

The Equal Employment Opportunity Commission's Unmet Mission

Challenges Impacting Prompt, Fair, and Impartial
Processing of Federal Employees' Equal Employment
Opportunity Complaints



**A Report to the President
and the Congress of the United States**

**The Coalition For Change, Inc., C4C
May 2023**



The Coalition For Change, Inc. (C4C)

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<https://coalition4change.org/index.html>

May 2023

Honorable Joesph R. Biden
United States President

Senator Chuck Schumer
Senate Majority Leader

Representative Kevin McCarthy
Speaker, U.S. House of Representatives

**Subject: The Coalition For Change, Inc. (C4C) Report On The
Federal Sectors' Equal Employment Opportunity Program**

Dear Sirs,

I am honored to submit The Coalition For Change, Inc. (C4C) report entitled *The Equal Employment Opportunity Commission's Unmet Mission: Challenges Impacting Prompt, Fair and Impartial Processing of Federal Employees' Equal Employment Opportunity Complaints.* We compiled this report to address the gross deficiencies in the federal equal employment opportunity (EEO) program under the U.S. Equal Employment Opportunity Commission (EEOC). The EEOC has failed to achieve President Jimmy Carter's and Congress' goals since assuming federal equal opportunity employment (EEO) enforcement from the Civil Service Commission in 1978. Today, like its predecessor, the EEOC needs to be more active in enforcing civil rights violations in the federal workplace.

In this report we highlight twenty-one (21) challenges civil servants and job applicants confront while navigating the EEO complaint program. We also propose reforms to address the longstanding concerns of advocacy groups, legal scholars, lawmakers, and federal whistleblowers. Our recommendations align with the earlier EEO reform measures C4C shared with Representative Elijah Cummings. These measures were enacted under the *Elijah Cummings Federal Employee Antidiscrimination Act of 2020*. Paulette Taylor, C4C's Civil and Human Rights

Chair, and I met with Representative Cummings. He played a pivotal role in addressing our concerns. He incorporated our input into the bill Congress passed into law. We will remain forever grateful for his committed and proactive leadership.

In September 2021, Representatives Carolyn Maloney and Jackie Speier requested that the Government Accountability Office [GAO] study how the federal government's EEO complaint process and anti-harassment programs can better “prevent and remedy unlawful employment discrimination and advance equal opportunity in the workplace.” Therefore, we contacted GAO to offer our recommendations. The Coalition for Change, Inc. (C4C) is a volunteer organization of former and present employees harmed by federal workplace race discrimination and reprisal. We stand in solidarity with public servants who courageously oppose unlawful discrimination. The C4C hopes the information in this report will spur discussion and further reforms in the federal EEO complaint program.

Respectfully,
“In Pursuit of Equality for All”

Tanya Ward Jordan

Tanya Ward Jordan, President
The Coalition For Change, Inc. (C4C)



T. Ward Jordan (L) Rep. Elijah Cummings (C) P.Taylor (R)
[Rep. Cummings recognize C4C officers for their invaluable contribution to the bill that later became the Cummings Act]

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**It is not only what we do, but also
what we do not do, for which
we are accountable.”**

— Molière

Table of Challenges

1. The EEOC Fails to Compel Discipline for Unlawful Discrimination
 2. The EEOC Engages in Conflict of Interest –[Contracts Out Adjudicatory Role]
 3. The EEOC Imposes an Artificial “Pre-Counseling” Requirement
 4. Agencies Fail to Process Discrimination Claims
 5. The EEOC Shields Discriminating Officials
 6. The EEOC Conceals Federal Agency Transgressions
 7. The EEOC Fails to Effectively Use Sanctioning Authority
 8. The EEOC Applies Double Standard For Missed Deadlines
 9. The EEOC Shirks Its Adjudicatory Role and Remands Complainant’s Cases to Defending Agency
 10. The EEOC Fails to Provide Transparency to Complainants
 11. The EEOC Fails to Effectively Target and Perform On-site Compliance Audits
 12. Agencies Fail to Comply With Cummings Act’s Head of Agency Reporting Requirement
 13. The EEOC Leadership’s Performance Remain Deficient
 14. The EEOC Needs to Refine Annual Report/Strategic Plan
 15. Agencies Fail to Uniformly Comply with No FEAR/Cummings Act Complaint Reporting
 16. Agencies’ Counsel Obstructs Complaint Process
 17. The EEOC’s Summary Judgement Provision Favors Agencies
 18. The EEOC Imposes a Class Certification Burden
 19. Agencies Fail to Use Table of Penalties for Civil Rights Violations
 20. The EEOC’s Revised Regulations on Filing Civil Actions Undermines Its Mission
 21. EEOC is the Wrong Steward of Civil Rights Enforcement in Federal Workplace
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CHALLENGE 1

The EEOC Fails to Compel Discipline for Unlawful Discrimination



INSIGHT

EEOC fails to suggest that agencies discipline federal supervisors or managers who unlawfully discriminate. Section 717(b) of Title VII of the Civil Rights Act of 1964 states: *"The Commission is authorized to issue rules, regulations, orders, and instructions governing the federal sector . . ."*

RECOMMENDATION

- ❖ To hold federal officials accountable for breaking the law, the EEOC should exercise leadership and coordinate with the Merit Systems Protection Board and the Office of Special Counsel, as needed.
- ❖ Title IV Sec 404 (a) of Cummings law addresses "Referrals of Findings of Discrimination" to the OSC for disciplinary action.² The EEOC should post:
 - a) the number of cases it refers to OSC, and
 - b) cite the offending agency.

² Note: The EEOC maintains a Memorandum of Understanding with the OSC, but seldom refers cases for disciplinary action, C4C, Inc. discovered via a Freedom of Information Act request.

CHALLENGE 2

The EEOC Engages in Conflict of Interest and Contracts Out Adjudicatory role



INSIGHT

Office of Federal Operations (OFO) Director Carlton Hadden states OFO's first significant duty is "the responsibility of resolving appeals filed by federal employees regarding determinations on their EEO complaints."³

- ❖ The enforcement agency contracts out its vital role to private non-federal attorneys. The EEOC apparently violates the Federal Activities Inventory Act and pays outside attorneys to adjudicate its inherently governmental function.
- ❖ A conflict of interest exists because EEOC pays private law firms to rule on employee/applicant complaints filed against the EEOC.

RECOMMENDATION

The EEOC should use attorneys from other agencies via interagency agreements consistent with language on its website.

³ Statement of Carlton M. Hadden, Director of EEOC's Office of Federal Operation, Meeting of September 7, 2006, Washington D.C. on Federal Sector EEO Investigations. Retrieved from <https://www.eeoc.gov/meetings/meeting-september-7-2006-washington-dc-federal-sector-eeo-investigations/hadden>

CHALLENGE 3

The EEOC Imposes an Artificial “Pre-Counseling” Requirement on Federal Complainants



INSIGHT

The EEOC permits *non-federal* aggrieved parties to file a formal complaint without the “pre-counseling” requirement. In contrast, the EEOC requires aggrieved civil servants and job applicant challenging discrimination in the *federal* sector to submit to counseling. The artificial requirement allows defending agencies to dismiss aggrieved parties’ viable discrimination claim before they can file a formal complaint. It also misleads abused parties in the federal sector because *pre-counseling* fails to arm them with ample information on the complaint process.

RECOMMENDATION

The EEOC should revise its regulations to eliminate pre-counseling from the federal EEO complaint process. The requirement imposes an extra step civil servants must take before filing a formal complaint. Furthermore, it sets an artificial deadline. If a complainant wants to file a formal complaint, the EEOC should permit them to do so. It should then issue a letter of acceptance or rejection of claims, as appropriate.

CHALLENGE 4

Agencies Fail to Process Discrimination Claims



INSIGHT

Agencies sometimes, fail to respond to employees' and applicants' discrimination claims. For example, in 2015, the Office of Special Counsel affirmed that fifty percent (50%) of the complaints filed against U.S. Department of Agriculture high-level officials should have been acted upon promptly. *"Some of which were unaddressed for up to five years."*

RECOMMENDATION

The EEOC should revise 29 CFR 1614- Federal Sector EEO regulations. The EEOC should give aggrieved parties the right to file formally and to request an EEOC administrative hearing. This is in cases where an agency fails to timely process the party's claim according to the EEOC's guidance. When the agency fails to comply with EEOC processing guidance, the EEOC should not remand the aggrieved party's case back to the defending agency for processing. Instead, the EEOC should hear the party's case. An aggrieved person should be allowed to begin the EEO process by contacting any agency official logically connected with the EEO process. Even if that official is not an EEO counselor.

CHALLENGE 5

The EEOC Shields Discriminating Officials



INSIGHT

The EEOC provides discriminating officials anonymity and permits civil rights violators to escape accountability.

RECOMMENDATION

To promote enhanced accountability and transparency, the EEOC should:

- ❖ Name officials found guilty of violating a law in the Federal Sector Appellate decisions. In these decisions, the EEOC issues a final discrimination finding, and *no further* administrative appeal exists.
- ❖ Rather than citing S1 for Supervisor 1, name the public official who broke a civil rights law.

CHALLENGE 6

The EEOC Conceals Federal Agency Transgressions

Name
Federal Court Awards More Than \$2.6 Million to EEOC Against Green JobWorks LLC
Federal Court Awards More Than \$2.6 Million to EEOC Against Green JobWorks LLC
EEOC Issues Federal Workforce Report for 2020
EEOC Sues Otis Elevator Company for Disability Discrimination
EEOC Scores Summary Judgment Win Against UPS in Disability Discrimination Case
ResourceMFG to Pay \$75,000 to Settle EEOC National Origin Discrimination Suit
DHI Group, Inc. Conciliates EEOC National Origin Discrimination Finding
EEOC Sues Subway Franchises for Unlawful Employment Practices on the Basis of Race and Color
EEOC Sues Papa John's Pizza for Disability Discrimination
EEOC Releases Annual Performance Report for Fiscal Year 2022

INSIGHT

The EEOC conceals federal agencies' unlawful transgressions. Yet the EEOC t magnifies private sector unlawful actions on its homepage and newsroom releases. [See example above.] The EEOC fails to provide transparency and accountability for discrimination suits in the Federal government, such as . . .

- ❖ [U.S. Marshal Class Action](#) {1994- Presently pending}
- ❖ Classwide Discrimination Found at SSA
- ❖ [Women Sue F.B.I., Claiming Discrimination at Training Academy](#)

RECOMMENDATION

Post federal violations on EEOC Homepage / Newsroom

CHALLENGE 7

The EEOC Fails to Effectively Use Sanctioning Authority



INSIGHT

The EEOC rarely sanctions an agency that refuses to comply with federal EEO complaint processing guidelines in 29 CFR 1614. For example, in *Owen L v Kiran A. Ahuja, Office of Personnel Management (OPM)*⁴ the EEOC found the agency supervisor influenced witnesses and breached confidentiality. An EEOC Administrative Judge (AJ) also noted the OPM failed to schedule a hearing for over a year and canceled it three times. Therefore, the AJ entered a default judgment against the agency. OFO's Dir. Carlton Hadden reversed the AJ's decision. Despite the OPM's non-compliance with guidelines and federal officials' transgressions, including perjury, Hadden chose not to issue a default judgment against OPM.

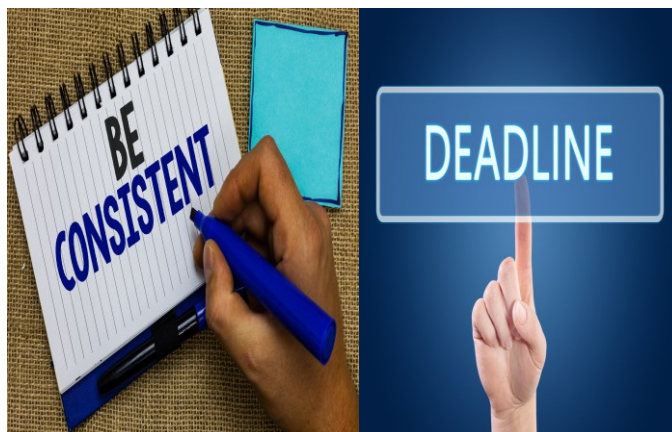
RECOMMENDATION

The EEOC should set a uniform standard to allow AJs to issue a Default *Judgement* when an agency official engages in perjury, influences witnesses, and (without just cause) exceeds investigative timeline.

⁴ Appeal No. 2020000990, July 15, 2021.

CHALLENGE 8

The EEOC Applies Double Standard for Missed Deadlines



INSIGHT

The EEOC expects complainants and defending agencies to meet timeframes. Yet, the EEOC remains lenient when seasoned EEO practitioners or agency counselors miss a deadline. In sharp contrast, if an aggrieved person misses a deadline in the complaint process, the EEOC will dismiss the complaint. Notably, according to an early Government Accounting Office report, a "*commissioner noted that a double standard exists.*"⁵

The EEOC is also quick to affirm an agency's dismissal of a party's complaint. *Stella B. v. U.S. Postal Service* illustrates how unforgiving EEOC is when an aggrieved person misses a complaint deadline. In *Stella*, the agency sent a notice of right to file a formal complaint to the complainant's address on May 19, 2014. The complainant's husband signed it. On June 17, 2014, the complainant filed her complaint. The agency dismissed the case asserting it went beyond the 15-day period.⁶ The EEOC affirmed the agency's dismissal of the complainant's complaint for being untimely brought.

⁵ (GAO-09-712) (p. 12)

⁶ The complainant appealed to the EEOC, stating that her husband did not tell her about the notice. Nevertheless, the EEOC held that receipt of a document at a complainant's correct address by a complainant's family member of suitable age and discretion constitutes constructive receipt by the complainant. *Stella B. v. U.S. Postal Serv.*, EEOC Appeal No. 0120142802 (January 7, 2016)

The EEOC is most forgiving when a defending agency fails to complete an EEO investigation timely. Notably, the EEOC asserts agencies must complete an investigation within 180 days of filing a complaint without complaint amendment. Yet, in Miquelina S. v William P., a case where the agency took 330 days to complete the investigation the EEOC pardoned the agency. Although, the EEOC cited how the agency "*exceeded even an extended time limit by a wide margin*" (p.4) the EEOC⁷ reversed the AJ's Default Order to sanction the agency. It remanded the complaint to the delinquent defending agency for further action.

RECOMMENDATION

The EEOC should provide revised guidance. Absent just cause, if an agency fails to conduct, complete timely, thoroughly investigate, or forward an investigation to the EEOC when the aggrieved party requests a hearing, the EEOC AJ should issue a default judgment in the complainant's favor. The EEOC should stop routinely pardoning agency officials if it seeks to combat discrimination. The onus should be on seasoned agency practitioners to contact the AJ with an explanation if agency officials cannot justifiably meet EEOC's long-established guidance.

⁷ EEOC pardoned the agency for its noncompliance and reversed AJ's Default Judgement in favor of the Complainant. [Decision Jan. 27, 2020-Bernadette B. *Wilson, Exec. Officer]

CHALLENGE 9

The EEOC Shirks Its Adjudicatory Role and Remands Complainant's Cases to Defending Agency



INSIGHT

EEOC guidelines prescribe, "*Within 15 days of receipt of the request for a hearing, the agency shall provide a copy of the complaint file to the EEOC and, if not previously provided, to the complainant*". [29 CFR 1614.108](#) However, the EEOC often fails to enforce its guidance, neglects its duty to provide hearings and returns cases to the alleged discriminating agency to rule.

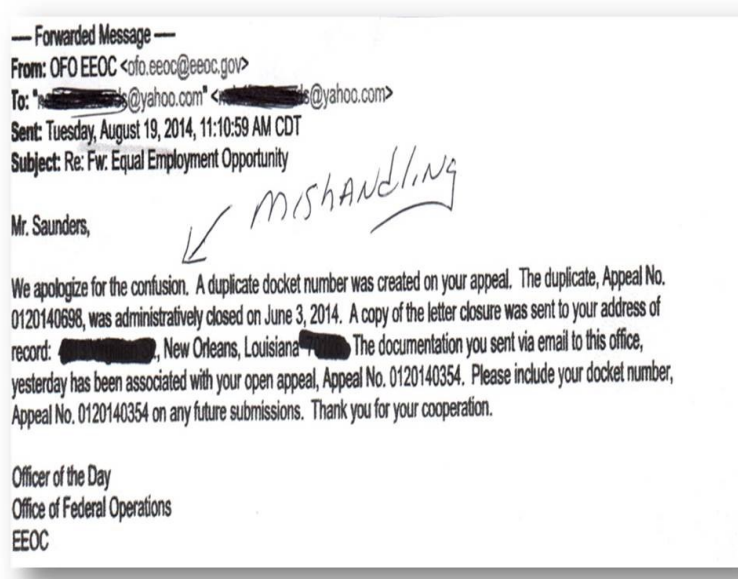
Take the *Kennedy v Vilsack*. In *Kennedy* case. USDA failed to comply with EEOC's AJ's Order to produce a complaint file. Therefore, instead of [sanctioning](#) the agency and issuing a default judgment as Kennedy requested, the EEOC abdicated its duties. The "enforcement agency" returned the case to USDA to issue a Final Agency Decision.

RECOMMENDATION

The EEOC's AJ should issue default judgments, and OFO should uphold default judgments when agencies defy a judge's order without a just cause.

CHALLENGE 10

The EEOC Fails to Provide Transparency to Complainants Seeking Case Information



INSIGHT

The EEOC lacks transparency in response to aggrieved parties in the federal sector. EEOC Employees often respond to complaint information anonymously. Rather than provide a name to aid inquiring parties, the EEOC allows its staff to sign off on emails or answer phone inquiries as “Attorney of the Day” or “Officer of the Day”

RECOMMENDATION

The EEOC should have its “Attorney of the Day” or “Officer of the Day” staff respond to callers either using their name or providing an operator code for enhanced accountability.

CHALLENGE 11

The EEOC Fails to Effectively Target and Perform On-Site Compliance Audits



INSIGHT

The EEOC conducts on-site field audits to assess agency guidance compliance. Despite C4C's many FOIA inquiries and a Congressional request about the EEOC field audit activity, the EEOC has never replied responsively. Moreover, the EEOC has ignored Alcohol Tobacco and Firearms' employees and other Federal employees' request for an on-site audit of the agencies EEO complaint processing practices.

RECOMMENDATION

The EEOC should post on its website how many on-site field audits it has performed, where the audits were performed and findings. The EEOC should also make public the criteria it uses to determine when an on-site audit should be performed.

CHALLENGE 12

Agencies Fail to Comply With Cummings Act “Head of Agency Reporting Requirement”



INSIGHT

According to the EEOC, an effective and compliant program requires direct reporting between the EEO director and the agency head. In 2021, Congress passed the Elijah E. Cummings Federal Employee Antidiscrimination Act. The Act requires the head of each Federal agency’s Equal Employment Opportunity (EEO) Program to report to the agency head. The EEOC defines⁸ a direct reporting structure as “*one where the head of the agency supervises the person with day-to-day control of the agency’s EEO program.*” Based on an EEOC FY 2021 survey⁹, only **36%** (5) of the large agencies **responded** that they maintained a direct reporting structure. Leadership unwillingness represented the primary obstacle to a direct reporting structure.

RECOMMENDATION

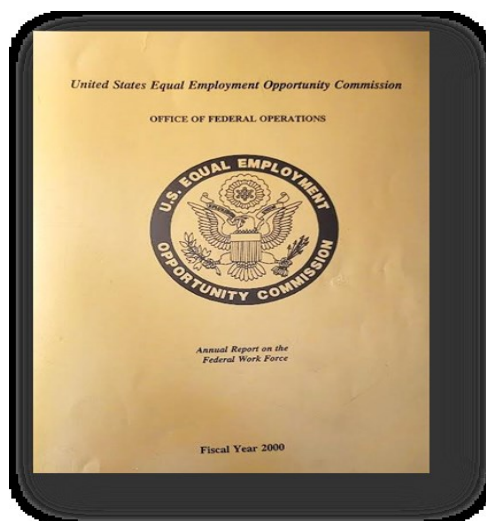
The EEOC should issue agency deficiency letters and post non-complying agencies on its website. Target these officials for an on-site review to increase agency compliance with guidelines.

⁸ <https://www.eeoc.gov/federal-sector/reports/status-and-impact-direct-reporting-structures-federal-agencies>

⁹ Status and Impact of Direct Reporting Structures for Federal Agencies

CHALLENGE 13

The EEOC Leadership Performance Remains Deficient



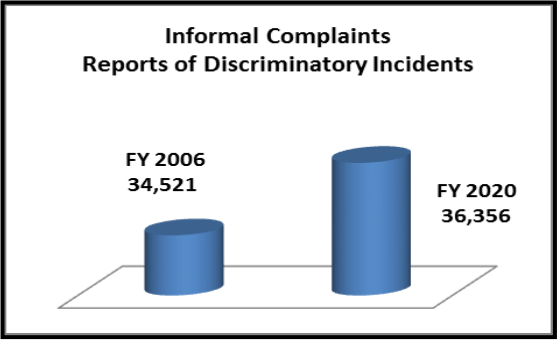
INSIGHT

The Office of Field Programs (OFP) Administrative Judges preside over *hearings* for discrimination cases filed by federal employees. OFP oversees and supports the EEOC's field offices. The Office of Federal Operations (OFO) resolves *appeals* filed by federal employees regarding EEO complaint determinations. The OFO also oversees and aids Executive Branch agencies in complying with EEO legal requirements. For decades OFPs and OFOs' leadership¹⁰ and enforcement have remained sluggish as civil servants suffer in a discriminatory climate.

The EEOC's *Annual Report of the Federal Workforce* reveals the constant flow of employees reporting federal workplace discrimination and retaliation incidents. Rather than focus on enforcing anti-discrimination laws, holding agencies accountable for non-compliance, or advocating discipline for federal officials who break civil rights laws, the EEOC emphasizes in its report to Congress how it reduces its workload. To civil servants' pain, the EEOC's strategy to reduce its hearing workload is to deny civil servants a hearing on viable discrimination claims.

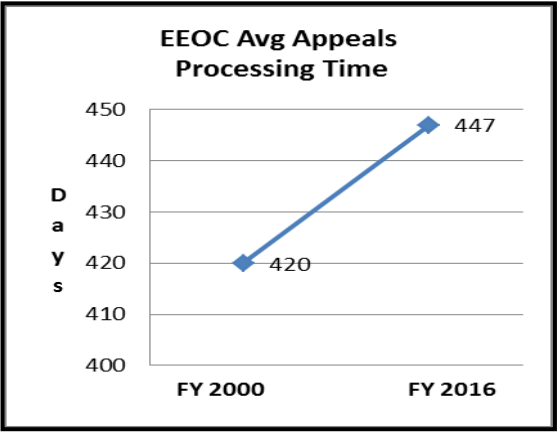
¹⁰ Carlton Hadden has served as the OFO Director for over twenty –two years. EEOC's OFO Director is named in the complaint headed for trial. *Menoken v. Janet Dhillon*, EEOC No. 1-5284 (D.C. Cir., 9/15/20).

Another method OFO and OFP to reduce its workload is to engage in excessive processing delays to the point civil servants either give up or file a lawsuit in court.



Informal Complaints
FY 2006 (34,521) FY2020 (36,356)

Formal Complaints
FY 2006 (16,723) FY2020 (14,003)



Avg Processing Times
Appeals 2000/420 days
Appeals 2016/447 days

RECOMMENDATION

Leadership change is warranted. Due to OFP/OFO's stagnant leadership and enforcement performance, the Commissioners and Congress should scrutinize their performance.¹¹ The counseling reports and class action complaints reveal that OFP/OFOs fail to meet the intended goals.

¹¹ 5 USC 4313 Appraisals of Senior Executive Service: "Appraisals of performance in the Senior Executive Service shall be based on both individual and organizational performance . . ."

CHALLENGE 14

EEOC Needs to Refine Annual Report/Strategic Plan



INSIGHT

The EEOC's core mission is to prevent and remedy unlawful employment discrimination and advance equal opportunity for all in the workplace. In the private sector, the EEOC functions like an advocate. It allows aggrieved parties to file discrimination claims directly with the EEOC. However, the role the EEOC plays in the non-federal sector differs dramatically. The EEOC adjudicates federal employees' claims. The aggrieved are unable to file a discrimination claim directly with the EEOC.

The EEOC should present measures to address its *dual role* when presenting a narrative in its [Annual Performance Reports](#), [Congressional Budget Justification](#), and [Strategic Plan](#). Presently, the EEOC combines its performance measure narrative for non-federal and federal sector employers. By doing so, the EEOC fails to provide an accurate picture to Congress of its achievements and shortcomings.

RECOMMENDATION

EEOC needs to separate private from public sector goals. Additionally, EEOC needs to establish the No FEAR Act and Cummings' Act Performance Measures.

CHALLENGE 15

Agencies Fail to Report No FEAR/Cummings Act Complaint Data Uniformly



INSIGHT

No FEAR Act/Cummings Act data must be publicly accessible from each agency's home page. Cummings Act Sec 1135 specifies individual and class action complaint data to be posted. While some agencies/departments comply with posting requirements, others do not. Compliance – Sec. 1133 requires the agency to post a *Notification of Violation*. Given the EEOC's sketchy guidance, agencies consistently post varied information in varied formats. Upon the C4C's review, agencies, including the EEOC, failed to post "class action " data pursuant to Cummings Act. Per the Cummings law, each agency is to post the following:

Individual Complaints

Date of a discriminatory finding

Law violated

Whether decision has been made about discipline

Class Action Complaints

Date class action filed

Summary of allegations

of Plaintiffs

Complaint status

Case # for civil actions - discrimination found

RECOMMENDATION

The EEOC should update its guidance to standardize the posting of agency data. *Regarding notification of violations, the EEOC should require agencies to report findings of discrimination at the lowest unit level where the discriminatory act occurred.* To illustrate, when discrimination is found at the Veteran Affairs (VA), it is insufficient to report a discriminatory finding happened at the “VHA” (Veterans Hospital Admin). In this example, VA should disclose the geographical level, the medical center, and the actual unit where discrimination was found.

Recap:

- ❖ EEOC should standardize agency posting data under No FEAR and Cummings Act
- ❖ EEOC should ensure agencies data is accessible from webpage
- ❖ EEOC should require agencies to post notices down to the unit level

CHALLENGE 16

Agency Counsel Obstructs Complaint Process



INSIGHT

The EEOC guidance states: *“There must be a firewall between the EEO function and the agency's defensive function.”* Still, the agencies' General Counsel helps agency witnesses write affidavits during the investigative process and non-compliant offenders face no penalties. As the EEO ruled in the Agency for International Development (AID) class action case below -- *“impartiality and the appearance of impartiality is paramount to the credibility of the equal employment program”* (p5)

Example 1: *Larraine D, et. al v Samantha Power* (AID) Appeal Nos. 2020003744-2020003746 Complainants requested sanctions when General Counsel interfered in the complaint process and the agency found “no discrimination.” In [Larraine D, et.al](#) the EEOC remanded the case back to the agency without sanction, even after the EEOC found:

- Agency’s [Office of Civil Rights and Diversity (OCD)] failed to maintain its impartiality in drafting the final decisions in Complainants’ cases.
- “. . . the actions by the OCD in accepting the work product of its [General Counsel] as a starting point for issuing its final decision to impinge the integrity of the EEO decision-making process.

Example 2: [Josefina L v. SSA](#)

EEOC Appeal No. 012016760 July 10, 2018

Agency attorney directly influenced manager's written testimony for the EEO investigator. The attorney *"reviewed and revised it."*

RECOMMENDATION

EEOC should reaffirm its position on counsel interference and impose penalty when found.

-

Moreover, SJs are problematic because the EEOC's AJs¹³ often misuses them to:

- ❖ Decide cases without giving plaintiffs the full benefit of discovery
- ❖ Delay cases (some cases sit for years without a ruling)
- ❖ Rule on cases with scanty or no explanation for granting defending agency's motion
- ❖ Make factual findings in the agency's favor without reliable evidence to support arguments
- ❖ Credit information in the agency's brief & agency controlled investigative file
- ❖ Reduce their hearings backlog.

SJ creates a systemic pro-defendant bias due to the pressure on AJs to move their dockets along and end cases rather than letting them go to a hearing. The EEOC gives AJs wide latitude when using their SJ authority. Yet, some AJs lack the training to use SJs. Others lack the discernment to properly assess when material facts are in genuine dispute.¹⁴ Do note, private sector aggrieved parties do not have to face SJ in an administrative proceeding. The SJ mechanism, employed in the federal EEOC complaint "*administrative process*" sinks viable claims. It permits egregious acts to flourish in the federal sector.

RECOMMENDATION

The EEOC should end SJs in the federal EEO complaint administrative process or suspend the SJ practice until AJs are given ALJ standing commensurate with the Administrative Procedures Act.. Use of the SJs simply create a pro-defendant bias in a setting where the defending agency retains control of the complaint intake activity and the investigative process which go before the ruling AJ for SJ rulings.

¹³ AJ needs more independence to judge fairly. They lack subpoena power, which could allow an aggrieved party to prove their case better.

¹⁴ In *Jennifer K. v. Dep't of the Navy*, EEOC Appeal No. 2020001035 (May 20, 2021), the EEOC reversed the agency's final decision after finding that AJ improperly used SJs and issued a decision without a hearing

CHALLENGE 18

The EEOC Imposes “Class Certification” Burden



INSIGHT

While in the administrative EEO complaint system, the EEOC imposes a class action "certification" requirement on civil servants and job applicants contesting workplace discrimination.¹⁵ Glaringly, aggrieved parties in the non-federal sector do not have to undergo a similar official certification process when contesting discriminatory acts by their employer. In the Federal realm, certification holds civil servants hostage in the administrative process for years. Rather than focusing on the legitimacy/merit(s) of a claim an aggrieved party brings, the EEOC chooses such issues as numerosity, that is, how many other people were impacted. To share a figurative analogy, rather than fix a pothole on the road a motorist complains about, the EEOC chooses to have the party present how many other motorists have rolled over the pothole rather than fix the pothole if it exists.

The EEOC certification requirement undermines its goal of eliminating discrimination. It stalls aggrieved parties in an unnecessary administrative process and directs others with similar claims in a holding pattern until such issues are

¹⁵ Class actions filed in court must go through the court's "certification process."

resolved. The class action cases below are only a few that have left civil servants waiting for justice amid a retaliatory workplace culture.

- ❖ Janet Howard et al. v Commerce
- ❖ Fogg v Marshals Service
- ❖ Taylor v Social Security Administration
- ❖ USDA Forest Service Firefighting Crew "Open Letter"
- ❖ Dennis Turner. et al. vs. Bureau of Prisons (1999Present)

Class certification need not be a pre-requisite to keep the EEOC from ordering class relief for a known problem. For example, where it can be proven that an unlawful act causes a disparate impact on a group of people, as in the Menoken¹⁶ case, neither a class action nor certification is needed to address the problem. The EEOC can order relief. In the Menoken case, the plaintiff filed a complaint and proved the O.P.M. used a particular benchmark as part of the ALJ application process — "partner in a large law firm." The use of the benchmark created a disparate impact based on race.

RECOMMENDATION

Obtain a legal opinion to determine the feasibility of eliminating the preliminary class certification requirement. To address promptly systemic discrimination impacting federal workers and to provide class relief as soon as possible, when needed, the EEOC should eliminate the "certification" process and focus on the merit(s) of a claim an aggrieved party brings that has class implications.

¹⁶ Cassandra M. Menoken ("Menoken"), an African American female attorney employed at the ("EEOC") who seeks to be a federal Administrative Law Judge ("ALJ"), brings this action against the U.S.s Office of Personnel Management ("O.P.M."). She charged that O.P.M.'s design, implementation, and/or administration of the ALJ application process unlawfully discriminates against African Americans and females.. *Menoken v. Blair*, Civil Action 03-01775 (H.H.K.) (D.D.C. Sep. 27, 2005) Retrieved from <https://casetext.com/case/menoken-v-blair-2>

CHALLENGE 19

Agencies Fail to Use Table of Penalties {EEO Forum}



INSIGHT

EEO claims often involve personal abuse. Yet, once an EEO case is dismissed, settled, or in court, agencies ignore the credible abuses the aggrieved party raises. Agencies fail to use their “*Table of Penalties*,” which provides letters of reprimand, suspensions, removals, and more for personnel infractions. Discriminating officials are often rewarded and escape discipline because of EEO loopholes and personnel offices disconnect. Take the case of Craig Littlejohn¹⁷ where an AJ found Littlejohn's discriminatory animus toward African American employees intense. In the case, the¹⁸ Appellate Court ruled that Littlejohn improperly interfered with the selection process for a job sought by a black man who was significantly better qualified than the job candidate. Nevertheless, a few weeks after the EEOC found Littlejohn guilty of discrimination, Interior Department rewarded Littlejohn with a pay increase..

¹⁷ EEOC Case No. 570-2008-00625X July 2, 2010.

¹⁸ Interior Department still has a way to go on the diversity front, Federal Diary, <https://www.washingtonpost.com/wp-dyn/content/article/2010/08/25/AR2010082506768.html>

They failed to use the penalty from Interior’s discipline chart for Little John's unlawful conduct. (See extract narrative below from Interior’s website)

DOI Department Manual Table of Offenses and Penalties	
4.	“Discourteous conduct toward supervisors, co-workers, or the public.”
5.”	Boisterous or disruptive/disorderly conduct; use of insulting, intimidating, abusive or offensive language”
10.	Failure to provide equal opportunity regardless of race, color, religion, gender, national origin, age, marital status, or handicapping condition”.

RECOMMENDATION

A liaison position could be created to interface with the EEO and Human Resources office to follow up when an obvious personnel abuse is raised during the complaint process, and the complaint has been resolved (i.e., settled, finally decided). At a minimum, the EEOC should instruct agency EEO practitioners to issue a referral letter to HR advising officials of a likely personnel infraction.

CHALLENGE 20

The EEOC's Revised Regulations on Filing Civil Actions Undermines Its Mission



Photo by Sora Shimazak

INSIGHT

Many civil servants prefer a hearing before a U.S. Equal Employment Opportunity Commission's (EEOC) administrative judge on their discrimination claims over a Final Agency Decision (FAD) from the employer named in their discrimination complaint. Because the EEOC promotes itself as a fair adjudicator, Federal employees tend to lean that way. Still, before formally requesting a hearing, some complainants wonder: Is the agency created to enforce Title VII and end unlawful employment discrimination a friend or foe to civil servants?

Through its revised regulations, the EEOC answered. The EEOC sent a grim message through the rules to distressed men and women who seek the enforcement agency's help when suffering workplace discrimination. On June 11, 2020, the EEOC changed the Federal sector complaint processing regulations to 29 CFR 1614.409. Sadly, the guidance dubbed Effect of Civil Action shows up for aggrieved Federal employees like a Trojan horse. It reads: "*A Commission decision on an appeal issued after a complainant files suit in district court will not be enforceable by the Commission.*" The EEOC officials finalized its guidance months before Congress passed the Elijah Cummings Federal Employee Antidiscrimination Act. Strikingly, when the EEOC modified section 29 CFR 1614.409 to decree: "Commission decision on an appeal . . . will not be enforceable," it undermined the bedrock of the Cummings law. The law

emphasizes "accountability" and the need to "enforce" discipline when Federal employees intentionally commit discriminatory acts.

*Neville vs. Lipnic, Chair of the EEOC (2018)*¹⁹, exposes EEOC's foot-dragging when duty calls for it to enforce civil rights laws in federal agencies. In *Neville*, a female National Guard technician appeared in court. She filed a mandamus to get the EEOC to act on a Petition for Enforcement against her employer. During the administrative process, the EEOC found the National Guard Bureau (NGB) guilty of egregious gender discrimination against Neville; but the EEOC declined to compel the discriminating agency to comply with its order. Rather than make the NGB do the right thing, the EEOC argued against Neville. According to court records, the EEOC claimed it did "not have a clear duty to act" and "any obligation the EEOC had to enforce its decision ceased when Neville filed the instant suit ... (Neville vs. Lipnic, 2018, p. 9)." The EEOC's latest pronouncement puts civil servants battling inequality in a disturbing and Catch-22 dilemma. The question builds. **What action should one take when the EEOC refuses to enforce its order for relief and accountability?**

29 CFR § 1614.409 Effect of filing a civil action	
April 10, 1992	June, 2020
Filing a civil action under § 1614.408 or § 1614.409 shall terminate Commission processing of the appeal. If private suit is filed subsequent to the filing of an appeal the parties are requested to notify the Commission in writing.	Filing a civil action under § 1614.407 or § 1614.408 shall terminate Commission processing of the appeal. A Commission decision on an appeal issued after a complainant files suit in district court will not be enforceable by the Commission.

RECOMMENDATION

Congress needs to know the EEOC created a guideline that impedes its duty to “stomp out and remedy discrimination.” It modified regulations to convey it has no duty to enforce Title VII and eliminate unlawful employment discrimination should a federal complaint go to court.

¹⁹ In 2018, the EEOC won the case against Neville on the "no clear duty to act" premise before a Western District of Texas Court Judge. In 2020, the EEOC updated the Federal complaint processing guidance to match Neville's claim. In *Neville*, an illuminating twist emerged. Although an EEOC Administrative Judge delivered Neville, a National Guard Technician, a "mixed" result on her claim, Neville did not proceed to Court on the disability claim.

CHALLENGE 21

EEOC, The Wrong Steward of Civil Rights Enforcement in Federal Workplace



INSIGHT

The EEOC serves as the civil rights enforcement steward, as of the federal government, which includes 2.1 million civilian workers.²⁰ “As the nation's largest employer, the federal government must model effective employment policies and practices that advance America's ideal of equal opportunity for all.”²¹ However, the goal will likely never come to fruition because the EEOC is the wrong steward. The EEOC, a federal agency, adjudicates federal agency complaints. The EEOC's placement as an “enforcement” agency within the Executive Branch creates conflict. It impedes its ability to serve as a neutral adjudicator. The EEOC rarely rules in favor of the aggrieved party alleging workplace discrimination.

According to the *EEOC Annual Report of the Federal Workforce*, the EEOC found discrimination in FY 2020 only three percent (3%) of the time. It ruled in favor of the agency ninety-seven (97) percent of the time.

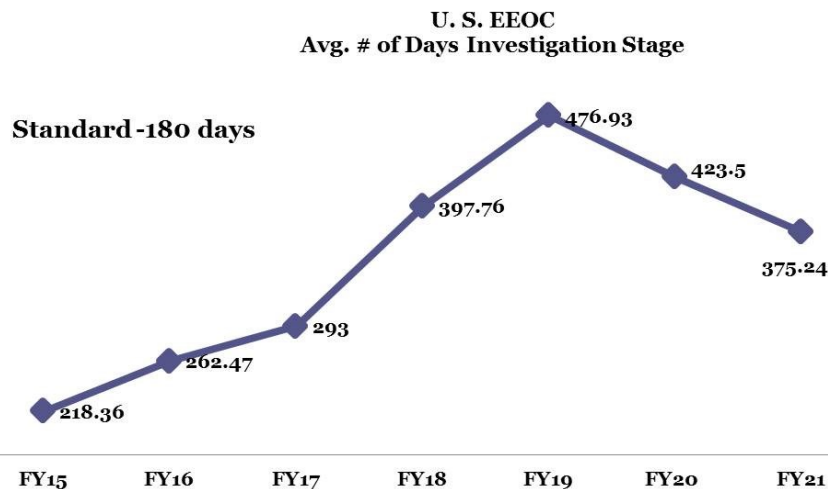
20 Congressional Research Service: (June 28, 2022) Federal Workforce Statistics Sources: OPM and OMB Retrieved from <https://sgp.fas.org/crs/misc/R43590.pdf>

21 U.S. Department of Labor. Retrieved from <https://www.dol.gov/agencies/odep/program-areas/employers/federal-employment#:~:text=As%20the%20nation's%20largest%20employer,of%20equal%20opportunity%20for%20all.>

The EEOC resists framing EEO guidance evenhandedly because EEOC officials know it will be held to the regulations it publishes for federal agencies. Likewise, it adopts a weak position on sanctioning agencies for non-compliance because the EEOC fails to follow its own guidelines. .

- EEOC does not post a direct link from its webpage pursuant to the Cummings Act
- EEOC does not avoid conflicts of interest. [The EEOC pays outside contractors to determine if the EEOC discriminates against EEOC employees and job applicants.
- EEOC recorded 33,147 complaint of counseling in FY 2013 compared to 36,356 complaint counselings In 2020²²
- EEOC exceeds the 180-day investigatory standard it sets for agencies.²³ ["Agencies must complete an investigation within 180 days of filing a complaint."²⁴

EEOC Fails to Conduct Timely Complaint Investigation



- The EEOC subjects complainants to long processing and appeal times

²² Annual Report of the Federal Workforce 2020, p.9 Annual Report of the Federal Workforce 2020, p.13

²³ <https://www.eeoc.gov/no-fear/equal-employment-opportunity-data-posted-pursuant-no-fear-act>

²⁴ <https://www.eeoc.gov/federal-sector/formal-complaint-investigation-process>

EEOC Long Processing Times

Fiscal Year	FY 2000	FY2016
HEARINGS	381 days	500 days
APPEALS	420 days	447 days

SOURCE: Annual Report of the FW 2000 p v-6 Table V-2 VI-4 Figure V11
 U.S. [EEOC Strategic Enforcement Plan FY 2017 - 2021](#) Executive Summary SEP Priorities (E.d.4)

The EEOC employs Administrative Judges (AJ), often mistaken for Administrative Law Judges (ALJ). AJs do not enjoy independence as ALJs. AJs are to preside neutrally over the administrative court. However, unlike ALJs, AJ's pay, rewards, leave, telework, and other benefits are subject to their EEOC supervisors' approval. Hence the climate reeks of conflict of interest. Statistics and testimonials from victims of discrimination show that the EEOC's AJs (federal employees within the Executive Branch) are challenged when finding federal agencies liable for discrimination. No doubt, AJs realize their judgment or actions can damage their personal and financial interests when presiding over federal employment claims.

RECOMMENDATION

As long as the EEOC stewards over the federal sector, accountability measures should be taken to reduce conflict of interest within the EEOC. One such measure would be to use Administrative Law Judges (ALJ) rather than AJs to preside over the federal complaint process. The placement of ALJ would be consistent with the Administrative Procedure Act. This would ensure EEOC adjudicators had more independence and were free from employers' control and influence.