



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

July 26, 2022

The Honorable Chris Pappas
Chairman
Subcommittee on Oversight and Investigations
Committee on Veterans Affairs
U.S. House Of Representatives
Washington, D.C. 20515

Dear Chairman Pappas:

This is in response to your July 20, 2022 letter to the Chair of the U.S. Equal Employment Opportunity Commission (EEOC or Commission) concerning the House Committee on Veteran's Affairs' Subcommittee on Oversight and Investigations hearing on the efforts to remedy unlawful harassment and discrimination at the Department of Veterans Affairs (VA). We appreciate your support for the agency's important work to prevent and remedy employment discrimination.

- 1. Is VA in compliance with EEOC management directives, which state, "The same agency official(s) responsible for executing and advising on personnel actions may not also be responsible for managing, advising, or overseeing the EEO pre-complaint or complaint processes"?**

- a. Office of Resolution Management, Diversity & Inclusion**

Twenty-five years ago, Congress enacted the Veterans' Benefits Act of 1997 to address VA's structural EEO problems, which persist to this day. In the 1990s, VA medical facility Directors served as EEO officers, creating concerns that VA's complaint adjudication system did not adequately protect victims of sexual harassment.¹ Many VA employees felt that medical facility directors would not impartially evaluate EEO complaints and would use their supervisory authority to retaliate against complaining employees.

In response to these concerns, Congress ultimately enacted the Veterans' Benefits Act of 1997, Pub. Law No. 105-114, 111 Stat. 2277. The Act required VA to establish an employment discrimination complaint resolution system and administer the system in an objective, fair, and effective manner that encourages timely and fair resolution. Pub. L. No. 105-114, § 101(a)(1); 111 Stat. at 2277, 2278. Additionally, the

¹ See H.R. Rep. No 105-292, at 5 (1997) (reporting conclusion "that a culture of tolerance of sexual harassment and abusive behavior exists at certain VA facilities, and that the policy of 'zero tolerance' of sexual harassment is insufficient to address these problems"), see also David Dahl, *VA Must Get Tough on Harassment*, St Petersburg Times, Nov II, 1997, at 3A, available in 1997 WL 14076191 ("Alarmed by the case of a sexual harasser. Congress on Monday passed a bill that forces the Department of Veterans Affairs to set up some of the strictest anti-harassment measures in the government. The legislation, approved over the objections of the VA, creates an office to hear employee complaints and empowers Congress and an outside auditor to oversee the department's performance in policing harassers. Congress acted after learning that [a] North Carolina VA hospital director was transferred to [another facility], with a six-figure salary, even though a VA investigation found he sexually harassed an employee and spoke offensively to two others.")

statute states that VA employees who perform employment discrimination complaint resolution functions at VA facilities shall not be subject to the authority of the facility's director with respect to these functions. 38 U.S.C. § 516.

As a result, the Act established the VA's Office of Employment Discrimination Complaint Adjudication (OEDCA) to issue final agency decisions on the merits of any employment discrimination complaint filed by a VA employee or applicant for employment. The Act requires the OEDCA Director to report to the Secretary or Deputy Secretary of Veterans Affairs. On February 22, 1998, VA also established the Office of Resolution Management (ORM), which recently changed its name to the Office of Resolution Management, Diversity & Inclusion (ORMDI). Pursuant to VA Directive 5977, ORMDI is responsible for providing timely and quality EEO complaint processing services to all complainants.

While the Act improved the structure of VA's EEO program in some ways, problems persisted. In July 2020, GAO issued a report, titled *Sexual Harassment: VA Needs to Better Protect Employees*, in which VA officials reported that the EEO Program Manager at a VA facility generally served as the head of the EEO program and, for many facilities, was the only on-site EEO personnel. These EEO Program Managers provide VA employees with training and information on the EEO program and Harassment Prevention Program (HPP), and employees can report harassment to them and get assistance with initiating an EEO complaint. However, EEO Program Managers are supervised or controlled by facility managers.

On January 1, 2021, Congress enacted the Elijah E. Cummings Federal Employee Anti-Discrimination Act of 2020 (Cummings Act), as an amendment to the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002. Section 403 of the Cummings Acts provides that "[t]he head of each Federal agency's Equal Employment Opportunity Program shall report directly to the head of the agency." Moreover, Section 401 of the Act prohibits the EEO program from being "under the control, either structurally or practically, of the agency's Office of Human Capital."

To-date, the organizational structure of VA's EEO office does not comply with the Cummings Act. First, the agency's EEO Director does not report to the Secretary. VA has designated the Assistant Secretary for Human Resources and Administration/ Operations, Security and Preparedness (HRA/OSP) as its EEO Director. On June 28, 2022, the Assistant Secretary informed EEOC that she reports to the Deputy Secretary. We also note that the Assistant Secretary does not actually function as the EEO Director. VA Directive 5977 states the Deputy Assistant Secretary for ORMDI has the authority to "implement and manage the EEOC regulatory requirements and procedures in this Directive." The Deputy Assistant Secretary is supervised by the Principal Deputy Assistant Secretary, who reports to the Assistant Secretary. As such, VA's EEO Director, whether the Assistant Secretary or the Deputy Assistant Secretary, does not report to the Secretary.

In a feedback letter, dated July 24, 2020, the EEOC notified VA that due to a conflict of interest concerning the location of ORMDI within HRA/OSP, the VA has a critical deficiency in its EEO program. This location of VA's EEO Office clearly violates the Cummings Act, because the Assistant Secretary oversees ORMDI and the Office of the Chief Human Capital Officer. Furthermore, as the feedback letter noted, Chapter One of EEOC's Management Directive 715 (MD-715) clearly states that a conflict of interest exists if the same agency official is responsible for executing and advising on personnel actions as well as managing, advising, or overseeing the EEO pre-complaint or complaint process. Since the EEO office often scrutinizes and challenges the motivations and impacts of personnel actions and decisions, the EEO function must be separate from the Human Resources function to maintain the integrity of the EEO investigative and decision-making processes. See EEOC Management Directive 110, Chapter One. We also are concerned that a perceived conflict of interest could have a chilling effect

on employees' use of and/or confidence in the EEO office. As such, the EEOC instructed VA to establish a plan to correct this deficiency in its next MD-715 report, which has not yet been submitted.

b. Veterans Health Administration's EEO Managers

Section 401 of the Cummings Act requires federal agencies to provide for the fair and impartial processing and resolution of complaints of employment discrimination. Pub. Law No. 116-283, 134 Stat. 3388. As the House determined in its report on the Veterans' Benefit Act of 1997, the complaint process should be completely free and independent of undue influence, and the appearance thereof, from supervisors, line managers or directors. On June 22, 2022, VA acknowledged to the EEOC that its facility EEO Program Managers and personnel should report to ORMDI. The agency explained that all EEO personnel in its Administrations have been realigned under ORMDI, except for approximately 180 EEO Managers in the Veterans Health Administration (VHA). VA has been unable to realign VHA's EEO Managers due to insufficient funding. Having local managers supervise EEO personnel inherently creates the inevitable perception that the EEO program is not impartial or independent because local facility supervisors will have undue influence and entanglement in the EEO process. This conflict of interest means that VA cannot meet Congress' goal of having "objectivity and fairness permeate the complaint process, from its initial informal stages through the Department's final agency decisions." As such, VA must ensure that VHA's EEO Managers report to ORMDI.

2. Why are these directives necessary, and what impact might an agency's failure to comply with these directives have on employees' willingness to report sexual harassment?

Title VII of the Civil Rights Act of 1964 (Title VII) and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act) mandate that all federal personnel decisions be made free of discrimination on the basis of race, color, religion, sex, national origin, reprisal or disability and also require that agencies establish a program of equal employment opportunity for all federal employees and job applicants. 42 U.S.C. §2000e-16 and 29 U.S.C. §791. EEOC's MD-715, which took effect on October 1, 2003, provides federal agencies with a roadmap for creating effective equal employment opportunity (EEO) programs for all federal employees as required by Title VII and the Rehabilitation Act.

As MD-715 makes clear, each federal agency is required to have an EEO program and engage in proactive discrimination prevention. An essential element of an agency's EEO efforts is an anti-harassment program that consists of (1) a policy that prohibits workplace harassment on each protected basis and (2) procedures for addressing such matters when they arise.² Such an anti-harassment program is different from, and serves a different purpose than, the federal agency EEO complaint process, which is designed to make individuals whole for discrimination that already has occurred and to prevent the recurrence of the unlawful discriminatory conduct. An anti-harassment program, on the other hand, requires the agency to take immediate and appropriate corrective action, including the use of disciplinary actions, to eliminate harassing conduct regardless of whether the conduct violated the law.

MD-715 specifies that a model EEO program must have a written policy statement issued by the agency head that expresses commitment to EEO and a workplace free of discriminatory harassment. To achieve a model EEO program, agencies must establish comprehensive anti-harassment procedures that prevent harassment on all protected bases. Moreover, to implement

² See *Management Directive (MD)-715, Element C*.

an effective anti-harassment program, Part G of the MD-715 Instructions sets forth that agencies must:

- Disseminate the anti-harassment policy to all employees (A.2.a);
- Inform its employees about the anti-harassment program (A.2.c.4);
- Allocate sufficient funding and qualified staffing to publish and distribute EEO materials, including anti-harassment policies (B.4.a.6), and to effectively manage its anti-harassment program (B.4.a.9);
- Train all managers and supervisors on the anti-harassment policy (B.5.a.3) and the communication and interpersonal skills necessary to effectively supervise a workplace with diverse employees (B.5.a.4);
- Establish a comprehensive and compliant anti-harassment policy and procedures (C.2.a) that requires corrective action to prevent or eliminate conduct before it rises to the level of unlawful harassment (C.2.a.1);
- Create a procedure to address harassment allegations that is separate from the EEO complaint process (C.2.a.3);
- Ensure the EEO office informs the anti-harassment program of all EEO counseling activity that allege harassment (C.2.a.4);
- Conduct a prompt inquiry (beginning within 10 days of notification) of all harassment allegations, including those initially raised in the EEO complaint process (C.2.a.5); and
- Implement a system to accurately collect, monitor, and analyze the processing of complaints in the anti-harassment program (E.4.a.6).

In addition to providing employees with an avenue for prompt correction of harassing behavior, anti-harassment policies serve to limit agency liability. An agency can avoid liability for hostile work environment harassment where, at a minimum, it has a harassment policy and procedure containing the six required elements and an employee unreasonably failed to take advantage of the procedure, such as failing to report the unwelcome conduct,³ failing to report unwelcome conduct after escalating or multiple incidents,⁴ or failing to utilize preventive measures offered by the agency.⁵ When an agency has an anti-harassment policy and an employee files a complaint under that policy, the EEOC may find discrimination if the agency fails to conduct a prompt, thorough, and impartial investigation, and take immediate and appropriate corrective action.

The failure to issue and/or effectively implement an anti-harassment policy can result in employees not knowing how to report sexual harassment and/or not feeling safe to report the allegations to the agency. In June 2016, EEOC's [*Select Task Force on the Study of Harassment in the Workplace*](#) (Select Task Force Study) found that “[r]oughly three out of four individuals who experienced harassment never even talked to a supervisor, manager, or union representative about the harassing conduct. Employees who experience harassment fail to report the harassing

³ *Woodall v. Dep't of the Navy*, EEOC Appeal No. 0120112204 (July 18, 2012).

⁴ *Complainant v. Dep't of Justice (Federal Bureau of Prisons)*, EEOC Appeal No. 0120130275 (September 10, 2014).

⁵ *Bernstein v. Social Security Administration*, EEOC Appeal No. 0120072322 (Nov. 20, 2007).

behavior or to file a complaint because they fear disbelief of their claim, inaction on their claim, blame, or social or professional retaliation.” Rather than file a complaint, the Select Task Force Study determined that employees who experience sex-based harassment “will avoid the harasser, deny or downplay the gravity of the situation, or attempt to ignore, forget, or endure the behavior.” The Select Task Force Study also shared that “gender-harassment conduct was almost never reported; unwanted physical touching was formally reported only 8% of the time; and sexually coercive behavior was reported only 30% of the women who experienced it.” One of the most important methods to increase the reporting of harassment is to demonstrate accountability. By implementing an anti-harassment program with “an effective and safe reporting system, a thorough workplace investigation system, and proportionate corrective action,” the Select Task Force Study found that employees learn “the employer takes harassment seriously” and “will be likely to complain if they experience harassment or report harassment that they observe.”

- 3. EEOC’s Associate Director for Federal Sector Programs, in a July 24, 2020, letter to VA’s former Assistant Secretary for Human Resources and Administration/ Operations, Security, and Preparedness, stated that VA’s “reporting structure is inconsistent with [EEOC] regulations and creates a conflict of interest by allowing the Assistant Secretary to supervise the EEO office and OCHCO.” The July 2020 letter referenced similar notice and feedback letters the Commission had sent VA dating back to 2017. To your knowledge, has VA made any progress in correcting this critical deficiency since the July 24, 2020, letter?**

No, VA has not made any progress toward implementing a compliant reporting structure for the Deputy Assistant Secretary, Office of Resolution Management, Diversity & Inclusion. The Deputy Assistant Secretary continues to report to the Assistant Secretary, Human Resources and Administration/Operations, Security, and Preparedness, who also oversees the Office of the Chief Human Capital Officer.

In addition, EEOC has identified the following additional deficiencies within the agency’s EEO program:

- Non-compliant anti-harassment policy and procedures;
- Non-compliant EEO policy statement (dated December 18, 2019);
- Lack of complete applicant flow data, tables A/B 6,7 and 8;
- Lack of coordination between EEO and OCHCO in preparing MD-715 report and identifying and removing barriers;
- Untimely Final Agency Decisions on the Merits;
- Failure to evaluate all managers and supervisors on EEO elements;
- Lack of sufficient EEO staffing to conduct thorough barrier analysis;
- Lack of sufficient budget and staffing to effectively administer its special emphasis programs and manage its reasonable accommodation program;
- Failure to require senior managers to participate in barrier analysis process and develop EEO action plans;

- Failure to forward harassment allegations raised in the EEO complaint process to the anti-harassment program;
- Lack of firewall between the Reasonable Accommodation Program Manager and the EEO Director;
- Failure to establish a tracking system for the reasonable accommodation program; and
- Failure to have a system in place to re-survey the workforce.

These deficiencies will be discussed with the VA during the EEOC's next technical assistance meeting with the agency in FY 2023.

We hope this information is helpful to you; and we look forward to working with you and all our partners in Congress to advance equal opportunity in our nation's workplaces.

Sincerely,



Jacinta Ma
Director
Office of Communications and Legislative Affairs