March 1, 2013

Executive Officer
Office of the Executive Secretariat
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

E-filed at strategic.plan@eeoc.gov

Re: National Employment Lawyers Association's Comments On The EEOC's Quality Control Plan (QCP)

Dear Sir or Madam:

The National Employment Lawyers Association (NELA) submits the following comments and recommendations for the Commission's consideration in drafting its Quality Control Plan (QCP). These comments focus on improving the quality of the Commission's intake process and investigations. NELA has filed comments relating to the Commission's Strategic Plan, Strategic Enforcement Plan, and Federal Sector Complement Plan. Our comments to improve the quality of federal sector charge processing have been previously filed with the Commission and are incorporated by reference (see attached letter to Claudia A. Withers dated February 1, 2012).

From the perspective of NELA members representing individuals in employment discrimination cases, the Commission's weakest performance has been, and continues to be, its charge processing and investigations. The types of problems are too numerous to mention here, but they include widely inconsistent policies and outcomes between offices; the fact that witness statements, interviews, or requests for specific documents from employers appear to be relatively rare (even in cases selected for "full" investigation); misunderstanding by investigative staff of the law and Commission policies; and other matters that adversely affect the Commission's ability to achieve its mission "to stop and remedy unlawful employment discrimination."

The Commission's intake and investigation systems would greatly benefit from meaningful training and supervision of personnel, more appropriate output measures,[1] clearer policies, and

[1] We are also concerned that the blanket position in the EEOC's Strategic Enforcement Plan against monitoring the percentage of "cause findings" may not be fully supported by available tools for statistical analysis, and may also lead the Commission away from other meaningful performance measures related to outcomes.

other steps to improve the performance of the EEOC in these vital areas. The Commission should also hold Fair Employment Practice Agencies (FEPAs) to such higher standards. We provide our recommendations below.

1. **Ensure that any system used to categorize and expedite the handling of charges inventory does not negatively impact the role of the private bar in enforcement.**

The Commission should ensure that any charge processing system or hierarchy does not delay the processing of those charges given a lesser assignment (e.g., class "B" charges in the old Priority Charge Handling Procedures); does not unnecessarily restrict the quality of the EEOC's investigation of such charges; and does not discourage timely sharing of investigatory results with Charging Parties and private counsel, who play a key role in the enforcement of the civil rights laws over which the Commission has responsibility.

We continue to hear about intake staff discouraging charge filings, or offices that issue "no cause" or right-to-sue letters without any attempt at investigation, sometimes on the same day as the charge is filed. Because at least one circuit has held that "early" right-to-sue letters may reflect a failure to exhaust the administrative process,[2] some private lawyers do not want immediate notice letters, but some EEOC staff appear insensitive to requests to stay a decision until 180 days have passed.

2. **Post worksharing agreements between the EEOC and the FEPAs on the Commission's website.**

An individual has the option of filing a charge with either the EEOC or with a Fair Employment Practices Agency (FEPA) in jurisdictions with such agencies. 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 may retain the charge for processing.

We urge the EEOC to post all worksharing agreements with the FEPAs on its website. This information may be critically important when Charging Parties are forced to respond to failure-to-exhaust claims in private litigation.

Although there may be legal impediments to such disclosure in a *minority* of worksharing agreements, there are no such legal issues with regard to most of them, and they should be posted as soon as possible. The others should be posted as soon as language not subject to disclosure is identified and redacted.

[2] *See Martini v. Federal Nat. Mortg. Ass'n*, 178 F.3d 1336 (D.C. Cir. 1999).

3. **Post Form 5 charge forms online, allow for online charge filing, and provide online access to case status.**

Posting Form 5 charge forms online, allowing for online charge filing, and providing online access to case status would not only make things easier for Charging Parties, but would save EEOC resources in responding to calls requesting a status update. (Our members continue to make reports of EEOC office phones that are not answered.)

4. **Implement an agency-wide policy requiring the prompt sharing of the Respondent's Position Statement with Charging Parties and their counsel.**

The EEOC should implement an agency-wide policy requiring Regional and District offices to disclose Respondents' Position Statements and attachments. The reasons for doing so include a higher likelihood that Charging Parties can realistically assess the strength of their cases, and can proceed to court in cases with relatively greater merit.[3] In addition, the Commission' investigations would be enhanced if the agency has a response from Charging Parties based on an actual Respondent Position Statement.

Although sharing of the Respondent's Position Statement with Charging Parties and their counsel has been discussed by the Commission for many years, a clear policy has not been adopted. Any potential concerns about confidentiality issues and the like are greatly outweighed by the potential benefits of prompt disclosure—for claimants, employers, and the Commission. Streamlining charge processing and enhancing the efficient resolution of complaints outweighs the theoretical disadvantages of disclosure. Moving to electronic submission and disclosure of charge files and the Respondent's Position Statement will result in efficiencies because such documents can be easily transmitted to Charging Parties and counsel without additional burden or expense to the EEOC.

Our members also report the practice of EEOC investigative staff telling Respondents that they do not have to respond. Such a practice is counterproductive to a proper investigation and should be abandoned immediately.

[3] An additional problem is that our members after they gain access to the EEOC file discover that the summary position statements have often misstated and/or overlooked some of the Respondent's contentions and provide little or no information as to what support if any has been provided by the Respondent. Training EEOC staff to prepare accurate and complete summaries will improve the process for all those involved.

5. Require Respondents' Position Statements to be verified.

NELA further urges the Commission to require that Position Statements, like Charges, be verified. Not only is this a matter of fundamental fairness; it also would improve the quality of the response, and allow for more informed replies by charging parties.

6. Implement an agency-wide policy requiring timely response to requests for access to 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. While we understand the reality of resource constraints, we 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. In some offices, investigative files are furnished only after the Charging Party or counsel produces a copy of a court-filed complaint. Our members also report extensive delays (sometimes up to six months) in receiving the investigation file, whether using FOIA or Section 83 procedures.

The Commission should also more clearly describe the various mechanisms (FOIA, Sec. 83, etc.) for requesting such access, and the pros and cons of each.

7. Adopt policies and implement training on the appropriate scope of information requests to Charging Parties.

Our members report that Charging Parties continue to receive "empty your briefcase" letters, typically requesting "all the evidence the Charging Party possesses or believes is available to support each of the allegations." Some EEOC staff may not recognize that the sworn statement of the Charging Party is itself evidence,[4] and that the evidence supporting allegations of discrimination are in some sense dependent on the Respondent's proffered reason for its adverse actions. For example, lying about the reason for termination is evidence of discrimination, yet as stated above, the Respondents' Position Statements are often not shared with the Charging Party or private counsel.

[4] According to the court in *McNeal v. Kansas City Ry.*, 2007 WL 1237934, at *2 (W.D. La. Apr. 27, 2007), § 26.8 of the EEOC Compliance Manual states that there will often be "conflicting or contradictory evidence from various sources … Where exhaustive investigation fails to produce any evidence supporting either the charging party's or respondent's statement, generally accept the charging party's credible version of the facts." This is an appropriate standard at the investigations stage, but some Commission staff do not follow it.

8. Adopt policies for handling charges filed under the ADA that are consistent with the Commission's regulations implementing the 2008 amendments to that law.

Some Commission offices or investigators continue to seek detailed medical information to establish a disability,[5] and some offices demand receipt of such information within ten days (or similar inappropriately short times periods). But the ADA Amendments Act of 2008 (ADAAA), and the Commission's own ADAAA regulations, make clear that the primary subject in ADA cases "should be whether [covered entities] have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."[6] "Congress did not intend for the threshold question of disability to be used as a means of excluding individuals from coverage."[7] The Commission needs new policies and staff training on this issue.

9. Adopt guidance for accommodating the needs of Charging Parties with disabilities.

Our members continue to hear from Charging Parties who have problems getting accommodation in charge filing, investigations, and dispute resolution. For example, Charging Parties who are deaf have been told to bring their own sign language interpreters to EEOC mediations. This is a legal violation, and thus serious staff training need. Our members also report problems in the Commission's investigation of charges by individuals with intellectual or psychiatric disabilities, but who have no physical symptoms.

10. Adopt policies and procedures that preserve rather than thwart the filing of timely charges.

The EEOC should adopt procedures that reduce the chances of an untimely charge by unrepresented Charging Parties. For example, although the Supreme Court has recognized that a questionnaire can satisfy the charge requirement, *Federal Exp. Corp. v. Holowecki*, 552 U.S. 389 (2008), the EEOC continues to resist embracing this view in a consistent way, or in a manner that protects Charging Parties. As a result, courts have rejected claims as untimely in cases in which there is a lag between the receipt of a questionnaire and the filing of a charge. See, e.g., *Dyson v. District of Columbia*, ___ F.3d ___, 2013 WL 425336 (D.C. Cir. Feb.

---

[5] One such letter states: "In order for the Commission to process the charge of discrimination filed under the Americans with Disabilities Act (ADA), the following information is necessary: 1. Written medical evidence that Charging Party (CP) has been medically diagnosed with a disability . . . . 3. Please list all medications CP is taking . . . ."

[6] Pub. L. 110–325, § 2(b)(5), 122 Stat. 3553 (Sep. 25, 2008), set out in the Note to 42 U.S.C. § 12101; 29 C.F.R. § 1630.1(c)(4). See also 29 C.F.R. Part 1630 App., § 1630.1(c), 76 Fed. Reg. 16978, 17005 (Mar. 25, 2011).

[7] 29 C.F.R. Part 1630 App., Intro., 76 Fed. Reg. 16978, 17004 (Mar. 25, 2011), citing 2008 House Judiciary Committee Report at 5.

5, 2013). According to some of our members, the EEOC either misinforms or misleads potential Charging Parties by stating that a completed questionnaire does not constitute a charge. Moreover, the Commission's instruction to Charging Parties also set out on the questionnaire form—to contact the Washington Field Office (WFO) if they have not heard from the EEOC within 30 days—is woefully inadequate, as our members report that the WFO does not respond to telephone calls by Charging Parties. Instead, the EEOC should notify Charging Parties that a questionnaire requesting the agency to investigate will be deemed a charge, and will start the processing timelines.

We share the Commission's goal of improvements that can help stop and remedy unlawful employment discrimination. Thank you for the opportunity to provide input to the EEOC's Quality Control Plan.

Sincerely,

Terisa E. Chaw
Executive Director

February 1, 2012

Via Email & U.S. Postal Service
(Claudia.Withers@EEOC.gov)

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

Dear Claudia:

On behalf of the National Employment Lawyers Association (NELA), we want to thank you and your colleagues for taking the time to meet on January 17, 2012 with David Cashdan, Joe Kaplan, and us regarding the EEOC's private and federal sector charge handling processes and the issues raised by NELA members at our 2011 Annual Convention this past June. As stakeholders in the Commission's primary mission of ensuring equality of opportunity by vigorously enforcing federal laws prohibiting employment discrimination, we appreciate your willingness to engage us in a thoughtful discussion of these operational matters.

In light of our conversation, we thought it would be helpful to outline the issues discussed and any pertinent action items, timelines, and concerns.

1) Request for Verification and Sharing of Respondent Position Statement

We appreciate the robust discussion of respondent position statements. It was helpful to hear the Commission's concerns based on those of some field staff, employers, and immigrant communities regarding the adequacy of Commission resources, confidentiality, and the potential "chilling effect" on claims filed by unrepresented workers. The overall agency stance seems to favor disclosure, which we appreciate. We also recognize that Commission initiatives are confidential until formally announced. Our understanding is that an initiative on private sector charge processing is likely to be announced in early February, approximately three weeks after our January 17 meeting.

2) Request for Timely Sharing of Investigation Files

As we stated during the meeting, 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 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 needs to 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. Without collecting and monitoring such data, the Commission's good intentions in this area will not lead to concrete improvements.

3) Posting of Worksharing Agreements Between the EEOC and Fair Employment Practices Agencies (FEPAs)

In the time allotted, our meeting did not allow for a thorough discussion of the possibility of posting all worksharing agreements between FEPAs and the Commission on its website. The only potential obstacle raised by Commission staff was a concern about legal impediments to disclosure in a minority of agreements. We urge the Commission to follow through on this initiative, considering the public benefits and the fact that many FEPAs are charged with enforcing employment discrimination laws that might provide broader protections than Title VII. The majority of agreements not posing legal issues should be posted as soon as possible; the others also should be posted soon, once language not subject to disclosure is identified and redacted. We see no reason why most agreements cannot be posted by July 1, 2012 and the remainder by the end of 2012.

4) Federal Sector Charge Processing

One subject discussed at our meeting has been resolved in a positive fashion since then. On January 17, we pressed staff for reasons why a Federal Sector rulemaking pending for nearly two years was stalled. We received no satisfactory answers at the meeting; however, a week later at the ABA Government Liaison Meeting in Washington, DC (January 23-24), the Chair informed attendees (including us) that the rule had been placed on the Commissioners' agenda for a vote. We understand that final action on the rule – including OMB review – is expected by July 1, 2012.

Mr. Kaplan once again asked about several proposed changes to Federal Sector procedures that NELA has highlighted for the Commission in previous correspondence, and that we believe would streamline the charging process and provide federal employees greater access to meaningful relief. As we have explained, all but one of these recommendations could be enacted via operational guidance and would not require a formal amendment to Federal Sector regulations.

In general, we understand that Commission staff is reviewing Federal Sector charge processing rules and procedures in order to identify a set of changes needed which they intend to consolidate in the form of a new proposed Federal Sector regulation. While such an initiative may lead to important improvements, we are concerned that it also could set back needed improvements in the case of measures that do not require regulatory change but are nevertheless included in a new proposed rulemaking. We look forward to seeing what will be included in the new proposed rule. We hope not to be in a position to object on grounds that components more appropriately included in an operational guidance are unnecessarily included in the proposed rule.

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, Mr. Kaplan 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. Our understanding is that the Commission will circle back with NELA on this issue in early February.

With respect to our specific recommendation that the Commission notify federal sector complainants of the right to bring a lawsuit, we were informed of staff concerns about a potential "chilling effect" this information might have on *pro se* federal employees who might abandon their claim. However, our sense is that this scenario is a rarity. Moreover, we note that the Commission provides federal employees notice of such rights on its website. Thus, in our view, the Commission should wholeheartedly adopt this recommendation that empowers complainants to defend their employment rights.

5) Forced Arbitration

We laud the Commission's plan to use its victory before the National Labor Relations Board as an *amicus* in the *D.R. Horton* case as an opportunity to demonstrate to field staff the Commission's commitment to weigh in on forced arbitration issues where possible and appropriate.

We look forward to our next opportunity to discuss these and other important matters that are of interest to our membership and the workers they represent.

Sincerely,

Eric M. Gutiérrez
Legislative & Public Policy Director

Daniel B. Kohrman
Vice President of Public Policy