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Avagliano v. Sumitomo: On Remand to the  
District Court

Sumitomo Shoji America, Inc. v. Avagliano, 457  
US 176 - Supreme Court 1982

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10-1980

## **Memo of Law of Defendant-Appellant in Support of Motion for an Order Reopening Record on Appeal**

Sumitomo Shoji America, Inc.

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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No. 80-7418

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY  
T. CRISTOFARI, CATHERINE CUMMINS, RAELEN  
MANDELBAUM, MARIA MANNINA, SHARON MEISELS,  
FRANCES PACHECO, JOANNE SCHNEIDER, JANICE  
SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,

Plaintiffs-Appellees,

-against-

SUMITOMO SHOJI AMERICA, INC.,

Defendant-Appellant.

Interlocutory Appeal From the United States District  
Court for the Southern District of New York

MEMORANDUM OF LAW OF DEFENDANT-APPELLANT SUMITOMO  
SHOJI AMERICA, INC. IN SUPPORT OF MOTION FOR AN  
ORDER REOPENING RECORD ON APPEAL AND STRIKING  
CERTAIN REFERENCES IN AMICUS CURIAE BRIEF OF  
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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PRELIMINARY STATEMENT

Defendant-Appellant Sumitomo Shoji America, Inc.  
("Sumitomo") submits this Memorandum in support of its motion  
for an order pursuant to Fed. R. App. P. 10(e) reopening the  
record on appeal herein, to allow Sumitomo to undertake disco-  
very with regard to certain matters referred to in a document  
not part of the record on appeal which was mailed to this Court

by the United States Equal Employment Opportunity Commission ("EEOC"). Sumitomo also requests an order striking said document and ordering deletion of all references thereto in the EEOC's brief on this appeal.

#### BACKGROUND

The relevant background of this motion is set forth at pp. 3-4 of the October 1, 1980 affidavit of J. Portis Hicks submitted in support of this motion. Briefly, the facts are as follows:

This is an interlocutory appeal from Opinions and Orders of the United States District Court for the Southern District of New York (Tenney, J.) dated June 5, 1979 and November 29, 1979.\* This Court granted Sumitomo permission to appeal by Order filed May 19, 1980. The record on appeal was certified to this Court on June 26, 1980. Sumitomo's brief and the Joint Appendix was filed on August 29, 1980.

On September 26, 1980, the EEOC mailed to this Court an amicus curiae brief. On the same day, without notice to or first obtaining consent of this Court or opposing counsel, the EEOC, by a transmittal letter signed by an EEOC staff attorney, also submitted to this Court a so-called "diplomatic note" (the "note"), cited in the EEOC brief as support for its contention that the Order of the District Court should be affirmed. The "note" was not presented by the EEOC to the Court below and is

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\* Such Opinions and Orders are set forth in the joint Appendix at A 108 et seq. and A 359 et seq.

not part of the record on this appeal. At page three of the "note", it may be seen that one "L. Prager" participated in its preparation, and that his initials were required thereon before its dissemination.

"L. Prager" is counsel for the EEOC on this appeal, and is listed in the Washington Monitor's Federal Yellow Book as "Assistant General Counsel for Amicus Curiae Briefs." Mr. Prager's participation in drafting the "note" was not disclosed in the EEOC staff attorney's September 26 letter to this Court, nor in the EEOC's brief. Furthermore, Mr. Prager also failed to disclose his participation in preparation of the "note" on yet another occasion, despite the opportunity to do so. In an affidavit sworn to October 1, 1980, apparently signed before his receipt of Sumitomo's motion papers, Mr. Prager sought to justify submission of the "note" by stating that he had "concluded that the Commission was obligated to call to the attention of the Court of Appeals the most recent official government position on the issue presented in Sumitomo." (see October 1, 1980 affidavit of Lutz Alexander Prager at ¶3, a copy of which is annexed as Exhibit 2 to Hicks Reply Affidavit of October 6, 1980) (herein "Prager October 1 Affidavit").\*

Also, at page 3 of the "note", it may be seen that its preparation in draft form commenced in May, 1980, after Sumitomo had petitioned this Court for permission to appeal. Despite this fact, the "note" was not actually signed or issued

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\* Such October 1, 1980 affidavit was authored in response to a letter written by Sumitomo's counsel withdrawing its consent to participation in the oral argument by the EEOC.

for another four months, and then only after the record on appeal had been certified, and Sumitomo had filed its brief on appeal, and had filed the joint appendix.

On discovering that Mr. Prager had participated in the preparation of the "note," Sumitomo filed the instant motion and requested an immediate hearing before this Court. By Order dated October 6, 1980, this Court ordered that Sumitomo's motion should be heard on October 17, 1980, together with the argument of the appeal herein.

ARGUMENT

THE RECORD SHOULD BE RE-OPENED  
FOR DISCOVERY AND THE NOTE AND  
REFERENCES THERETO IN THE EEOC  
BRIEF SHOULD BE STRICKEN

Ex parte supplements to a record on appeal offend the most obvious requirements of Rule 10 of the Federal Rules of Appellate Procedure. Fed. R. App. P. 10(a) defines "record on appeal" as follows:

The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.

Fed.R. App. P. 10(e) states that the record on appeal can be supplemented in three ways: by stipulation of the parties, by sua sponte action of the court, or by proper applica-

tion to the Court of Appeals. Material submitted in disregard of these requirements should be stricken from the record on appeal. See Panaview Door & Window Co. v. Reynolds Metal Co., 255 F.2d 902, 922 (9th Cir. 1958).

These safeguards relating to the record on appeal are intended to protect the integrity of the appellate process and ensure fairness to the parties, and also are to be observed as a matter of professional ethics, government lawyers included. See e.g., N.Y. Judiciary Law app., Code of Professional Responsibility, E.C. 7-14 (McKinney 1975). As stated by the Fourth Circuit, in rejecting a similar attempt to bolster an argument by appending certain affidavits to a brief:

[w]e are disturbed that these affidavits were not a part of the record for appeal; they were merely inserted by counsel for the defendants without notice in their printed brief. See, Rule 10 F.R.A.P. An reference to material not in the agreed record for appeal, much less its inclusion in a brief filed with the Court, is both improper and censurable. [emphasis added.]

United States v. Anderson, 481 F.2d 685, 702 n.19 (4th Cir. 1973) aff'd 417 U.S. 211 (1974).

This Court, in Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 998, n.55 (2d Cir.), cert. denied 423 U.S. 1018 (1975), has expressed similar disapproval of efforts to circumvent appellate procedure, noting that where one wishes to submit new material, a motion to re-open the record should be made.

In addition to its having been improperly submitted to this Court, the "note" also reflects obvious elements of having been prepared for the purposes of this litigation and, in particular, this appeal. The EEOC failed in both its letter of transmittal and its brief to apprise this Court of Mr. Prager's participation in the drafting of the "note" -- a document purporting to be a conclusion of the United States Department of State on issues presented on this appeal. By his own admission, Mr. Prager's involvement in the drafting of this document was not incidental or ministerial, but rather, involved substantive input on at least two occasions.\*

The EEOC attempts to justify Mr. Prager's participation in the preparation of this document as merely an incident of a "normal government practice of interagency coordination..." See October 3, 1980 Opposition by EEOC to Appellant's Motion For Order Re-Opening Record On Appeal and For Order Striking Material Submitted by EEOC at 2 (herein "EEOC Opposition Papers") This statement is belied by the EEOC's own internal organization directives which disclose that it is the EEOC's "Office of Interagency Coordination" -- not the Assistant General Counsel for Amicus Curiae Briefs -- which is specifically charged with providing "assistance and information to federal departments and agencies with respect to interpretation and techniques of application of Federal EEOC legislation, orders and policies."

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\* See October 3, 1980 Affidavit of Lutz Alexander Prager In Opposition to Emergency Motion For Reopening Record On Appeal and Order to Strike Material Submitted By EEOC at ¶2 and ¶3 (herein "Prager October 3, Affidavit.")



(EEOC Order 110, EEOC Organization Mission and Functions at 5-2, 5-3 (May 9, 1979), (attached hereto as Exhibit 1). Therefore, Mr. Prager's participation in preparing the "note" was not, as the EEOC asserts, a function of the "normal practice" of this agency. On the contrary, it was to create support for the EEOC's position on this appeal.\*

Finally, Mr. Prager belatedly asserts that his substantive role arose at the "request" of the State Department. (Prager October 3 Affidavit at ¶2). It strains credibility to suppose that Mr. Prager, a person so regularly involved with the litigation process, could accidentally ignore fundamental prescriptions against referring the Court to "probative documents" prepared by counsel without disclosing the fact of counsel's participation. Truth should need no disguise. The "note" here at issue should have been referred to this Court under the only title it could honestly have been given -- an argumentative statement in support of the EEOC's position which its counsel helped prepare. See Hazel-Atlas Co. v. Hartford Co., 322 U.S. 238, 247 (1944). This was not done. That it was not done merely underscores that the "note" is inherently unreliable because the statements asserted therein reflect an advocate's bias on the issue before this Court. See Palmer v. Hoffman, 318 U.S. 109, 113-14 (1943); Pittsburgh Press Club v. United States, 579 F.2d 751, 758 (3rd Cir. 1978).

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\* In this regard it appears Mr. Prager was successful. Before this motion was made, showing that Mr. Prager's participating role in preparing the "note" had been exposed, the EEOC stated that the note "reflect[s] a change in the State Department interpretation of the Treaty...." (EEOC brief at 9).

The EEOC's failure to disclose Mr. Prager's role in preparing the "note" raises serious questions regarding the integrity of statements asserted therein which are central to the "conclusion" the note purports to reach. For example, what "records" were "extensively" reviewed by the State Department in reaching its conclusion? What is stated in the March 17, 1980 document to which the "note" refers and allegedly responds? Why does this note refer with approval to the reasoning employed by the Court below in this litigation, when the last allegedly "official" statement of the State Department on the subject refused to comment on such reasoning? Why did the State Department not disclose to the Danish government that the June 5, 1979 decision of the District Court in this litigation, cited with approval in the "note", was modified by a later decision, which among other things expressed greater doubts about the correct outcome of Sumitomo's motion to dismiss this litigation?

The EEOC's "eleventh hour" submission of the "note" warrants a reopening of the record on appeal to allow Sumitomo to discover vital matters asserted therein only recently disclosed. This should especially be done where statements asserted in the attempted submission by the EEOC raises issues central to the disposition of the appeal (as even the EEOC itself claims). In this type of situation, this Court has the power to direct that the record be reopened, to allow discovery of matters asserted in the "note", and then be

returned to this Court for scrutiny on appeal. See United States v. Chesapeake & Ohio Railway Co., 281 F. 2d 698, 702 (4th Cir. 1960).

This Court should not overlook the anomalous position in which Sumitomo has been placed by the EEOC's litigation tactics. This submission by the EEOC on the eve of oral argument has forced Sumitomo to argue against the propriety of the submission of the "note", and in so doing, to address its contents. The EEOC knew that such would be the case when it submitted the "note". That attempt to gain unfair advantage, by deliberate violation of this Court's rules, should not be permitted. In this situation, the administration of justice requires a reopening of the record to allow Sumitomo a full opportunity to explore the matters in the "note" asserted to this Court. The necessity for such discovery is not diminished by the EEOC's belated assertions in the Prager Affidavit of October 3, 1980. Those disclaimers came only after the disclosure of his role in creating the "note", and should not be given weight on this motion. This Court should order that the record on this appeal be reopened to allow discovery on the September 9, 1980 "diplomatic note" under supervision of the District Court, and further order that pending such discovery, said "note" be stricken

and all references thereto be deleted from the brief filed herein by the EEOC.

Respectfully submitted,

WENDER, MURASE & WHITE  
Attorneys for Defendant-Appellant  
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Of Counsel:

J. Portis Hicks  
Lance Gotthoffer  
Terence F. Brennan

SUBJECT. ORGANIZATION, MISSION AND FUNCTIONS

Purpose. This transmittal covers the revision of EEOC Order 110, Organization, Mission and Functions which announces the organization, mission and functions of the Equal Employment Opportunity Commission and each of its organization elements from Commission to branch level. Major changes consist of the addition of Chapters 4 and 5 and the revision of Chapters 3, 6 and 9 to add Civil Service Commission and Department of Labor functions which have been or are to be transferred to EEOC in January and July 1979, respectively, or to delete references to Regional Offices of General Counsel, Regional Offices and District Offices (Non-Model). While other chapters may have been renumbered, their content remains unchanged or has had only minor modifications.

Effective Date. May 14, 1979

Distribution. W

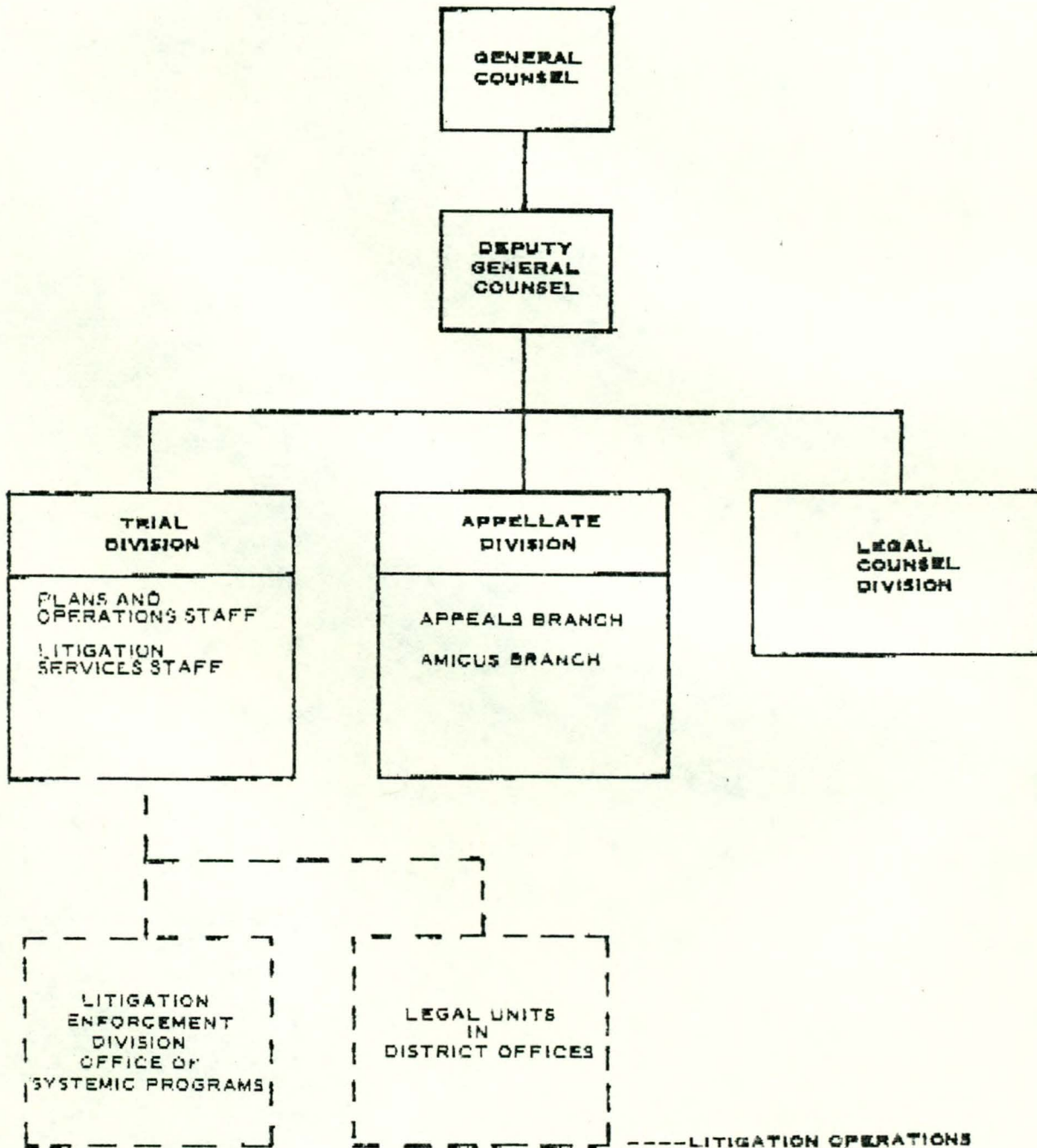
Obsolete Data. This order supersedes Order 110, EEOC Organization, Mission and Functions dated May 3, 1978. This superseded order should be removed from all reference directives files and destroyed.

Approved:

*Eleanor H. Norton*

Eleanor Holmes Norton  
Chair

OFFICE OF GENERAL COUNSEL



## Chapter 3

## Office of General Counsel

Mission

Under the direction of the Commission, to conduct or manage the conduct of all litigation to which the Commission is a party or in which it is involved; and to provide legal advice and counsel to the Commission and its officials on all phases of its work.

Missions and Functions

1. General Counsel. Acts as chief legal officer for the Commission; responsible, on behalf of the Commission, for all litigation, all legal opinions, legal advice, and the review of all EEOC regulations, guidelines and contracts for legal sufficiency; performs functions in conformity with policies of the Commission.
2. Office of the General Counsel assures accomplishment of the missions of the General Counsel through the development and implementation of a management plan approved by the Chair of the Commission and provides direction, coordination and guidance to the Associate General Counsels of the Offices' divisions in order that the goals of the plan are met; coordinates with the Office of Field Services to assure the effective integration of the administrative process and the litigation programs in field offices and with the Office of Systemic Programs to assure the effective implementation of the systemic program in headquarters and the field.
3. Trial Division.
  - a. Mission. Under the direction of the General Counsel, to oversee and monitor all trial litigation in U.S. District Courts which the Commission initiates or in which it intervenes as a party plaintiff; to recommend all litigation to the Commission; and to supervise all U.S. District Court matters involving subpoenas.
  - b. Functions.
    - (1) Plans and Operations Staff represents or supervises the representation of the Commission in all cases to which it is a party in U.S. District Courts; through the litigation units in district offices and in the Office of Systemic Programs, provides legal advice and assistance in the administrative processing of charges of discrimination; advises on all matters dealing with agency procedures which affect the litigation programs; oversees, directs and coordinates the development and conduct of all litigation in the litigation units of district offices, the Office of Systemic Programs, and

the Litigation Services Staff; coordinates and reviews the status of all litigation to ensure consistent development of litigation policy and strategy; in conjunction with the Office of Policy Implementation, advises the Commission with respect to novel or difficult questions EEOC laws, regulations and orders; and formulates and recommends new litigation programs to the Commission.

- (2) Litigation Services Staff reviews all proposed direct suits and interventions submitted by litigation units of district offices and the Office of Systemic Programs and makes recommendations on same; monitors, and in some instances intervenes in pending private litigation when issues of general public importance are involved; generates special litigation; prepares determinations on petitions to modify or revoke administrative subpoenas issued by Commission officials in the investigation of a charge of discrimination; and serves as the record-keeping activity for litigation conducted by the Trial Division and litigation units; and makes periodic reports on the status of litigation activity.

4. Appellate Division.

a. Mission. Under the direction of the General Counsel, to appear and represent the Commission in all matters in U.S. Courts of Appeal and as amicus curiae in all courts (except the Supreme Court of the United States).

b. Functions.

- (1) Appeals Branch conducts all litigation and coordinates all matters in the U.S. Courts of Appeal (and, as appropriate, in U.S. District Courts); reviews and recommends cases for appeal; prepares and files motions, briefs and other court papers; presents oral arguments; and recommends and participates in actions pertaining to appellate litigation in the U.S. Supreme Court.
- (2) Amicus Branch conducts amicus curiae litigation in all courts; and prepares, files and presents oral arguments before courts in all amicus curiae cases.

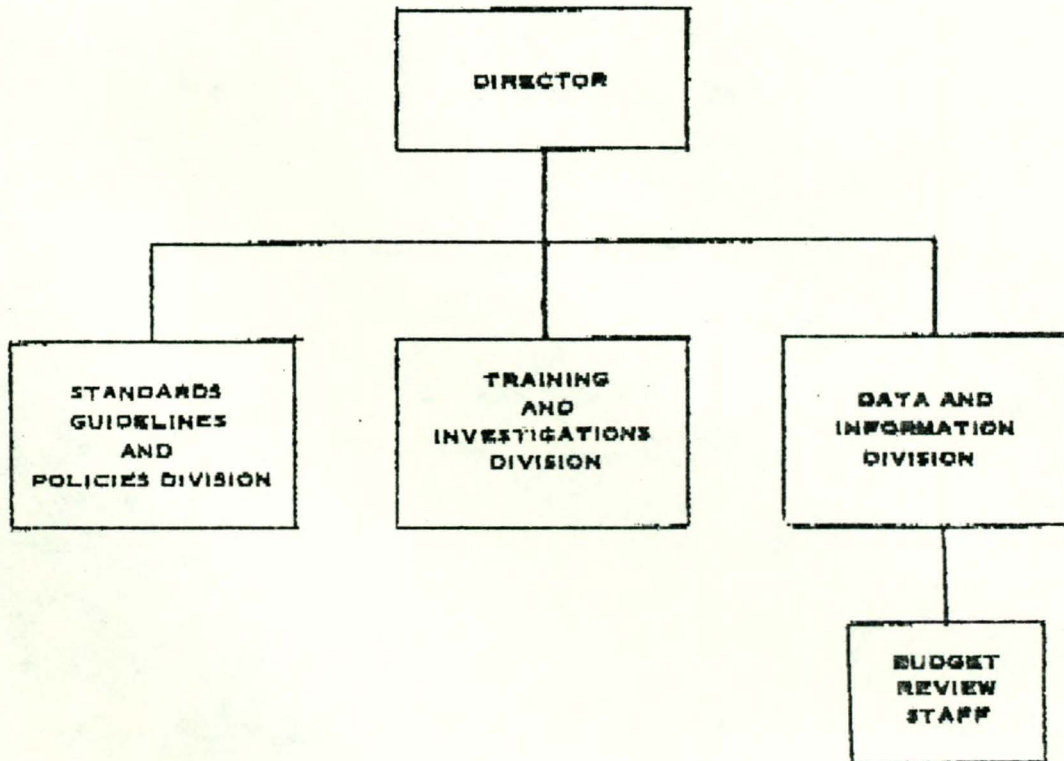
5. Legal Counsel Division.

a. Mission. Under the direction of the General Counsel, to provide legal advice and counsel to the Commission and its officials, to members of the public and, upon request, to other federal agencies, state and local governments and fair employment practices agencies, and members of Congress.



- b. Functions. Represents and defends the Commission in all litigation in which it is a defendant; represents the Commission at EEO, adverse action, administrative grievance and performance rating hearings; prepares legal memoranda, opinions on issues relating to the compliance process, letters and other legal materials at the request of, and for use by, offices within the Commission and, as requested, for other federal agencies, state and local governments and FEM' agencies, and members of Congress; reviews proposed Commission regulations, guidelines, directives and orders for legal sufficiency; reviews Commission contracts, procurement actions and grants for legal sufficiency; reviews for legal sufficiency and except for documents originating in the Office of Policy Implementation, causes to be published all documents for issuance in the Federal Register; reviews for legal sufficiency all proposed Commission publications; prepares Freedom of Information Act responses, and recommendation memoranda to the Commission on Freedom of Information Act appeals; provides assistance in the implementation and administration of the Freedom of Information Act, Privacy Act, and the Government in the Sunshine Act, and prepares the required annual reports to Congress; prepares recommendations on claims against the Commission under the Federal Tort Claims Act; advises on matters of employee conduct; advises on subpoenas issued against the Commission; and reviews for legal sufficiency applications for FEP deferral status.

OFFICE OF INTERAGENCY COORDINATION



## Chapter 5

## Office of Interagency Coordination

Mission

Under the direction of the Executive Director for administrative matters, and the direction of the Commission for policy matters through its Staff Committee for Interagency Policy to assist in providing leadership and coordination to the efforts of Federal departments and agencies having responsibilities for equal employment opportunity enforcement programs; to coordinate the development, approval and implementation of agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions, and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders and policies.

Mission and Functions

1. Staff Committee for Interagency Policy
  - a. Mission. To oversee and to participate in the development of policies and activities relating to interagency coordination under Executive Order 12067.
  - b. Functions. Identifies and determines matters to be subjected to interagency coordination; recommends policy direction; and recommends the vehicle for expressing interagency policies and standards.
2. Office of the Director of Interagency Coordination
  - a. Mission. To assure accomplishment of the mission of the Office of Interagency Coordination and to provide direction, coordination and guidance to the staff of the Office of Interagency Coordination.
  - b. Functions. Develops and obtains approval by the Equal Employment Opportunity Commission of priorities to be followed in the coordination activities of the office; develops and obtains approval by the Equal Employment Opportunity Commission of uniform policies, standards, regulations, guidelines, training programs, recordkeeping and reporting requirements, data collection and data sharing systems, and complaint processing systems; subject to the guidance of the Staff Committee for Interagency Policy and of the Executive Director, initiates action with agencies and departments of the Federal government to identify needs and opportunities for establishing uniformity and consistency in EEO enforcement policies and practices; establishes Interagency Committees as the Commission deems appropriate to provide advice and assistance; initiates and develops recommendations with the approval of the Commission to the Office of Management and Budget with respect to the resource needs of

Federal EEO enforcement activities; and, subject to the guidance of the Commissioners' Staff Committee for Interagency Policy and of the Executive Director, provides assistance and information to Federal departments and agencies with respect to interpretation and techniques of application of Federal EEO legislation, orders and policies.

3. Standards, Guidelines and Policies Division.

- a. Mission. To develop uniform standards, regulations, guidelines and policies for use by all departments, agencies and branches of the Federal government in enforcement of equal employment opportunity legislation, orders and policies.
- b. Functions. Identifies areas and issues for which uniform standards, regulations, guidelines or policies are appropriate and needed; coordinates with other agencies and with interagency committees; develops draft regulations or guidelines reflecting uniformity of definition of discrimination or enforcement; coordinates the participation of Commissioners and approval by the Commission throughout the development; and coordinates implementation of approved standards, guidelines and policies.

4. Training and Investigations Division.

- a. Mission. To develop and implement uniform training programs for personnel involved with the administration and enforcement of equal employment opportunity legislation, orders and policies.
- b. Function. Identifies training needs at various levels and various organizations; determines priorities; develops training programs; schedules training; conducts or directs training; and coordinates the participation of Commissioners and approval by the Commission throughout the development.

5. Data and Information Division.

- a. Mission. To develop uniform recordkeeping, reporting requirements, and data and data sharing systems.
- b. Function. Develops data, identifying existing information systems, reporting and recordkeeping systems, data or data sharing systems; determines opportunities and needs for uniformity; develops and coordinates approval of uniform data and information and reporting systems; and coordinates the participation of Commissioners and approval by the Commission throughout the development.

6. Budget Review Staff.

- a. Mission. To make recommendations, with Commission approval, to OMB concerning staff and resource needs of Federal departments and agencies for EEO administrative and enforcement activities.

- b. Function. Reviews reports, information and data relating to Federal equal employment opportunity enforcement programs and, where appropriate, develops and presents budget recommendations to OMB; and coordinates the participation of Commissioners and approval by the Commission throughout the development.