

Congress of the United States

Washington, D.C. 20515

September 27, 2022

Delivered via Email

The Honorable Charlotte A. Burrows
Chair
Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20002

Dear Chair Burrows:

We write concerning several troubling developments at the Equal Employment Opportunity Commission (EEOC or Commission) during your chairmanship. In particular, since President Biden designated you as Chair on January 21, 2021,¹ EEOC has undermined a number of transparency and case-management reforms implemented under your predecessor. You have also issued guidance that directly contravenes the U.S. Supreme Court's holding in *Bostock v. Clayton County*.² Cumulatively, these actions demonstrate a pattern of partisanship and mismanagement that merits oversight.

In 1995, EEOC delegated its litigation authority to the Office of General Counsel (OGC) despite Congress's clear statutory command that the Commission commence litigation.³ The 1995 delegation of authority predictably resulted in EEOC approving only a small percentage of litigation from Fiscal Years (FY) 2009 to FY 2019, with the Commission approving only 124 of the 1,933 merit suits filed by EEOC.⁴ The remaining suits were filed by OGC without Commission approval.

In January 2021, under the leadership of former Chair Dhillon, EEOC implemented a number of reforms that increased transparency in the Commission's operating procedures. Specifically, in an attempt to remedy the delegation of substantial authority to an unaccountable administrative state, Chair Dhillon led an effort to ensure the Commission votes on more cases and could potentially vote on each case the OGC wanted to pursue in court.⁵ These votes were to be posted on EEOC's website. The salutary effect of the delegation reforms, affording as they did a greater opportunity for deliberation and transparency, was soon made apparent. Moreover, despite the predictable hyperbole and remonstrations from special interest groups, the transparency reforms

¹ U.S. Equal Employment Opportunity Commission, "[President Appoints Charlotte A. Burrows as EEOC Chair](#)." Press Release. January 21, 2021.

² 140 S.Ct. 1731 1753, 207 L.Ed.2d 218 (2020).

³ See 42 U.S.C. § 2000e-4(g)(6)(authorizing the Commission to intervene "in a civil action brought under [section 2000e-5](#) of this title by an aggrieved party against a respondent other than a government, governmental agency or political subdivision.")

⁴ "[Resolution Concerning the Commission's Authority to Commence or Intervene in Litigation and the Commission's Interest in Filing Appeals](#)." Equal Employment Opportunity Commission. March 10, 2020.

⁵ See *id.*

did not hinder EEOC's enforcement capabilities, as the total monetary benefits for systemic discrimination for FY 2021, the year following implementation of the delegation reforms, exceeded those of FY 2020.⁶

Despite the benefits of the Commission's previous delegation reforms, a recent opinion piece written by Commissioner Dhillon and Commissioner Sonderling and published in *The Wall Street Journal* demonstrates that they are now being abused and mismanaged.⁷ For example, they write that when a majority of the Commissioners vote against filing a proposed lawsuit, Acting General Counsel Gwendolyn Reams simply "withdraws" the case administratively rather than formally closing the matter.⁸ The result of such subterfuge is to allow the General Counsel to bring the proposed lawsuit before the Commission again—presumably when it has a majority in place that will support your political agenda. These actions render the transparency measures embodied by the reforms a mockery, as votes declining to authorize certain lawsuits do not appear publicly on EEOC's website. Such chicanery in effect nullifies the delegation reforms, dilutes the power of Commissioners who are intended to serve on an equal footing, and circumvents congressional oversight and accountability.

In their opinion piece, Commissioners Dhillon and Sonderling describe another example of EEOC running amok. In June 2021, EEOC issued guidance purportedly to "educate" employees and employers about their rights and obligations, respectively, following issuance of *Bostock*. Yet, this guidance went far beyond what the U.S. Supreme Court actually decided. The question before the Court in *Bostock* was discrete, "whether an employer who *fires* someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex.'"⁹ [emphasis added]. Whether "sex-segregated bathrooms, locker rooms, and dress codes" would prove sustainable under Title VII was not, as Justice Gorsuch emphasized, before the Court, and the Court would not presume to "prejudge any such question."¹⁰

However, such a clear directive did not deter EEOC under your leadership from issuing expansive guidance on the issue without public input or a Commission vote. Senator Burr wrote to you about these concerns last year, and they have proved prescient in the wake of a federal court order enjoining EEOC from implementing the guidance in part because the guidance "go[es] beyond the holding of *Bostock*" and "purports to explain what Title VII requires of covered employers with regard to the exact conduct *Bostock* declined to address."¹¹ As testament to the overreach the guidance represented, the court held that "[t]he EEOC's guidance identifies and creates rights for applicants and employees that have not been established by federal law"

⁶ U.S. Equal Employment Opportunity Commission. "[Systemic Enforcement Information](#)."

⁷ See "[An Administrative Power Grab at the EEOC](#)." Commissioners Janet Dhillon and Keith Sonderling. *Wall Street Journal*, August 25, 2022.

⁸ *Id.*

⁹ 140 S.Ct. at 1753.

¹⁰ *Ibid.*

¹¹ [Tennessee v. U.S. Department of Education](#), No. 3:21-cv-308, 2022 WL 2791450 (E.D.Tenn. July 15, 2022).

and as such was a legislative rule requiring compliance with notice-and-comment procedures under the *Administrative Procedure Act*.¹²

Finally, in a letter sent by Commissioner Dhillon to the Board of Directors of the Technology Modernization Fund (TMF Board), we learned about another example of your improper management practices.¹³ Specifically, Commissioner Dhillon's letter alerts the TMF Board that you have blocked certain Commissioners and Commissioners' staff real-time access to EEOC's new case management system. Instead, they must go through EEOC information technology (IT) staff to get even limited access. More shocking still, these Commissioners and their staff have not been allowed to participate in agency-wide educational sessions on the new system.

In 2019, under former Chair Dhillon, EEOC rightly decided to seek approval from the TMF Board to update its 17-year-old case management system to make it more efficient and more secure. However, when Chair Dhillon began the process to update the system, no one could imagine it would be used to cut off Commissioners or their staffs' 24-hour, direct, and unrestricted access to the system. Having this access is essential for them to do their jobs, and we expect you to restore this access to all Commissioners and their staffs immediately.

EEOC's actions during your tenure as chair indicate a level of secrecy, a lack of transparency, and a willingness to evade scrutiny that are deeply troubling. It is a shame that duly sworn commissioners have not been able to address these issues within EEOC and instead were compelled to air their concerns publicly to try to effectuate a much-needed course correction at EEOC. So the Committees can understand these issues better, please respond to the following requests for information by October 7, 2022. When responding, please include your answer below each request for information, rather than in a narrative format.

Delegation Authority

1. Please provide a list of all cases where the Commission voted on a case but the vote was administratively withdrawn and therefore not posted on the website.
2. Provide an explanation of why these cases were not posted on EEOC's website.
3. Will you commit to disallowing the Acting General Counsel from withdrawing cases administratively that are voted down instead of formally closing the case?

Bostock Guidance

1. Will you withdraw the *Bostock* guidance in light of the federal district court ruling?
2. In your response to Senator Burr's June 2021 letter, you claimed the June 15 guidance "merely reiterates already established positions of the Supreme Court and Commission decisions." Yet, despite Justice Gorsuch's clear caveat that the decision does not apply to bathrooms, locker rooms and dress codes, EEOC's guidance purports to do exactly that. In light of the federal district court's injunction, do you stand by your statement?

¹² Ibid. at *42.

¹³ Letter from Janet Dhillon, Comm'r, EEOC, to Bd. of Dirs., TMF (July 25, 2022) (On file with authors).

3. In the same reply to Senator Burr's letter, you assert that "the June 15, 2021, technical assistance document does not purport to be solely an interpretation of *Bostock*, and there is no requirement that it be so limited." Yet, the federal district court has noted that it is precisely that refusal to confine guidance to the *Bostock* decision that inevitably results in improperly expanding its reach and creating new legal obligations without notice-and-comment rulemaking.¹⁴ In light of the court's injunction, do you stand by your statement?

Case Management System

1. Why does the new case management system no longer allow Commissioners on-demand, unfettered access to the system, as they had in the previous case management system?
2. Do any EEOC staff have on-demand access, or must all EEOC staff go through IT staff to access the new case management system?
3. Do any EEOC staff have unfettered access, or do all EEOC staff have limited access to the new case management system?
4. Why have certain Commissioners and their staff not been allowed to attend educational sessions on the new case management system?
5. Will you commit to giving all Commissioners and their staffs on-demand and unfettered access to the case management system immediately?
6. Will you commit to allowing all Commissioners and their staffs to attend educational sessions on the case management system?

Thank you for your attention to this matter.

Sincerely,



Richard Burr
Ranking Member
Senate Committee on Health, Education,
Labor and Pensions



Virginia Foxx
Ranking Member
House Committee on Education and Labor

¹⁴ [Tennessee v. U.S. Department of Education](#), No. 3:21-cv-308, 2022 WL 2791450 (E.D.Tenn. July 15, 2022).