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United States General Accounting Office
Washington, DC 20548

June 26, 2001

The Honorable F. James Sensenbrenner, Jr.
Chairman, Committee on the Judiciary
House of Representatives

Subject: The Federal Workforce: Answers to Questions Related to the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2001

Dear Mr. Chairman:

This letter responds to your request for additional information following the Committee's May 9, 2001, hearing on the Notification and Federal Employee Antidiscrimination and Retaliation (NoFEAR) Act of 2001, at which I testified.¹ Because our responses to your questions are based primarily on our previous work and the knowledge we have gained in doing this work, we did not seek agency comments on a draft of this letter. Your questions and our responses follow.

1. Please describe what kind of message an agency sends to its employees when its managers and employees who discriminate are not disciplined.

Under regulations promulgated by the Equal Employment Opportunity Commission (EEOC) governing the discrimination complaint process for federal employees, agencies are to take appropriate disciplinary action against employees who engage in discriminatory practices.² Not taking action—or the appearance that action is not taken—can send a message that the agency is indifferent to unlawful discrimination or, worse, tolerant of such behavior. We believe that transparency is important with regard to reporting actions taken in cases in which discrimination is found, lest the agency send an unintended message that it is not committed to treating its workforce fairly and holding individuals accountable for their actions. Therefore, in addition to an unambiguous policy of zero tolerance, an agency should have clearly defined and transparent policies and procedures for identifying and determining the culpability of individuals involved in discrimination cases. In other words, employees should be

¹ *The Federal Workforce: Observations on Protections From Discrimination and Reprisal for Whistleblowing* (GAO-01-715T, May 9, 2001).

² 29 C.F.R. 1614.102(a)(6).

fully aware of what conduct is not allowed, the consequences for misconduct, and how a determination of misconduct will be made.

- 2. Under the current system, federal agencies must pay out of their own budgets if they settle in the administrative process. If the agencies fight the case through the courts, however, the agencies do not have to pay for any settlement or court decision. Instead, as you know, the money comes out of the general fund.**
 - a. Under this current system, would you agree that there is a financial incentive to prolong the case regardless of the merits of the government's position?**
 - b. Do you believe that the current system is beneficial or detrimental to federal employees?**
 - c. Do you believe that the current system discourages federal employees from coming forward with concerns?**

As I described in my testimony, federal agencies bear the cost of judgments and settlements when a case is resolved by administrative procedures, such as the procedures for discrimination complaints under the jurisdiction of EEOC. However, when a lawsuit is filed, any subsequent relief (except in the case of the Postal Service) is generally paid by the Judgment Fund. The Judgment Fund, created to avoid the need for a specific congressional appropriation for settlement and judgment costs, provides a permanent indefinite appropriation for paying settlements and judgments against the federal government. In this way, the Judgment Fund provides a safety net to help ensure that agency operations are not disrupted in the event of a large financial settlement or judgment and that monetary awards are paid in a timely fashion. The availability of the Judgment Fund as a source for paying settlement and judgment costs also gives agencies the opportunity to shift financial accountability for paying these costs from their own budgets to the Judgment Fund. However, we have no information regarding the extent to which agencies intentionally have or have not avoided resolving discrimination complaints through administrative procedures to shift the burden of payment to the Judgment Fund. Similarly, we have no information regarding the extent to which the current system is beneficial or detrimental to federal employees or the extent to which it discourages them from coming forward with their concerns.

- 3. At the hearing, you testified that the Postal Service was not negatively impacted by the fact that the Postal Service is required by law to pay discrimination judgments and cannot dip into the general treasury's Judgment Fund.**
 - a. How has the Postal Service responded to the responsibility of paying for such judgments?**
 - b. Has the number of Postal Service discrimination complaints increased?**

Prior to the Postal Reorganization Act of 1970, the Post Office Department (as the Postal Service was then called) had a permanent appropriation of postal revenues to pay judgments. With the passage of the Reorganization Act, the law changed to provide that judgments against the Postal Service be paid out of any funds available to the Service. Unlike other federal agencies, the Postal Service does not have the safety net that the Judgment Fund provides for paying the costs of settlements and judgments. This appears consistent with a goal of the Reorganization Act to bring private-sector business practices to the Service. Although we have not formally studied this issue, we are not aware of any situation in which Postal Service operations were disrupted as a result of paying the cost of a settlement of judgment.

Like other federal agencies, the Postal Service faced an increase in the number of discrimination complaints filed by its workers under the complaint process within EEOC's jurisdiction.³ After rising during most of the last decade, however, the number of postal workers' discrimination complaints has declined recently, as table 1 shows.

Table 1: Discrimination Complaints Filed by Postal Workers, Fiscal Years 1991-2000

1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
7,772	8,469	8,858	10,221	13,322	13,252	14,326	14,397	12,027	10,553

Source: EEOC.

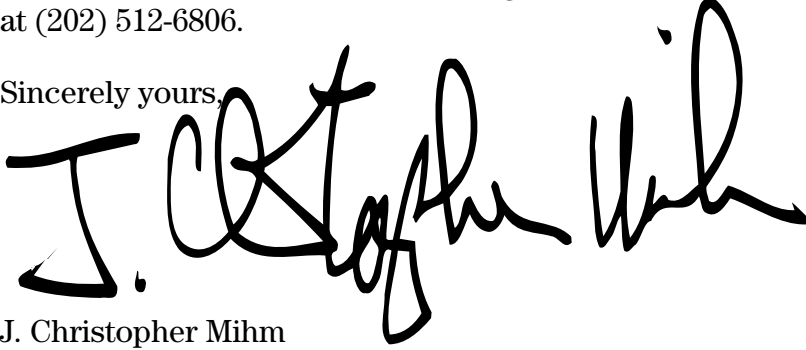
The decline in the number of discrimination complaints in fiscal years 1999 and 2000 coincides with the Postal Service's agencywide deployment of its alternative dispute resolution (ADR) program in fiscal year 1999. The program called REDRESS (Resolve Employment Disputes, Reach Equitable Solutions Swiftly), which uses mediation as the exclusive ADR technique, began with pilot sites in 1994 and expanded to other sites because of the high number of discrimination complaints and the sense that many complaints are rooted in personality conflicts.

We are sending copies of this letter to the Ranking Minority Member, Committee on the Judiciary; the Chairman, Subcommittee on Civil Service and Agency Organization, House Committee on Government Reform; the Ranking Minority Member, Subcommittee on Civil Service and Agency Organization; the Chairman, Subcommittee on Proliferation, International Security, and Federal Services, Senate Committee on Government Affairs; and the Ranking Minority Member, Subcommittee on Proliferation, International Security, and Federal Services.

³*Equal Employment Opportunity: Complaint Caseloads Rising, With Effects of New Regulations Unclear* (GGD/GAO-99-128, Aug. 16, 1999).

If you have any questions concerning this letter, please contact me or Anthony Lofaro at (202) 512-6806.

Sincerely yours,

A handwritten signature in black ink, appearing to read "J. Christopher Mihm". The signature is written in a cursive style with a large initial "J" and a prominent "M".

J. Christopher Mihm
Director, Strategic Issues

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