

Whistleblower Comments to Agency Report of Investigation

Allegation 1

The Agency's conclusion that continued violations of regulation over a period of years came only as a result of "*systemic issues with the EPA's internal procedures for processing FAD requests*" and not the result of gross mismanagement appears to overlook the definition of gross mismanagement. Gross mismanagement involves a management action or inaction that creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission.

The Agency, in its investigative summary, appears reluctant to admit that it did uncover evidence of gross mismanagement. Further, the Agency appears to deny that inaction can constitute gross mismanagement.

In its own investigative report, the EPA provides statistics from annual Form 462 Reports that EPA submitted to the Equal Employment Opportunity Commission (EEOC) for 6 consecutive years (2011-2016). These statistics illustrate continued violations of the same regulation. It appears that these Form 462 Reports do have a section that identifies individual(s) responsible for the overall Equal Employment Opportunity (EEO) program for the Agency in addition to individual(s) responsible for the day-to-day operations of the EEO program for the Agency.

As opposed to the claim in the investigative report that there was no evidence of gross mismanagement on the part of any employee of the Agency, the management inaction to correct the violation of regulation that they continued to report from 2011 through 2016 appears to constitute gross mismanagement.

The regulation requires that the Final Agency Decision (FAD) be issued in 60 days. According to the Agency's investigative report, most recently in 2016, the Agency has increased its average number of days to issue the FAD to 810.13 days! This length of time is a new record overwhelming the previous record set in 2015 of 609.33 days. There is no mention in the investigative report as to how many FADs remained in the queue for each of those years.

The number of FADs in the queue and when each was due should be included as part of the investigation for purposes of a complete record concerning this matter.

It is unclear how the remedial action in Part D of the Recommended Areas Requiring Remedial Actions can be effective. Since 2011, it appears that the Agency has not determined the appropriate level of resources that it needs for timely issuance of FADs. Part C of the remedial actions emphasize that the Agency, at least since 2011, has failed to implement "clear guidelines setting forth the roles and responsibilities of employees in OCR and CRFLO with regard to the drafting and legal review of FADs." It seems that identifying roles and responsibilities for tasks required to comply with EEO regulations would

be a management action and that, to date, there has been management inaction or action that was never effective and described in the Agency's investigation as "inefficient and lengthy."

- The EPA investigative report cited some roles and actions that are also included in EEOC Management Directive 110. They are mentioned in the Agency's discussion as factors or causes for the Agency's delay in issuing Final Agency Decisions. Remedial actions by the Agency should include steps to assure there are no conflicts of interest as described in that Management Directive, such as those described in its Part IV, Avoiding Conflicts of Interest.

The Agency's investigative report states that *"OCR and CRFLO currently do not have guidelines in place concerning the roles and responsibilities of the staff in each Office for the drafting and legal review of FADs"* and that *"...until May 2017, a significant percentage (in some instances up to 50%) of the work assigned to the Attorney Advisors in OCR involved matters other than the drafting of FADs (i.e., review of Investigation Plans, review of Accept/Dismiss letters, counseling of case manager, etc.)"*

Here is an excerpt from EEOC Management Directive 110:

https://www.eeoc.gov/federal/directives/md-110_chapter_1.cfm

D. Separation of EEO Complaint Program from Agency's Defensive Function

Heads of agencies must manage the dual obligations of carrying out fair and impartial investigations of complaints that result in final agency determinations as to whether discrimination has occurred and defending the agency against claims of employment discrimination. Only through the vigilant separation of the investigative and defensive functions can this inherent tension be managed.

Ensuring a clear separation between the agency's EEO complaint program and the agency's defensive function is thus the essential underpinning of a fair and impartial investigation, enhancing the credibility of the EEO office and the integrity of the EEO complaints process.

There must be a firewall between the EEO function and the agency's defensive function. The firewall will ensure that actions taken by the agency to protect itself from legal liability will not negatively influence or affect the agency's process for determining whether discrimination has occurred and, if such discrimination did occur, for remedying it at the earliest stage possible.

It is important for the EEO Director to be provided with sufficient legal resources (either directly or through contracts) so that the legal analyses necessary for reaching final agency decisions can be made within the autonomous EEO office.

At a minimum, however, the agency representative in EEO complaints may not conduct legal sufficiency reviews of EEO matters. Legal sufficiency reviews in the EEO process involve legal analysis made by the EEO office during the processing of EEO complaints, such as acceptance/dismissal of complaints, legal theories utilized by the EEO office during investigations, and legal determinations made in final agency actions. The optimal situation is for the EEO office to have sufficient internal legal resources. However,

when necessary and requested by the EEO office, legal sufficiency reviews conducted outside the EEO office must be handled by individuals that are separate and apart from the agency's defensive function.

Similarly, impartiality or the appearance of impartiality is not ensured by simply rotating agency representatives within the same office and is undermined where the agency representative's associates are assigned the legal sufficiency function in EEO cases from the representative's caseload.

Allegation 2

In its summary of conclusions, the Agency admits that its failure to issue FADs in a timely manner could subject it to default judgments and monetary penalties. Thus, the failure to issue FADs in a timely manner could lead to needless expenditure of Government funds.

The Agency's investigation claims that a Claimant is not delayed access to the EEOC as a result of the failure to issue FADs in a timely manner. It is an interesting conclusion with a creative explanation on the part of the Agency. First, it appears that the Agency wants the Office of Special Counsel to overlook the *"if compliance with the 60-day time requirement has not occurred."*

In practice, this requires a Complainant to await a violation of the 60-day time requirement prior to making a motion to the EEOC to require the federal agency to produce a FAD.

Additionally, a Complainant must wait for the Agency to issue a Final Agency Decision before a Complainant may file an appeal of that FAD with the EEOC.

Footnote 1 in the Agency's investigative report details a real delay. The Agency was required to issue a Final Agency Decision 60 days after the Complainant's request for one on October 17, 2016. By regulation, the Agency was required to issue its Final Agency Decision on December 16, 2016. After EEOC issued an Order to EPA because it was in violation of the regulation, the Agency finally issued its Final Agency Decision on July 3, 2017. This created a real delay of over 6 months from when the Complainant would have had the right to file an appeal to that Final Agency Decision had it been issued in a timely manner as required by regulation.

A Claimant was already delayed access to the appeal process to the EEOC as a result of the Agency's failure to issue FADs in a timely manner.