COMMENT

Procedures for Previously Exempt State and Local Government Employee Complaints of Employment Discrimination under Section 304 of the Government Employee Rights Act of 1991, RIN 3046-AB09

07-19-2023

LABOR AND EMPLOYMENT

Submitted via Regulations.gov

RE: Procedures for Previously Exempt State and Local Government Employee Complaints of

Employment Discrimination under Section 304 of the Government Employee Rights Act of 1991, RIN 3046-AB09

Dear Mr. Windmiller:

I appreciate this opportunity to provide comments on the above-captioned proposed rule. I am an attorney with the Competitive Enterprise Institute. The Competitive Enterprise Institute is a non-profit research and advocacy organization that focuses on regulatory policy.

I. Introduction

On May 19, 2023, the Equal Employment Opportunity Commission ("Commission") issued a notice of proposed rulemaking ("NPRM") entitled Procedures for Previously Exempt State and Local Government Employee Complaints of Employment Discrimination under Section 304 of the Government Employee Rights Act of 1991, RIN 3046-AB09; 88 Fed. Reg. 32,154 (May 19, 2023). In the NPRM the Commission proposes to amend regulations in 29 C.F.R. part 1603, which governs procedures for complaints filed pursuant to the Government Employee Rights Act of 1991, 42 U.S.C. § 2000e-16c ("GERA"). Among other things, the Commission proposes to amend 29 C.F.R. § 1603.107, which currently provides:

§ 1603.107 Dismissals of complaints.

(a) Where a complaint on its face, or after further inquiry, is determined to be not timely filed or otherwise fails to state a claim under this part, the Commission shall dismiss the complaint.

(b) Where the complainant cannot be located, the Commission may dismiss the complaint provided that reasonable efforts have been made to locate the complainant and the complainant has not responded within 30 days to a notice sent by the Commission to the complainant's last known address.

(c) Where the complainant fails to provide requested information, fails or refuses to appear or to be available for interviews or conferences as necessary, or otherwise refuses to cooperate, the Commission, after providing the complainant with notice and 30 days in which to respond, may dismiss the complaint.

(d) Written notice of dismissal pursuant to paragraphs (a), (b), or (c) of this section shall be issued to the complainant and the respondent. The Commission hereby delegates authority to the Program Director, Office of Field Programs, or to his or her designees, and District Directors, or to their designees, to dismiss complaints.

(e) A complainant who is dissatisfied with a dismissal issued pursuant to paragraphs (a), (b), or (c) of this section may appeal to the Commission in accordance with the procedures in subpart C of this part.

The Commission proposes to rescind two paragraphs of that section, i.e., section

1603.107(b) and (c) ("paragraphs (b) and (c)"), which authorize the Commission to dismiss complaints brought pursuant to the GERA when the complainant cannot be located or refuses to cooperate. As I shall explain in this comment, the Commission erroneously seeks to standardize dissimilar procedures. The NPRM's stated reasons do not support the proposal—or even pertain to it for the most part.

II. The Commission's Reasons for the Proposal

In the preamble of the NPRM, the Commission states that it proposes to rescind paragraphs (b) and (c) for the reasons it gave in 2008 when rescinding paragraphs of another rule authorizing dismissals:

"This proposed removal of the language from part 1603 would standardize the EEOC's various procedural regulations. The paragraphs in question state that the Commission may dismiss a GERA complaint if the complainant cannot be located or if the complainant fails to provide information, appear for interviews, or otherwise cooperate with the agency. When similar language was removed from part 1601 in 2008, the agency noted that removing the language would bring part 1601 in line with the agency's procedural regulations governing the Age Discrimination in Employment Act and the Equal Pay Act, which do not contain the dismissal bases of failure to cooperate or failure to locate. Additionally, the agency noted in 2008 that the language had resulted in dismissals of private lawsuits when courts determined that the plaintiffs had not satisfied all prerequisites for filing suit; some courts held that having one's charge dismissed for failure to cooperate with the EEOC's investigation equated to failure to exhaust one's administrative remedies. The Commission did not intend to cause Federal court dismissals or to impose on charging parties any additional prerequisites to suit."

88 Fed. Reg. 32,154, 32,155 (May 19, 2023). The Commission then states that "[f]or these reasons it now proposes to remove" paragraphs (b) and (c). *Id.* Below, I summarize the reasons that the Commission provided in the 2008 final rule's preamble upon which the Commission now relies for the present proposal.

In 2008, the Commission adopted a final rule that rescinded 29 C.F.R. § 1601.18(b) through (d). Procedural Regulations under Title VII and ADA, 73 Fed. Reg. 3,387 (Jan. 18, 2008). Section 1601.18(b) through (d) authorized the Commission to dismiss charges brought pursuant to Title VII of the Civil Rights Act ("Title VII") and the Americans with Disabilities Act ("ADA") when a charging party failed to cooperate, could not be located, or refused to accept an offer of full relief.

The 2008 preamble gave two rationales for rescinding those subsections. *Id.* at 3,388. The first was as follows:

"In 1995, the Commission adopted Priority Charge Handling Procedures

(PCHP) to facilitate flexibility and permit more strategic use of resources. Among other things, PCHP authorized field offices to issue final determinations when further investigation was not likely to lead to evidence establishing a violation of the employment discrimination statutes. Thus, § 1601.18(b) through (d) are no longer needed to accomplish the Commission's case management goals. Their elimination is also consistent with EEOC's procedural regulations governing the Age Discrimination in Employment Act and the Equal Pay Act which do not contain the dismissal bases of failure to cooperate, to locate, and to accept full relief."

Id. at 3,387.

The second rationale given by the Commission was that section 1601.18(b) through (d) had led to the unintended consequence of cases being dismissed due to a perceived failure to exhaust administrative remedies. The Commission described a circuit split in which the Tenth Circuit had upheld district courts' dismissals of cases on the ground that a plaintiff whose charge had been dismissed by the Commission for "failure to cooperate" as set forth in section 1601.18(b) had not exhausted administrative remedies but the Seventh Circuit had reversed such a dismissal. *Id.* at 3,387-88. The Commission went on to explain that it neither

anticipated nor intended that section 1601.18(b) through (d) would bar access to the courts. To the contrary, in the Commission's view the law and the jurisprudence of the Supreme Court were clear that the only elements of a right to trial *de novo* of employment discrimination cases under Title VII and the ADA were a timely filing of a charge and receipt of notice of a right to sue. *Id.* at 3,388.

III. The Inapplicability of the Commission's Reasons for the Proposal

In summary, the Commission explained in the 2008 preamble that "we are eliminating 1601.18(b) through (d) because they are no longer necessary and because the Commission did not intend to affect charging parties' rights to *de novo* judicial review when adopting them." *Id.* For those two reasons, the Commission now "proposes to remove two paragraphs that are substantively analogous to paragraphs removed in 2008 from the agency's procedural charge processing regulations in 29 CFR 1601.18." 88 Fed. Reg. at 32,155.

However, even though the paragraphs at issue in the NPRM and in the 2008 final rule might be substantively analogous, their contexts are not. The Commission investigates a "charge" filed pursuant to Title VII and the ADA. If the Commission does not find reasonable grounds for the charge it must dismiss the charge and promptly notify the person claiming to be aggrieved. 42 U.S.C. §§ 2000e-5(b), 12117(a). If the Commission finds reasonable grounds, it must try to eliminate the alleged unlawful employment practice, and it may bring a civil action against the respondent. 42 U.S.C. §§ 2000e-5(f)(1), 12117(a).

In contrast, the procedures of the GERA are not substantively analogous to those procedures. "Unlike most federal discrimination statutes, claims under the GERA require a distinct procedural path. Once a party files a timely complaint with the EEOC 'stat[ing] a claim within the scope of GERA[, it] is referred to an administrative law judge, who oversees adjudication of the claim.'" *Prosper v. Bureau of Corr.*, No. 1:17-CV-00020, 2021 WL 832642 at *8 (D.V.I. Mar. 4, 2021) (quoting *Fischer v. N.Y. State Dep't of Law*, 812 F.3d 268, 279 (2d Cir. 2016)). Upon receipt of a "complaint" (not a charge), the Commission neither files suit nor accords to the individual a private right of action in district court. Rather, the Commission itself determines whether a violation occurred, using the procedures of the Administrative Procedure Act (which provide for administrative law judges) and issues a final order. 42 U.S.C. § 2000e-16c(b)(1). Parties may seek judicial review of the final order in a federal court of appeals of proper venue. *Id.* at § 2000e16c(c); *Garcia v. EEOC*, 861 F. App'x 592, 594-95 (5th Cir. 2021).

This pronounced difference in procedures renders both of the Commission's justifications for the 2008 rule change inapplicable to the present proposal.

A. Consistency and PCHP

The NPRM says the 2008 preamble noted that removing section 1601.18(b) through (d)

"would bring part 1601 in line with the agency's procedural regulations governing the Age Discrimination in Employment Act and the Equal Pay Act, which do not contain the dismissal bases of failure to cooperate or failure to locate." 88 Fed. Reg. at 32,155. Both the NPRM and the 2008 preamble fail to disclose, at least expressly, a purpose for bringing one set of rules into line with another.

I have endeavored to discern a purpose for consistency from the context in which the

Commission discussed it. The 2008 preamble asserted that eliminating section 1601.18(b) through (d) "is also consistent with EEOC's procedural regulations governing the Age Discrimination in Employment Act and the Equal Pay Act which do not contain the dismissal bases of failure to cooperate, to locate, and to accept full relief" immediately after discussing PCHP. 73 Fed. Reg. at 3,387. Beyond perhaps an aesthetic desire for symmetry, the reason for consistency seems to be the effect of PCHP on the procedures of all four types of cases. In each of them, PCHP

"accomplish[es] the Commission's case management goals" with respect to dismissals. The 2008 preamble's summary of its reasons supports this inference because it asserts the effect of PCHP as a reason for the rule change without mentioning consistency: "As explained above, we are eliminating 1601.18(b) through (d) because they are no longer necessary and because the Commission did not intend to affect charging parties' rights to *de novo* judicial review when adopting them." *Id.* 3,388.

PCHP, however, does not result in paragraphs (b) and (c) becoming "no longer necessary" and does not provide a reason for standardizing GERA procedural rules with procedural rules for other types of cases under the Commission's jurisdiction. PCHP is used to determine the amount of resources to be committed to different investigations.[1] It replaced a policy of fully investigating all charges with a policy of prioritizing charges based on the likelihood of finding reasonable cause to believe discrimination occurred.[2] [3] The NPRM does not state that PCHP is used in connection with GERA cases. Indeed, it cannot be used to winnow GERA cases that will not be investigated because "[u]nder GERA, once a proper complaint has been filed with the EEOC, the Commission must determine whether a violation has occurred." *Guy v. Illinois*, 958 F. Supp. 1300, 1306 (N.D. Ill. 1997). Moreover, the PCHP provision upon which the Commission relies—the provision authorizing field offices to issue final determinations—cannot apply to GERA cases. A field office does not issue a final determination in a GERA case. The Commission does, rendering its determination in a final order. 42 U.S.C. § 2000-e16(b)(1). The Commission is required to make its determination "in accordance with sections 554 through 557 of title 7." *Id.* Those provisions of the Administrative Procedure Act do not permit field offices or their employees to preside over a hearing because they are not the Commission, a member of the Commission, or an administrative law judge. *See* 5 U.S.C. § 557(B). Of those three options, the Commission has chosen administrative law judges to be the presiding officers in cases that are not dismissed or resolved under 29 C.F.R. part 1603(A).[3] As a field office or field office employee cannot preside over a hearing, neither one can issue an initial or final determination. *See* 5 U.S.C. § 557(B).

Although PCHP arguably presented a reason to bring section 1601.18 into line with the procedural regulations governing other cases, the Commission has not offered a reason to do so with regard to paragraphs (b) and (c). Those paragraphs are not duplicative of a provision in PCHP that does not even apply to GERA cases.

To the contrary, paragraphs (b) and (c) serve a function, interacting with two other sections of part 1603 that the Commission overlooks. First, under section 1603.109, the Commission may investigate a complaint before referring it to an administrative law judge. If the Commission is to perform that function, it is reasonable for the Commission to be able to dismiss cases that it is investigating pursuant to section 1603.109 when the complainant cannot be located or refuses to cooperate. Second, paragraphs (b) and (c) of section 1603.107 are incorporated into section 1603.216, which provides that an administrative law judge may dismiss a complaint if he finds that "the complaint may be dismissed pursuant to § 1603.107."

B. Exhaustion of Remedies

The exhaustion of remedies rationale has even less to do with GERA cases. As noted, the Commission in 2008 identified an exhaustion of remedies problem with Title VII and ADA cases and adopted a final rule as a reasonable solution. Here, however, the Commission presents a solution without a problem.

The 2008 preamble cited Tenth Circuit cases upholding dismissals by district courts of Title VII, ADA, and ADEA lawsuits on the ground that the plaintiffs had not exhausted their administrative remedies because the Commission had dismissed the plaintiffs' charges due to their failure to cooperate.[4] The Commission contrasted those cases with a Seventh Circuit case overruling the district court's dismissal of a Title VII lawsuit for failure to exhaust administrative remedies where the Commission had dismissed the plaintiff's charge for failure to cooperate.[5]

The Commission has cited no cases of a district court dismissing a GERA lawsuit on exhaustion grounds. There are none. No district court has dismissed a GERA lawsuit on those grounds; that is because district courts do not have jurisdiction to decide GERA cases. *Strong v. Delaware County*, 976 F. Supp. 2d 1038, 1045-46 (S.D. Ind. 2013).

"A regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist." *City of Chicago v. Fed. Power Comm'n*, 458 F.2d 731, 742 (D.C. Cir. 1971). Because the problem the Commission identifies does not exist, the solution it proposes to replicate from an entirely different situation for the sake of consistency is indefensible.

After setting forth the two rationales discussed above, the NPRM adds, "This proposed revision is not intended to limit the Commission's discretion to dismiss complaints on these or other grounds where appropriate." 88 Fed. Reg. at 32,154. If the Commission believes it has discretion to impose a sanction in given situations, it ought not to be rescinding a rule advising parties and the public of that discretion.

IV. Conclusion

A basic requirement of rulemaking is that an agency "must give adequate reasons for its decisions" and "articulate a satisfactory explanation for its action." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016); *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Commission has not given any adequate reasons for its proposal, nor has it articulated a satisfactory explanation for it. Accordingly, if the Commission proceeds with rulemaking in RIN 3046-AB09, the Commission should omit from the final rule the proposed rescission of paragraphs (b) and (c). It is entirely possible that paragraphs

(b) and (d) might benefit from some reconsideration, but the present proposal is not supported or well thought out. As an alternative, the Commission might consider how section 1603.107 could be revised to work better with the provisions of the Government Employee Rights Act.

Cordially yours,

David S. McFadden

Attorney

Competitive Enterprise Institute

David.McFadden@cei.org

[1] U.S. Equal Employment Opportunity Commission, *Quality Practices for Effective Investigations and Conciliations*,EEOC.gov 2 (Sept. 30, 2015), https://www.eeoc.gov/quality-practices-effective-investigations-and-conciliations.

[2] U.S. Equal Employment Opportunity Commission, *Strategic Enforcement Plan Fiscal Years 2017-2021*, EEOC.gov12, https://www.eeoc.gov/us-equal-employment-opportunity-commission-strategic-enforcement-plan-fiscal-years2017-2021#

[3] C.F.R. pt. 1603(B).

[4] *Shikles* v. *Sprint/United Mgmt. Co.*, 426 F.3d 1304 (10th Cir. 2005); *McBride v. Citgo Petroleum Corp.*, 281 F.3d 1099 (10th Cir. 2002).

[5] *Doe* v. *Oberweis Dairy*, 456 F.3d 704 (7th Cir. 2006).