EEOC: An Agency on the Wrong Track? Litigation Failures, Misfocused Priorities, and Lack of Transparency Raise Concerns about Important Anti-Discrimination Agency

U.S. Senate Committee on Health, Education, Labor and Pensions
Ranking Member Lamar Alexander (R-TN)
Minority Staff Report
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TABLE OF CONTENTS

EXECUTIVE SUMMARY

The Equal Employment Opportunity Commission (EEOC) serves an important role in our nation's workplaces. Under the leadership of five commissioners and a general counsel, EEOC is charged with protecting employees from discrimination at work through enforcement of equal opportunity employment laws. The commission investigates allegations of discrimination and seeks to mediate cases, allowing lawsuits to go forward if settlements are unsuccessful. The general counsel pursues allegations of discrimination in court and has been deputized by the commission to initiate litigation in many instances. The commission also issues guidance to inform the public about how it believes employers should interpret and apply the laws.

Today's EEOC, however, is pursuing many questionable cases through sometimes overly aggressive means—and, as a result, has suffered significant court losses that are embarrassing to the agency and costly to taxpayers. Courts have found EEOC's litigation tactics to be so egregious they have ordered EEOC to pay defendants' attorney's fees in ten cases since 2011. The courts have criticized EEOC for misuse of its authority, poor expert analysis, and pursuit of novel cases unsupported by law. Several courts have openly criticized EEOC for its failure to satisfy pre-litigation requirements, such as attempting to resolve discrimination disputes out of court; yet, the general counsel is leading an effort to prevent court review of such requirements.

These court losses also have come at a significant cost to victims of workplace discrimination. While EEOC's monetary recoveries for victims through settlements are up, EEOC's litigation has recovered almost $200 million less for victims than under the previous administration over the same time frame. In March 2014, EEOC reported almost 71,000 unresolved complaints of discrimination from individuals who filed charges with EEOC.

EEOC also has suffered from a troubling lack of transparency. In the past two and a half years, EEOC has ignored calls from current commissioners and Congress to allow public review of significant and controversial guidance prior to its adoption. Also, the Office of General Counsel has, since 2010, failed to issue its standard annual report, and the agency is being sued for violating the Freedom of Information Act.

This staff report will first explain the background and operation of EEOC. Next, the report will explore costly rebukes of EEOC's recent litigation practices. The report will also discuss the ways in which EEOC has shown a lack of transparency.

Today's EEOC has had successful enforcement efforts and court victories for victims of discrimination, but this report finds the agency is increasingly demonstrating poor judgment and using questionable tactics in pursuit of cases that are not fulfilling the EEOC's objective of protecting employees from workplace discrimination.

KEY FINDINGS

- EEOC's Office of General Counsel frequently initiates litigation without the benefit of a commission vote. In FY 2012, only three of 122 lawsuits filed by EEOC were brought to the commission for a vote. According to a former EEOC general counsel who served from 2003 to 2005, this represents a significant departure from the previous commission.

- EEOC has been sanctioned by courts and ordered to pay attorney's fees ten times since 2011 for untenable litigation and litigation strategies. (See Appendix 1.)

- Monetary awards pursued in litigation for victims of discrimination are down from previous years. In FY 2012 and 2013, EEOC recovered $44.2 million and $38.6 million, respectively—the lowest recovery amounts in the past 16 years.

- As of March 2014, EEOC had 70,781 unresolved discrimination charges pending.

- EEOC's credibility is at risk. As one commissioner described, EEOC's "reputation and credibility has … suffered from several recent lawsuits where [EEOC was] not only sanctioned, but openly chastised by the courts."

- A federal court reprimanded EEOC for being "negligent in its discovery obligations, dilatory in cooperating with defense counsel, and somewhat cavalier in its responsibility to the United States District Court."

- EEOC caused a small employer to spend $100,000 attempting to comply with requests for information that, according to a federal judge, "EEOC had no authority to obtain."

- A unanimous three judge panel of the U.S. Court of Appeals for the Tenth Circuit found "[t]he EEOC continued to litigate . . . claims after it became clear there were no grounds upon which to proceed."

- EEOC is not consistently meeting its statutory mandate to attempt to resolve discrimination disputes out of court. One court found EEOC "blatantly contravene[d] Title VII's emphasis on resolving disputes without resort to litigation," and another found EEOC ignored its obligation to conciliate. EEOC's general counsel is leading the fight to prevent court review of such efforts, and the U.S. Supreme Court is reviewing the issue this term.

- Successful conciliations (i.e. resolution of a case outside of court) have decreased from 8,273 during the first five years of the previous administration to 6,967 during the same time period in the current administration.

- Despite Office of Management and Budget best practices found in an agency bulletin and support from a majority of commissioners, EEOC does not allow the public to review or comment upon its draft guidance, even in cases of novel, significant or controversial

guidance. This is especially concerning because in two cases last year, the U.S. Supreme Court rejected substantive positions found in EEOC guidance.

- Unlike prior years, EEOC's Office of General Counsel has only published one annual report since 2010. These reports summarize the activities and litigation record of the Office of General Counsel.

- EEOC is being sued for failing to meet statutory deadlines imposed by the Freedom of Information Act (FOIA) and EEOC's own FOIA regulations.

I. Introduction

Congress created the Equal Employment Opportunity Commission (EEOC) to protect employees from unlawful employment discrimination.[1] Established by the *Civil Rights Act of 1964*, EEOC is tasked with enforcing federal discrimination laws that protect individuals from employment discrimination on the basis of race, color, religion, national origin, [2] sex,[3] age,[4] disability,[5] and genetic information[6] (collectively, protected classes). Discrimination in the workplace can occur in hiring, firing, harassment, promotion, training, benefit, or wage determinations.[7] In general, such discrimination claims may be brought pursuant to the theories of disparate treatment or disparate impact. Disparate treatment is intentional discrimination by the employer against a protected class of individuals. The theory of disparate impact alleges that although an employment policy is facially neutral, it nevertheless has an adverse impact on a protected class.

EEOC is headquartered in Washington, D.C., and has 53 field offices in 15 districts throughout the United States. EEOC is comprised of a five-member commission and a general counsel. The commission is a Senate-confirmed panel with three members from the president's political party and two from the minority party.[8] The commission is responsible for EEOC's regulatory agenda, including the promulgation of policy and enforcement guidance. The commission also issued EEOC's Strategic Enforcement Plan, outlining its enforcement and litigation priorities.[9] The general counsel is a four-year Senate-confirmed position.[10] The general counsel is responsible for conducting litigation and oversight of litigation in the field and district offices.[11]

Title VII of the Civil Rights Act, as amended, grants authority to the commission to bring litigation. In 1995, EEOC delegated the commission's litigation authority to the general counsel with limited exceptions.[12] Therefore, in most cases, commissioners have no ability to vote to commence or halt litigation. Under EEOC's self-adopted policy, commissioners must be presented the opportunity to vote to commence or intervene in litigation when any of the following circumstances are present: (1) cases involving a major expenditure of resources; (2) cases presenting novel or developing areas of law; (3) cases that have a high probability of causing public controversy; or (4) all decisions to intervene in ongoing litigation as *amicus*

[1] The Equal Employment Opportunity Commission (hereinafter "EEOC") enforces non-discrimination laws as they pertain to private and federal, public employees. However, federal employees have a different complaint process. This report refers solely to private employees.
[2] Civil Rights Act of 1964, 42 U.S.C. § 2000e-4 (1964).
[3] *Id.*; Equal Pay Act, 29 U.S.C. § 206 (1963); Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1978).
[4] Age Discrimination in Employment Act, 29 U.S.C. § 623 (1967).
[5] Americans with Disabilities Act, 42 U.S.C. § 12112 (1990); Rehabilitation Act, 29 U.S.C. §§ 791 et seq. (1973).
[6] Genetic Information Nondiscrimination Act, 42 U.S.C. § 2000ff (2008).
[7] Employers with 15 or more employees (20 employees for purposes of the Age Discrimination in Employment Act), labor unions, and employment agencies are subject to the jurisdiction of EEOC.
[8] Commissioners serve staggered, five year terms. 42 U.S.C. § 2000e-4(a).
[9] EEOC Strategic Enforcement Plan (hereinafter "SEP") FY2013-FY2016, *available at* http://www.eeoc.gov/eeoc/plan/sep.cfm
[10] 42 U.S.C. § 2000e-4(b).
[11] *Id.*
[12] EEOC, 1996 National Enforcement Plan, *available at* http://www.eeoc.gov/eeoc/plan/nep.cfm.

curiae.[13] These exceptions are broad and grant the general counsel considerable discretion to determine the cases brought to the commission for a vote. Such broad delegation of litigation authority to the general counsel detracts from the commission's ability to perform its statutorily obligated duties and ensure prudent litigation decisions are made on behalf of EEOC.

Since General Counsel Lopez's tenure began in April of 2010, the commission's role in approving litigation has been minimal. In Fiscal Year 2010, only five cases were brought to the commission for a vote.[14] In Fiscal Year 2011, the commission voted on seven cases.[15] In Fiscal Year 2012, only three of 122 lawsuits filed by EEOC were brought to the commission for a vote.[16] According to a former EEOC general counsel who served from 2003 to 2005, this represents a significant departure from the previous commission.[17]

In December 2012, EEOC reaffirmed the delegation of litigation authority in its Strategic Enforcement Plan, with a few changes.[18] Specifically, at least one case from each of the 15 district offices must now be presented to the commission for a litigation decision every Fiscal Year.[19] Under this change, General Counsel Lopez has allowed the commission to vote on 16 lawsuits in Fiscal Year 2013, and 17 in Fiscal Year 2014[20]—barely more than the 15 case minimum required by the Strategic Enforcement Plan.

Also, despite an increase in complaints of discrimination filed by individuals (called "charges"), EEOC's overall litigation activity has declined markedly over the past several years. An average of 80,287 charges per year were filed by individuals during the first five years of President George W. Bush's administration, as compared to an average of 97,257 charges filed by individuals during the first five years of President Obama's administration.[21] Despite this increase, EEOC filed an average of 371 merit suits per year during the first five years of President George W. Bush's administration, as compared to an average of 209 merit suits during the first five years of President Obama's administration.[22] Further, the number of merit suits filed has declined each year since 2009—from 281 suits in 2009 down to 131 in 2013.[23]

These declines may be due in part to EEOC's focus on higher-impact, higher-profile cases, sometimes without any actual plaintiff raising allegations of discrimination. As expanded

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[13] *Id.*
[14] Information provided to Committee staff by EEOC staff in response to questions posed during David Lopez's Nov. 6, 2014, staff interview.
[15] *Id.*
[16] *Id.*
[17] *Hearing on H.R. 4959, EEOC Transparency and Accountability Act; H.R. 5244, Litigation Oversight Act of 2014; H.R. 5423, Certainty in Enforcement Act of 2014, Hearing Before the H. Comm. on Educ. & Workforce*, 113th Cong. (2014) (statement of Eric Dreiband, Former Gen. Counsel of EEOC).
[18] SEP at 20, *available at* http://www.eeoc.gov/eeoc/plan/sep.cfm.
[19] *Id* at 21.
[20] Information provided to Committee staff by EEOC staff in response to questions posed during David Lopez's Nov. 6, 2014, staff interview.
[21] *See* EEOC Charge Statistics, FY 1997 through FY 2013, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.
[22] *See* EEOC Litigation Statistics, FY 1997 through FY 2013, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm.
[23] *Id.*

upon later in this staff report, EEOC has pursued its litigation strategy at a significant cost, not only to its statutory obligation to first seek informal resolutions of discrimination charges, but also to taxpayers, due to court-ordered sanctions and resources lost to meritless lawsuits. It also has a detrimental impact on victims of workplace discrimination. As of March 2014, EEOC had 70,781 unresolved discrimination charges pending.[24]

The focus on high-impact lawsuits may be one reason why EEOC has recovered significantly less monetary awards through litigation than in previous years. While EEOC's monetary recoveries for victims through settlements have increased, in Fiscal Years 2012 and 2013, EEOC recovered $44.2 million and $38.6 million through litigation, respectively—the lowest litigation recovery amounts in the past 16 years.[25] During the first five years of George W. Bush's presidency, EEOC recovered $526 million through litigation for victims of discrimination.[26] By contrast, during the first five years of the Obama administration, EEOC recovered $341 million through litigation for victims of discrimination.[27]

This staff report will explore the extent to which EEOC has made questionable decisions about enforcement activity and litigation, decisions that have often come at a significant cost to taxpayers in the form of court sanctions against the EEOC, as well as costs to litigants that have had to defend against unwarranted enforcement action. This staff report will also demonstrate the extent to which EEOC's enforcement and regulatory activities have been conducted without proper transparency.

II. EEOC's Litigation Failures

Many of EEOC's litigation efforts under this administration have met strong resistance in the courts. EEOC has suffered a series of embarrassing losses due to its failure to meet the statutory requirement to attempt to conciliate cases before filing suit, its abuse of and unreasonable use of authority, its use of inferior expert analysis to prove basic elements of disparate impact claims, and its pursuit of novel cases unsupported by law. Unfortunately, taxpayers have been left to foot the bill for some of these litigation failures. Courts award attorney's fees only in rare cases that are considered particularly egregious. EEOC has been ordered to pay attorney's fees in ten cases since 2011.

A. Courts Rebuke EEOC for Failing to Conciliate

EEOC is required by *Title VII of the Civil Rights Act* to attempt to resolve a case outside of court (called "conciliation") before bringing a suit.[28] Under the original provisions of Title VII, EEOC lacked the authority to bring civil actions at all. When Congress granted EEOC that

[24] EEOC, Fiscal Year 2015 Congressional Budget Justification at 28, *available at* http://www.eeoc.gov/eeoc/plan/upload/2015budget.pdf
[25] EEOC Litigation Statistics, Fiscal Year 1997 through Fiscal Year 2013, *available at* http://eeoc.gov/eeoc/statistics/enforcement/litigation.cfm.
[26] *Id.*
[27] *Id.*
[28] 42 U.S.C. § 2000e-5(b).

authority in 1972, it stated litigation is appropriate only when the agency finds itself "unable to secure from [the employer] a conciliation agreement acceptable to the commission."[29] To achieve conciliation, EEOC and the employer should make a good faith effort to "negotiate how the employer might alter its practices to comply with the law, as well as how much, if any, the employer will pay in damages."[30]

This administration has seen a decline in conciliations. Successful conciliations have decreased from 8,273 during the first five years of the previous administration to 6,967 during the same time period in the current administration.[31] EEOC has been rebuked by the courts for its failure to conciliate, and in response, EEOC has challenged whether courts should have the ability to review EEOC's conciliation efforts at all.

In *EEOC v. Bloomberg*, for example, EEOC failed to conciliate claims that accused Bloomberg of pregnancy discrimination against several dozen women.[32] The court found "[t]he record shows that the EEOC spurned any efforts to conciliate individual claims" noting that, by doing so, EEOC had "blatantly contravene[d] Title VII's emphasis on resolving disputes without resort to litigation."[33] This is a case that was brought under the previous administration, but EEOC continued to pursue discovery requests in litigation to find new claims of discrimination. The court found EEOC did not attempt to conciliate those claims.

In a case filed in February 2014, *EEOC v. CVS*, EEOC failed to conciliate claims that alleged provisions in CVS' severance agreements interfered with employees' ability to file charges of discrimination with EEOC in violation of Title VII.[34] Here, it is undisputed that conciliation did not occur.[35] Instead, EEOC argued that "it [was] not required to engage in conciliation procedures in this case"[36] because its duty to conciliate did not extend to certain pattern or practice claims that were the subject of the lawsuit. The court disagreed, noting that the statute and EEOC's own regulations require conciliation. Moreover, the court found no case law to support EEOC's nuanced argument. Thus, "EEOC was not authorized to file [the] suit."[37]

For decades the courts had uniformly taken the position that in litigation, judges could review EEOC's conciliation efforts to determine whether a case against an employer could move forward. Courts disagreed over what standard judges should apply when reviewing EEOC's conciliation efforts, but all eight federal appeals courts that had been presented with the issue agreed that some level of judicial review was appropriate.[38] However, in the wake of recent

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[29] 42 U.S.C. § 2000e-5(f)(1).
[30] *EEOC v. Bloomberg L.P.*, 967 F. Supp. 2d 802, 811 (S.D. N.Y Sept. 9, 2013).
[31] EEOC Enforcement & Litigation Statistics Fiscal Year 1997 through Fiscal Year 2013, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm.
[32] *EEOC v. Bloomberg L.P.*, 967 F. Supp. 2d 802 (S.D. N.Y Sept. 9, 2013).
[33] *Id.* at 814.
[34] *EEOC v. CVS Pharmacy*, No. 14-cv-863 at 4 (N.D. Ill. Oct. 7, 2014).
[35] *Id.* at 3.
[36] *Id.*
[37] *Id.* at 9.
[38] The Fourth, Sixth, and Tenth Circuits have required only a minimal level of good faith. *See EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir.1979); *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1102 (6th Cir.1984); *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir.1978); The Second, Fifth, and Eleventh Circuits have adopted a three-part inquiry, under which EEOC must (1) explain to the employer the reasonable cause for its belief that Title VII

setbacks over EEOC's failure to conciliate, EEOC no longer wants this judicial oversight of its conciliation efforts.

In *EEOC v. Mach Mining*,[39] and in a string of other cases,[40] EEOC has raised the novel argument in court that its conciliation efforts are not subject to any judicial review. Despite the virtual unanimity of the circuits that have disagreed with EEOC,[41] last year the U.S. Court of Appeals for the Seventh Circuit broke from this consensus and adopted EEOC's argument that the agency's conciliation efforts are not subject to judicial review.[42] To resolve the circuit split, Mach Mining asked the U.S. Supreme Court to review the Seventh Circuit's decision. EEOC supported Supreme Court review to decide whether, and to what extent, a court may enforce EEOC's duty to conciliate discrimination claims before filing a lawsuit.[43] On June 30, 2014, the U.S. Supreme Court granted the petition for review; it will be argued this term.[44]

B. Abuse of Authority

EEOC has also been rebuked by courts for abusing its authority and for ignoring local court rules and bringing claims that are unsupported by the law. In congressional testimony from the U.S. Chamber of Commerce, employers detail similarly aggressive tactics that have also marred EEOC's investigatory activity.[45]

1. "Misuse of Authority" in Litigation

In 2013 in *EEOC v. HomeNurse, Inc.*, EEOC committed several blunders attempting to enforce an "unduly burdensome" subpoena against a small employer that was "a threat to [its]. . . operations."[46] The court succinctly summarized EEOC's misuse of authority:

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has been violated; (2) give the employer an opportunity to comply voluntarily; and (3) respond reasonably and flexibly to the reasonable conduct of the employer. *See EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1259 (11th Cir.2003); *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1534 (2d Cir.1996); *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir.1981); The Eighth and Ninth Circuits have not expressly adopted a standard of review, but have reviewed conciliation: *See EEOC v. Trans States Airlines*, 462 F.3d 987, 996 (8th Cir. 2006) (allowing review of the "EEOC's failure to satisfy its obligation to conciliate" in deciding whether to award attorney's fees against the agency); *EEOC v. Bruno's Rest.*, 13 F.3d 285, 288-289 (9th Cir. 1993) (subjecting adequacy of the EEOC's conciliation efforts to judicial scrutiny in the context of awarding attorney's fees against the Commission).

[39] *EEOC v. Mach Mining, LLC*, 738 F.3d 171 (7th Cir. 2013).

[40] *EEOC v. Swissport Fueling, Inc*., 916 F.Supp.2d 1005 (D. Ariz. 2013); *EEOC v. Bass Pro Outdoor World, LLC*, 2013 WL 5515345 (N.D.Tex. Mar. 4, 2014).

[41] *See supra* note 38.

[42] *EEOC v. Mach Mining, LLC*, 738 F.3d 171 (7th Cir. 2013).

[43] SCOTUSblog, *Mach Mining v. EEOC, available at* http://www.scotusblog.com/case-files/cases/mach-mining-v-equal-employment-opportunity-Commission/.

[44] *Id.*

[45] *Hearing on The Regulatory and Enforcement Priorities of the EEOC: Examining Concerns of Stakeholders, Hearing Before the H. Comm. On Educ. & Workforce*, 113th Cong. (2014) (statement of Camille Olson on behalf of the United States Chamber of Commerce).

[46] *EEOC v. HomeNurse, Inc.*, 2013 U.S. Dist. LEXIS 147686, 44 (N.D. Ga. Sept. 30, 2013).

> The EEOC's highly inappropriate search and seizure operation, its failure to follow its own regulations, its foot-dragging, its errors in communication which caused unnecessary expense for [HomeNurse, Inc.], its demand for access to documents already in its possession, and its dogged pursuit of an investigation where it had no aggrieved person, constitutes a misuse of its authority as an administrative agency.[47]

Moreover, the court strongly defended the company. It noted HomeNurse, Inc. had already spent $100,000 attempting to comply "with requests for information that the EEOC had no authority to obtain."[48] In its final remarks, the court forcefully rebuked EEOC stating, "[t]he federal courts stand as a bulwark to protect this nation's citizens from powerful government agencies that seek to run roughshod over their rights."[49] Accordingly, the court refused to enforce the subpoena.

In a case brought in 2010, *EEOC v. U.S. Steel Corporation*, EEOC advanced a "novel" legal theory that, in the court's opinion, was not supported by law.[50] EEOC alleged that conducting random drug and alcohol tests on new employees under a probationary period violated the *Americans with Disabilities Act* (ADA) because such tests are not job-related and not consistent with a business necessity. U.S. Steel conducted these tests on new hires who were less familiar with their working environment to ensure safety at a busy steel factory with numerous hazardous working conditions.[51] Yet, in EEOC's view, the company needed an individualized, reasonable suspicion of intoxication to perform such tests.[52] The court disagreed. It opined that such an exacting standard was nowhere in the statute or case law and presented a "novel question of law."[53] Moreover, common sense dictated that new employees would be less familiar with company rules and would not have fully internalized the importance of workplace safety; therefore, to promote safety, the company should be able to test the employees at random.[54]

EEOC brought this suit despite what the court cited as EEOC's "minimal" investigative process and failure to follow local court rules while litigating this case. For example, EEOC did not ask U.S. Steel why it conducted the tests, nor did it step foot in a plant to determine whether its policy could be justified.[55] In violation of court rules, EEOC did not properly respond to U.S. Steel's presentation of material facts, failing to admit or deny 79 of 83 factual statements.[56] The litigation was subject to embarrassing media scrutiny, including headlines such as "EEOC Goes to Bat for Drunken Steelworkers; Strikes Out."[57]

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[47] *Id.*
[48] *Id.* at 43-44.
[49] *Id.* at 45.
[50] *See EEOC v. U.S. Steel Corporation*, 2013 U.S. Dist. LEXIS 22748 (W.D. Pa. Feb. 20, 2013).
[51] *Id.* at 7.
[52] *Id.* at 42-43.
[53] *Id.* at 44.
[54] *Id.* at 58.
[55] *Id.* at 12.
[56] *Id.* at 3-4.
[57] EEOC Goes to Bat for Drunken Steelworkers; Strikes Out, Powerline (2013), *available at http://www.powerlineblog.com/archives/2013/02/eeoc-goes-to-bat-for-drunken-steelworkers-strikes-out.php.*

2. Abusive Investigations

EEOC has been criticized recently in a number of other circumstances for its overly aggressive enforcement activity. In one example, EEOC pursued an investigation of an employer despite no reasonable cause to show discrimination occurred.[58] EEOC only dismissed the charge after that employer refused to pay a mid-five-figure sum requested by EEOC.[59] In a recent congressional hearing, the U.S. Chamber of Commerce detailed EEOC investigatory abuses against its members, including:

- [P]ursuing investigations despite clear evidence that an employee's termination was not discriminatory (including challenging a termination based on video capturing the charging party displaying pornography around the workplace);
- Several examples of instances where employers have been required to submit detailed position statements, information and documents relating to employees' claims that they had been terminated unlawfully when they were either still employed or had resigned voluntarily (resulting in the expenditure of thousands of dollars in legal fees);
- Serving subpoenas for information or documents that were not previously requested by the investigator;
- Refusing to provide charging parties or employers with information regarding the case status while the case is open; and
- Refusing to close cases that are several years old, instead continually sending employers' additional requests for information.[60]

These complaints are not an anomaly. According to the transcript of an EEOC public meeting, plaintiff and defense counsel have complained about the quality of EEOC investigations.[61]

Pursuant to federal non-discrimination laws, individuals who are partners are employers and therefore not protected by discrimination laws that protect employees. EEOC is currently involved in a directed investigation of accounting firms Deloitte LLP and KPMG LLP, alleging the mandatory retirement age included in their partnership agreements is tantamount to age discrimination.[62] EEOC is now in its fourth year of investigating Deloitte, without a single

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[58] *Hearing on The Regulatory and Enforcement Priorities of the EEOC: Examining Concerns of Stakeholders, Hearing Before the H. Comm. on Educ. & Workforce*, 113th Cong. (2014) (statement of Camille Olson on behalf of the United States Chamber of Commerce).
[59] *Id.*
[60] *Id.*
[61] *See* EEOC Commission Meeting, Public Input into the Development of EEOC's Strategic Enforcement Plan, July 18, 2012, *available at* http://www.eeoc.gov/eeoc/meetings/7-18-12/index.cfm.
[62] *Hearing on H.R. 4959, EEOC Transparency and Accountability Act; H.R. 5244, Litigation Oversight Act of 2014; H.R. 5423, Certainty in Enforcement Act of 2014, Hearing Before the H. Comm. on Educ. & Workforce*, 113th Cong. (2014) (statement of William Lloyd, Gen. Counsel of Deloitte LLP).

complainant to date.[63] Previously, EEOC investigated PricewaterhouseCoopers LLP for the same allegations of age discrimination.[64] There is significant concern EEOC is seeking to create an example of accounting firms to subject all partnerships to discrimination laws, potentially overturning long-standing precedent regarding the definition of an employee.[65]

C. Courts Rebuke EEOC for Using Inferior Expert Analysis in Disparate Impact Cases

Since 2006, EEOC has made the enforcement and litigation of systemic discrimination cases a priority. Systemic discrimination cases are "pattern or practice, policy, and/or class cases where the alleged discrimination has a broad impact on an industry, occupation, business, or geographic area."[66] As part of that initiative, EEOC recently attempted to bring several disparate impact cases against employers who use background checks in hiring.

In a disparate impact theory case against the use of background checks, EEOC must meet three requirements. First, the burden falls on EEOC to establish that an employer's policies, although neutral on their face, in fact have a disproportionate impact upon a class protected under Title VII.[67] Second, once EEOC meets this burden, the employer must then show that its use of background checks is job-related and consistent with business necessity.[68] And, finally, even if the employer's technique of screening applicants is able to satisfy both of these requirements, EEOC may still prevail if it can show that the employer has refused to adopt some alternative hiring practice that serves the employer's legitimate purposes but has a lesser effect on the protected class in question.[69] In three recent background check cases EEOC has litigated, it has failed to meet the first of these requirements, failing in each case to show either the required disproportionate impact from the use of background checks or that such a hiring policy even existed.

In *EEOC v. Kaplan Higher Education Corporation*, EEOC used inferior expert analysis to allege that the use of credit checks had a disparate impact on African American applicants.[70] Indeed, the methodology used by EEOC's expert to show disparate impact

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[63] *Id.*
[64] *Discriminating Against Partnerships: The Feds Try to Rewrite PwC's Retirement Policy*, Wall St. J., June 3, 2013, *available at* http://online.wsj.com/articles/SB10001424127887323855804578511693604180764.
[65] EEOC and Supreme Court (*Clackamus Gastroenterology Assoc. v. Wells*, 538 U.S. 440, 449-50 (2003)) consider the following six factors to determine coverage of major shareholders, members of boards of directors, officers, or partners: (1) whether the organization can hire or fire the individual or set the rules and regulations of the individual's work; (2) whether and, if so, to what extent the organization supervises the individual's work; (3) whether the individual reports to someone higher in the organization; (4) whether and, if so, to what extent the individual is able to influence the organization; (5) whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and (6) whether the individual shares in the profits, losses, and liabilities of the organization.
[66] SEP at 12, *available at* http://www.eeoc.gov/eeoc/plan/sep.cfm.
[67] *EEOC v. Freeman*, No. 8:09-cv-2573, at 11 (D. Md. Aug. 8, 2013), *available at* http://www.workplaceclassaction.com/files/2013/08/2013-08-09-Memorandum-Opinion-c.pdf.
[68] *Id.* at 12.
[69] 42 U.S.C. § 2000e-2(k)(1)(A)(ii).
[70] *EEOC v. Kaplan Higher Education Corporation*, 748 F.3d 749 (6th Cir. 2014).

"flunked" all the factors that measure admissibility.[71] To summarize the problems with EEOC's expert, a unanimous three-judge panel on the Sixth Circuit Court of Appeals stated:

> EEOC brought this case on the basis of a homemade methodology, crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted only by the witness himself.[72]

Therefore, the Sixth Circuit affirmed the evidence was inadmissible.

In addition to EEOC's poor analysis, the court expressed shock that "EEOC sued the defendants for using the same type of [credit] background check that the EEOC itself uses."[73] Indeed, according to the court, EEOC conducts credit checks on applicants for 84 of its 97 positions.[74] *The Wall Street Journal*'s editorial page dubbed the court's decision the "Opinion of the Year" because "sometimes the prosecution is so outrageous, and the legal smackdown so sublime, that the episode deserves special recognition."[75]

Similarly, in *EEOC v. Freeman*, EEOC tried to use the same unreliable expert to allege that the use of credit and criminal background checks had a disparate impact on African-Americans and males.[76] However, the court described the expert's analysis as "worthless"[77] and "laughable."[78] Further, it contained a "plethora"[79] and "mind-boggling number of errors";[80] "analytical fallacies";[81] "material flaws";[82] and was "insufficient to support a finding of disparate impact."[83] The court dismissed the case noting EEOC's lawsuit was "a theory in search of facts to support it."[84] Moreover, the court opined that to impose liability based on such unreliable data "would be to condemn the use of common sense" because it would discourage employers from the valid use of background checks.[85]

Finally, in a case which brought some $750,000 in fees against the agency,[86] EEOC filed a suit against Peoplemark, Inc., a temporary employment agency, premised on the allegation that the company had adopted a blanket, companywide policy against hiring individuals with felony convictions – a policy which, EEOC learned in discovery, the company did not in fact have.

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[71] *Id.* at 752.
[72] *Id.* at 754.
[73] *Id.* at 750.
[74] *Id.*
[75] Editorial, Opinion of the Year, *Wall Street Journal* (Apr. 16, 2014), *available at* http://online.wsj.com/articles/SB10001424052702304512504579491860052683176.
[76] *EEOC v. Freeman*, 961 F. Supp. 2d 783 (D. Md. Aug. 9, 2013).
[77] *Id.* at 796.
[78] *Id.*
[79] *Id.* at 793.
[80] *Id.* at 796.
[81] *Id.* at 793.
[82] *Id.* at 794.
[83] *Id.* at 793.
[84] *Id.* at 803.
[85] *Id.*
[86] *EEOC v. Peoplemark, Inc.*, 732 F.3d 584 (6th Cir. 2013).

Indeed, "22% of the 286 so-called victims of [Peoplemark's] purported policy had in fact been hired despite having felony records."[87] The court remarked, "a good investigation would probably have shown that the EEOC could not make [its] case even prior to the filing of the lawsuit, but that certainly became evident when all of the evidence submitted by the other side was available…."[88] Yet, despite uncovering this fatal flaw in its case, EEOC "failed to adequately manage the prosecution of this case"[89] and "let it drag on"[90] for another several months, until both parties finally moved for dismissal. Indeed, "from October 1, 2009, through [March 24, 2010, when the case was dismissed] . . . the Commission's claim was unreasonable to maintain."[91] Peoplemark subsequently requested fees from EEOC which the district court granted and the Sixth Circuit later affirmed.

D. Courts Rebuke EEOC for Litigation that is "Frivolous, Unreasonable or Without Foundation"

Of all EEOC's abusive, wasteful, and inept enforcement efforts, perhaps the worst are the cases so egregious that attorney's fees were awarded.[92] EEOC does not publically report this information; however, information provided by EEOC to the Committee as well as court decisions available on public databases show that since 2011, EEOC has been ordered to pay attorney's fees to employers in ten different cases. In six cases, fees were awarded under a rare step allowed by Title VII of the Civil Rights Act, which according to the U.S. Supreme Court is reserved for cases that are "frivolous, unreasonable, or without foundation" or "continued to [be] litigate[d]" after those circumstances became present.[93] In the other four cases, the court awarded fees for failing to prevent the destruction of evidence, for discovery abuses, and for pursuing a case that lacked substantial justification.

Not all of these cases where EEOC was ordered to pay attorney's fees were initiated by this administration. But the current general counsel initiated five of them, and the rest appear to have been pursued by this administration. What follows is a summary of some of the significant cases. See Appendix 1 for a chart describing each case.[94]

In August 2012, in *EEOC v. TriCore Reference Laboratories*, a unanimous three judge panel of the U.S. Court of Appeals for the Tenth Circuit affirmed a lower court's decision to award TriCore $140,571 in attorney's fees.[95] In *TriCore*, EEOC alleged the company violated the ADA for failing to accommodate and firing an employee with a disability. However, the

[87] *EEOC v. Peoplemark, Inc.*, 2011 U.S. Dist. LEXIS 38696 at 8 (W.D. Mich. Mar. 31, 2011).
[88] *Id.* at 15.
[89] *Id.* at 16.
[90] *Id.* at 18.
[91] *EEOC v. Peoplemark, Inc.*, 732 F.3d 584, 587 (6th Cir. 2013).
[92] Attorney's fees is used throughout this report to collectively refer to fees, costs, and expenses.
[93] *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).
[94] *EEOC v. CRST Van Expedited, Inc.*, No. 07-CV-95-LRR (N.D. Iowa Aug. 1, 2013), is not included in the Appendix because fees were first awarded in February 2010. However, in 2012, the Eight Circuit reversed the fee award because two sexual harassment claims remained; therefore, CRST was not a prevailing defendant for purposes of a fee award. Subsequently, one of these claims was dismissed and the other settled; therefore, on remand, the district court again found CRST was entitled to fees.
[95] *EEOC v. TriCore Reference Laboratories*, 2012 U.S. App. LEXIS 17200 (10th Cir. 2012).

court found "[t]he EEOC continued to litigate the . . . claims after it became clear there were no grounds upon which to proceed."[96] Specifically, EEOC should have known by April 8, 2010, and June 4, 2010, respectively that its accommodation and termination claim had no merit, but it continued to litigate.[97] In fact, EEOC "persisted . . . in spite of clear evidence that TriCore went well beyond ADA requirements in trying to oblige [the] employee."[98] Therefore, the court found EEOC's claims were "frivolous, unreasonable, and without foundation."[99]

In February 2013, in *EEOC v. The Original Honeybaked Ham Company of Georgia, Inc.*, a federal district court ordered EEOC to pay attorney's fees for the "unnecessary waste" it caused during discovery.[100] In particular, the court reprimanded EEOC for being "negligent in its discovery obligations, dilatory in cooperating with defense counsel, and somewhat cavalier in its responsibility to the United States District Court."[101] Even worse, the court specifically blamed EEOC leadership for wasting time and taxpayer resources. According to the court, "the powers that be . . . in the higher echelons of the EEOC [kept] interfering with the promises and commitments that the trial attorneys [were] making."[102] This suit eventually settled on the merits; therefore, the court did not ultimately assess fees. But the words of the court are troubling nonetheless.

As noted above, in *EEOC v. Peoplemark*, the U.S. Court of Appeals for the Sixth Circuit affirmed a lower court's decision to award Peoplemark $751,942 in attorney's fees.[103] Here, EEOC alleged that Peoplemark had a blanket policy against hiring applicants with a criminal record, adversely affecting African Americans. Yet, "the complaint turned out to be without foundation from the beginning"[104] because Peoplemark had no such policy. This administration continued to pursue the case for six months after the claim was unreasonable to maintain. Peoplemark subsequently requested fees from EEOC which the district court granted and the Sixth Circuit later affirmed.

In December 2013, in *EEOC v. Bok Financial Corporation*, a federal district court awarded $26,570 in attorney's fees for EEOC's discovery abuses.[105] In particular, "EEOC engaged in conduct that obstructed the discovery process, improperly instructed deponents not to answer questions on multiple occasions, and failed to produce a . . . representative who was prepared and able to answer questions during a deposition."[106]

In March 2014, in *EEOC v. Propak Logistics*, a unanimous three judge panel of the U.S. Court of Appeals for the Fourth Circuit affirmed a lower court's decision to award Propak

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[96] *Id.* at 15.
[97] *Id.* at 14.
[98] *Id.* at 2.
[99] *Id.* at 15.
[100] *EEOC v. The Original Honeybaked Ham Company of Georgia, Inc.*, 2013 U.S. Dist. LEXIS 26887 (D. Colo. Feb. 27, 2013).
[101] *Id.* at 3.
[102] *Id.* at 6.
[103] *EEOC v. Peoplemark, Inc.*, 732 F.3d 584 (6th Cir. 2013).
[104] *EEOC v. Peoplemark, Inc.*, 2011 U.S. Dist. LEXIS 38696 at 7 (W.D. Mich. Mar. 31, 2011).
[105] *EEOC v. Bok Financial Corporation*, No. Civ. 11-1132 (D. N.M. Dec. 6, 2013).
[106] *EEOC v. Bok Financial Corporation*, No. Civ. 11-1132 (D. N.M. Nov. 12, 2013).

$189,175 in attorney's fees.[107] In *Propak*, after a multi-year and delayed investigation, EEOC filed a lawsuit that alleged Propak refused to hire a class of non-Hispanic individuals at one of its since-closed facilities. But, the court determined EEOC's lawsuit "effectively was moot at its inception" because EEOC failed to identify any class victims that could be entitled to relief.[108] Therefore, "EEOC unreasonably initiated the lawsuit."[109]

In April 2014, in *EEOC v. Womble Carlyle Sandridge & Rice*, a federal district court ordered EEOC to pay $22,900 in attorney's fees because the claimant in EEOC's case shredded evidence after EEOC initiated the lawsuit.[110] While EEOC learned that the documents were destroyed during discovery, it failed to inform Womble Carlyle. Moreover, the court was not satisfied that EEOC took steps to ensure the claimant retained relevant documents. Thus, EEOC's actions "evince[d] a 'sufficiently culpable mindset'"[111] to "constitute negligence, if not gross negligence."[112]

In September 2014, in *EEOC v. West Customer Management*, a federal district court found that the defendant was entitled to attorney's fees after EEOC lost a jury trial.[113] The court found that from the date of the pretrial conference through the trial's conclusion EEOC's evidence "was not sufficient to make out a *prima facie* case and in fact at that point was plainly frivolous for the lack of evidence supporting the claim."[114] The amount of fees has yet to be determined.

These substantial awards and losses have not gone unnoticed. According to one EEOC commissioner, EEOC's "reputation and credibility has … suffered from several recent lawsuits where [EEOC was] not only sanctioned, but openly chastised by the courts."[115] Moreover, in April 2012, the U.S. Senate Committee on Appropriations report language that accompanied the fiscal year 2013 spending bill noted the criticism EEOC's litigation activities had received from federal courts, including awards of attorney's fees against EEOC, and urged EEOC to use litigation resources more wisely.[116]

III. Lack of Transparency

In addition to its wasteful and abusive litigation tactics, EEOC has not kept the public informed of its regulatory and litigation activities. Despite urging from members of Congress

[107] *EEOC v. Propak Logistics, Inc.*, 746 F.3d 145 (4th Cir. 2014).
[108] *Id.* at 152.
[109] *Id.*
[110] *EEOC v. Womble Carlyle Sandridge & Rice*, 2014 U.S. Dist. LEXIS 58938 (M.D. N.C. Apr. 29, 2014); *EEOC v. Womble Carlyle Sandridge & Rice*, 2014 U.S. Dist. LEXIS 793 (M.D. N.C. Jan. 6, 2014).
[111] *EEOC v. Womble Carlyle Sandridge & Rice*, 2014 U.S. Dist. LEXIS 793 at 15 (M.D. N.C. Jan. 6, 2014).
[112] *Id.* at 12.
[113] *EEOC v. West Customer Management Group, LLC*, 2014 U.S. LEXIS 125126 (N.D. Fla. Sept. 8, 2014).
[114] *Id.* at 2.
[115] Memorandum of Constance S. Barker, Draft Enforcement Guidance on Pregnancy Discrimination and Related Issues, May 23, 2014.
[116] Report 112-158, page 114-115, to accompany S. 2323, making appropriations for Departments of Commerce and Justice, and Science, and Related Agencies for the fiscal year ending September 30, 2013, and for other purposes. Reported out of Appropriations Committee April 19, 2012.

and its own commissioners, EEOC has failed to give the public an opportunity to comment on its draft guidance. The general counsel has failed to issue annual reports since 2010, and the commission may not have met its obligations under the Freedom of Information Act (FOIA).

A. EEOC Issues Guidance without Public Notice and Comment

The Office of Management and Budget (OMB) has established best practices for federal agencies' use of guidance documents. One key best practice is to allow the public to comment on significant draft guidance before it is adopted.[117] Guidance is significant when, among other things, it has a "broad and substantial impact" on regulated parties.[118] OMB particularly encourages *pre-adoption* public comment when guidance is novel or controversial because it "increase[s] the quality of the guidance and provide[s] for greater public confidence in and acceptance of the ultimate agency judgments."[119] However, EEOC has chosen not to implement this practice.

EEOC has ignored this best practice twice in the past two and a half years. In April 2012, EEOC issued criminal background check guidance—formally known as Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act. This guidance, which impacts employers in every industry, sparked controversy because it is widely viewed as an expansion of EEOC's authority.[120]

Senator Michael B. Enzi (R-Wyo.), then ranking member of the Health, Education, Labor and Pensions Committee, twice wrote to EEOC in 2012 urging greater opportunity for public comment on any criminal background check guidance and criticizing slow responses to FOIA requests related to the guidance. Echoing this request, the Senate Appropriations Committee report accompanying the fiscal year 2013 spending bill for EEOC directed the agency to publically circulate any new guidance on the use of background checks for six months prior to its adoption.[121] Commissioner Constance Barker also disagreed with the decision not to publish draft guidance for public comment,[122] and Commissioner Chai Feldblum, noting the utility of allowing the public to comment on draft guidance, urged EEOC to consider doing so in the future.[123] Neither Senator Enzi's request, nor the Appropriations Committee report language,

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[117] Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007).
[118] *Id.* at 3435.
[119] *Id.* at 3438.
[120] *See Hearing on The Regulatory and Enforcement Priorities of the EEOC: Examining Concerns of Stakeholders, Hearing Before the H. Comm. On Educ. & Workforce*, 113th Cong. (2014) (statement of Camille Olson on behalf of the United States Chamber of Commerce); *see also* Letter from Patrick Morrisey, Att'y Gen., State of W. Va., et al., to U.S. Equal Emp't Opportunity Comm'n (hereinafter "State AG Letter") (July 24, 2013), *available at* http://www.eeoccountdown.com/files/2013/07/EEOC-Letter.pdf.
[121] Report 112-158, page 114-115, to accompany S. 2323, making appropriations for Departments of Commerce and Justice, and Science, and Related Agencies for the fiscal year ending September 30, 2013, and for other purposes. Reported out of Appropriations Committee April 19, 2012.
[122] Public Statement of Commissioner Constance Barker: Issuance of EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues (July 14, 2014).
[123] EEOC Public Meeting Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, Meeting Transcript, Apr. 24, 2012, *available at* http://www.eeoc.gov/eeoc/meetings/4-25-12/transcript.cfm.

nor the urging of two commission members moved the EEOC to utilize a more public process for this controversial guidance.

EEOC again issued guidance without providing the public an opportunity to comment on a draft. In July 2014, EEOC issued pregnancy discrimination guidance—formally known as Enforcement Guidance on Pregnancy Discrimination and Related Issues. According to Commissioner Victoria Lipnic, a majority of commissioners supported making a draft of the guidance available for public comment.[124] Commissioners Lipnic and Barker, in particular, protested the guidance for taking a novel position that further jeopardized EEOC's credibility.[125] Therefore, at a minimum, it deserved the appropriate public scrutiny,[126] yet draft guidance was not made available for public comment.

EEOC has defended its decision not to make draft guidance available for public comment by pointing to its public meetings. Indeed, EEOC does hold meetings on substantive topics to consider the value of issuing guidance in a particular area; however, this is insufficient. As Commissioner Feldblum has pointed out, without the benefit of concrete text it is impossible to raise targeted questions when "talking in the abstract."[127] Conversely, to allow public comment on draft guidance would enable parties to comment on specific text instead of theoretical concepts.

Underscoring the need to improve the quality of guidance, the U.S. Supreme Court recently struck down substantive positions in EEOC guidance. In *Vance v. Ball State University*, for example, the court rejected EEOC's definition of a supervisor in EEOC's 1999 Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors.[128] According to the court, EEOC's definition, as articulated in the guidance, was "nebulous"[129] and proposed a "standard of remarkable ambiguity"[130] that called for "murky"[131] fact-finding examinations. Therefore, the court adopted a clearer definition that can be "readily applied"[132] instead of inviting "highly case-specific evaluation of numerous factors"[133] that impedes resolution of a case before trial. Similarly, in *University of Texas Southwestern Medical Center v. Nassar*, the court rejected EEOC's causation theory related to retaliation claims articulated in its 1992 Enforcement Guidance on Recent Developments in Disparate Treatment Theory.[134]

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[124] Statement of The Honorable Victoria A. Lipnic, Commissioner, EEOC, Enforcement Guidance on Pregnancy Discrimination and Related Issues (July 14, 2014).
[125] See *id.*; *see also* Public Statement of Commissioner Constance Barker: Issuance of EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues (July 14, 2014).
[126] *See id*.
[127] EEOC Public Meeting Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, Meeting Transcript, Apr. 24, 2012, *available at* http://www.eeoc.gov/eeoc/meetings/4-25-12/transcript.cfm.
[128] *Vance v. Ball State University*, 133 S. Ct. 2434 (2013).
[129] *Id.* at 2443.
[130] *Id.* at 2449.
[131] *Id.*
[132] *Id.* at 2437.
[133] *Id.* at 2443.
[134] *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013).

B. EEOC's Office of General Counsel Fails to Issue Annual Reports

Traditionally, EEOC's Office of General Counsel released an annual report regarding its litigation activities. Reports from FY 2002-2010 can be found on EEOC's website.[135] The annual report includes information vital to EEOC transparency, including litigation statistics and detailed case information. Since FY 2010, however, the general counsel has failed to publish its annual report.[136] EEOC blamed staffing and funding deficiencies for their absence;[137] however, EEOC's budget increased by approximately $20 million from FY 2009 to FY 2014.[138]

C. EEOC Neglects Freedom of Information Act Obligations

EEOC appears to be neglecting its responsibilities under FOIA. Texas Roadhouse, a restaurant chain based in Kentucky, recently sued EEOC for violating FOIA.[139] Since 2007, EEOC has been investigating Texas Roadhouse for alleged age discrimination. However, EEOC has not provided information to Texas Roadhouse about the basis for its investigation. Therefore, in July and August 2014, Texas Roadhouse submitted FOIA requests to EEOC to obtain this and other information related to EEOC's investigation, but EEOC missed statutory and its own regulatory deadlines to respond to the request.[140] Accordingly, in September 2014, Texas Roadhouse filed suit against EEOC.[141]

IV. Conclusion

EEOC is charged with enforcement of numerous important laws to address discrimination in the workplace. Unfortunately, in many instances, its enforcement and flawed litigation strategies are proving ineffective, costly and burdensome for ill-treated defendants. Moreover, its lack of transparency is further jeopardizing its credibility. Moving forward, EEOC should ensure its efforts are focused on legitimate discrimination claims and begin to restore its tarred reputation.

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[135] EEOC, Office of General Counsel Annual Reports, *available at* http://www.eeoc.gov/eeoc/litigation/reports/index.cfm (last visited Nov. 17, 2014).
[136] *See id.*
[137] E-mail from Todd Cox, Dir., Office of Commc'n and Legislative Affairs, EEOC, to Kyle Fortson, Labor Policy Dir., Senate Committee on Health, Education, Labor, and Pensions, (Jun. 25, 2014, 13:37 EDT) (on file with recipient).
[138] *See* http://www.eeoc.gov/eeoc/plan/budgetandstaffing.cfm.
[139] Complaint for Injunctive Relief, Texas Roadhouse Inc. et al v. EEOC, No. 3:14-cv-00652 (W.D. Ky. Sept. 30, 2014).
[140] *Id.*
[141] *Id.*

Appendix 1
Summary of EEOC Sanctions First Awarded Since 2011

Case	Date Filed/Fees Awarded	Issue in Underlying Case	Sanction	Reason for Sanction
EEOC v. TriCore Reference Laboratories	Suit Filed: Sept. 29, 2009 Fees Awarded: D. N.M. Oct. 26, 2011; Affirmed by 10th Cir. Aug. 16, 2012	EEOC alleged the company violated the Americans with Disabilities Act for failing to accommodate and firing an employee with a disability.	$140,571 in attorney's fees (plus $21,179 in appellate fees) awarded to defendant.	Summary judgment was granted for TriCore on Feb. 7, 2011. The Tenth Circuit affirmed the lower court's award of fees to the defendant, finding that EEOC continued to pursue the case "after it became clear there were no grounds upon which to proceed," rendering the claim "frivolous, unreasonable, and without foundation."
EEOC v. Towersite Services, LLC	Suit Filed: Sept. 20, 2010 Fees Awarded: N.D. Ga. Mar. 29, 2013	EEOC brought suit alleging racial discrimination on behalf of an individual, but it was dismissed because the company that was sued was not an employer under Title VII.	$111,491 in attorney's fees, expenses, and costs awarded.	The district court awarded fees because EEOC should have known its claim "had no merit."
EEOC v. Peoplemark, Inc.	Suit Filed: Sept. 29, 2008 Fees Awarded: W.D. Mich. Oct. 17, 2011; Affirmed by 6th Cir. Oct. 7, 2013	EEOC brought suit against Peoplemark for allegedly using a blanket, companywide policy against hiring convicted felons, resulting in discrimination against African Americans under a "disparate impact" theory.	$751,942 in fees awarded to defendant.	The 6th Circuit upheld the lower court's fee award against EEOC for continuing its litigation even after learning in discovery that a premise crucial to the suit was false: Peoplemark did not in fact have a blanket, companywide policy against hiring convicted felons. According to the court, "from Oct. 1, 2009, through [Mar. 24, 2010, when case was voluntarily dismissed] . . . the Commission's claim was unreasonable to maintain."

EEOC v. Womble Carlyle Sandridge & Rice	Suit Filed: Jan. 16, 2013 Fees Awarded: M.D.N.C. Apr. 29, 2014	EEOC filed suit against Womble Carlyle alleging that the firm failed to provide reasonable accommodation for a cancer-stricken employee, and had discharged her due to that condition.	$22,900 awarded to defendant for attorney's fees.	The district court awarded fees against the EEOC for failing to prevent the employee from destroying evidence about her efforts to find a new job after the EEOC had commenced its suit. On June 26, 2014, the district court granted summary judgment on the underlying claims. EEOC has appealed summary judgment.
EEOC v. Propak Logistics, Inc.	Suit Filed: Aug. 12, 2009 Fees Awarded: W.D.N.C. Mar. 26, 2013; Affirmed by 4th Cir. Mar. 25, 2014	EEOC filed suit against Propak for allegedly violating Title VII by refusing to hire a class of non-Hispanic individuals at a North Carolina facility.	$189,175 in attorney's fees and costs awarded to defendant.	Summary judgment granted for Propak on Aug. 7, 2012. The Fourth Circuit held the district court did not abuse its discretion in awarding fees and costs to Propak on the grounds that a delay in EEOC's pursuit of litigation was unreasonably long and consequently caused Propak undue prejudice.
EEOC v. Memphis Health Care Center, Inc.	Suit Filed: Sept. 30, 2008 Fees Awarded: W.D. Tenn Sept. 23, 2011; 6th Circuit affirms standard, but remands to reassess fees May 17, 2013; W.D. Tenn. July 7, 2014 fees awarded again	EEOC brought a suit alleging age discrimination and retaliation in violation of the Age Discrimination in Employment Act.	Attorney's fees to be determined by the court; defendant requests $104,282 in fees, costs, and expenses	Summary judgment granted for Memphis Health Care on Sept. 10, 2010. The district court awarded fees because EEOC's suit "lack[ed] substantial justification" under the Equal Access to Justice Act, which the Sixth Circuit found applied to EEOC in Age Discrimination in Employment Act cases for the purposes of awarding fees.
EEOC v. Bok Financial Corporation	Suit Filed: Dec. 27, 2011 Fees Awarded:	EEOC brought suit alleging defendant unlawfully terminated employees because of their age, gender, and age plus gender.	$26,570 in attorney's fees and costs	The district court awarded fees because EEOC "engaged in conduct that obstructed the discovery process."

	D. N.M. Dec. 6, 2013			
EEOC v. Rock-Tenn Services Company, Inc.	Suit Filed: Sept 30, 2010 Fees Awarded: N.D. Tex. July 23, 2013	EEOC brought suit on behalf of a charging party and a class of similarly situated individuals alleging race discrimination and a hostile work environment.	$17,022 in attorney's fees and costs	The district court awarded fees because EEOC "continued to refuse to provide the documents it was ordered to produce" by the magistrate judge in discovery. Suit was eventually settled on the merits.
EEOC v. RJB Properties, Inc. and Blackstone Consulting, Inc.	Suit Filed: Mar. 31, 2010 Fees Awarded: N.D. Ill. June 16, 2014	EEOC brought suit alleging present and former employees were discriminated against based on their national origin because they were only told limited information about overtime opportunities, and other employees were not promoted for refusing to discriminate. One of the co-defendants settled and the other contested its employer and joint employer status.	$60,775 in attorney's fees	The district court awarded fees incurred in defending against the alleged claims beyond the close of discovery because EEOC's claims "became frivolous after discovery revealed that they stood no chance of success." The fees are under appeal in the Seventh Circuit.
EEOC v. West Customer Management	Suit Filed: Sept. 30, 2010 Fees Awarded: N.D. Fla. Sept. 8, 2014	EEOC brought suit alleging the defendant discriminated against a job applicant based on his national origin. At trial, the jury found for the defendant, finding that the applicant was not qualified for the position for which he applied.	Attorney's fees to be determined by the court	The district court awarded fees from the date of the pretrial conference, which was held Jan. 17, 2014, through the conclusion of trial, Jan. 31, 2014, because "the case presented at trial…was not sufficient to make out a prima facie case and in fact at that point was plainly frivolous."