

## **Report Supplement** **EEOC**

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### **EEOC Faces Administrative Challenges, Focuses on Developing Systemic Litigation**

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#### **EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

As Equal Employment Opportunity Commission officials deal with moving approximately 500 employees to a new headquarters site in Washington and installing a new system for receiving telephone calls, agency investigators and lawyers will be pursuing a renewed emphasis on large, systemic cases that leverage **EEOC**'s limited resources.

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The Equal Employment Opportunity Commission faces a year of changes in 2008, as it brings call center functions back in house and prepares to move its Washington, D.C., headquarters from an established downtown business location to a more transitional urban area.

Meanwhile, commission officials seek to advance **EEOC**'s renewed emphasis on litigating large cases of alleged systemic discrimination by embracing a "national law firm" model and promoting two senior attorneys to an executive level to help oversee such litigation.

The most immediate concern for **EEOC** Chair Naomi Earp is ensuring the commission has adequate technology and personnel to handle telephone calls effectively from members of the public with potential discrimination claims. On Dec. 19, the National Contact Center (NCC), a privately run call center for **EEOC** operated by Vangent Inc. in Lawrence, Kan., closed its doors after a sharply divided commission had voted earlier not to extend the NCC, which was originally launched on a pilot basis in 2005.

The action ended a sometimes testy internal debate about whether **EEOC** should contract out the call function, but also left the agency scrambling to fill a void. Vangent will host an interactive voice response system for **EEOC** through March 20, and Earp has presented commissioners with a transition plan that would give Vangent a one-year contract to provide other telephone technology services. That and another key component of the transition plan--putting out to competitive bid a more permanent technology solution--still must be voted on by Earp, Vice Chair Leslie Silverman, and Commissioners Stuart Ishimaru and Christine Griffin.

Calls currently are being routed to **EEOC**'s 53 field offices, and the agency has hired 37 temporary employees to help shoulder the load, Earp told BNA in a

January interview. If commissioners approve the transition plan's technology provisions, Earp said **EEOC** then would bring on board 64 new permanent employees to answer phones and retrieve data as calls are routed to **EEOC**'s 15 districts. Hiring would begin in mid-February, with the new employees coming on board by late February or early March, according to an **EEOC** spokeswoman.

Earp said she would have preferred to continue the NCC as a "21st-century tool to allow us to use technology in a way we haven't been able to previously" with a "more sluggish" **EEOC** internal system. "But having understood the philosophical and political aversion" to an outsourced call center, Earp said, "we've been moving as aggressively as we can" to bring the call center functions back in house.

### **Preparing for a Move**

Another major issue on Earp's plate is moving the commission's Washington headquarters and its Washington, D.C., field office from the downtown location it has occupied since the 1980s to a new building north of Union Station in a less developed part of the District of Columbia. As of Jan. 7, 458 **EEOC** employees worked in headquarters, and the Washington field office had 33 employees handling discrimination complaints from local workers.

Originally scheduled for the summer of 2008, the move has "slipped a bit" to October 2008, which Earp said is partially the result of accommodating headquarters employees, some of whom vehemently objected to the new location when it was announced last spring.

Earp said that in order to give employees who "understandably" have concerns some "buy in" regarding the move, employee committees have been formed and conversations held between management and staff to "respond to some of the questions employees felt that they hadn't been allowed to weigh in on" prior to the new site decision. "If all goes well, we hope to be out of this building in mid-October," Earp said. "The actual build-out of the new building should start between late February and early March."

Current plans call for **EEOC**'s headquarters operations literally to be moved overnight, with as little disruption to the agency's business as possible, Earp said. "I have to put in a plug for how exciting it is to be going to a site that's not wired" yet, she added. "We get an opportunity to have fiber optics, to have cable in places where we don't have it here. The walls are down so we get to insert placeholders that we can't afford right now, but that if the budget improves, the infrastructure will already be there."

### **Guidance on Religion, Testing Contemplated**

Earp said a proposed rule on disparate impact claims under the Age Discrimination in Employment Act, following the U.S. Supreme Court's decision in *Smith v. Jackson*, 544 U.S. 228, 95 FEP Cases 641 (2005), was sent to the White House's Office of Management and Budget in early December. OMB has 90 days for review and comment, so assuming White House approval, the proposed rule could be issued sometime in March or April.

Although **EEOC** does not plan any other major rulemaking this year, Earp said the commission is considering a number of topics for possible policy guidance. "We have a draft that we're working on regarding religion, in which we'll try to balance some of those competing interests there," she said. "Pursuant to the E-RACE initiative that [**EEOC**] rolled out last year, we're looking at credit checks,

background checks, and arrest and conviction records, those areas that potentially have a disparate impact on people of color."

Following a commission meeting last May that explored potential bias resulting from employment testing, Earp said **EEOC** also is contemplating guidance on testing and selection devices. "I don't know exactly what the time line is for issuing guidance, but what we learned is that [the testing issue] is very complex," Earp said. "On the one hand, employers are constantly looking for ways to cull a field of enormous numbers of people for small numbers of jobs. And we support that; we don't want to be a barrier to that. But we want the test to be valid, to be race- and gender-neutral. Race is never a job necessity; gender is less and less [so]."

Earp said the agency should take some time, weigh all the information presented, and deliberate before issuing guidance on testing, particularly with a recently hired **EEOC** legal counsel, Reed Russell, who needs to "get up to speed and look at the deliberations from our [May 2007] meeting as well as our draft of what the guidance will be."

Earp said she would like a testing guidance as "part of my legacy," which means completing it before a new administration arrives in January 2009. "But doing it fast is not as important as doing it right," she said.

Building on the E-RACE (Eradicating Racism and Colorism in Employment) initiative, Earp said the commission plans a public meeting on Asian Americans in the federal workplace, probably in the spring. She explained that **EEOC**'s investigation so far has shown that Asian American workers are susceptible to discrimination based on color, both within and outside Asian communities. "In many workplaces, public and private, Asians are there in sufficient numbers but encounter the 'bamboo ceiling,' as Asians call it, the old 'glass ceiling,'" Earp said. "We want to try to look at those issues and consider the federal workforce first."

### **Backlog and Recoveries Both Grow**

The commission's preliminary year-end figures for fiscal 2007, contained in **EEOC**'s November 2007 annual performance and accountability report, showed **EEOC**'s charge inventory growing to 54,970, up approximately 38 percent from the 39,946 charges pending at the end of fiscal 2006.

In a Jan. 22 statement, the union representing **EEOC** employees said the main reason for the charge backlog is insufficient staffing. Commission employees at the end of fiscal 2007 numbered 2,158, down from 2,924 in fiscal 2002, the union pointed out. "The number one reason **EEOC** can't keep up with the work is because we don't have the bodies to get it done," said Gabrielle Martin, president of the National Council of **EEOC** Locals No. 216, American Federation of Government Employees. "To turn things around, **EEOC** must replenish frontline staffing."

In the BNA interview, Earp said budget and securing adequate resources are her top priorities as **EEOC** chair. An agency spokeswoman said staffing, budget, and the fact that "it simply takes time" to process **EEOC** charges are all factors in the charge inventory. **EEOC** received 82,792 charges in fiscal 2007, up 9 percent from fiscal 2006, while it resolved 72,442 charges, according to the preliminary year-end figures.

The agency's monetary awards on behalf of discrimination victims also were up, as **EEOC** recovered more than \$290.6 million in monetary benefits through administrative enforcement, compared with \$229.8 million obtained in fiscal 2006. The agency secured monetary and non-monetary relief for 17,357 individuals through its charge processing system.

In addition, **EEOC** said it resolved 364 "merits" lawsuits in fiscal 2007, obtaining approximately \$54.8 million for discrimination victims, compared with \$44 million in fiscal 2006. "Merits" lawsuits are those alleging violations of the substantive provisions of the anti-discrimination laws that **EEOC** directly files or in which it intervenes. Of the total recovery in court, \$38.8 million was obtained in cases under Title VII of the 1964 Civil Rights Act, \$3.1 million in ADEA cases, \$2.4 million in cases under the Americans with Disabilities Act, \$215,000 under the Equal Pay Act, and \$10.2 million in cases involving more than one statute.

Some fiscal 2007 figures show signs of the agency's new emphasis on litigating larger, systemic cases, according to **EEOC**. The commission filed 14 lawsuits naming 20 or more alleged victims of discrimination in fiscal 2007, up from 11 such suits in fiscal 2006, and it resolved 20 suits on behalf of 20 or more discrimination victims, up from 7 such resolutions in fiscal 2006. In addition, **EEOC** resolved four lawsuits affecting 100 or more victims of discrimination in fiscal 2007, compared with none in fiscal 2006.

### **National Law Firm Model**

Among the biggest recoveries for **EEOC** in 2007 were a \$20 million settlement of race discrimination claims against Walgreens and a \$27.5 million age bias settlement with the law firm of Sidley Austin.

Walgreens is a perfect example of using a "national law firm" model, which the commission hopes to expand, **EEOC** officials said. In a January BNA interview, **EEOC** General Counsel Ronald Cooper said that faced with litigating a case involving about 10,000 potential class members, he made staffing decisions from Washington, appointing as **EEOC** lead counsel a senior attorney in Chicago with "considerable experience in big-case litigation." Commission attorneys from St. Louis, where the case originated, and Florida also were assigned to the case, Cooper said, "so we wouldn't have to fly people all around the country to handle it."

Cooper said that to advance the systemic litigation initiative, **EEOC** lawyers from field offices with more experience handling large class suits are mentoring commission attorneys in locations with less experience in large cases. "We created partnerships with some of our more experienced offices so that they could try to help [the less experienced offices] put in place the new system, the methods that would be most effective," Cooper said.

Two senior **EEOC** attorneys will be promoted to senior executive status, a first for commission lawyers, and they will have key roles in managing the systemic litigation initiative, according to Earp and Cooper. "It would be two of our existing regional attorneys who would be promoted and tasked with helping us with the rollout of the systemic initiative in **EEOC** offices around the country," Cooper said.

The general counsel's office also has hired two paralegals for the systemic program and plans to hire two additional lawyers in 2008 from the **EEOC** Attorney Honors Program, who will be assigned to district offices in Memphis, Tenn., and New York.

But with a flat budget of \$329.3 million for fiscal 2008 largely precluding the addition of many new employees, Earp said "sound management requires us to do a couple of things" to address the charge backlog. She said that by putting more resources in investigating and litigating systemic cases, **EEOC** can more effectively deal with increased discrimination charges. "This allows us to get whole industries, whole geographic areas of the country, and leverage limited dollars in a way that you can't when you are primarily focused on the individual claim," Earp said.

She added that **EEOC** is making "better use of our technology enhancements" to internal management systems for tracking charges and relying more on state and local fair employment practice agencies to help with enforcement.

Earp cautioned that the monetary recovery numbers for fiscal 2007 were buoyed by the large Walgreens and Sidley Austin settlements. "We are not going to be surprised if there is a small downturn either in the number of cases litigated or in the recovery [in 2008] because the systemic cases take a long time to build," she said.

### Responding to the Court

**EEOC** is poised for a busy term at the U.S. Supreme Court, as the justices already have heard oral argument in three cases in which the commission is a party or was involved in preparing the government's brief. At least five other cases raising issues under the federal anti-discrimination laws will be argued in the next few months, including two in which the court granted review Jan. 18.

Meanwhile, AARP, the largest older Americans' advocacy group, has asked the Supreme Court to review a U.S. Court of Appeals for the Third Circuit decision upholding **EEOC's** power to grant an ADEA exemption for employers who coordinate retiree health care benefits with retirees' eligibility for Medicare. The justices have not yet decided whether to grant review. **EEOC** issued its final rule on the subject in December.

During oral argument last fall in *Federal Express Corp. v. Holowecki*, Justice Antonin Scalia sharply criticized **EEOC's** charge-handling and intake procedures in a case raising the issue of when, if ever, an intake questionnaire can be considered a "charge" for purposes of tolling the statute of limitations when **EEOC** fails to notify the charged employer. Scalia suggested the commission's procedures were ill-serving both employers and aggrieved workers who contact **EEOC** with potential discrimination claims.

"It's not good to have Supreme Court justices criticizing what you're doing," Earp told BNA, but she added **EEOC** is taking steps to address the alleged confusion. The commission immediately issued guidance to its field offices regarding intake procedures when it learned the Supreme Court was reviewing *Holowecki*, she said. "The problem that led to that case was that different [**EEOC**] offices handle that initial information differently," Earp said. "I think I can say today with a fair amount of certainty that we have uniformity--the guidance has gone out, the field is aware of it."

Earp said **EEOC** also is developing a public brochure with a checklist "on exactly what's involved" at the intake stage when an individual approaches the commission with a potential claim, "trying to make the intake process as simple and as available to as many people as possible." **EEOC** also is working on a "self-assessment tool" that would allow workers who suspect discrimination to

complete a series of interactive questions and answers before they contact the commission to determine if they really have a potential claim, Earp said.

"One of the things that we have to balance is when is it really a charge," Earp said. "A lot of people call [**EEOC**], a lot of people come in. For most, it's a very, very serious matter to challenge an employer. So we don't want to be precipitous, on the one hand, and on the other hand, as the Supreme Court has pointed out, we don't want to delay and fail to give appropriate notice to the employer."



*By Kevin P. McGowan*