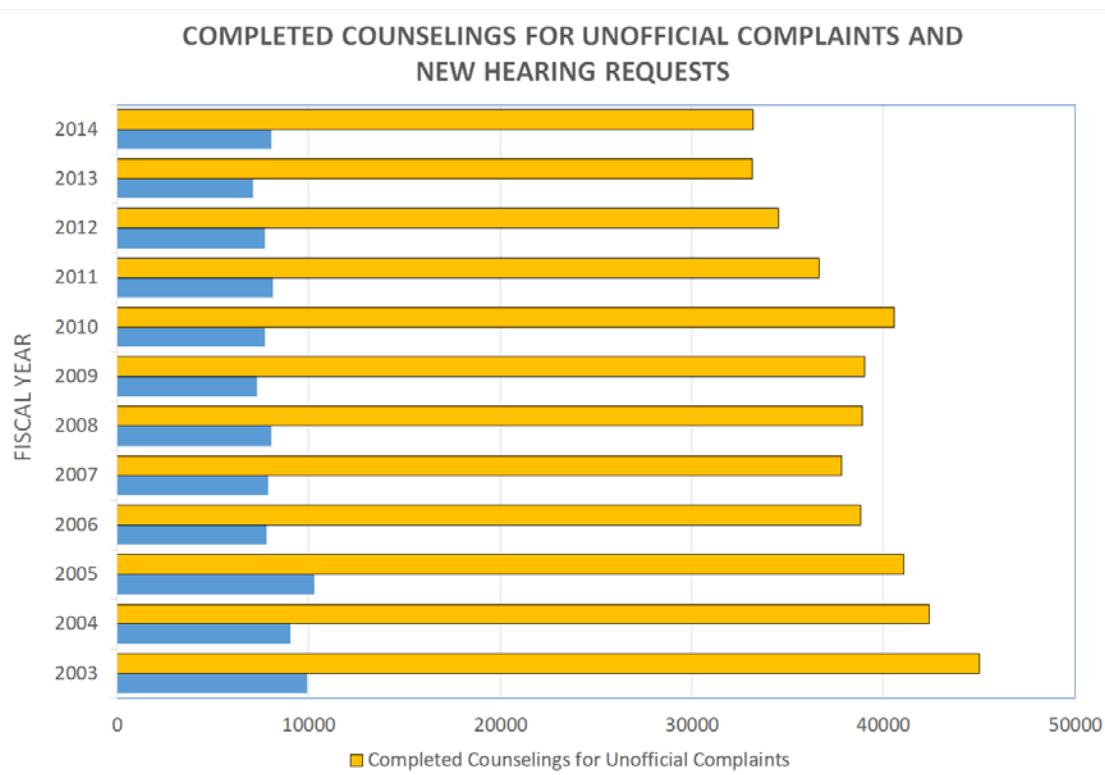
A rising backlog of unresolved complaints negatively affects all parties involved. Without additional staffing or support, a growing backlog of unresolved complaints increases the overall workload for administrative judges as they are expected to resolve more cases each year with no new support. An administrative judge's active docket typically consists of both "aged" complaints, as well as "new requests for hearings." Aged complaints are ones that haven't been resolved in prior years, while new requests were received (either by the individual judge or the regional office) in the current fiscal year. Since the individual caseload for administrative judges are capped each year, new cases that weren't assigned to any judge remain on inventory until a subsequent fiscal year when dockets clear, thereby contributing to the backlog issue. Moreover, because administrative judges may not be able to close all of the cases on their active dockets in one fiscal year, some of these unresolved cases are simply carried over onto their active dockets for the following fiscal year. Essentially, the inventory of unresolved complaints is steadily growing as fewer cases are resolved each year while the number of new requests remains steady. According to our client, "Some complainants are forced to wait more than two years before their complaint is activated and additional years before their complaint is finally resolved."<sup>30</sup>

## **A. The Steady Request for Administrative Hearings**

As mentioned above, in the midst of a growing number of cases on inventory, administrative judges at the EEOC continue to receive a steady number of new requests for hearings each year (see "New Hearing Requests" in Figure 3). This is particularly interesting given that the number of complaints resolved by agencies after the informal EEO counseling sessions (during stage one of the agency's EEO process) has steadily declined. (See Figure 4). As employees are less likely to resolve their disputes in EEO counseling and more likely to request administrative hearings to resolve their claims, a potential underlying cause of the increased workload for administrative judges is a flawed EEO process at the agency level.

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<sup>30</sup> Discussion of policy problem in September 2017 proposal letter from client.



**Source:** Equal Employment Opportunity Commission, (2007-2014). *Annual Report on the Federal Work Force Part I EEO Complaints Processing*.

**Figure 4:** The bar graph shows the total number of new hearing requests and the total number of completed pre-complaint counselings. Despite the decreasing number of issues employees want addressed, there is a relatively stable number of new hearings requested through the EEO process.

### Systematic and Widespread Failures of EEO Process at the Agency-Level

As mentioned above, federal employees are less likely to resolve their disputes in EEO counseling and more likely to request administrative hearings to resolve their claims (see Figure 4). The EEO system may be increasing the workload for administrative judges by diminishing the confidence that federal employees have in their agency's internal EEO process for addressing, investigating, and ultimately resolving employment discrimination issues.<sup>31</sup> Our analysis of the underlying EEO process suggests that federal agencies may be failing employees by: (a) taking arbitrary actions against employees at various stages of the

<sup>31</sup> See, U.S. EEOC, Office of Federal Operations and Office of Field Programs Federal Sector Complement Plan to the Strategic Enforcement Plan, at 6, stating, "When Federal agencies repeatedly ignore regulatory requirements to provide files, conduct timely investigations, fail to meet hiring deadlines...it erodes employee faith in the EEO program and discourages employees and applicants from accessing the system," accessible at: [https://www.eeoc.gov/eeoc/plan/federal\\_complement\\_plan.cfm](https://www.eeoc.gov/eeoc/plan/federal_complement_plan.cfm).

EEO process; (b) failing to provide employees with relevant information; and (c) Creating conflicts of interest that work against employees.

In 2014, the Office of the Secretary of Defense commissioned the RAND Corporation to research and solve issues affecting the agency's internal EEO complaint process.<sup>32</sup> As part of this study, RAND interviewed 11 employees who previously participated in DOD's EEO process. In the subsequent report published in 2015, these anonymous employees recommended several suggestions for improving the agency's EEO complaint process, from intake to investigation to resolution. Remarking on how the EEO process failed him, one Navy employee stated:

I know there were some issues with intake and investigation, where the investigator would say, "This is everything I need,"...and they send us everything we already sent them. That's very frustrating and that's happened a lot. They will say, "we never got that." "What do you mean? I confirmed with intake that you got that." That's my problem...<sup>33</sup>

Moreover, another employee, commenting on how the EEO staff in his agency were underqualified for their jobs, stated:

The intake reviewers are GS-7 [General Service level 7]. [In the past], they were GS-13s who were previously investigators. The concept of what was needed, being able to quickly recognize what's in the files, what the forms are, what it means--it was easier, versus a GS-7 with no real background in HR or EEO...<sup>34</sup>

Our analysis of the underlying EEO process suggests that federal agencies are commonly failing employees by: (1) taking arbitrary actions against complainants at various stages of the EEO process; (2) failing to provide employees with relevant information; and (3) creating conflicts of interest that work against employees. This is relevant to administrative judges at the EEOC because, after enduring a complex, time-consuming, and/or inefficient process at the agency-level, employees may distrust the integrity of their agency's EEO process or system. What's more, the EEO process does not furnish employees with accessible

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<sup>32</sup> Miriam Matthews, Nelson Lim, and The RAND Corporation, "Improving the Timeliness of Equal Employment Opportunity Complaint Processing in Department of Defense," 2015, accessible at: [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR600/RR680/RAND\\_RR680.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR600/RR680/RAND_RR680.pdf).

<sup>33</sup> *Ibid.* at 66.

<sup>34</sup> *Ibid.* at 59.

information to make an informed decision about the standards needed to win in court prior to requesting a hearing from an administrative judge at the EEOC. As one administrative judge noted, in either situation, the EEO system “diminishes the trust that employees have for their agency and the procedures they use to resolve claims, which makes it more likely they will request a hearing from an administrative judge instead of relying on the agency’s decision.”<sup>35</sup>

### *Arbitrary Dismissals*

Federal agencies are required to adopt and implement a formal EEO program to protect employees from discriminatory treatment and uphold their rights under the law. The EEOC’s Office of Federal Operations (OFO) has found, however, that at times, agencies have treated some complainants unfairly throughout the EEO process by, among other things, improperly dismissing claims.<sup>36</sup> As part of its Strategic Enforcement Plan, OFO analyzed the rate at which it received and granted appeals from an agency’s decision to dismiss a complaint during the EEO process.<sup>37</sup> Over a five year period, OFO overturned between 30-45% of agency decisions where agencies refused to accept and investigate EEO complaints.<sup>38</sup> In 57% of the cases that were overturned, OFO found that agencies improperly dismissed claims during the EEO process for “failure to state a claim.”<sup>39</sup> In addition, 24% of the agency decisions that OFO overturned involved cases where agencies dismissed claims and alleged that employees improperly failed to comply with applicable regulatory time limits.<sup>40</sup> Indeed, OFO went on to note that “agency errors in procedurally dismissing federal sector EEO complaints appears to be a growing problem.”<sup>41</sup>

### *Inadequate Training and Information*

The EEO system does not provide employees with adequate and relevant information that would help them to make informed decisions about whether to request administrative hearings in the first place.<sup>42</sup> Although the EEO process allows employees to file claims with

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<sup>35</sup> Interview with Administrative judge 22(a)(7).

<sup>36</sup> U.S. EEOC, “Common Errors By Federal Agencies in Dismissing Complaints of Discrimination on Procedural Grounds,” September 15, 2014, accessed on February 1, 2018, <https://www.eeoc.gov/federal/reports/dismissals.cfm>.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.* at 22.

<sup>40</sup> *Ibid.*

<sup>41</sup> U.S. EEOC, “Research and Data Plan For 2016-2019,” 2015, accessed April 1, 2018, [https://www1.eeoc.gov/eeoc/plan/research\\_data\\_plan.cfm?renderforprint=1#\\_ftn1](https://www1.eeoc.gov/eeoc/plan/research_data_plan.cfm?renderforprint=1#_ftn1).

<sup>42</sup> Interview with Administrative judge 22(a)(7) and 24(c)(2).

administrative judges after the agency finishes an investigation, our investigation revealed that few resources are devoted to educating employees on the exceedingly difficult nature of meeting the substantive and procedural burdens needed to allege or ultimately prove a case of discriminatory treatment before a judge; indeed, all of the administrative judges we interviewed stated that employees did not have adequate information about the judicial administrative process for litigating cases prior to their initial conference.<sup>43</sup>

In remarking on the failure to properly educate employees, one administrative judge we interviewed stated, “Agencies give boilerplate references about administrative hearings. What’s [needed] are clearer explanations of the legal standards before employees file complaints.”<sup>44</sup> This administrative judge went on to reflect that if employees knew about the exceedingly high standard for proving discrimination at a hearing, they would better assess their likelihood of success given the available evidence, and a good number would decide against requesting a hearing in the first place.<sup>45</sup> According to another administrative judge, some employees request hearings despite “not having any legal basis” for alleging discriminatory treatment or shallow chances of proving liability.<sup>46</sup>

Administrative judges are not the only ones who believe the EEO system is failing to properly educate federal employees. Highlighting the disparities in knowledge and training provided, Patricia Randle, a supervisory attorney at the American Federation of Government Employees, wrote, “Complainants are not educated on the EEO process in the same fashion as the managers and EEOC’s outreach must include employees and labor.”<sup>47</sup>

#### *Agencies with High Rates of Complaints*

Several federal agencies have consistently had high rates of complaints filed against them. From 2011 to 2014, the Department of Labor (DOL), the Department of Justice (DOJ), and the Social Security Administration (SSA) have remained in the top number of large agencies (agencies with 15,000 or more employees) with the highest rate of complainants (see Appendix 3) when comparing the number of complaints that year to the total number of employees within that agency.

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<sup>43</sup> Administrative judges 22(a)(7), 40(b)(12), 24(c)(2), and 42(d)(19).

<sup>44</sup> Administrative judge 22(a)(7).

<sup>45</sup> *Id.*

<sup>46</sup> Administrative judge 24(c)(2).

<sup>47</sup> U.S. EEOC, “Written Testimony of Patricia Randle: Public Input Into the Development of the EEOC’s Strategic Enforcement Plan,” July 18, 2012, accessed February 15, 2018, <https://www1.eeoc.gov/eeoc/meetings/7-18-12/randle.cfm?renderforprint=1>.

A high rate of complaints, while not necessarily signifying discriminatory treatment, could nonetheless impact the ability of administrative judges to manage their workload if these complainants are being filed because of poor working conditions and environments and not necessarily because of employment discrimination.<sup>48</sup> According to a judge we interviewed, a frequent cause for such misplaced hearing requests are personality and work conflicts at the supervisory level.<sup>49</sup> When these conflicts are not resolved within the agency due to an employees' lack of trust in the agency as mentioned above, it leads to extraneous requests for hearings.<sup>50</sup> This same administrative judge stated that in order to decrease these requests, agencies "need to give training to employees on how to resolve work conflicts and difficult work situations" at the basic EEO level.<sup>51</sup>

While a pattern of receiving a high rate of complaints does not necessarily indicate that the agency is systemically discriminating their employees, it might still indicate the existence of practices that are causing more employees to feel discriminated against than in agencies with generally lower rates of complaints. Whether meritorious on the grounds of employee discrimination laws or not, these complaints from the large 'problem agencies' are contributing to the backlog that AJs face because they are producing high volumes of hearing requests each year.

## B. Increase in Average Processing Time for Administrative Complaints

The ability of administrative judges to resolve complaints efficiently is not only affected by the number of new requests for hearings, but is also affected by the amount of time it takes to process complaints. Specifically, the average amount of time it takes to process and close cases has increased over the years (see Figure 5). Two factors are likely contributing to the longer time it takes to close cases: (a) the complex number of claims alleged over the years; and (b) an inefficient system for managing cases.

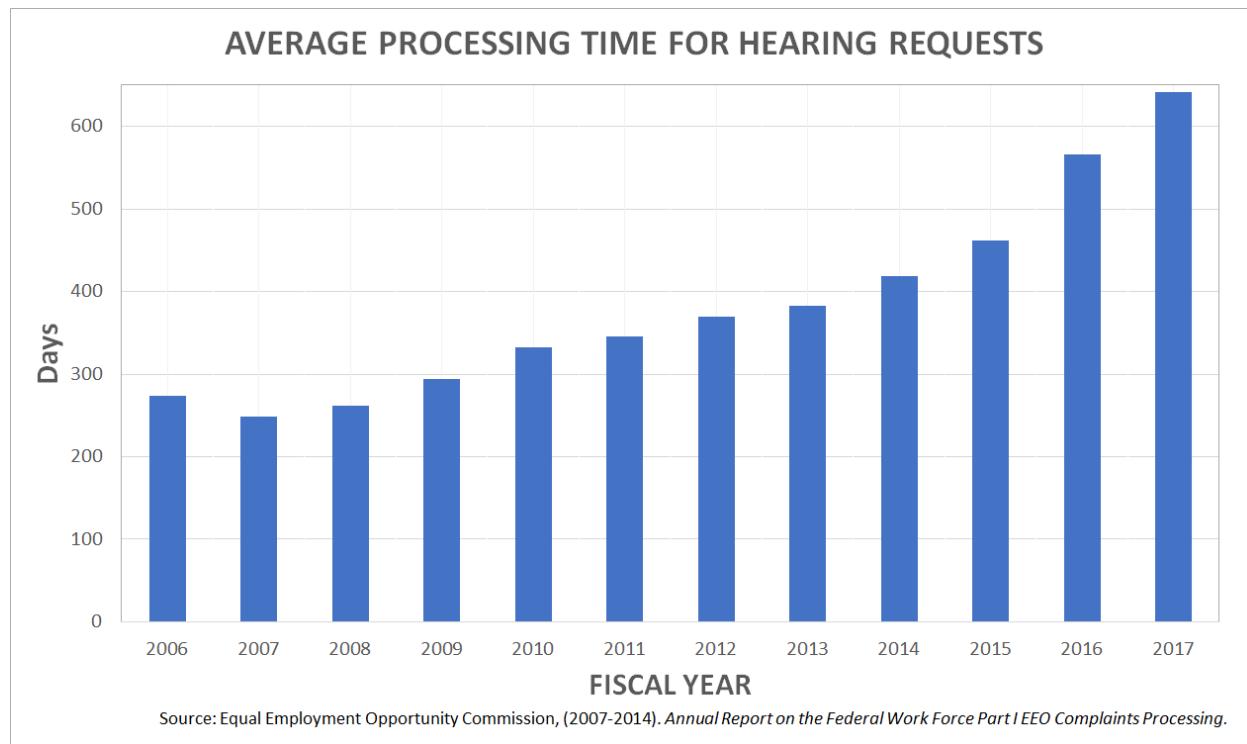
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<sup>48</sup> Administrative Judge 42(d)(19).

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*



**Figure 5:** The graph shows the average number of days it takes to close cases requesting hearings. Since 2007, the number of processing days has more than doubled.

#### *Increased Number of Complex Cases*

We explored empirical data about the composition and texture of cases filed over the years and discovered the following trends:

- Since 2008, non-sexual harassment / hostile work environment became the most frequently claimed charge (see Figure 6);
- Since 2008, reprisal has consistently been the top basis of discrimination alleged and may have increased relative to all bases being filed (see Figure 7);
- Since 2007, disability has remained in the top 5 of bases of claims (see Figure 7).

What's interesting is that not only are harassment, disability, and reprisal charges commonly alleged in cases before administrative judges at the EEOC, but these specific claims are also exceedingly complex to resolve. In fact, every administrative judge that we interviewed

reported that claims based on harassment and disability are more difficult to resolve than other types of claims.

Changes in legislation and Supreme Court jurisprudence over the years may have, in part, contributed to the complex nature of these specific claims, making it more time-consuming for judges to now process certain cases than others. In 1981, the GAO studied the backlog of unresolved civil cases in 9 Federal District Courts.<sup>52</sup> Remarking on how updates in legislation and changes in jurisprudence affected the workload of Federal District judges, the GAO wrote, “Over the last decade, new and revitalized legislation has affected the operations of the federal district courts by placing new and added demands on the courts’ services.”<sup>53</sup> For administrative judges at the EEOC, changes in the law for harassment, disability, and retaliation claims may have increased the time it takes to resolve these specific claims.

In terms of harassment claims, all administrative judges interviewed stated that harassment claims are more complex and therefore challenging to resolve in a quickly manner. In cases such as *Meritor Savings Bank v. Vinson* and *Farris v. Forklift Systems*, the Supreme Court not only changed the standards for pleading non-sexual and sexual harassment / hostile work environment claims, but also required judges to perform more in-depth analysis into all the circumstances of the case, including “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”<sup>54</sup>

Other Supreme Court decisions, such as the 2013 case of *Vance v. Ball State University*, heightened the requirement for determining whether the harasser was actually a “supervisor,” requiring more in-depth analysis than in prior years.<sup>55</sup> With non-sexual harassment becoming the most common action alleged claim filed in the case at-hand, (see Figure 7), administrative judges may be spending more time to process and close these specific types of cases.

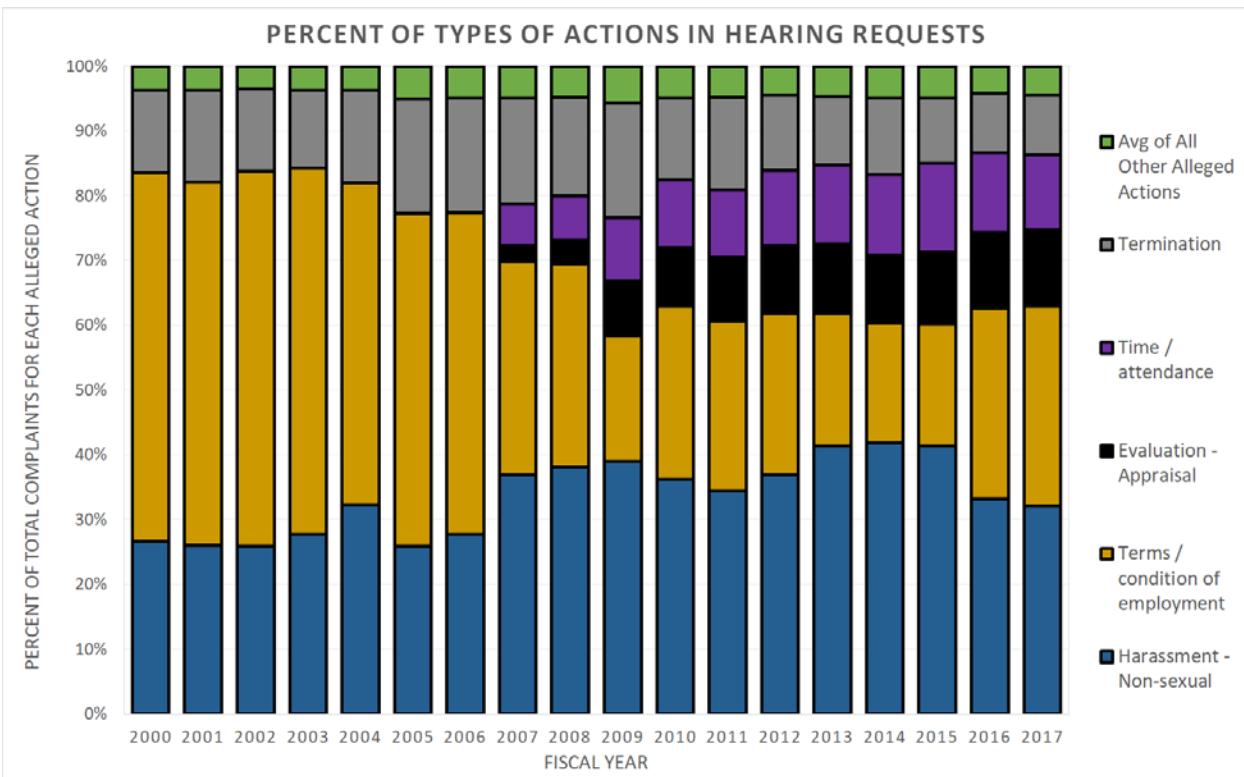
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<sup>52</sup> U.S. GAO, “Report to the Congress of the United States: Better Management Can Ease Federal Civil Case Backlog,” at 9, February 24, 1981, accessed on January 20, 2018, <https://www.gao.gov/assets/140/132071.pdf>.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

<sup>55</sup> *Vance v. Ball State University*, 133 S.Ct. 2434 (2013).



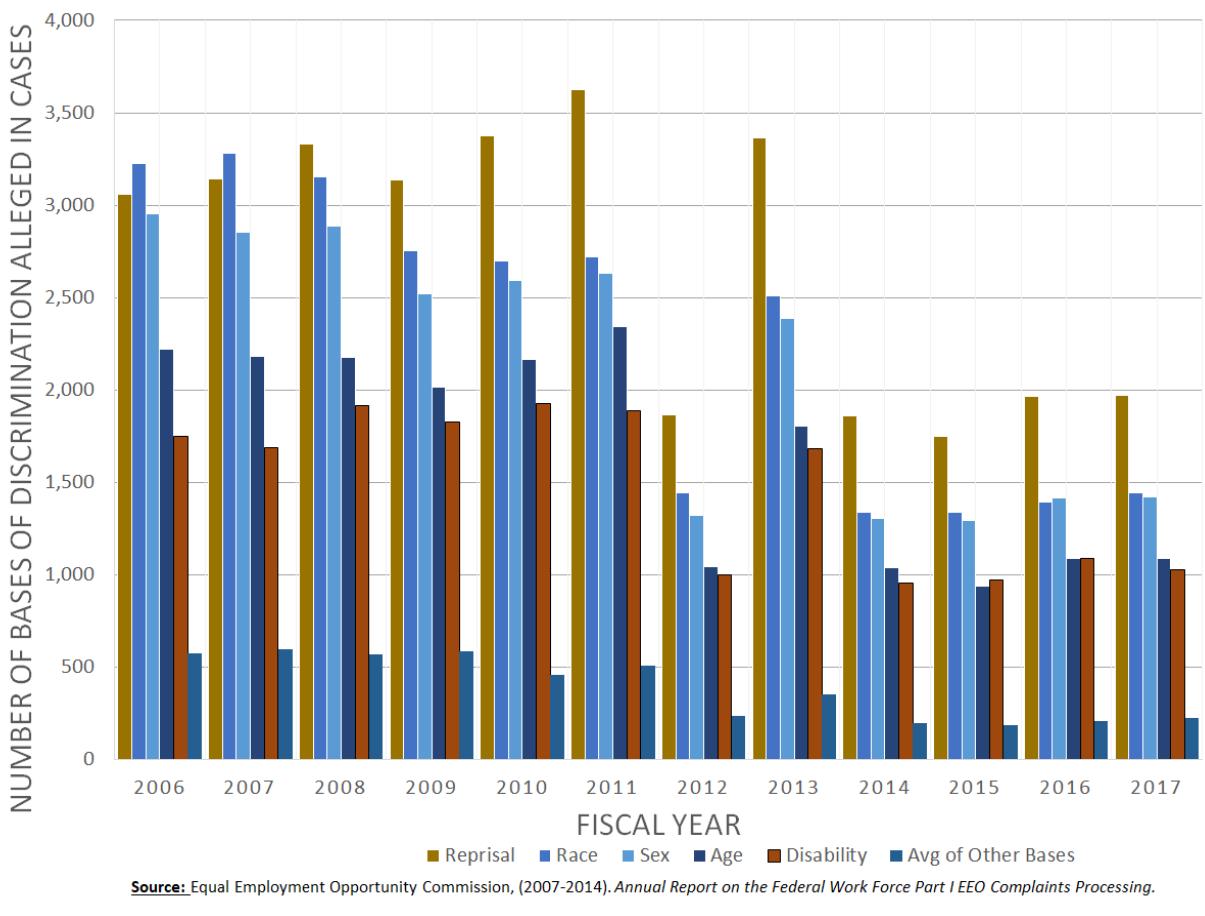
**Source:** Equal Employment Opportunity Commission, (2007-2014). *Annual Report on the Federal Work Force Part I EEO Complaints Processing*.

**Figure 6:** The graph shows the percentage of actions alleged in cases requesting hearings each year. Harassment-nonsexual has become the most commonly alleged action since 2007.

In terms of disability law, Congress may have expanded the scope of remedies available to citizens, but simultaneously increased both the number of people who could file a claim and the amount of time it takes to resolve a claim. According to the GAO, the “enactment and revitalization of legislation have expanded litigants’ access to Federal courts and have contributed to increased filings of civil cases.”<sup>56</sup> The most recent changes to the Americans with Disabilities Act occurred in 2008 with the Amendments to the Americans with Disabilities Act (AADA), in which Congress not only expanded the definition of disability under the ADA, but also expanded the scope of people eligible who may qualify for the protections under the ADA. See changes in PL 110-325 (S 3406).

<sup>56</sup> GAO, “Report to Congress: Judicial Backlog” at 9.

## TOTAL NUMBER OF BASES FOR DISCRIMINATION OF ALL CASES REQUESTING HEARINGS



**Figure 7:** This graph shows the total number of each bases of discrimination alleged in cases requesting hearings. Reprisal can be seen as the dominant basis and disability has remained in the top 5 even when taking the total average of other bases of discrimination per year in one group. Despite the stark decrease in all filings after 2013, you can see moderate increase in reprisal cases relative to all cases requesting a hearing.

Moreover, retaliation claims have also become more complex over the years, especially when they intersect with other prohibited bases. Remarking on how changes to the law have made it more difficult to efficiently resolve these type of claims, Peter Mansfield, Assistant U.S. Attorney wrote that the Supreme Court has “adopted two different standards plaintiffs must successfully plead and eventually prove to establish and recover for Title VII hostile-work-environment and relation claims, respectively” but when judges are “confronted with hybrid claims of retaliatory hostile work environment, [they] must

harmonize, distinguish, or select between these competing standards,” thereby increasing the amount of time it takes to efficiently resolve these complaints.<sup>57</sup>

This data suggest that changes in Supreme Court jurisprudence and updates in legislation have made claims based on harassment / hostile work environment, disability, and retaliation more difficult to resolve, thereby increasing the amount of time required to process these common types of complaints.

#### *Inefficient Management and Processing of Cases*

Similar to judges in Federal District Court, the ways in which administrative judges at the EEOC manage their cases may impact their ability to resolve claims in a fair yet efficient manner. When studying the backlog of complaints in Federal District Court, the GAO discovered an interesting and particularly relevant fact:

*Federal judges were unable to efficiently handle all the cases on their docket because of their inefficient case-management systems and strategic use of resources.*<sup>58</sup>

Remarking on the need for Federal judges to adopt certain practices, the GAO investigative report went onto say, “Processing a large volume of cases requires the development and enforcement of a case management system, use of magistrates and clerks’ office, and an adequate number of judges.”<sup>59</sup>

Based on our analysis, we believe administrative judges at the EEOC are suffering from the same problems. Outside the formal litigation procedures for resolving disputes, administrative judges at the EEOC have considerable flexibility in how they manage cases. Once an administrative judge at the EEOC is assigned to a case, s/he assumes “full responsibility for the adjudication of the complaint, including overseeing the development of the record.”<sup>60</sup> Although AJs are required to hold “initial conferences” with both parties within 60 days of receiving a complaint, administrative judges have discretion on how they manage and process cases.

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<sup>57</sup> Peter Mansfield, “The Retaliatory Hostile Work Environment: A Hybrid Cause of Action in Search of a Standard” *The Federal Lawyer*, Vol. 64, Issue 5, at 48, June 2017, accessed January 25, 2018.

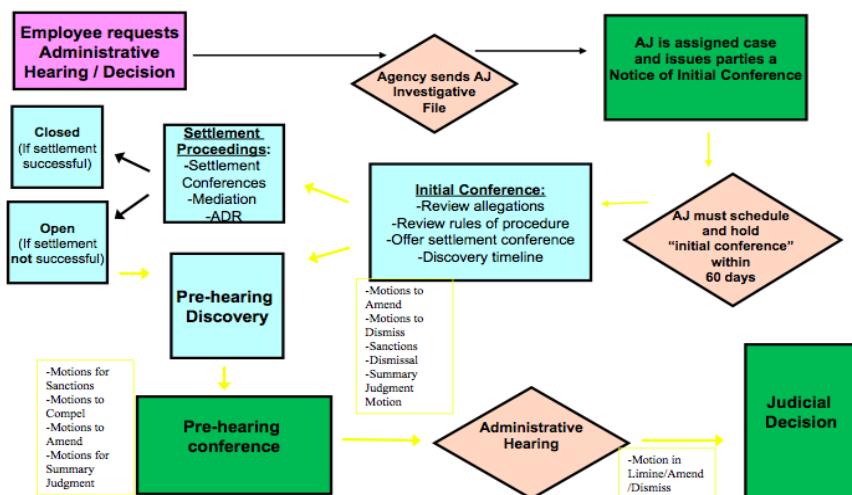
<sup>58</sup> U.S. GAO. “Report to the Congress of the United States: Better Management Can Ease Federal Civil Case Backlog.” February 24, 1981. Accessed on January 20, 2018. <https://www.gao.gov/assets/140/132071.pdf>.

<sup>59</sup> *Ibid. at i.*

<sup>60</sup> 29 C.F.R. §1614.109 (a).

In terms of the effective use of resources and support, the 1981 GAO investigative report also found that, "Courts and judges that used clerks' offices for administering case management and docket control systems had fewer backlog cases than those that did not take advantage of this resource. The use of the clerk's office in such a fashion helps reduce the administrative burden on judges and increase the pace of litigation."<sup>61</sup> While Federal judges in District Court are provided with secretaries and law clerks to process cases, administrative judges at the EEOC must handle all matters of case processing and resolution, thereby diminishing their ability to focus exclusively on resolving claims. (See Figure 5). In describing these limitations, one administrative judge that we interviewed remarked how judges at the EEOC must handle time-consuming clerical tasks that are normally reserved for paralegals or law clerks in traditional courtrooms, but required of judges at the EEOC.<sup>62</sup> This administrative judge mentioned that calendaring, for instance, consumes a great deal of time for that judge; as parties often need to reschedule conferences, request extensions to deadlines, or schedule new hearings, a great majority of this judge's time is spent on coordinating between both parties to find dates and time-frames that fit well with everyone's schedules.<sup>63</sup>

### JUDICIAL INTERVENTION & DECISION-MAKING



**Figure 8:** The yellow boxes indicate where judges may be required to intervene and rule on more substantive questions of the law, producing a motion or ruling on a legal issue or making a determination about the sufficiency of a complaint. The yellow arrows signify where administrative judges must perform some of the routine tasks normally handled by paralegals or administrative assistants, such as scheduling conferences.

<sup>61</sup> GAO, "Report to Congress," at ii.

<sup>62</sup> Interview with administrative judge 42(d)(19).

<sup>63</sup> Interview with administrative judge 42(d)(19).

Moreover administrative judges at the EEOC not only lack assistance with clerical tasks, but unlike federal judges in district court, they are not provided with consistent legal support for the more substantive aspects of judicial resolution. Four out of five administrative judges interviewed stated that the most demanding aspects of their jobs are to respond to the motions and pleadings submitted by parties during the pre-hearing stages of any given case.<sup>64</sup> These more substantive aspects of case resolution require that judges not only review the affirmative (and opposing) pleadings and motions submitted by both parties, but also review the lengthy evidentiary record, citations, the legal basis for the pleadings, and conduct additional research, writing, and analysis to make a proper decision. While Federal judges in District Court, as well as administrative law judges at 8 federal agencies hire full-time, year-long judicial law clerks to assist with things like legal research and writing, administrative judges at the EEOC does not hire full-time postgraduate law clerks, but must instead rely on law students to volunteer either part-time during the academic year or full-time in the summer.<sup>65</sup>

What's more, deficiencies in technology may also hinder their ability to manage their caseloads efficiently. Currently, administrative judges at the EEOC process and track the filings that are submitted by parties using both their individual (ad-hoc and informal) monitoring system and the EEOC's internal database. Two judges mentioned the deficiencies in the EEOC's electronic case management system - Integrated Mission System (IMS) - wishing that it allowed them to track the status of cases internally instead of having to create their own excel spreadsheet or record information in Microsoft Word.<sup>66</sup> These technological disadvantages may cause the administrative judges to either track cases insufficiently using their own systems or use spend time monitoring IMS unnecessarily. The insufficient functionality of IMS stalls the office's transition to electronic records and management. IMS is managed by the Office of Information Technology (OIT) of the EEOC and has not been updated since 2014.<sup>67</sup>

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<sup>64</sup> Interviews with administrative judges 22(a)(7), 34(c)(2), 42(d)(19), and 8(e)(3).

<sup>65</sup> Interview with Administrative Judge 22(a)(7). *See also*, NALP, "Federal Administrative Law Judges Post Graduate Clerkship Information," February 2016, last accessed March 4, 2018, [http://www.lawschool.cornell.edu/careers/judicial-clerkships/upload/Federal\\_ALJ\\_Post\\_Graduate\\_Clerkship\\_Hiring\\_Information.pdf](http://www.lawschool.cornell.edu/careers/judicial-clerkships/upload/Federal_ALJ_Post_Graduate_Clerkship_Hiring_Information.pdf).

<sup>66</sup> Interview with Administrative judge 42(d)(19).

<sup>67</sup> EEOC, "Office of Information Technology Integrated Mission System Release Memo," 2014, accessed on March 1, 2018, <https://ims.eeoc.gov/releaseMemo.html>.

## V. CRITERIA FOR EVALUATING OPTIONS

Before exploring the relevant policy options, we will first discuss the methods we used to select and evaluate our alternatives. Our preliminary assessment of the problem resulted in 13 initial policy options (see Appendix 4 for the eliminated options). We narrowed this list down to nine viable options after receiving additional insight from interviews, empirical data, and relevant literature on the problem and potential solutions.

To analyze the nine policy options, we ranked each option as “high,” “medium,” or “low,” measuring them with a corresponding score of “3,” “2,” or “1,” for their ability to reach the following five criteria: effectiveness, equity, cost, administrative feasibility, and political feasibility (see below for definition of each criteria).<sup>68</sup> Our rankings were guided by the information we obtained from interviews and relevant scholarly articles and publications concerning the problem and potential solutions (as experienced by the EEOC and other federal administrative agencies). Moreover, the five criteria were developed and weighed based on our client’s expressed concerns.

Table A. Criteria Scoring System					
	Effectiveness	Equity	Cost	Administrative Feasibility	Political Feasibility
Weight Score \n \diagdown	0.3	0.3	0.1	0.1	0.2
1	Low	Low - Diminishes the rights of a complainant and/or agency	High cost	Low	Low
2	Medium	Medium - No change	Medium cost	Medium	Medium
3	High	Low - Enhances the rights of a complainant and/or agency	Low cost	High	High

We calculated each option’s final “weighted score” by ranking the option and multiplying the resulting score by the weight of each criteria and adding these values to obtain a weighted score for each option. (Table A). We then compared the nine options against each other using their respective “weighted score.”<sup>69</sup>

<sup>68</sup> For cost, a score of “3” signifies “low” cost.

<sup>69</sup> We also examined the sensitivity of the recommendations to these weights. Our overall recommendations generally did not change when we applied several different weighting systems. See Appendix 5.

As mentioned above, we used the following five criteria to evaluate our options:

### **1. Effectiveness**

Each option's effectiveness depends on whether it would be effective at addressing our primary focus, either directly or indirectly: to reduce delays to the EEOC process and to resolve employee discrimination complaints more efficiently. An option with "low" or uncertain effects at reducing backlog ranked "low" for effectiveness. Subsequently, options that would have moderate effect would rank as "medium" and substantial effects as high. Because there is no statistical literature on the effectiveness of the options we consider, we made subjective estimates about each option's potential effectiveness based on perceived effectiveness by the judges we interviewed and our review of scholarly sources or other publications when available.

### **2. Equity**

In proposing a set of recommendations, we want to ensure that a proposed policy or procedure does not violate the rights of the parties involved in any manner (e.g. deprive them of due process or access to the law). Options that may violate the rights of any party involved are rated "low" for equity. Options that do not impact or change equity concerns from the status quo are rated "medium." Options that potentially improve the quality of the EEOC's work in protecting the civil rights of employees rank as "high" for equity.

### **3. Cost**

We analyzed the costs associated with the implementation and maintenance of each policy option, including operational expenses and personnel costs to either oversee or personally implement the option (e.g. training new judicial law clerks would require judicial labor). When possible, we addressed how each option could receive funding. Because our client is the administrative judge and not the entire EEOC, our cost analysis narrowly involved the costs that would be incurred to the administrative judges and their regional offices; we incorporated costs that would be incurred to anyone other than them into political feasibility analysis. For example, if an option is costly to entities outside of the regional office, such cost may negatively impact the option's political feasibility because external groups would be less likely to support the option.

Because calculating accurate costs for each option would require much more information than what we could obtain for this project, we ranked the costs as high, medium, or low instead of projecting specific dollar amounts (sometimes we give dollar amounts of known averages to gauge a general range, but those are not meant to be construed as exact

cost estimates for the office). If an option does not require an extensive amount of additional funding or effort beyond the status quo, it ranked as “low” in cost; if an option requires some budget or effort but is affordable, it ranked as “medium”; if the option requires budget that the regional office might not be able to afford and therefore unlikely to approve, the option ranked as “high” for costs.

For the purpose of calculating scores, options that rank as “high” for cost are scored as “1,” options that rank as “medium” for cost are scored at “2,” and options that rank as “low” for cost are scored at 3.

#### **4. Administrative Feasibility**

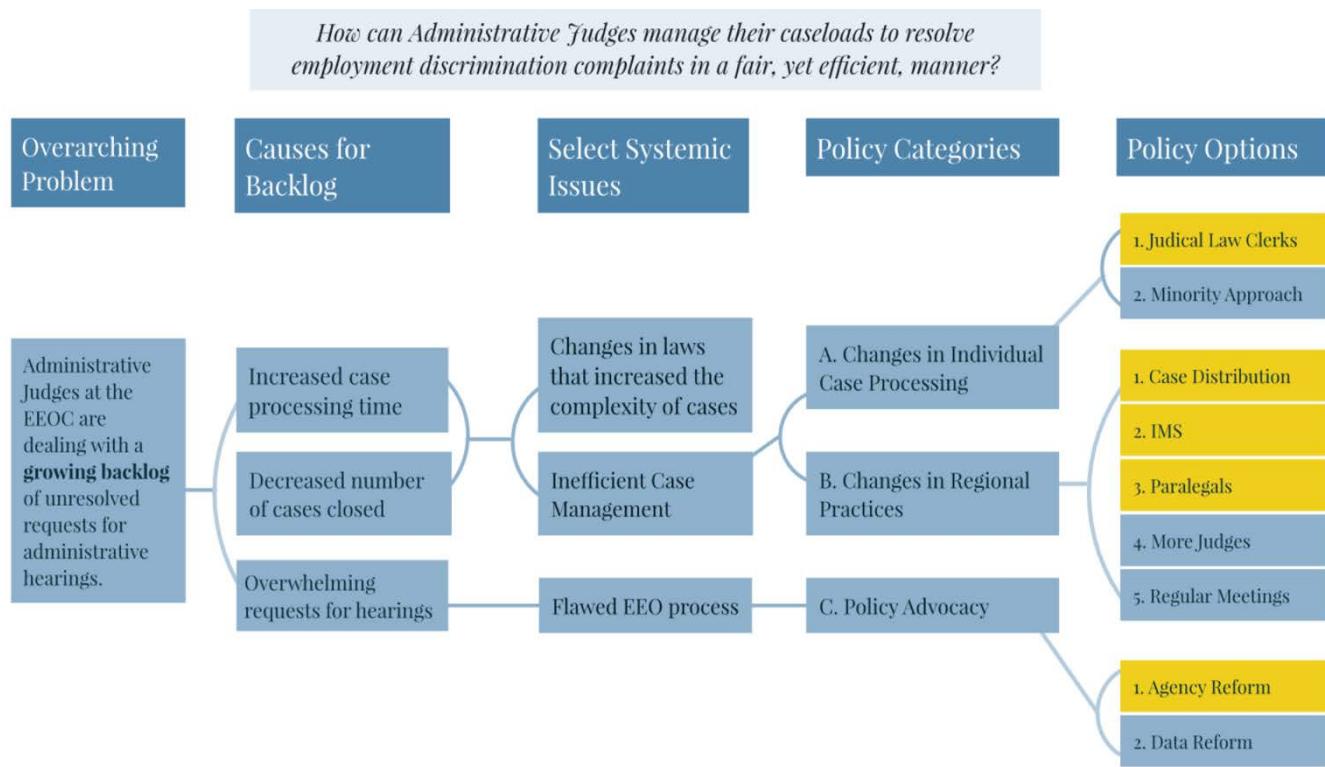
Administrative feasibility depends on whether administrative judges have the technical and administrative capacity to implement and maintain the respective option. Therefore, to assess administrative feasibility, we considered whether administrative judges are currently able (and willing) to implement the proposal with their current expertise, authority, resources, and preferences. Options that judges are able and willing to implement are ranked as “high.” Options that might require additional expertise, authority, resources, or support are ranked as “medium.” Options that are unlikely to be within the judge’s or office’s capacity are ranked as “low” in administrative feasibility.

#### **5. Political Feasibility**

Given that our client operates within a larger federal executive agency where important decisions are often constrained by political dynamics, an option’s political feasibility depends on whether administrative judges would need support from external political groups (e.g., Congress, the President, or the President’s political appointee). When possible, we highlight the type of support each policy consideration requires. For the scope of this project, our policy recommendations should ideally be implementable by an administrative judge without requiring external support. Options that do not require permission and would not trigger substantial opposition from external actors are ranked as “high,” or highly politically feasible. Options that may require some degree of permission from external entities, such as Congress, but nonetheless have a good chance of being granted are ranked as “medium.” Policy solutions that require permission from external stakeholders such as the newly elected Presidential administration, and have a low chance of being granted are ranked as “low” for political feasibility.

## VI. ANALYSIS OF POLICY OPTIONS

We identified three potential root causes underlying our client's policy problem: (1) a potentially inefficient **method for processing and managing cases**; (2) inefficient **regional office** structures; and (3) a **flawed underlying EEO process at the agency level**. To increase the chances that our policy options address the overarching problem in meaningful ways, we propose options for addressing all three underlying issues that feed into the larger problem. We therefore divide our options into three different groups and evaluate the options in light of our criteria, and then recommend preferred options that respond to each root cause (see Chart 2).



**Chart 2:** This chart shows the overall structure of this APP. In particular, there are three categories of policy solutions aimed at addressing each underlying systemic issue. The policy options are all grouped and analyzed according to the relevant policy category. The policy options highlighted in yellow are the alternatives that we ultimately recommended from all nine policy options.

## A. Improve Judicial Systems for Processing and Managing Cases

Administrative Judges (AJs) at the EEOC may be able to improve their ability to efficiently resolve claims without sacrificing the rights of the parties involved by changing how they manage their caseloads and distribute their workload.

### *1. Recruit a Full-time Judicial Law Clerk to Assist with Appropriate Aspects of the Case*

**Overview.** According to Berkeley Law School's Office of Career Services, "Some [administrative law judges] hire law clerks or staff attorneys to assist them with performing legal research and drafting memoranda and orders, among other things, in connection with their quasi-judicial functions."<sup>70</sup> These clerks are recent law school graduates who have passed the bar exam and are hired for 1-2 year terms. Moreover, judges in Federal and State District, Appellate and Supreme Courts (including the U.S. Supreme Court) hire judicial law clerks each year to perform various legal research and writing assignments to help judges manage their caseloads. AJs at the EEOC currently do not have a formal system for recruiting and sustaining full-time postgraduate judicial law clerks; instead, they either hire law student externs to serve as part-time clerks for 1 or 2 academic semesters and some AJs do not recruit any clerks at all.

AJs should implement a judicial clerkship program to recruit full-time, year-round judicial clerks. These clerks would perform the same functions as judicial law clerks hired by federal and state judges at the District, Appellate, and Supreme Court level, as well as AJs at other federal agencies. The clerks could help research legal issues, perform certain aspects of case management, write legal memoranda explaining issues in each case, and/or potentially draft judicial decisions, such as motions for summary judgment or other orders as necessary. Our client believes this option would be relatively easy to implement if there was a funding stream and that full-time judicial law clerks could help AJs manage their caseload.

Since AJs at the EEOC currently lack funding to pay for full-time judicial law clerks, they should form partnerships with law schools throughout the city and state that regularly fund popular year-long postgraduate public interest fellowships for students. These entry-

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<sup>70</sup> Berkeley Law School, Career Development Office, "Applying to Clerkships with Federal Administrative Law Judges," at 1, August 2013, accessed on January 20, 2018,  
[https://www.law.berkeley.edu/files/careers/ALJ\\_Clerkships\\_-\\_updated\\_8\\_2013.pdf](https://www.law.berkeley.edu/files/careers/ALJ_Clerkships_-_updated_8_2013.pdf).

level fellowships are extremely common in the legal community and are a popular means for recent graduates to pursue and obtain year-long positions with government agencies or non-profit organizations that would be otherwise unavailable because of funding from these respective organizations. Law schools regularly provide these paid-fellowships on an annual basis to qualifying recent graduates and “host” organizations typically begin recruiting students during the spring semester. In the more immediate future, we recommend that judges pursue opportunities to recruit law clerks from UCLA Law or other area public law schools throughout the U.C. system, which all currently fund the U.C. President’s Legal Fellowship Programs.

**Rating.** Our client believes that post-graduate judicial law clerks would be a tremendous help. Based on their experiences with second and third year law students (who volunteer part-time and haven’t studied for and passed the bar exam), some AJs said that the helpfulness of law clerks will vary depending on their quality and they would not trust current law clerks to do substantive work.<sup>71</sup> The recommendation to obtain judicial law clerks has “medium” or moderate *effectiveness* because the success of this option may depend on the quality of judicial law clerks recruited and retained throughout any given year. Therefore the ability of any judge to utilize any given clerk to reduce their backlog and maintain civil rights for all parties may depend on the caliber of the law clerk.

This option ranks “high” for *equity*. Utilizing judicial law clerks may help to uphold and improve the rights of all parties involved in a lawsuit by ensuring that judges are making decisions based on a wealth of relevant information that they may not pursue in the absence of a clerk. Law clerks could thoroughly perform tasks that AJs may not be able to devote a great deal of time on, such as legal research or reviewing the investigative hearing record, to ensure that judges are making informed decisions.<sup>72</sup> Clerks could also be a second pair of eyes for administrative judges to ensure accuracy.<sup>73</sup>

Employing judicial law clerks ranks “medium” for *cost*. It uses institutional fellowships from law schools (such as UCLA Law) to cover the clerk’s year-long salary, ensuring that administrative judges do not have to pay for their salaries out-of-pocket. However, this option would require judges to devote time away from their work to recruit, train and supervise the judicial law clerks, therefore earning a medium rank for labor and training costs.

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<sup>71</sup> Interview with administrative judges 24(c)(2) and 42(d)(19).

<sup>72</sup> Administrative Judges 42(d)(19) and 24(c)(2).

<sup>73</sup> Administrative Judge 42(d)(19).

This option ranks “high” for *administrative feasibility*. Administrative judges can implement this with little practical difficulty and our client expressed a willingness and eagerness to pursue this option. This option also ranks “high” for *political feasibility* because judges would not face political opposition; moreover, political decision-makers would likely support this option since it is currently used regularly by judges in federal and state courts at all levels of the judiciary and by AJs at other federal agencies.

## *2. The Minority Approach:* *Deemphasize settlement discussions; prioritize fixed deadlines and timelines*

**Overview.** Within 60 days of receiving a case, all administrative judges must schedule an “initial conference” with employees and agency attorneys. During this conference, judges speak to both parties to review the complaint allegations, discuss settlement potential, set a timeline for discovery, and explain the judicial process. During the “initial conference,” judges make determinations about the best way to try to process cases to ultimately find a resolution. They make two important decisions: (1) whether to allow the case to proceed through settlement discussions (the status quo, or “The Majority Approach” in Appendix 4) or (2) whether to proceed with a pre-discovery timeline to expedite the case and the time it takes to render a decision. Four out of five administrative judges interviewed stated that they followed the settlement route<sup>74</sup> while the other administrative tended to follow the more expedient method for resolving cases by allowing them to proceed to the pre-hearing stage.<sup>75</sup> In the latter case (“the minority approach”), the administrative sets applicable timeframes (as recommended in the GAO report) and is less likely to focus on settlement conferences from the onset.

The administrative judge who adopts this approach establishes a timeline during the initial conference that parties must meet in order to raise additional issues, proceed through discovery, or enter any additional items of evidence into the record. Although this administrative judge follows the approach recommended by the GAO, this judge does not necessarily devote proper attention to fully developing the hearing record and may be content with making decisions about the merits of a case even if there is a possibility that all the potentially relevant evidence hasn’t been fully explored or uncovered.

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<sup>74</sup> Administrative Judges 22(a)(7), 24(c)(2), 42(d)(19), and 8(e)(3).

<sup>75</sup> Administrative Judge 40(b)(12).

**Rating.** The minority approach option ranks “high” for *effectiveness*. Because the administrative judge who utilizes this approach can close double the amount of cases that the other judges close in one fiscal year, this option would be effective at reducing the backlog issue. However, this option is “low” for *equity* because there is some consensus that parties may not have fair opportunities to fully develop their cases under this approach.<sup>76</sup> Employees who are unfamiliar with the judicial process and who do not have access to an attorney or representative are at a particular disadvantage when litigating cases before this particular judge. In addition, parties are not afforded as many opportunities to engage in settlement discussions to resolve their disputes in ways that could prove beneficial to everyone involved.

This option ranks “medium” for *cost* because we fear that the administrative judge who follows this approach is more likely to have cases overturned on appeal, which would eventually require the EEOC to spend additional time determining the merits of the appeal and overturning the judge’s decision.

This option ranks “high” for *administrative feasibility* because AJs can currently implement this system without much difficulty. However, the minority approach ranks “medium” for *political feasibility* because some political actors who care more about giving all parties a meaningful chance to develop the record would likely disapprove of this approach.

Policy Options	Criteria, Weight, and Score						Weighted Score
	Effectiveness	Equity	Cost	Administrative Feasibility	Political Feasibility		
	0.3	0.3	0.1	0.1	0.2		
1. Recruit Judicial Law Clerks	2	3	2	3	3	2.6	
2. The Minority Approach	3	1	3	3	2	2.2	

**Recommendations.** In light of this analysis, we recommend option (1) *recruit judicial law clerks* to address the issue of judicial case-management. Although the minority approach allowed one administrative judge to close cases much faster, there were concerns among other AJs that doing so sacrificed equity and fairness to the parties by not allowing them to fully develop their cases or have sufficient time to engage in settlement discussions. This also negatively affected the political feasibility of the option.

<sup>76</sup> Administrative Judges 8(e)(3) and 42(d)(19).

On the other hand, while the clerkship program moderately improves an administrative judge's efficiency, it could potentially result in fairer case processing. Obtaining judicial law clerks through institutional university fellowships (which are a common form of post-graduate employment in the legal community) would not cost AJs any money and would only require that they devote time to train and supervise the law clerks when necessary.

## B. Reform Regional Operations

This section considers five options that could be implemented at the regional or district level. The individual district offices have autonomy over how they distribute cases among judges, structure the workload for individual judges, and use their resources to support the workload of judges.

### *1. Comprehensive Streamlining of Case Distribution*

**Overview.** Supervisory judges (SJs) at the EEOC currently distribute cases among individual AJs without reviewing the nature of the complaints, such as their allegations and bases. Aside from whether each judge is at their individual capacity for the amount of cases they can decide, the only other consideration that SJs take into consideration when assigning cases is whether the case consists of a class-action lawsuit. Distributing cases based on specialty may be a viable option for improving judicial efficiency, promoting equality of rights, and minimizing the problem of backlogged complaints.

Specializing may be a viable policy option for improving efficiency for judges at the EEOC because some judges may be better at adjudicating and resolving particular types of cases over others (e.g. class action lawsuits over disability claims). Specialization within a subfield is promoted in many professions - such as the medical field where doctors have specific practice areas - because it allows them to build expertise in the field and be more proficient at their job. Federal courts and judges have become specialized over the years; in addition to bankruptcy courts and tax courts, there are federal judges who specialize in "patent" law.<sup>77</sup> Remarking on the occurrence of specialization in the legal field, Chad

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<sup>77</sup> See, e.g., Chad M. Oldfather, *Judging, Expertise, and the Rule of Law*, "Washington University Law Review," Volume 89, Issue 4 (2012), accessible at: [https://openscholarship.wustl.edu/law\\_lawreview/vol89/iss4/3](https://openscholarship.wustl.edu/law_lawreview/vol89/iss4/3), accessed on April 28, 2018.

Oldfather, Professor of Law at Marquette University School of Law wrote, “Professionals across a spectrum of fields focus on mastering and practicing in narrow subspecialties. This is hardly a surprise. As the scale of knowledge grows, it becomes increasingly difficult for any one person to stay on top of details and developments across a field, and specialization represents something of a natural division of labor. Law is no exception.”<sup>78</sup>

In light of this, the EEOC’s current system for randomly distributing cases may miss the opportunity to maximize the potential for AJs to specialize in a subset area of employment discrimination law, such as cases involving class-action, retaliation, or disability claims, and ultimately resolve these claims in a more fair and efficient manner.

Under our policy option, there are three possible components to the distribution process. First, we recommend that SJs distribute cases to individual judges based on their specialty or preference for a specific type of claim. We assume that if judges are consistently given their preferred types of cases, they would have greater potential to process those claims efficiently than other judges who are unfamiliar with (or dislike) a particular area of employment discrimination law. For instance, there is one AJ in the LA Office who prefers to receive (and is very good at resolving) class-action cases and will therefore receive a higher number of class-action cases each fiscal year as opposed to other type of cases.<sup>79</sup>

Second, SJs can distribute cases to AJs based on the specific agencies involved. If multiple cases from the same agency are on file, they should be given to the same AJ. Cases from each federal agency usually involves the same in-house attorneys that represent the agencies. One AJ prefers to have cases with the same federal agencies because it allows the judge to efficiently schedule conferences and discussions for a series of cases with one attorney as opposed to coordinating schedules with multiple attorneys from various agencies.

Third, we recommend that cases be distributed based on complexity. Currently, SJs at the EEOC assign AJs cases without any regard to the complex nature of the claims involved and how much time potentially required to address the claims. We believe that if EEOC judges received a proportionate mix of “easy,” “soft,” and “hard” cases, they would be poised to resolve claims faster and decrease the backlog more efficiently. The Social Security Administration (SSA) implemented a similar method, called the “augmentation strategy,” to reduce the amount of backlogged complaints and distribute cases to judges more

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<sup>78</sup> *Ibid.* at 847.

<sup>79</sup> Administrative Judge 22(a)(7)

strategically.<sup>80</sup> Under the Augmentation Strategy, the SSA aimed to use electronically generated data to determine which appeals could be screened and assigned to administrative appeals judges based on complexity or the ability of a specific judge to resolve a particular type of claim.<sup>81</sup> The SSA projected that more experienced administrative appeals judges would be able to process difficult or complex cases more efficiently than administrative law judges with less experience.<sup>82</sup> The SSA assured that “there is no due process violation inherent in [the] hearing system.”<sup>83</sup>

While the consequences of the SSA’s augmentation strategy is currently unknown (and pending), this approach is transferable to our client’s general structure for adjudicating complaints since EEOC judges also receive cases that can be distributed to judges based on complexity and type of claim. In particular, judges at the EEOC receive “easy,” “soft,” and “hard” cases. Judges can close “easy cases” within a matter of hours for clear procedural reasons (e.g. a plaintiff is unavailable, withdrew their complaint, or a party failed to comply with a regulatory deadline). The AJs we interviewed stated that, during each fiscal year, they receive anywhere between 5-20 “easy” cases that are relatively straightforward to dismiss because of procedural violations. Much like the SSA’s approach, under this new policy option, a SJ at the EEOC could allow AJs with more experience to close the more complex cases. Or, the SJ could simply assign all AJs an unofficial “quota” of easy cases to solve each year (and subsequently distribute the more difficult case to judges based on their level of experience). According to our calculations, if each AJ dedicated six hours per week to closing easy cases, each would be able to close over a hundred easy cases per year (to ensure that easy cases do not receive unfair preference, the proportion of hours that AJs dedicate to those cases should not exceed the proportion of easy cases).

**Rating.** This distribution option, when considered in its entirety, rates “medium” or moderately for its *effectiveness*. The option was not rated “high” because there was no strong evidence to suggest that the option would help to promote efficiency or improve the backlog issue; however, the literature reviews did suggest that these are some innovative and new ways to approach this type of policy problem. The distribution option ranks “medium” for

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<sup>80</sup> U.S. Social Security Administration, “Compassionate and Responsive Service Plan to Reduce Pending Hearings,” (A-05-16-50167), September 2016, accessed March 1, 2018, <https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-05-16-50167.pdf>.

<sup>81</sup> *Ibid.* at 8.

<sup>82</sup> Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Regulatory Affairs and Federal Management, *Statement of Theresa Gruber, Deputy Commissioner, Disability Adjudication and Review, Social Security Administration*, May 12, 2016, accessed March 10, 2018, [https://www.ssa.gov/legislation/testimony\\_051216.html](https://www.ssa.gov/legislation/testimony_051216.html).

<sup>83</sup> U.S. Social Security Administration, “Attachment C to Testimony of Theresa Gruber,” May 12, 2016, [https://www.ssa.gov/legislation/testimony\\_051216\\_AttachmentC.pdf](https://www.ssa.gov/legislation/testimony_051216_AttachmentC.pdf)

*equity* because the status quo for equity would be maintained as it would not impact the rights of the parties involved. Although AJs may improve their ability to schedule the necessary hearings and settlement discussions, these are aspects of case-management that would not impact the civil rights of the parties as normal scheduling activities don't disadvantage parties.

The distribution option ranks “low” for *cost*. Categorizing cases by types of complaints and agencies involved would require only a small time investment by the SJ or individual AJ, and it does not require additional funds to implement. The *administrative feasibility* for this method is “medium” because it would require the approval and willingness of the SJ to distribute the cases, and the other AJs would need to agree to specialize in order for the distribution method to work. This method ranks “high” in *political feasibility* because judges at the EEOC would not need approval from headquarters or external political stakeholders to implement or adopt this approach and these entities would not object to this method.

## *2. Petition to Improve Electronic Case Management System*

**Overview.** We previously identified several problems with Integrated Mission System (IMS). This policy option encourages AJs to petition the EEOC’s Office of Information Technology (OIT) to update IMS to fix technical “bugs” and operational issues, increase features, and improve user-friendliness. These changes would allow judges to fully maximize IMS to track and manage the status of their cases uniformly.

The AJs that we interviewed all experienced problems with basic features in IMS, such as the faulty notification system and the inability to meaningfully track relevant features of the status of complaints. We recommend that OIT add functionality to allow the system to align with how each regional office assigns cases to AJs, thereby reducing the case distribution workload for the SJ. An example of such a feature would be an algorithm to automatically categorize the easy, soft, and hard cases without the need for human eyes to look through the pile. It could be done by calculating multiple factors such as the word counts of documents submitted, number of claims in a file, number of complainants (or if it is a class-action lawsuit), and the last date or frequency with which the involved parties are updating documents (to gauge if they are still actively involved or plan to drop the case). The results of such categorization may not always be accurate, but the categorization would only serve the purpose of roughly estimating and proportionately distinguishing the cases as “easy,” “soft,” and “hard.” Another potential categorization feature could be the ability to “tag” cases by the type of bases alleged, actions involved, attorneys involved, timeframes, or any other

essential information useful for distinguishing cases to judges based on specialty. This feature could be used in conjunction with the above algorithm to not only enable automatic distribution of cases, but also to help judges organize cases and manage their workload more efficiently.

**Rating:**\* Petitioning to improve IMS rates “high” in *post-submission effectiveness* because an improved IMS could allow AJs to efficiently manage their caseload by helping them to access important and relevant information effortlessly. Improving IMS ranks “medium” for *equity*, because the individual civil rights of the parties to the case would not be directly implicated or changed from the status-quo.

This option ranks “high” in *post-submission administrative feasibility*; although there is a chance that some judges may face an initial learning curve in using the updated IMS, many AJs would welcome the improvements to IMS and would thus be willing to learn it. In addition, one of our recommended improvements is user-friendliness, which should make the application more intuitive for judges and paralegals to use. Improving IMS ranks “medium” in *political feasibility* because, although updating IMS is a costly endeavor for OIT, the EEOC has already approved the Research and Data Plan (R&D Plan) for the years 2016 to 2019 as part of the Strategic Enforcement Plan.<sup>84</sup> The R&D Plan provides for various projects involving changes to IMS, so AJs can request these improvements to be incorporated as part of those efforts without reinventing the wheel.

**\*A Note on Petitions:** Three of the policy options suggest that AJs sign petitions to headquarters or another department to request larger systemic changes. The ratings for these options are marked with an asterisk. Analyses for these options required two sets of ratings (which are averaged for the final scores):

- Pre-submission: Rating of the actual task of drafting and submitting a petition, which depends on the judges. The ratings for this task is the same for all petitions: their **effectiveness** rank low, **equity** rank medium, **cost** rank low, and **administrative** and **political feasibility** rank high because submitting the petition itself will not produce results and does not need resources, efforts or approval.

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<sup>84</sup> U.S. EEOC. “Research and Data Plan For 2016-2019,” 2015, accessed on April 1, 2018, accessible at: [https://www1.eeoc.gov/eeoc/plan/research\\_data\\_plan.cfm?renderforprint=1#\\_ftn1](https://www1.eeoc.gov/eeoc/plan/research_data_plan.cfm?renderforprint=1#_ftn1).

- Post-submission: Rating of the chances and consequences of petition approval, which depends on the entire agency and administration. This rating depends on the content of the petition. All options received the same low **cost** and high **administrative feasibility** ratings for this part because they do not cost the AJs or the regional office at any stage and require little involvement of AJs in implementation after approval.

### *3. Hire Full-Time Paralegals*

**Overview.** All of the AJs interviewed stated that lack of clerical support detracted from the amount of time they could devote to resolving legal disputes. Paralegals commonly assist judges with administrative support by performing tasks, such as coordinating schedules, that are time-consuming yet necessary for managing a case or docket. AJs at the EEOC, however, have access to only one office-wide clerk and must therefore perform these tasks on their own. The GAO found that offices where judges set their own calendars and managed case flow had large backlogs and suggested that offices establish *uniform case management systems* to improve.<sup>85</sup> The recommendation to hire paralegals recognizes that paralegals could perform routine tasks that are time-consuming, such as filling evidence, calendaring, managing schedules, and detract from the ability of AJs to concentrate on adjudicating cases.

The average lawyer-to-paralegal ratio in the U.S. is reported to be 3.57-to-1 by one source,<sup>86</sup> while another estimated the ratio as 4-to-1.<sup>87</sup> This means that on average, law departments and firms hire one paralegal to support three or four lawyers. If the number of paralegals that meet this ratio is enough to support the eight AJs in the LA Office, the office may need to hire only three paralegals.

**Rating.** This option ranks “medium” for *effectiveness*. According to the 1981 GAO report, “Courts with the least backlog more actively involved the clerks’ offices in administering case management and docket control systems than the courts with the higher

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<sup>85</sup> GAO, “Report to Congress: Judicial Backlog,” at 20.

<sup>86</sup> Reese Morrison, “Morrison on Metrics: Lawyers Per Paralegal,” Corporate Counsel, October 11, 2010, accessed March 5, 2018,

<https://www.law.com/insidecounsel/almID/4dcafef2160ba0ad57003171/?slreturn=20180213035756>.

<sup>87</sup> E.S. Martin, “What is the Ratio of Support Staff in Large Law Firms,” AZ Central, accessed March 5, 2018, <https://yourbusiness.azcentral.com/ratio-support-staff-large-law-firms-24967.html>.

case backlogs.”<sup>88</sup> In the current context, paralegals perform such clerks’ administrative tasks and would provide comparable productivity benefits reported by the GAO. Paralegals are trained to do specific case management jobs and typically work long-term, so they would not require frequent training and an adjustment period that would negatively affect their effectiveness.

Moreover, Judge Mulligan testified before the Administrative Judge Association that “approximately 20% of all AJ time is spent on clerical or administrative tasks such as copying, mailing and IMS entry.”<sup>89</sup> Thus, we could infer that when enough paralegals are hired to perform these tasks for AJs at the EEOC, paralegals will free up about 20% of each individual AJs’ time. Assuming that AJs will use the additional time to do substantial case-processing, the LA Office’s work output could increase by 20% / 80%, or about 25% per year.

The option to hire paralegals ranks “medium” for both *equity* and *cost*. Hiring paralegals would not change the status-quo of equity for parties. In terms of cost, hiring paralegals would require consistent funding for three paralegals (the average annual salary for paralegals in Los Angeles is \$61,910<sup>90</sup>). Hiring paralegals ranks “high” for *administrative feasibility* because there is a relatively high supply of paralegals to recruit from and the option could be implemented by the regional office. Hiring paralegals ranks “high” for *political feasibility* because the regional EEOC office may have enough budget in its discretion for this purpose and would not require intervention from political actors.

#### *4. Hire Additional Administrative Judges*

**Overview.** The LA Office has a shortage of AJs.<sup>91</sup> According to Thomas J. Crane, an employment attorney in Texas who litigates before judges at the EEOC, “The Texas region has [also] been short of a few judges for several years now. But, much of the country is also short of Administrative Judge.”<sup>92</sup> Although the full capacity of the LA Office went up to 12 AJs at most, four have left and one is planning to retire next year, which would leave only seven

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<sup>88</sup> GAO, “Report to Congress: Judicial Backlog,” at 19.

<sup>89</sup> EEOC, “Mulligan Testimony,” (2012).

<sup>90</sup> Paralegal 411, “Paralegal Careers” *California Paralegal Career Guide*, accessed on March 10, 2018, <https://www.paralegal411.org/careers/california/>.

<sup>91</sup> Interviews with Administrative judges 22(a)(7), 40(b)(12), and 8(e)(3).

<sup>92</sup> Thomas, Crane, “Federal Employees Wait Years for an EEOC Judge,” San Antonio Employment Law (blog), Law Office of Thomas J. Crane, February 6, 2018, <https://www.sanantonioemploymentlawblog.com/2018/02/articles/litigation-and-trial-practice/federal-employees-wait-years-for-an-eecd-judge/>.

administrative judges in the office next year. Three of the AJs that we interviewed consider it important to hire additional judges to address this shortage and fill capacity.<sup>93</sup>

**Rating.** The option to hire additional AJs ranks “high” for *effectiveness* because we assume that each additional administrative would close about 50~60 additional cases per year, which double the amount of cases the average judge in the LA Office typically closes each year. Put differently, given that there are currently eight administrative in the LA Office, a rough thought experiment shows that, on average, hiring one additional AJ could increase the office’s current work output by  $\frac{1}{8}$ , or about 12.5%.

Hiring more AJs ranks “medium” for *equity* because the rights of the parties involved would not be affected. This policy option ranks “high” for *cost* because the average salary for an AJ at the EEOC ranges from \$111,000 to \$195,000.<sup>94</sup> The LA Office would need to hire four more AJs if it wants to fill capacity, thereby requiring substantial financial investments. The option to hire more AJs ranks “low” in *administrative feasibility* because there is a lack of institutional and organizational resources, such as office space and technical support, to employ these additional judges at the moment. This option ranks “low” in *political feasibility* because hiring additional AJs would require the approval and consent of political actors, such as the U.S. President and Congress, who would need to approve the budget, but given the current policy dynamics, these entities would be unlikely to support this approach.

## *5. Hold Office Meetings to Share Best Practices*

**Overview.** The AJs in the LA Office do not regularly meet to share updates with each other or strategize about best practices. Other industries have recognized the benefits of strategy meetings for improving services or results. Doctors in the medical profession also hold strategy meetings with peers to discuss ongoing complex or sophisticated cases and receive insight from other doctors when feasible.<sup>95</sup> A study of a middle school’s professional learning community (PLC) model for teachers, in which teachers “reported meeting regularly in...teams to discuss administrative issues, such as consistent discipline practices, grading procedures, parent information, etc.” found that their “learning from each other was more professionally rewarding and effective than...more traditional professional

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<sup>93</sup> Interview with Administrative judges 40(b)(12), 22(a)(7), 42(d)(19).

<sup>94</sup> PAYSA, “EEOC Administrative Judges,” 2018.

<sup>95</sup> See, e.g., Mental Health Commission, “Multidisciplinary Team Working: From Theory to Practice,” *Mental Health Discussion Paper*, January 2006, accessed on April 28, 2018, <http://www.mhcirl.ie/File/discusspapmultiteam.pdf>.

development..."<sup>96</sup> Therefore, AJs at the EEOC may also benefit from holding strategy meetings with other AJs in the office to discuss particularly difficult and complex cases or to receive feedback on a particular aspect of a case. By providing opportunities for AJs to collaborate and learn from each other, these strategy meetings may prove useful at helping AJs solve cases more efficiently in the long-run.

**Rating.** The option to hold additional meetings ranks "low" for *effectiveness* because the success of this option would largely depend on what the other AJs have to offer and on their willingness to participate. Also, the implementation of strategy meetings will not produce the immediate impact of reducing backlog and improving processing time. This option ranks "medium" for *equity* as it would not affect the equity of the parties and would keep the status quo.

The option to hold additional meetings is "low" in *cost* because it would not require additional funds or a large investment of time and resources. This option ranks "medium" for *administrative feasibility* because while judges have flexibility in how they manage their time, they may not be able to coordinate with the other judges in the office to hold these meetings. Moreover, this option ranks "high" for *political feasibility* as judges do not require permission from external entities to conduct these meeting and these entities would not be opposed to the implementation of this option.

Policy Options	Criteria, Weight, and Score					Weighted Score
	Effectiveness	Equity	Cost	Administrative Feasibility	Political Feasibility	
	0.3	0.3	0.1	0.1	0.2	
1. Streamlined Case Distribution	2	2	3	2	3	2.3
2. Petition: IMS Improvement	2	2	3	3	2.5	2.3
3. Hire Paralegals	2	<b>2</b>	2	3	3	2.3
4. Hire More Ajs	3	2	1	1	1	1.9
5. Hold Office Meetings	1	2	3	2	3	2

**Recommendations.** Based on the final scores (see Table C), we recommend three options from this category: (1) *Comprehensive Streamlining of Case Distribution*, (2) *Petitioning to Improve Electronic Case Management* and (3) *Hiring of Full-Time Paralegals*.

<sup>96</sup> Parry Graham, "Improving Teacher Effectiveness through Structured Collaboration: A Case Study of a Professional Learning Community," *RMLE Online*-Volume 31, No. 1, 2017, accessed March 20, 2018, <https://files.eric.ed.gov/fulltext/EJ801113.pdf>.

The case distribution proposal is a feasible, low-cost option that could better utilize each AJ's expertise, thereby allowing for more efficient processing of cases. Among other things, implementing the case distribution method would allow judges to schedule block conferences for multiple cases, minimizing the time they spend on this tedious task. This option may also have the additional effect of synergizing with the *Petition for Agency EEO Reform* option we recommend for the agency-level reform in the next section: if each AJ receives cases from the same agency, repeat offender agencies and petition headquarters to intervene in the agency's EEO operations to help the agency reform.

Next, petitioning for IMS improvements may have an important and lasting impact on the ability of AJs to process and manage the status of their cases. The post-submission political feasibility of this option is higher than the other petition options because, while updating the system is also a costly endeavor, it would not offend any political actors.

The option to hire paralegals is a common practice among lawyers that AJs at the EEOC should pursue. AJs can delegate time-consuming clerical tasks to the paralegals, as well as allow paralegals to handle the IMS system to track necessary evidence or documents for any given case. This would save AJs 25% of time they currently spend on case-management tasks.

Although the shortage of AJs in the LA Office is a legitimate issue that will need to be addressed eventually, the option to hire more judges did not make the final recommendations for this report because of how costly and unfeasible it currently is. It is also projected to be less cost-effective than the option to hire paralegals. Considering average salary, for the cost of hiring one AJ, the LA Office can alternatively hire three paralegals. As we show in the potential scenario above, hiring one additional AJ could theoretically yield 12.5% more work output per year for the LA Office, while hiring three paralegals could yield 25% more work output for the LA Office each year. Thus, we project that hiring three paralegals might be twice as effective as hiring one additional judge.

While office meetings is a low-cost and feasible option that may help address various causes of inefficiency if implemented successfully, we cannot predict its effectiveness for this report.

The three recommended options from this section appear to us synergistic, suggesting that this set of options would be most effective when implemented together. If OIT approves the petition and makes the improvements and add the features requested, judges will be able to gradually transition into receiving all cases electronically and could let IMS automatically sort and distribute cases to them by expertise, agency, and complexity. Paralegals could also incorporate the features of the improved IMS into their uniform case management system.

## C. Reform Underlying EEO Process at Agency Level

The flawed overall EEO process affects the workload of AJs at the EEOC. To improve the overall EEO process at the agency level, AJs must take action to improve certain agency issues before complaints reach their desk. We proposed and analyzed two policy options for this purpose.

### *1. Petition to Headquarters to require agencies with high rate of complaints to reform*

**Overview.** We discussed “problem agencies” in Section IV, which indicated that many hearing requests may be the results of consistent systemic problems plaguing an agency’s EEO process. This option suggests that AJs petition headquarter for the EEOC to take a more proactive role in requiring individual agencies that are repeat offenders to reform their EEO process. If the petition is approved, the EEOC will start an investigation into the target agencies, which would identify the underlying problems of the agencies’ EEO process and methods for reforming those processes. Advocating for greater EEOC involvement into EEO programs at the agency level is important because the EEOC has “statutory responsibility to review and approve federal agencies’ EEO plans and evaluate their EEO programs’ operation.”<sup>97</sup> Inquiring into the EEO programs for problem agencies would be a proactive approach that could lead to significant structural improvements within the agency. Such improvements may include a fairer agency EEO program and the implementation of a training program aimed at educating employees of their rights and best practices in navigating the EEO process.

**Rating:**\* The option to petition headquarters to intervene in problem agencies is “highly” effective. The EEOC’s proactive involvement in ensuring organizational compliance and competency at the beginning may ultimately reduce the number of hearing requests at the end of the process. Employees who file discrimination claims with their federal agency may end up requesting administrative hearings with EEOC judges because the employees do not trust the agency to handle their claims fairly, as identified in the section detailing the flawed EEO process; agency reform may help regain employees’ trust in the EEO process and diminish the likelihood that they need to request an administrative hearing.

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<sup>97</sup> U.S. EEOC, “Federal Sector Quality Practices for Effective Hearings, Appeals and Oversight,” at 2, accessed on January 3, 2018, [https://www.eeoc.gov/federal/quality-practices.cfm#\\_ftnref5](https://www.eeoc.gov/federal/quality-practices.cfm#_ftnref5).

The recommendation to petition headquarters rates “high” for *equity* because it would ultimately increase the chances that employees are treated fairly. For instance, by providing federal employees with the proper counseling, knowledge and information about their rights, including the heightened standards of proving complaints at the EEOC, this option levels the playing field for employees. Thus the post-approval *effectiveness* and *equity* rank as high. This option ranks “low” in *cost* because AJs would not have to pay to execute this approach.

## *2. Petition to Headquarters to Streamline and Standardize Data Reporting*

**Overview.** Currently, there is no reporting system that records complaints and hearings in an easily accessible and interpretable way. If agency EEO offices improved and standardized the data reporting system, the EEOC would be able to better track and analyze the data over time. This would allow policymakers and researchers to plan future interventions and evaluations more effectively and to streamline district- or nation-wide reports.

**Rating.\*** The data itself will not improve EEO processes and would do so only if used effectively by policymakers and researchers in the distant future to identify problems and produce solutions, so its *effectiveness* after implementation ranks low and its *equity* ranks medium.

Policy Options	Criteria, Weight, and Score					Weighted Score
	Effectiveness	Equity	Cost	Administrative Feasibility	Political Feasibility	
2. Petition: Agency Reform	0.3	0.3	0.1	0.1	0.2	2.35
3. Petition: Data Reporting	2	2.5	3	3	2	1.9

**Recommendation.** In order to improve the EEO process at the agency level, we recommend (1) *petition for agency reform*. This option scored higher in post-submission effectiveness and equity. If approved and implemented, a petition to improve an agency’s EEO processes could potentially reduce the inequity in the EEO process or better educate employees of their rights, thereby reducing the number of requests for administrative hearings. Because data reporting wouldn’t immediately impact the EEO process nor equity, it scored lower. The administrative and political feasibility of submitting a petition is high

for both options; however, both petitions have low political feasibility after submission because the implementation of agency reforms would be costly and could cause the agencies to object. Still, we recommend that judges actively observe agency EEO practices to tackle identifiable issues in order to promote a more equitable treatment and education of federal employees and thus reduce the number of hearing requests. In addition, judges might benefit from implementing the option to distribute cases by agency along with this option because it may allow them to more easily identify agencies' problematic practices.

## VII. CONCLUSION

The EEOC's administrative hearings process was initially conceived to provide federal employees with an effective mechanism for vindicating their rights in a manner unavailable in traditional courtroom proceedings. However, the situation has been less than ideal, as employees are forced to wait exceedingly long periods of time to resolve their disputes.

In this report, we highlighted how the number of complaints that administrative judges are able to close each year has steadily decreased, while the number of new complaints they receive annually remains steady. Given the increase in processing time and the declining rates for closing cases, administrative judges are currently experiencing a backlog of unresolved complaints. We offered potential underlying causes of the problem: (1) a flawed EEO system; (2) changes in employment discrimination law that made certain cases more difficult to resolve than others; and (3) less than ideal resources for case-management.

We propose five recommendations, tailored to the underlying problems, that administrative judges should adopt to address this issue in a meaningful way.

- To improve the ability of administrative judges to decide cases efficiently, we suggest that they (1) *recruit full-time, postgraduate judicial law clerks* through popular fellowships.
- To better serve and support administrative judges, we recommend that the regional office adopt the following suggestions: (2) *distribute cases based on judges' expertise*; (3) *hire paralegals* to eliminate the amount of time that judges spend performing routine clerical tasks; and (4) *petition the Office of Information Technology for improvements to the Integrated Mission System*.
- To tackle the systemic flaws in the EEO processes, we suggest that judges actively monitor agencies with frequently higher rates of complaints filed against them and (5) *submit petitions to reform discriminatory policies to the EEOC Headquarters*.

The recruited judicial law clerks and paralegals would be able to provide immediate relief to the judges' current workload as well as eliminate the time judges currently waste on clerical tasks, while the specialized distribution of cases, updated IMS, and reformed agency policies would hopefully provide necessary improvements for efficiency and equity in the long run. While these recommendations will not reform all the problems confronting

administrative judges at the EEOC, these are actionable recommendations that our client and his fellow administrative judges may implement to improve both their own workload and their ability to resolve claims in a fair and efficient manner, while potentially reducing the number of complaints continually filed in years to come. Moreover, we believe the results from this project will be useful to other federal agencies that may be experiencing backlog issues and hope to improve their ability to serve the public.

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## **IX. APPENDICES**

### **Appendix 1. Sample Interview Guide for Administrative Judges**

#### **Qualitative Assessments of the Problem and Potential Solutions**

##### Interview Questions for Administrative Judges

###### (A). His/her case-management system.

1. What is your system for managing cases (what do you do after you receive a request for a hearing)?
2. Do you have a formal or informal system for prioritizing cases (e.g. based on type of claims alleged, complexity of claims, potential merits of a case, etc.)?
3. Over the last few years, how many of your cases were resolved pre-hearing? How were they resolved (e.g. through settlement conference, motion to dismiss, etc.) ie: example from other judge?
4. How do you decide which cases to refer to mediation? How many cases per year do you refer to mediation for the past ~10 years?
  - Do you believe mediation is an effective form of dispute resolution?
5. And out of the cases that you refer to mediation, how many reach a settlement?
6. In your experience, are certain cases more likely to settle pre-hearing (e.g. claims involving less money, a certain type of discriminatory treatment, or involving more evidence)?
  - How are cases resolved pre-hearing (motion to dismiss, prehearing settlement conference, directed verdict, etc)?
  - Is it possible for you to encourage/incentivize employees to settle pre-hearing?
7. How do you monitor the status of your cases?
  - Do you use any institutional procedures, systems or databases? Or do you create your own system?
8. What administrative support do you have for managing your caseload?
  - To what extent do you rely on them?
  - What are some barriers you feel there would be to hiring/taking?

9. What support do you have for deciding the merits of claims?

- What support or resources do you believe you currently lack that would make your job easier (ie: administrative tasks)?

10. Do you utilize law student externs (or recent graduates) throughout the academic year or summer?

- How many and in what capacity?

- Is this on a consistent basis?

- And to what extent do you find their assistance helpful (ie: what are they able to address/improve in efficiency)?

12. What is the most time-consuming aspect of making judicial determinations (researching the law, writing decisions, etc.)?

13. To the best of your knowledge, how does your process for handling complaints or making judicial decisions differ from the methods used by other administrative judges in the LA Office and/or nationwide (ie: what is unique about your process)?

(B). His/her understanding of factors contributing to the increase in requests for administrative hearings.

14. Why do you think there is an increase in the number of requests for hearings across the country?

- Do you believe it's part of the normal caseload fluctuations over the years?

15. Have you noticed an increase in the number of certain types of claims alleged?

16. To the best of your knowledge, have there been any recent changes in laws that may have contributed to the increase in complaints? (Changes in Supreme Court jurisprudence -- standard for hostile work environment -- or changes to the Americans with Disabilities Act)

17. Have there been any recent changes in the procedures or policies for managing cases (refer to graph for 2012 decline, 2013 increase, 2014 decline)?

18. To the best of your knowledge, have there been any changes to how agencies address complaints (educate employees or investigate complaints) that may have contributed to the increase in request or processing times for hearings?

(Refer to processing times and ways cases are closed proportion graph)

19. In your opinion, how effective are agencies at addressing disputes before they reach your desk?

Have you noticed any deficiencies in how agencies initially address EEO allegations that could be improved before they reach your desk?

How could agencies improve their EEO complaint process?

21. Are certain hearings more difficult to conduct (e.g. hearings outside of Los Angeles or that involve parties stationed outside of the U.S.)

(C). His/her understanding of why it takes an increased amount of time to resolve claims.

22. Have there been any changes to the procedures for resolving complaints, conducting hearings, or managing your caseload? (i.e. Have procedures become more complicated over the years?)

(Refer to processing times and ways cases are closed proportion graph)

23. Are there any type(s) of claims that are more complex and/or challenging and time-consuming to resolve?

Why? What type(s) of claims are “easier” to resolve? Why?

11. What is the most time-consuming aspect of managing cases (E.g. Pre-hearing conferences or conducting hearings? Or writing decisions? Or researching legal issues, etc.)?

24. In your opinion, does having an attorney (or representation) change the outcome for complainants?

Does having access to an attorney (or representative) make proceedings more efficient and/or less time-consuming?

25. Has there been any significant fluctuations in the number of employees in your office (administrative judges, clerical or administrative support staff)?

Do changes in the number of employees affect your workload or ability to manage cases? How so?

27. What aspect of your job consumes the most time are make you less efficient?

What part(s) of your job, if any, would you consider “easier” or less difficult?

28. If you were king or queen for a day, what would you change to decrease the amount of time cases are resolved?

(D). His/her understanding of the constraints (political, statutory, time, institutional, financial) imposed on administrative judges.

29. What are some of the external or institutional constraints that make it difficult for you to do your job?

30. Are there any financial limitations that make it difficult to do your job?

31. Do changes in political leadership / organizational staffing impact your job or ability to address complaints?

(E). His/her understanding of the discretion that administrative judges have when resolving claims.

31. Do administrative judges have any discretion in how they manage their caseload or resolve complaints?

(F). His/her ideas on policies that can improve backlog issue.

32. If you were king or queen for a day, what, if anything, would you change (staffing changes,)?

How would you approach the backlog issue within the institution?

33. Would you have time to invest in a clerkship program (recruit, interview, mentor, train) for full-time law clerks?

What barriers would you anticipate in taking advantage of this resource?

(G). His/her ideas on policies that can improve time it takes to resolve claims.

34. Would greater collaboration with other administrative judges help you manage or resolve cases more efficiently?

35. How would you reform the overall EEO process?

36. If you were king or queen for a day, what changes would you make to the organizational structure to help you do your job?

----- Additional Questions -----

\*\* How is the current budget being used?

\*\* Do admin judges have the authority to reallocate budget?

\*\* Can you get more budget or not?

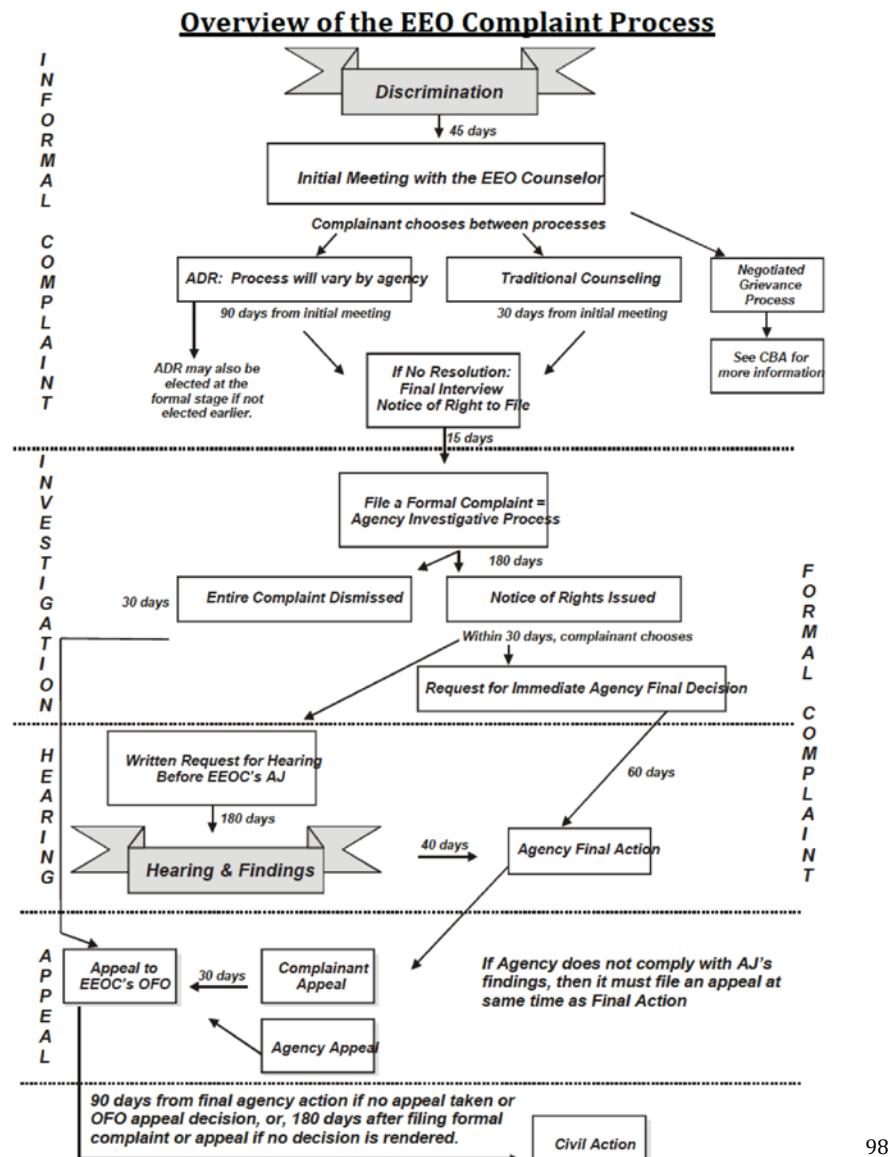
\*\* What is the judge's authority to affect agencies' EEO processes?

\*\* How are cases distributed among judges? Is it possible to distribute cases not randomly, for instance, by specialty?

\*\* What is the percentage of plaintiffs who are represented by attorneys?

\*\* Any other comments? Anything else you think we should have asked in the interview?

## Appendix 2. Overview of the EEO Complaint Process



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<sup>98</sup> (Source: The American Federation of Government Employees (AFGE)

## Appendix 3. Tables of Repeat Offenders

### EEOC FY 2011 Annual Report on the Federal Work Force Part I

#### Agencies with the Highest Complainant Rate in FY 2011

Agency	Total Work Force*	Complainants as % of Total Work Force
<i>Cabinet or Large (15,000 or more employees)</i>		
Department of Labor	16,331	0.84%
Defense Commissary Agency	15,758	0.77%
U.S. Postal Service	642,457	0.73%
<i>Medium Agencies (1,000 to 14,999 employees)</i>		
Government Printing Office	2,207	1.31%
Department of Housing and Urban Development	9,070	1.05%
Defense Office of the Secretary Washington Headquarters Services	6,154	0.86%
Department of Education	4,629	0.86%

### EEOC FY 2012 Annual Report on the Federal Work Force Part I

#### Agencies with the Highest Complainant Rate in FY 2012

Agency	Total Work Force*	Complainants as % of Total Work Force
<i>Cabinet or Large (15,000 or more employees)</i>		
Department of Labor	16,819	0.77%
Social Security Administration	65,474	0.69%
U.S. Postal Service	625,701	0.68%
<i>Medium Agencies (1,000 to 14,999 employees)</i>		
Government Printing Office	1,879	1.22%
Defense Commissary Agency	14,382	0.97%
Equal Employment Opportunity Commission	2,291	0.96%

### EEOC FY 2013 Annual Report on the Federal Work Force Part I

#### Agencies with the Highest Complainant Rate in FY 2013

Agency	Total Work Force*	Complainants as % of Total Work Force
<i>Cabinet or Large (15,000 or more employees)</i>		
Department of Labor	16,302	0.91%
Department of Justice	116,022	0.72%
Social Security Administration	62,725	0.70%
<i>Medium Agencies (1,000 to 14,999 employees)</i>		
Government Printing Office	1,879	2.39%
Equal Employment Opportunity Commission	2,161	1.16%
Department of Housing and Urban Development	8,764	1.03%

### EEOC FY 2014 Annual Report on the Federal Work Force Part I

#### Agencies with the Highest Complainant Rate in FY 2014

Agency	Total Work Force*	Complainants as % of Total Work Force
<i>Cabinet or Large (15,000 or more employees)</i>		
Department of Labor	15,984	0.74%
Department of Justice	114,378	0.72%
Social Security Administration	65,974	0.66%
<i>Medium Agencies (1,000 to 14,999 employees)</i>		
Consumer Financial Protection Bureau	1,428	1.68%
Defense Commissary Agency	13,550	1.01%
Department of Housing and Urban Development	8,530	0.93%

Source: Equal Employment Opportunity Commission, (2007-2014). Annual Report on the Federal Work Force Part I EEO Complaints Processing.

**Table (a)-(d):** Tables (a) [top left] & (b) [top right] show the last two years when USPS was within the Top 3 of number of complaints filed, which amounted to .73% of the workforce. Tables (c) [bottom left] & (d) [bottom right] show that the Top 3 agencies have consecutively been the DOL, DOJ, and SSA in 2013 and 2014.

## **Appendix 4. Other Options**

### **A. Improve Judicial Systems for Processing and Managing Cases**

#### **The Majority Approach:**

Prioritize settlement discussions during initial conference and then proceed as usual if discussions collapse

Within 60 days of receiving the case, all Administrative Judges must also schedule an “initial conference” with the employees and the Agency’s attorneys. During this conference, Judges speak to both parties to review the complaint allegations, discuss settlement potential, set a timeline for discovery, and explain the judicial process. During this initial conference, judges make determinations about the best way to try to process cases to ultimately find a resolution. During the initial conference, judges make two important decisions: (1) whether to allow the case to proceed through settlement discussions (“the settlement route”) or (2) whether to proceed with a pre-discovery timeline to expedite the case and the time it takes to render a decision. Four out of five Administrative Judges interviewed stated that they followed the settlement route while the other judge tended to follow the more expedient method for resolving cases by allowing them to proceed to the pre-hearing stage.<sup>99</sup> In the latter case (the minority approach discussed infra), the judge sets applicable timeframes as recommended in the GAO report and is less likely to focus on settlement conferences from the onset.

Administrative Judges who follow the settlement or majority route allow parties opportunities to discuss the issues at-hand to try to find a mutually-agreeable outcome before proceeding with formal adjudication. According to the EEOC’s Handbook for Administrative Judges, “Settlement of [a] case without the necessity for a hearing or issuance of a decision by the Administrative Judge is highly encouraged.”<sup>100</sup>

- We do not discuss this option in the report because it is the status quo.

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<sup>99</sup> Our qualitative interviews with Administrative Judges revealed that the ability to refer cases to mediation is limited due to a lack of funding for the mediation program.

<sup>100</sup> U.S. EEOC. (2002). *Administrative Judges’ Handbook*, at 2. Accessible at: <https://www1.eeoc.gov//federal/ajhandbook.cfm?renderforprint=1>.

### Educate Complainants During Initial Counseling

We discovered in the process of understanding the problem that employees are often unaware of important aspects of the hearing process, such as necessary documents, their chances of winning, and ways to access representation. This could be in the form of AJs developing and handing out more readable pamphlets explaining the process or directing employees to legal self-help centers, websites, or pro-bono resources, among others. Although it is the agency EEO office's responsibility to educate employees on these matters, it is not always being done properly. This option suggests that it would be helpful if AJs actively assessed complainants' prior knowledge and helped them understand such essential elements of the hearing process, as well as directed them to additional legal resources, during the initial counseling session.

- We do not discuss this option in the report because it is not the AJ's responsibility to educate employees and also because it would likely increase the already long case-processing time. Instead, we mention in the Petition for Agency Reform option that AJs could petition for better employee training at the agency-level EEO process.

## B. Reforms at the Regional Level

### Request Conversion of Administrative Judges to Administrative Law Judges

Currently, LA's administrative judges have GS-14 status, which means they receive less salary than some other offices' administrative law judges (ALJ) who have GS-15 status. According to an account of a conference among LA office's supervisory judge and the AJs, the lower salary may have been a cause of the current understaffing of LA office, which lost two out of twelve judges to GS-15 districts over the past 4 years.<sup>101</sup> The judges should petition to transition LA office administrative judges to ALJs with GS-15 status for the purposes of recruiting and maintaining enough judges to tackle the backlog. Since ALJs are required to conduct hearings under the Administrative Procedure Act, this option might have a positive impact on equity as well.

- We eliminated this option as it is unlikely to be politically feasible.

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<sup>101</sup> Interview with (Judge Lepak) or anonymous?

### C. Changes to the Underlying EEO Process at Agency Level

#### Increase Judicial Interventions on Agency Reform of Discriminatory Policies

In a 2015 study on the practices of Administrative Judges at the EEOC, experts discovered that Administrative Judges at the EEOC are more likely to give judicial deference, or shifting responsibility, to organizational structures of individual agencies when ruling on employment discrimination cases. The article defines judicial deference as “occurring when judges use structures as indicators of nondiscrimination without scrutinizing their adequacy or while ignoring strong evidence that the structures are inadequate.”<sup>102</sup> However, the need for judges to reform agency practices becomes particularly important when considering an agency’s compliance structures, their implementation of EEO policies, and their practices. When judges give deference to, and fail to intervene in, how agencies are structuring and implementing their EEO programs, “they are accepting the symbolism of these structures without scrutiny as to whether they are effective...they [also] fail to scrutinize whether or how the structures are implemented within the organization.”<sup>103</sup> Therefore, this option advocates for judges to strategically and actively use judicial remedies to improve an agency’s EEO structures and implementation process in cases where they do find that agencies violate the law. Implementing reforms at the agency level may go some way towards reducing the amount of discriminatory charges and decreasing the likelihood that federal employees request hearings in general.

- We eliminated this option because we cannot reliably determine which judges are currently more or less inclined to exercise judicial intervention and when appropriate situations that call for it might arise.

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<sup>102</sup> Best, Rachel; Edelman, Lauren; and Krieger, Linda. (Fall 2015). *When ‘Best Practices’ Win, Employees Lose: Symbolic Compliance and Judicial Inference in Federal Equal Employment Opportunity Cases*, at 851. Law and Social Inquiry Journal.

<sup>103</sup> *Id.* at 851-852.

## Appendix 5. Sensitivity Analysis

In our sensitivity analysis, Petition IMS option scored slightly higher than the other two options of the category. However, this would not change our overall recommendations because Petition IMS option alone would not be effective enough; our other two recommendations from the Regional Office section, Case Distribution and Paralegals, still scored the next highest with different weights.

Table A. Sensitivity Analysis: Unweighted							
		Criteria					
Policy Options		Effectiveness	Equity	Cost	Administrative Feasibility	Political Feasibility	Final Score
Individual Judge	1. Judicial Law Clerks	2	3	2	3	3	13
	2. Minority Approach	3	1	3	3	2	12
Regional Office	1. Streamline Case Distribution	2	2	3	2	3	12
	2. Petition IMS	2	2	3	3	2.5	12.5
	3. Hire Paralegals	2	2	2	3	3	12
	4. Hire Additional Ajs	3	2	1	1	1	8
	5. Hold Office Meetings	1	2	3	2	3	11
Agency	1. Petition: Agency Reform	2	2.5	3	3	2	12.5
	2. Petition: Data Reporting	1	2	3	3	2	11

Table B. Sensitivity Analysis: Increased Equity, Decreased Political Feasibility							
Individual AJ Case Processing and Management							
Policy Options		Criteria, Weight, and Score					
		Effectiveness	Equity	Cost	Administrative Feasibility	Political Feasibility	
1. Recruit Judicial Law Clerks		0.3	0.4	0.1	0.1	0.1	2.6
2. The Minority Approach		2	3	2	3	3	2.1
Regional Office Case Management							
Policy Options		Criteria, Weight, and Score					
		Effectiveness	Equity	Cost	Administrative Feasibility	Political Feasibility	
1. Streamlined Case Distribution		0.3	0.4	0.1	0.1	0.1	2.2
2. Petition: IMS Improvement		2	2	3	3	2.5	2.25
3. Hire Paralegals		2	2	2	3	3	2.2
4. Hire More Ajs		3	2	1	1	1	2
5. Hold Office Meetings		1	2	3	2	3	1.9
Agency EEO Process Reform							
Policy Options		Criteria, Weight, and Score					
		Effectiveness	Equity	Cost	Administrative Feasibility	Political Feasibility	
2. Petition: Agency Reform		0.3	0.4	0.1	0.1	0.1	2.4
3. Petition: Data Reporting		2	2.5	3	3	2	1.9

Table C. Sensitivity Analysis: Slightly Lowered Effectiveness and Equity

Individual AJ Case Processing and Management						
Policy Options	Criteria, Weight, and Score					
	Effectiveness	Equity	Cost	Administrative Feasibility	Political Feasibility	Weighted Score
	0.25	0.25	0.15	0.15	0.2	
1. Recruit Judicial Law Clerks	2	3	2	3	3	2.6
2. The Minority Approach	3	1	3	3	2	2.3
Regional Office Case Management						
Policy Options	Criteria, Weight, and Score					
	Effectiveness	Equity	Cost	Administrative Feasibility	Political Feasibility	Weighted Score
	0.25	0.25	0.15	0.15	0.2	
1. Streamlined Case Distribution	2	2	3	2	3	2.35
2. Petition: IMS Improvement	2	2	3	3	2.5	2.4
3. Hire Paralegals	2	2	2	3	3	2.35
4. Hire More Ajs	3	2	1	1	1	1.75
5. Hold Office Meetings	1	2	3	2	3	2.1
Agency EEO Process Reform						
Policy Options	Criteria, Weight, and Score					
	Effectiveness	Equity	Cost	Administrative Feasibility	Political Feasibility	Weighted Score
	0.25	0.25	0.15	0.15	0.2	
2. Petition: Agency Reform	2	2.5	3	3	2	2.425
3. Petition: Data Reporting	1	2	3	3	2	1.9

Table D. Sensitivity Analysis: Lower Effectiveness and Equity, Increased Political Feasibility

Individual AJ Case Processing and Management						
Policy Options	Criteria, Weight, and Score					
	Effectiveness	Equity	Cost	Administrative Feasibility	Political Feasibility	Weighted Score
	0.15	0.15	0.2	0.2	0.3	
1. Recruit Judicial Law Clerks	2	3	2	3	3	2.65
2. The Minority Approach	3	1	3	3	2	2.4
Regional Office Case Management						
Policy Options	Criteria, Weight, and Score					
	Effectiveness	Equity	Cost	Administrative Feasibility	Political Feasibility	Weighted Score
	0.15	0.15	0.2	0.2	0.3	
1. Streamlined Case Distribution	2	2	3	2	3	2.5
2. Petition: IMS Improvement	2	2	3	3	2.5	2.55
3. Hire Paralegals	2	2	2	3	3	2.5
4. Hire More Ajs	3	2	1	1	1	1.45
5. Hold Office Meetings	1	2	3	2	3	2.35
Agency EEO Process Reform						
Policy Options	Criteria, Weight, and Score					
	Effectiveness	Equity	Cost	Administrative Feasibility	Political Feasibility	Weighted Score
	0.15	0.15	0.2	0.2	0.3	
2. Petition: Agency Reform	2	2.5	3	3	2	2.475
3. Petition: Data Reporting	1	2	3	3	2	1.9