RECLAIMING EEOC'S MISSION

Patrick O. Patterson*

October 1, 2021

I. Introduction

When Congress created the Equal Employment Opportunity Commission (EEOC or Commission), it declared that the purpose of the agency was to "prevent any person from engaging in any unlawful employment practice" prohibited by Title VII of the Civil Rights Act of 1964 (Title VII).[1] EEOC itself has stated that its mission is "to prevent and remedy unlawful employment discrimination and advance equal opportunity for all in the workplace."[2] However, toward and at the end of the previous administration, the Trump-appointed majority of the EEOC, led by Chair Janet Dhillon (the Trump EEOC),[3] seemed bent on undermining that

* Patrick O. Patterson is an attorney who served as Senior Counsel to the Chair, U.S. Equal Employment Opportunity Commission (2010-2014) and Deputy Director, Office of Federal Contract Compliance Programs, U.S. Department of Labor (2014-2017). He previously taught employment discrimination law and other subjects at the University of Wisconsin and UCLA Law Schools, and served as Assistant Counsel (New York) and Western Regional Counsel (Los Angeles) for the NAACP Legal Defense and Educational Fund, Inc.

[1] 42 U.S.C. § 2000e-5(a).

[2] EEOC Website, https://www.eeoc.gov/overview.

[3] The term "Trump EEOC," as used in this paper, refers to the Commission as it existed between May 15, 2019, and January 20, 2021, when Janet Dhillon was the Trump-appointed Chair of the EEOC, and particularly during the period between September 22, 2020, and January 20, 2021, when Ms. Dhillon and two other Trump-appointed Republicans constituted

mission.[4] It sought to hollow out the agency's staff and to adopt policies that obstructed, rather than enhanced, enforcement of Title VII,[5] the Equal Pay Act (EPA),[6] the Age Discrimination in Employment Act (ADEA),[7] the Americans with Disabilities Act (ADA),[8] the Rehabilitation Act,[9] and the Genetic Information Nondiscrimination Act (GINA).[10]

In recent months, some steps have been taken to undo the damage that was done during the previous administration and to enhance EEOC's ability to serve its mission. Upon taking office in January 2021, President Biden replaced the Trump-appointed Chair and Vice Chair of the

---

the majority of the five-member Commission. *See* EEOC Website, https://www.eeoc.gov/commission.

[4] *See* Jenny R. Yang and Cathy Ventrell-Monsees, "Employment: Three Strategies To Advance Equality," *Democracy, a Journal of Ideas* (Fall 2020), https://democracyjournal.org/magazine/special-symposium/employment-three-strategies-to-advance-equality/ ("the Trump Administration, rather than enforcing the nation's anti-discrimination laws to protect workers, has unleashed a tidal wave of divisive actions that make it harder to hold employers accountable for discrimination. Trump's appointed chair of EEOC, Janet Dhillon, has actively undercut the agency's longstanding, bipartisan mission by starving the agency of staff and creating hurdles to effective enforcement"). The cited article advocates dramatically increasing the agency's budget and staff and refocusing its resources on systemic discrimination.

[5] 42 U.S.C. § 2000e *et seq*.

[6] 29 U.S.C. § 206.

[7] 29 U.S.C. § 621 *et seq*.

[8] 42 U.S.C. § 12101 *et seq*.

[9] 29 U.S.C. §§ 794, 794a.

[10] 42 U.S.C. § 2000ff *et seq*.

Commission with his own appointees, Charlotte Burrows and Jocelyn Samuels,[11] thus transferring administrative control of the agency to them.[12] EEOC's new leadership, the Biden administration, and Congress have been able to reverse some of the Trump-era damage. For example, EEOC reinstated its statutorily mandated obligation to share EEO-1 data with state and local fair employment practice agencies;[13] President Biden revoked an executive order that effectively prohibited federal agencies, contractors, and grantees from conducting meaningful diversity, equity, and inclusion

[11] EEOC Website, https://www.eeoc.gov/commission.

[12] *See* 42 U.S.C. § 2000e-4(a).

[13] Title VII requires EEOC to provide to state and local fair employment practice agencies – "upon request and without cost" – the data it obtains in annual employer information (EEO-1) reports filed by private employers. 42 U.S.C. § 2000e-8(d). After decades of complying with this requirement, the Trump EEOC stopped doing so, and instead severely restricted the access of state and local agencies to that data. In October 2020, California and other states sued the EEOC over its new policy. *California v. Dhillon*, No. 3:20-cv-07664-EMC (N.D. Cal., complaint filed Oct. 30, 2020). In 2021, after the change in agency leadership, EEOC reverted to its previous policy of sharing EEO-1 data with state and local agencies in accordance with Title VII, and the lawsuit was settled. *Id.* (stipulation of dismissal without prejudice approved July 12, 2021).

training;[14] and Congress repealed a regulation that severely limited EEOC's ability to conciliate cases.[15]

[14] In September 2020, President Trump issued a sweeping executive order that, in essence, prohibited government contractors and grantees, federal departments and agencies, and the U.S. military from conducting most, if not all, effective DEI programs. The order also suggested that such programs "may contribute to a hostile work environment and give rise to potential liability under Title VII." Executive Order 13950 ("Combating Race and Sex Stereotyping,"), 86 Fed. Reg. 60683, 60688 (Sept. 22, 2020). In one of the lawsuits challenging the order, the district court issued a nationwide preliminary injunction prohibiting implementation and enforcement of sections 4 and 5 of EO 13950. *Santa Cruz Lesbian and Gay Community Center v. Trump,* Case No. 5:20-cv-07741-BLF (N.D. Cal., Dec. 22, 2020), https://www.dol.gov/sites/dolgov/files/OFCCP/eo-13950/SantaCruz81-PreliminaryInjunction.pdf. On January 20, 2021, President Biden issued Executive Order 13985, which revoked EO 13950 and directed agency heads to review, identify, and consider suspending, revising, or rescinding all proposed and existing agency actions relating to or arising from EO 13950. *Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/ (Jan. 20, 2021).

[15] Shortly before and continuing after the 2020 election, EEOC rushed a new conciliation regulation through the rulemaking process. *See Update of Commission's Conciliation Procedures*, 86 Fed. Reg. 2974 (Jan. 14, 2021). The Commission had previously used a flexible conciliation process, which is mandated by Title VII and was upheld by the Supreme Court in *Mach Mining, LLC v. EEOC*, 575 U.S. 480 (2015). The new rule imposed a set of rigid requirements that compelled EEOC to make extensive and detailed disclosures of its investigative information and its legal analysis to employers and other respondents in all conciliations. The rule would have, in effect, turned EEOC into a free pretrial, investigative, and legal analysis service for employers; exposed employee witnesses to retaliation; jeopardized the agency's deliberative process, attorney-client, and attorney work product privileges; and spawned new rounds of non-merits litigation over whether EEOC had adequately complied with all the new requirements. *See Statement of Administration Policy,* https://www.whitehouse.gov/wp-content/uploads/2021/05/SAP-S.J.-Res.-13.pdf (May 18, 2021). On June 30, 2021, President Biden signed a joint resolution of Congress repealing the new rule pursuant to the Congressional Review Act, 5 U.S.C. § 801 *et seq*. *See* https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/30/bills-signed-s-j-res-13-s-j-res-14-s-j-res-15/.

Within days after the 2020 election, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) issued a final rule that, like EEOC's new conciliation rule, requires its staff to make expanded disclosures to federal contractors in connection with compliance reviews under Executive Order 11,246. *See* 41 C.F.R. §§ 60-1.33(a)(4) (Predetermination Notices) and (b)(3) (Notices of Violation) (OFCCP "will disclose why, in the absence of qualitative evidence, the agency is issuing the [Notice] based on evidence of an extraordinarily compelling disparity alone," and "upon the contractor's request, OFCCP must also provide the model and variables used in any statistical analysis and an explanation for why any variable proposed by the contractor was excluded from that analysis."). 85 Fed. Reg.

Congress has the theoretical power to enact more far-reaching statutory amendments that could correct judicial misinterpretations of Title VII and other civil rights laws, and could also make those laws more effective vehicles for preventing discrimination and advancing equal opportunity in the workplace. For example, Congress could – in theory – overturn court decisions approving forced arbitration in employment cases,[16] limiting the scope and effectiveness of the ADEA,[17] and imposing a strict "but-for" causation standard in many civil rights cases.[18] Congress could also – again, in theory – expand the types of employment covered by

71553, 71571 (Nov. 10, 2020), https://www.federalregister.gov/documents/2020/11/10/2020-24858/rin-1250-aa10. The OFCCP rule remains in effect.

[16] *See Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991) (ADEA); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (California Fair Employment and Housing Act); *Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009) (ADEA); *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (Fair Labor Standards Act and state law claims; class and collective action waivers are enforceable).

[17] *See Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009)*; Smith v. City of Jackson,* 544 U.S. 228 (2005); *Meacham v. Knolls Atomic Power Laboratory*, 554 U.S. 84 (2008); *Kleber v. CareFusion Corp.*, 914 F.3d 480 (7th Cir. 2019) (*en banc)*, *cert. denied,* 140 S. Ct. 306 (2020); *Villarreal v. RJ Reynolds Tobacco Co.*, 839 F.3d 958 (11th 2016) (*en banc*), c*ert. denied,* 137 S. Ct. 2292 (2017).

[18] *See Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009); *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013); *Comcast Corp. v. National Ass'n of African American-Owned Media*, 140 S. Ct. 1009 (2020).

the employment discrimination laws,[19] increase statutory damage caps,[20] and strengthen EEOC's enforcement authority.[21] Given the current political divisions in Congress, however, such legislative action seems extremely unlikely.

This paper will therefore focus on positive changes EEOC can and should make without any additional legislative authorization.

II. The Structure and Composition of the EEOC

The Commission by statute consists of five members – no more than three of whom may be from one party – appointed by the President and

---

[19] Title VII, ADA, GINA, and ADEA protect only actual or prospective "employees" from discrimination, generally excluding interns, part-time workers, gig workers, independent contractors, and anyone else not considered a traditional employee. *See*, *e.g.*, 42 U.S.C. § 4000e(f) ("[t]he term 'employee' means an individual employed by an employer …"); *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 449-50 (2003); *Alam v. Miller Brewing Co.*, 709 F.3d 662, 663, 668-69 n.3 (7th Cir. 2013).

[20] The Civil Rights Act of 1991 amended Title VII, the ADA, and the Rehabilitation Act to provide for awards of compensatory and punitive damages in cases of intentional discrimination, but capped those awards at $50,000 per party for employers with 15-100 employees, $100,000 for employers with 101-200 employees, $200,000 for employers with 201-500 employees, and $300,000 for employers with more than 500 employees. 42 U.S.C. § 1981a. These caps have not been changed since 1991, even though a dollar today is worth only about half as much as a dollar in 1991. See U.S. Bureau of Labor Statistics, https://www.bls.gov/data/inflation_calculator.htm ($1.00 in 1991 equivalent to buying power of approximately $2.00 in 2021).

[21] Congress could, for example, amend Title VII to grant EEOC substantive rulemaking authority (*see* 42 U.S.C. § 2000e-12(a)); clarify EEOC's authority to sue in pattern-or-practice cases (*see* 42 U.S.C. § 2000e-6); and specify that employers are required to maintain employment records for a period of at least three years (*see, e.g.*, 42 U.S.C. § 2000e-8 and 29 C.F.R. § 1602.14).

confirmed by the Senate to serve staggered five-year terms.[22] The current Commissioners and the expiration dates of their terms are:[23]

Charlotte Burrows, Chair (Democrat; term ends July 1, 2023)
Jocelyn Samuels, Vice Chair (Democrat; term ends July 1, 2026)
Janet Dhillon (Republican; term ends July 1, 2022)
Keith Sonderling (Republican; term ends July 1, 2024)
Andrea Lucas (Republican; term ends July 1, 2025)

Chair Burrows now has administrative control of the agency,[24] and has the power to determine whether and when policy decisions – including the adoption, repeal, or revision of regulations and guidance documents – may come before the Commission for a vote. When and if there is a vote on any matter of policy, however, those decisions will continue to be made by a majority of the Commission. So long as the three Republican Commissioners continue to vote as a bloc (as they have so far), they will remain in control of determining EEOC policy, and they will be unlikely to

[22] 42 U.S.C. § 2000e-4(a).

[23] EEOC Website, https://www.eeoc.gov/commission.

[24] 42 U.S.C. § 2000e-4(a) ("[t]he Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission …"). "The Chair is responsible for the administration and implementation of policy and the financial management and organizational development of the Commission." EEOC Website, https://www.eeoc.gov/commission.

vote in favor of overturning any changes they made during the Trump administration.

Title VII provides that EEOC Commissioners "shall be appointed by the President by and with the advice and consent of the Senate for a term of five years" and that the General Counsel shall be "appointed by the President, by and with the advice and consent of the Senate, for a term of four years."[25] Unlike some other statutes establishing regulatory agencies, Title VII does not specify whether the President, with or without cause, may remove the Commissioners or the General Counsel before the expiration of their terms. The Department of Justice Office of Legal Counsel has taken the position that EEOC "is an Executive Branch agency whose members serve at the pleasure of the President and are removable without cause."[26] Thus, a new President may arguably remove and replace EEOC Commissioners (or the General Counsel) appointed by a previous President without cause before the expiration of their statutory terms.

[25] 42 U.S.C. §§ 2000e-4(a) and (b)(1).

[26] 7 Op. O.L.C. 57, 65 (1983) (footnote omitted). *Cf. Seila Law LLC v. CFPB,* 140 S. Ct. 2183, 2198-99 (2020) (holding that the President has the authority to remove the Director of the Consumer Financial Protection Bureau before the completion of the Director's 5-year term without cause and that a statute imposing a for-cause requirement was unconstitutional, but distinguishing the single-director structure of the CFPB from the multi-commissioner structure of agencies like EEOC).

No evidence has come to light indicating that any EEOC Commissioner has ever been removed and replaced in these circumstances. But in January 2021, President Biden did terminate the General Counsel of the National Labor Relations Board, who had been appointed for a four-year term under language of the National Labor Relations Act that is identical to (and was the model for) that of the General Counsel provision of Title VII.[27] And in March 2021, the President terminated the EEOC General Counsel, whose term was not due to expire until 2023; she was replaced with an Acting General Counsel.[28] It is therefore possible that President Biden could attempt to remove one or more of the Republican Commissioners before the expiration of their terms. However, in view of the political blowback that such a move would generate – undoubtedly surpassing that caused by the termination of a General Counsel – it seems unlikely that the President would take such action.

Assuming that President Biden does not remove and replace any of the Republican Commissioners, they all could in theory elect to stay in

[27] *See* 29 U.S.C. § 153(d); 42 U.S.C. § 2000e-4(b). The termination of the NLRB General Counsel, and his replacement with an Acting General Counsel, were upheld in *Goonan v. Amerinox Processing, Inc.*, No. 1:21-cv-11773-NLH-KMW (D.N.J. July 14, 2021).

[28] *See* "Presidential Power Questioned After EEOC's Top Lawyer Fired," https://news.bloomberglaw.com/daily-labor-report/presidential-power-questioned-after-sacking-of-eeocs-top-lawyer (March 9, 2021).

office until their terms expire. However, it has been customary in the past for deposed Chairs to leave soon after a new Chair has been named, and not to serve out their full term as a Commissioner. If ex-Chair Dhillon (or one of the other Republican Commissioners) decides to leave early,[29] she could be replaced by a Democratic Commissioner, and the Democrats would then have a majority. If, on the other hand, Commissioner Dhillon and the other Republicans choose to stay through their terms, Democrats will not have a majority – and therefore will not have control over policy decisions – until after the end of her term on July 1, 2022, and after a new Democratic Commissioner has been appointed by the President and confirmed by the Senate.[30]

[29] Past EEOC Chairs have frequently chosen to leave after the election of a new President of the opposite party, thus allowing the new President to appoint a new member of the Commission. For example, Eleanor Holmes Norton was appointed Chair by President Carter in 1977 and left the Commission in 1981 after the election of President Reagan in 1980; Evan J. Kemp Jr. was appointed Chair by President George H.W. Bush in 1990 and left the Commission in 1993 after the election of President Clinton in 1992; Ida L. Castro was appointed Chair by President Clinton in 1998 and left the Commission in 2001 after the election of President George W. Bush in 2000; and Naomi C. Earp was appointed Chair by President George W. Bush in 2006 and left the Commission in 2009 after the election of President Obama in 2008. *See* https://en.wikipedia.org/wiki/Equal_Employment_Opportunity_Commission.

[30] A sitting member of the Commission whose term has expired may continue to serve for up to 60 additional days when Congress is in session, or longer if a nomination to fill the vacancy has been submitted to the Senate, but may not serve after the adjournment *sine die* of the session of the Senate in which such a nomination has been submitted. 42 U.S.C. § 2000e-4(a)(1) and (2).

Even if the Republican Commissioners remain in the majority for some time to come, Chair Burrows should exercise her administrative authority over the agency by taking certain constructive steps on her own as soon as possible, such as changing internal procedures to bring back procedural safeguards (*e.g.,* reforming Commission voting procedures and ending an alternative dispute resolution pilot) and issuing technical assistance documents that apply existing legal positions to new facts (*e.g.,* implementing the Supreme Court's decision in *Bostock v. Clayton County*[31] and applying the ADA and its reasonable accommodation provisions to specific disabilities, including deafness).

III. What the Commission Can and Should Do

When Democratic Commissioners eventually become the EEOC majority, there is no guarantee that they will vote in a bloc as the Trump Republicans have. Indeed, it has not been unusual in the past for Commissioners to form alliances across party lines and to vote for policy changes advocated by Commissioners from the opposing party. That is how a bipartisan Commission *should* function. However, the new majority

[31] 140 S. Ct. 1731 (2020) (holding that Title VII's prohibition of sex discrimination includes discrimination based on sexual orientation and gender identity).

will have opportunities to take – and they should take – some robust action to rebuild and strengthen the agency's ability to accomplish its mission. Some examples follow.

A. Reinstate the Collection of Pay Data.

EEOC should reinstitute an appropriate system for employers to report pay data as well as the racial and gender composition of their work forces. Since the 1960s, pursuant to Title VII and implementing regulations,[32] all private employers with 100 or more employees, and federal contractors with 50 or more employees meeting certain criteria, have been required to file an annual Employer Information Report (EEO-1 Component 1 Report) that contains demographic workforce data by sex, race, ethnicity, and job category.[33]

In 2016, after years of consideration and collaboration with the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) as well as a study by the National Academy of Sciences, EEOC adopted and the Office of Management and Budget (OMB) approved a

[32] 42 U.S.C. § 2000e-8(c); 29 CFR 1602.7-.14 and 41 CFR 60-1.7(a).

[33] See EEOC Website, https://www.eeoc.gov/employers/eeo-1-data-collection. The reports are filed with a joint reporting committee composed of EEOC and OFCCP. 29 C.F.R. § 1602.7. EEOC is required to share these reports, upon request, with state and local fair employment practice agencies. 42 U.S.C. § 2000e-8(c).

requirement that employers also report summary W-2 earnings data for their employees by sex, race, ethnicity, and job category beginning in March 2018 (EEO-1 Component 2 Report). In August 2017, however, the Trump OMB stayed the Component 2 pay data collection OMB had previously approved, and EEOC discontinued that collection. Litigation ensued, and the court held that EEOC and OMB had violated the Administrative Procedure Act. The court vacated OMB's stay and reinstated OMB's previous approval,[34] and it subsequently ordered EEOC to collect the Component 2 data for 2017 and 2018.[35]

EEOC complied with the court's orders and collected pay data for 2018 and 2019, but in September 2019 EEOC requested OMB approval of a proposal to abandon the collection of EEO-1 Component 2 pay data while it continued to collect Component 1 employment data for three more years.[36] OMB approved this request in June 2020,[37] and accordingly EEOC

[34] *National Women's Law Center v. Office of Management and Budget,* 358 F. Supp. 3d 66 (D.D.C. 2019).

[35] *National Women's Law Center v. Office of Management and Budget,* Civil Action No. 17-cv-2458 (D.D.C. Feb. 10, 2020).

[36] EEOC 30-Day Notice of Information Collection, 85 Fed. Reg. 16340, https://www.federalregister.gov/documents/2020/03/23/2020-06008/agency-information-collection-activities-existing-collection#citation-36-p16347 (March 23, 2020).

[37] EEOC Website, https://www.eeoc.gov/wysk/what-you-should-know-about-publication-eeo-1-30-day-notice.

again stopped collecting the Component 2 data. As of this writing, it is unclear whether the agency has made any use of the pay data it collected under court order.

Even before there is a new majority, Chair Burrows (if she has not already done so) should assign career staff to analyze and present options based on other pay data collection systems, such as those in California and some European countries.[38] Staff should also be assigned to analyze the pay data EEOC collected in 2018-2019 as well as the results of an ongoing National Academy of Sciences study[39] as soon as those results are available. When the Commission has a new majority, it should adopt a new system for collecting EEO-1 Component 2 pay data.

B. Revise the New Compliance Manual Section on Religious Discrimination.

[38] *See* Cal. Govt. Code § 12999; Cal. DFEH Website, https://www.dfeh.ca.gov/paydatareporting/; European Commission, *Pay Transparency in the EU,* file:///C:/Users/popsc/Documents/DFEH/Riot%20Games/eeln_pay_transparency_in_the_eu_46F4A75D-E8DB-2F86-FF7C113A2E3FED3D_44501.pdf (April 2017); https://www.cloudpay.com/resources/a-guide-to-pay-parity-laws-around-the-world (April 18, 2019).

[39] National Academy of Sciences, "Panel to Evaluate the Quality of Compensation Data Collected from U.S. Employers by the Equal Employment Opportunity Commission through the EEO-1 Form," https://www8.nationalacademies.org/pa/projectview.aspx?key=51938 (March 24, 2021); EEOC Website, https://www.eeoc.gov/newsroom/eeoc-announces-analysis-eeo-1-component-2-pay-data-collection (News Release, July 16, 2020).

In November 2020, shortly after the election, the Trump EEOC solicited public comment on a new version of Section 12 of the EEOC Compliance Manual, which covers religious discrimination.[40] On January 15, 2021 – five days before President Biden was inaugurated and could appoint the new Chair and Vice Chair of the Commission – EEOC canceled a previously scheduled meeting to consider the proposed revisions and announced instead that it had approved a revised version of Section 12 by a 3-2 vote.[41] The new section (Revised § 12) was then posted on the EEOC website.[42]

Although much of Revised § 12 is a straightforward update of EEOC's past guidance on Title VII's prohibition of religious discrimination against workers,[43] it contains several provisions that are designed not to

---

[40] *See* Press Release*, EEOC Seeks Public Input on Revised Enforcement Guidance on Religious Discrimination,* https://www.eeoc.gov/newsroom/eeoc-seeks-public-input-revised-enforcement-guidance-religious-discrimination (Nov. 17, 2020); EEOC, *Proposed Updated Compliance Manual on Religious Discrimination 11-17-20* ("Revised § 12"), https://beta.regulations.gov/document/EEOC-2020-0007-0001 (posted Nov. 16, 2020).

[41] Press Release, *Commission Approves Revised Enforcement Guidance on Religious Discrimination*, https://www.eeoc.gov/newsroom/commission-approves-revised-enforcement-guidance-religious-discrimination (Jan. 15, 2021). Although the Commission did not specify or explain what changes it had made to its initial proposal, the final revised version of Section 12 does not appear to differ significantly from the proposed version with respect to the matters discussed below.

[42] EEOC Website, https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination.

[43] Section 12 of the Compliance Manual was last updated in 2008. *See* Transcript of EEOC Meeting, https://www.eeoc.gov/meetings/meeting-november-9-2020-discussion-update-compliance-manual-section-religious/transcript (Nov. 9, 2020) (statement of then-EEOC Legal Counsel Andrew Maunz).

protect workers from discrimination based on *their* religious beliefs and practices, but rather to enhance the ability of employers to discriminate against workers based on the *employers'* professed religious beliefs.[44] For example, new provisions of Revised § 12:

- Suggest, citing dicta in *Burwell v. Hobby Lobby Stores, Inc.*,[45] that Title VII's religious organization exception[46] is not limited to

---

[44] After the election, the Trump OFCCP issued a final rule that adopts a similarly expansive reading of the "religious organization" exemption in section 204 of Executive Order 11,246. The OFCCP rule, which amends 41 C.F.R. § 60-1.3, allows federal contractors, including for-profit corporations, to discriminate against workers based on the contractors' professed religious beliefs. 85 Fed. Reg. 79324 (Dec. 9, 2020), https://www.federalregister.gov/documents/2020/12/09/2020-26418/implementing-legal-requirements-regarding-the-equal-opportunity-clauses-religious-exemption. *See, e.g.,* 41 C.F.R. § 60-1.3(4)(iii)(B) (example of a for-profit company that likely qualifies as a religious organization because its "mission statement and other materials show a religious purpose," its "predominant business activity of providing kosher meals directly furthers and is wholly consistent with that self-identified religious purpose, as are its hiring and training practices," and it "holds itself out as a religious organization" in its advertising and on its website).

On January 21, 2021, two lawsuits were filed challenging the OFCCP rule under the Administrative Procedure Act, one by Democracy Forward and the National Women's Law Center on behalf of two non-profit labor organizations and the American Federation of Teachers, and the other by a coalition of 15 states. *See Oregon Tradeswomen, Inc. v. United States Department of Labor*, Case No. 3:21-cv-00089, https://democracyforward.org/wp-content/uploads/2021/01/Oregon-Tradeswomen-et-al-v.-DOL-1.21.21.pdf (D. Ore., filed Jan. 21, 2021); *State of New York v. United States Department of Labor*, Case No. 1:21-cv-00536, https://democracyforward.org/wp-content/uploads/2021/01/NY-et-al.-v.-DOL-1.21.21.pdf (S.D.N.Y., filed Jan. 21, 2021). OFCCP subsequently advised the courts that it intended to rescind the new rule. *See* https://news.bloomberglaw.com/daily-labor-report/labor-department-to-rescind-religious-contractor-exemption-rule (Feb. 10, 2021). As of this writing, however, the new rule appears to remain on the books. *See* OFCCP Website, https://www.dol.gov/agencies/ofccp/executive-order-11246 and https://www.ecfr.gov/current/title-41/subtitle-B/chapter-60/part-60-1/subpart-A/section-60-1.3.

[45] 573 U.S. 682 (2014).

[46] 42 U.S.C. § 2000e-1(a) ("This subchapter [Title VII] shall not apply … to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.")

churches and other religion-based non-profits, but may also allow for-profit corporations to discriminate based on religion.[47] Revised § 12 treats this as an open question, stating that "Title VII case law has not definitively addressed whether a for-profit corporation that satisfies the other factors can constitute a religious corporation under Title VII."[48]

- State that Title VII's exception allows religious organizations, which may include for-profit corporations, to discriminate in favor of "individuals who share their religion, defined not by the self-identified religious affiliation of the employee, but broadly by the *employer's* religious observances, practices, and beliefs," and to terminate employees whose conduct or religious beliefs are inconsistent with those of their employers.[49]
- Endorse an extremely broad reading of *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*[50] and *Our*

---

[47] *See* Revised § 12-1.C.1, nn. 62-63.

[48] Revised § 12-1.C.1.

[49] *Id*. (emphasis added).

[50] 565 U.S. 171 (2012).

Lady of Guadalupe School v. Morrissey-Berru.[51] In those decisions, the Supreme Court adopted a First Amendment ministerial exception to employment laws for certain jobs in religious institutions. Revised § 12 indicates that, in a broad range of jobs far beyond the scope discussed by the Supreme Court, the ministerial exception may permit religious employers not only to discriminate in hiring and termination based on sex or race, but also to engage in sexual and racial harassment with impunity, thus depriving many religious organization employees of any protections whatsoever under the antidiscrimination laws.[52]

- Contend, despite substantial case law to the contrary, that the First Amendment and the Religious Freedom Restoration Act[53] may provide private employers with defenses against claims of religious discrimination and failure to accommodate employees'

[51] 140 S. Ct. 2049 (2020).

[52] *See* Revised § 12-1.C.2 and n. 86.

[53] 42 U.S.C. § 2000bb *et seq*.

religious beliefs and practices.[54] Revised § 12 describes all the cases rejecting such defenses as "unsuccessful[ ] thus far."[55]

EEOC should further revise section 12 of the Compliance Manual to bring it back into line with the purpose of Title VII, which is to protect *workers* from discrimination, not to shield employers from liability for discrimination. EEOC can properly recognize cases like *Hosana-Tabor* and *Our Lady of Guadalupe* without unnecessarily expanding them to shield private, for-profit corporations from liability for imposing their religious beliefs on their employees.

C. Extend Employer Recordkeeping Requirements from One to Three Years.

The antidiscrimination statutes contain no express requirement for employers to maintain employment records for any specific period of time. Title VII merely requires employers to make and keep "records relevant to the determinations of whether unlawful employment practices have been or are being committed," and to "preserve such records for such periods … as

[54] *See* Revised § 12-1.C.3 and n. 117.

[55] *Id.*, n. 117.

the [EEOC] shall prescribe by regulation or order ….”[56] The ADA[57] and GINA[58] impose the same requirement by reference to the cited section of Title VII. Similarly, the ADEA gives EEOC the authority to require employers to keep records “necessary or appropriate for the administration of this chapter.”[59]

EEOC has issued regulations pursuant to Title VII, the ADA, and GINA requiring the preservation of “any personnel or employment record made or kept by an employer … for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later,” or “for a period of one year from the date of termination.”[60] In many cases, the one-year period – which has remained unchanged since 1991[61] – is not long enough to provide EEOC investigators (and plaintiffs in subsequent litigation) with sufficient information to get a full picture of the employer’s treatment of the charging party and any relevant class over time

[56] 42 U.S.C. § 2000e-8(c).

[57] 42 U.S.C. § 12117(a).

[58] 42 U.S.C. § 2000ff-6(a).

[59] 29 U.S.C. § 626(a).

[60] 29 C.F.R. § 1602.14.

[61] *See* 56 Fed. Reg. 35753, 35755 (July 26, 1991).

or to make meaningful comparisons with the treatment of other similarly situated employees.

EEOC should amend its regulations to require employers to maintain certain specified records (as set forth in the ADEA regulations), [62] as well as all other records ordinarily made and kept by the employer (as set forth in the Title VII-ADA-GINA regulations), for a uniform three-year period so that EEOC investigators would have access to more complete information.

D. Return to EEOC's Previous Delegation of Litigation Authority to the General Counsel and Regional Attorneys.

In EEOC's Strategic Enforcement Plan (SEP) for 2017-2021,[63] adopted in 2016, the Commission reaffirmed, with minor modifications, its prior delegation to the General Counsel (GC) of the authority to decide to commence or intervene in litigation in all cases, with the following exceptions: (1) cases that may involve a major expenditure of agency resources, a category that was "expected to include many systemic, pattern-or-practice or Commissioner charge cases"; (2) cases that present

[62] EEOC's ADEA regulations require employers to make and keep payroll and certain other records for a period of three years, but other personnel and employment records are required to be kept only "for a period of 1 year from the date of the personnel action to which any records relate." 29 C.F.R. § 1627.3.

[63] U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan, Fiscal Years 2017-2021, https://www.eeoc.gov/us-equal-employment-opportunity-commission-strategic-enforcement-plan-fiscal-years-2017-2021.

issues in a developing area of the law; (3) cases that the GC "reasonably believes to be appropriate for submission for Commission consideration, for example, because of their likelihood for public controversy or otherwise"; and (4) all recommendations in favor of EEOC participation as *amicus curiae*.[64] The 2017-2021 SEP also ratified the Commission's prior decision to authorize the GC to redelegate to Regional Attorneys (RAs) the GC's authority to commence litigation.[65]

In March 2020, the Commission dramatically curtailed the GC's authority. It revised the SEP's litigation delegation to require Commission approval for cases involving issues in which EEOC had taken or was proposing to take a position contrary to precedent in the federal Circuit where the case would be filed. For cases not clearly requiring Commission approval, the March 2020 modification established a process of consultation between the GC and the Chair to determine if the proposed litigation should be voted on by the Commission; thus, then-Chair Dhillon alone could permit the GC (who was then also a Trump appointee) to file such cases, or she could insist that any cases proposed by the GC must be approved by a majority of the Commission. In addition, the March 2020

[64] *Id.*, § IV.A.2.1.

[65] *Id.*, § IV.A.2.2.

modification revoked the Commission's prior ratification of the GC's authority to redelegate to RAs the authority to commence litigation.[66]

On January 13, 2021 – seven days before President Biden was inaugurated and the new Chair and Vice Chair were appointed – the Commission adopted a new resolution, by a Republican-majority vote of 3-2, which further eroded the GC's litigation authority. The January 2021 resolution bestows on the Trump-appointed majority of the Commission the sole authority to decide whether to commence or intervene in: (1) all systemic discrimination and pattern-or-practice cases; (2) all cases expected to involve a major expenditure of agency resources; (3) all cases presenting issues on which the Commission has taken a position contrary to Circuit precedent; (4) all cases presenting a position on which the GC proposes to take a position contrary to Circuit precedent; (5) "[o]ther cases reasonably believed to be appropriate for Commission approval in the judgment of the General Counsel"; (6) all recommendations in favor of

[66] *See* EEOC, *What You Should Know About EEOC and Modified Delegation of Litigation Authority,* https://www.eeoc.gov/wysk/what-you-should-know-about-eeoc-and-modified-delegation-litigation-authority (Jan. 13, 2021) (summary of the March 2020 revision; the actual text of that revision does not appear to be available anywhere on the EEOC website).

EEOC participation as *amicus curiae*; and (7) a minimum of one litigation recommendation from each District Office in each fiscal year.[67]

Additionally, the January 2021 resolution requires the GC to submit all *other* cases – *i.e.,* all cases that do not fit into any of the seven criteria above – to *all* Commissioners for a five-day review period before filing suit, and to submit such cases to the full Commission for a vote if a majority of the Commission so determines during that five-day period. The effect of this provision is to repeal the authority granted to ex-Chair Dhillon in March 2020, under which she determined whether to submit such cases to the full Commission for a vote. Now, new Chair Burrows no longer has that authority; instead, the Republican-majority Commission itself will decide whether the GC must submit each case to the Commission for approval. Finally, the January 2021 resolution permits the GC to redelegate to RAs only the authority to refer public-sector Title VII, ADA, and GINA cases to the Department of Justice for litigation; it does not permit the GC to redelegate to RAs the authority to commence any litigation.[68]

---

[67] *EEOC Resolution Concerning the Commission's Authority to Commence or Intervene in Litigation and the Commission's Interest in Information Concerning Appeals,* https://www.eeoc.gov/resolution-concerning-commissions-authority-commence-or-intervene-litigation-and-commissions-0 (Jan. 13, 2021).

[68] *Id*.

EEOC should review its Trump-era policies regarding the delegation and redelegation of litigation authority, as well as *amicus curiae* participation,[69] and should restore an appropriate balance that will allow the General Counsel and Regional Attorneys to perform their legitimate law enforcement functions without undue political intervention by the Commission.

E. Return to the Commission's Former Interpretation of its Title VII Pattern-or-Practice Authority.

In September 2020, the Trump EEOC issued an opinion letter[70] reversing its longstanding interpretation of its "pattern-or-practice" authority under section 707 of Title VII.[71] Relying on the language of the statute,[72]

---

[69] Also on January 13, 2021, by a vote of 5-0, the Commission voted to revise the procedures for obtaining Commission approval of *amicus curiae* recommendations. The revised procedures include provisions stating that, in 18 months (*i.e.,* July 13, 2022), "the Commission will conduct an evaluation of practical experience gained to assess whether alterations to the procedures are warranted," and that "[t]hese procedures may be modified at the Commission's discretion by Commission vote." *EEOC Revised Procedures for Commission Approval of Amicus Curiae Participation,* https://www.eeoc.gov/revised-procedures-commission-approval-amicus-curiae-participation (Jan. 13, 2021). It is perhaps noteworthy that the end date for this evaluation period will occur right after ex-Chair Dhillon's term on the Commission is set to expire.

[70] *EEOC Opinion Letter: Section 707*, https://www.eeoc.gov/commission-opinion-letter-section-707 (Sept. 3, 2020).

[71] 42 U.S.C. § 2000e-6.

[72] Section 707(a), as enacted in 1964, originally authorized the Attorney General to file an action when he or she has "reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by [Title VII]." 42 U.S.C. § 2000e-6(a). As the EEOC's new opinion letter acknowledges, section 707 actions by the Attorney General were and are not subject to the pre-suit requirements (the filing of a charge, a formal finding of reasonable cause, and an attempt to conciliate) that apply to actions brought under other sections of Title VII. *EEOC Opinion Letter: Section 707*, at n.6. In

EEOC had previously taken the position that it could bring a section 707 action against a private employer for "a pattern or practice of resistance to the full enjoyment of any of the rights secured by [Title VII],"[73] without tying that resistance to a specific violation of any other section of Title VII. Additionally, EEOC – like the Attorney General, who had formerly exercised that pattern-or-practice authority – had determined that it was not required to satisfy the pre-suit requirements of section 706 (*i.e.,* the filing of a charge, a formal finding of reasonable cause, and an attempt to conciliate),[74] which apply to actions brought under sections 703 (discrimination)[75] and 704 (retaliation).[76] Both EEOC and the Department of Justice – including the Trump Justice Department – have interpreted Title VII in this manner for decades.[77]

1972, Congress enacted section 707(c), which transferred to EEOC the authority to bring pattern-or-practice actions against private employers while leaving with the Attorney General the authority to bring such actions against state and local government employers. 42 U.S.C. § 2000e-6(c).

[73] 42 U.S.C. § 2000e-6(a).

[74] 42 U.S.C. § 2000e-5.

[75] 42 U.S.C. § 2000e-2.

[76] 42 U.S.C. § 2000e-3.

[77] Both before and since the inauguration of President Biden, the Civil Rights Division's website has stated that, in addition to its authority to prosecute cases referred by EEOC, the Department of Justice "also has authority to initiate investigations and prosecute enforcement actions against state and local government employers where it has reason to believe that a 'pattern or practice' of employment discrimination exists." U.S. Department of Justice, Civil Rights Division, *Laws Enforced by the Employment Litigation Section*, https://www.justice.gov/crt/laws-enforced-

However, rejecting the Justice Department's interpretation of Title VII as well as EEOC's own prior interpretation, the September 2020 opinion letter concluded that EEOC cannot bring a lawsuit under section 707 unless it can also establish a violation of section 703 or 704, and that before filing any section 707 suit EEOC must satisfy the pre-suit requirements that apply to other sections of the statute. The opinion letter, which essentially confers immunity on employers who rely on it,[78] cites exactly one appellate case[79] that has adopted this interpretation of Title VII. Other cases, however, have long recognized that EEOC can sue under section 707 without satisfying the requirements imposed on suits brought under other sections of Title VII. "Section 707 does not make it mandatory that anyone file a charge against the employer or follow administrative timetables before the suit may be brought. It was unquestionably the design of Congress in the enactment of § 707 to provide the government

employment-litigation-section. *See also United States v. New Jersey,* 473 F. Supp. 1199, 1205 (D.N.J. 1979) ("Section 707 nowhere mandates that the Attorney General follow EEOC procedures before initiating suit.").

[78] An EEOC opinion letter protects employers from Title VII liability for actions they take "in good faith, in conformity with, and in reliance on" matters addressed in the letter. 42 U.S.C. § 2000e-12(b). If such a defense is established, it "shall be a bar to the action or proceeding, notwithstanding that … after such act or omission, [the opinion expressed in the letter] is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect." *Id.*

[79] *EEOC v. CVS Pharmacy, Inc.*, 809 F.3d 335 (7th Cir 2015).

with a swift and effective weapon to vindicate the broad public interest in eliminating unlawful practices, at a level which may or may not address the grievances of particular individuals."[80]

EEOC should rescind the September 2020 opinion letter and return to its prior interpretation of section 707, which was and is consistent with the language and purpose of Title VII.

III. Conclusion

With a new Chair and Vice Chair in place, and with the eventual emergence of a new majority, EEOC will have opportunities to undo some of the damage done to it and its mission during the Trump years. Although Congress is likely to remain gridlocked and unable to enact any constructive changes in Title VII or other employment discrimination legislation in the foreseeable future, there is much the Commission can and should do under its existing statutory authority to reclaim its mission of preventing discrimination and advancing equal opportunity in America's workplace.

[80] *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 843 (5th Cir. 1975). *See also Serrano v. Cintas Corp.*, 699 F.3d 884, 896 (6th Cir. 2012) ("§ 707 permits the EEOC to initiate suit without first receiving a charge filed by an aggrieved individual, as it must when initiating suit under § 706").