Regulating Marginalized Labor

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Farmworkers are one of many vulnerable groups who exist largely in the shadows of the law. While there is a relatively robust regulatory framework that ostensibly governs the conditions under which they work, it is highly fragmented and seldom enforced. One agency, the Equal Employment Opportunity Commission (EEOC), has emerged as an important exception, adopting innovative strategies to secure substantial settlements and a wide range of injunctive relief. Decades before contemporary movements on behalf of low-wage workers of color began, the EEOC was mounting an initiative to bring farmworkers into the core of Title VII's protections and jurisprudence. Drawing upon an original database of EEOC farmworker litigation and interviews with both EEOC employees and farmworker advocates, this Article provides the first empirical analysis of the agency's groundbreaking initiative over the past two decades, which has escaped the attention of legal scholars.

Conventional accounts of the EEOC portray an agency hampered by managerialist, bureaucratic approaches that do little to combat systemic discrimination. By contrast, I argue, the Commission's farmworker initiative evinces a carefully tailored, creative approach that has enabled it to surmount many of the bureaucratic obstacles that have hindered other agencies in this context. At least two features were critical to its success. First, the EEOC's de-centralized, entrepreneurial structure permitted this initiative to diffuse from the bottom up within the agency and helped to insulate it from oscillation across administrations. Second, its unique and sustained partnerships with advocacy organizations enabled the Commission to respond effectively to the needs of this isolated, vulnerable population. These findings contribute to a growing literature on how to entrench the enforcement of civil rights within administrative agencies. This Article further echoes the call to reinvigorate the enforcement apparatus of the federal government. As it suggests, the EEOC's trajectory provides insight into how to develop a more robust vision of public enforcement in the context of marginalized communities like farmworkers.

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INTRODUCTION

While the administrative state is thought to pervade nearly every aspect of modern life, its reach has proven far more limited for many marginalized populations. No group may be more isolated from its grasp than farmworkers. If one were to venture into one of the fields in which nearly three million farmworkers labor every year in the United States, it would seem that this vast regulatory state is nowhere to be found. Many work fifteen-hour days without breaks, go unpaid for their work without recourse, endure sexual abuse from their employer, and retire to company-provided, packed trailers that lack basic sanitation.[1] While a relatively robust framework exists to protect them, it is highly fragmented, and the sparse empirical evidence suggests that these laws remain largely unenforced. Employers—emboldened by the extreme imbalance of power and a long history in which farmworkers were excluded from many of the central protections afforded other laborers—violate their rights with impunity. As one farmworker explains, "No one sees the people in the field. We're ignored."[2]

One notable exception to this story of under-enforcement has emerged over the past two decades: the Equal Employment Opportunity Commission (EEOC), which has been successful in securing a wide range of injunctive relief to prevent harassment and discrimination and won millions of dollars on behalf of farmworkers. At first glance, the EEOC may seem an unlikely place to locate this success, as conventional accounts portray the agency as adopting bureaucratic responses to discrimination that mirror managerialist, business responses, and do little to achieve meaningful reform.[3] In this view, the agency's employment discrimination litigation has proven to be drastically different from the specifically tailored remedies and judicially monitored injunctive relief that public legal scholars originally envisioned. This has led some to conclude that the private bar could better fulfill the EEOC's functions. Drawing upon an original empirical analysis of the agency's efforts over the past two decades, this Article contends that the Commission has demonstrated innovation in the context of farmworkers that merits closer scrutiny. Rather than adopting a managerialist approach, the EEOC's efforts on behalf of farmworkers evince a more tailored strategy that has allowed it to surmount many of the barriers to reaching isolated communities that agencies frequently confront.

The EEOC brought most of its cases on behalf of farmworkers under Title VII of the Civil Rights Act of 1964,[4] and sought to remedy the widespread sexual

1. *See* Luz E. Nagle, *Tainted Harvest: Transborder Labor Trafficking and Forced Servitude in Agribusiness*, 37 WIS. INT'L L.J. 511, 522–27, 532–34 (2020).

2. MARY BAUER & MÓNICA RAMÍREZ, S. POVERTY L. CTR., INJUSTICE ON OUR PLATES: IMMIGRANT WOMEN IN THE U.S. FOOD INDUSTRY 4 (2010).

3. *See* LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS 138–40 (2016).

4. 42 U.S.C. § 2000e-2 (1991).

abuse of female farmworkers.[5] Prior to this litigation, many farmworker women had come to view rape as an inevitable part of the job.[6] While the #MeToo movement has recently revealed the prevalent nature of sexual harassment in the workplace and the failure of legal remedies to address it, it has also lain bare the exacerbated inequalities and risks for low-wage workers of color.[7] A 2017 letter in *TIME* magazine, authored by the Alianza Nacional de Campesinas, described gender-based violence as a reality that 700,000 farmworker women "know all too well."[8] Situating themselves "in the shadows of society in isolated fields and packinghouses that are out of sight and out of mind for most people in this country," they emphasized the sharp contrast to the notoriety of the more affluent women of Hollywood.[9] Nonetheless, they stood in solidarity, explaining that they suffer from a similar imbalance of power, where revealing abuse puts too much at risk, "including the ability to feed our families."[10] Indeed, farmworkers confront a unique intersection of factors that present barriers to claims-making in the workplace: race, immigration status, limited English proficiency, geographical isolation, poverty, gender, and reliance upon seasonal jobs.[11] Stories of sexual harassment, wage theft, and racial segregation abound

5. Maria L. Ontiveros, *Lessons from the Fields: Female Farmworkers and the Law*, 55 ME. L. REV. 157, 169 (2002) (noting that "ninety percent of female farmworkers report that sexual harassment is a major problem").

6. *See* William R. Tamayo, *The Role of the EEOC in Protecting the Civil Rights of Farm Workers*, 33 U.C. DAVIS L. REV. 1075, 1080 (2000) (explaining that farm workers referred to one company's field as the field de calzón, or "field of panties," because so many women were raped while employed there); 42 U.S.C. § 2000e-2 (2000) (prohibiting discrimination based on sex).

7. Jessica A. Clarke, *The Rules of #MeToo*, 2019 UNIV. CHI. LEGAL F. 37, 37 (2019). Catherine Albiston has recently exposed the ways in which the #MeToo debate has given legitimacy to arguments that had long since been rejected by the legal doctrine. *See* Catherine Albiston, *What's So New About the #MeToo Movement?*, *in* TRUMPISM AND ITS DISCONTENTS 72–86 (Osagie K. Obasogie ed., 2020). As Albiston argues, this has included a resexualization of what harassment means, obscuring the ways in which it more broadly disadvantages women in the workplace, and has re-focused attention on the plight of the accused. *Id.* at 78.

8. Alianza Nacional de Campesinas, *700,000 Female Farmworkers Say They Stand with Hollywood Actors Against Sexual Assault*, TIME (Nov. 10, 2017, 11:11 AM), https://time.com/5018813/farmworkers-solidarity-hollywood-sexual-assault.

9. *Id.*

10. *Id.*

11. A growing body of legal scholarship has addressed the movement's exclusion of low-wage workers of color, particularly women, drawing upon a well-established literature on the intersection of race and gender in discrimination. *See, e.g.*, Trina Jones & Emma E. Wade, *Me Too? Race, Gender, and Ending Workplace Harassment*, 27 DUKE J. GENDER L. & POL'Y 203, 208 (2020) (noting that it was in fact a Black woman who first coined the term "MeToo" a full decade prior to the movement gaining force); Marissa Ditkowsky, *#UsToo: The Disparate Impact of and Ineffective Response to Sexual Harassment of Low-Wage Workers*, 26 UCLA WOMEN'S L.J. 69, 73 (2019); Leticia M. Saucedo, *Intersectionality, Multidimensionality, Latino Immigrant Workers, and Title VII*, 67 SMU L. REV. 257, 258 (2014) (arguing that discrimination for Latino immigrant workers may be manifested differently than that suggested by traditional sex and national origin cases). For earlier works recognizing that discussions of gender most often focus on the needs of White, middle-class women, see Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 UNIV. CHI. LEGAL F. 139, 140 (1989); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585–90 (1990). Farmworker women also face the challenge of entering a traditionally masculine occupation, a context ripe for systemic discrimination. *See* Albiston, *supra* note 7, at 76–77.

across farms and processing plants throughout the country.[12] While the letter in *TIME* magazine drew the plight of farmworkers into the public eye and the pandemic has further exposed their unique vulnerabilities,[13] it seems that they, like many low-wage workers of color, have faded from public consciousness all too quickly.[14]

Long before this movement began, however, the EEOC had been engaged in a less visible effort to bring farmworkers within the core of Title VII's protections and jurisprudence. This initiative has gone largely unnoticed by legal scholars. In 1988, for example, the EEOC brought the first case on behalf of a farmworker who had been fired as a result of pregnancy, and the court found that Alicia Castrejon was entitled to protection under Title VII even though she was undocumented.[15] A decade later, the EEOC reached the largest farmworker settlement to date, securing $1.855 million for Blanca Alfara and other female workers who had faced sexual harassment and a hostile work environment.[16] The Commission's farmworker initiative also reached more broadly, as it began bringing discrimination cases based upon national origin, race, and disability.

This Article is the first to empirically examine the EEOC's farmworker initiative and to consider its implications for how agencies may more effectively reach marginalized populations. Drawing upon an original database of EEOC farmworker litigation and interviews with both farmworker advocates and EEOC employees, it argues that at least two factors were crucial to the agency's success: its de-centralized, entrepreneurial structure, and its innovative collaborations with advocacy organizations. Both of these factors permitted the initiative to diffuse from the bottom up, and insulated it, at least to some degree, from changes across presidential administrations and agency leadership. These findings contribute to a growing literature on how to entrench the robust enforcement of civil rights within administrative agencies.[17]

Administrative law scholars have long criticized the traditional regulatory model for an excessive centralization that creates "a one-size-fits-all approach"

12. Stephen Lee, *The Food We Eat and the People Who Feed Us*, 94 WASH. U. L. REV. 1249, 1252 (2017).

13. BRENDA ESKENAZI, ANA MARIA MORA, JOSEPH LEWNARD, MAX CUEVAS & OGUCHI NKOWCHA, UC BERKELEY SCH. PUB. HEALTH & CLINICA DE SALUD DEL VALLE DE SALINAS, SUMMARY REPORT: PREVALENCE AND PREDICTORS OF SARS-COV-2 INFECTION AMONG FARMWORKERS IN MONTEREY COUNTY, CA 3 (2020) (describing farm workers as essential workers whose living and working conditions exacerbate the risk of transmission, and whose ethnicity was associated with a higher risk of mortality).

14. Ditkowsky, *supra* note 11, at 73 (noting that interest has since "decreased in the plight of low-wage workers, particularly those of women of color, undocumented workers, and other marginalized groups").

15. EEOC v. Tortilleria La Mejor, 758 F. Supp. 585, 593–94 (E.D. Cal. 1991).

16. Consent Decree, EEOC v. Tanimura & Antle, Inc., No. C99-20088 (N.D. Cal. 1999), https://www.clearinghouse.net/chDocs/public/EE-CA-0221-0002.pdf (document no. EE-CA-0221-0002); Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC and Tanimura & Antle Settle Sexual Harassment Case in the Agricultural Industry (Feb. 23, 1999), https://www.eeoc.gov/newsroom/eeoc-and-tanimura-antle-settle-sexual-harassment-case-agricultural-industry-0.

17. *See, e.g.*, Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 436 (2007).

that may not be effective in diverse contexts.[18] The EEOC's unique entrepreneurial structure, which vests a great degree of authority in Regional Attorneys and encourages close collaboration between offices as new strategies and cases emerge, permitted this initiative to diffuse and grow within the agency. As the interviews reveal, the agency's farmworker initiative was not the result of a top-down mandate that flowed from the national headquarters to district offices. Rather, it began from the bottom up, diffusing from one district office outward, as offices coordinated closely with one another and offered valuable lessons from prior successes. This analysis suggests that this diffuse structure, in which regional offices exercise a large level of autonomy, may lessen the degree of oscillation within administrative agencies.

This study further reveals that the EEOC mounted a rather remarkable effort to engage advocacy organizations in its farmworker initiative. In one interviewee's words, the agency recognized that "for farmworkers, the typical bureaucratic processes don't work well."[19] These unique and sustained partnerships were integral to the EEOC's strategy, as these advocates served as the "eyes and ears" of the agency.[20] Critically, they enabled the EEOC to develop cases that it may not have otherwise even identified because of the plaintiffs' precarious legal status and geographic isolation.[21] As I explore below, these relationships were mutually beneficial: they influenced the way that the agency operates, to be sure, but advocates reported that collaboration with the EEOC also influenced the approach of their own organizations. These collaborations permitted less traditional, more innovative, strategies to flourish. One of the primary obstacles to litigation on behalf of farmworkers is the seasonal nature of agriculture, which can mean that by the time an agency investigator is ready to act on a claim, the witnesses are long gone and the job site is virtually unrecognizable. Indeed, this may be a primary reason that the very serious allegations of sexual abuse in these cases have not been prosecuted. In order to overcome this problem, some EEOC regional offices reported reaching an agreement with community-based organizations that when they learn of a case of sexual harassment on a farm, for example, they can reach out directly to either the District Director or the Education and Outreach Coordinator, who will act immediately.[22] As they explained, "by working in a

18. *See, e.g.*, Nancy M. Modesitt, *Reinventing the EEOC*, 63 SMU L. REV. 1237, 1257 (2010); Dave Owen, *Regional Federal Administration*, 63 UCLA L. REV. 58, 68 (2016).

19. Interview with EEOC Employee (June 1b, 2020).

20. William R. Tamayo, *The EEOC and Immigrant Workers*, 44 U.S.F. L. REV. 253, 264–65 (2009).

21. Lisa Pruitt has compellingly demonstrated the ways in which geographic isolation in rural places essentially disables the law, rendering it anemic and ineffective. *See* Lisa Pruitt, *The Rural Lawscape: Space Tames Law Tames Space*, *in* THE EXPANDING SPACES OF LAW: A TIMELY LEGAL GEOGRAPHY 190–214 (Irus Braverman, Nicholas Blomley, David Delaney & Alexandre Kedar eds., 2014). In the case of farmworkers, this isolation is compounded by other vulnerabilities, often including precarious legal status, literacy, and language barriers.

22. Interview with EEOC Employee (June 1b, 2020).

non-bureaucratic way, we're able to address some of the shortcomings of the system."[23]

This Article proceeds in five parts. Part I sets forth the data and methods, as this study relies upon an original database of the EEOC's litigation on behalf of farmworkers, a content analysis of all publicly available consent decrees and verdicts, interviews with EEOC employees and farmworker advocates, and review of a wide range of government and organizational materials. Part II explores the history of the EEOC and the relevant scholarship on the impediments to achieving meaningful structural reform. Next, Part III contextualizes the problem of agency failure, exploring the ways in which the modern regulatory state has largely left farmworkers behind. Drawing upon an analysis of court records and interviews with EEOC employees and farmworker advocates, Part IV carefully explores the EEOC's litigation record over the past two decades and argues that the scholarship has missed its innovation in the context of farmworkers. Part V identifies the factors that enabled the agency's success in order to consider what lessons may be learned for other agencies seeking to more effectively reach vulnerable populations.

I. DATA AND METHODS

This Article employs a multi-method approach. In order to take a broad view of the EEOC's efforts on behalf of farmworkers over time, it draws upon an original database of the sixty-four cases brought by the EEOC on behalf of farmworkers. This litigation spans approximately twenty-one years, from 1999 to 2020.[24] I identified these cases by searching EEOC press releases and additional media searches and consulting an EEOC website highlighting its cases on behalf of farmworkers through 2015.[25] Using a combination of public repositories and searches in PACER, I obtained consent decrees in forty-nine of the cases (the remaining ten were not publicly available), and verdicts in the five cases that reached bench or jury trials. As discussed below, a careful review of these decrees and verdicts permitted me to analyze the types of relief secured in each case, and to trace variation across cases and EEOC district offices.

I supplemented this analysis with fourteen in-depth, semi-structured interviews of two groups of respondents: EEOC employees and farmworker advocates.[26] To better understand the evolution of the EEOC's efforts and its

23. *Id.*

24. Cases were collected through August 2020.

25. *Selected List of Pending and Resolved Cases Involving Farmworkers from 1999 to the Present*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/selected-list-pending-and-resolved-cases-involving-farmworkers-1999-present (last updated Oct. 2015).

26. The semi-structured format allowed me to both investigate a predetermined set of questions and explore unique perspectives that emerged during the interview. Each subject was recruited by email. I initially identified EEOC employees from their signatures on case filings in many of the high-profile cases, and farmworker advocates through either participation as plaintiff intervenors, or through their status as noted advocates who were frequently mentioned in media or organizational reports.

strategy in these cases, I interviewed senior leadership within a majority of the EEOC district offices that have brought cases on behalf of farmworkers. This included a range of District Directors, Regional Attorneys, Senior Trial Attorneys, and Outreach and Education Coordinators. I also interviewed notable farmworker advocates across the country, each of whom had worked closely with the EEOC in litigation or advocacy efforts.[27] This included attorneys from organizations in both rural and urban locations, in states such as California, Florida, Texas, and Washington. Together, these interviews helped to illuminate the process by which the EEOC built its farmworker initiative during the preceding two decades.[28] It further provided insight into the litigation process and the agency's reasoning in pursuing various strategies. To preserve anonymity, interviewees are simply identified as either an "EEOC employee" or an "advocate" when I draw upon these interviews in my analysis, and I use plural pronouns (they, them) to further ensure anonymity.

Finally, to better understand the EEOC's efforts in this arena, I reviewed a broad array of organizational and agency documents. Some of these were provided to me by EEOC employees or advocates subsequent to their interviews. Others were drawn from the EEOC's website, such as internally produced articles on its history, training materials it provided to organizations on sexual harassment cases, and agency meeting minutes. This analysis also included a review of the press releases associated with each case and testimony by many of the EEOC Regional Attorneys that discussed the agency's efforts on behalf of farmworkers. It also included documents retrieved through archives and advocacy organization websites.

II. THE EEOC'S EVOLUTION

The Commission may seem an unlikely place to locate a story of administrative innovation, as most administrative law scholars characterize the EEOC as ineffectual and committed to symbolic or bureaucratic responses to discrimination.[29] Some urge significant reinvestment in the agency, pointing to its early years as a "toothless tiger," and others argue that it is essentially unnecessary.[30] This Part reviews existing literature on the EEOC and its history. Standing in sharp contrast to the traditional narrative told about the agency, the

27. This research was approved by the University of California Berkeley Committee for Protection of Human Subjects under CPHS protocol number 2018-07-11222.

28. These interviews typically lasted between one hour and seventy-five minutes. Each interview was recorded with the consent of the interviewee and was subsequently transcribed, and each interviewee was promised anonymity. Due to technical difficulties, two interviews were not able to be recorded, and I typed notes as the interviewee spoke instead.

29. *See, e.g.*, EDELMAN, *supra* note 3; Brent K. Nakamura & Lauren B. Edelman, *Bakke at 40: How Diversity Matters in the Employment Context*, 52 U.C. DAVIS L. REV. 2627, 2640–45 (2019).

30. *See, e.g.*, Modesitt, *supra* note 18, at 1256; Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 24 (1996).

Commission's efforts on behalf of farmworkers emerge as particularly innovative and worthy of study.

A. THE EEOC'S BEGINNINGS AS A "TOOTHLESS TIGER"

The EEOC began as a relatively weak agency, armed with very few enforcement powers and a meager budget. Nicholas Pedriana and Robin Stryker provide the most comprehensive account of the EEOC's unlikely trajectory.[31] As they explain, while Title VII of the Civil Rights Act of 1964[32] created the EEOC and charged it with eradicating employment discrimination, it was a law mired in contradiction. On the one hand, it bestowed a variety of robust legal protections against discrimination, created a new administrative agency to enforce the law, and granted access to federal courts to protect these new rights.[33] As they explain, "[n]ever had Congress made so bold a statement about the economic rights of black Americans and other disadvantaged groups."[34]

However, despite these seemingly significant advances, Congress gave the newly created EEOC no teeth. The EEOC had no independent enforcement authority when Congress passed Title VII in 1964.[35] Rather, the agency was authorized to receive and investigate charges of discrimination, and to seek voluntary resolution through conciliation.[36] When this failed, enforcement was available only through a private lawsuit or referral to the Attorney General. As Pedriana and Stryker describe, the EEOC suffered from a "revolving door-personnel problem,"[37] in the late 1960s, and went through a rapid turnover of staff in the 1970s.[38] If an employer chose not to follow the law, there was little the EEOC could do to remedy it. In 1967, then-EEOC Chairman Stephen N. Shulman told the *Wall Street Journal* that "We're out to kill an elephant with a fly gun."[39] The EEOC's own anniversary publication, which reviewed its first thirty-five years, explains that most civil rights groups viewed the agency as a "toothless tiger" in the early years of existence.[40]

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31. *See generally* Nicholas Pedriana & Robin Stryker, *The Strength of a Weak Agency: Enforcement of Title VII of the 1964 Civil Rights Act and the Expansion of State Capacity, 1965-1971*, 110 AM. J. SOCIO. 709 (2004).

32. 42 U.S.C. § 2000e-4 (1972).

33. Pedriana & Stryker, *supra* note 31, at 710.

34. *Id.*

35. Pauline T. Kim, *Addressing Systemic Discrimination: Public Enforcement and the Role of the EEOC*, 95 B.U. L. REV. 1133, 1137 (2015).

36. Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 358–59 (1977).

37. James P. Gannon, *Uphill Bias Fight: After Faltering Start, Agency Readies Attack on Job Discrimination*, WALL ST. J., Apr. 12, 1967, at 1.

38. Pedriana & Stryker, *supra* note 31, at 713.

39. Maryam Jameel & Joe Yerardi, *Workplace Discrimination is Illegal. But Our Data Shows It's Still a Huge Problem*, VOX (Feb. 28, 2019, 8:29 AM), https://www.vox.com/policy-and-politics/2019/2/28/18241973/workplace-discrimination-cpi-investigation-eeoc.

40. EQUAL EMP. OPPORTUNITY COMM'N, THE STORY OF THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: ENSURING THE PROMISE OF OPPORTUNITY FOR 35 YEARS 1965–2000, at 5 (2000) [hereinafter STORY OF THE EEOC].

At the time of the EEOC's creation, many members of Congress were opposed to the institution of federal protections against workplace discrimination, and race entered explicitly into their reasoning.[41] More than 200 fair employment measures had failed in the two decades before the Civil Rights Act was passed.[42] Just days before it was passed, a staunch opponent of the Act, Representative Howard Smith (D-VA) inserted a sex discrimination clause in order to protect white woman.[43] As Democrat George Andrews of Alabama reasoned, without legislation prohibiting discrimination, every employer would hire an African American woman, and white women would suffer discrimination.[44]

The EEOC was finally vested with prosecutorial power in 1972. The 1972 Amendments to Title VII expanded the enforcement role, authorizing the EEOC to bring suit against private employers, and "shifted power to pursue pattern of practice cases from the Attorney General to the EEOC."[45] The EEOC's internal anniversary report headline depicts the shift with the headline, "The 'Toothless Tiger' Gets Its Teeth," in a new era of enforcement.[46] The agency began to target more systemic forms of discrimination, and Commission Chair Eleanor Holmes Norton created a new program focused on systemic cases in 1977.[47] The EEOC's earliest work was focused upon overt forms of discrimination, where it received the least resistance, such as dismantling segregated workplaces and unions.[48] It was slower to confront practices that appeared neutral on their face, and yet were discriminatory in impact. In 1970, it expanded its guidelines to include national origin discrimination, and later broadened this in the 1980s to enforce the rights of employees to use their native tongues at the workplace and prevent "English only" rules.[49]

Civil rights groups soon mounted a concerted effort to expose the need for the agency's powers to be more robust. As Pedriana and Stryker write, groups such as the National Association for the Advancement of Colored People (NAACP) and the Legal Defense Fund (LDF) hit the EEOC with complaints in an unrelenting drive to demonstrate that the agency lacked the resources to aggressively enforce Title VII. In its first fiscal year, the Commission had received more than 8,800 complaints as part of this effort, despite being created

41. Jameel & Yerardi, *supra* note 39.

42. *Id.*

43. *Id.*

44. *Id.*

45. Kim, *supra* note 35, at 1137.

46. STORY OF THE EEOC, *supra* note 40, at 15.

47. LESLIE E. SILVERMAN, EQUAL EMP. OPPORTUNITY COMM'N, SYSTEMIC TASK FORCE REPORT TO THE CHAIR OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 57–58 (2006), https://www.eeoc.gov/systemic-task-force-report-chair-equal-employment-opportunity-commission (http://perma.cc/6VF9-6-ESW).

48. Pedriana & Stryker, *supra* note 31, at 726.

49. Ida Castro, *Treatment of Low-Wage Immigrant Laborers in the U.S.*, 24 DEF. ALIEN 153, 155 (2001).

with a budget to handle a mere 2,000 cases.[50] By mounting a campaign to expose the EEOC's inadequacy, these civil rights organizations hoped to incentivize Congress to increase EEOC's budget, personnel, and enforcement power.[51]

This effort was successful, and the EEOC similarly bolstered the efficacy of civil rights organizations' litigation by filing amicus briefs in Title VII lawsuits.[52] Gradually, Pedriana and Stryker argue, these civil rights organizations and the Commission began to present a united front in advocating for broadened interpretations of the law in novel contexts, such as seniority systems.[53]

Pedriana and Stryker argue that the EEOC ultimately surmounted its weak institutional design and soon proved to be a formidable force, possessing capacity beyond what political scientists would have predicted.[54] It aggressively enforced Title VII and broadened employment discrimination laws in ways that "significantly expanded legal rights and resources available to minority groups."[55] Today, the Commission accomplishes the overwhelming majority of its work through voluntary resolutions, mediation, settlement, and conciliation.[56] Litigation, on the other hand, is described as "truly a last resort."[57] Within each office, the functions are split into the enforcement branch, which handles the initial investigation and conciliation, and the legal branch, led by a Regional Attorney, which handles litigation if conciliation fails.[58] The EEOC's charging process permits either an individual or an EEOC commissioner to file a claim, and it need not be from the aggrieved individual.[59] Rather, a third-party organization with knowledge of the facts can file the claim, which permits the Commission to investigate when advocates file a claim.[60] If the EEOC finds reasonable cause to believe that a charge is true, it first attempts to eliminate the unlawful practice by conciliation.[61] Where the Commission is unable to secure a conciliation agreement, it may sue the employer in federal court, and at this point the case moves from the enforcement branch to the legal branch.[62] The

50. Pedriana & Stryker, *supra* note 31, at 725 (quoting NAACP Papers 1965).

51. *Id.*

52. *Id.* at 731.

53. *Id.*

54. *Id.* at 710.

55. *Id.*

56. *See Oversight of the Equal Employment Opportunity Commissions: Examining EEOC's Enforcement and Litigation Programs: Hearing on S.165 Before S.Comm on Health, Educ., Lab., and Pensions*, 114th Cong. 5–15 (2015) (statement of Jenny R. Yang, Chair, U.S. Equal Emp. Opportunity Comm'n).

57. *Id.* at 6.

58. *See, e.g.*, *Enforcement and Litigation Statistics*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statistics/enforcement-and-litigation-statistics (last visited Apr. 20, 2022). *See generally* Modesitt, *supra* note 18.

59. 42 U.S.C. §§ 2000e-5(f), 2000e-6(a), (c).

60. 42 U.S.C. § 2000e-5(b) (1988 and Supp. V 1993).

61. While this is mandatory when an EEOC commissioner initiates it, it is not when an aggrieved person files the charge.

62. 42 U.S.C. § 2000e-5(f)(1) (2010).

charging party can intervene in the suit and also bring any related state or federal claims, which can sometimes far exceed the caps on federal employment damages caps.[63] A court may award the same remedies as it might to a private plaintiff when the EEOC proves that the employer wrongfully discriminated.[64] A court may also enjoin the respondent from discriminating, or award any other equitable relief it deems appropriate.[65] While the EEOC describes litigation as a last resort, when it does litigate, its successful resolution rate is relatively high.[66]

B. PRIOR SCHOLARSHIP ON THE EEOC

There has been a longstanding tension between the agency's duty to respond to individual complaints and its ability to investigate and bring class actions. During the Clinton-Gore Administration, the Commission made a number of changes to permit the agency to focus more on systemic litigation.[67] This included the elimination of a performance review system that considered only the number of charges resolved, rather than the impact of each charge, in order to afford offices greater discretion to close charges that lacked potential.[68] While legislators have often criticized the agency for focusing too much on systemic litigation,[69] agency leaders such as former General Counsel David Lopez counter that many of the systemic cases involve plaintiffs who cannot come forward themselves. As he argues, the focus on systemic litigation permits the Commission to target abuse that it would not discover by relying upon worker-initiated claims alone.[70] Scholars have long issued calls for Congress to relieve the EEOC of its duty to process individual charges entirely."[71] Pauline Kim, for example, argues that reducing its emphasis on charge processing would

63. WILLIAM R. TAMAYO, U.S. EQUAL EMP. OPPORTUNITY COMM'N, SEXUAL HARASSMENT AND VIOLENCE IN THE WORKPLACE: THE ROLE OF ATTORNEYS, ADVOCATES, COUNSELORS AND MEDICAL PROFESSIONS IN OBTAINING COURT AWARDED DAMAGES FOR VICTIMS 12 (2015), http://www.calcasa.org/wp-content/uploads/2015/08/3-7-Helping-Victims-of-Sexual-Harassment-and-Violence-in-the-Workplace-B.pdf.

64. *Remedies for Employment Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/remedies-employment-discrimination (last visited Apr. 20, 2022).

65. 42 U.S.C. § 2000e-5(g) (2010).

66. *See What You Should Know: The EEOC, Conciliation, and Litigation*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/guidance/what-you-should-know-eeoc-conciliation-and-litigation (last visited Apr. 20, 2022) (finding the EEOC "achieved a favorable resolution in approximately 90 percent of all district court resolutions).

67. *See* Paul M. Igasaki, *Doing the Best With What We Had: Building a More Effective Equal Employment Opportunity Commission during the Clinton-Gore Administration*, 17 LAB. LAW. 261, 264 (2001).

68. *Id.* at 264-65.

69. *Oversight of the Equal Employment Opportunity Commission: Examining EEOC's Enforcement and Litigation Programs: Hearing on S.165 Before S.Comm on Health, Educ., Lab., and Pensions*, 114th Cong. 29–30 (2015) (statement of Sen. Christopher Murphy).

70. *Id.* As he argues, a paradigm shift to focus on individual claims would render plaintiffs like the intellectually disabled class in *Hill County Farms* without recourse. *Id.* at 29.

71. *See* Maurice E. R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 YALE L. & POL'Y REV. 219, 219 (1995); Modesitt, *supra* note 18, at 1256.

better allow it to shift priorities and more substantively address widespread discrimination.[72]

Many scholars view the EEOC as uniquely situated to eradicate discriminatory employment practices.[73] As Maurice Munroe argues, private lawsuits are often more limited in scope, focusing on isolated incidents of discrimination, even though employment discrimination more commonly occurs in systemic patterns.[74] Unlike private litigants, the EEOC has the resources to monitor employment practices more broadly and to focus on more systemic practices.[75] In addition, in *Walmart v. Dukes*,[76] the Supreme Court made it far more difficult for private plaintiffs to certify a class of employees in a discrimination claim and made the role of the Commission in systemic discrimination all the more critical.

However, most scholars have argued that the EEOC has failed to be a meaningful force in combatting systemic discrimination.[77] Many have emphasized that the agency itself doesn't bear the blame for this failure, as Congress has never given the EEOC the resources it would need to adequately investigate cases and prevent a large backlog of cases.[78] While criticizing the agency for struggling to combat systemic discrimination, scholars like Nancy Modesitt have also recognized that the primary reason is the extent to which structural impediments have hampered the EEOC's efforts.[79] As she explains, it has been forced to spend much of its time on the intake and processing of claims, rather than investigation or conciliation, and struggled with poor management and excessive turnover in its most senior positions. [80] Congress has routinely under-funded the agency, which has led to long delays and a backlog of cases, though this was improved under the Clinton-Gore administration.[81] The result, Modesitt argues, is that the EEOC has suffered a "significant credibility crisis."[82]

Lauren Edelman argues that the EEOC has never surmounted its weak administrative structure, which has allowed employers to construct the meaning of compliance with anti-discrimination laws in ways that symbolically met their

72. Kim, *supra* note 35, at 1145.

73. *Id.*

74. Munroe, *supra* note 71, at 220.

75. *Id.*

76. 564 U.S. 338, 376 (2011).

77. *See, e.g.*, Munroe, *supra* note 71, at 220; Modesitt, *supra* note 18, at 1257.

78. *See* Kathryn Moss, Scott Burris, Michael Ullman, Matthew Johnsen & Jeffrey Swanson, *Unfunded Mandate: An Empirical Study of the Implementation of the Americans with Disabilities Act by the Equal Employment Opportunity Commission*, 50 U. KAN. L. REV. 1, 4 (2001) (undertaking a close analysis of the EEOC's charge processing of disability claims and finding numerous inaccuracies and problems in management).

79. Modesitt, *supra* note 18, at 1238.

80. *Id.*

81. Paul M. Igasaki, *Setting Priorities: Organizational Change at a Federal Civil Rights Agency*, 21 J. ORG. EXCELLENCE 27, 28 (2001).

82. Modesitt, *supra* note 18, at 1238–40.

requirements, rather than substantively.[83] As one telling sign of its weak influence, Michael Selmi argues that the EEOC has rarely been a party to Supreme Court litigation advancing and developing antidiscrimination laws.[84] While he finds that the EEOC does have a higher success rate than private litigation, he also finds that it more often results in smaller awards for the litigants.[85] Other studies have also shown that the EEOC's internal assessments of a cause (or no-cause) finding have very little predictive power in the ultimate outcome of a case later brought in court.[86] Selmi concludes that the EEOC serves two primary functions: to screen a large number of non-meritorious claims, and to pursue claims that were otherwise too low in dollar value to be pursued by the private bar.[87] These two functions could be better fulfilled by the private bar, Selmi argues, rendering the agency unnecessary.[88]

Perhaps because of the EEOC's poor reputation, the scholarship on structural reform in the courts has largely neglected the role of the agency. Writing in 2014, Margo Schlanger and Pauline Kim sought to remedy this through an empirical examination of the Commission's litigation record.[89] As they argue, scholars of structural reform have also tended to rely upon a handful of "mega," high-profile cases that are not necessarily representative of the broader class of cases.[90] In order to fill these lacunae, Schlanger and Kim systematically analyzed a ten-year period of EEOC's litigation activities to understand how the agency's strategies fit within the structural reform litigation scholarship.

Schlanger and Kim conclude that the Commission's pattern fits neither of the prevailing theories of structural reform litigation.[91] They find that most of

83. EDELMAN, *supra* note 3, at 1531.

84. Selmi, *supra* note 30, at 24.

85. *Id.* at 14–15.

86. *See, e.g.*, David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 649 (2013); Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1288 (2012). Studies of employment discrimination litigation generally have found that it very often resulted in low-value judgments for the plaintiffs. *See, e.g.*, Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUDS. 429, 455 (2004); *see also* Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 550 (2001) (finding that plaintiffs lost about half of cases that were decided on a pretrial motion, bench trial, or jury trial).

87. Selmi, *supra* note 30, at 3.

88. *Id.*

89. *See generally* Margo Schlanger & Pauline T. Kim, *The Equal Opportunity Commission and Structural Reform of the American Workplace*, 91 WASH. U. L. REV. 1519 (2014). Schlanger and Kim note that Lauren Edelman's work serves as one notable exception to the structural reform literature's failure to consider the role of the EEOC. *Id.* at 1521.

90. *Id.* at 1523.

91. In what scholars have termed the "gladiator" theory, structural reform litigation is dramatic, "replete with confrontations and threats," and protracted, with extensive judicial oversight. *Id.* at 1528. A newer model of reform litigation, the collaboration theory, gained traction in the past fifteen years, which argues that litigation efforts have shifted away from the injunctive regulation, and toward experimentalist intervention. *Id.* at 1530.

the EEOC's cases involved remedial periods that lasted only a few years.[92] Rather than dramatic legal struggles, they conclude, most cases ended in a settlement that involved very little judicial intervention, and required only modest (rather than wholesale) changes to company practices.[93] They also find little evidence of the flexible, contextualized, and decentralized decision-making that more recent structural reform scholars had identified.[94] Rather, the decrees obtained by the EEOC often involved nearly identical, form language that was not specific to individual employers.[95] Several phrases were repeated across decrees, and very few encouraged ongoing dialogue, gave employees any meaningful voice in articulating anti-discrimination norms, or implemented any means of holding employers accountable.[96]

Schlanger and Kim argue that the EEOC's litigation efforts more closely resemble the managerialist model developed by sociologists, most prominently Lauren Edelman and Frank Dobbin.[97] In other words, the EEOC's efforts might best be described as the "routinized application of managerialist, bureaucratic responses to the legal prohibitions against discrimination."[98] By "managerialist," Edelman explains that this approach is marked by the gradual infusion of managerial or business ideals into understandings of law.[99] As she and Brent Nakamura argue, this can often lead corporations to visible "symbolic metrics of diversity," such as anti-discrimination policies, diversity mission statements and training programs, and formalized organizational structures.[100] Building upon Edelman's work, Schlanger and Kim conclude that the EEOC's litigation strategy forms part of this larger phenomenon of adopting "routinized bureaucratic responses" to anti-discrimination laws that do little to address systemic discrimination.[101] As I argue below, a close analysis of the EEOC's efforts in the farmworker context reveals a markedly different approach, as the agency has developed innovative approaches to overcome many of the bureaucratic impediments to achieving relief.

92. *Id.* at 1525.

93. *Id.*

94. *Id.* at 1531; Charles F. Sabel & William H. Simon, *Destabilizing Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1019 (2004).

95. Schlanger & Kim, *supra* note 89, at 1526.

96. *Id.*

97. *Id.*

98. *Id.*

99. Nakamura & Edelman, *supra* note 29, at 2641.

100. *Id.* at 2638.

101. Schlanger & Kim, *supra* note 89, at 1581. Notably, Schlanger and Kim do not necessarily see the turn to managerialism as entirely detrimental; rather, they argue that some managerialist responses are indeed useful. They point to the fact that several of them may in fact reduce discrimination, and that they ultimately enable the EEOC to bring and resolve more lawsuits than the more resource-intensive gladiator or collaboration approaches would permit. *Id.* at 1587–88.

III. HISTORY OF THE EEOC'S INVOLVEMENT WITH FARMWORKERS

Despite a sizeable literature focused on the impact of the EEOC, the existing scholarship has largely ignored its efforts on behalf of farmworkers. The majority of farmworkers face an array of unique challenges when accessing legal resources, and a history of agricultural exceptionalism and discriminatory immigration laws have further compounded these difficulties. Nevertheless, in the mid-1990s, policy entrepreneurs in the Commission began an initiative to bring the agency's anti-discrimination work to the agricultural workplace.

A. UNIQUE VULNERABILITIES THAT FARMWORKERS FACE

While legal scholars have neglected the Commission's efforts on behalf of farmworkers, there is a well-developed line of scholarship on the precarious nature of undocumented workers' experiences more broadly.[102] More than thirty years ago, Linda Bosniak compellingly identified the dual identity of the undocumented immigrant worker. As she explained, they are "members" of the national community and have limited employment rights, and yet these rights are sharply curtailed because of their legal status as "outsiders."[103] In a large body of work, sociologist Shannon Gleeson has probed the process by which immigrant workers claim violations of their rights.[104] Most relevant to this study, Gleeson finds that the presence of an EEOC office makes immigrant workers more likely to engage in claims-making behavior.[105]

Farmworkers have historically been excluded from central protections afforded most other employees in what scholars have referred to as the doctrine of "agricultural exceptionalism."[106] Most live in abject poverty.[107] They are not eligible for most governmental benefits, such as housing assistance, welfare, food stamps, or disability.[108] While the data are known to be incomplete, farmworkers earn very little and are typically not employed year-round. The most recent National Agricultural Workers Survey (NAWS) showed an average individual income is between $15,000 and $17,499, and between $20,000 and

102. *See* Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 966 (1988).

103. *Id.*

104. *See generally* SHANNON GLEESON, PRECARIOUS CLAIMS: THE PROMISE AND FAILURE OF WORKPLACE PROTECTIONS IN THE UNITED STATES (2016).

105. Shannon Gleeson, *Brokering Immigrant Worker Rights: An Examination of Local Immigration Control, Administrative Capacity and Civil Society*, 41 J. ETHNIC & MIGR. STUDS. 470, 471 (2015).

106. Greg Schell, *Farmworker Exceptionalism Under the Law: How the Legal System Contributes to Farmworker Poverty and Powerlessness*, *in* THE HUMAN COST OF FOOD: FARMWORKERS' LIVES, LABOR, AND ADVOCACY 139, 141 (Charles D. Thompson & Melinda F. Wiggins eds., 2002).

107. Ontiveros, *supra* note 5, at 167–68.

108. Schell, *supra* note 106.

$24,999 for a family.[109] More than one-half of farmworkers are also parents.[110] Child labor laws are seldom enforced, despite the fact that there are estimated to be between 300,000 and 800,000 children aged 18 years and under who work in the fields.[111]

A number of other factors make farmworkers uniquely vulnerable, including their geographic isolation and the transient nature of their work, which can make accessing social or legal services particularly difficult. More than forty percent of farmworkers have completed six or fewer years of school.[112] In addition, language difficulties are prevalent.[113] In one study, nearly one third of farmworkers reported that they could not speak any English, and another forty-one percent reported speaking "a little" English.[114] Many farmworkers don't speak a common second language like Spanish; Miztecan languages are common, and agency employees reported in interviews that there are very few court translators available throughout the country.[115]

All of these vulnerabilities are exacerbated by the fact that many farmworkers are noncitizens. It is estimated that just under half of all farmworkers are undocumented, which renders them far less likely to report any abuse.[116] As explored below, their status poses unique challenges for agencies enforcing the rights available to them. A sizeable percentage are workers who enter through the H-2A guest worker program.[117] These laborers are also uniquely vulnerable because their legal status is tied to a single employer, which renders them unable to leave an abusive employer to work for another.[118] This creates a situation that is ripe for abuse by the grower, and there is evidence that such abuse is rampant.[119] Their legal status can have a substantial impact on their likelihood of ensuring their safety on the job. As one study by UCLA demonstrated, "[Many of the interviewees] felt they could not ask for protective equipment, training, or other health and safety-related items, because they might

109. TRISH HERNANDEZ & SUSAN GABBARD, U.S. DEP'T OF LAB., FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS): 2015–2016: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARMWORKERS, RESEARCH REPORT NO. 13, at iii (2018), https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS_Research_Report_13.pdf.

110. *Id.* at i.

111. *Child Labor in Agriculture*, NAT'L CTR. FARMWORKER HEALTH, http://www.ncfh.org/child-labor.html (last visited Apr. 20, 2022).

112. HERNANDEZ & GABBARD, *supra* note 109, at ii.

113. *Id.*

114. *Id.*

115. Interview with EEOC Employee (May 8, 2020).

116. HERNANDEZ & GABBARD, *supra* note 109, at 4–5.

117. *See* Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights,* 18 HOFSTRA LAB. & EMPL. L.J. 575, 576, 596–97 (2001).

118. *Id.* at 595.

119. *Id.*

be turned into the Immigration and Naturalization Service (INS or "la migra") or fired."[120]

While the EEOC has led efforts to render legal status irrelevant to the ability to enforce anti-discrimination labor laws, some agricultural defendants have found new ways to convince judges to introduce evidence of the plaintiff's legal status at trial, and to intimidate workers outside of the courtroom.[121] In one case, discussed below, the defendant argued that the plaintiff had fabricated a rape charge in order to qualify for a visa that the EEOC was concurrently supporting, for example, and the judge ruled that her status was accordingly admissible.[122] One EEOC employee explained that legal status was frequently an impediment to bringing these cases because it was not merely the plaintiffs working for these employers.[123] Rather, "their whole family is: their spouses, their parents, their uncles, aunts, cousins. So [defendants] will use that as leverage to threaten them to back off."[124] As this EEOC employee explained, the opposing lawyers in these cases sometimes intimidated the families and threatened deportation.[125]

Scholars have used the term "agricultural exceptionalism" to describe the exclusion of farmworkers from many of the central protections that most employees enjoy.[126] Perhaps most significantly, farmworkers did not benefit from the extraordinary transformation of the workplace during the New Deal period. As Greg Schell writes, "Virtually every labor protective standard passed on both a federal and state level prior to 1960 excluded agricultural workers."[127] Within Congress, influential senators from the rural south were swayed by industry interests, and this was particularly true because most farmworkers were African American at the time.[128] Several scholars have argued that many of the agricultural exemptions were rooted in racism.[129] Juan Perea argues that during the New Deal era, the statutory exclusion of agricultural and domestic employees was well-understood as a race-neutral proxy for omitting African Americans from the benefits and protections available to whites.[130] As Bernice Yeung has argued, agricultural laborers were excluded in order to avoid

120. MARIANNE P. BROWN, ALEJANDRA DOMENZAIN & NELLIANA VILLORIA-SIEGERT, UCLA LAB. OCCUPATIONAL SAFETY & HEALTH PROG., VOICES FROM THE MARGINS: IMMIGRANT WORKERS' PERCEPTIONS OF HEALTH AND SAFETY IN THE WORKPLACE 38 (2002), https://losh.ucla.edu/research-and-policy-2/immigrant-workers.

121. Interview with EEOC Employee (May 13, 2020).

122. Interview with EEOC Employee (May 11, 2020).

123. *Id.*

124. *Id.*

125. *Id.*

126. Schell, *supra* note 106, at 141.

127. *Id.*

128. *Id.* at 142.

129. Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1360 (1987).

130. Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 96 (2011).

protecting African American workers, and domestic laborers were further excluded because they were mostly African American women.[131]

The result of this agricultural exceptionalism is that farmworkers are not included in many of the central protections afforded to most employees. The National Labor Relations Act (NLRA) explicitly excludes agricultural workers, meaning that farmworkers are not protected from retaliation for joining a labor union.[132] Prior research demonstrates that union employees are often safer than non-union employees in the workplace, as unions are often more effective at engaging with management to reduce risks,[133] and more likely to file OSHA complaints.[134] Farmworkers are also exempt from the overtime provisions of the Fair Labor Standards Act (FLSA), and included in its minimum wage provision at a lower rate than other workers.[135] States with progressive labor laws like New York, California, New Jersey, and Michigan have passed modest reforms to limit "the most obvious abuses of farmworkers, such as transportation in unsafe and overcrowded vehicles and housing workers in units lacking electricity or running water."[136] In most other states, the political power of the agricultural industries prevented any such legislation.[137] In proposed legislation on employer sanctions, employers have been very frank in their testimony that they rely upon undocumented labor and that sanctions would impose severe financial obstacles.[138] This reliance upon undocumented labor makes sense in some ways, as farm work involves such difficult labor. In the 1986 amnesty for seasonal workers, which allowed approximately 1.2 million undocumented workers to become permanent residents, farmworkers tended to switch to safer and steadier work upon gaining legal status.[139]

On the heels of *Harvest of Shame*, a documentary that depicted the unsafe living and working conditions of farmworkers, Congress held lengthy hearings

131. *See* BERNICE YEUNG, IN A DAY'S WORK: THE FIGHT TO END SEXUAL VIOLENCE AGAINST AMERICA'S MOST VULNERABLE WORKERS 70–73 (2018).

132. Alexis Guild & Iris Figueroa, *The Neighbors Who Feed Us and Government Policy—Challenges and Solutions*, 13 HARV. L. & POL'Y REV. 157, 169 (2018).

133. Marion Gillen, Davis Baltz, Margy Gassel, Luz Kirsch & Diane Vaccaro, *Perceived Safety Climate, Job Demands, and Coworker Support Among Union and Nonunion Injured Construction Workers*, 33 J. SAFETY RSCH. 33, 45 (2002).

134. Jayesh M. Rathod, *Immigrant Labor and the Occupational Safety and Health Regime: Part 1: A New Vision for Workplace Regulation*, 33 N.Y.U. REV. L. & SOC. CHANGE 479, 517 (2009).

135. BON APPETIT MGMT. FOUND. & UNITED FARM WORKERS, INVENTORY OF FARMWORKER ISSUES AND PROTECTIONS IN THE UNITED STATES iii (2011), https://s3.amazonaws.com/oxfam-us/static/oa3/files/inventory-of-farmworker-issues-and-protections-in-the-usa.pdf [hereinafter INVENTORY OF FARMWORKER ISSUES].

136. Schell, *supra* note 106, at 141–42.

137. *Id.* at 142.

138. MICHAEL FIX & PAUL T. HILL, ENFORCING EMPLOYER SANCTIONS: CHALLENGES AND STRATEGIES 21 (1991); Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 1 U. CHI. LEGAL F. 193, 201 (2007).

139. DAVID RUNSTEN, RAUL HINOJOSA, KATHLEEN LEE & RICHARD MINES, UCLA NAID CTR., THE EXTENT, PATTERN, AND CONTRIBUTIONS OF MIGRANT LABOR IN THE NAFTA COUNTRIES: AN OVERVIEW 17 (2000).

to learn about the need for more expansive federal protections.[140] In the end, it passed a modest bill called the Farm Labor Contractor Registration Act (FLCRA), which was the first law to regulate the living and working conditions of farmworkers.[141] The Migrant and Seasonal Agricultural Workers' Protection (MPSA) replaced this bill in 1983.[142] MPSA created federal jurisdiction over farmworkers' claims, gave them the ability to establish proper venue in any court where personal jurisdiction exists over the defendant, and established an anti-retaliation provision.[143] It allows any person aggrieved under the statute to file in any district court having jurisdiction over the parties, without regard to citizenship of the parties. Many scholars have written about the limitations of MPSA.[144]

Farmworkers face another unique vulnerability from the structure of the relationships in the agricultural industry. Farm Labor Contractors (FLCs) work as intermediaries between growers and laborers.[145] The use of FLCs varies by states; in some, like California, it is estimated that FLCs supply fifty to seventy-five percent of the farmworkers.[146] The growers will typically contract with an FLC to complete a particular job, such as harvesting a certain number of acres.[147] This allows some growers to distance themselves from the working conditions of farmworkers, and to be removed from negotiating the terms under which the farmworkers are contracted to work on their land.[148] As one EEOC employee testified:

> Unfortunately, the multiple layers of contracted labor make it difficult to impute criminal liability to the grower who benefits from cheap labor. Sadly, many growers will turn a blind-eye to immigration status and the working conditions in their lands in order to obtain a workforce that is cheap to employ and with little risk of being reported for violations of labor and employment rights.[149]

Even when farmworkers have rights, they have little recourse when an employer violates them. While MPSA regulates housing and transportation for

140. Schell, *supra* note 106, at 154.

141. *Id.*

142. 29 U.S.C. § 1801–1872 (1994).

143. 29 U.S.C. § 1854(a) (2011).

144. *See, e.g.*, Schell, *supra* note 106.

145. Ontiveros, *supra* note 5, at 162. FLCs are licensed by the U.S. Department of Labor and regulated by MPSA. *Id.*

146. Phillip Martin, *Farm Labor in California: Then and Now* 2 (Ctr. Compar. Immigr. Stud. Working Paper No. 73, 2001), https://ccis.ucsd.edu/_files/wp37.pdf.

147. INVENTORY OF FARMWORKER ISSUES, *supra* note 135, at 4.

148. *Id.*

149. *Written Testimony of Ana Isabel Vallejo*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Jan. 19, 2011), https://www.eeoc.gov/meetings/meeting-january-19-2011-human-trafficking-and-forced-labor/vallejo.

the minority of employees that provide these to farmworkers,[150] legal advocates report unsafe transportation and substandard housing as common.[151] The Southern Poverty Law Center reports that minimum wage rules are routinely violated by growers and labor contractors paying "piece" rates instead of hourly wages, which allows them to avoid paying the minimum wage.[152] Farmworkers also routinely report not being paid at all and having no recourse.[153] They also experience the highest rates of toxic chemical injuries and skin disorders of any workers in the country, according to the Department of Labor.[154] Language barriers can contribute to the likelihood of injury, as one study reported that participants "could not read warning labels on containers holding toxic chemicals."[155] Thus, there is ample evidence that much of the statutory and regulatory framework has not been successful in protecting farmworkers from unsafe working conditions.

As scholars such as Maria Ontiveros have recognized, farmworkers suffer from the fact that the law is very fragmented, which often means that many of their most pressing problems are analyzed independently instead of holistically.[156] Critically, Ontiveros argues, farmworkers and their advocates have a history of crafting responses to these problems themselves through their own organizing.[157] Thus, while this Article focuses on the importance of a robust public enforcement scheme to ensure that farmworkers can avail themselves of the legal protections to which they are entitled, this important history of advocacy by farmworkers cannot be overlooked. Farmworker women, in particular, have an important history of grassroots advocacy that has most recently included recognition within the #MeToo movement, as they expressed their solidarity in *TIME* magazine.[158]

B. THE EVOLUTION OF THE AGENCY'S EFFORTS

As discussed below, William ("Bill") Tamayo played an instrumental role in the Commission's work on behalf of farmworkers. Tamayo was the Director of the San Francisco District Office until July of 2021, and formerly served as its Regional Attorney from 1995 to 2015.[159] He argues that the EEOC was initially slow to reach immigrant communities, as it was "understandably driven

150. INVENTORY OF FARMWORKER ISSUES, *supra* note 135, at iii.

151. *Id.*

152. BAUER & RAMÍREZ, *supra* note 2, at 25.

153. *Id.* at 23.

154. *Id.* at 30.

155. *Id.* at 25.

156. Ontiveros, *supra* note 5, at 158.

157. *Id.* As Kirti Datla and Richard Revesz explain, most agencies do not have independent litigating authority. Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 799–804 (2013). This further limits the availability of traditional public litigation remedies on behalf of farmworkers.

158. Alianza Nacional de Campesinas, *supra* note 8.

159. Tamayo, *supra* note 20, at 253.

by a 'black v. white' framework, much like the rest of the civil rights community in analyzing and addressing issues of racial minorities."[160] This paradigm tended to focus more on industrial, blue-collar workers and was less attuned to the needs of more geographically isolated workers. As Tamayo argues, "the EEOC did not significantly respond to the changing phenomena in the workplace" initially that were brought about by globalization, industry expansion, and international and domestic instability.[161] In addition, as he explains, the Commission was hampered by advocates' perception of the agency. "By the 1990s the EEOC was sometimes viewed by civil rights advocates as irrelevant, poorly trained, ill-prepared to address the discrimination issues of the decade, and indifferent to the civil rights concerns of new Americans and emerging communities."[162]

How did the EEOC evolve from a "poorly trained" and "ill-prepared" agency to being a central actor in the farmworker context? The agency's reluctance to engage with farmworkers shifted in 1995, when Tamayo joined the EEOC as the Regional Attorney. That year, he arranged for EEOC staff from the San Francisco District Office to meet with farmworkers and advocates in Fresno, California, where they learned how pervasive the problem of sexual harassment was in the fields.[163] This prompted the San Francisco District Office to develop an education and outreach campaign as part of its Local Enforcement Plan, discussed below that included innovative partnerships with a number of advocates and public interest organizations.[164] This effort was also supported by a National Enforcement Plan (NEP), adopted under Chairman Gilbert Casellas, that stressed the importance of heightened outreach to underserved communities, especially with respect to national origin bias, harassment toward immigrant workers, wage discrimination and retaliation.[165] Critically, the NEP changed the authorization procedure for regional offices to bring litigation, which had previously required the full Commission's authorization.[166] It delegated litigation decisions to the EEOC's General Counsel, who in turn re-delegated this authority to Regional Attorneys.[167] Under this more entrepreneurial approach, the Regional Attorney of each District Office had wide latitude to determine its litigation priorities.

As the San Francisco District Office grew its partnerships with outside organizations, the California Rural Legal Assistance, Inc. (CRLA) soon presented the perfect test case with strong factual allegations. In *EEOC v. Tanimura & Antle*, the lead plaintiff, a farmworker, testified that she had been

160. Tamayo, *supra* note 6, at 1078.
161. *Id.* at 1079.
162. *Id.*
163. Tamayo, *supra* note 6, at 1079–80.
164. *Id.*
165. Castro, *supra* note 49, at 156.
166. *Id.*
167. *Id.*

forced to have sex with the hiring official.[168] In 1999, the EEOC San Francisco District Office reached a $1.855 million settlement against the largest lettuce grower in the world.[169] It was the largest sexual harassment settlement in the agricultural industry that the Commission had ever handled.[170] *Tanimura* captured the attention of the national office, as Chairwoman Ida Castro attended the press conference announcing the settlement.[171] Chairwoman Castro's approach was very aligned with this effort, and the changes that she had initiated at the national level were supportive of these types of cases. Shortly after taking office in 1998, she determined that a new comprehensive enforcement approach was needed to move past the plateau in employment civil rights enforcement.[172] As she believed, the EEOC needed to increase its presence in underserved communities, including immigrant and limited English proficient communities.[173] That same year, the Commission made the representation of low-wage workers a national priority through its "Low Wage Task Force," and this included immigrant workers.[174]

Once the *Tanimura* settlement made headlines, the effort on behalf of immigrant workers in the agricultural industry began to spread nationally within the Commission. As discussed below interviews with advocates and EEOC employees indicated that Tamayo's efforts drove much of this diffusion outward, as he was deeply invested in these cases. Two years later, the Milwaukee office announced a $1.525 million settlement on behalf of a class of Mexican female employees in a poultry and egg processing plant.[175] Four years later, the Los Angeles District Office would announce a similarly large settlement of $1.05 million in a sexual harassment class of Latino farmworkers.[176]

The agency stepped in to fill a significant gap in representation in this context, as federal restrictions prevent Legal Services Corporations (LSCs) from participating in class actions, representing undocumented workers (under most

168. EEOC v. Tanimura & Antle, C99-20088 (N.D. Cal. 1999); Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC and Tanimura & Antle Settle Sexual Harassment Case in the Agricultural Industry (Feb. 23, 1999), https://www.eeoc.gov/newsroom/eeoc-and-tanimura-antle-settle-sexual-harassment-case-agricultural-industry-0.

169. *Tanimura & Antle*, C99-20088 (N.D. Cal. 1999); U.S. Equal Emp. Opportunity Comm'n, *supra* note 168.

170. Tamayo, *supra* note 6, at 1082.

171. Interview with EEOC Employee (May 8, 2020).

172. U.S. COMM'N ON CIV. RTS., OVERCOMING THE PAST, FOCUSING ON THE FUTURE: AN ASSESSMENT OF THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S ENFORCEMENT EFFORTS ix (2000).

173. Castro, *supra* note 49, at 157.

174. Tamayo, *supra* note 20, at 261. Title VII does not expressly protect immigrants on the basis of citizenship status; rather, the agency has often protected the rights of immigrant workers on the statutory basis of national origins discrimination. *See id.* at 254.

175. Consent Decree at 9, EEOC v. Austin J. Decoster d/b/a Decoster Farms of Iowa, and Iowa AG L.L.C., No. C02-3077 (2002).

176. Consent Decree at 7, EEOC v. Rivera Vineyards, Inc. d/b/a Blas Rivera Vineyards, et al., 03-01117 (C.D. Cal. 2005).

circumstances), or obtaining attorneys' fees.[177] Several Regional Attorneys and advocates confirmed in interviews that very few in the private bar (outside of legal service corporations) have taken these cases. As others have also written, both business considerations and the gatekeeping function of the plaintiffs' bar make it much less likely that these cases will be taken.[178] Interviewees explained that private lawyers experience difficulty in identifying these claims due to geographic isolation and language barriers, and the plaintiffs are unlikely to be able to cover costs as the litigation proceeds.[179] Prior to the EEOC taking this initiative, the result was that farmworkers had nearly no legal recourse when they suffered harassment.

III. ANALYSIS OF EEOC'S LITIGATION EFFORTS ON BEHALF OF FARMWORKERS

In this Part, I turn to a comprehensive analysis of the EEOC's litigation efforts on behalf of farmworkers, which span more than two decades.[180] Drawing from the EEOC records, case law drawn from PACER and Lexis Nexis, public repositories of consent decrees, and media searches discussing the Commission and farmworkers, I provide a first look at the agency's engagement with farmworkers.

A. THE COMMISSION'S CASES ON BEHALF OF FARMWORKERS

In deciding how to define a "farmworker" case, I took the broad view of the EEOC's anti-discrimination efforts in the agricultural industry, including what one advocate referred to in an interview as "agricultural-adjacent[,] low-wage worker cases."[181] Accordingly, I included cases that did not technically occur on a farm, such as those in poultry or egg processing plants. It also bears mentioning that these cases include a range of plaintiffs. Some are plaintiffs who have legal status as guest workers or permanent residents, while many others lack legal status, and others are citizens. While many of the cases involve Spanish-speaking or Mixtec-speaking Central or Latin American farmworkers,

177. Tamayo, *supra* note 6, at 1084.

178. *See, e.g.*, HERBERT JACOB, LAW AND POLITICS IN THE UNITED STATES 123 (1986); Herbert M. Kritzer, *Contingency Fee Lawyers as Gatekeepers in the Civil Justice System*, 81 JUDICATURE 22, 22 (1997); HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 1–2, 11 (2004).

179. Interview with EEOC Employee (May 8, 2020).

180. Of course, litigation represents only a small fraction of the charges that the agency processes. One study found, for example, that 1,106 sexual harassment complaints had been filed with the Commission against agricultural industries as of 2015. Bernice Yeung & Grace Rubenstein, *Female Workers Face Rape, Harassment in US Agriculture Industry,* REVEAL NEWS (June 25, 2013), https://revealnews.org/article/female-workers-face-rape-harassment-in-us-agriculture-industry. While there are no reliable data on how many the Commission investigates, the publicly available data indicate that it declines to investigate approximately fifty percent of sexual harassment complaints across all industries more broadly. *Id.* The remainder proceed to the internal conciliation process, and a small fraction of those (that are not resolved) result in a lawsuit. *See id.*

181. Interview with Farmworker Advocate (May 24, 2020).

other cases involved guest workers from countries such as Thailand or Haiti. As described below, several district offices have also brought cases on behalf of African American citizens who were farmworkers, alleging that the employers discriminated against them in favor of foreign farmworkers. While outside the scope of this work, it bears mentioning that many of the same dynamics affect other low-wage immigrant industries, such as the janitorial industry, in which the EEOC has also been involved.[182]

Research revealed sixty-four cases between the Commission's first suit on behalf of farmworkers in 1995 and the present day. The vast majority of these cases (fifty) contained a claim of discrimination based upon sex. Notably, at least two of the cases involving sex-based discrimination were brought on behalf of male plaintiffs. A sizeable portion of them also contained allegations of discrimination based upon national origin (eighteen). There were a smaller number of race-based claims (eight) and an even smaller number based upon disability (three). These categories are not mutually exclusive, as race and national origin were often brought in tandem, for example.

Nearly every one of the cases (fifty-nine) settled through the form of a court-monitored consent decree, while three went to a jury trial and two went to a bench trial. Of the cases settled by consent decrees, these decrees were publicly available in all but ten cases.[183] In those cases in which they were not available, a combination of the Commission's press releases, the docket sheets for each case, and media sources provided basic information about the action. The very high rate of settlement by consent decree is likely the result of at least two factors. First, as interviews with EEOC employees stressed, these cases often don't involve corroborating evidence and inevitably depend upon the fact-finder believing the farmworker to be more credible than the defendant.[184] Several EEOC employees expressed concern about this, explaining, for example, that it was very difficult to get an all-white jury in a rural location to step into the shoes of a farmworker in just a matter of days.[185] After an unsuccessful trial in one case, a white jury member explained that he had not believed the farmworker because she had not reported the assault to the police, and he believed that his daughter would have done so.[186] In addition, as discussed below, at least one EEOC employee expressed concern about bringing a number of undocumented witnesses to a courtroom to testify. As this person explained, in one case, every one of the witnesses "was undocumented[,] and we wound up resolving the case

182. YEUNG, *supra* note 131, at 70–73.

183. *Consent Decrees*, CORNELL UNIV. DIGIT. COMMONS@ILR, https://digitalcommons.ilr.cornell.edu/condec (last visited Apr. 20, 2022).

184. Interview with EEOC Employee (May 8, 2020).

185. Interview with EEOC Employee (May 13, 2020). Of course, the composition of eligible jury members would vary across locations. Lisa Pruitt has considered some of this variation, writing about how rural places in the South, for example, construct the Latinx experience differently from "gateway" cities and states. *See* Lisa R. Pruitt, *Latina/os, Locality, and Law in the Rural South*, 12 HARV. LATINO L. REV. 135, 138–39 (2009).

186. Interview with EEOC Employee (May 13, 2020).

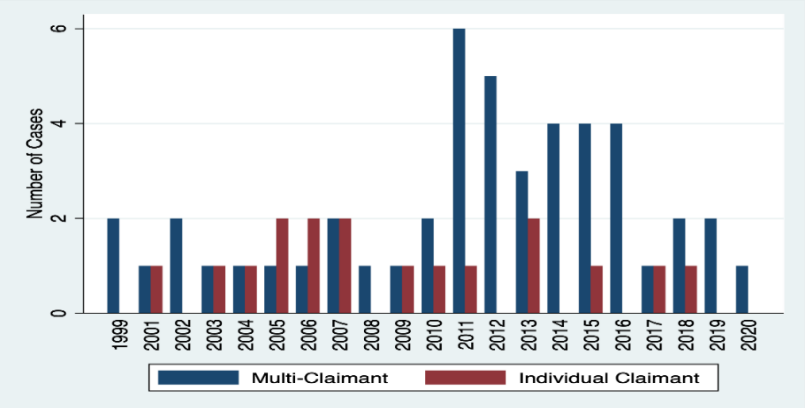
in part, probably for less than we otherwise might have gotten because we didn't want to subject all these people who weren't even parties to the case to being deposed."[187] While the agency "fights very hard and is for the most part successful that immigration status can't be discovered, it creates a chilling effect."[188] A consent decree avoids the need to gather testimony and ensures continuing judicial oversight without the need to file subsequent litigation, and guarantees badly needed relief for the plaintiffs.[189] From the employer's perspective, it often contains a provision denying any wrongdoing, and so it permits the employer to avoid admitting any fault or establishing any precedent.[190]

Interviewees were reluctant to provide much explanation for why many cases did not settle earlier, during the internal conciliation process within the agency, as much of this process is confidential.[191] However, at least one EEOC employee explained that the defendants frequently do not offer enough at this stage, which forces the case to proceed to litigation.[192] This interviewee explained that while only twelve to fourteen percent of cases nationwide to the EEOC involve sexual harassment, twenty-five to thirty percent of the EEOC's litigation is sexual harassment.[193] "It's all about reputations," the interviewee explained; in their perception, many more defendants are willing to go to trial to destroy the plaintiff's credibility because it affects their reputation.[194]

Figure 1 presents the number of cases per year and includes whether the EEOC brought each case on behalf of an individual claimant or multiple. When asked whether the Commission favors systemic or individual litigation, most interviewees responded that a balance was viewed as important within their regional offices. One EEOC employee offered the perspective that systemic cases were preferable in the farmworker context because these cases so frequently involved attacks on the plaintiff's credibility.[195] In an individual case, "there's always going to be a flaw, since there's never a perfect claimant."[196] In a class of plaintiffs, "then it becomes more of the employer's actions as opposed to singling out the individual."[197] This same employee explained that the Commission was in a favorable position because it didn't have to do class certifications, so it was "very aggressive about trying to find other victims. It's very important for us."[198]

187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. Interview with EEOC Employee (May 8, 2020).
192. *Id.*
193. *Id.*
194. *Id.*
195. Interview with EEOC Employee (May 11, 2020).
196. *Id.*
197. *Id.*
198. *Id.*

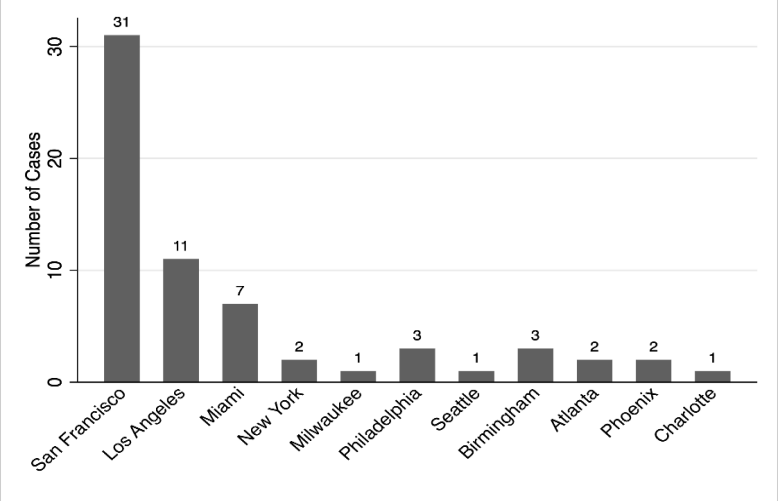
FIGURE 1: CASE TYPE: INDIVIDUAL OR MULTIPLE CLAIMANTS BY YEAR OF RESOLUTION



As Figure 1 reflects, the farmworker initiative gained traction within the agency during the Bush administration, though the EEOC litigated the most cases on behalf of farmworkers during the Obama administration. While the number of cases may reflect the influence of the national leadership at the EEOC to some extent, every EEOC employee that was interviewed stressed that they had not experienced a difference in their freedom to pursue these cases across administrations. One interviewee noted that they had felt equally free to pursue these cases during the Bush administration, for example.[199] Three EEOC employees offered that the recent decrease in cases did not reflect national control over regional litigation; rather, they believed that claimants were too afraid of retaliation during the Trump Administration to report claims to community organizations.[200] Interviews with farmworker advocates confirmed that they had seen a reticence to report claims due to fears of retaliation. However, several EEOC employees surmised that recent leadership changes within the EEOC could eventually affect the priorities for low-wage workers during an administration's second term.[201] In their view, it sometimes took time for these changes to filter down to regional offices, and they saw them as more likely to occur over a lagged timeframe. Thus, while it is difficult to determine whether the national leadership affected the number of cases brought each year, it is evident that the farmworker initiative at least persisted across administrations.

199. Interview with EEOC Employee (May 8, 2020).
200. Interviews with EEOC Employees (May 8, 11, 13, 2020).
201. Interviews with EEOC Employees (May 13, June 4, 2020).

FIGURE 2: CASES BY ORIGINATING DISTRICT OFFICE



As Figure 2 illustrates, at least eleven EEOC district offices have initiated cases on behalf of farmworkers, with the vast majority of them originating in California.[202] To some extent, this aligns with where much of the agricultural industry is within the United States, as the states with the highest farmworker populations are in the Pacific (states such as California, Washington, and Oregon) and South Atlantic (states like Florida, Georgia and North Carolina) regions.[203] To some extent, this also likely reflects regional variation in the priority afforded to farmworker cases in certain regional EEOC offices.

Figure 3 reflects the overall distribution of the recovery obtained (either by consent decree or a verdict), adjusted for inflation.[204] While most of the larger victories have arisen from the San Francisco and Los Angeles District Offices, several other offices have achieved notable victories. This includes, for example, the $1.5 million *Decoster* settlement in Milwaukee,[205] a $3.75 million settlement

202. Figure 2 shows the originating district offices, which is how the EEOC typically records these cases. Each district office encompasses a number of field offices, and these serve as co-counsel. Farmworker litigation has also included offices in Albuquerque, Baltimore, Denver, Fresno, Honolulu, Raleigh, San Antonio, San Diego, San Jose, and Seattle.

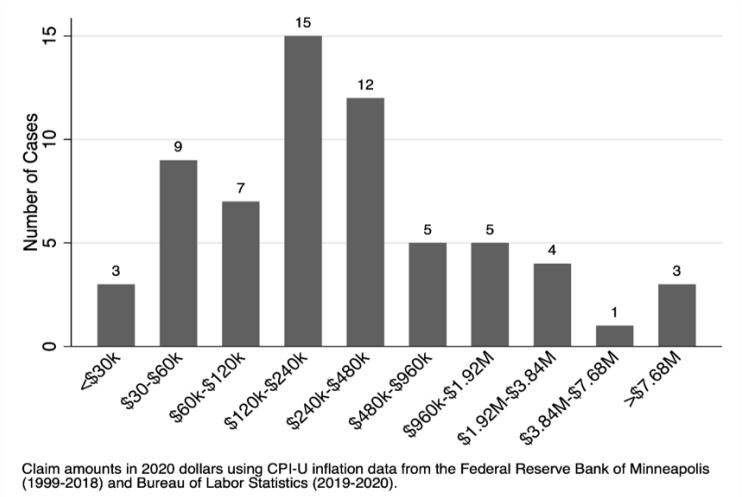
203. *Farm Labor*, U.S. DEP'T AGRIC. ECON. RSCH. SERV., https://www.ers.usda.gov/topics/farm-economy/farm-labor/#geography (last updated Feb. 18, 2022).

204. This means, for example, that $1 recovered in 1999 is worth $1.55 in 2020. This was adjusted using the Consumer Price Index, Urban. *Consumer Price Index*, U.S. BUREAU LAB. STATS., https://www.bls.gov/cpi/questions-and-answers.htm (last updated Mar. 9, 2022).

205. Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC and Decoster Farms Settle Complaint for $1,525,000 (Sept. 30, 2002), https://www.eeoc.gov/newsroom/eeoc-and-decoster-farms-settle-complaint-1525000.

in *Koch Foods* out of the Birmingham District Office,[206] and several cases out of the Miami District Office, including a $17.425 million jury verdict in *Moreno Farms*.[207]

FIGURE 3: AMOUNT OF RELIEF



B. CONSENT DECREES IN FARMWORKER LITIGATION

To better understand the range of relief across cases, I coded and analyzed the forty-nine publicly available consent decrees the EEOC obtained in farmworker litigation. Studying the EEOC's litigation efforts more broadly, Schlanger and Kim find that the consent decrees primarily implement managerialist remedies, or the policies and structures considered "best practices" within industries.[208] While noting that many scholars have been critical of these tendencies, Schlanger and Kim argue that some managerialist responses are useful, and that more empirical evidence of their effectiveness is needed.[209]

My review of the agency's litigation on behalf of farmworkers revealed a more nuanced approach. On the one hand, there were standard types of relief in nearly every consent decree, which was consistent with their findings with

206. Press Release, U.S. Equal Emp. Opportunity Comm'n, Koch Foods Settles EEOC Harassment, National Origin and Race Bias Suit (Aug. 8, 2018), https://www.eeoc.gov/newsroom/koch-foods-settles-eeoc-harassment-national-origin-and-race-bias-suit.

207. Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC Wins Jury Verdict of over $17 Million for Victims of Sexual Harassment and Retaliation at Moreno Farms (Sept. 10, 2015), https://www.eeoc.gov/newsroom/eeoc-wins-jury-verdict-over-17-million-victims-sexual-harassment-and-retaliation-moreno.

208. Schlanger & Kim, *supra* note 89, at 1586.

209. *Id.* at 1587.

respect to EEOC litigation more generally. In interviews, EEOC employees consistently agreed that there were types of relief that they tended to prioritize in nearly all farmworker cases. Outside of California, which has more recently mandated sexual harassment training for any company with at least five employees,[210] EEOC employees explained that the majority of agricultural defendants formerly had no policies or complaint procedures in place at all.[211] As this interviewee explained, "these companies are basically ignorant about their duties under the law. They put people in positions of power, like a foreman or a manager, and they don't look back."[212] As another EEOC employee explained, there was a general resistance on the part of the agricultural industry to be required to train all employees because their work is so seasonal in nature.[213] As a result, all forty-nine of the available consent decrees required the defendant to implement anti-discrimination and anti-harassment training. Most of these decrees contained common provisions: upper-level management was required to make a personal appearance to introduce the training, the training was required to be provided in at least Spanish and English, and the EEOC retained the right to approve the training. Most consent decrees also contained a provision requiring distribution or posting of the harassment policy at regular intervals.

On the other hand, consent decrees in the farmworker context also evinced more narrowly tailored and innovative approaches. While Schlanger and Kim find that very few of the EEOC's consent decrees encouraged ongoing dialogue with the defendants or implemented means of holding employers accountable,[214] this was not the case in the farmworker context. Many of the decrees required the defendant to report biannually to the Commission any harassment complaints that it had received and how it had dealt with them. In addition, one EEOC employee explained that they "really try to ensure that injunctive relief is actually accessible to the workforce in these cases."[215] This has meant, for example, not just providing employees with a flyer that contains the EEOC policies and having them sign it, as might be standard in other employment contexts, since very few employees in any industry are likely to read it, and many farmworkers are not literate. Instead, the EEOC has been successful in negotiating for defendants to produce and routinely play a live video when the season begins to ensure that all of the incoming workers can view it.[216] This also includes a requirement that the defendant produce the video in the relevant languages so that the workers can understand it. Finally, the same EEOC

210. S.B. 1343, 2017-2018 Leg., Reg. Sess. (Cal. 2018).

211. Interview with EEOC Employee (June 5, 2020).

212. *Id.*

213. Interview with EEOC Employee (June 1a, 2020).

214. Schlanger & Kim, *supra* note 89, at 1526.

215. Interview with EEOC Employee (May 11, 2020).

216. *See, e.g.*, Consent Decree at 11, United States EEOC v. Cyma Orchids Corp., No. 2:10-cv-07122-DMG-RZ (C.D. Cal. Nov. 28, 2011).

employee explained, a persistent problem in the agricultural industry is that supervisors are aware of abuse but do not report it. As a result, the EEOC has focused heavily on consent decrees that make the supervisors' performance contingent upon following mandatory reporting procedures in order to ensure the proper internal investigation of all claims.[217] Many of the decrees specifically set up complaint procedures in great detail for companies that did not previously have one, and then tied the evaluation of supervisors to their proper investigation of these complaints.[218] Many decrees also contained specific injunctive relief, which varied across cases: some required defendants to terminate certain employees, for example, or to establish a specific hotline in multiple languages that was accessible at any time.[219]

Several of the consent decrees contained very specific goals and metrics by which to judge the defendant's compliance. For example, *Hamilton Growers*, brought by the Atlanta District Office, involved African American seasonal workers who were subjected to discrimination based upon their national origin and/or race.[220] As advocates explained in interviews, the requirement that an H-2A guest worker stay with an employer in order to retain their legal status creates a situation ripe for abuse, and many in the agricultural industry have begun to favor these workers because of the ability to exploit them.[221] Suits like *Hamilton Growers,* while focused on African American plaintiffs, create an opportunity to improve the working conditions for all farmworkers by reducing the employer's ability to exploit noncitizen guest workers. In this case, the defendant had fired all U.S. citizen workers and retained only Mexican workers over a two-year period, and the plaintiffs alleged that the firings were coupled with race-based comments by management, fewer job opportunities, and less pay.[222] In this consent decree, the defendant agreed to retain at least sixty-five percent of the non-H2A workers.[223] It also specified that the company would allocate fifty percent of supervisory or leadership positions to "American and/or African American workers."[224] It further required the defendant to hire a compliance official whose duty it would be to monitor policies and practices to ensure that they didn't adversely affect African American workers and create a Task Force with the goal of retaining non-H2A workers.[225] It further created a termination appeals process for any non-H2A worker that would be overseen by

217. *Id.* at 10.

218. *See, e.g.*, Consent Decree at 23–24, EEOC v. Hamilton Growers, No. 7:11-CV-134-HL (M.D. Ga. Dec. 7, 2012).

219. *See., e.g.*, Consent Decree at 12, EEOC v. Global Horizons, No. 1:11-cv-00257-LEK-RLP (D. Haw. June 3, 2014); EEOC v. LFC Agricultural Services, No. 2:09-cv-00636-FTM-29-DNF (M.D. Fla. May 31, 2011).

220. Consent Decree at 2, *Hamilton Growers*, No. 7:11-CV-134-HL.

221. Interview with Farmworker Advocate (May 28b, 2020).

222. Consent Decree at 19, *Hamilton Growers*, No. 7:11-CV-134-HL.

223. *Id.* at 18.

224. *Id.* at 19.

225. *Id.* at 21.

a third party.[226] Finally, it created a presumption of re-employment for the plaintiffs, and an agreement to make reasonable efforts to extend rehire offers to previously terminated employees.[227]

Most surprisingly, some consent decrees also included provisions that would fall outside of the EEOC's enforcement mandate. In *Hamilton Growers*, the consent decree required the defendant to provide sanitation units that were accessible, provide coolers with cool drinking water and disposable cups, and prohibit weapons and firearms.[228] In *Global Horizons,* a $1.2 million settlement on behalf of Thai farmworkers who had been trafficked to a nut farm in Hawaii, the consent decree appointed a third-party monitor who would monitor farmworkers' housing, living, and transportation conditions.[229] As one EEOC employee explained, the agency "needs out of the box thinking, understanding that their trafficking victims need more than just money. They need social services. I think that is the beauty of the ability of the Commission, when allowed to do its work and be creative."[230]

The EEOC was also sometimes able to find a solution for the common difficulty in holding liable the intermediary, farm labor contractors (FLCs). In some consent decrees, like *Global Horizons,* the defendant assumed responsibility for holding FLCs accountable for Title VII compliance.[231] It required the defendant to conduct audits of any housing provided by the FLCs and to provide orientations on anti-harassment, and created a hotline for employees to contact for any concerns related to their working or housing conditions.[232]

Of course, there were important limitations to the relief obtained in these cases. As Nancy Levit has argued, extensive judicial oversight was a key hallmark of the institutional reform litigation that successfully restructured conditions in schools, prisons, and voting booths.[233] She also notes that in employment discrimination cases, "the courts that have taken more aggressive oversight responsibilities have had better outcomes."[234] In reviewing the dockets of these cases, seldom was there any post-decretal involvement by the court, which is consistent with what Schlanger and Kim found of the EEOC's litigation more generally. EEOC employees confirmed this in interviews, often citing the agency's lack of resources as limiting their ability to engage in post-decretal

226. *Id.* at 26.

227. *Id.* at 28.

228. *Id.* at 31.

229. Consent Decree at 12, EEOC v. Global Horizons, No. 1:11-CV-00257-LEK-RLP (M.D. Fla. May 31, 2011).

230. Interview with EEOC Employee (May 11, 2020).

231. *Id.*

232. *Id.*

233. Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. REV. 367, 414–15 (2008).

234. *Id.*; *see also* Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1285–88 (2003).

monitoring.[235] As another EEOC employee explained, while many consent decrees allow for the possibility of the EEOC to conduct audits at the worksite, this EEOC employee was not aware of the agency ever having done that.[236] Going forward, this would be a fruitful area of focus for the EEOC in order to strengthen the impact of its litigation in the farmworker context and beyond.

In addition, it appeared that the Commission might benefit from closer collaboration across district offices, as certain types of relief were more likely in some areas than others. While this may reflect geographic differences in how much growers are likely to concede during negotiation, or other case-specific factors, it also likely reflects differences in individual attorney strategies across offices. A number of the decrees relied on third-party monitors, and some included very specific ways of ensuring compliance. *Smokin' Spuds*,[237] for example, required the third-party monitor to distribute an anonymous written survey probing whether employees had experienced any harassment in both English and Spanish to all employees, and to provide a copy of the results to the EEOC.[238] However, EEOC employees differed in the extent to which their offices monitored subsequent compliance with the consent decree. One EEOC employee explained that such monitoring was an important part of what their office did, and explained that they frequently used third-party monitors.[239] In contrast, other EEOC employees said that their offices lacked the resources to monitor cases beyond the reports that the companies were required to file with the agency, and were otherwise limited to learning about subsequent violations by receiving another complaint.[240] As one EEOC employee explained, this second offense would lay the foundation for punitive damages, which provided an incentive for companies not to re-offend.[241] While certain offices preferred to use a third-party monitor more generally,[242] others explained that their offices tended to only use these in systemic cases.[243] For offices that did appoint a third-party monitor, the monitor was often responsible for overseeing the revision and implementation of anti-discrimination and anti-retaliation policies and the complaint and investigation process.[244]

A review of the decrees revealed that certain offices had been more successful at negotiating certain terms. The Los Angeles office, for example, was particularly likely to secure a third-party monitor to ensure compliance with

235. Interview with EEOC Employee (May 8, 2020).

236. Interview with EEOC Employee (June 1a, 2020).

237. Consent Decree at 20, EEOC v. Smokin' Spuds, Inc., No. 1:14-CV-02206-REB-KMT (D. Colo. June 30, 2015).

238. *Id.*

239. Interview with EEOC Employee (May 11, 2020).

240. Interview with EEOC Employee (May 8, 2020).

241. *Id.*

242. Interview with EEOC Employee (May 11, 2020).

243. Interview with EEOC Employee (June 1a, 2020).

244. *See, e.g.*, Consent Decree at 8–9, EEOC v. Zoria, No. 1:13-CV-01544-DAD-SKO (E.D. Cal. June, 23, 2015).

the consent decree,[245] and the Atlanta office had particular success in securing terms that reached beyond the terms of the lawsuit and implicated the broader conditions on the farms.[246] While interviews described a relatively high degree of collaboration across district offices, they also suggested that the EEOC could place greater emphasis upon sharing the successful negotiation of these types of provisions.

IV. IMPLICATIONS

This case study revealed that at least two factors contributed to the EEOC's success in this context: the de-centralized, entrepreneurial structure of the agency, and its unique, sustained relationships with advocacy organizations. As I explore below, each of these enabled the agency to surmount obstacles that often impede the administrative state's ability to reach more marginalized populations. Interviews with EEOC employees and farmworker advocates further illuminate the process by which the Commission came to prioritize and grow its farmworker initiative, and I draw heavily upon these in the section that follows. These findings suggest that these factors may both facilitate the diffusion of such an approach within an agency and provide some degree of insulation from oscillation across administrations. They inform a growing literature on how to entrench civil rights protections within agencies.

In addition, I argue that the prior scholarship has missed an important element of what makes these cases meaningful, particularly in the agricultural industry: the symbolic and signaling function of these cases. Finally, the interviews revealed two recurring difficulties in the EEOC's work on behalf of farmworkers: the challenges inherent to bringing cases in which the plaintiffs may lack legal status, and the difficulty of inter-agency coordination. Each of these is more broadly relevant to other contexts and ripe for further exploration, and ought to inform a future research agenda.

A. CENTRALIZATION AND THE ENTREPRENEURIAL APPROACH

Administrative law scholars have long criticized the traditional regulatory model for having an excessive centralization that creates "a one-size-fits-all approach" that may not be effective in diverse contexts.[247] Rather than the more typical, top-down approach that describes many federal agencies, the Commission's efforts on behalf of farmworkers reveal a very different trajectory. As one EEOC employee explained, the initiative began in San Francisco, spearheaded by Regional Attorney Bill Tamayo, and gradually

245. *See, e.g.*, Consent Decree at 9, 20, EEOC v. Global Horizons, No. 1:11-CV-00257-LEK-RLP (M.D. Fla. May 31, 2011).

246. *See, e.g.*, Consent Decree at 33, EEOC v. Hamilton Growers, No. 7:11-CV-134-HL (M.D. Ga. Dec. 7, 2012).

247. Modesitt, *supra* note 18, at 1257; Richard B. Stewart, *Reconstitutive Law*, 46 MD. L. REV. 86, 96–100 (1986).

diffused to other district offices.[248] The EEOC has a unique "entrepreneurial approach" to litigation, delegating much of the authority to Regional Attorneys in the district offices.[249]

The interviews and the litigation data (reflected in Figure 2, *supra*) helped to illuminate the process by which the agency's work on behalf of farmworkers diffused throughout the agency. In the words of one EEOC employee, "things just started exploding" after the *Tanimura* case out of the San Francisco District Office, under Bill Tamayo's leadership.[250] Another interviewee explained that Tamayo had come to the Commission with the goal of making farmworker cases a priority to the agency and had engaged in outreach to outside organizations to see whether they would be willing to partner with the agency.[251] Prior to that, the interviewee explained, their office hadn't collaborated with outside organizations or focused on farmworker cases, and this quickly changed.[252] The Commission began taking cases in other parts of California and the Pacific Northwest, and this effort gradually spread across the country. This involved EEOC attorneys traveling from California to the district office in Birmingham, Alabama, for example, to train them on how to assess credibility.[253] Interviewees described offices collaborating in partnerships with the Southern Poverty Law Center, for example, and one EEOC employee described efforts to "teach" other offices that these cases were possible.[254] As this person explained, this evolution reflects in part, "the way EEOC is structured, it happens district by district."[255] Some of the initial resistance by other offices, according to this interviewee, was the hesitation to file unless they were certain they would be successful, and this interviewee described convincing other offices that it was worth taking a risk of loss initially.[256] As they put it, in a civil rights case, "if you don't take a risk, you've lost already."[257]

Advocates recalled Bill Tamayo approaching their organizations directly to act as partners, and they explained that the approach was mutually advantageous. These organizations had more experience with farmworkers, but the EEOC had more experience litigating discrimination cases that their organizations were "only on the cusp of developing."[258] One advocate recalled that Tamayo had a large presence outside of the local outreach efforts within

248. Interview with EEOC Employee (June 1a, 2020).

249. The Commission still has to approve major expenditures, address developing areas of law, or raise issues of public controversy. Castro, *supra* note 49, at 155–56.

250. Interview with EEOC Employee (May 8, 2020).

251. Interview with EEOC Employee (June 4, 2020).

252. *Id.*

253. Interview with EEOC Employee (May 8, 2020).

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. Interview with EEOC Employee (June 6, 2020).

Northern California.[259] In their view, Tamayo was ultimately able to influence national priorities as well, which influenced where the agency invested its investigative resources.[260] In the terminology developed by public administration law scholars, Tamayo fits the classic description of a "policy entrepreneur" who was successful at agenda-setting within an agency.[261] Tamayo entered the agency from the outside: he was a former cause lawyer who sought to remedy the inertia and complacency that can be common within government agencies.[262] As several interviewees reflected, his explicit goal was to enable the Commission to develop a record of litigation on behalf of farmworkers, and he sought to do so by engaging in less traditional strategies of case development.[263]

Thus, the EEOC's farmworker work was largely made possible by the leadership of a few Regional Attorneys who prioritized these types of cases, beginning with Bill Tamayo in San Francisco and Anna Park in Los Angeles.[264] As interviewees explained, these leaders gradually convinced other district offices to do the same.[265] The interviewees consistently described a high degree of collaboration across district offices on these cases.[266] Both EEOC employees and advocates stressed that certain Regional Attorneys had acquired a reputation for having expertise in certain types of cases, including those involving farmworkers, and the overlapping categories of trafficking and guest worker abuse.[267] As they explained, when those types of charges were brought before an office that may not have had as much experience with these types of cases, these Regional Attorneys would be pulled in to cases outside of their districts in order to lend their expertise.[268]

This regional autonomy was central to the farmworker initiative's success. As former Vice Chair Paul Igasaki has written, many of the changes during the Clinton-Gore Administration effectively swung the pendulum "from national micro-management to local control . . . ."[269] In interviews, EEOC employees stressed the relatively high degree of autonomy within each office. As one EEOC employee explained, "the district leadership is the one that is on the ground. They're the ones who have to figure out how to really make national policies or how to execute national policies or make them a reality."[270]

259. *Id.*

260. *Id.*

261. Nancy C. Roberts & Paula J. King, *Policy Entrepreneurs: Their Activity Structure and Function in the Policy Process*, 1 J. PUB. ADMIN. RSCH. & THEORY 147, 148 (1991).

262. Interview with EEOC Employee (May 8, 2020).

263. *Id.*; Interview with EEOC Employee (May 20, 2020).

264. Interview with EEOC Employee (June 6, 2020).

265. *Id.*

266. *See, e.g.*, Interviews with EEOC Employee (May 26, June 6, 2020).

267. Interview with Farmworker Advocate (May 20, 2020); Interview with EEOC Employee (May 8, 2020).

268. *Id.*

269. Igasaki, *supra* note 81, at 31.

270. Interview with EEOC Employee (May 8, 2020).

Farmworker advocates also emphasized that they perceived the Regional Attorneys as having a large degree of autonomy in setting the office's agenda.[271] However, despite the relatively high degree of autonomy within each office, the national leadership in the years preceding (and during) the initial farmworker litigation undoubtedly played an important role in facilitating its diffusion. Chairwoman Castro began increasing efforts to outreach to immigrant communities immediately upon joining the Commission, and the first large farmworker settlement coincided with low-wage immigrant workers being included in the national priorities.[272]

Of course, this insulation may be disadvantageous as well. Interviewees reported that a district office's priorities were very dependent on the leadership within a given district. Former Vice Chair Igasaki writes of how the move to local control had negative effects as well, as those offices that had weak programs continued to produce limited results.[273] Similarly, this structure renders offices vulnerable to changes in local leadership. At least one advocate mentioned that a change in the Regional Attorney within a district office had affected the organization's ability to collaborate with the Commission on farmworker cases.[274] As this advocate explained, there was a "significant difference" in the extent to which the new Regional Attorney prioritized farmworker cases, even though the national enforcement plan still prioritized low-wage immigrant workers, and it was within the context of a supportive administration.[275] As they explained, it had made advocates less likely to approach the Commission with a potential case.[276] Other advocates stressed these differences as well, noting that in their view, the Regional Attorneys have the ability to significantly set the "tone" of an individual office, and the extent to which they prioritize these types of cases.[277] Thus, while the entrepreneurial structure may provide some degree of insulation from oscillation across national administrations, it also leaves initiatives more vulnerable to changing priorities and leadership at the local level.

B. PARTNERSHIPS WITH ADVOCACY ORGANIZATIONS AND ATTORNEY HIRING

One of the most striking aspects of the Commission's approach was its unique strategy of partnering with other organizations. Much of the existing literature has missed how truly innovative this agency has been in establishing

271. Interview with Farmworker Advocate (May 20, 2020).
272. Castro, *supra* note 49, at 157.
273. Igasaki, *supra* note 81, at 31.
274. Interview with Farmworker Advocate (May 20, 2020).
275. *Id.*
276. *Id.*
277. Interview with Farmworker Advocate (May 24, 2020).

close partnerships with outside organizations.[278] In the absence of these, it is unlikely that the EEOC would have learned of these cases at all, or been able to move forward with them, as they present several unique obstacles to the agency. First, there is the difficulty of identifying the claim at all. In part, this reflects their geographic isolation, as most farmworkers are necessarily located in more rural areas, far from the offices of most federal agencies. In addition, developing a case requires extensive outreach in order to gain the trust of farmworkers, particularly among those who may lack legal status. While the Commission has made efforts to hire attorneys who may be more likely to be able to do this, it lacks the resources to make outreach its primary function.[279] As described below, with the assistance of organizations whose principal mission *is* outreach, the agency has been able to identify many more plaintiffs.[280] Second, there is the inherent difficulty of factual development in cases in which the power imbalance is so extreme between the parties, and this likely would have served as a significant impediment in the absence of close collaboration with advocates. As one EEOC employee explained, "in none of our farmworker cases did any of these women come in complaining of sexual harassment. They complained that they were fired and then we have to ask, 'Well, why were you fired?'"[281] As the agency employees explained, only with the right training is it possible to bring out their stories of harassment and help them feel comfortable enough to proceed, and this is one reason that the close partnerships with other organizations had played such a critical role.[282] As I explore below, these unique relationships are instructive in considering how other agencies can more effectively reach marginalized populations.

1. Relationship Between Advocates and the EEOC

In the case of the Commission, advocates have been closely intertwined with the agency's success since its very inception. As Pedriana and Stryker explain, civil rights groups were arguably responsible for the EEOC's strength as an institution, as their strategy of overwhelming the agency with far more complaints than it had the capacity to initially handle incentivized Congress to increase its budget, personnel, and enforcement power.[283] Pedriana and Stryker demonstrate that the Commission and these civil rights organizations gradually evolved to present a united front in advocating for broadened interpretations of the law in novel contexts.[284]

278. For one notable exception, see Ming H. Chen, *Where You Stand Depends on Where You Sit: Bureaucratic Politics in Federal Workplace Agencies Serving Undocumented Workers*, 33 BERKELEY J. EMP. & LAB. L. 227, 282 (2012).

279. Interview with EEOC Employee (May 8, 2020).

280. *See* Tamayo, *supra* note 20, at 264.

281. Interview with EEOC Employee (May 8, 2020).

282. *Id.*

283. Pedriana & Stryker, *supra* note 31, at 725.

284. *Id.* at 731.

Much of the literature has focused on the ways that advocates have influenced the administrative state by exerting external pressure, as in the case of civil rights groups' strategy to overwhelm the EEOC with litigation during its early years.[285] However, the scholarship has not devoted similar attention to the ways in which close collaboration with these advocates has influenced the administrative state and facilitated its ability to reach vulnerable populations. Beginning in the 1990s, the EEOC "developed critical and indispensable partnerships with the Esperanza Project of the Southern Poverty Law Center, California Rural Legal Assistance, National Sexual Violence Resource Center, ACLU Women's Project, Oregon Law Center, Northwest Justice Project, Organizacion en California de Lideres Campesinas, and many other similar organizations."[286] Tamayo describes these organizations as "the eyes and ears of the EEOC."[287] In fact, the Commission initiated its farmworker initiative in 1995, after attorneys met with advocates and learned of the pervasive sexual abuse in the fields.[288] As one EEOC employee explained, this collaboration was particularly useful because the EEOC's jurisdiction is so widespread, and the outside organizations have a better sense of the local politics and the individual businesses.[289] Referring to intervenor organizations that had served as co-counsel on a farmworker case, another EEOC employee explained that "these organizations have an ear to the community that the government doesn't have. They can communicate what their rights are, who the EEOC is, and how to contact them."[290]

The Houston EEOC District Office, for example, formed a coalition known as the "Justice and Equality in the Workplace Partnership" (JEWP) that includes other labor enforcement agencies, the local labor council, advocate organizations, and the Latin American consulates.[291] The goal was to increase outreach in order to show people how to file complaints and to be aware of their rights.[292] As Shannon Gleeson has argued, JEWP created an important line of communication between federal labor standards enforcement agencies and workers, and has played a significant role in allowing Latino immigrant workers to make claims.[293]

The agency's partnerships were aided by the fact that there is a particularly well-developed and robust set of non-profit and low-wage worker rights centers. These grew out of the congressional decision in the 1980s to restrict legal aid

285. *Id.* at 710.
286. Tamayo, *supra* note 20, at 264.
287. *Id.*
288. *Id.*
289. Interview with EEOC Employee (June 4, 2020).
290. Interview with EEOC Employee (May 26, 2020).
291. Shannon Gleeson, *Shifting Agendas, Evolving Coalitions: Advocating for Immigrant Worker Rights in Houston*, 16 J. LAB. & SOC'Y 207, 211 (2013).
292. *Id.* at 211.
293. *Id.* at 212, 219–20.

organizations' ability to represent undocumented immigrants and to bring class action suits.[294] As one advocate explained, many of the legal aid organizations had previously maintained very vibrant farmworker practices.[295] When this legislation rendered them unable to do so, many of them left to establish private legal services organizations.[296]

The relationship between the Commission and the outside organizations operated in both directions, as each was influenced by the other. Several advocates reported adjusting their strategies because of the Commission's influence, with one explaining that their organization "began to do community outreach in a different way" as a result of these meetings.[297] As one example, this interviewee offered the following: "Many legal service programs operate in a 'white culture.' Things happen from 9-5, they have to be done a particular way."[298] As they explained, collaborating with the Commission had made the organization's staff more receptive to the fact that when workers are in the fields, they can't be expected to seek legal or social services, and effective outreach might involve hours outside of the 9-5 workday, for example.[299] Advocates also explained that attorneys from the Commission served on various state coalitions working on farmworker issues, and had helped advocates to produce a video that employers had requested by reviewing the legal content of the video.[300]

One advocate explained that the San Francisco district office had created a wide network of advocates engaged in farmworker advocacy.[301] Tamayo launched broad outreach efforts even outside of California, convening meetings of broad groups of advocates and organizations so that they could learn from one another about the best ways of identifying these cases.[302] Advocates stressed that having a government agency on the "conference circuit" at all, interacting with advocates, industry representatives, and academics, was a rarity.[303] Rather than just reporting on the Commission's efforts, EEOC attorneys would speak at the conferences with the aim of asking, "What can we do differently?"[304] As they stressed, the EEOC representatives were "very open to different ways of thinking about this work in particular."[305] Part of these efforts included reaching out to researchers who were involved in work on how to prevent harassment.[306] As an advocate explained, "rather than just putting the onus on employees for

294. Guild & Figueroa, *supra* note 132, at 161.
295. Interview with Farmworker Advocate (May 24, 2020).
296. *Id.*
297. Interview with Farmworker Advocate (May 20, 2020).
298. *Id.*
299. *Id.*
300. Interview with Farmworker Advocate (July 1, 2020).
301. Interview with Farmworker Advocate (May 20, 2020).
302. *Id.*
303. Interview with Farmworker Advocate (July 1, 2020).
304. *Id.*
305. *Id.*
306. *Id.*

reporting, [the Commission] wants to look at prevention and mitigation" from the employers' perspective.[307] Tamayo had served as a "matchmaker of sorts" in the subsequent decades, they explained, frequently putting them in touch with a broad range of stakeholders who might benefit from their work, and further strengthening the national farmworker advocacy network.[308]

These close partnerships also changed the way the Commission operated. As one EEOC employee explained, "It did require us to retool within the EEOC."[309] One advocate explained that the agency's approach was distinctive from other government agencies with whom they had interacted, as the agency was very receptive to the work of the advocates informing the agency's approach.[310] Attorneys from the Commission frequently came back to the advocates and asked questions such as: "So if you're learning this, does that change [the Commission's] approach? Should we update materials or engage employers in more meaningful ways?"[311] Like many government agencies, some staff members were not initially trained in how to do credibility assessments, and the Regional Attorney for that office brought in domestic violence experts to teach EEOC staff how to assess credibility with traumatized victims.[312] The EEOC employee continued, "It really was a retooling because it was revolutionary for a lot of the offices. For my office and for many of the offices, they had never done credibility assessments like this."[313] By training EEOC employees to more carefully investigate the reasons for the termination, many more cases could be identified. Another EEOC employee explained that their office regularly receives training on working with trauma victims and the "neurobiological effects" that can render one reticent to report abuse, as well as training on cultural competencies in working with farmworkers.[314]

2. EEOC Hiring

Interviewees emphasized two structural aspects of EEOC hiring that further enabled the agency's work with farmworkers. First, several interviewees described EEOC employees' previous work experience within the private bar or in public interest legal organizations. As one EEOC employee explained, this experience more readily equipped them to immediately begin collaborating with these organizations when they joined the Commission.[315] In bringing one of the first farmworker cases, this employee consulted with their network of several outside organizations and told them, '"we can't do anything unless we do

307. *Id.*
308. *Id.*
309. Interview with EEOC Employee (May 8, 2020).
310. Interview with Farmworker Advocate (July 1, 2020).
311. *Id.*
312. *Id.*
313. Interview with EEOC Employee (May 8, 2020).
314. Interview with EEOC Employee (June 1a, 2020).
315. Interview with EEOC Employee (May 8, 2020).

outreach with you.' Then eventually the key case comes in, so we develop all these materials, we're starting presentations all over."[316] As this interviewee explained, it was helpful to have Regional Attorneys who were "from the outside, not bound by tradition."[317] Citing "inertia in the government," they explained that other offices initially responded that they simply weren't aware that farmworker discrimination was a problem since "none of these cases ever came to our office."[318] In the interviewee's view, it was necessary to educate other offices that they couldn't expect farmworkers to just walk into a government office and make a complaint.[319] Rather, it was important to depart from the more common tradition of promoting within the agency, and to instead bring in a fresh perspective from outside the government.

In addition, several EEOC employees emphasized that hiring attorneys who were either bilingual or from underrepresented communities played a critical role in enabling the agency to establish trust with the plaintiffs. One EEOC employee explained that a significant number of attorneys in the District Office were bilingual.[320] Another EEOC employee described hiring a new attorney who brought very little litigation experience, but "gave us instant credibility in the fields and who had worked with farmworkers."[321] As this employee explained, this attorney was critically able to travel to a farmworker's home and spend time with her family, which enabled her to establish trust and convince the plaintiff to take a considerable risk to herself and her family by going forward with a large systemic discrimination case.[322]

3. Role of Outreach and Education Coordinators within the Agency

As described below, the interviews also revealed the critical role of the Outreach and Education Coordinators (hereinafter "Coordinators") in facilitating relationships with advocacy organizations. In particular, they described a number of particularly innovative strategies that could be useful for other agencies to consider, and illuminated how the farmworker initiative was established as a priority across administrations.

EEOC employees also addressed the challenges inherent in maintaining meaningful relationships with community-based organizations in the face of changing national priorities across different Commissioners.[323] In order to address this difficulty, each district also establishes its group of "Significant Partners," a core group of organizations with which the district commits to

316. *Id.*
317. *Id.*
318. *Id.*
319. *Id.*
320. Interview with EEOC Employee (May 13, 2020).
321. Interview with EEOC Employee (May 8, 2020).
322. *Id.*
323. Interview with EEOC Employee (May 26, 2020).

collaborate regardless of changing national priorities.[324] In several districts, farmworkers were among the designated groups for outreach in several offices.[325] One EEOC employee described these organizations as being selected through a combination of significant input from that district's Outreach and Education Coordinator, in addition to the District Director consulting with the National Outreach Coordinator.[326] Through this strategy, they were able to further entrench the farmworker priority across changing administrations.[327]

Coordinators reported innovative ways of tackling the unique challenges inherent in farmworker cases by collaborating with community-based organizations.[328] As one interviewee explained, "breaking bread" with these organizations and "asking them what they need" was essential to their approach, and they contrasted it to the "standard bureaucratic scripts" used by agencies.[329] This employee emphasized that the EEOC stood apart because it vests the Coordinators with substantial latitude to develop their own initiatives.[330] As they explained, many of their counterparts in other agencies simply receive a "script" that they have to follow, whereas they are, in their words, "given the latitude to really engage."[331]

Interviewees offered several examples of this broad latitude. One of the primary obstacles is the seasonal nature of agriculture, which can mean that by the time an investigator is ready to investigate a claim, the witnesses are long gone, and the job site looks completely different. This, in fact, is one of the reasons agricultural defendants were able to act with impunity for so long. As this EEOC employee put it, "With farmworkers, the typical bureaucratic processes don't work well."[332] Instead, they reached an agreement with the community-based organizations that if they see a case of sexual harassment on a farm, for example, they can reach out directly to either the District Director or the Coordinator, who will act immediately.[333] As they explained, "by working

324. *Id.*

325. *Id.*

326. Interview with EEOC Employee (June 1b, 2020).

327. *Id.*

328. *Id.*

329. *Id.*

330. In addition to its outreach in the context of finding plaintiffs, the EEOC also does extensive outreach in the form of educating the public. These efforts take the form of Technical Assistance Program (TAP) seminars with employers to educate them on their obligations and the rights of their employees. Cindy O'Hara, Senior Trial Attorney, U.S. Equal Emp. Opportunity Comm'n, Best Practices for Migrant Workers, Presentation at UCD Changing Face Conference: Best Practices (Apr. 26, 2000), https://migration.ucdavis.edu/cf/more.php?id=80. In collaborating with community groups, ethnic organizations, unions, and social service and legal service agencies, it includes appearances in Spanish language television and radio talk shows, and production of pamphlets, fliers, and hand-outs in a variety of languages. *Id.*

331. Interview with EEOC Employee (June 1b, 2020).

332. *Id.*

333. *Id.*

in a non-bureaucratic way, we're able to address some of the shortcomings of the system."[334]

In another example, a Coordinator in one office had developed a relationship with a farmworker advocacy group that specialized in education, which they noted was outside the scope of their mandate.[335] At the same time, this manager saw a unique opportunity to travel with them in order to have contact with the parents of the migrant children, which was the population the EEOC needed to reach.[336] By using these unconventional methods, this manager had found a way of engaging with a population that was challenging for the agency to reach. A Coordinator also reported working very closely with the state Monitor Advocate, a position created by the Department of Labor in response to a court order.[337] Together, the Monitor Advocate and the EEOC Coordinator had realized that the training modules for employers were outdated and not very effective, and they worked together to produce a new one to be distributed to agricultural businesses throughout the state.[338]

These interviews also revealed obstacles that the Coordinators frequently confront. EEOC employees explained that one of the major difficulties they face is that the efficacy of their Coordinators depends so heavily upon the "establishment and support of community-based organizations across geographic areas."[339] This interviewee felt that their district office was permanently at a disadvantage compared to other offices like California, where an extensive network of such organizations existed. As this EEOC employee emphasized, the government will likely never be the primary source to which farmworkers report abuse, and the lack of such organizations means that even in states with many farmworkers, those EEOC district offices will see fewer charges and ultimately be able to bring less litigation.[340] This conclusion is consistent with Shannon Gleeson's work, who found that the size of the civil society, measured by the number of non-profit organizations, was associated with more claims filed before the EEOC.[341] As Gleeson concludes, "civil society may function as an important liaison between the existence and experience of these protections."[342]

One additional obstacle that several EEOC employees emphasized was the farmworkers' fear of retaliation. One EEOC employee explained that retaliation

334. *Id.*

335. *Id.*

336. *Id.*

337. *See Monitor Advocate System*, U.S. DEP'T. LABOR: EMP. & TRAINING ADMIN., https://www.dol.gov/agencies/eta/agriculture/monitor-advocate-system (last visited Apr. 20, 2022). They are appointed in each state to monitor conditions for farmworkers and other migrant workers. *Id.*

338. Interview with EEOC Employee (June 1b, 2020).

339. *Id.*

340. *Id.*

341. Shannon Gleeson, *From Rights to Claims: The Role of Civil Society in Making Rights Real for Vulnerable Workers*, 43 LAW & SOC'Y REV. 669, 688 (2009).

342. *Id.* at 689.

claims have spiked in the past five years overall, as now approximately fifty-four percent of EEOC cases involve threats to retaliate.[343] As a result, they had heard from advocacy organizations that fewer women are reaching out to complain at all out of fear, particularly in the more recent "anti-immigrant" atmosphere.[344] Interviews with advocates confirmed that they had seen a similar trend of fewer women seeking legal services recently.[345] Without the close relationships with advocates, many of these cases would have never reached the agency. As one EEOC employee explained in reference to threats from defendants to use plaintiff's legal status against them and their entire families, "[a]llowing people the strength to look beyond that and stay with us is difficult and earning the trust. It takes a lot of time, energy, and compassion."[346] EEOC employees described putting substantial resources into these outreach efforts and investing resources in less conventional efforts. As the EEOC employee explained, they engaged in efforts that included "going into those fields at three in the morning and giving them phones so we can communicate with them."[347]

In a study of the partnerships between the Houston EEOC office and outside organizations, Gleeson suggests that future work is needed to understand whether the partnerships ultimately facilitate or hinder the development of a robust labor standards enforcement agency in the long term.[348] In the context of the EEOC's work with farmworkers, it appears that these collaborations have ultimately strengthened the agency's ability to enforce their rights. Further, in their absence, it appears nearly impossible for any agency to engage as closely with the community as the outside organizations have been successful in doing, and the EEOC has benefited directly from this collaboration.

C. THE SYMBOLIC AND SIGNALING FUNCTIONS OF LITIGATION

Employment law scholars point to the routinized language in the EEOC's consent decrees as evidence that the agency is not achieving meaningful reform.[349] However, interviews with EEOC employees and farmworkers suggest that this criticism may obscure an important element of what is at work here, as litigation can affect behavior beyond the mere language of the settlement. This is particularly true in this context, where the agricultural industry was essentially beginning from a blank slate, with nearly no procedures for reporting or investigating discrimination.

Interviewees believed that consent decrees play a critical role in deterring subsequent conduct and ensuring more favorable settlements.[350] EEOC

343. Interview with EEOC Employee (May 8, 2020).
344. *Id.*
345. Interview with Farmworker Advocate (May 21, 2020).
346. Interview with EEOC Employee (May 11, 2020).
347. *Id.*
348. Gleeson, *supra* note 291, at 220.
349. *See* Schlanger & Kim, *supra* note 89, at 1526.
350. Interview with EEOC Employee (May 11, 2020).

employees offered at least anecdotal evidence that they had seen subsequent cases settle at a much earlier point in the conciliation process after the defendants had observed the public nature of large settlements with other agricultural defendants.[351] As they explained, these same types of cases had never settled prior to many of the landmark agricultural cases. They reasoned that because the industry was now on notice that the Commission was willing to prioritize and invest in these cases, it took them much more seriously.[352] As one EEOC employee explained, the fear of future litigation is "really what motivates them. They don't want to be litigating with the government because, unlike private plaintiffs, we're motivated differently. We'll take it to trial just on principle because we're committed to the case."[353] In other words, "being visible is another source of incentives."[354] Another EEOC employee described these cases as having a prophylactic effect. As they explained, the EEOC attorneys explicitly tell the defendants, "Look, you don't want to be in the news. It hurts."[355] Another interviewee explained that their approach was to be very upfront with opposing counsel, that the EEOC operates differently because it serves the public, and that this meant that there would be a public press release and that any future violations would be publicized.[356] As this interviewee explained, they worked to create a cooperative relationship in which the defendant would come to *want* to comply and to put in place provisions that would prevent future abuses, in order to avoid bad publicity in the future.[357]

Interviewees further view high-value settlements as particularly instrumental in deterring future discrimination. One EEOC employee explained that the agency had received criticism for focusing on obtaining high-value settlements instead of prioritizing the revision of anti-harassment policies and training.[358] However, in their view, this critique was missing the effect of high monetary settlements on deterring future bad behavior by defendants.[359] They continued, if defendants think "that they would be subject to these multi-million-dollar lawsuits, they wouldn't be cavalier."[360] In their view, the high dollar amounts of these settlements served as "a way to communicate with businesses."[361]

Interviews with advocates were consistent with these observations. One interviewee was emphatic that the Commission's cases have made a difference

351. *Id.*
352. Interview with EEOC Employee (May 8, 2020).
353. Interview with EEOC Employee (May 11, 2020).
354. *Id.*
355. Interview with EEOC Employee (May 8, 2020).
356. Interview with EEOC Employee (June 4, 2020).
357. *Id.*
358. *Id.*
359. *Id.*
360. *Id.*
361. Interview with EEOC Employee (May 13, 2020).

in the way that employers respond to subsequent allegations.[362] As they explained, growers slowly began to change their practices as the Commission began bringing these cases and began to take complaints of sexual harassment much more seriously. Prior to these cases, the advocate explained, it was "virtually unheard of for growers to hire investigators in response to sexual harassment complaints, and now they routinely do."[363] Now, these prior cases have "made a difference in my cases today, in the way employers respond to allegations of sexual harassment. They take them more seriously right away."[364] Other advocates stressed that the specter of having the federal government pursue a grower changed the prospective defendant's behavior.[365] Advocates also observed that they had witnessed growers behave very differently when it was the EEOC bringing the case, rather than a private law firm.[366] In cases involving the federal government, they explained, growers were willing to invest more resources to settle the cases quickly and were more motivated to comply.[367] These interviews offered insight into one reason that a more robust public enforcement model may incentivize defendants to behave differently than a private attorney general model.[368]

In addition to changing the agricultural industry's behavior, these cases have also empowered the farmworkers to come forward in response to violations of their rights. Both EEOC employees and advocates stressed this, explaining that they had witnessed this firsthand in some cases. In one case, for example, an EEOC employee explained that a consent decree had required visible posting of contact information for the EEOC, and that workers at these farms had subsequently been contacting them more frequently.[369] These subsequent complaints, in turn, permitted the EEOC to establish the foundation for punitive damages in a second action against the employer.[370]

On the other hand, there was evidence that the ability of these cases to change working conditions was limited by the circumstances of the workers. For example, one advocate mentioned that the EEOC had settled a case involving Haitian women.[371] This interviewee said that the conditions on the farm are now either just as bad or worse, as the farmworker plaintiffs know that the number of jobs is shrinking, and they farmworkers are becoming less employable with age.[372] As a result, they are very unlikely to report future abuses. This suggests

362. Interview with Farmworker Advocate (May 20, 2020).
363. *Id.*
364. *Id.*
365. Interview with Farmworker Advocate (May 28b, 2020).
366. *Id.*
367. Interview with Farmworker Advocate (May 20, 2020).
368. *See* Waterstone, *supra* note 17, at 441 (arguing for the need to reinvigorate the public enforcement model, as the private attorney general model has largely failed).
369. Interview with EEOC Employee (May 26, 2020).
370. *Id.*
371. Interview with EEOC Employee (May 28b, 2020).
372. *Id.*

that in deciding where to invest resources, the EEOC might consider factors such as the unique vulnerability of plaintiffs, including their ability to find other work. In cases such as these, the agency might do well to invest more post-decretal monitoring, knowing that the employees may be less likely to report future abuses.

Finally, these cases can also serve important signaling functions in the political and legislative arenas. Pointing to the EEOC's litigation against Evans Fruit, one EEOC employee explained that this settlement had resulted in a documentary, *Rape in the Fields*, which had greatly raised awareness about the issue.[373] The documentary, in turn, led to legislation mandating training and increasing liability for the middlemen, or farm labor contractors, for sexual harassment in California[374] because it had caught the attention of a California legislator.[375] Following this case, the state grower association invited the EEOC to speak for the first time at its annual meeting,[376] and one EEOC employee discussed having observed the larger effect of this case on the agricultural industry in Washington.[377]

In sum, this case study suggests that we miss something important if we look only to the cases that the EEOC settles in assessing its impact, as these cases may have a much broader reach within the industry. Both defendants' interaction with the litigation process and the publication of the cases (through word of mouth within the industry or among farmworkers, or within more formal outlets such as the media) have the potential to change behavior. From the perspective of the industry, it may lead companies to be more proactive in responding to complaints, and to take investigation by the EEOC much more seriously out of a fear of publicity or costly settlements. It may also lead them to settle more readily in the initial conciliation process to avoid litigation. From the perspective of the farmworkers, these cases can make them far more likely to report subsequent abuse as they learn not to fear the legal process and become aware of a means of contacting a resource within the Commission or an organization.

D. THE CHALLENGES OF EEOC FARMWORKER LITIGATION

The next two sections describe challenges that interviewees raised in litigation on behalf of farmworkers: the legal status of plaintiffs and the difficulty of inter-agency communication. Both of these warrant further

373. Interview with EEOC Employee (June 1a, 2020).

374. S.B. 1087, 2013–2014 Leg., Reg. Sess. (Cal. 2014).

375. Interview with EEOC Employee (June 1a, 2020).

376. Press Release, U.S. Equal Emp. Opportunity Comm'n, Evans Fruit Settles Sexual Harassment and Retaliation Lawsuits with EEOC, NW Justice Project (Jan. 28, 2016), https://www.eeoc.gov/newsroom/evans-fruit-settles-sexual-harassment-and-retaliation-lawsuits-eeoc-nw-justice-project.

377. Interview with EEOC Employee (June 1a, 2020).

examination in future scholarship and are relevant considerations for other agencies as they develop best practices in reaching vulnerable populations.

1. Legal Status of Plaintiffs

Interviewees stressed that the Commission treads a delicate line in these cases, as many of the claimants and witnesses may be undocumented. In this context, the EEOC has also been particularly innovative, as it was part of early efforts to make legal status irrelevant to litigation, which is crucial to allowing farmworkers (and other noncitizen workers) to bring claims.[378] Nonetheless, as they described, it remains relevant both because growers have found novel ways of circumventing the rules, and because it can affect jurors' perceptions of the plaintiffs.

The Commission has adopted a status-blind approach, meaning that it does not inquire into an employee's legal status on its own initiative, and it does not consider this status when weighing the substantive merits of a claim.[379] The EEOC pioneered a way of obtaining legal status for plaintiffs bringing sexual harassment cases by supporting their applications for U- and T-visas, and worked with other agencies to develop similar procedures.[380] As Ming Hsu Chen has written, the agency was particularly innovative in this context, as "attorneys involved recall 'making it up as we went along' when confronted with the forms to accompany the U-visa petition."[381]

More broadly, the Commission has been forceful in resisting employers' efforts to silence farmworkers by using lawsuits to obtain information on the workers' legal statuses. As part of its standard practice, the Commission seeks a protective order to bar defendants' inquiry into immigration status, and later files motions in limine to similarly prohibit this inquiry.[382] In one of the first cases, *Rivera v. NIBCO, Inc.*,[383] involving Latino and Asian workers who alleged disparate impact based upon their national origin, counsel for the employers sought the legal status of the plaintiffs in deposition.[384] The EEOC resisted this attempt, and was successful in obtaining a protective order from the district court that barred those questions.[385] Counsel for the EEOC argued that because each plaintiff had already been verified for employment at the time of hiring, and

378. *Id.*

379. Chen, *supra* note 278, at 282.

380. *Id.* at 286.

381. *Id.*

382. WILLIAM R. TAMAYO, U.S. EQUAL EMP. OPPORTUNITY COMM'N, EFFECTIVE COMMUNITY, PRIVATE BAR & GOVERNMENT PARTNERSHIPS TO ASSIST IMMIGRANT WORKERS: COOPERATING WITH AN EEOC INVESTIGATION AND PLAINTIFF-INTERVENTION IN AN EEOC LAWSUIT 5 (2013), http://employeerightsadvocacy.org/wp-content/uploads/2017/02/S0502_PartnershipsEEOCLawsuit_TamayoW.pdf.

383. 204 F.R.D. 647 (E.D. Cal. 2001).

384. Tamayo, *supra* note 20, at 267.

385. *Id.* However, though the judge barred all discovery related to the plaintiffs' immigration status, the judge did not bar the employer's independent investigation into the matter. *Rivera*, 204 F.R.D. at 649.

further questioning related to their immigration status was not relevant to their claims, it would have a chilling effect on the pursuit of their workplace rights.[386] In upholding that order, the Ninth Circuit noted that "employers have a perverse incentive to ignore immigration laws at the time of hiring but insist upon their enforcement when their employees complain."[387] Relying upon the *NIBCO* case, the EEOC was successful in obtaining similar protective orders in cases in New York[388] and Chicago.[389]

While the plaintiff's legal status was another area in which the agency had been innovative, interviews revealed that this was a persistent problem, as growers found novel ways to undermine the agency's efforts. In one recent case, for example, an EEOC employee explained that the growers successfully introduced plaintiffs' legal status by arguing that they fabricated the underlying allegations in order to qualify for the visa.[390] In *Favorite Farms,* the judge denied the EEOC's motion to keep the plaintiff's application for a U visa under seal.[391] In response to this adverse ruling, the EEOC attorneys argued that this plaintiff had a great deal to lose by calling the police as an undocumented person, and yet she had taken the risk of reporting the rape to the police.[392] In the end, they prevailed, and the jury awarded $850,000 to her.[393] The Commission also won injunctive relief, including sexual harassment and retaliation training in multiple languages, and mandatory reporting to the EEOC on any complaints received by the company.[394] However, these efforts were not always successful. In another case, one EEOC employee explained that the judge ruled that if the plaintiffs were to plead the Fifth Amendment regarding their legal status, they would not be able to seek emotional distress damages.[395] Thus, the Commission was forced to weigh the damage of revealing their legal status against the inability to seek distress damages, and ultimately chose to protect the plaintiffs' legal status.

386. Rivera v. NIBCO, Inc., 364 F.3d 1057, 1061 (9th Cir. 2004).

387. *Id.* at 1069–72 (declining to reach the question of whether Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002) applied, but expressing "serious doubts" that it would, given the significance of Title VII's statutory purpose). The Supreme Court's decision in *Hoffman* construed the employer sanctions provision of IRCA to prohibit the awarding of backpay to undocumented workers who were subjected to unlawful retaliation for reporting workplace abuses. Ming Hsu Chen has written about the pattern of regulatory resistance to rulings that restrict immigrant rights, like *Hoffman*. She examines the ways in which three agencies—the National Labor Relations Board (NLRB), the U.S. Department of Labor, and the EEOC—have resisted such rulings out of a professional ethos of protecting workers and a commitment to enforcing labor laws independently of the policy preferences. Chen, *supra* note 278, at 228.

388. EEOC v. First Wireless Grp., Inc., 225 F.R.D. 404 (E.D.N.Y. 2004).

389. EEOC v. City of Joliet, 239 F.R.D. 490 (N.D. Ill. 2006).

390. Interview with EEOC Employee (May 11, 2020).

391. EEOC v. Favorite Farms, Inc., No. 8:17-CV-1292 (M.D. Fla. 2018).

392. Interview with EEOC Employee (May 11, 2020).

393. Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC Wins Jury Verdict Against Favorite Farms for Sexual Harassment and Retaliation (Dec. 21, 2018), https://www.eeoc.gov/newsroom/eeoc-wins-jury-verdict-against-favorite-farms-sexual-harassment-and-retaliation.

394. Amended Judgment on Injunctive Relief at 2-3, *Favorite Farms*, 8:17-CV-1292 (M.D. Fla. 2020).

395. Interview with EEOC Employee (June 4, 2020).

Other EEOC employees recounted instances in which they suffered bias from the jury because of the plaintiff's legal status. In one case, the EEOC employee explained that there was a straightforward, "slam dunk" harassment case, and the jury found against the plaintiff.[396] As the employee explained,

> What it was, was that they were guest workers. They didn't see them as people. So it didn't really matter that we had direct evidence, the guy admitting to it. The company did nothing with it. I think it just shows there is a lot of work to be done.[397]

In a different case, another EEOC employee recounted asking the all-white jury afterward why they didn't believe the plaintiff, and one juror cited the fact that she didn't report the rape to the police, and his daughter would have gone to the police.[398] As this EEOC employee explained, this was the most difficult aspect of these cases: "how do you get white jurors in a matter of days to put themselves in the shoes of a farmworker, when they don't interact with them at all?"[399]

2. The Challenges of Inter-agency Coordination

Interviewees also stressed that the lack of inter-agency coordination impeded their efforts on behalf of farmworkers. Critics of the traditional regulatory state have pointed to structural flaws that make cross-agency cooperation very difficult even in "an era of multiple potential regulators."[400] In a compelling study of the employment hazards faced by day laborers, Jayesh Rathod has argued that "the regulatory silos in employment law could better coordinate to detect unlawful working conditions."[401] In other contexts, less coordination may be desirable. Stephen Lee and Kati Griffith have each written about the importance of maintaining a firewall between immigration enforcement and labor standards enforcement agencies such as the EEOC.[402]

One EEOC employee explained that there were important differences in the "prisms" through which various agencies view these cases.[403] While the EEOC viewed them as "civil rights cases at their heart," other agencies viewed

396. Interview with EEOC Employee (May 11, 2020).

397. *Id.*

398. Interview with EEOC Employee (May 8, 2020).

399. *Id.*

400. Modesitt, *supra* note 18, at 1257; *see also* Keith Cunningham-Parmeter, *A Poisoned Field: Farmworkers, Pesticide Exposure, and Tort Recovery in an Era of Regulatory Failure*, 28 N.Y.U. REV. L. & SOC. CHANGE 431, 451–53 (2004).

401. Jayesh M. Rathod, *Danger and Dignity: Immigrant Day Laborers and Occupational Risk*, 46 SETON HALL L. REV. 813, 879 (2016).

402. *See* Kati L. Griffith, *ICE Was Not Meant to be Cold: The Case for Civil Rights Monitoring of Immigration Enforcement at the Workplace*, 53 ARIZ. L. REV. 1137–56 (2011); Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103, 1137–43 (2011).

403. Interview with EEOC Employee (May 11, 2020).

them primarily from a law enforcement perspective. As this EEOC employee argued, this made inter-agency coordination particularly difficult.[404] They explained that the EEOC is "an anomaly" as an independent agency that also brings its own litigation, and this made it difficult for other agencies to understand what the Commission does.[405] This employee described some success, particularly in the trafficking realm, in the ability to collaborate with other agencies, and cited the Chair of the Commission's subsequent invitation to speak with cabinet members about trafficking.[406] On the other hand, the EEOC employee explained that convening the typical cross-agency task forces was not sufficient to achieve meaningful collaboration.[407] Rather, this employee argued, the directive needed to come from the top-down, with an instruction to actually work with one another.[408] Otherwise, it was too easy for "turf issues" to impede such collaboration. As this employee explained, when multiple agencies could be involved in a case, each agency might have a different sense of who should take the lead or the best approach to the case, among other issues.[409] This, they explained, "was where the rubber hits the road."[410] In the end, the person explained, "those have all been done on an individualized basis," without a clear directive, and were ultimately impeded by problems over each agency's authority.[411] The need for better inter-agency cooperation is particularly glaring when one considers that nearly none of the egregious sexual assault cases brought by the EEOC in farmworker litigation have resulted in criminal charges.[412]

The lack of inter-agency coordination also has a concrete effect on the agency's ability to litigate cases on behalf of farmworkers. One EEOC employee expressed concern that Immigration and Customs Enforcement (ICE) may enter the courtroom and arrest witnesses and explained that the agency took precautions as a result, which included bringing in only one witness at a time into the courthouse.[413] As the employee explained, their practice was to have only one witness in the witness preparation room in order to prevent this.[414] Most strikingly, this EEOC employee explained that this office would sometimes settle a case rather than take the risk of bringing it to trial because the witnesses

404. *Id.*
405. Interview with EEOC Employee (May 8, 2020).
406. *Id.*
407. *Id.*
408. *Id.*
409. *Id.*
410. *Id.*
411. Interview with EEOC Employee (May 11, 2020).
412. Interview by PBS Frontline with Bill Tamayo, Reg'l Att'y, U.S. Equal Emp. Opportunity Comm'n, S.F. Dist. (Sept. 17, 2012), https://www.pbs.org/wgbh/pages/frontline/social-issues/rape-in-the-fields/bill-tamayo-criminal-cases-needed-to-end-immigrant-abuse.
413. Interview with EEOC Employee (May 13, 2020).
414. *Id.*

might all lack legal status and they did not want to expose them to that risk.[415] As they explained, while "some MOU [memorandum of understanding] may exist somewhere in Washington, you can't count on a line official from ICE to know that."[416]

3. Limitations to the EEOC's Efficacy

On the whole, advocates expressed a positive view of the Commission's work on behalf of farmworkers. One advocate explained that their advocacy organization spends a lot of its time thinking about how to do the most with limited resources.[417] Part of that calculus, they explained, was the fact that this work largely involved "agencies that are pretty ineffectual."[418] By contrast, the EEOC had a critical mass of people "who care enough to do the job right," which made collaboration with the EEOC a worthwhile investment of resources.[419] However, advocates also sometimes criticized the EEOC investigators, and this advocate confirmed that because of these investigators, the plaintiffs' bar often views the Commission as merely "an obstacle you have to get through to file your suit."[420] In their experience, many of the investigators are not very competent, lack a good understanding of the law, and have been very business- or employer-oriented, "eager to toss a charge."[421] This interviewee was in some ways sympathetic to the difficulty of the investigators' position, as they emphasized that they have far too many cases and far too few resources.[422]

Advocates stressed that this was one area in which the Regional Attorneys could intervene and make a large difference, and they were aware of at least one who had done so. They emphasized that the attorneys and investigators have their own, separate hierarchies, and the Regional Attorneys are not meant to directly supervise the investigators.[423] On the other hand, they emphasized, some Regional Attorneys had taken a particular initiative to interface directly with farmworker advocates on a regular basis, explicitly instructing them to reach out directly if a charge had been pending with no action from the investigator.[424] The advocate mentioned that some of these same Regional Attorneys did the same on the employer side and tried to maintain collegial relationships with defense attorneys.[425] In interviews with EEOC employees, one confirmed that offices had varying reputations for how closely the legal and enforcement sides

415. *Id.*
416. *Id.*
417. Interview with Farmworker Advocate (May 24, 2020).
418. *Id.*
419. *Id.*
420. *Id.*
421. *Id.*
422. *Id.*
423. Interview with EEOC Employee (June 4, 2020).
424. *Id.*
425. *Id.*

collaborated.[426] This individual's office enjoyed a very good reputation for such collaboration, and they believed that the investigators in this district office were particularly competent as a result.[427] Thus, the interviews suggested that, from a national level, the Commission should ensure closer collaboration between the legal and enforcement branches, as this may ultimately improve the quality of the investigations.

Several advocates criticized the fact that the EEOC process moved much more slowly than they wished to proceed, though they noted that this was often a given in a government agency.[428] In some cases, one advocate explained, the investigation stage might take so long that a private organization may end up litigating it alone instead. As they explained, by the time the investigation had concluded, the private organization may be so far ahead in litigating that the EEOC attorneys may decide not to litigate. In one case that was likely to have a systemic impact, they explained, they had the sense that the Regional Attorney was regretful that the agency had not moved faster.[429] Advocates also mentioned that some of these farms go out of business, and there can be difficulty collecting the settlement money at all.[430] And, of course, several interviewees stressed that seeking redress after the fact is no substitute for policies that would prevent this harm from occurring at all. This is where other agencies, like the Department of Labor, could play a larger role.

Despite these limitations, there is mounting evidence that these policies have had a very tangible effect for farmworkers. Shannon Gleason shows that there is more claims-making by immigrant workers in areas where an EEOC agency is present, for example.[431] And, as discussed above, both EEOC employees and farmworkers explained that they had seen large differences in both the plaintiffs' likelihood of reporting abuse, and in the seriousness with which growers treated claims of harassment or discrimination.

CONCLUSION

The EEOC has emerged as a leader in agency efforts on behalf of farmworkers. As this Article has illuminated, its innovative strategies in this context depart from much of the prior scholarship's criticism of the Commission for adopting managerialist responses to discrimination. In the case of farmworkers, it has achieved remedies that are responsive to the needs of claimants, and often tailored to the specific situation at hand. In addition, there is evidence that the very public nature of the Commission's work has changed the agricultural industry's treatment of discrimination and harassment claims in

426. *Id.*
427. *Id.*
428. Interview with Farmworker Advocate (June 5, 2020).
429. Interview with Farmworker Advocate (May 24, 2020).
430. Interview with Farmworker Advocate (May 28b, 2020).
431. Gleeson, *supra* note 105, at 475.

ways that reach far beyond the specific terms of an individual consent decree. This suggests that it is important to consider these symbolic and signaling functions when assessing the impact of the EEOC.

This study has highlighted several factors as integral to the EEOC's success on behalf of farmworkers. The first is the agency's decentralized design, and its entrepreneurial approach to litigation that vests a high level of control in each regional office and fosters close collaboration between offices. In the case of farmworkers, this permitted the initiative to develop from the bottom up, as one Regional Attorney initially led efforts that diffused outward to other offices and helped to entrench the farmworker initiative as a priority across administrations. In addition, the agency affords its Outreach and Education Coordinators a wide degree of latitude. As they described, they are not forced to follow a bureaucratic script like their counterparts in other agencies and are free to engage in more innovative techniques.

The unique and sustained partnerships with outside organizations were also instrumental to its success and deserve more attention from other agencies. The EEOC adopted innovative approaches that departed from the oft-described complacency in government agencies and the tendency for rigid adherence to bureaucratic practices. As advocates stressed, the agency regularly displayed a receptiveness to change that they had seldom observed in a government agency. EEOC attorneys routinely asked advocates how the Commission might learn from their work, whether these new insights might change the way that the agency interacted with employers, and whether there were opportunities for more meaningful engagement with employers as a result.[432] These relationships were mutually beneficial, as both EEOC employees and farmworker advocates reported learning from one another.

This study also reveals important limitations of the Commission's approach and points to ways that it might improve. An analysis of the interviews and consent decrees demonstrates that the agency engages in very little post-decretal monitoring. While this may be driven by a lack of resources, it impedes the Commission's ability to achieve reform. It also reveals that some offices are more likely to secure a third-party monitor or obtain innovative forms of relief that lie outside the scope of the suit, such as monitoring of the sanitation, transportation, and living conditions of the workers. The agency might benefit from closer collaboration on forms of relief, in particular, among offices. This collaboration could focus on securing post-decretal monitoring more uniformly across offices, for example. In addition, interviews reveal that the quality of EEOC investigators varies between offices, and that efforts to improve coordination between the enforcement and investigative branches within offices would improve this variation. Finally, EEOC employees expressed frustration

432. Interview with Farmworker Advocate (July 1, 2020).

with the difficulty of cross-agency collaboration, which is vital to ensuring prosecution of the underlying crimes in many of these cases.

The EEOC's trajectory may inspire lessons for other agencies that play a central role in monitoring the conditions of farmworkers, such as the Department of Labor (DOL) and its Occupational Safety and Health Administration (OSHA). Several EEOC employees and advocates stressed that the mere involvement of the federal government in these cases had an impact on defendants that reached far beyond the terms of an individual case. As one advocate explained, when an agency becomes involved and issues a public press release, the agricultural industry views this as a sign that they may be at risk of public exposure in the future and is much more likely to take complaints by employees very seriously. If, on the other hand, "agencies turn a blind eye, they interpret this as a get out of jail free card" that may worsen employment conditions for farmworkers.[433]

Observers have assailed OSHA "for its ossified agency structure and its inability to adapt to changing workplaces in the United States, including the growing presence of foreign-born workers."[434] In particular, the "protracted pace" of OSHA's regulatory efforts has been an area of concern.[435] While a large part of its mandate is to issue standards, it takes an average of ten years to develop and promulgate an OSHA standard.[436] As Jayesh Rathod has written about extensively, the existing standards suffer from some serious gaps, and the agency's interpretations have weakened its existing standards.[437] It has "faced criticism for its limited civil penalties, its frequent reductions of penalty amounts, and its rare prosecutions."[438] As a congressional report on occupation safety put it, "a company official who willfully and recklessly violates federal OSHA laws stands a greater chance of winning a state lottery than being criminally charged."[439] Rathod concludes that rather than adding to a growing list of policy proposals, what is needed is a "new normative vision for regulating safety in the workplace given the changing demographics of the workforce."[440] As the foregoing analysis has demonstrated, the example of the EEOC is instructive in developing this new normative vision.

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433. Interview with Farmworker Advocate (June 5, 2020).

434. Rathod, *supra* note 401, at 818.

435. Rathod, *supra* note 134, at 521–22.

436. OCCUPATIONAL SAFETY & HEALTH ADMIN. & NAT'L ADVISORY COMM. ON OCCUPATIONAL SAFETY & HEALTH, U.S. DEP'T OF LABOR, REPORT AND RECOMMENDATIONS RELATED TO OSHA'S STANDARDS DEVELOPMENT PROCESS (2000), https://www.osha.gov/advisorycommittee/nacosh_report_06062000.

437. Rathod, *supra* note 134, at 523. Rathod explains that the agency has not yet issued standards to address workplace violence, even though workers in the retail industry have a larger homicide rate than law enforcement workers. In addition, its interpretations have often weakened existing standards, in areas such as the number of immigrant worker fatalities that result from falls in building erection and roofing work. *Id.* at 526.

438. *Id.* at 534.

439. David Barstow, *U.S. Rarely Seeks Charges for Deaths in Workplace*, N.Y. TIMES (Dec. 22, 2003), https://www.nytimes.com/2003/12/22/us/us-rarely-seeks-charges-for-deaths-in-workplace.html.

440. Rathod, *supra* note 134, at 534.

To be sure, there are important differences between OSHA and EEOC, including their structures and levels of independence. Critically, though, OSHA and EEOC share an important structural feature: they were both built to be weak by design and to rely upon worker-initiated complaints. Their success critically depends upon full participation by employees, which is a significant impediment in a context in which workers may be extremely reluctant to initiate a claim. In the case of farmworkers, numerous obstacles inhibit them from directly approaching a federal government agency. Through its close partnerships with advocates and the other strategies discussed above, the Commission has surmounted this structural weakness in the context of farmworkers.

If OSHA were to form closer partnerships with outside organizations in the way that the EEOC has, these relationships could do a great deal to overcome this structural weakness in the agency's design. This is particularly true because very few farmworkers are unionized, and it is unions who generally bring complaints to the attention of OSHA and are also able to mitigate the problem of OSHA under-enforcement. Rathod notes that OSHA has made some effort to offer trainings in Spanish,[441] and has also "developed some outreach materials and public service announcements in Spanish, which are targeted towards the Latino immigrant community."[442] As he concludes, this work "highlights the need for sustained partnerships and a closer examination of how worker centers can mediate safety-related concerns."[443]

By drawing upon the model developed by the EEOC, other agencies might more effectively reach vulnerable populations like farmworkers. This Article urges a future research agenda that reinvigorates the focus on a robust public enforcement model, particularly in the context of a new administration that is more receptive to such an approach than its predecessor. As this study reveals, the need for public enforcement is at its most compelling in the context of these marginalized communities.

441. *Id.* at 532.
442. *Id.* at 541.
443. Rathod, *supra* note 401, at 879.

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