NELA
Advocates for Employee Rights℠
National Employment Lawyers Association

July 13, 2012

Honorable Jacqueline A. Berrien, Chair
Office of the Chair
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

Honorable Constance Barker, Commissioner
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

Honorable Chai Feldblum, Commissioner
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

Honorable Victoria Lipnic, Commissioner
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

Dear Chair Berrien and Commissioners:

On behalf of the National Employment Lawyers Association (NELA) – in my capacity as a longtime NELA member and volunteer, and as a current NELA Executive Board member and the organization's Vice President of Public Policy – I congratulate you and the Commission staff for seeking public recommendations regarding the Strategic Enforcement Plan (SEP) for Fiscal Years 2012-2016 with respect to improving the EEOC's enforcement, outreach, prevention, and customer service efforts.

We understand that the SEP is expected to play a key role in establishing the framework for achieving the EEOC's mission and its vision of "justice and equality in the workplace." NELA shares this vision. Hence, we appreciate the opportunity to provide the following comments

National Office • 417 Montgomery Street, Fourth Floor • San Francisco, California • 94104 • TEL 415.296.7629
Washington DC Office • 1828 L Street, NW, Suite 600 • Washington DC • 20036 • TEL 202.898.2880
email: nelahq@nelahq.org • www.nela.org • FAX 866.593.7521

and to participate in roundtable discussions on the SEP, which the EEOC has scheduled for July 18, 2012.[1]

I. Enforcement

The EEOC should factor in the critical role of the private bar in employment civil rights enforcement in establishing strategies to implement the Commission's enforcement priorities.

EEOC enforcement priorities always can be expected to have a multiple impact. If successfully implemented, they will directly influence the agency's areas of focus and affect allocation of EEOC resources. But such priorities also can be expected to indirectly affect – whether enhancing or impeding – the role of the private bar in employment civil rights law enforcement.

One example is the "A,B, C" charge processing hierarchy. Focusing on promising class "A" charges obviously improves the efficiency of the Commission's enforcement efforts. But if this system also has the effect, whether intentionally or unintentionally, of delaying the processing of class "B" charges (many of which, while not sure winners or cutting-edge cases, have merit), lessening the vigor and quality of the EEOC's investigation of such charges, or discouraging timely sharing with charging parties and private counsel of the Commission's investigation (e.g., defense position statements and/or other key information gleaned from defendants), then this method of prioritizing EEOC resources may weaken private enforcement by charging parties and private counsel.

In NELA's view, this potential and unintended counterproductive consequence of establishing and implementing enforcement priorities should be considered by the EEOC as a factor to be avoided. After all, to the extent it exists, it acts as a "negative" that counterbalances the positive benefits of the EEOC's focus on strategic enforcement priorities.

The EEOC should post worksharing agreements between Fair Employment Practices Agencies (FEPAs) on its website.

An individual has the option of filing a charge with either the EEOC or with a Fair Employment Practices Agency (FEPA) in jurisdictions where such agencies enforce laws

[1] In regard to NELA's views, please also see NELA's Comments on the EEOC's Strategic Plan for FY 2012-2016 dated February 1, 2012. In addition, we have conveyed to other participants in the roundtables NELA's views on substantive enforcement priorities in the areas in which the EEOC is active. Here, however, we take the opportunity to focus on other aspects of the SEP.

similar to those enforced by the Commission. When an individual initially files with a FEPA that has a worksharing agreement with the EEOC, and the allegation is covered by a law enforced by the EEOC, the FEPA will dual file the charge with EEOC but will usually retain the charge for processing.

We urge the EEOC to post all worksharing agreements between FEPAs and the Commission on its website considering the public benefits of this initiative and the fact that many FEPAs are charged with enforcing employment discrimination laws that might provide broader protections than Title VII of the Civil Rights Act of 1964. We are cognizant of the potential obstacle to disclosure with respect to legal impediments in a *minority* of worksharing agreements. Nevertheless, the majority of agreements not posing legal issues should be posted as soon as possible; the others should be posted reasonably soon once language not subject to disclosure is identified and redacted. A reasonable timeline for posting of most agreements is by September 1, 2012, and the remainder by the end of 2012.

II. Customer Service

The EEOC should implement an agency-wide policy regarding the prompt sharing of the Respondent Position Statement with charging parties.

During the EEOC Roundtable at the NELA 2011 Annual Convention in New Orleans, LA, NELA members raised a series of issues regarding the lack of consistency in procedures Regional and District EEOC offices follow in terms of responding to requests for sharing of the Respondent Position Statement. In subsequent conversations, NELA and Commission representatives have discussed the potential efficiencies that could be achieved in terms of case resolution, as well as subsequent private enforcement, if the Respondent Position Statement were shared with charging parties. These include a higher likelihood of charging parties obtaining a realistic assessment of the strength of their cases, and private counsel proceeding to court in cases with relatively greater merit. In addition, the Commission would have an enhanced ability to assess how cases fall on its priority ladder if the agency has a response from charging parties based on an actual Respondent Position Statement.

It appears from the record that the Commission has long since committed to routine sharing of the Respondent Position Statement, but has never fully implemented this policy position. On December 1, 1994, Chairman Gilbert F. Casellas authorized a task force chaired by Vice-Chairman Paul M. Igasaki to conduct a "clean slate" review of the Commission's charge processing procedures. On April 19, 1995, the Commission adopted a series of motions incorporating key recommendations of the task force. In addition, the Chairman announced a number of action items implementing the new procedures.

Section II (C)(9)(d) of the EEOC's 1995 *Priority Charge Handling Procedures* for private and non-federal public sector cases filed by charging parties, plainly lays out the Commission's own policy regarding this matter:

> The Chairman has directed that charging parties and respondents should normally be provided with access, upon request, to the positions of the other. This exchange, including documents as appropriate, should permit the parties to narrow the issues, encourage them to resolve disputed facts, and reduce the burden on the office in handling FOIA/§ 83 document requests.[2]

We recognize the legitimate concerns of field staff, employers, and immigrant communities regarding the adequacy of Commission resources to share Respondent Position Statements. We also appreciate the agency's concerns about confidentiality issues, as well as the asserted potential "chilling effect" on claims filed by unrepresented workers if the exchange of the Respondent Position Statement were to lead to a compromise of confidentiality or worse, the prospect of retaliation by employers against employees who continue their employment. We believe these concerns, however, do not justify forsaking the enormous potential benefits – for claimants and the Commission, as well as employers – of prompt disclosure. Streamlining the charging process and enhancing the efficient resolution of complaints outweighs the theoretical disadvantages of disclosure, which the Commission should be able to control through careful implementation. We, therefore, recommend that the EEOC implement an agency-wide policy regarding the prompt request for verification and sharing of the Respondent Position Statement as outlined in its *Priority Charge Handling Procedures*.

In order to assure maximum positive impact of sharing the Respondent Position Statement, NELA further urges the Commission to require, or at very least to encourage strongly, that Position Statements, like Charges, be verified. To the extent a judgment is made that requiring verification demands more formal proceedings by the Commission, NELA favors the EEOC taking such steps at an appropriate time in the future.

The EEOC should implement an agency-wide policy regarding the request for timely sharing of investigation files.

Prompt provision of investigation files upon request is essential in all cases, but acutely so when a Notice of Right to Sue letter is issued and a complainant is preparing for litigation. We appreciate the Commission's pledge to provide the highest level of customer support possible, taking into account staff resources for enhancing the speed of disclosure. We also

[2] The Baltimore, Dallas, Miami, and Philadelphia offices were specifically identified as having particularly poor customer service in terms of document sharing and responding to attorney inquiries. NELA attorneys in these areas have offered to provide intake training for EEOC staff.

appreciate the Commission's commitment to investigate strategies for addressing delays caused when files are shuttled between offices because the office in possession of a file is not the same as the one responsible for responding to a disclosure request. While we understand the reality of resource constraints, including in some offices limits on staff available to produce copies of charge files on a timely basis, we will continue to insist that the Commission improve the timeliness of producing such files to charging parties and their counsel. Charging parties simply cannot be expected to make sound decisions about initiating a lawsuit and to satisfy standards for litigation without timely access to their investigation file.

To that end, the Commission should collect and analyze data regarding the number of file requests pending and processed, and the time lapsed between the request and file production, both nationwide and for specific regions, districts and offices. Based on the analysis of such data, the Commission should then implement an agency-wide policy regarding the request for timely sharing of investigation files pursuant to the data collected. The policy also should address consequences for offices in violation of the deadline.

The EEOC should enact policies and procedures for an efficient standardization of Federal Sector Charge Processing.

We understood that Federal Sector rulemaking pending for nearly two years had been placed on the Commissioners' agenda for a vote. A final action on the rule, including OMB review, was expected by July 1, 2012. To this date, nothing has happened.

NELA has proposed changes to Federal Sector procedures that would streamline the charging process and provide federal employees greater access to meaningful relief. All but one of these recommendations could be enacted via operational guidance and would not require a formal amendment to Federal Sector regulations.[3]

With respect to our specific recommendation regarding the Federal Sector EEOC Acknowledgement Order, advocating for a standard practice in the form's identification of particular practices and procedures governing a case, NELA posited that the Administrative Law Judge's (ALJ) discretion would stem any rigid interpretation of the new standard and would not unduly restrict the ALJ's prerogatives.

Regarding our specific recommendation that the Commission notify federal sector complainants of the right to bring a lawsuit, we are aware of concerns of a potential "chilling effect" this information might have on *pro se* federal employees who might abandon their claim. This scenario, however, seems more the exception than the standard.

[3] See attached correspondence from NELA relating to these issues.

Moreover, the Commission regularly provides federal employees notice of such rights on its website.

We urge the Commission to adopt all of the recommendations outlined our correspondence, including the ones highlighted above.

Thank you for the opportunity to provide input to the EEOC's Strategic Enforcement Plan as a means of establishing the framework for enactment of the Commission's mission to stop and remedy unlawful employment discrimination.

Sincerely,

//s//

Daniel B. Kohrman
National Employment Lawyers Association
Executive Board Member & Vice President of Public Policy

Attachments

From:	Terisa Chaw
To:	CLAUDIA WITHERS; PATRICK PATTERSON
Cc:	"Kohrman, Dan"; Eric Gutierrez; "Patricia Barasch"; dcashdan@cashdankane.com; "Joseph Kaplan"; Rebecca Hamburg; Matthew Koski
Subject:	NELA Meeting Request to Follow-Up On October 13 Meeting
Date:	Monday, November 07, 2011 8:10:14 AM
Attachments:	Withers Fed Sector Letter FINAL_12 2 10.pdf

November 7, 2011 Via E-mail

Claudia A. Withers, Esq.
Chief Operating Officer
Patrick O. Patterson, Esq
Senior Counsel
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

Dear Claudia and Patrick:

Thank you very much for meeting with us on October 13 along with Chair Berrien and Mona Papillon. Also, we appreciate Claudia's invitation to meet in December to discuss the federal sector complaint process. We would like to meet with both of you as soon as possible (preferably before December, and if need be with one of you before then) to discuss a concrete and specific list of action items, all of which we believe EEOC can and should work to implement within the next three to six months.

We have focused on those action items that we believe are both necessary and feasible – i.e., they can be implemented without complex process (i.e., regulations or legislation) or consultation (i.e., with other agencies or Congress). We welcome your candid feedback and, in particular, whether you see any impediments to implementation of these action items. If you have any concerns, we look forward to the opportunity to address them when we meet.

A. Private Sector Charge Processing

We believe that Items 1 and 2 below can be implemented within three months, and Item 3 within six months.

1. For all charges filed with the Commission, respondents should be required to submit a certified response to the charge (i.e., made under oath), and the response should be promptly shared with the charging party or parties. Any reply submitted by the

charging party likewise should be certified (i.e., made under oath) and promptly shared with the respondent. (To this end we recommend a requirement, to be implemented as soon as possible if not immediately, that the response be filed electronically in PDF form for easy sharing with the charging party.)

A Charge must be certified; so should the response be. A Charge is routinely served to the opposing party; so should the response be. Not only is this a matter of fundamental fairness; it also would improve the quality of the response and furthermore allow for the charging party to reply. Based on a certified Charge, Response and Reply, the Commission would be in a much better position to determine how to handle the Charge and to determine whether and the extent to which it has merit.

2. A communication should be sent to all EEOC offices declaring that – consistent with Section 83 of the Compliance Manual, and notwithstanding any contrary procedure now in effect – once a right to sue notice has been sent, charging parties should be routinely and promptly (within thirty days) provided a copy of the charge file.

This is necessary to assure that charging parties receive timely and complete information essential to their determination whether to pursue a claim in court. Accordingly, a notice of the rights of charging parties to their file should be provided with the right to sue letter.

3. Agreements between the EEOC and state and local FEPAs regarding charge-processing should be posted on the EEOC's and the state agencies' websites for easy reference by charging parties and respondents.

B. Federal Sector Charge-Processing

The list below is derived from NELA's letter of December 2, 2010 to Claudia (attached to this e-mail) regarding federal sector EEO compliance issues. We believe Items 1-4 can be implemented within three months, and Items 5-6 within six months.

1. "Finalize the proposed regulation requiring that agencies issue a '180-day letter' informing the complainant of the right immediately to request a hearing or to file a complaint in federal court at the close of 180 days." See Fed. Reg. 243, pp. 67839-676844 (December 21, 2009)(NPRM)." (12-2-10 letter, Item 1)

This rule would facilitate timely resolution of federal sector complaints. It has been pending for nearly two years and there is no reason we can see not to finalize it immediately.

2. "Adopt a 'meet and confer' rule akin to Federal Rule of Civil Procedure 26 (FRCP 26), requiring the parties to file a proposed discovery schedule prior to the Administrative Law Judge (ALJ) sending out the Acknowledgment Order containing pre-hearing discovery orders. . . ." (12-2-10 letter, Item 8)

3. "Institute a 'case suspension' procedure providing for automatic suspension of case processing upon request of either party if needed for discovery. Under such a procedure, all deadlines in the case would be stayed pending resolution of a discovery motion, and the ALJ would be required to issue a new schedule after deciding the

motion." (12-2-10 letter, Item 9)

4. "Implement a standardized interactive process for resolving potential dismissals by the agency. Specifically, before the agency dismisses a complaint, it should be required to issue a written notice to the complainant informing him/her of the reasons for the proposed dismissal and providing an opportunity for the complainant to present evidence or argument in response." (12-2-10 letter, Item 7).

5. "Extend the time for initiating the EEO Process for federal sector employees" to 180-days – the statute of limitations for private sector employees – from the current limit of 45 days.

This is the most important item on the 12-2-10 list, but we recognize it is a harder "lift" because it would require the issuance of a regulation.

6. Finally, we would appreciate concrete and specific responses to each of the other items on our list of 12-2-10 (Items 2, 3, 4, 5, and 6).

C. Forced Arbitration

We request that a communication be sent immediately to all EEOC offices reaffirming the commitment of the Commission to implement its 1997 guidance on mandatory pre-dispute arbitration to the maximum extent permissible and consistent with current law.

We look forward to hearing from you and to our meeting to discuss these important issues.

Sincerely yours,

Terisa E. Chaw
Executive Director

Daniel B. Kohrman
Vice President of Public Policy

Eric M. Gutiérrez
Legislative & Public Policy Director

National Employment Lawyers Association
417 Montgomery Street
Fourth Floor
San Francisco, CA 94104
Tel: 415-296-7629 Fax: 866-593-7521
E-mail: tchaw@nelahq.org
NELA Website: www.nela.org

Advancing employee rights and serving lawyers who advocate for equality and justice in the American workplace.

December 2, 2010

Claudia A. Withers, Esq.
Chief Operating Officer
U.S. Equal Employment Opportunity Commission
131 M Street, NW
Washington, DC 20507

Re: Meeting To Discuss Federal Sector EEO Compliance Issues

Dear Claudia:

On numerous occasions in the past, NELA and the EEOC have discussed issues of concern relating to both the public and private sector complaint processes. As Donna Lenhoff has mentioned to you, we are eager to continue this dialog with the EEOC under Chair Jacqueline Berrien's leadership. For an initial topic, we would like to focus on federal sector equal employment opportunity (EEO) compliance issues and our recommendations to improve the process. My thought is that we meet first with you (and others you wish to involve) to present our recommendations for reforms and to discuss steps for further action, including appropriate meetings with the Chair, the Commissioners, and other key managers involved with federal sector EEO compliance. We defer to your guidance as to how best to proceed.

The following list of suggested reforms was prepared by Joseph Kaplan and me in consultation with other NELA members who have substantial experience representing federal employees before the EEOC and in federal court. We believe that these simple reforms would be relatively easy to implement and significantly improve the ability of federal employee complainants to understand and participate in the EEO compliance process. With the exception of items 1 and 10, none of the recommendations requires regulatory action.

Recommendations to Improve the Federal Sector Compliance Process

1. Finalize the proposed regulation requiring that agencies issue a "180-day letter" informing the complainant of the right immediately to request a hearing or to file a complaint in federal court at the close of 180 days. See 74 Fed.Reg. 243, pp. 67839-67844 (December 21, 2009) (NPRM).

2. In order to eliminate regional inconsistencies and the resulting confusion, standardize the Acknowledgment Order nationwide.

3. Require that (a) the Acknowledgment Order notify the complainant of his/her right to withdraw from the administrative process and file a complaint in federal court, and (b) the Office of Field Operations notify the complainant of this right as well, in a separate letter.

4. Require that the Notice of Rights inform the complainant that s/he may file a hearing request with the EEOC on a mixed case complaint where the criteria for "firmly enmeshed" (see, e.g., *Lucas v. Dept. of the Navy*, EEOC Appeal No. 01965130 (October 1, 1998), or "inextricably intertwined" (see, e.g., *Blount v. Dept. of Homeland Security*, EEOC Appeal No. 0720070010 (October 21, 2009) are met.

5. Require the agency to provide a notice of rights and responsibilities to witnesses once they are identified during the investigation, including a statement that it is unlawful for the agency to retaliate against a witness for participation in the EEO process.

6. Prohibit agency counsel interference with EEO investigations, and ensure that there is a process in place to address such interference *during* the investigation. Specifically, authorize an official in the Office of Field Operations to review allegations of interference and to direct compliance with MD-110, including transfer of the investigation to the EEOC in appropriate cases.

7. Implement a standardized interactive process for resolving potential dismissals by the agency. Specifically, *before* the agency dismisses a complaint, it should be required to issue a written notice to the complainant informing him/her of the reasons for the proposed dismissal and providing an opportunity for the complainant to present evidence or argument in response.

8. Adopt a "meet and confer" rule akin to Federal Rule of Civil Procedure 26 (FRCP 26), requiring the parties to file a proposed discovery schedule prior to the Administrative Judge (AJ) sending out the Acknowledgment Order containing pre-hearing discovery orders. *A copy of FRCP 26 is attached for your reference.*

9. Institute a "case suspension" procedure providing for automatic suspension of case processing upon request of either party if needed for discovery. Under such a procedure, all deadlines in the case would be stayed pending resolution of a discovery motion, and the AJ would be required to issue a new schedule after deciding the motion.

10. Extend the time for initiating the EEO process for federal sector employees to the 180–day statute of limitations for private sector employees.

We look forward to the opportunity to discuss these recommendations with you. Please call or e-mail me at your convenience with any questions you might have, as well as suggested dates and times for us to meet.

Sincerely,

David R. Cashdan
First Vice President
National Employment Lawyers Association

cc: Joseph V. Kaplan, Esq.
Passman & Kaplan, P.C.

Donna R. Lenhoff, Esq., Legislative & Public Policy Director
National Employment Lawyers Association

Cheryl Polydor, Esq., Advocacy Fellow
National Employment Lawyers Association

Attachment: Federal Rules of Civil Procedure 26