

I ask unanimous consent to have the report's executive summary and key findings printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From the U.S. Senate Committee on Health, Education, Labor and Pensions—Ranking Member Lamar Alexander (R-TN) Minority Staff Report, Nov. 24, 2014]

EEOC: AN AGENCY ON THE WRONG TRACK? LITIGATION FAILURES, MISFOCUSED PRIORITIES, AND LACK OF TRANSPARENCY RAISE CONCERNS ABOUT IMPORTANT ANTI-DISCRIMINATION AGENCY

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 contravened[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.

REMEMBERING COLONEL ELIOT NATHANIEL PEARL

Mr. BARRASSO. Mr. President, I wish to express our Nation's deepest thanks and to honor the life of Col. Eliot N. Pearl, U.S. Air Force (Ret.).

On July 12, 2014, Colonel Pearl died at the age of 95 peacefully at his home in Silver Spring, MD.

Today, Colonel Pearl's family will lay him to rest at Arlington National Cemetery with full military honors in recognition of his 36 years of service to our Nation. In 1939, Eliot graduated from the Massachusetts Institute of Technology. Instead of becoming a doctor, Eliot chose to serve his Nation during World War II, much to the chagrin of his father. He was commissioned into the Army Air Corps and served as a cryptographic message center officer. Colonel Pearl served two active duty tours in World War II and the Korean war including a deployment to Panama. Colonel Pearl was also one of the founding instructors of the Department of Defense's cryptology schoolhouse.

After Colonel Pearl separated from active duty service, he continued to serve our Nation in the Air Force Reserve for another 25 years concurrently working as a cryptologist at the National Security Agency, Fort Meade, MD.

On August 16, 1978, Colonel Pearl retired from the Air Force. He was awarded the American Theater Service Medal, World War II Victory Medal, and National Defense Service Medal.

We continue to live safe and free because of individuals like Colonel Pearl. He committed his life to serving our Nation while in uniform and as a civilian. Eliot defended our Nation and led the way for the next generation that will secure our future.

Colonel Pearl's beloved son David and his beloved second wife Joyce, preceded him in death. He is survived by his sons, Mark A. Pearl (Pamela), Scott M. Pearl (Renee) and Geoffrey B. Anthony Pearl; five loving grandchildren: David, Vincent, Samuel, Anthony and Daniel; his devoted sister Eva Erony; his first wife Thelma Pearl; his loving niece Susan Erony (Jay Jaroslav); and his nephew Alan Erony.

As we say goodbye, we also say thank you for your service that keeps our Nation strong and free. May God bless Colonel Pearl and his family, and welcome him with open arms.

ADDITIONAL STATEMENTS

RECOGNIZING EMILY KATH

● Mr. BARRASSO. Mr. President, I would like to take the opportunity to express my appreciation to Emily Kath for her hard work as an intern in my Washington, DC, office. I recognize her efforts and contributions to my office as well as to the State of Wyoming.

Emily is a native of Powell, WY, and a graduate of Powell High School. She currently attends the University of Wyoming, where she is studying communications and prelaw. She has demonstrated a strong work ethic, which has made her an invaluable asset to our office. The quality of her work is