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August 7, 2020

Re: FOIA No.: 820-2020-000457 (QFR)

Your Freedom of Information Act (FOIA) request, received on May 26, 2020, is processed. Our search began on May 27, 2020. The initial due date was extended by 10-business days to July 7, 2020. All agency records in creation as of May 27, 2020 are within the scope of EEOC's search for responsive records. The paragraph(s) checked below apply.

[ X ] Your request is granted.

[ X ] You may contact the EEOC FOIA Public Liaison, Stephanie D. Garner, for further assistance or to discuss any aspect of your request. In addition, you may contact the Office of Government Information Services (OGIS) to inquire about the FOIA mediation services they offer.

The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, email at [ogis@nara.gov](mailto:ogis@nara.gov); telephone at (202) 741-5770; toll free 1-877-684-6448; or facsimile at (202)741-5769.

The contact information for the FOIA Public Liaison: (see contact information in the above letterhead or under signature line).

[ X ] See the attached Comments page for further information.

Sincerely,

*/s/Sdgarner*

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Stephanie D. Garner  
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Comments

This is in response to your Freedom of Information Act (FOIA), request. You request a copy of the Questions For the Record (QFR) and agency QFR responses to Congress responding to QFRs during calendar years 2017, 2018, 2019 and 2020 to date, for EEOC. Your request is granted.

Forwarded separately for your review are the requested records.

- 2017 QFR – Chair Janet Dhillon (35 pages, 9-19-2017)
- 2017 QFR – Dr. Daniel Gade, PhD (27 pages, dated 9-19-2017)
- 2018 QFR – Sharon Gustafson, OGC (18 pages, dated 4-10-2018)
- 2019 QFR – EEOC (21 pages, dated 9-19-2019)
- 2020 QFR – Andrea Lucas (1 page, dated 4-15-2020, 7 pages, dated 5-1-2020)
- 2020 QFR – Jocelyn Samuels (2 pages, dated 4-15-2020)

This response was prepared by Tracy L. Smalls, Government Information Specialist, who may be reached at 202-663-4331.

**Questions for the Record**  
**“Ms. Janet Dhillon to Chair, Equal Employment Opportunity Commission”**  
**Hearing Date: September 19, 2017**

**Questions for the Record from Ranking Member Patty Murray**

1. Do you agree that employee access to information about pay within a workplace is critical to helping employees determine whether they are being paid less than their peer for discriminatory reasons?

Answer: An employee's pay can be a function of a number of individualized factors. The EEOC Compliance Manual recognizes a variety of legitimate factors that can explain pay differences. Thus, while access to information about other employees' pay may provide a basis for comparison, that comparison needs to be put into appropriate context.

2. What initiatives will you undertake to strengthen the ability of the EEOC and the ability of working people to identify and challenge pay discrimination?

Answer: If confirmed, I would work with the career professional staff and my fellow commissioners to ensure that an appropriate amount of the agency's resources are being devoted to enforcement of federal equal pay laws. In addition, if confirmed, I would consult with the career professional staff and my fellow commissioners to examine what additional data the EEOC needs to fulfill its mandate to enforce equal pay laws.

3. The Administration recently stayed the EEOC's equal pay data collection via the EEO-1 form for further review. OMB stayed the data collection and instructed the EEOC to submit a new proposal. EEOC must now address OMB's expressed concerns and identify a path forward for the collection of pay data. At the hearing, you affirmed that you supported the collection of pay data from employers by the EEOC, and that development of a revised pay data collection would be priority and would be completed in a reasonable time period.
  - a. Do you agree in order to be useful and effective for enforcement purposes, employers must be required to collect and submit to the EEOC data identifying job type, total compensation, and whether the employee is full-time or part-time?

Answer: Pay discrimination is a serious issue and an appropriate focus of the EEOC's efforts. I believe that transparency of pay data is a useful tool, but it is important that the data collected and disclosed allow for a meaningful comparison. If confirmed, I would consult with the career professional staff and my fellow commissioners to examine what additional data the EEOC needs to fulfill its mandate to enforce federal equal pay laws.

- b. Do you believe a revised pay data collection should be mandatory for participating employers?

Answer: If confirmed, I would consult with the career professional staff and my fellow commissioners to examine what additional data the EEOC needs to fulfill its mandate to enforce federal equal pay laws. I am open to exploring an initial pilot program to develop a better understanding of how collection of pay data could help further the EEOC's mission of enforcing the federal equal pay laws.

- c. If you have concerns about the EEO-1 pay data collection as previously approved, how would you seek to modify it while still ensuring that critical information about pay and hours worked is collected and submitted by employers?

Answer: Pay discrimination is a serious issue and an appropriate focus of the EEOC's efforts. I believe that transparency of pay data is a useful tool, but it is important that the data collected and disclosed allow for a meaningful comparison. If confirmed, I would consult with the career professional staff and my fellow commissioners to examine what additional data the EEOC needs to fulfill its mandate to enforce federal equal pay laws. I would like to understand how the EEOC performed its burden analysis, and the agency's data security program. I am open to exploring an initial pilot program to develop a better understanding of how collection of pay data could help further the EEOC's mission of enforcing federal equal pay laws.

- d. Please explain how you will incorporate the public comments and analysis already produced during the extensive planning process for the pay data collection.

Answer: If confirmed, I would consult with the career professional staff and my fellow commissioners to examine the comments and analysis already provided to the EEOC and how that input was incorporated into the final regulations. I will want to understand the reasoning behind the agency's decision to not incorporate comments, including comments addressing data security issues, the type of data collected, and the burden and costs that employers would have incurred in complying with the EEO-1 requirement. I would also seek to learn why the agency rejected suggestions to implement a pilot program.

- e. If you are confirmed, will you commit to leading a process to finalize and implement pay data collection by EEOC, including through a public hearing and other diverse stakeholder engagement efforts, and to submitting a revised pay data collection proposal to OMB for its review within 6 months of your confirmation?

Answer: If confirmed, I would consult with the career professional staff and my fellow commissioners to examine what additional data the EEOC needs to fulfill its mandate to enforce equal pay laws, and analyze the relevant legal requirements governing data collection, including those contained in the Paperwork Reduction Act. I am open to exploring an initial pilot program to develop a better

understanding of how collection of pay data could help further the EEOC's mission of enforcing the federal equal pay laws.

4. The equal pay data collection was adopted after transparent process that included multiple opportunities for the public to comment, public hearings, and extensive explanation by EEOC of its analysis and its decision. At the hearing, you stated that said the EEO-1 would have benefitted from a "more vigorous process" of public comment, and that the agency failed to incorporate the suggestions of stakeholders that would have been helpful. Please provide specific details regarding the ways in which you found the process lacking as well as specific additional activities you believe might have resulted in a more vigorous process.

Answer: Pay discrimination is a serious issue and an appropriate focus of the EEOC's efforts. I believe that transparency of pay data is a useful tool, but it is important that the data collected and disclosed allow for meaningful comparisons. I am concerned that the final EEO-1 did not adequately reflected the input of stakeholders on various elements, including the type of pay data to be collected, whether a pilot program was appropriate, and data security implications inherent in the collection of that data. I also do not believe that the EEOC effectively communicated the burden and costs to employers of gathering and submitting this data. If confirmed, I would consult with the career professional staff and my fellow commissioners to examine what additional data the EEOC needs to fulfill its mandate to enforce federal equal pay laws.

5. The EEOC's analysis supporting the pay data collection explained in detail the agency's justification for adding pay data to the EEO-1, the process by EEOC used to choose the W-2 data collection mechanism, and the stakeholders the EEOC consulted with. For example, the EEOC analysis explains that the Commission considered give different measures of earnings, and detailed the strengths and weaknesses of the various measures. The EEOC analysis also explained that the Commission convened a two-day working group of employer representatives, statisticians, human resources information system (HRIS) experts, and information technology specialists to inform its revision of the EEO-1. EEOC also reviewed over 900 public comments while adopting the EEO-1 pay data collection. OMB's decision to review and stay the previously approved EEO-1 pay data collection was not subject to a public notice and comment process and the publicly available explanation provided by OMB for its decision to set aside this extensively reviewed pay data collection was just two paragraphs long. Do you agree with OMB's change in position?

Answer: I do not have sufficient information about the OMB's processes to respond to this question. If confirmed, I would consult with OMB, as well as career professional staff and my fellow commissioners to fully understand both the substantive and procedural questions surrounding pay data collection.

6. Do you believe that OMB should fully disclose the basis for its stay, the analysis underlying its conclusion, and the process by which it reached that conclusion, including any outside interest groups with which it consulted?

Answer: I do not have sufficient information about the OMB's processes to respond to this question. If confirmed, I would consult with OMB, as well as career professional staff and my fellow commissioners to fully understand both the substantive and procedural questions surrounding pay data collection.

7. OMB's decision to stay the pay data collection rested in part on the assertion that EEOC provided "data file specifications" for employers to directly upload pay data only after OMB approved the equal pay data collection. Are you aware that this is just one voluntary option to submit the data that is offered by the EEOC for employer convenience?

Answer: I do not have sufficient information about the OMB's processes to respond to this question. If confirmed, I would consult with OMB, as well as career professional staff and my fellow commissioners to fully understand both the substantive and procedural questions surrounding pay data collection.

8. Do you believe that OMB's decision to stay the pay data collection was justified, given that OMB approved the data collection last year fully aware that EEOC would post the data file specifications afterwards?

Answer: I do not have sufficient information about the OMB's processes to respond to this question. If confirmed, I would consult with OMB, as well as career professional staff and my fellow commissioners to fully understand both the substantive and procedural questions surrounding pay data collection.

9. President Trump's 2018 budget proposed merging the Office of Federal Contract Compliance Programs (OFCCP) and EEOC and significantly reducing the offices' budget. What is your position on the proposed merger?

Answer: I understand that the merger has been proposed as a means of streamlining government and saving taxpayer dollars, which are worthy goals. I recognize that the two agencies have different mechanisms for investigation and enforcement, and that the two agencies are discussing how a merger would be accomplished. If confirmed, I look forward to learning more about those discussions.

10. The Retail Litigation Center, the litigation arm of the Retail Industry Leaders Association, is "dedicated to advocating the retail industry's perspective in judicial proceedings." Deborah White, President of RLC, described you as "instrumental in the formation and early success of the Retail Litigation Center." You were the Chairman and past Chairman of the Board of the Retail Litigation Center (RLC) from March 2010 to March 2015, and the RLC website continues to list you as an emeritus member of the

Board. For each of the following cases, please answer whether you voted for or against filing the brief, and a detailed explanation of why you voted the way you did.

Answer: I was Chair of the RLC from its formation in 2010 until October 2013, and thereafter served on the Board until March 2015. I have not been involved in the RLC since March 2015. The RLC is a membership organization, and the decision to participate or not participate in cases was made collectively by the Board. I did not have the unilateral authority to cause the RLC to act.

- a. The 2011 RLC amicus brief filed in *Wal-Mart Stores, Inc. v. Dukes* (S. Ct. 2011) arguing that a nationwide class of women workers at Wal-Mart alleging sex discrimination in pay and promotions had been improperly certified.

Answer: The RLC advocated for the reversal of the certification of the class in the underlying action. The United States Supreme Court found that the class had been improperly certified and remanded the case to the lower court.

- b. The 2011 RLC amicus filed in *Jock v. Sterling Jewelers, Inc.* (2d Cir. 2011) regarding allegations of gender and age discrimination against employees at a jewelry store.

Answer: The RLC, joining another amicus, asked the Second Circuit to affirm that parties may not be compelled to participate in class arbitrations. The Second Circuit reversed the lower court's decision vacating the arbitration award and remanded with instructions to confirm the arbitration award.

- c. The 2013 brief filed in *Vance v. Ball State Univ.* (S. Ct. 2013) regarding the "power to hire and fire" test for determining who is a supervisor for the purposes of employer's vicarious liability for supervisor sexual harassment.

Answer: The RLC, joined by another amicus, asked the United States Supreme Court to affirm the "power to hire and fire" standard used by the Seventh Circuit Court of Appeals. The Supreme Court affirmed the Seventh Circuit's decision, holding that under Title VII, a supervisor, for purposes of imputing liability to the employer, is defined as an employee who has the power to hire and fire.

- d. The 2013 RLC amicus filed in *University of Texas v. Nassar* (S. Ct. 2013) arguing that a plaintiff must show but-for causation to succeed under Title VII's anti-retaliation provision.

Answer: The RLC, joined by another amicus, asked the United States Supreme Court to reverse the Fifth Circuit's decision and find that Title VII's anti-retaliation provision requires a plaintiff to prove but-for causation and that a mixed-motive is insufficient to establish employer liability. The Supreme Court held that claimants asserting a retaliation claim under Title VII must prove but-for causation. The case was vacated and remanded.



11. Given the conflicting legal interests of the RLC and workers, how can this Committee be confident that under your leadership the EEOC will continue to vigorously investigate, conciliate, and litigate workplace discrimination?

Answer: If I am confirmed, I will do my best to objectively lead the agency in a manner consistent with the EEOC's statutory mandates, as well as applicable judicial and agency precedent, taking into account the views of other commissioners, the career professional staff, and interested stakeholders.

12. While you served on the board of the Retail Litigation Center, you approved the filing of an amicus brief in the Supreme Court case *Mach Mining v. EEOC*. The amicus brief, filed on behalf of the RLC, the Chamber of Commerce, and other business associations, urged the Court to find that the EEOC's duty to conciliate is subject to judicial review.

- a. Is this litigation position, advocating for substantially limiting the EEOC's authority and ability to investigate and litigate systemic discrimination cases, at odds with the mission of the agency you are nominated to lead?

Answer: The issue in *Mach Mining v. EEOC* was whether EEOC's statutory duty to conciliate was subject to judicial review. The RLC, and other amici, argued that the EEOC's conciliation obligation was subject to judicial review. The United States Supreme Court agreed in a unanimous decision authored by Justice Kagan. I do not believe that judicial review of the EEOC's statutory obligation to conciliate is at odds with the mission of the EEOC.

- b. Do you commit to establishing enforcement goals and priorities at the EEOC that include addressing systemic discrimination against marginalized communities, including women and people of color?

Answer: Yes. If I am confirmed, I will do my best to objectively lead the agency in a manner consistent with the EEOC's statutory mandates, as well as applicable court and judicial precedent, taking into account the views of other commissioners, the career professional staff, and interested stakeholders.

13. Do you agree with the EEOC's position in *Baldwin v. Dep't of Transportation* (EEOC Appeal No. 0120133080, July 15, 2015) that sexual orientation discrimination is a form of sex discrimination?

Answer: If confirmed, I will consult with the career professional staff and other Commissioners on cases and work to enforce employment discrimination laws in accordance with the statutes and applicable legal precedents.

#### *Supplemental Response*

The United States Supreme Court's decision to deny certiorari in the Evans v. Georgia Regional Hospital matter does not cause me to alter my prior response. The Supreme Court's decision did not impact any of its prior decisions, including its holding that a

claim of discrimination on the basis of gender stereotyping is cognizable under Title VII.

While it is impossible to know why the Supreme Court denied certiorari in Evans, I do not view its action (or inaction) as an indication that it would decline certiorari in another case that presented the question of whether Title VII's prohibition against discrimination on the basis of sex includes claims of discrimination on the basis of sexual orientation or gender identity. As I understand it, the Evans case presented an unusual procedural issue (whether the defendants had been served), which may have made the case less attractive to the Supreme Court. The issue presented in Evans continues to be litigated in the lower courts, including in a case that is pending before the Second Circuit *en banc*.

14. Do you agree with EEOC's position in *Lusardi v. Dep't of the Army* (EEOC Appeal No. 0120133395, March 27, 2015) that denying employees access the restroom matching their gender identity is sex discrimination?

Answer: If confirmed, I will consult with the career professional staff and other Commissioners on cases and work to enforce employment discrimination laws in accordance with the statutes and applicable legal precedents.

*Supplemental Response*

The United States Supreme Court's decision to deny certiorari in the Evans v. Georgia Regional Hospital matter does not cause me to alter my prior response. The Supreme Court's decision did not impact any of its prior decisions, including its holding that a claim of discrimination on the basis of gender stereotyping is cognizable under Title VII.

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15. Do you agree with EEOC's position in *Macy v. Dep't of Justice* (EEOC Appeal No. 0120120821, April 20, 2012) that discrimination against someone because they are transgender is a form of sex discrimination?

Answer: If confirmed, I will consult with the career professional staff and other Commissioners on cases and work to enforce employment discrimination laws in accordance with the statutes and applicable legal precedents.

### *Supplemental Response*

The United States Supreme Court's decision to deny certiorari in the Evans v. Georgia Regional Hospital matter does not cause me to alter my prior response. The Supreme Court's decision did not impact any of its prior decisions, including its holding that a claim of discrimination on the basis of gender stereotyping is cognizable under Title VII.

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16. The EEOC's strategic enforcement plan current includes "protecting lesbians, gay men, bisexuals, and transgender (LGBT) people from discrimination based on sex." Do you intend to amend the inclusion of protections for LGBT workers in the strategic enforcement plan?

Answer: No.

17. Do you commit to advancing the current EEOC position that Title VII prohibits employers from discriminating on the basis of sexual orientation and gender identity in circuit courts where the question has not been decided?

Answer: If confirmed, I will consult with career professional staff, and seek the input of the other commissioners, to determine how to most effectively advocate on behalf of charging parties who allege discrimination on the basis of sexual orientation and gender identity in jurisdictions where there is no applicable circuit court precedent. Claims of sexual orientation discrimination and gender identity discrimination based on gender stereotyping are based on United States Supreme Court precedent, and the EEOC can pursue these claims in all circuit courts.

### *Supplemental Response*

The United States Supreme Court's decision to deny certiorari in the Evans v. Georgia Regional Hospital matter does not cause me to alter my prior response. The Supreme Court's decision did not impact any of its prior decisions, including its holding that a claim of discrimination on the basis of gender stereotyping is cognizable under Title VII.

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another case that presented the question of whether Title VII's prohibition against discrimination on the basis of sex includes claims of discrimination on the basis of sexual orientation or gender identity. As I understand it, the Evans case presented an unusual procedural issue (whether the defendants had been served), which may have made the case less attractive to the Supreme Court. The issue presented in Evans continues to be litigated in the lower courts, including in a case that is pending before the Second Circuit *en banc*.

18. The EEOC's systemic litigation program has successfully ensured workers discriminated against in their employment receive justice. In July 2016 EEOC Chair Jenny Yang issued a report entitled A Review of the Systemic Program of the U.S. Equal Employment Opportunity Commission. The review found that in 2013–2014 the systemic litigation program contributed to a tripling of monetary relief recovered for victims and that the systemic program has had a 10-year success rate of 94 percent. Do you agree with the findings of the report? Do you agree that overall the existing systemic litigation program has been successful?

Answer: I do not have access to the underlying, nonpublic data to make an assessment. I am mindful of the significant backlog of individual charges of discrimination that existed during the period of time covered by the report. If confirmed, I would also want to understand why the number of litigation cases based on individual charges of discrimination has declined.

19. You have indicated that you are not confident that EEOC staff are sufficiently trained and resourced to pursue systemic litigation. Please explain the challenges you believe face the systemic program, how those challenges factor into the findings of the report and how you plan to address those challenges.

Answer: Systemic litigation tends to be more complex than individual charges of discrimination, and can require greater reliance on expert testimony, more extensive discovery, more complicated evidentiary issues, and more complex trials. If confirmed, I will seek to learn more about the resources available to the professionals at the EEOC who handle systemic litigation.

20. Will you commit to continuing to pursue coordinated, systemic litigation on behalf of those subject to discriminatory patterns, practices, or policies?

Answer: If confirmed, I will work with the career professional staff, and consult with my fellow commissioners, to understand the resources being devoted to systemic investigations and the resources applied to the existing backlog of charges. I am concerned about the backlog, and would work to ensure there is an appropriate balance between these two efforts. In addition, if confirmed, I will want to learn why the number of litigation cases based on individual charges of discrimination has declined.

21. Please describe in detail when you believe that systemic litigation is appropriately used by EEOC.

Answer: I believe that systemic litigation can be used to maximize the impact of the agency's resources by pursuing matters that are high impact. Systemic litigation that addresses a widespread pattern or practice of discriminatory treatment is a valuable tool to combat discrimination.

22. In 2012, the EEOC issued criminal history guidance. In your opinion, when can employers appropriately use criminal history background checks when making employment decisions and when is it unlawful or discriminatory for an employer not to hire workers with criminal histories?

Answer: Because this guidance has been challenged and is the subject of ongoing litigation, I do not believe it is appropriate for me to respond to this question. I am aware that the EEOC's efforts to enforce this guidance through litigation have been subjected to criticism from various courts, including in *EEOC v. Kaplan Higher Education Corp.*, *EEOC v. Freeman, Inc.* and *EEOC v. Peoplemark, Inc.*, and that significant sanctions have been assessed. If confirmed, I will seek to learn more about the EEOC's enforcement efforts in this area.

23. Do you support maintaining the current EEOC criminal history guidance that has been in place for five years and is generally understood by employers? If not why not?

Answer: Because this guidance has been challenged and is the subject of ongoing litigation, I do not believe it is appropriate for me to respond to this question. However, if confirmed, I would consult with career professional staff and my fellow commissioners to understand the issues surrounding the guidance.

24. Title II of the Genetic Information Nondiscrimination Act (GINA) and Title I of the Americans with Disabilities Act (ADA) protect an employee's privacy in the workplace and ensure that employers can only request or obtain genetic and medical information when an employee provides it *voluntarily*. In a recent ruling by the U.S. District Court for the District of Columbia on *AARP v. EEOC*, the EEOC's rules about the fees employers can assess workers who do not participate in workplace wellness programs were deemed arbitrary. However, rather than vacate the rules, the court has requested EEOC to "address the rules' failings in a timely manner". Please explain your understanding of why the court sent the wellness rules back to the EEOC.

Answer: The District Court stated in its Memorandum Opinion that the "EEOC . . . has failed to provide a reasoned explanation for its decision to adopt the 30% incentive levels in both the ADA and GINA rules." The Court remanded the rules to the EEOC for reconsideration.

25. Do you agree that workplace wellness programs do not need to collect and retain employees' genetic and medical information to be effective?

Answer: I do not have sufficient information on which to form an opinion. If confirmed, I would consult with career professional staff and my fellow commissioners to fully understand the impact of GINA and the ADA on the need to collect and retain medical information as part of workplace wellness plans.

26. As the Commission redrafts rules on how Title II of GINA and Title I of ADA apply to workplace wellness programs, will you work to ensure that an employee (or spouse) should not be subject to steep financial pressure by their employer or health plan to disclose their genetic and medical information?

Answer: If confirmed, I will work with the career professional staff and my fellow commissioners to redraft the rules to address the concerns raised by the Court in the *AARP v EEOC* matter, and to ensure that the EEOC's interpretations are consistent with the regulations that HHS, the Department of Treasury and the DOL promulgated in the wake of the ACA's passage, as well as the requirements of GINA and the ADA. In light of the ongoing litigation, I do not believe it would be appropriate for me to comment on specific aspects of the wellness regulations that the EEOC has promulgated, and which are the subject of the litigation and the court's recent order.

27. What are some possible ways the wellness program rules can be redrafted to protect employee health privacy, ensure voluntary employee participation, and comply with Title I of the Americans with Disabilities Act (ADA) and Title II of the Genetic Information Nondiscrimination Act (GINA)?

Answer: If confirmed, I will work with the career professional staff and my fellow commissioners to redraft the rules to address the concerns raised by the Court in the *AARP v EEOC* matter, and to ensure that the EEOC's interpretations are consistent with the regulations that HHS, the Department of Treasury and the DOL promulgated in the wake of the ACA's passage, as well as the requirements of GINA and the ADA. In light of the ongoing litigation, I do not believe it would be appropriate for me to comment on specific aspects of the wellness regulations that the EEOC has promulgated, and which are the subject of the litigation and the court's recent order.

28. In your opinion, when is it appropriate for an agency to use sub regulatory guidance?

Answer: Sub regulatory guidance should be used to state the law in a manner that is understandable to all stakeholders.

29. EEOC under the leadership of Chair Yang has conducted a public process when considering sub regulatory guidance. Do you agree additional transparency has improved the process and the final guidance?

Answer: I believe that additional transparency is helpful. In addition, sub regulatory guidance should be used to state the law in a manner that is understandable to all stakeholders.

30. Every year, EEOC receives tens of thousands of harassment complaints. For example, in FY2016, nearly 30,000 harassment complaints were filed with the EEOC. In 2015, EEOC convened a bipartisan Select Task Force on the Study of Harassment in the Workplace. After 18 months of examination, the Task Force released a lengthy report on workplace harassment, along with recommendations for a range of stakeholders, including the EEOC. Do you commit to supporting the bipartisan task force recommendations? If not, which task force recommendations to you oppose? Please explain your answer in detail.

Answer: I believe that Task Force's efforts to seek input from stakeholders were positive and appropriate, and that the Task Force's report was drafted in a constructive way. I thought that the checklists and charts of risk factors, drafted in a straightforward terms, were particularly helpful and serve as a good example of how the EEOC can work to prevent unlawful employment discrimination. If confirmed, I look forward to learning more about the process within the agency for assembling the Task Force's report, and how the lessons from that process can be applied to future efforts by the agency.

31. Do you have any concerns with EEOC's 2017 Proposed Enforcement Guidance on Unlawful Harassment? Do you believe the guidance needs to be rescinded or revised in any way?
- a. Do you support the Proposed Enforcement Guidance's expansion of the interpretation of sex-based harassment to include harassment based on gender stereotypes and nonconformance with gender norms, gender identity and sexual orientation?
  - b. Do you believe that the Proposed Enforcement Guidance should make clear that sex-based harassment includes harassment on the basis of pregnancy, childbirth, or other related conditions, including reproductive health decisions?

Answer: I believe that EEOC's efforts to seek public comment on the Proposed Enforcement Guidance were appropriate. I thought that the work underlying the Proposed Enforcement Guidance, particularly the Select Task Force on the Study of Harassment in the Workplace, was constructive. I am aware of concerns raised about the potential conflict between the EEOC's recommendations that employers provide civility training, and the NLRB's position that broad workplace civility codes can infringe on employees' rights. If confirmed, I will seek the input of the career professional staff, and my fellow commissioners, and review the input from stakeholders on all aspects of the Proposed Enforcement Guidance. I will take all of these views into careful consideration in forming an opinion on whether any changes to the Proposed Enforcement Guidance are necessary or desirable, keeping in mind that the role of sub regulatory guidance is to state the law in a manner understandable to all stakeholders, not as a means of changing existing law.

32. Do you have any concerns with EEOC's 2016 Enforcement Guidance on National Origin Discrimination? Do you believe the guidance needs to be rescinded or revised in any way?

Answer: I believe that the EEOC's guidance reflects a significant effort on the part of the agency, and reflects input from stakeholders as well as the EEOC's extensive experience in this area. I am aware of concerns that have been raised about the guidance on the issue of "perceived" national origin. If confirmed, I look forward to working with the career professional staff, and my fellow commissioners, to evaluate whether those concerns have had any practical impact on the EEOC's enforcement efforts, or caused any meaningful confusion in the employer community.

33. Do you have any concerns with EEOC's 2016 Enforcement Guidance on Retaliation and Related Issues? Do you believe the guidance needs to be rescinded or revised in any way?

Answer: It is vitally important that employees are protected from retaliation. If confirmed, I look forward to working with the career professional staff, and my fellow commissioners, to learn how the Guidance is impacting the prosecution of retaliation cases at the EEOC. I am aware of concerns that have been raised that the Guidance reflects the EEOC's view that employees are protected even when they assert claims in bad faith. If confirmed, I look forward to evaluating whether this issue has impacted the agency's efforts to enforce legal prohibitions against workplace retaliation.

34. Do you have any concerns with EEOC's 2015 Enforcement Guidance on Pregnancy Discrimination and Related Issues? Do you believe the guidance needs to be rescinded or revised in any way?

Answer: If confirmed, I will work with the career professional staff and fellow commissioners to review the Enforcement Guidance, and analyze how it is being applied in practice. I will also want to understand why this Enforcement Guidance was not made available for public comment before it was issued.

35. Do you commit to inform the members of this Committee if you intend to undertake any review or revision of any existing or ongoing enforcement guidance?

Answer: I will work with the Committee in its oversight activities.

36. The 50<sup>th</sup> anniversary of the Age Discrimination in Employment Act ("ADEA") is this year. While we have made substantial progress in the last five decades in reducing discrimination faced by older workers, there is much progress left to be made. What specific steps will you recommend EEOC take to reduce age discrimination in the workforce?

Answer: If confirmed, I will work with the career professional staff and fellow commissioners to understand ongoing efforts to enforce the ADEA, and to identify



whether additional efforts are needed to reduce age discrimination in the workforce. I am also aware that some judicial interpretations of the ADEA have placed limitations on the ability of the EEOC to combat certain forms of age discrimination in the workplace.

37. What is your opinion about whether minority members of the Health, Education, Labor, and Pensions (“HELP”) Committee have the authority to conduct oversight of the EEOC?

Answer: If confirmed, I will work with all members of the HELP Committee.

38. If confirmed, do you agree to provide briefings on EEOC business to members of the HELP Committee, including minority members, if requested?

Answer: Yes.

39. If confirmed, do you commit to answer promptly any letters or requests for information from individual members of the HELP Committee including request for EEOC documents, communications, or other forms of data?

Answer: Yes, subject to statutory limitations on the ability of the EEOC to disclose information about charging parties and respondents.

#### **Questions for the Record from Senator Bernard Sanders**

1. The EEOC is an independent federal agency that seeks to “eradicate employment discrimination at the workplace” yet your history of defending cases has been characterized as limiting the ability of workers to challenge discriminatory practices. The Chairman of the EEOC plays a critical role in driving the policies to achieve the EEOC’s mission. As an attorney who built their career advocating for corporate interests and pursuing policies that weaken protections for the American worker, how do plan to carry on the EEOC’s mission of eradicating discrimination in the workplace? You critics point to your tenure at the Retail Litigation Center, an organization that many describe as hostile toward EEOC positions and enforcement efforts, as a troubling background for a someone now charged with protecting workers. How do you respond to such criticisms? What biases do you think you bring to the position of Chairman of the EEOC? How do you plan to balance your background with the responsibilities inherent in your new role?

Answer: In my prior roles as General Counsel, I worked to put into place policies and practices to prevent unlawful employment discrimination. I also took steps to ensure that when complaints of discrimination were raised, they were promptly and fairly investigated, and that appropriate action was taken if necessary. I believe these efforts were fully consistent with the mission of the EEOC.

Likewise, the RLC supported the work of the EEOC and its objective to eliminate workplace discrimination.

My experiences in the private sector, and with the RLC, taught me that honest debate, vigorous exchange of views and respectful consideration of other perspectives leads to better outcomes. If confirmed, I will strive to apply those lessons to my work at the EEOC.

2. An integral part of our government system is checks and balances. One way this is exercised is through Congressional oversight. Oversight includes the review, monitoring, and supervision of federal agencies, and timely and accurate information from agencies is critical to conducting that oversight. For example, the Senate exercises its oversight role is with confirmation hearings for presidential appointees, the appropriations process, or through investigations and inquiries. Congressional oversight is a critical to ensuring transparency and making sure we are good stewards of taxpayer dollars. Ms. Dhillon, it is reported that you instructed executive agencies not to comply with Democratic oversight requests. Do you commit to responding timely and appropriately to all oversight requests from the Senate, regardless of which Senator or party initiates the request?

Answer: I have not given any instructions to any executive agencies; I have never served in government. The press reports referenced in this question do not refer to me. If confirmed, I will cooperate with the HELP Committee's oversight activity.

3. In 2010, you signed a letter to the SEC arguing against protections for stakeholders. This letter addresses a post-Dodd-Frank regulatory proposal by the SEC concerning the reporting of corporate misconduct to in-house compliance departments. Representing corporate interests, you urged the SEC to require whistleblowers to use internal reporting mechanisms before turning to the SEC. In the letter, you acknowledge the risk that companies would retaliate against reporting employees and the delay in filing cases with the SEC. In your testimony before the Committee, you acknowledged a delay in case filings hurts both sides and argued that it would be better for all parties involved if the delay for filing and processing was minimized.
  - a. If confirmed, you will be sworn in to fulfill the mission of the EEOC, as directed by the Congress, to enforce laws prohibiting workplace discrimination. How do you plan to reconcile your past position of advocating for industry/internal reporting mechanisms over filing with the appropriate regulatory federal agency?
  - b. Do you agree that in instances of systemic cultural workplace discrimination, internal reporting would only reinforce a culture of discrimination?

Answer: In the 2010 letter signed by members of the Association of Corporate Counsel (ACC), the signatories expressed the view that creating disincentives for whistleblowers to report internally could delay the discovery of wrongdoing. This is particularly concerning in the context of financial reporting, where a delay in identifying internal wrongdoing could harm shareholders and others.

I continue to believe that the points identified by the ACC are legitimate concerns. In the context of statutes enforced by the EEOC, there is no requirement that an employee

notify his or her employer before filing a charge of discrimination, and I believe this structure is appropriate. That said, I believe it is desirable for employers to create and foster supportive environments where employees feel comfortable raising concerns of discrimination with their manager, or others in the organization, without fear of retaliation.

4. In 2016, the EEOC began reporting out on LGBTQ sex discrimination cases. Will you ensure that this vital data continues to be made publically available?

Answer: Yes.

5. In your testimony before the Committee, you emphasized outreach and education as a means to achieve the EEOC's mission. What educational and outreach approaches would you add, change, or remove in order to support the EEOC's mission?

Answer: If confirmed, I would seek the input of the career professional staff and my fellow commissioners on ways to enhance ongoing educational and outreach efforts. In particular, I would want to look at ways to enhance educational efforts for small businesses and their employees, as well as in sectors that generate disproportionate charge activity. I would also seek to understand the impact on the effectiveness of the EEOC's current practice of charging fees to attend certain EEOC-sponsored events.

#### **Questions for the Record from Senator Al Franken**

1. Women make up about half the workforce, and are the primary or co-breadwinners in two-thirds of American households. Yet a woman still makes only 80 cents, on average, for every dollar earned by a man, and the gap is even wider for women of color. In the absence of the EEOC being able to collect pay data as proposed in the recently blocked update to the EEO-1 pay data collection survey, how would you propose pay information be collected, and how should the EEOC address gender-based pay inequality?

Answer: If confirmed, I would work with the career professional staff and my fellow commissioners to ensure that an appropriate amount of the agency's resources are being devoted to enforcement of federal equal pay laws. I believe that transparency of pay data is a useful tool, but it is important that the data collected and disclosed allows for meaningful comparisons. In addition, if confirmed, I would consult with the career professional staff and my fellow commissioners to examine what additional data the EEOC needs to fulfill its mandate to enforce equal pay laws.

2. In October of last year, the EEOC approved a Strategic Enforcement Plan for Fiscal Years 2017-2021. The Plan identifies six substantive priority areas for the EEOC. Number five is titled "Preserving Access to the Legal System."

The plan provides that the EEOC will focus on addressing employer "policies and practices that limit substantive rights, discourage or prohibit individuals from exercising

their rights under employment discrimination statutes, or impede EEOC's investigative or enforcement efforts. Specifically, EEOC will focus on overly broad waivers, releases, and mandatory arbitration provisions that limit substantive rights, deter or prohibit filing charges with EEOC, or deter or prohibit providing information to assist in the investigation or prosecution of discrimination claims.”

Ms. Dhillon, are you able to stand behind that statement? In other words, can you commit to fighting forced arbitration clauses that prevent workers from vindicating their rights under the Civil Rights Act?

Answer: I am committed to enforcing the country's employment antidiscrimination laws and to removing barriers to employees seeking to remedy employment discrimination. In addition, I note that the EEOC is not bound by arbitration agreements between an employer and employee. If confirmed, I would support the EEOC's pursuit of cases regardless of the existence of an arbitration agreement.

3. Ms. Dhillon, the Retail Litigation Center, which you helped form, has devoted a considerable amount of time to defending employers' use of forced arbitration clauses and class action waivers. These clauses prevent workers from banding together to seek justice in a public court of law when they've been cheated or mistreated by their employer.

As a founder, former chair, and then member of the Board of the Retail Litigation Center, can you describe what role you played in determining which cases the Center would get involved in? And based on the Center's advocacy, is it fair to say that you stand behind employers' use of pre-dispute arbitration clauses in employment contracts?

Answer: The Retail Litigation Center (RLC) is a membership organization, and the decision to participate in cases was made collectively by the Board. I did not have the unilateral authority to cause the RLC to act.

I believe that arbitration can be a useful process to resolve disputes in a cost-effective manner, reduce stress on the litigants, and alleviate burdens on the courts. The Federal Arbitration Act sanctions the use of arbitration, and the United States Supreme Court has recognized arbitration as a legally enforceable mechanism for dispute resolution. The Supreme Court has also held that the EEOC is not bound by arbitration agreements between an employer and employee. If confirmed, I would support the EEOC's pursuit of cases regardless of the existence of an arbitration agreement.

4. Your stance on forced arbitration demonstrates your willingness to defend workers' rights under the Civil Rights Act. Former Fox News anchor, Gretchen Carlson, began fighting against the use of forced arbitration clauses after filing a lawsuit against her boss, Roger Ailes, for sexual harassment. Mr. Ailes' lawyers tried to force her into private arbitration, arguing that Ms. Carlson had breached a forced arbitration clause in her employment contract – a clause which also prohibited her from speaking out about the claim.

In an op-ed published a few months back, Ms. Carlson wrote, “so many women are being silenced by employers who force them into a secret star chamber proceeding called arbitration. By coercing women to remain silent about illegal behavior, the employer is able to shield abusers from true accountability and leave them in place to harass again. The arbitration process — often argued to be a quicker and cheaper method of dispute resolution for employees —instead has silenced millions of women who otherwise may have come forward if they knew they were not alone.”

Ms. Dhillon, would you agree that one benefit of our civil justice system is ensuring that other victims, including workers who have faced harassment and discrimination, are made aware of widespread wrongdoing? And that such awareness allows them to mitigate the harm to themselves?

Answer: Yes.

5. As head of the EEOC, it would be incumbent on you to take every action to ensure safety and equality in the workplace. It’s particularly important that EEOC investigate public allegations of widespread wrongdoing within an organization. Would you agree that this mission is hampered if harmed individuals are prevented from speaking out about their claims?

Answer: Yes.

#### **Questions for the Record from Senator Sheldon Whitehouse**

1. Given your extensive history defending employers, what assurances can you provide that you can adequately appreciate the claims of individuals how bring claims against employers?

Answer: In my prior roles as General Counsel of three public companies, I worked to put into place policies and practices to prevent unlawful employment discrimination. I also took steps to ensure that when complaints of discrimination were raised, they were promptly and fairly investigated, and that appropriate action was taken if necessary. If employees brought charges with the EEOC, I expected my team to work constructively with the EEOC, in a respectful and professional manner, to promptly address the matters raised. I believe that my work in the private sector demonstrates my commitment to enforcement of the nation’s antidiscrimination laws.

2. Please list the three most significant cases in which you successfully obtained relief for an individual who brought an employment discrimination claim. Why were those cases significant to you?

Answer: As a General Counsel, my professional and ethical obligations were to my employer. In my community work, my efforts focused on securing services and

protecting the rights of children in foster care and other temporary care arrangements, and on supporting food banks. Earlier in my career, I worked on pro bono matters involving housing discrimination and criminal sentencing.

3. What do you understand the role of Fair Employment Practices Agencies (FEPAs) to be?

Answer: FEPAs generally enforce employment discrimination laws enacted by states or localities. The EEOC has work-sharing agreements with some FEPAs which allow them to work cooperatively and reduce duplication of effort.

4. Do you agree with the EEOC's current enforcement priorities?

- a. If not, what do you think the priorities should be?

Answer: If confirmed, I will consult with the career professional staff, as well as my fellow commissioners, concerning the EEOC's current enforcement priorities. I will seek to understand the resources being devoted to each priority, as well as what metrics are being used to measure progress. I will seek to balance these enforcement priorities against the need to reduce the backlog of individual charges.

5. Do you support systemic lawsuits as an effective and efficient way to combat discrimination?

Answer: I believe that systemic litigation can be used to maximize the impact of the agency's resources by pursuing matters that are high impact. Systemic litigation that addresses a widespread pattern or practice of discriminatory treatment is a valuable tool to combat discrimination.

6. Do you commit to maintaining the EEOC's current position that discrimination on the basis of sexual orientation or gender identity is a form of sex discrimination prohibited by Title VII?

Answer: The United States Supreme Court has recognized that discrimination on the basis of gender stereotyping is a violation of Title VII. If confirmed, I will work to ensure the EEOC continues its work to address discrimination on this basis, including in cases that involve allegations of discrimination on the basis of sexual orientation or gender identity. I will also work to continue the EEOC's efforts to enforce the provisions of applicable Executive Orders that prohibit discrimination on the basis of sexual orientation or gender identity. In addition, in those circuits that have recognized a cause of action for discrimination on the basis of sexual orientation or gender identity under Title VII (even absent gender stereotyping), I will work to ensure that the EEOC continues to pursue those cases. And, of course, I will take steps to ensure that the EEOC does not stand in the way of claimants pursuing discrimination claims on the basis of sexual orientation or gender identity under applicable state laws. With the respect to those federal jurisdictions where the courts have held that Title VII does not extend to

discrimination claims based on sexual orientation or gender identity (absent allegations of gender stereotyping), the EEOC must comply with the law of that circuit.

*Supplemental Response*

The United States Supreme Court's decision to deny certiorari in the Evans v. Georgia Regional Hospital matter does not cause me to alter my prior response. The Supreme Court's decision did not impact any of its prior decisions, including its holding that a claim of discrimination on the basis of gender stereotyping is cognizable under Title VII.

While it is impossible to know why the Supreme Court denied certiorari in Evans, I do not view its action (or inaction) as an indication that it would decline certiorari in another case that presented the question of whether Title VII's prohibition against discrimination on the basis of sex includes claims of discrimination on the basis of sexual orientation or gender identity. As I understand it, the Evans case presented an unusual procedural issue (whether the defendants had been served), which may have made the case less attractive to the Supreme Court. The issue presented in Evans continues to be litigated in the lower courts, including in a case that is pending before the Second Circuit *en banc*.

7. You have stated that you are personally opposed to discrimination on the basis of sexual orientation and gender identity, but you have equivocated when asked whether you would continue the EEOC's current interpretation of Title VII on these issues. When making decisions as the Chair of the EEOC your personally held views are not as relevant as the effects of your decisions. If you are confirmed as Chair of the EEOC, will you make decisions that promote or tolerate employment discrimination against LGBT people?

Answer: No.

8. Do you personally know anyone who is transgender?

Answer: Yes.

- a. Would you be willing to meet with transgender workers to discuss their workplace experiences?

Answer: Yes.

**Questions for the Record from Senator Tammy Baldwin**

In 2013, the Supreme Court issued a decision in *Vance v. Ball State University* that made it much harder to hold employers accountable for the harassment employees face at the hands of direct supervisors. Under this decision, only people with the power to hire and fire are supervisors under Title VII. In reality, lower-level supervisors can have enormous authority over

subordinates – particularly in low-wage occupations like child care workers and cashiers, where women make up a significant majority of workers.

When you served on the board of directors of the Retail Litigation Center, that organization filed an amicus brief in *Vance* supporting a narrow understanding of Title VII with regard to liability for supervisor harassment. The Center also took positions in a number of cases in favor of narrowing employer liability standards.

Given that record, can you explain how, as a Commissioner, you would work to ensure that individuals who experience harassment and discrimination at the hands of their supervisors have recourse? Would you support legislation that I have previously introduced, the Fair Employment Protection Act, which makes clear that employers can be held liable for the discriminatory conduct of lower-level supervisors?

Answer: If I am confirmed, I will do my best to objectively lead the agency in a manner consistent with the EEOC's statutory mandates, as well as applicable judicial and agency precedent, taking into account the views of other commissioners, the career professional staff, and interested stakeholders. If additional laws are enacted to provide additional protections to employees, and the EEOC is charged with enforcing those laws, I will work to faithfully implement those new laws.



## **Questions for the Record from Senator Elizabeth Warren**

### **Sexual Orientation and Gender Identity Discrimination**

Title VII of the *Civil Rights Act* prohibits employment discrimination on the basis of “race, color, religion, sex, or national origin.”<sup>1</sup> The EEOC currently “interprets and enforces Title VII’s prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation...regardless of any contrary state or local laws.”<sup>2</sup> Numerous court decisions<sup>3</sup> support EEOC’s conclusion that “sex discrimination provisions in Title VII protect lesbian, gay, bisexual, and transgender (LGBT) applicants and employees against employment bias.”<sup>4</sup> Since beginning data collection on LGBT discrimination in 2013, the EEOC has collected \$6.4 million in monetary relief for individuals who have experienced LGBT-related discrimination.<sup>5</sup>

During your confirmation hearing on September 19<sup>th</sup>, you stated that you were “personally opposed to discrimination on the basis of gender identity or sexual orientation.” You also asserted that the EEOC is the “preeminent federal agency on workplace discrimination issues” and that “courts and other litigants should recognize that EEOC is an honest broker whose advocacy is beyond reproach [and] whose motives are always transparent.” If confirmed as EEOC Chair, you will inherit pending cases addressing LGBT discrimination.<sup>6</sup>

1. The EEOC has laid out its position on Title VII in numerous federal sector court cases.<sup>7</sup> Do you agree with the EEOC’s legal interpretation that Title VII prohibits sex discrimination on the basis of sexual orientation and gender identity? If so, please highlight the specific EEOC cases that align with your legal interpretation of Title VII, as well as provide rebuttals to arguments that Title VII does not prohibit sex discrimination on the basis of sexual orientation and gender identity.

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<sup>1</sup> U.S. Equal Employment Opportunity Commission, “Title VII of the Civil Rights Act of 1964” (online at <https://www.eeoc.gov/laws/statutes/titlevii.cfm>).

<sup>2</sup> U.S. Equal Employment Opportunity Commission, “What You Should Know About EEOC and the Enforcement Protections for LGBT Workers” (online at [https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement\\_protections\\_lgbt\\_workers.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm)).

<sup>3</sup> U.S. Equal Employment Opportunity Commission, “Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII” (online at [https://www.eeoc.gov/eeoc/newsroom/wysk/lgbt\\_examples\\_decisions.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/lgbt_examples_decisions.cfm)).

<sup>4</sup> U.S. Equal Employment Opportunity Commission, “What You Should Know About EEOC and the Enforcement Protections for LGBT Workers” (online at [https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement\\_protections\\_lgbt\\_workers.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm)).

<sup>5</sup> U.S. Equal Employment Opportunity Commission, “What You Should Know About EEOC and the Enforcement Protections for LGBT Workers” (online at [https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement\\_protections\\_lgbt\\_workers.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm)).

<sup>6</sup> U.S. Equal Employment Opportunity Commission, “Fact Sheet: Recent EEOC Litigation Regarding Title VII & LGBT-Related Discrimination” (last updated July 8, 2016) (online at [https://www.eeoc.gov/eeoc/litigation/selected/lgbt\\_facts.cfm](https://www.eeoc.gov/eeoc/litigation/selected/lgbt_facts.cfm)).

<sup>7</sup> U.S. Equal Employment Opportunity Commission, “Federal Sector Cases Involving Transgender Individuals” and “Federal Sector Cases Involving Lesbian, Gay, or Bisexual Individuals” (online at [https://www.eeoc.gov/federal/reports/lgbt\\_cases.cfm](https://www.eeoc.gov/federal/reports/lgbt_cases.cfm)).

Answer: The United States Supreme Court has recognized that discrimination on the basis of gender stereotyping is a violation of Title VII. Lower courts have applied this reasoning to claims involving allegations of discrimination on the basis of sexual orientation or gender identity. Executive Orders also prohibit discrimination on the basis of sexual orientation or gender identity, and apply to federal civilian employees as well as employees of federal contractors. In addition, at least one circuit court has recognized a cause of action for discrimination on the basis of sexual orientation or gender identity under Title VII (absent gender stereotyping).

The crux of the legal issue under Title VII is whether the word “sex” extends to claims for discrimination on the basis of sexual orientation or gender identity (absent gender stereotyping). There is a split in the circuits on this question, and now there is a split of government agencies (with the EEOC advocating in favor of one interpretation, and the Department of Justice advocating in favor of the opposite interpretation).

The legislative history of the original Civil Rights Act of 1964 does not resolve this question of statutory interpretation. In subsequent amendments to Title VII, Congress did not expand the statute to explicitly encompass claims for discrimination on the basis of sexual orientation or gender identity. Multiple bills have been introduced in Congress to address this issue, but none have passed. Those unsuccessful bills are cited as evidence that Congress did not intend to have Title VII’s reference to “sex” read broadly to include claims of discrimination based on sexual orientation or gender identity.

#### *Supplemental Response*

The United States Supreme Court’s decision to deny certiorari in the Evans v. Georgia Regional Hospital matter does not cause me to alter my prior response. The Supreme Court’s decision did not impact any of its prior decisions, including its holding that a claim of discrimination on the basis of gender stereotyping is cognizable under Title VII.

While it is impossible to know why the Supreme Court denied certiorari in Evans, I do not view its action (or inaction) as an indication that it would decline certiorari in another case that presented the question of whether Title VII’s prohibition against discrimination on the basis of sex includes claims of discrimination on the basis of sexual orientation or gender identity. As I understand it, the Evans case presented an unusual procedural issue (whether the defendants had been served), which may have made the case less attractive to the Supreme Court. The issue presented in Evans continues to be litigated in the lower courts, including in a case that is pending before the Second Circuit *en banc*.

2. As EEOC Chair, would you continue to uphold the EEOC’s current position on Title VII, including in currently pending cases?

Answer: The United States Supreme Court has recognized that discrimination on the basis of gender stereotyping is a violation of Title VII. If confirmed, I will work to

ensure the EEOC continues its work to address discrimination on this basis, including in cases that involve allegations of discrimination on the basis of sexual orientation or gender identity. I will also work to continue the EEOC's efforts to enforce the provisions of applicable Executive Orders that prohibit discrimination on the basis of sexual orientation or gender identity. In addition, in those circuits that have recognized a cause of action for discrimination on the basis of sexual orientation or gender identity under Title VII (even absent gender stereotyping), I will work to ensure that the EEOC continues to pursue those cases. And, of course, I will take steps to ensure that the EEOC does not stand in the way of claimants pursuing discrimination claims on the basis of sexual orientation or gender identity under applicable state laws. With respect to those federal jurisdictions where the courts have held that Title VII does not extend to discrimination claims based on sexual orientation or gender identity (absent allegations of gender stereotyping), the EEOC must comply with the law of that circuit.

### *Supplemental Response*

The United States Supreme Court's decision to deny certiorari in the Evans v. Georgia Regional Hospital matter does not cause me to alter my prior response. The Supreme Court's decision did not impact any of its prior decisions, including its holding that a claim of discrimination on the basis of gender stereotyping is cognizable under Title VII.

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3. On January 27, 2017, the Department of Justice (DOJ) filed an *amicus* brief in an LGBT-discrimination case that Title VII "does not...reach[] sexual orientation discrimination." DOJ also stated that the EEOC was "not speaking for the United States" in its opposing brief on the matter.<sup>8</sup>

- a. Do you believe that the DOJ or the EEOC "speaks for the United States" on the issue of Title VII discrimination?

Answer: Under Title VII, the EEOC does not have the authority to issue substantive rules or regulations; its explicit rule-making authority is limited to procedural rules. See EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 257-58

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<sup>8</sup> Alan Feuer, "Justice Department Says Rights Law Doesn't Protect Gays," *New York Times* (July 27, 2017) (online at <https://www.nytimes.com/2017/07/27/nyregion/justice-department-gays-workplace.html>).

(1991) (“Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations . . . the level of deference afforded [to the EEOC’s interpretations] will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”) (citations omitted).

The Department of Justice brings litigation to enforce Title VII against state and local governments. Further, the Department of Justice, through the Solicitor General, represents the EEOC before the United States Supreme Court.

- b. Should disagreements between the EEOC and other federal agencies over the interpretation of Title VII arise in the future, how will you defend the EEOC’s role as the “preeminent” arbiter of workplace discrimination issues?

Answer: The EEOC has the authority to adjudicate disputes under Title VII in the federal employment sector, although it cannot impose injunctive relief on other federal agencies. The Department of Justice has jurisdiction for enforcing Title VII against state and local governments in the litigation context. Further, the Department of Justice, through the Solicitor General, represents the EEOC before the United States Supreme Court. If confirmed, I will continue to respect this distribution of authority among the agencies.

4. The EEOC’s Strategic Enforcement Plan (SEP) for 2013-2016 listed the “coverage of lesbian, gay, bisexual and transgender individuals under Title VII’s sex discrimination provisions” as an “emerging or developing” issue that EEOC should “prioritize.”<sup>9</sup> The EEOC’s SEP for 2017-2021 lists the protection of LGBT Americans from discrimination based on sex as an “emerging and developing issue” priority, but notes that “the Commission may choose to add or remove particular issues as the law develops.”<sup>10</sup> If confirmed, would you support continuing to prioritize the protection of LGBT Americans from sex discrimination as an “emerging and developing” issue?

Answer: Yes.

## **EEO-1 Data and Pay Discrimination**

The Civil Rights Act of 1967 and the Equal Employment Opportunity Act of 1972 require employers with 100 or more employees to annually submit EEO-1 forms to the EEOC. EEO-1 forms capture information on the gender and race of employees.<sup>11</sup> In January 2016, the Obama Administration proposed an update to the EEO-1 that would have required employers to report

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<sup>9</sup> U.S. Equal Employment Opportunity Commission, “Strategic Enforcement Plan: FY 2013-2016” (online at <https://www.eeoc.gov/eeoc/plan/sep.cfm>).

<sup>10</sup> U.S. Equal Employment Opportunity Commission, “Strategic Enforcement Plan: Fiscal Years 2017-2021” (online at <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>).

<sup>11</sup> U.S. Equal Employment Opportunity Commission, “EEO-1: Legal Basis for Requirements” (online at <https://www.eeoc.gov/employers/eo1survey/legalbasis.cfm>).

additional information on workers' wages, broken down by race, ethnicity, and gender. The form was officially revised in September 2016. The goal of this revision—which would have required companies to start submitting data by March 2018—was to provide EEOC with additional wage data to track and combat wage discrimination.<sup>12</sup>

Describing the new EEO-1 requirements—particularly its “data file specifications for employers”—as “unnecessarily burdensome,” the Office of Management and Budget (OMB) recently halted the implementation of the EEO-1 pay data collection requirements. During your nomination hearing, you committed to “make finalizing a transparent pay data collection by the EEOC a priority” in a “timely matter.”

5. Do you agree with the OMB's assessment that the EEOC's recent efforts to change the EEO-1 form are “unnecessarily burdensome” for employers? If not, please describe what steps the EEOC will take under your leadership to ensure that the EEO-1 form is amended to collect pay data by gender and race. If so, please provide a detailed description of how you will alter the EEOC's pay data collection proposal to make the regulation less “burdensome” while still collecting pay data by gender and race.

Answer: Pay discrimination is a serious issue and an appropriate focus of the EEOC's efforts. I believe that transparency of pay data is a useful tool, but it is important that the data collected and disclosed allows for meaningful comparisons. If confirmed, I would consult with the career professional staff and my fellow commissioners to examine what additional data the EEOC needs to fulfill its mandate to enforce federal equal pay laws. I would like to understand how the EEOC performed its burden analysis, and how it arrived at its annual burden estimate per filer. I am open to exploring an initial pilot program to develop a better understanding of how collection of pay data could help further the EEOC's mission of enforcing the federal equal pay laws.

6. Changes to the EEO-1 form were meant to “help focus public enforcement of our equal pay laws.” How would you direct the EEOC to utilize additional race- and gender-related pay data, should the EEOC manage to successfully collect it?

Answer: If confirmed, I would want to consult with the career professional staff, as well as my fellow commissioners, to determine how best to utilize collected pay data to further the agency's mission. I would also look to reports previously done by the EEOC, including *Diversity in the Finance Industry*, *Diversity in the Media*, as examples of how the EEOC can utilize the data it collects to further its mission.

7. Do you think measures to increase transparency by providing employees with information about pay is an effective tool to combat discrimination? If so, what specific measures—in addition to improving pay data collection at the EEOC—do you support?

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<sup>12</sup> President Barack Obama, “FACT SHEET: New Steps to Advance Equal Pay on the Seventh Anniversary of the Lilly Ledbetter Fair Pay Act,” *The White House of President Barack Obama* (January 29, 2016) (online at <https://obamawhitehouse.archives.gov/the-press-office/2016/01/29/fact-sheet-new-steps-advance-equal-pay-seventh-anniversary-lilly>).

Answer: Pay discrimination is a serious issue and an appropriate focus of the EEOC's efforts. I believe that transparency of pay data is a useful tool, but it is important that the data collected and disclosed allow for meaningful comparisons. The EEOC Compliance Manual recognizes a variety of legitimate factors that can explain pay differences. Thus, while access to information about other employees' pay may provide a basis for comparison, that comparison needs to be put into appropriate context.

## Wellness Programs

The EEOC is responsible for enforcing the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). Among other requirements, the ACA "prohibits employers from requiring medical exams or inquiring as to whether an individual has a disability unless the inquiry is both 'job related' and 'consistent with business necessity'—though employers may collect this information if its collection is "voluntary."<sup>13</sup> GINA, meanwhile, "prohibits employers from requesting, requiring, or purchasing genetic information from employees or their families."<sup>14</sup>

To help reduce the cost of healthcare, the Affordable Care Act (ACA) allows employers to offer financial incentives to encourage employee participation in wellness programs. In 2013, the Departments of Labor, Health and Human Services, and the Treasury (the Departments) issued regulations implementing the ACA that permit employers to offer financial incentives of up to 30% of healthcare premiums for participation in "health contingent" wellness plans. In 2016, EEOC issued regulations designed to align the ADA and GINA with the Department's wellness program regulations.<sup>15</sup> The EEOC's regulations asserted that programs with a 30% financial incentive were "voluntary" under the ADA, and would have permitted employers to condition financial incentives on the participation of an employees' spouse in a program that collects their genetic information. On July 13, 2015, and February 2, 2016, I sent letters to the EEOC expressing my concerns with this approach.<sup>16</sup>

In August 2017, a district court ruled in *AARP v. U.S. Equal Employment Opportunity Commission* that the EEOC's regulations violated the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA).<sup>17</sup> The EEOC was directed to

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<sup>13</sup> Epstein Becker & Green, "EEOC's Wellness Program Incentive Regulations Rejected by the District Court," *JDSupra* (August 28, 2017) (online at <http://www.jdsupra.com/legalnews/eeoc-s-wellness-program-incentive-72781/>).

<sup>14</sup> Epstein Becker & Green, "EEOC's Wellness Program Incentive Regulations Rejected by the District Court," *JDSupra* (August 28, 2017) (online at <http://www.jdsupra.com/legalnews/eeoc-s-wellness-program-incentive-72781/>).

<sup>15</sup> Epstein Becker & Green, "EEOC's Wellness Program Incentive Regulations Rejected by the District Court," *JDSupra* (August 28, 2017) (online at <http://www.jdsupra.com/legalnews/eeoc-s-wellness-program-incentive-72781/>).

<sup>16</sup> See Letters from Senator Warren et al. to Jenny R. Yang, Chair, EEOC, on July 13, 2015, and February 2, 2016.

<sup>17</sup> Epstein Becker & Green, "EEOC's Wellness Program Incentive Regulations Rejected by the District Court," *JDSupra* (August 28, 2017) (online at <http://www.jdsupra.com/legalnews/eeoc-s-wellness-program-incentive-72781/>).

rewrite its regulations defining how employers can incentivize participation in wellness programs.<sup>18</sup>

8. Will you commit to preserving GINA protections in the EEOC's upcoming revision of its wellness program regulations?

Answer: If confirmed, I will work with the career professional staff and my fellow commissioners to redraft the rules to address the concerns raised by the Court in the *AARP v EEOC* matter, and to ensure that the EEOC's interpretations are consistent with the regulations that HHS, the Department of Treasury and the DOL promulgated in the wake of the ACA's passage, as well as the requirements of GINA and the ADA. In light of the ongoing litigation, I do not believe it would be appropriate for me to comment on specific aspects of the wellness regulations that the EEOC has promulgated, and which are the subject of the litigation and the court's recent order.

9. Will you commit to preserving ADA protections in the EEOC's upcoming revision of its wellness program regulations?

Answer: If confirmed, I will work with the career professional staff and my fellow commissioners to redraft the rules to address the concerns raised by the Court in the *AARP v EEOC* matter, and to ensure that the EEOC's interpretations are consistent with the regulations that HHS, the Department of Treasury and the DOL promulgated in the wake of the ACA's passage, as well as the requirements of GINA and the ADA. In light of the ongoing litigation, I do not believe it would be appropriate for me to comment on specific aspects of the wellness regulations that the EEOC has promulgated, and which are the subject of the litigation and the court's recent order.

10. Do you believe that participation in an employee wellness program can be "voluntary" if the terms of the program place significant financial pressure on an employee to reveal genetic information, including the medical history of the employee or a family member?

Answer: If confirmed, I will work with the career professional staff and my fellow commissioners to redraft the rules to address the concerns raised by the Court in the *AARP v EEOC* matter, and to ensure that the EEOC's interpretations are consistent with the regulations that HHS, the Department of Treasury and the DOL promulgated in the wake of the ACA's passage, as well as the requirements of GINA and the ADA. In light of the ongoing litigation, I do not believe it would be appropriate for me to comment on specific aspects of the wellness regulations that the EEOC has promulgated, and which are the subject of the litigation and the court's recent order.

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<sup>18</sup> Epstein Becker & Green, "EEOC's Wellness Program Incentive Regulations Rejected by the District Court," *JDSupra* (August 28, 2017) (online at <http://www.jdsupra.com/legalnews/eec-s-wellness-program-incentive-72781/>).

## **Criminal Background Checks**

11. In your opinion, what is the appropriate use of criminal history background checks in an employment application process?

Answer: Criminal history background checks can be appropriate to screen applicants whose prior criminal history indicates the applicant could put the employer and/or its employees/customers at unreasonable risk. For example, an applicant with a criminal record for child sexual abuse would likely not be an appropriate candidate for a position in a child day-care center.

12. Is it ever unlawful or discriminatory for an employer not to hire workers with criminal histories?

Answer: Yes.

13. Will you commit to bringing cases against employers whose use of criminal background checks has a disparate impact on protected classes under Title VII?

Answer: Because the EEOC's guidance on this topic has been challenged and is the subject of ongoing litigation, I do not believe it is appropriate for me to respond to this question. I am aware that the EEOC's efforts to enforce this guidance through litigation have been subjected to criticism from various courts, including in *EEOC v. Kaplan Higher Education Corp.*, *EEOC v. Freeman, Inc.* and *EEOC v. Peoplemark, Inc.*, and that significant sanctions have been assessed. If confirmed, I will seek to learn more about the EEOC's enforcement efforts in this area.

## **Credit Checks**

14. In your opinion, what is the appropriate use of credit checks in an employment application process?

Answer: If an employer elects to use credit checks in an employment application process, it must do so in a neutral fashion, and not as a pretext for screening out protected classes of employees. In addition, credit checks must be conducted in accordance with the requirements of FCRA (the Fair Credit Reporting Act) and other similar state laws.

15. Is it ever unlawful or discriminatory for an employer not to hire workers because of their credit history?

Answer: If an employer elects to use credit checks in an employment application process, it must do so in a neutral fashion, and not as a pretext for screening out protected classes of employees. In addition, credit checks must be conducted in accordance with the requirements of FCRA (the Fair Credit Reporting Act) and other similar state laws.



16. Will you commit to bringing cases against employers whose use of credit history has a disparate impact on protected classes under Title VII?

Answer: If confirmed, I will consult with the career professional staff, as well as my fellow commissioners, and review the data on this subject.

**Case Load:**

17. Given the current case backlog at EEOC do you support the Trump administration's FY2018 budget proposal to eliminate 249 full-time positions at EEOC?

Answer: If confirmed, I will carefully examine the agency's expenditures to make sure that the agency is making the most efficient use of its resources, and is making strategic investments of its resources to ensure it can achieve its mandate in the most cost-effective manner possible.

18. If not, will you commit to advocating against budget cuts to The White House?

Answer: If confirmed, I will advocate for resources necessary for the agency to perform its mandate.

**Systemic Investigations:**

19. What are your views on EEOC's systemic program?

Answer: I believe that systemic investigations and litigation can be used to maximize the impact of the agency's resources by pursuing matters that are high impact. Systemic investigations and, where necessary, litigation, that addresses a widespread pattern or practice of discriminatory treatment is a valuable tool to combat discrimination.

**Census**

20. As you may know, the EEOC relies on data gathered in Census products such as the American Community Survey. But the President has proposed debilitating budgets to the Census and has not appointed a Director. Will you commit to advocating to the White House for a fully funded and staffed Census Bureau?

Answer: I am aware that the EEOC receives data from the Census, but I am not familiar with that data, nor how it is utilized. If confirmed, I will work with the career professional staff to understand how the agency uses Census data.

21. Will you commit to informing the HELP Committee if you do not have adequate data from Census products or if the quality of Census data that you use declines?

Answer: Yes.

## **Retail Litigation Center**

You helped found and served as chair of the Retail Litigation Center (RLC), which files briefs representing the retail industry's interests in a variety of legal proceedings, including matters of EEOC policy, enforcement, and litigation.<sup>19</sup> In that capacity, you worked with high-level executives of other major employers to decide if and how to intervene in retail-related cases, including some before the EEOC.

22. What steps will you take to avoid the appearance of impropriety if the RLC has filed a brief in a case that comes before you as chair of the EEOC?

Answer: I intend to recuse myself from matters in which the RLC is involved if I had involvement in that matter while I was on the Board of the RLC. Beyond that, I will consult with the EEOC's ethics officer on recusal issues.

23. Please list the companies whose executives sat on the RLC's Board of Directors while you were Chair.

Answer: J.C. Penney Company, Inc., Lowe's Companies, Inc., Michaels Stores, Inc., Target Corporation, 7-Eleven, Inc., Jo-Ann Stores, Inc., Dollar General Corporation, Whole Foods Market, Inc., Wal-Mart Stores, Inc., and Walgreen Co.

24. If any of these companies is a party in a case that comes before the EEOC, what steps will you take to avoid the appearance of impropriety in light of your prior relationship with such a company?

Answer: I will consult with the EEOC's ethics officer on recusal issues.

- a. In such circumstances, would you take a meeting or otherwise communicate with an executive from that company?

Answer: I will consult with the EEOC's ethics officer.

## **Congressional Oversight**

25. Please describe your views on the role of Congress in conducting oversight of the EEOC.

Answer: Congressional oversight is important function that supports Congress's authorizing and appropriating roles and derives from its implied powers in the Constitution.

26. Will you commit to promptly and comprehensively answering any requests for information that you receive from any member of members of the HELP committee?

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<sup>19</sup> <https://www.rila.org/enterprise/retaillitigationcenter/Pages/default.aspx>

Answer: Yes, subject to statutory limitations on the ability of the EEOC to disclose information about charging parties and respondents.

27. Will you treat requests for information from Majority members of Congress differently than you will treat requests from Minority members? If so, how?

Answer: No.

### **Questions for the Record from Senator Tim Kaine**

1. In light of this Administration's attacks on undocumented immigrants, it is more important than ever that the EEOC continue to vigorously enforce claims of discrimination filed by undocumented workers. Will you abide by the EEOC's guidance stating that workers are protected under Title VII regardless of their immigration status or authorization to work?

Answer: Yes.

2. Strong EEOC enforcement efforts are especially important in low-wage jobs because these jobs are disproportionately held by workers who are vulnerable to discrimination, including women of color.

- a. How do you plan to make sure that the EEOC is devoting sufficient resources to addressing discrimination in the industries where these low-wage jobs are concentrated?

Answer: I believe that the EEOC's focus on vulnerable members of the nation's work force is an important part of its overall mission. If confirmed, I will work with the career professional staff, and my fellow commissioners, to ensure that an appropriate amount of the agency's resources are focused on issues impacting these workers.

- b. Are there any biases you bring to the EEOC from your work on behalf of management and industry in the retail sector that will hinder your ability to strongly enforce low-wage workers' rights, including those in the retail industry?

Answer: No – I do not believe so. If I am confirmed, I will do my best to objectively lead the agency in a manner consistent with the EEOC's statutory mandates, as well as applicable judicial and agency precedent, taking into account the views of other commissioners, the career professional staff, and interested stakeholders.

3. The Office of Management and Budget (OMB) recently suspended the pay data collection and reporting requirement under the updated version of the EEO-1 form that was originally scheduled to take effect in March of 2018.

- a. Do you believe there is a gender-base wage gap that is due in part to lack of transparency around compensation and lack of review by employers into their pay practices?

Answer: Yes.

- b. Do you believe that some intervention by the EEOC is needed to gain insight into employers' pay practices?

Answer: Yes.

- c. What do you think are effective strategies to address pay discrimination?

Answer: Pay discrimination is a serious issue and an appropriate focus of the EEOC's efforts. I believe that transparency of pay data is a useful tool in combating pay discrimination, but it is important that the data collected and disclosed allow for meaningful comparisons. If confirmed, I would consult with the career professional staff and my fellow commissioners to examine what additional data the EEOC needs to fulfill its mandate to enforce federal equal pay laws. I will also want to understand what resources are being devoted to enforcement of the nation's equal pay laws, and make a determination whether those resources are appropriate.

## **Questions for the Record from Senator Margaret Wood Hassan**

1. Section 14(c) of the Fair Labor Standards Act, authorizes employers to pay sub-minimum wages to workers who experience disabilities. Often times, this type of employment occurs in a secluded environment known as a sheltered workplace. In 2015, with the support of the NH business community, New Hampshire was the first state to eliminate the payment of the subminimum wage and there have been efforts in Congress to end this practice.
  - a. Understanding that your role is to execute the current law, do you personally support ending the practice of paying subminimum wage to individuals who experience disabilities and phasing out the practice of using sheltered workplaces in favor of Competitive Integrated Employment?

Answer: I do not have sufficient information or background on this issue to form an informed view. If confirmed, I would consult with the career professional staff and fellow commissioners to learn more about this area.

2. One of the biggest gaps between men and women in both education and the workforce is in the STEM fields. Women outnumber men as college graduates, but in STEM fields the numbers are quite the opposite. In turn, men have higher representation in STEM careers, which tend to pay much more than jobs in female-dominated spheres. And women who do enter into STEM fields often face heavy discrimination and hostile work environments, as many recent articles about STEM-field office cultures have demonstrated. They are also shortchanged on pay. A 2015 study by the American Association of University Women found that women in STEM fields are paid only 82-87% of what their male counterparts are paid.<sup>20</sup>
  - a. How will you work to combat this systemic gap in pay?
  - b. How will you monitor whether this gap is closing?
  - c. What steps will you take to ensure that these women's rights' are protected in hostile work environments?

Answer: I believe that pay discrimination in any field is unacceptable. In the past, the EEOC has established Task Forces to focus on particular issues, and has issued reports on employment practices in particular sectors (for example, the EEOC's reports titled *Diversity in the Finance Industry* and *Diversity in the Media*). I believe these types of in-depth efforts have been effective at driving positive change. If confirmed, I would work with the career professional staff, as well as my fellow commissioners, to explore ways that the EEOC can address these issues.

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<sup>20</sup> <http://www.aauw.org/2015/04/14/women-shortchanged-in-stem/>

3. As you know the Americans with Disabilities Act requires that employers provide reasonable accommodations to an employee who experiences a disability. Despite this, individuals with disabilities continue to face an unemployment rate of over 8 percent and have a labor participation rate of only 20.5 percent compared to 68.8 percent of individuals who do not experience a disability.

- a. Can you explain your understanding of a reasonable accommodation under the ADA?

Answer: What constitutes a reasonable accommodation is highly dependent on the facts of a particular circumstance. Employers should engage in the interactive process to determine what constitutes a reasonable accommodation in a particular circumstance.

4. Often times, especially in cases of individuals with mental health issues or a learning disability, employees may choose to not disclose their disability and in turn not receive the accommodations they are afforded under law.

- a. What role do you believe the EEOC plays in ensuring that employers are held accountable to provide accommodations and that employees know their legal rights to disclose their disability with no repercussions?

Answer: I believe that employer and employee outreach and education efforts are particularly important in this area. In addition, the EEOC's mediation program can play a significant role in these types of situations. In addition, if unlawful discrimination is found, the EEOC should engage in a meaningful conciliation effort.

- b. You've been a corporate executive for several retail chains, do you feel there are too many lawsuits under the ADA?

Answer: I do not have access to information on which to form a judgment on the amount of litigation brought under the ADA.

**Questions for the Record**  
**“Dr. Daniel M. Gade, Ph.D., to Member, Equal Employment Opportunity Commission”**  
**Hearing Date: September 19, 2017**

**Questions for the Record from Ranking Member Patty Murray**

1. In January of 2011 a blogpost on the website BlackFive argued that women should not be allowed in combat units. You commented twice on this post, agreeing with the author’s argument – that combat units should be restricted to men. You said allowing women in combat roles will be a detriment to national security, will result into lower standards at Ranger, SFAS, and other schools, and that the idea of women fighting in that environment is “laughable.” Please explain how your views have changed since 2011 and why.

As late as 2011, I agreed with the military’s policy at that time that excluded women from some combat roles. Later that year, when I arrived at West Point as a professor, I began to observe women in demanding leadership roles within the Corps of Cadets. I mentored many women, including several who became combat arms officers upon graduation. I am proud of those women, and proud of my mentorship of them.

My concerns that the military would lower physical standards as part of the effort to include women were unfounded, and I do not currently hold the views that I held in 2011. My direct observation and mentorship of women who are currently serving as combat arms officers, including one who was the 4<sup>th</sup> woman to graduate from Ranger School and another who is the only woman serving as a Sapper platoon leader in the 101<sup>st</sup> Airborne Division, make my concerns in 2011 seem antiquated. I no longer hold those views, and am proud of my years-long mentorship of those officers.

2. The original blogpost in question, “Women in combat units – Oh! Hell! No!” not only argued vigorously against allowing women into combat roles, but did so in an incendiary way perpetuating harmful gender stereotypes. For example, the author said that “[w]omen are not as big and strong as men, nor can they withstand the rigors of living completely off the grid for the extended stretches combat can require.” The author went on to explain “you just threw a healthy, breeding age, female into a pack of dogs with an established, yet always evolving hierarchy,” questioned where the “vital gap is in our combat repertoire that requires a feminine touch, and noted “the need for monthly maintenance is another show stopper” (referring to menstruation). Did you agree with these statements in 2011 and do you agree with them now? How can women trust that you no longer hold or endorse these stereotypes?

No, I did not agree with the original poster of that article, nor do I agree with him now. Military professionals who are leading units in austere environments must take into account all of the unique needs of their soldiers, including mental and physical health, hygiene, and other mission requirements. I believe in the professionalism of the leaders of those units, and trust them to take into account all of the variables related to mission accomplishment. Anyone with concerns can

look to my record of mentorship and direct care of women who later joined combat arms branches.

3. In one of your comments on BlackFive you called the Military Leadership Diversity Commission, which was established by Congress in 2009, “silly.” What about your experience with women in the military at the time you made those comments led you to think that it was a silly or laughable idea for women to serve in combat units?

I knew nothing at that time about the diversity commission, and do not believe that it was “silly”. My concern at that time was that the Commission would simply endorse the political views of its founders and members, rather than take military readiness into account in a direct and honest way. Although I am not familiar with any reports made by that Commission, I am pleased that the Army has been rigorous in enforcing the standards for each position rather than relying on the sex of the soldier as a proxy for ability. Women can (and do) serve with distinction across the force, and I am pleased that some of those women were mentored by me during my time as a professor at West Point.

4. Are there currently any jobs or types of work that you believe should be restricted or open only to one gender? If so, what are those jobs? Please explain in detail.

No, I do not think that gender is relevant to employment. Some jobs require more physical strength than others, and the employer must be careful to only apply tests that are directly relevant to the actual job to be performed rather than relying on stereotypes.

5. The EEOC’s mission is to promote equal employment opportunity in the workplace. Do you commit to supporting EEOC’s efforts to reduce women’s barriers to entry into jobs traditionally dominated by men?

Yes. I believe in the EEOC’s role in that important work, and am committed to enforcing the law in those matters.

6. Many jobs traditionally dominated by men, such as firefighting, use physical requirements and tests in recruitment, hiring, and promotion. Height and weight requirements, and strength and physical tests, have often been designed and used to exclude women from nontraditional fields. In some cases such requirements have been found to impose a disparate impact on women in violation of Title VII. Do you believe that occupational standards for jobs, whether in the military or civilian sectors, should reflect the actual, regular and recurring duties of the job, and be applied fairly?

For many years, job applicants were excluded from some jobs based on their sex. In order to prevent discrimination based on sex, any test applied to job applicants should clearly reflect actual job necessities.

- a. Do you believe that the use of physical tests and requirements in recruitment, hiring, and promotion is justified? If yes, in what circumstances



Yes, physical tests may be appropriate. When used, those tests must not be based on assumptions about the characteristics of each sex, nor may they be designed to exclude members of a particular sex. Instead, they must be carefully designed to allow those capable of doing the work to be hired, promoted, and retained.

- b. If you are confirmed, what steps will you take to actively promote equal employment opportunity for women, particularly in fields traditionally dominated by men?

The law must be vigorously enforced, and I am committed to doing so.

7. Do you support the Administration's ban on military service by transgender individuals?

The President, in accordance with the Secretary of Defense, Service Secretaries, and Joint Chiefs of Staff, make policy affecting the military services. I believe that any person who meets the physical and mental standards of the profession of arms should be allowed to serve. During my service, I had no involvement with policy issues related to transgender service.

8. Do you agree that employee access to information about pay within a workplace is critical to helping employees determine whether they are being paid less than their peer for discriminatory reasons?

Yes. One of the lessons of the Lilly Ledbetter case was that people sometimes don't know that they have been discriminated against because they have no information about what others are paid. As a general matter, I believe that employees should be able to have access to the required information to discern whether they have been discriminated against based on sex, race, or other protected category.

9. What initiatives will you undertake to strengthen the ability of the EEOC and the ability of working people to identify and challenge pay discrimination?

The EEOC has the legal authority to collect pay data. If the EEOC decides to re-issue a revision to the EEO-1 form, the data collected should serve three purposes: to allow employees to understand whether they are being paid fairly; to allow employers to conduct self-audits to determine whether they are paying their employees fairly; and to allow the government to use the data for law enforcement or educational purposes.

10. The EEO-1 form was created in the 1960s to provide the agency a better understanding of employment patterns by race, gender, and ethnicity across different job categories and industries. For more than 50 years, the form has been an effective tool to help root out discriminatory practices. It continues to be a vital tool that the EEOC relies on to investigate and resolve race, sex, and national origin discrimination claims. The revised EEO-1 form approved in 2016 continued the collection of this important data, in what is called component 1 of the form, and added a new component 2 focused on pay data collection. Given the important role that the EEO-1 form has played in the EEOC's work to combat race, gender, and national origin discrimination, do you believe that the data on

race, gender, and ethnicity collected through component 1 of the form is still useful today and that the EEOC should continue to collect this data?

Yes, I absolutely agree that the component 1 data should be collected and analyzed.

11. Are there specific changes to the collection of component 1 data (race, gender, ethnicity) that you think are important to pursue? If so, why?

I am committed to working with the career staff and other commissioners to analyzing this question. If additional data fields are to be collected, that requirement should be promulgated through a normal notice and comment process, and subject to as much collaboration and consultation as possible. I am committed to openness and transparency in that process.

12. The Administration recently stayed the EEOC's equal pay data collection via the EEO-1 form for further review. OMB stayed the data collection and instructed the EEOC to submit a new proposal. EEOC must now address OMB's expressed concerns and identify a path forward for the collection of pay data. At the hearing, you affirmed that you supported the collection of pay data from employers by the EEOC, and that development of a revised pay data collection would be priority and would be completed in a reasonable time period.

- a. Do you agree in order to be useful and effective for enforcement purposes, employers must be required to collect and submit to the EEOC data identifying job type, total compensation, and whether the employee is full-time or part-time?

I am committed to effectively enforcing anti-discrimination law. In consultation with those professionals who were involved in the original design of the new EEO-1 form, I am committed to working swiftly to address OMB and stakeholder concerns with the data to be collected and the process for collecting it.

- b. Do you believe a revised pay data collection should be mandatory for participating employers?

I am committed to the mission of the agency, and believe that pay discrimination is both illegal and immoral. I am not willing to pre-judge the outcome of the discussions that we will have related to this issue. However, "optional" data collection is rarely efficacious in detecting and correcting unsound behaviors and practices.

- c. If you have concerns about the EEO-1 pay data collection as previously approved, how would you seek to modify it while still ensuring that critical information about pay and hours worked is collected and submitted by employers?

I am committed to working collaboratively with the professionals who designed the revised EEO-1 in the first place. The agency clearly needs to address the OMB and stakeholder concerns with the data to be collected and the process of fielding the requirement, while upholding its statutory mandate to eliminate discrimination.

- d. Please explain how you will incorporate the public comments and analysis already produced during the extensive planning process for the pay data collection.

The process of revising the EEO-1 form must take into account the concerns of the commenters on the original process. I am committed to addressing each major category of concern, and to include all stakeholders in the revision process.

- e. If you are confirmed, will you commit to supporting a process to finalize and implement pay data collection by EEOC, including through a public hearing and other diverse stakeholder engagement efforts, and to submitting a revised pay data collection proposal to OMB for its review within 6 months of your confirmation?

I am committed to the mission of the agency, and believe that pay discrimination is both illegal and immoral. I intend to work with the Commissioners to ensure the EEOC has the information necessary to enforce America's anti-discrimination laws. I am not willing to prejudge the outcome of the discussions that we will have related to this issue, nor am I willing to commit to a 6-month deadline. I am not familiar with the timelines involved in such a project. However, I believe that it would be helpful if the agency updates Congress at regular intervals.

13. The EEO's analysis supporting the pay data collection explained in detail the agency's justification for adding pay data to the EEO-1, the process by EEOC used to choose the W-2 data collection mechanism, and the stakeholders the EEOC consulted with. For example, the EEOC analysis explains that the Commission considered giving different measures of earnings, and detailed the strengths and weaknesses of the various measures. The EEOC analysis also explained that the Commission convened a two-day working group of employer representatives, statisticians, human resources information system (HRIS) experts, and information technology specialists to inform its revision of the EEO-1. EEOC also reviewed over 900 public comments while adopting the EEO-1 pay data collection. OMB's decision to review and stay the previously approved EEO-1 pay data collection was not subject to a public notice and comment process and the publicly available explanation provided by OMB for its decision to set aside this extensively reviewed pay data collection was just two paragraphs long. Do you agree with OMB's change in position?

OMB, and members of Congress, had a number of serious concerns with the process and its result. I am committed to a way forward that takes those concerns into account.

14. The EEO-1 pay data collection currently under review, ensures reporting of compensation data by gender and racial/ethnic groups within each of ten job categories, rather than by an employer's own job titles or job classification system to allow analysis and comparison of wage data for firms employing workers in the same job class, in the same industry, in the same location, and in the same year. Do you agree that the pay data collection facilitates the consistent comparison of pay disparities in job categories among employers in a given industry and geographic area? If not, why not?

I am committed to spending time with the professionals who designed the data reporting requirement prior to proposing any changes to their work. Some commenters believed that the categories were too broad (for example, listing surgeons and X-ray technicians together as “professionals”). Those kinds of concerns should be taken into account.

15. Do you believe that OMB should fully disclose the basis for its stay, the analysis underlying its conclusion, and the process by which it reached that conclusion, including any outside interest groups with which it consulted?

I am not familiar with OMB processes and how much public disclosure of those processes is appropriate. While I am generally in favor of transparency and openness, it is the prerogative of the White House to determine the extent to which its deliberative materials should be made public.

16. OMB’s decision to stay the pay data collection rested in part on the assertion that EEOC provided “data file specifications” for employers to directly upload pay data only after OMB approved the equal pay data collection. Are you aware that this is just one voluntary option to submit the data that is offered by the EEOC for employer convenience?

I am not familiar with how employers may provide this information. As a general matter, any required data should be able to be submitted in a way that is convenient to the employer and sufficient for the legitimate governmental purposes that it serves.

17. Do you believe that OMB’s decision to stay the pay data collection was justified, given that OMB approved the data collection last year fully aware that EEOC would post the data file specifications afterwards?

If confirmed, I look forward to reviewing OMB’s decision closely.

18. President Trump’s 2018 budget proposed merging the Office of Federal Contract Compliance Programs (OFCCP) and EEOC and significantly reducing the offices’ budget. What is your position on the proposed merger?

While I am familiar with that proposal, I am not ready to take a position on it as I would need time to review it in greater detail. If the OFCCP and EEOC are merged, it should be done in such a way to ensure that the critical mission of combatting discrimination is not negatively affected.

19. Do you agree with the EEOC’s position in *Baldwin v. Dep’t of Transportation* (EEOC Appeal No. 0120133080, July 15, 2015) that sexual orientation discrimination is a form of sex discrimination?

I am personally opposed to sexual orientation discrimination. The current Circuit Court split, as well as the current disagreement between the EEOC and the DOJ, make this an issue that is ripe

for final determination by the Supreme Court or the Congress. In the meantime, I am not aware of, nor will I drive, any current efforts to refine the EEOC position on this issue.

20. Do you agree with EEOC's position in *Lusardi v. Dep't of the Army* (EEOC Appeal No. 0120133395, March 27, 2015) that an employer who denies an employee access to a restroom that matches their gender identity is a form of sex discrimination?

I am personally opposed to gender identity discrimination. Any change to the EEOC position should be made only with close consultation among the Commissioners, as well as an open and transparent process. I am committed to enforcing the law as written by Congress and interpreted by the courts.

21. Do you agree with EEOC's position in *Macy v. Dep't of Justice* (EEOC Appeal No. 0120120821, April 20, 2012) that discrimination against someone because they are transgender is a form of sex discrimination?

Please see my answer to question #20, above.

22. At the hearing, you stated that if confirmed, one of your priorities would be to review the EEOC's strategic enforcement plan. Do you agree with the substantive area priorities and strategies set forth in the current strategic enforcement plan? Please be specific about priorities you would add or seek to remove.

The current strategic enforcement plan should be reviewed by the full commission to determine whether it plots the proper course into the future. I am not currently willing to prejudge that process, but am committed to a process that is open and transparent to all stakeholders, including members of Congress and others.

23. The EEOC's strategic enforcement plan currently includes "protecting lesbians, gay men, bisexuals, and transgender (LGBT) people from discrimination based on sex." Do you intend to amend the inclusion of protections for LGBT workers in the strategic enforcement plan?

I am personally opposed to gender identity and sexual orientation discrimination. The current Circuit Court split, as well as the current disagreement between the EEOC and the DOJ, make this an issue that is ripe for final determination by the Supreme Court or the Congress. I am committed to enforcing the law as written by Congress and interpreted by the courts. In the meantime, I am not aware of, nor will I drive, any current efforts to refine the EEOC position on this issue.

24. Do you commit to continuing to advocate that Title VII prohibits employers from discriminating on the basis of sexual orientation and gender identity in circuit courts where the question has not been decided?

I am personally opposed to gender identity and sexual orientation discrimination. The current Circuit Court split, as well as the current disagreement between the EEOC and the DOJ, make

this an issue that is ripe for final determination by the Supreme Court or the Congress. I am committed to enforcing the law as written by Congress and interpreted by the courts. In the meantime, I am not aware of, nor will I drive, any current efforts to refine the EEOC position on this issue.

25. At the hearing, you stated you believed that “most discrimination is unintentional.” Have you reviewed data that supports this position? Given your statement at the hearing, do you believe that a focus on disparate impact discrimination should be a top priority of the EEOC?

I base that assertion on a belief that most discrimination (or alleged discrimination) never makes it to the formal complaint process. Instead, a worker who believes that he has been discriminated against may tell his supervisor, and she may make on-the-spot corrections involving the parties who may have caused offense. For example, people with disabilities often hear the word “retard” used as a synonym for “foolish”. Most people, when informed that the word “retard” is considered to be an ableist slur, will cease using it. That is an example of unintentional discrimination that does not rise to the level of a formal complaint, and where education and increased awareness will generally suffice.

Disparate impact discrimination is real, common, and a cause for action in many cases. Each of those cases should be judged based on its own merits, and I support EEOC efforts in that regard.

26. The EEOC’s systemic program has successfully ensured workers discriminated against in their employment receive justice. Commissioner Jenny Yang and her staff reviewed the systemic program from 2013–2014 and found that the program has contributed to a tripling of monetary relief recovered for victims. In all, they found that the systemic program has had a 10-year success rate of 94 percent. Will you commit to continuing to pursue coordinated, systemic litigation on behalf of those subject to discriminatory patterns, practices, or policies?

Systemic litigation is a powerful tool, and when deployed appropriately, can be used to remedy some kinds of discrimination. Like any powerful tool, it should be used carefully, and I firmly believe that any systemic enforcement action should be undertaken after careful consideration by the full Commission.

27. Please describe in detail when you believe that the EEOC should use systemic litigation.

Systemic litigation is appropriate where a pattern or practice of discrimination is uncovered that affects a broad group of people, even if they do not know that they have been discriminated against. In particular, the most vulnerable workers (migrants, people with disabilities, part-time workers, and others) may not know that they have been discriminated against, and systemic litigation may be appropriate in those cases.

28. Please explain any challenges you believe face the systemic program.

The main challenge facing systemic litigation is that it can be used inappropriately, and can divert agency resources away from cases in which there is a specific complainant. Each decision to pursue systemic cases should be undertaken as a policy choice, not simply a litigation choice.

29. In 2012, the EEOC issued criminal history guidance. In your opinion, when can employers appropriately use criminal history background checks when making employment decisions and when is it unlawful or discriminatory for an employer not to hire workers with criminal histories?

Ex-offenders face a difficult path to full reintegration, and this path can certainly be made steeper by discriminatory practices. A blanket bar to employment based on criminal history may affect Black and Hispanic men at a higher rate than others, and be the basis of a valid disparate impact claim. I would need to study this issue in greater depth, and consult with the other commissioners and career staff, before making any policy determinations in this area.

30. Do you support maintaining the current EEOC criminal history guidance that has been in place for five years and is generally understood by employers? If not, why not?

I would need to study this issue in greater depth, and consult with the other commissioners and career staff, before making any policy determinations in this area. Any change to that guidance should be done after a full and open consultation with the Commissioners and relevant stakeholders.

31. Title II of the Genetic Information Nondiscrimination Act (GINA) and Title I of the Americans with Disabilities Act (ADA) protect an employee's privacy in the workplace and ensure that employers can only request or obtain genetic and medical information when an employee provides it *voluntarily*. In a recent ruling by the U.S. District Court for the District of Columbia on *AARP v. EEOC*, the EEOC's rules about the fees employers can assess workers who do not participate in workplace wellness programs were deemed arbitrary. However, rather than vacate the rules, the court has requested EEOC to "address the rules' failings in a timely manner". Please explain your understanding of why the court sent the wellness rules back to the EEOC.

My understanding is that the court sent the wellness rules back to the EEOC because it was not convinced that the EEOC's "30% rule" was in accordance with the other relevant laws, and because it felt that the adoption of that rule was arbitrary. I support wellness programs, and believe that the EEOC plays an important role in protecting the rights of workers (especially people with disabilities and adverse genetic histories).

32. Do you agree that workplace wellness programs do not need to collect and retain employees' genetic and medical information to be effective?

I look forward to reviewing the regulation and the court decision in an open, collaborative way. Medical and genetic information are exceptionally powerful tools, and use of them in a wellness

program should be carefully balanced with the civil rights of the persons involved. Some basic medical information may be relevant (BMI, blood pressure, cholesterol, etc.), but these pieces of information should be carefully considered with an eye toward protecting the privacy and dignity of each employee.

33. As the Commission redrafts rules on how Title II of GINA and Title I of ADA apply to workplace wellness programs, will you work to ensure that an employee (or spouse) should not be subject to steep financial pressure by their employer or health plan to disclose their genetic and medical information?

Yes. At some level of “incentive”, the financial pressure may become coercive. The level of incentive may vary according to the financial resources of the person involved, and should be considered as this regulation is redesigned.

34. What are some possible ways the wellness program rules can be redrafted to protect employee health privacy, ensure voluntary employee participation, and comply with Title I of the Americans with Disabilities Act (ADA) and Title II of the Genetic Information Nondiscrimination Act (GINA)?

I do not want to commit to or prejudice any result of the policymaking process. However, any wellness regulations that are allowed should be able to meet the needs of the employer while protecting the civil rights of the employee (and her family). I am committed to protecting privacy, ensuring voluntary participation, and complying with the ADA and GINA.

35. In your opinion, when is it appropriate for an agency to use sub-regulatory guidance?

Sub-regulatory guidance serves an important educational role. However, any time the agency uses such guidance, it should do so in an open and transparent process.

36. EEOC under the leadership of Chair Yang has conducted a public process when considering sub-regulatory guidance. Do you agree additional transparency has improved the process and the final guidance?

Yes. Transparency is always better than its inverse.

37. Every year, EEOC receives tens of thousands of harassment complaints. For example, in FY2016, nearly 30,000 harassment complaints were filed with the EEOC. In 2015, EEOC convened a bipartisan Select Task Force on the Study of Harassment in the Workplace. After 18 months of examination, the Task Force released a lengthy report on workplace harassment, along with recommendations for a range of stakeholders, including the EEOC. Do you commit to supporting the bipartisan task force recommendations? If not, which task force recommendations to you oppose? Please explain your answer in detail.

I have not reviewed the Task Force report in detail. However, any process that involves stakeholders in an open and collaborative process should be given tremendous weight.



38. Do you have any concerns with EEOC's 2017 Proposed Enforcement Guidance on Unlawful Harassment? Do you believe the guidance needs to be rescinded or revised in any way?

- a. Do you support the Proposed Enforcement Guidance's expansion of the interpretation of sex-based harassment to include harassment based on gender stereotypes and nonconformance with gender norms, gender identity and sexual orientation?

Because this is a rapidly developing area of the law, I am committed to working with the stakeholders and advocates to understanding this issue prior to forming an opinion. As a general matter, I support the efforts of the EEOC to combat workplace harassment, and look forward to assisting with education and outreach along those lines.

- b. Do you believe that the Proposed Enforcement Guidance should make clear that sex-based harassment includes harassment on the basis of pregnancy, childbirth, or other related conditions, including reproductive health decisions?

Since 1978, Title VII has included protections based on pregnancy, childbirth, and related matters (lactation, pregnancy-related health care, etc.). I support the continued enforcement of those laws, and I will commit to assisting in those efforts.

39. Do you have any concerns with EEOC's 2016 Enforcement Guidance on National Origin Discrimination? Do you believe the guidance needs to be rescinded or revised in any way?

I have no concerns with this guidance, and support EEOC's work to prevent national origin discrimination.

40. Do you have any concerns with EEOC's 2016 Enforcement Guidance on Retaliation and Related Issues? Do you believe the guidance needs to be rescinded or revised in any way?

I have no concerns with this guidance, and support EEOC's work to prevent retaliation.

41. Do you have any concerns with EEOC's 2015 Enforcement Guidance on Pregnancy Discrimination and Related Issues? Do you believe the guidance needs to be rescinded or revised in any way?

I have no concerns with this guidance, and support EEOC's work to prevent pregnancy-related discrimination.

42. Do you commit to inform the members of this Committee if you intend to undertake any review or revision of any existing or ongoing enforcement guidance?

Yes, I am committed to openness and transparency with members of this Committee and other interested parties.

43. The 50<sup>th</sup> anniversary of the Age Discrimination in Employment Act (“ADEA”) is this year. While we have made substantial progress in the last five decades in reducing discrimination faced by older workers, there is much progress left to be made. What specific steps will you recommend EEOC take to reduce age discrimination in the workforce?

I am committed to enforcing the ADEA in all actions with which I am involved. I generally support the effort in Congress to return the ADEA to its pre-*Gross* interpretation, and support EEOC efforts like that in the *Texas Roadhouse* case. Older workers are a critical part of our society and workforce, and they should be protected to the maximum extent of the law.

44. What is your opinion about whether minority members of the Health, Education, Labor, and Pensions (“HELP”) Committee have the authority to conduct oversight of the EEOC?

I support the right of minority members to conduct oversight, and will respond in a timely way to requests from members in the minority.

45. If confirmed, do you agree to provide briefings on EEOC business to members of the HELP Committee, including minority members, if requested?

Yes.

46. If confirmed, do you commit to answer promptly any letters or requests for information from individual members of the HELP Committee including request for EEOC documents, communications, or other forms of data?

Yes, provided that the documents are properly protected in cases where they contain personally identifiable information (PII), or that it is not information protected by statute, or is pre-decisional in nature.

### **Questions for the Record from Senator Bernard Sanders**

1. Dr. Gade, thank you for your service and sacrifice to our country. The EEOC is an independent federal agency that seeks to “eradicate employment discrimination at the workplace.” You have a distinguished military career, yet you do not have the traditional legal background of other commissioners. What challenges do you anticipate, given your lack of a background in discrimination law? If confirmed, you would be the only non-lawyer on the Commission. How do you view your role as a Commissioner of the EEOC?

I do bring a unique perspective to the EEOC. If confirmed, my policy training and background, in addition to my extensive work advocating for people with disabilities and Veterans, will be a valuable additional insight to the Commission’s work. I will rely on attorneys for advice on

specific legal matters, but trust that they can rely on me for well-developed judgment, policy expertise, and leadership in the critically important coordinating role that the EEOC often plays.

2. In your testimony before the Committee, you emphasized outreach and education as a means to achieve the EEOC's mission. What educational and outreach approaches would you add, change, or remove in order to support the EEOC's mission?

I have the heart of a teacher, and treasure the time I spent teaching at West Point. I believe that education is far preferable to litigation, and intend to assist the chair and the other commissioners with conducting a holistic review of the educational and outreach functions of the agency. I am excited about learning the current processes, and in contributing to their ongoing evolution.

### **Questions for the Record from Robert P. Casey, Jr.**

1. I would like to look at a position that the EEOC has already taken that has to do with sexual orientation. The EEOC has determined that the prohibition on sex discrimination in Title VII of the Civil Rights act includes sexual orientation.
  - a. Do you agree with that decision?

I am personally opposed to gender identity and sexual orientation discrimination. The current Circuit Court split, as well as the current disagreement between the EEOC and the DOJ, make this an issue that is ripe for final determination by the Supreme Court or the Congress. I am committed to enforcing the law as written by Congress and interpreted by the courts. In the meantime, I am not aware of, nor will I drive, any current efforts to refine the EEOC position on this issue.

- b. Do you agree that Title VII covers those who are gay or lesbian?

I am personally opposed to gender identity and sexual orientation discrimination. The current Circuit Court split, as well as the current disagreement between the EEOC and the DOJ, make this an issue that is ripe for final determination by the Supreme Court or the Congress. I am committed to enforcing the law as written by Congress and interpreted by the courts. In the meantime, I am not aware of, nor will I drive, any current efforts to refine the EEOC position on this issue.

- c. Do you agree that Title VII covers those who are transgender?

I am personally opposed to gender identity and sexual orientation discrimination. The current Circuit Court split, as well as the current disagreement between the EEOC and the DOJ, make this an issue that is ripe for final determination by the Supreme Court or the Congress. I am committed to enforcing the law as written by Congress and interpreted by the courts. In the meantime, I am not aware of, nor will I drive, any current efforts to refine the EEOC position on this issue.

- d. If confirmed, will you maintain the EEOC's position on sexual orientation discrimination and support bringing cases to defend workers discriminated against because they are gay, lesbian, or transgender?

I am personally opposed to gender identity and sexual orientation discrimination. The current Circuit Court split, as well as the current disagreement between the EEOC and the DOJ, make this an issue that is ripe for final determination by the Supreme Court or the Congress. I am committed to enforcing the law as written by Congress and interpreted by the courts. In the meantime, I am not aware of, nor will I drive, any current efforts to refine the EEOC position on this issue.

2. In your opening statement at the nomination hearing before the Senate HELP Committee you said, "I would like to spend time on the educational and outreach functions of the EEOC, in the sincere belief that most discrimination is unintentional and could be prevented with better information."

- a. Please define the term "unintentional discrimination" and provide an example of what you consider to be unintentional discrimination in your response.

As a person with a disability, and having spent more than a decade working in the disability area, I have become very sensitive to the term "retard". This term can have two meanings: the most common use of the word is as a synonym for "foolish". When used in this way, the user of the term may be thought of as having been discriminatory, even though she did not mean it to be so. This type of discrimination can often be corrected with education, and rarely or never needs to resort to litigation. In most human interactions, I find the offending party does not mean to be offensive, and leadership and climate in the organization will assist in correcting undesirable behavior.

- b. In order to hold employers responsible for disparate treatment of people with disabilities, EEOC must show that the disparate treatment is intentional. Given that unintentional discrimination is much harder to remedy under Title VII, how do you intend to take action on this issue?

One of the educational functions of the EEOC is in this specific area. Employers may use overbroad job testing for historical reasons ("that's the way we've always done it") without regard for the fact that poorly designed job testing may have a disparate impact. I believe that educational outreach about pre-employment testing is a key area for preventing this kind of discrimination.

- c. EEOC data on charges of employment discrimination and resolutions for FFY 2016 do not appear to support your claim that most employment discrimination is, in fact, unintentional. For example, this data show there were more charges filed alleging discharge on the basis of disability than alleging a failure to accommodate. Therefore, how did you arrive at this conclusion?

It is true that the cases that eventually result in a formal claim of discrimination are not typically cases of “unintentional” discrimination. However, by my definition of unintentional discrimination, those incidents are often handled formally or informally at the employer level and generally do not rise to the level of a formal complaint. My larger point in that statement was simply that most people seek to treat others with respect, and that most discrimination can be prevented by simply treating others in that way. As an example, when I am discriminated against based upon my use of a novel mobility device (Segway), my primary approach is to educate the person involved on the relevant law rather than to resort to litigation. Once I explain the reason for my use of the Segway, it becomes accepted in almost all cases.

- d. Since most of EEOC’s education, outreach, and technical assistance is provided upon request, how would this method prevent discrimination that is, as you have put it, unintentional? In the case of an employer, doesn’t contacting an EEOC outreach program coordinator presume the employer is aware of an issue?

I agree that once an employer or an employee reaches out for assistance, there has already often been an incident of discrimination. However, the EEOC has a critically important role to play in combatting discrimination by compliance education and assistance more generally. I am committed to using my position to enhance these efforts whenever possible.

#### **Questions for the Record from Senator Al Franken**

1. President Trump recently announced a policy to ban transgendered individuals from military service. If an employer were to institute a similar ban in their workplace, do you believe this sort of ban would be discriminatory? If confirmed, what sort of action would you recommend the EEOC take in response to such an employer’s actions?

The President, in conjunction with the Secretary of Defense and the Service Secretaries, makes policy with respect to who is allowed to serve. My personal belief is that anyone who meets those physical and mental standards should be allowed to serve, but I have not been involved in the military’s policymaking process.

I am opposed to discrimination based on transgender status. I am committed to enforcing the laws as written by Congress and interpreted by the Courts.

#### **Questions for the Record from Senator Sheldon Whitehouse**

1. Do you believe that the ADA strikes the right balance between employment opportunity for people with disabilities and business efficiency?

Yes. While there is always room for improvement, the ADA is a wonderful law that was only strengthened by the ADA Amendments Act of 2008.

2. Do you support or oppose the ADA Education and Reform Act of 2017 (H.R. 620)?

I am not familiar with that legislation. I would need to review it in greater detail, and discuss its potential implications with relevant stakeholders, before I could make a determination about supporting or opposing it. I will certainly enforce any provision of law that involves the EEOC, and encourage improvement of existing laws where they are insufficient.

3. Do you agree with EEOC's current interpretation that Title VII prohibits discrimination on the basis of gender identity and sexual orientation under the category of sex discrimination?

I am personally opposed to gender identity and sexual orientation discrimination. The current Circuit Court split, as well as the current disagreement between the EEOC and the DOJ, make this an issue that is ripe for final determination by the Supreme Court or the Congress. I am committed to enforcing the law as written by Congress and interpreted by the courts. In the meantime, I am not aware of, nor will I drive, any current efforts to refine the EEOC position on this issue.

- a. If not, do you support an amendment of Title VII to explicitly include those protections?

I am personally opposed to discrimination on the basis of sexual orientation or gender identity. I would need to review proposed legislative language before committing to support it.

4. You have stated that you are personally opposed to discrimination on the basis of sexual orientation and gender identity, but you have equivocated when asked whether you would continue the EEOC's current interpretation of Title VII on these issues. When making decisions as a member of the EEOC your personally held views are not as relevant as the effects of your decisions. If you are confirmed as a member of the EEOC, will you make decisions that promote or tolerate employment discrimination against LGBT people?

I am personally opposed to gender identity and sexual orientation discrimination. The current Circuit Court split, as well as the current disagreement between the EEOC and the DOJ, make this an issue that is ripe for final determination by the Supreme Court or the Congress. I am committed to enforcing the law as written by Congress and interpreted by the courts. In the meantime, I am not aware of, nor will I drive, any current efforts to refine the EEOC position on this issue.

5. During your interview you said that you do not believe anyone should be fired on the basis of their sexual orientation or gender identity.

- a. What actions by an employer regarding a transgender employee would constitute disparate treatment?

Firing a transgender person because of their transgender status would be an example of disparate treatment. However, depending on the court of jurisdiction, this may or may not be a protected

category under Title VII. I am personally opposed to gender identity discrimination. I am committed to enforcing the law as written by Congress and interpreted by the courts. In the meantime, I am not aware of, nor will I drive, any current efforts to refine the EEOC position on this issue.

- b. What actions by an employer regarding a transgender employee would constitute harassment?

As an example, allowing an employee to use disparaging words in such a way that it creates a hostile environment may constitute harassment. However, depending on the court of jurisdiction, this may or may not be a protected category under Title VII. I am personally opposed to gender identity discrimination. I am committed to enforcing the law as written by Congress and interpreted by the courts. In the meantime, I am not aware of, nor will I drive, any current efforts to refine the EEOC position on this issue.

- c. What actions by an employer regarding a transgender employee would constitute a valid Title VII sex discrimination claim?

This could be a highly fact-specific question depending on the court of jurisdiction. I am committed to enforcing the laws as passed by Congress and interpreted by the courts.

- 6. During your interview you described policy entrepreneurship as being undesirable, and said that it was your view that definitions were locked in at the time legislation passed.

- a. Is that an accurate description of your views?

I believe that it is the role of Congress to make the laws, and the courts to resolve disputes about the interpretation of the laws. I commit to faithfully enforcing the law, as it is written and interpreted.

- b. What sources will you use to determine what definitions were locked in at the time legislation passed?

I believe that it is the role of Congress to make the laws, and the courts to resolve disputes about the interpretation of the laws. I commit to faithfully enforcing the law, as it is written and interpreted.

- c. Do you think Title VII prohibits male-on-male sexual harassment?

I believe that it is the role of Congress to make the laws, and the courts to resolve disputes about the interpretation of the laws. The Supreme Court decided this question in *Oncale* (1998). I commit to faithfully enforcing the law, as it is written and interpreted.

- d. Do you think that conduct is what Congress was thinking about when it passed Title VII?

I believe that it is the role of Congress to make the laws, and the courts to resolve disputes about the interpretation of the laws. I commit to faithfully enforcing the law, as it is written and interpreted.

7. Why do you think disparities on the basis of sex and race exist in America today?

I assume that this question refers to *pay* disparities. Certainly, illegal (and immoral) discrimination is a part of the reason for disparities. Such discrimination is illegal, immoral, and odious.

### **Questions for the Record from Senator Elizabeth Warren**

#### **EEO-1 Data and Pay Discrimination**

The Civil Rights Act of 1967 and the Equal Employment Opportunity Act of 1972 require employers with 100 or more employees to annually submit EEO-1 forms to the EEOC. EEO-1 forms capture information on the gender and race of employees.<sup>1</sup> In January 2016, the Obama Administration proposed an update to the EEO-1 that would have required employers to report additional information on workers' wages, broken down by race, ethnicity, and gender. The form was officially revised in September 2016. The goal of this revision—which would have required companies to start submitted data by March 2018—was to provide EEOC with additional wage data to track and combat wage discrimination.<sup>2</sup>

Describing the new EEO-1 requirements—particularly its “data file specifications for employers”—as “unnecessarily burdensome,” the Office of Management and Budget (OMB) recently halted the implementation of the EEO-1 pay data collection requirements. During your nomination hearing, you committed to “make finalizing a transparent pay data collection by the EEOC a priority” in a “timely matter.”

1. Do you agree with the OMB's assessment that the EEOC's recent efforts to change the EEO-1 form are “unnecessarily burdensome” for employers? If not, please describe what steps the EEOC will take under your leadership to ensure that the EEO-1 form is amended to collect pay data by gender and race. If so, please provide a detailed description of how you will alter the EEOC's pay data collection proposal to make the regulation less “burdensome” while still collecting pay data by gender and race.

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<sup>1</sup> U.S. Equal Employment Opportunity Commission, “EEO-1: Legal Basis for Requirements” (online at <https://www.eeoc.gov/employers/eeo1survey/legalbasis.cfm>).

<sup>2</sup> President Barack Obama, “FACT SHEET: New Steps to Advance Equal Pay on the Seventh Anniversary of the Lilly Ledbetter Fair Pay Act,” *The White House of President Barack Obama* (January 29, 2016) (online at <https://obamawhitehouse.archives.gov/the-press-office/2016/01/29/fact-sheet-new-steps-advance-equal-pay-seventh-anniversary-lilly>).



Any data collection effort by the EEOC should serve three purposes: to allow employees to compare their pay to the pay of other, similarly situated employees; to allow employers to conduct self-checks to ensure compliance with the law; and to allow the EEOC or other enforcement agencies to ensure compliance with the law. I am committed to examining whether the EEO-1 report could better meet those three goals, but I am not willing to prejudge the outcome of that process.

2. Changes to the EEO-1 form were meant to “help focus public enforcement of our equal pay laws.” How would you direct the EEOC to utilize additional race- and gender-related pay data, should the EEOC manage to successfully collect it?

As one of five commissioners, I will not have the authority to “direct” the use of the data. However, any such data should be useful for enforcement and educational functions.

3. Do you think measures to increase transparency by providing employees with information about pay is an effective tool to combat discrimination? If so, what specific measures—in addition to improving pay data collection at the EEOC—do you support?

Yes, more transparency is always a good thing, because it gives employees the ability to advocate for themselves and employers the ability to self-police. I support EEOC data distribution as part of research or educational functions, either internal to the agency or in partnership with university and non-profit partners.

## **Sexual Orientation and Gender Identity Discrimination**

Title VII of the *Civil Rights Act* prohibits employment discrimination on the basis of “race, color, religion, sex, or national origin.”<sup>3</sup> The EEOC currently “interprets and enforces Title VII’s prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation...regardless of any contrary state or local laws.”<sup>4</sup> Numerous court decisions<sup>5</sup> support EEOC’s conclusion that “sex discrimination provisions in Title VII protect lesbian, gay, bisexual, and transgender (LGBT) applicants and employees against employment bias.”<sup>6</sup> Since beginning data collection on LGBT discrimination in 2013, the EEOC has collected \$6.4 million in monetary relief for individuals who have experienced LGBT-related discrimination.<sup>7</sup> During your confirmation hearing on September 19<sup>th</sup>, you stated

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<sup>3</sup> U.S. Equal Employment Opportunity Commission, “Title VII of the Civil Rights Act of 1964” (online at <https://www.eeoc.gov/laws/statutes/titlevii.cfm>).

<sup>4</sup> U.S. Equal Employment Opportunity Commission, “What You Should Know About EEOC and the Enforcement Protections for LGBT Workers” (online at [https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement\\_protections\\_lgbt\\_workers.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm)).

<sup>5</sup> U.S. Equal Employment Opportunity Commission, “Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII” (online at [https://www.eeoc.gov/eeoc/newsroom/wysk/lgbt\\_examples\\_decisions.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/lgbt_examples_decisions.cfm)).

<sup>6</sup> U.S. Equal Employment Opportunity Commission, “What You Should Know About EEOC and the Enforcement Protections for LGBT Workers” (online at [https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement\\_protections\\_lgbt\\_workers.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm)).

<sup>7</sup> U.S. Equal Employment Opportunity Commission, “What You Should Know About EEOC and the Enforcement Protections for LGBT Workers” (online at [https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement\\_protections\\_lgbt\\_workers.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm)).

that you were “personally opposed to discrimination on the basis of gender identity or sexual orientation.”

4. The EEOC has laid out its position on Title VII in numerous federal sector court cases.<sup>8</sup> Do you agree with the EEOC’s legal interpretation that Title VII prohibits sex discrimination on the basis of sexual orientation and gender identity? If so, please highlight the specific EEOC cases that align with your legal interpretation of Title VII, as well as provide rebuttals to arguments that Title VII does not prohibit sex discrimination on the basis of sexual orientation and gender identity.

I am personally opposed to gender identity and sexual orientation discrimination. The current Circuit Court split, as well as the current disagreement between the EEOC and the DOJ, make this an issue that is ripe for final determination by the Supreme Court or the Congress. I am committed to enforcing the law as written by Congress and interpreted by the courts. In the meantime, I am not aware of, nor will I drive, any current efforts to refine the EEOC position on this issue.

5. Would you continue to uphold the EEOC’s current position on Title VII, including in currently pending cases?

I am personally opposed to gender identity and sexual orientation discrimination. I am not aware of, nor will I drive, any current efforts to refine the EEOC position on this issue.

6. On January 27, 2017, the Department of Justice (DOJ) filed an *amicus* brief in an LGBT-discrimination case that Title VII “does not...reach[] sexual orientation discrimination.” DOJ also stated that the EEOC was “not speaking for the United States” in its opposing brief on the matter.<sup>9</sup>

- a. Do you believe that the DOJ or the EEOC “speaks for the United States” on the issue of Title VII discrimination?

Both do, despite their disagreement. This is a situation which cries out for judicial or legislative resolution.

- b. Should disagreements between the EEOC and other federal agencies over the interpretation of Title VII arise in the future, how will you work to defend the EEOC’s role as the “preeminent” arbiter of workplace discrimination issues?

My goal as an EEOC commissioner will be to defend the Constitution and the laws enacted under it. I am committed to fighting discrimination in all of its forms, and will work with Congress to update laws that are unclear.

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<sup>8</sup> U.S. Equal Employment Opportunity Commission, “Federal Sector Cases Involving Transgender Individuals” and “Federal Sector Cases Involving Lesbian, Gay, or Bisexual Individuals” (online at [https://www.eeoc.gov/federal/reports/lgbt\\_cases.cfm](https://www.eeoc.gov/federal/reports/lgbt_cases.cfm)).

<sup>9</sup> Alan Feuer, “Justice Department Says Rights Law Doesn’t Protect Gays,” *New York Times* (July 27, 2017) (online at <https://www.nytimes.com/2017/07/27/nyregion/justice-department-gays-workplace.html>).

7. The EEOC's Strategic Enforcement Plan (SEP) for 2013-2016 listed the "coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions" as an "emerging or developing" issue that EEOC should "prioritize."<sup>10</sup> The EEOC's SEP for 2017-2021 lists the protection of LGBT Americans from discrimination based on sex as an "emerging and developing issue" priority, but notes that "the Commission may choose to add or remove particular issues as the law develops."<sup>11</sup> Would you support continuing to prioritize the protection of LGBT Americans from sex discrimination as an "emerging and developing" issue?

I am personally opposed to gender identity and sexual orientation discrimination. The current Circuit Court split, as well as the current disagreement between the EEOC and the DOJ, make this an issue that is ripe for final determination by the Supreme Court or the Congress. I am committed to enforcing the law as written by Congress and interpreted by the courts. In the meantime, I am not aware of, nor will I drive, any current efforts to refine the EEOC position on this issue.

### **Wellness Programs**

The EEOC is responsible for enforcing the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). Among other requirements, the ACA "prohibits employers from requiring medical exams or inquiring as to whether an individual has a disability unless the inquiry is both 'job related' and 'consistent with business necessity'—though employers may collect this information if its collection is "voluntary."<sup>12</sup> GINA, meanwhile, "prohibits employers from requesting, requiring, or purchasing genetic information from employees or their families."<sup>13</sup>

To help reduce the cost of healthcare, the Affordable Care Act (ACA) allows employers to offer financial incentives to encourage employee participation in wellness programs. In 2013, the Departments of Labor, Health and Human Services, and the Treasury (the Departments) issued regulations implementing the ACA that permit employers to offer financial incentives of up to 30% of healthcare premiums for participation in "health contingent" wellness plans. In 2016, EEOC issued regulations designed to align the ADA and GINA with the Department's wellness program regulations.<sup>14</sup> The EEOC's regulations asserted that programs with a 30% financial incentive were "voluntary" under the ADA, and would have permitted employers to condition financial incentives on the participation of an employees' spouse in a program that

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<sup>10</sup> U.S. Equal Employment Opportunity Commission, "Strategic Enforcement Plan: FY 2013-2016" (online at <https://www.eeoc.gov/eeoc/plan/sep.cfm>).

<sup>11</sup> U.S. Equal Employment Opportunity Commission, "Strategic Enforcement Plan: Fiscal Years 2017-2021" (online at <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>).

<sup>12</sup> Epstein Becker & Green, "EEOC's Wellness Program Incentive Regulations Rejected by the District Court," *JDSupra* (August 28, 2017) (online at <http://www.jdsupra.com/legalnews/eeoc-s-wellness-program-incentive-72781/>).

<sup>13</sup> Epstein Becker & Green, "EEOC's Wellness Program Incentive Regulations Rejected by the District Court," *JDSupra* (August 28, 2017) (online at <http://www.jdsupra.com/legalnews/eeoc-s-wellness-program-incentive-72781/>).

<sup>14</sup> Epstein Becker & Green, "EEOC's Wellness Program Incentive Regulations Rejected by the District Court," *JDSupra* (August 28, 2017) (online at <http://www.jdsupra.com/legalnews/eeoc-s-wellness-program-incentive-72781/>).

collects their genetic information. On July 13, 2015, and February 2, 2016, I sent letters to the EEOC expressing my concerns with this approach.<sup>15</sup>

In August 2017, a district court ruled in *AARP v. U.S. Equal Employment Opportunity Commission* that the EEOC's regulations violated the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA).<sup>16</sup> The EEOC was directed to rewrite its regulations defining how employers can incentivize participation in wellness programs.<sup>17</sup>

8. Will you commit to preserving GINA protections in the EEOC's upcoming revision of its wellness program regulations?

Yes. Any regulation that is put forth to answer the objections of the court in *AARP* must comply with the law.

9. Will you commit to preserving ADA protections in the EEOC's upcoming revision of its wellness program regulations?

Yes. Any regulation that is put forth to answer the objections of the court in *AARP* must comply with the law. This is an area that I am quite passionate about.

10. Do you believe that participation in an employee wellness program can be "voluntary" if the terms of the program place significant financial pressure on an employee to reveal genetic information, including the medical history of the employee or a family member?

At some level, significant financial pressure becomes coercive. This level probably varies for different kinds of workers, and the eventual regulation should take that into account. I look forward to working on this issue with my fellow commissioners and the agency staff.

### **Criminal Background Checks**

11. In your opinion, what is the appropriate use of criminal history background checks in an employment application process?

Criminal history background checks should be carefully tailored to the job at hand. For example, a person with an embezzlement conviction should probably not be able to get employment in a bank, nor a child molester as a daycare worker.

12. Is it ever unlawful or discriminatory for an employer not to hire workers with criminal histories?

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<sup>15</sup> See Letters from Senator Warren et al. to Jenny R. Yang, Chair, EEOC, on July 13, 2015, and February 2, 2016.

<sup>16</sup> Epstein Becker & Green, "EEOC's Wellness Program Incentive Regulations Rejected by the District Court," *JDSupra* (August 28, 2017) (online at <http://www.jdsupra.com/legalnews/eeoc-s-wellness-program-incentive-72781/>).

<sup>17</sup> Epstein Becker & Green, "EEOC's Wellness Program Incentive Regulations Rejected by the District Court," *JDSupra* (August 28, 2017) (online at <http://www.jdsupra.com/legalnews/eeoc-s-wellness-program-incentive-72781/>).

Yes. Given that some racial minorities have significantly higher criminal conviction rates, a case could be made that blanket exclusion of people with criminal backgrounds is unlawful discrimination.

13. Will you commit to bringing cases against employers whose use of criminal background checks has a disparate impact on protected classes under Title VII?

The decision as to whether to bring such a case would be highly fact specific. The use of criminal background checks can be discriminatory, but there are also legitimate circumstances under which employers can use them. I look forward to working on any such cases with my fellow commissioners and the agency staff.

### **Credit Checks**

14. In your opinion, what is the appropriate use of credit checks in an employment application process?

I see this as analogous to the criminal history question. In some circumstances, a bad credit history may be relevant to the job criteria. However, such use of credit checks may disproportionately disadvantage people of color and single women (or, more generally, those with limited financial resources).

15. Is it ever unlawful or discriminatory for an employer not to hire workers because of their credit history?

This is an undeveloped area of law at this time. I will consult with the career professional staff and other commissioners on this issue.

16. Will you commit to bringing cases against employers whose use of credit history has a disparate impact on protected classes under Title VII?

This theory has not been fully tested in the courts. However, a disparate impact case could be made, depending on the specific facts of a case.

### **Case Load:**

17. Given the current case backlog at EEOC do you support the Trump administration's FY2018 budget proposal to eliminate 249 full-time positions at EEOC?

I am not familiar with which positions would be cut, and whether they would affect the backlog. The agency should be funded at a level that allows it to do its very important work.

18. If not, will you commit to advocating against budget cuts to The White House?

I will participate in the internal discussions about how to best get the resources to meet the agency's goals, as well as describing those goals and constraints to Congress and the Administration.

### **Systemic Investigations:**

19. What are your views on EEOC's systemic program?

The systemic program is a powerful tool, but should be used only where other efforts fail. It can be particularly powerful in cases where the people who are harmed are totally unable to advocate for themselves, such as migrant workers or people with disabilities. The full commission should vote on systemic cases.

### **Census**

20. As you may know, the EEOC relies on data gathered in Census products such as the American Community Survey. But the President has proposed debilitating budgets to the Census and has not appointed a Director. Will you commit to advocating to the White House for a fully funded and staffed Census Bureau?

Yes. The Census is a critically important function, and mandated by the Constitution.

21. Will you commit to informing the HELP Committee if you do not have adequate data from Census products or if the quality of Census data that you use declines?

Yes.

### **Congressional Oversight**

22. Please describe your views on the role of Congress in conducting oversight of the EEOC.

I welcome a vigorous and thorough oversight program, as it is a core function of Congress. I will advocate for internal and external transparency at all times.

23. Will you commit to promptly and comprehensively answering any requests for information that you receive from any member of members of the HELP committee?

I support the right of members to conduct oversight, and will respond in a timely manner to requests.

24. Will you treat requests for information from Majority members of Congress differently than you will treat requests from Minority members? If so, how?

No. Each request from a member represents a request from his or her constituents, the rightful source of political power. I will respond promptly and accurately.

### **Questions for the Record from Senator Tim Kaine**

1. In light of this Administration's attacks on undocumented immigrants, it is more important than ever that the EEOC continue to vigorously enforce claims of discrimination filed by undocumented workers. Will you abide by the EEOC's guidance stating that workers are protected under Title VII regardless of their immigration status or authorization to work?

I am not familiar with the legislative underpinning of this question. However, I believe personally that people should be able to work in an environment free of discrimination.

2. Strong EEOC enforcement efforts are especially important in low-wage jobs because these jobs are disproportionately held by workers who are vulnerable to discrimination, including women of color. How do you plan to make sure that the EEOC is devoting sufficient resources to addressing discrimination in the industries where these low-wage jobs are concentrated?

I agree that the most vulnerable workers are those who are in low-wage, high-turnover jobs. I look forward to reviewing the EEOC's efforts in that regard, and in furthering protections for those workers, if possible, under the law.

3. Do you believe that employee wellness programs could negatively impact individuals with disabilities? Is there tension between the Americans with Disabilities Act (ADA) and the administration of employee wellness programs? Why or why not?

Yes, employee wellness programs could clearly fall afoul of the spirit and letter of the ADA. As the EEOC revises its guidance and regulation on such programs, it needs to ensure that workers do not forgo their rights under either the ADA or GINA.

4. The Office of Management and Budget (OMB) recently suspended the pay data collection and reporting requirement under the updated version of the EEO-1 form that was originally scheduled to take effect in March of 2018.
  - a. Do you believe there is a gender-base wage gap that is due in part to lack of transparency around compensation and lack of review by employers into their pay practices?

Yes.

- b. Do you believe that some intervention by the EEOC is needed to gain insight into employers' pay practices?

The EEOC has an important role to play in combatting illegal pay discrimination. I look forward to consulting with the career professional staff and other commissioners to determine how the EEOC can best fulfill this important responsibility.

- c. What do you think are effective strategies to address pay discrimination?

Educating employers and employees on their rights and responsibilities remains critical, and strong, consistent enforcement of pay discrimination laws will remain an important tool.

**Questions for the Record from Senator Margaret Wood Hassan**

1. Section 14(c) of the Fair Labor Standards Act, authorizes employers to pay sub-minimum wages to workers who experience disabilities. Often times, this type of employment occurs in a secluded environment known as a sheltered workplace. In 2015, with the support of the NH business community, New Hampshire was the first state to eliminate the payment of the subminimum wage and there have been efforts in Congress to end this practice.
  - a. Understanding that your role is to execute the current law, do you personally support ending the practice of paying subminimum wage to individuals who experience disabilities and phasing out the practice of using sheltered workplaces in favor of Competitive Integrated Employment?

Yes, with the exception that sub-minimum wage positions can be an important stepping-stone to competitive integrated employment. People with disabilities are uniquely vulnerable to abuse and discrimination, and the laws should protect them.

2. One of the biggest gaps between men and women in both education and the workforce is in the STEM fields. Women outnumber men as college graduates, but in STEM fields the numbers are quite the opposite. In turn, men have higher representation in STEM careers, which tend to pay much more than jobs in female-dominated spheres. And women who do enter into STEM fields often face heavy discrimination and hostile work environments, as many recent articles about STEM-field office cultures have demonstrated. They are also shortchanged on pay. A 2015 study by the American Association of University Women found that women in STEM fields are paid only 82-87% of what their male counterparts are paid.<sup>18</sup>

- a. How will you work to combat this systemic gap in pay?

It is illegal and immoral to pay women less for the same work at the same education and experience levels. Enforcing the laws that prevent that as well as educating employers and employees on their rights and responsibilities will continue to close this gap.

- b. How will you monitor whether this gap is closing?

I look forward to working with the professional staff, commissioners, interested groups, and other government agencies to determine how to best identify illegal pay discrimination.

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<sup>18</sup> <http://www.aauw.org/2015/04/14/women-shortchanged-in-stem/>



- c. What steps will you take to ensure that these women's rights' are protected in hostile work environments?

Enforcing existing laws, and being transparent about where existing laws may be insufficient, is an important first step.

- 3. In 2011, you commented that the notion of women in combat roles is "laughable." You now say that your views have evolved on this matter.

- a. What specific events or experiences led to your current view?

When I arrived at West Point in 2011, I was immediately exposed to the breadth and depth of the talent pool of both men and women. I mentored a number of wonderful female Cadets, and saw that they could thrive in any role if given the opportunity, desire, and ability. One of the Cadets I mentored was the first female Sapper platoon leader in the 101<sup>st</sup> Airborne Division, and another is a Ranger School graduate and platoon leader in the 82<sup>nd</sup> Airborne Division. I am proud of my evolution on this issue, and fully support the idea of women serving in any role for which they are trained and equipped.

- b. If you are confirmed, how will you demonstrate that your views have changed?

I firmly believe that actions speak much louder than words. I will continue to treat those around me with dignity and respect, and honor the commitment of the men and women in the agency. I will also use my personal evolution as an example to other people as part of my educational and outreach functions.

- c. What data will you collect to ensure that women are being treated fairly in the workplace and across industries?

I will work with the other commissioners, professional staff, stakeholders, and lawmakers to identify the best ways to combat illegal discrimination. I strongly support a vigorous enforcement program that protects women and other workers.

- d. How will you penalize companies that the data shows are not treating women fairly?

I am not fully familiar with the penalties available, or the role of a single commissioner in enacting penalties. However, I am committed to working with the other commissioners and the professional staff to ensure that our enforcement and litigation programs are robust, responsive, and targeted on those who are abusing their authority.

**Sharon Fast Gustafson**  
**Nominee for General Counsel, Equal Employment Opportunity Commission**  
**U.S. Senate Committee on Health, Education, Labor and Pensions**

**Questions for the Record**  
**Hearing Date: April 10, 2018**  
**Submitted to Nominee: April 12, 2018**

**Introduction**

I appreciate the opportunity to answer the Committee's questions. As the background and foundation to my answers, let me acknowledge that, if I am confirmed, it will be my duty and privilege to perform the responsibilities that Congress has committed to the General Counsel of the EEOC. Congress has given the General Counsel "responsibility for the conduct of litigation" for the EEOC, "such other duties as the Commission may prescribe or as may be provided by law", and the task of "concur[ring] with the Chairman of the Commission on the appointment and supervision of regional attorneys". 42 U.S.C. § 2000e-4(b)(1). As the EEOC's Regional Attorney's Manual explains, "The mission of EEOC's Office of General Counsel (OGC) is to conduct litigation on behalf of the Commission to obtain relief for victims of employment discrimination and to ensure compliance with the statutes that EEOC is charged with enforcing." Or, as the agency's website puts it, the General Counsel "provide[s] direction, coordination, and supervision to the EEOC's litigation program."

Part of the function of the Commission is to set agency policy by issuing "procedural regulations", 42 U.S.C. § 2000e-12(a), as well as "written interpretation[s] or opinion[s]", id. 12(b), that explain, interpret, and apply the statutes within the agency's jurisdiction that Congress has enacted. (See also 29 U.S.C. §§ 259, 626(e) (ADEA); 42 U.S.C. § 2000ff-10 (GINA); 42 U.S.C. § 12116 (ADA).) That policy-making function is exercised by the Commission itself; and its legal advisor for that function is its Office of Legal Counsel ("OLC"), not the General Counsel; and it is OLC that formally promulgates the EEOC's policy documents.

If I am confirmed, it will not be my task to set the EEOC's policy. Where my responses below disclaim a role in making policy or issuing guidance, that disclaimer is not an evasion but an attempt at a conscientious description of my true anticipated function if I am confirmed. I would not pursue any agenda, except for doing my best to enforce the laws enacted by Congress, as interpreted by the Supreme Court, and in light of the policies determined by the Commission. If the Commission asked for my advice, I would give it according to the law. I would not aspire to change the law; I would resolve to enforce it.

Where the questions below raise issues on the frontiers of Title VII jurisprudence, I have indicated that answers cannot be definitive. However, the vast majority of the charges filed with the EEOC invoke legal principles that are well settled; and if confirmed, I would confidently direct the litigation of such cases with a view toward achieving the ends that Congress plainly intended and vindicating the rights of American workers.

### **Questions from Senator Alexander**

1. If confirmed, will you include in the annual Office of General Counsel reports any cases in which the EEOC is ordered to pay attorneys' fees or other costs, including the amount in fees or costs, and regardless of whether EEOC plans to or is appealing the fees or costs?

Yes. I understand this question to relate not to routine costs, which are awarded as a matter of course under Rule 54(d)(1) of the Federal Rules of Civil Procedure, but rather to attorney's fees awarded under Rule 54(d)(2).

2. If confirmed, will you include in the annual Office of General Counsel reports the number of cases sent to the Commission for a vote?

Yes.

### **Questions from Senator Young**

1. As General Counsel of the EEOC, you will play a pivotal role in determining which cases will receive consideration. As the Chairman has drawn attention to over the years, the EEOC has a backlog of 61,000 pending cases. I understand that progress has been made recently to address this backlog. This has resulted in a 16% reduction in caseload. This was achieved by new strategies that prioritized charges with merit and updating digital systems. However, there is still a significant number of pending cases that you will have a role in addressing, if confirmed.
- If confirmed as General Counsel for the EEOC, what will be some strategies that you will use to help address the backlog of pending cases?

I understand the Committee's concern about the backlog. As I understand the question, the pending cases in which there is a backlog are charges of discrimination filed by aggrieved employees. As I understand the operation of the EEOC, the investigation and processing of those charges are not within the responsibility of the General Counsel but rather of the Commission itself. See 42 U.S.C. § 2000e-5(b). In a fraction of those instances, the Commission's investigators recommend litigation, at which point the matter does fall within the responsibility of the General Counsel. I therefore do not know of strategies that the General Counsel can undertake that will directly affect that backlog, but I would attempt to handle the matters in litigation as promptly as possible.

- Furthermore, how will you determine which cases should receive consideration?

If I am confirmed, in making those determinations, I would consider the statutes that Congress has charged the EEOC to enforce, the advice of the regional attorneys, and the evidence that supports or contradicts the charges.

**Questions for the Record from Ranking Member Patty Murray**

1. Do you agree that employee access to information about pay within a workplace is critical to helping employees determine whether they are being paid less than their peers?

Yes.

2. If confirmed, will you prioritize pay discrimination investigations and ensure that the Equal Employment Opportunity Commission (EEOC) continues to pursue litigation against employers for discriminatory pay practices?

Unlawful pay discrimination is an important issue that I have litigated and that the EEOC must address. The specific priority given to pay cases (like the priority given to any type of case) must depend on a variety of factors, including the proportion of charges brought that implicate pay practices, and the factual merits of the prospective pay cases.

3. The Administration recently stayed the EEOC's equal pay data collection via the EEO-1 form for further review. OMB instructed the EEOC to submit a new proposal. The EEOC must now address OMB's expressed concerns and identify a path forward for the collection of pay data. Do you agree that large employers should be required to collect and submit information on compensation as part of the existing EEO-1 data collection?

I do not have sufficient information to give an informed answer to this question. As I understand the General Counsel's responsibilities, they do not include the promulgation of Form EEO-1 or the collection of data outside of discovery in litigation under the Federal Rules of Civil Procedure. If I were confirmed and became aware that the amount and nature of information being obtained were insufficient, I would raise the need for more and better data collection.

4. Do you agree with the position the EEOC has taken in *Baldwin v. Dep't of Transportation* (EEOC Appeal No. 0120133080, July 15, 2015) that sexual orientation discrimination is a form of sex discrimination?

Title VII prohibits discrimination "because of [an employee's] ... sex". 42 U.S.C. § 2000e-2(a). The statute, enacted in 1964, is not explicit about the extent to which "sex" includes "sexual orientation", and the Courts of Appeals are divided on that question. Until the Supreme Court answers that interpretive question, or until the Congress clarifies the law, it is not possible to give a definitive answer.

5. Do you agree with the position the EEOC has taken in *Lusardi v. Dep't of the Army* (EEOC Appeal No. 0120133395, March 27, 2015) that denying employees access to the restroom matching their gender identity is sex discrimination?

Title VII prohibits discrimination "because of [an employee's] ... sex". 42 U.S.C. § 2000e-2(a). The statute, enacted in 1964, is not explicit about the extent to which "sex" includes "gender identity" and/or the extent to which "discrimination" includes sex-based designations of restrooms and locker rooms. Until the Supreme Court answers those interpretive questions, or until the Congress clarifies the law, it is not possible to give a definitive answer.

6. Do you agree with the position the EEOC has taken in *Macy v. Dep't of Justice* (EEOC Appeal No. 0120120821, April 20, 2012) that discrimination against an individual who is transgender is a form of sex discrimination?

Title VII prohibits discrimination "because of [an employee's] ... sex". 42 U.S.C. § 2000e-2(a). The statute, enacted in 1964, is not explicit about the extent to which "sex" includes transgender status. Until the Supreme Court answers that interpretive question, or until the Congress clarifies the law, it is not possible to give a definitive answer. An examination of this question would include consideration of the Supreme Court's opinion in *Price Waterhouse v. Hopkins*, concerning sex stereotyping.

7. Please state your understanding of the current law with regard to the question of whether Title VII prohibits discrimination on the basis of sexual orientation in circuit courts where the question has not been addressed.

Title VII prohibits discrimination "because of [an employee's] ... sex". 42 U.S.C. § 2000e-2(a). The statute, enacted in 1964, is not explicit about the extent to which "sex" includes "sexual orientation", and the Courts of Appeals are divided on that question. Until the Supreme Court answers that interpretive question, or until the Congress clarifies the law, it is not possible to give a definitive answer.

8. Please state your understanding of the current law with regard to the question of whether Title VII prohibits discrimination on the basis of gender identity in circuit courts where the question has not been addressed.

Title VII prohibits discrimination "because of [an employee's] ... sex". 42 U.S.C. § 2000e-2(a). The statute, enacted in 1964, is not explicit about the extent to which "sex" includes "gender identity". Until the Supreme Court answers that interpretive question, or until the Congress clarifies the law, it is not possible to give a definitive answer.

9. Though the Commission has made progress in reducing its case backlog over the last three years, the EEOC routinely has a backlog of more than 70,000 cases. What specific steps will you take to address the case backlog?

I share the Committee's concerns about the backlog of cases. As I understand the question, the cases in which there is a backlog are charges of discrimination filed by aggrieved employees. As I understand the operation of the EEOC, the

investigation and processing of those charges are not within the responsibility of the General Counsel but rather of the Commission itself. See 42 U.S.C. § 2000e-5(b). In a fraction of those instances, the Commission's investigators recommend litigation, at which point the matter does fall within the responsibility of the General Counsel. I therefore do not know of strategies that the General Counsel can undertake that will directly affect that backlog, but I would attempt to handle the matters in litigation as promptly as possible.

10. The EEOC's systemic litigation program has successfully ensured workers discriminated against in their employment receive justice. In July 2016 the EEOC issued a report entitled "A Review of the Systemic Program of the U.S. Equal Employment Opportunity Commission." The review found in 2013–2014, the systemic litigation program contributed to a tripling of monetary relief recovered for victims, and the systemic program has had a 10-year success rate of 94 percent. Do you agree that the findings of the report appear to demonstrate a strong record of success for the systemic litigation program?

Monetary relief is a measure of success, and a win-rate is another measure of success. Other measures would need to be considered, including the number of instances in which the outcome would be a useful precedent and the opportunity costs incurred by not pursuing the alternative litigation that might have been pursued but was not. For instance, *Young v. UPS* was a single plaintiff case that resulted in an employer of more than 400,000 employees "decid[ing] to provide additional accommodations for pregnancy-related physical limitations" (UPS's brief of 10/24/2014 at 24), and then resulted in a Supreme Court decision that clarified Title VII's protections against pregnancy discrimination in a manner that benefited pregnant women nationwide. "Systemic" litigation is one means of accomplishing the purposes of the EEOC on a systemic level.

11. Do you agree that systemic litigation has value in addressing widespread practices even in the absence of a specific claim?

Yes.

12. Please describe in detail when you believe systemic litigation is appropriate for use by the EEOC.

Systemic litigation is most appropriate when it is prompted by a charge filed by an employee, and the investigation of that charge yields information of a systemic abuse.

13. Will you commit to continuing to pursue coordinated, systemic litigation on behalf of those subject to discriminatory patterns, practices, or policies?

If confirmed as General Counsel, I would expect to continue to conduct systemic litigation whenever appropriate cases arose.

14. In your opinion, when is it appropriate for an agency to use subregulatory guidance?

The issuance of subregulatory guidance is a function of the Commission itself and not of the General Counsel. Such guidance is most appropriate when it gives prospective guidance to employers in difficult areas.

15. In recent years, the EEOC has conducted a public process when considering subregulatory guidance. Do you agree additional transparency has improved the process and the final guidance?

I assume that it has, but I have no information about the internal process of proposing, revising, and issuing guidance. Since at least as early as 1978, the EEOC has been expected to "afford the public an opportunity to comment" as to the agency's "significant rules, regulations, policies, procedures or orders". Exec. Order 12067, § 1-305 (June 30, 1978).

16. In 2012, the EEOC issued criminal history guidance. In your opinion, when can employers appropriately use criminal history background checks when making employment decisions, and when is it unlawful or discriminatory for an employer not to hire workers with criminal histories?

Pursuant to Title VII as amended, criminal history background checks can be used where (1) the practice does not disproportionately screen out a protected group or (2) the employer can demonstrate that the practice is job-related and consistent with business necessity.

17. Title II of the Genetic Information Nondiscrimination Act (GINA) and Title I of the Americans with Disabilities Act (ADA) protect an employee's privacy in the workplace and ensure that employers can only request or obtain genetic and medical information when an employee provides it *voluntarily*. In a recent ruling by the U.S. District Court for the District of Columbia on *AARP v. EEOC*, the EEOC's rules about the fees employers can assess workers who do not participate in workplace wellness programs were deemed arbitrary. However, rather than vacate the rules, the court has requested the EEOC to "address the rules' failings in a timely manner". Please explain your understanding of why the court sent the wellness rules back to the EEOC.

On August 22, 2017, the AARP sued the EEOC over these rules, arguing that the 30 percent incentive was too high to make the wellness programs truly voluntary for employees. The U.S. District Court for the District of Columbia sent the regulations back to the EEOC for revisions, finding that the EEOC's rulemaking was arbitrary and capricious and did not offer a valid reason supported by the administrative record to justify the proposed incentive levels. *AARP v. United States Equal Employment Opportunity Commission*, 267 F. Supp.3d 14 (D.C.D.C. 2017). The court held that the administrative record failed to include "any concrete data, studies, or analysis" or other explanation of how the EEOC's rules

met the statutes' objectives. Id. at 35, 37. The Court found that the EEOC had failed to consider any factors actually relevant to voluntariness -- "factors relevant to the financial and economic impact the rule is likely to have on individuals who will be affected by the rule." Id. at 32 (finding that the 30% incentive would double the cost of insurance coverage for most employees and would more adversely affect employees with disabilities -- a group the EEOC is tasked with protecting).

18. Do you agree that workplace wellness programs do not need to collect and retain employees' genetic and medical information to be effective?

I do not have sufficient information to give an informed answer to this question. Few GINA cases have been litigated, and I have not litigated any in my practice.

19. What are some possible ways the wellness program rules can be redrafted to protect employee health privacy, ensure voluntary employee participation, and comply with Title I of the Americans with Disabilities Act (ADA) and Title II of the Genetic Information Nondiscrimination Act (GINA)?

As was made clear in my interviews with Committee staff and at the hearing on April 10, 2018, the wellness rules are an important issue about which Congress is concerned. I do not currently have sufficient information to give an informed answer to this question. Revising the wellness rules will be a function of the Commission itself and not of the General Counsel per se. If I were confirmed as General Counsel and were asked by the Commission to advise on this subject, I would review the court's decision, evaluate the EEOC's process in light of the Administrative Procedures Act, study the issue in collaboration with the EEOC's Office of Legal Counsel, and give the best advice of which I am capable. It seems likely that the EEOC will need to avail itself of subject-matter experts on this subject.

20. Do you believe that sex-based harassment, including sexual harassment, remains a serious and pervasive barrier to equality, economic security, and workplace safety for women?

Yes.

21. Every year, the EEOC receives tens of thousands of harassment complaints. For example, in FY2016, nearly 30,000 harassment complaints were filed with the EEOC. In 2015, the EEOC convened a bipartisan Select Task Force on the Study of Harassment in the Workplace. After 18 months of examination, the Task Force released a lengthy report on workplace harassment, along with recommendations for a range of stakeholders, including the EEOC. Do you commit to supporting the bipartisan task force recommendations? Please explain your answer in detail.



Insofar as they relate to the EEOC itself, the recommendations are largely directed to the work of the Commission and not the General Counsel's work. The "best practices" recommended for settlements (which may include settlements in cases under the General Counsel) appear to be appropriate. I am supportive of the goals of the Task Force to reduce sexual harassment.

22. Do you have concerns with the EEOC's 2017 Proposed Enforcement Guidance on Unlawful Harassment?

- a. Do you support the Proposed Enforcement Guidance's expansion of the interpretation of sex-based harassment to include harassment based on gender stereotypes and nonconformance with gender norms, gender identity, and sexual orientation?

The issuance of guidance is a function of the Commission itself and not the General Counsel. Title VII prohibits discrimination "because of [an employee's] ... sex", 42 U.S.C. § 2000e-2(a), and this prohibition should be interpreted in accordance with the canons of statutory construction. The Supreme Court ruled in *Price Waterhouse v. Hopkins* that gender stereotyping can be evidence of sex discrimination, and ruled in *Oncale v. Sundowner Offshore Services* that same-sex sexual harassment is actionable under Title VII. However, as to gender identity and sexual orientation, the Supreme Court has not ruled whether they are included in "sex" under Title VII; and the statute, enacted in 1964, is not explicit about the extent to which "sex" includes these concepts. Until the Supreme Court answers that interpretive question, or until the Congress clarifies the law, it is not possible to give a definitive answer.

- b. Do you believe that the Proposed Enforcement Guidance should make clear that sex-based harassment includes harassment on the basis of pregnancy, childbirth, or other related conditions, including reproductive health decisions?

The issuance of guidance is a function of the Commission itself and not the General Counsel. Title VII prohibits discrimination "because of [an employee's] ... sex", 42 U.S.C. § 2000e-2(a). Congress made clear in the Pregnancy Discrimination Act that "because of sex" includes "pregnancy, childbirth, or related medical conditions", 42 U.S.C. § 2000e(k). Two Courts of Appeals have held that the PDA protects a woman from discrimination on the grounds that she has had an abortion. See *Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358 (3d Cir. 2008); *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1214 (6th Cir. 1996). I am not aware of any Court of Appeals holding that such protection reaches harassment related to reproductive decisions.

23. Do you agree with the EEOC's 2016 Enforcement Guidance on National Origin Discrimination?

The issuance of guidance is a function of the Commission itself and not the General Counsel. I have been aware of this national origin discrimination guidance since its issuance, and I have not determined that any aspect of it is inconsistent with the statute. However, the guidance is lengthy, and it would be premature for me to state at this point whether I agree with it in every respect.

24. Do you agree with the EEOC's 2016 Enforcement Guidance on Retaliation and Related Issues?

The issuance of guidance is a function of the Commission itself and not the General Counsel. I have been aware of this retaliation guidance since its issuance, and I have not determined that any aspect of it is inconsistent with the statute. However, the guidance is lengthy, and it would be premature for me to state at this point whether I agree with it in every respect.

25. Do you commit to inform the members of this Committee if you intend to undertake any review or revision of any existing or ongoing enforcement guidance?

The issuance of guidance is a function of the Commission itself and not the General Counsel. I will respond to inquiries from the Committee in its exercise of oversight.

26. What is your opinion about whether minority members of the Health, Education, Labor, and Pensions ("HELP") Committee have the authority to conduct oversight of the EEOC?

It is not my place to opine on who has authority to conduct oversight of the EEOC. It would be my intention, if confirmed, to cooperate with reasonable requests from both the majority and minority,

27. If confirmed, do you agree to provide briefings on EEOC business to members of the HELP Committee, including minority members, if requested?

Yes.

28. If confirmed, do you commit to answer promptly any letters or requests for information from individual members of the HELP Committee including request for EEOC documents, communications, or other forms of data?

Yes.

### **Questions for the Record from Senator Tammy Baldwin**

1. Women are the primary or co-breadwinners in two thirds of American households today and make up about half of our nation's workforce. But still today, for every dollar earned by a man, a woman still makes only 80 cents on average - and that gap gets even wider

for women of color. Should you be confirmed as EEOC General Counsel, how would you advise the Commission to best collect pay data and deal with pay inequality?

I do not have sufficient information to give an informed answer to this question. As I understand the General Counsel's responsibilities, they do not include the promulgation of Form EEO-1 or the collection of data outside of discovery in litigation under the Federal Rules of Civil Procedure. If I were confirmed and became aware that the amount and nature of information being obtained were insufficient, I would raise the need for more and better data collection.

2. In your conversations with the White House while being vetted to be nominated for the General Counsel position of the EEOC and the lead up to your confirmation hearing, were you asked by White House officials about the issue of workplace protections for LGBTQ people?

- a. Did you make any sort of commitment on your position regarding workplace protections for LGBTQ people with anyone within the Administration or connected to your nomination to this position?

No.

- b. Prior to your confirmation hearing did you make any statement about your views in this area to anyone? If so, will you please share those positions or statements with us?

I had several interviews with White House personnel, at which I took no notes. I do not recall any questions being raised about workplace protections for LGBTQ people. I do recall a very brief mention being made of the transgender bathroom/locker room issue (as in *Lusardi, supra*), and though I cannot recall my response *verbatim*, I know I would have given a response consistent with my answers above to Questions 4-8 and 22(a) from Senator Murray. I certainly made no commitment to take any particular position.

- c. Prior to your confirmation hearing were you asked for any sort of commitment on the issue of workplace protections for LGBTQ people? If so, with whom and what was your commitment?

I was not asked, and I gave no commitments.

3. Should you be asked to dismiss pending commission litigation or reverse EEOC legal positions included in pending litigation -would the ask alone be enough for you to act or would you need some sort of new evidence, or presentation of new facts to make that change?

I would, if confirmed, make an evaluation of the merits of the case before changing position.

4. Will you commit to not terminate any pending Commission litigation, or reverse any EEOC legal positions unless you are presented with a pertinent change in facts or new standing legal precedent?

If confirmed, I would expect to evaluate all relevant precedent, whether old or new, in determining the position in any litigation.

5. You participated in podcast #73 titled: Sharon Gustafson on Sexual Harassment & the Law of Love, hosted by Cross and Gavel, which is described on their website as “a regular podcast, featuring host Mike Schutt, the Director of the Institute for Christian Legal Studies. He interviews practicing lawyers, law professors, and students who discuss issues of Christian calling in the law.” The episode is no longer accessible, or available for download on the website and it has been taken down from other online resources, yet other podcasts following and preceding your podcast #73 are still available.

- a. Do you know why the episode is not available anymore?

Yes. I asked that it be taken down.

- b. Do you know why it was removed?

Yes. My comments were more devotional than legal, and were directed to lawyers who share my faith. I spoke of Jesus' statement that the entire law of God depends on two commandments--to love God with all one's heart and to love one's neighbor as oneself. The principal points that I made were, as I recall them, that harassment ultimately results from a lack of love, when people put their own felt needs and desires over the needs of their neighbor, and that only love of God and neighbor--and not a mere prohibition of harassment--can cure the harassment problem that we experience and observe. Legal restrictions are necessary and good for the ordering of civil society, but they are not sufficient for the ordering of the human heart.

Of course, the statutory duty of the General Counsel of the EEOC is to enforce the statutes that Congress has enacted--including a statute protecting the religious freedoms of all workers--and not Jesus' law of love. It is my judgment that the publicizing of my comments might be confusing or distracting to any who might not appreciate that distinction, or might raise the question whether as General Counsel I might suppose I had a devotional role.

- c. Did you play any role in removing the episode? If not, do you know who did?

I requested CLS to take down the podcast.

- d. Will you provide a recording and a transcript of the interview to this committee?

I do not have a recording or transcript. I do not know whether CLS retained the recording; but if it did, I have no objection whatsoever to the Committee requesting a copy.

**Questions for the Record from Senator Christopher S. Murphy**

The President and many others have focused on the importance of preventative mental health supports for children, youth, and the general public. For adults, one of the greatest prevention strategies is a stable job. Supportive work settings have been associated with positive outcomes for those with chronic mental health disabilities. But we've also seen that workplaces can be places of discrimination for those with mental health disabilities. Two 2014 studies, one in *Advances in Mental Health*, and one in the journal *Psychiatric Services*, have indicated that those with mental health conditions are often discriminated against in workplace hiring, evaluations, and discipline.

1. What efforts would you put in place to ensure EEOC protects the rights of those with mental health disabilities in the same manner the EEOC interprets the ADA to protect the rights of those with physical disabilities, those with intellectual disabilities, or those who are blind or deaf?

The role of General Counsel is to direct litigation, and in that connection I would litigate ADA cases involving mental health disabilities just as I would litigate other ADA cases.

2. The previous general counsel for the EEOC, David Lopez, had a strong history of reaching out to disability groups to gather information about the types of discrimination individuals with disabilities were experiencing. How will you keep abreast of the types of discrimination people with mental health disabilities are experiencing? Who will you reach out to in order to keep aware of the types of discrimination individuals with mental health disabilities are experiencing?

To obtain such awareness in the role of General Counsel, I would, if confirmed, principally look to the charges filed by persons experiencing such discrimination. I would also be open to any other sources of information among the EEOC's stakeholders.

3. People with mental health disabilities have been stigmatized by some leaders and by those in the media because, linking them to some of the horrific shootings that have occurred recently. We know it is unfair to the millions of Americans with mental health disabilities to link them to such horrible events, yet the way this group is portrayed can have a devastatingly debilitating effect on their ability to even be considered for a job, let alone receive the accommodations they are entitled to under the ADA. What will your office do to combat this stigma and how will you advise the EEOC to educate employers to support their employees who may have mental health needs?

The General Counsel's chief means of combating such stigma is to litigate cases involving such discrimination. To the extent that work yields possible suggestions to be made to the Commission about education of employers, if confirmed, I would make those suggestions.

### **Questions for the Record from Senator Elizabeth Warren**

1. The Trump administration has proposed decreasing the EEOC's budget, despite its significant backlog and the fact that its staffing levels have shrunk over the past decade. If you are confirmed, will you commit to advocating to Congress for increased funding, and against budget cuts, for the EEOC?

I would, if confirmed, do the best job that I could do with the resources given to me. If those resources were insufficient for the performance of the General Counsel's portion of the EEOC's mission, I would request more resources in my funding requests to the Chair of the Commission and to the Office of Management and Budget.

2. If you believe that the EEOC is hindered from fulfilling its mission in any way due to a lack of resources, will you commit to informing the members of the HELP Committee?

If confirmed, I would respect the budgetary process and would expect to include such information in my funding requests to the Chair of the Commission and to the Office of Management and Budget.

3. Please describe what you believe to be the role of the General Counsel in accommodating oversight requests by Members of Congress.

The statute requires an annual report from the General Counsel, and if confirmed I would comply with that requirement. Beyond that, I would cooperate with all reasonable requests for information.

4. Will you commit to responding in full, in a timely fashion, to any requests from members of the HELP Committee, whether in the majority or minority?

I will respond to all requests.

5. On January 27, 2017, the Department of Justice (DOJ) filed an *amicus* brief in an LGBT-discrimination case that stated that Title VII of the Civil Rights Act of 1964 "does not...reach[] sexual orientation discrimination." The DOJ's position stands in contrast to the EEOC's position, which holds that sex discrimination under Title VII includes discrimination on the basis of gender identity and sexual orientation. DOJ has stated that the EEOC is "not speaking for the United States" on the matter.<sup>1</sup>

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<sup>1</sup> Alan Feuer, "Justice Department Says Rights Law Doesn't Protect Gays," *New York Times* (July 27, 2017) (online at <https://www.nytimes.com/2017/07/27/nyregion/justice-department-gays-workplace.html>).

- a. Of the positions taken by the DOJ and the EEOC on Title VII and workplace discrimination on the basis of sexual orientation and gender identity, which aligns most closely with your personal views?

Title VII prohibits discrimination "because of [an employee's] ... sex". 42 U.S.C. § 2000e-2(a). The statute, enacted in 1964, is not explicit about the extent to which "sex" includes "gender identity" or "sexual orientation". Until the Supreme Court answers that interpretive question, or until the Congress clarifies the law, it is not possible to give a definitive answer. I would welcome a clear answer from Congress or the Supreme Court, and I would enforce the law as thus clarified.

- b. Do you believe that the DOJ or the EEOC "speaks for the United States" on the issue of Title VII discrimination?

My understanding is that the General Counsel "represent[s] the Commission", 42 U.S.C. § 2000e-4(b)(2), whereas it is the attorneys of the Department of Justice under the Attorney General who represent the United States, see 28 U.S.C. §§ 516-519. Consistent with this understanding is the fact the EEOC (and not the "United States") is the named party in suits brought or defended on behalf of the EEOC.

6. The EEOC's Strategic Enforcement Plan (SEP) for 2013-2016 listed the "coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions" as an "emerging or developing" issue that EEOC should "prioritize."<sup>2</sup> The EEOC's SEP for 2017-2021 lists the protection of LGBT Americans from discrimination based on sex as an "emerging and developing issue" priority, but notes that "the Commission may choose to add or remove particular issues as the law develops."<sup>3</sup> If confirmed, would you support continuing to prioritize the protection of LGBT Americans from sex discrimination as an "emerging and developing" issue?

This is fairly characterized as an "emerging and developing issue". LGBT Americans, like all Americans, are entitled to protection against sex discrimination. My understanding is that the Commission, and not the General Counsel, composes its Strategic Enforcement Plan. Lawsuits filed by the General Counsel would depend on the facts and evidence in the charges filed.

7. Will you commit to not end currently pending EEOC litigation, or reverse the Commission's legal positions in ongoing litigation, without a relevant change in factual circumstances or the law?

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<sup>2</sup> U.S. Equal Employment Opportunity Commission, "Strategic Enforcement Plan: FY 2013-2016" (online at <https://www.eeoc.gov/eeoc/plan/sep.cfm>).

<sup>3</sup> U.S. Equal Employment Opportunity Commission, "Strategic Enforcement Plan: Fiscal Years 2017-2021" (online at <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>).

If confirmed, I would expect to evaluate all relevant precedent, whether old or new, with regard to any litigation.

8. In your opinion, what is the appropriate use of criminal history background checks in an employment application process?

Criminal history background checks can be used so long as they are not unlawfully discriminatory--that is, where (1) the practice does not disproportionately screen out a protected group or (2) the employer can demonstrate that the practice is job-related and consistent with business necessity.

9. Is it ever unlawful or discriminatory for an employer not to hire workers with criminal histories?

Yes.

10. Will you commit to bringing cases against employers whose use of criminal background checks has a disparate impact on protected classes under Title VII?

If confirmed, I will bring such cases where the facts and law warrant.

11. In your opinion, what is the appropriate use of credit checks in an employment application process?

Credit checks can be used so long as they are not unlawfully discriminatory--that is, where (1) the practice does not disproportionately screen out a protected group or (2) the employer can demonstrate that the practice is job-related and consistent with business necessity.

12. Is it ever unlawful or discriminatory for an employer not to hire workers because of their credit history?

Yes.

13. Will you commit to bringing cases against employers whose use of credit history has a disparate impact on protected classes under Title VII?

If confirmed, I will bring such cases where the facts and law warrant.

14. The EEOC relies on data gathered in Census products such as the American Community Survey. Will you commit to advocating to the White House for a fully funded and staffed Census Bureau?

This function does not fall within the responsibility of the General Counsel. Funding for the Census Bureau will be a matter for Congress to decide.



15. Will you commit to informing the HELP Committee if you do not have adequate data from Census products or if the quality of Census data that you use declines?

I would raise this issue if the need arises.

16. Under the EEOC's current Enforcement Guidance on Pregnancy Discrimination, the Commission holds that employers cannot discriminate against female employees for utilizing contraception, infertility treatments, or accessing abortion services.

- a. If confirmed, will you commit to upholding these anti-discrimination protections?

Yes. Title VII prohibits discrimination "because of [an employee's] ... sex", 42 U.S.C. § 2000e-2(a). Congress made clear in the Pregnancy Discrimination Act that "because of sex" includes "pregnancy, childbirth, or related medical conditions", 42 U.S.C. § 2000e(k). Two Courts of Appeals have held that the PDA protects a woman from discrimination on the grounds that she has had an abortion. See *Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358 (3d Cir. 2008); *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1214 (6th Cir. 1996). No Court of Appeals has held otherwise. This holding comports with the EEOC's position.

- b. As General Counsel, would you oppose changes to existing protections for women who utilize contraception, infertility treatments, and abortion services?

Under the PDA as it is currently interpreted by the EEOC and the courts, there is no basis to argue for such changes to the protections currently afforded to women who utilize such services.

The Civil Rights Act of 1967 and the Equal Employment Opportunity Act of 1972 require employers with 100 or more employees to annually submit EEO-1 forms to the EEOC. EEO-1 forms capture information on the gender and race of employees.<sup>4</sup> In January 2016, the Obama Administration proposed an update to the EEO-1 that would have required employers to report additional information on workers' wages, broken down by race, ethnicity, and gender. The form was officially revised in September 2016. The goal of this revision—which would have required companies to start submitted data by March 2018—was to provide EEOC with additional wage data to track and combat wage discrimination.<sup>5</sup>

Describing the new EEO-1 requirements—particularly its “data file specifications for employers”—as “unnecessarily burdensome,” the Office of Management and Budget (OMB) halted the implementation of the EEO-1 pay data collection requirements in 2017.

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<sup>4</sup> U.S. Equal Employment Opportunity Commission, “EEO-1: Legal Basis for Requirements” (online at <https://www.eeoc.gov/employers/eeo1survey/legalbasis.cfm>).

<sup>5</sup> President Barack Obama, “FACT SHEET: New Steps to Advance Equal Pay on the Seventh Anniversary of the Lilly Ledbetter Fair Pay Act,” *The White House of President Barack Obama* (January 29, 2016) (online at <https://obamawhitehouse.archives.gov/the-press-office/2016/01/29/fact-sheet-new-steps-advance-equal-pay-seventh-anniversary-lilly>).

17. Changes to the EEO-1 form were meant to “help focus public enforcement of our equal pay laws.” As General Counsel, how would you use additional race- and gender-related pay data to strengthen the enforcement of equal pay and workplace discrimination laws at the EEOC, should the Commission manage to successfully collect it?

I do not have sufficient information to give an informed answer to this question. As I understand the General Counsel's responsibilities, they do not include the promulgation of Form EEO-1 or the collection of data outside of discovery in litigation under the Federal Rules of Civil Procedure.

18. If confirmed, will you commit to advocating for the collection, in some form, of data on workers' wages, broken down by race, ethnicity, and gender, in order to better understand and combat wage discrimination?

I do not have sufficient information to give an informed answer to this question. As I understand the General Counsel's responsibilities, they do not include the promulgation of Form EEO-1 or the collection of data outside of discovery in litigation under the Federal Rules of Civil Procedure. If I were confirmed and became aware that the amount and nature of information being obtained were insufficient, I would raise the need for more and better data collection.

### **Questions for the Record from Senator Margaret Wood Hassan**

1. After being struck down in the courts over concerns about whether a 30 percent cost incentive was in fact voluntary, Employer Wellness Program rules are once again before the EEOC. These rules are intended to outline how employer sponsored wellness programs can comply with the Americans with Disabilities Act (ADA), Genetic Information Nondiscrimination Act (GINA), Personal Health Information Protection Act (HIPPA), and the Affordable Care Act (ACA). While these wellness programs can be beneficial in increasing employee wellness and decreasing costs, there are also concerns regarding individuals who experience disabilities being forced to provide information required by these health and wellness plans and how that may impact their employment. As you may know, individuals who experience disabilities have one of the lowest labor participation rates at less than 25 percent, compared to nearly 70 percent of individuals who do not experience a disability.<sup>6</sup> Individuals who experience disabilities in particular face a number of barriers to employment, and I believe it is incredibly important to be supporting these individuals in the workforce rather than increasing those barriers. Though the development of these wellness rules do not fall under the General Counsel's direct responsibility, commissioners may look to you for guidance on this issue.

In the context of workplace wellness programs, can you explain the right to privacy that people who experience disabilities have under the American's with Disabilities Act,

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<sup>6</sup> Office of Disability Employment Policy, DOL (<https://www.dol.gov/odep/>)

Genetic Information Nondiscrimination Act, and the Health Insurance Portability and Accountability Act?

The Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, the Health Insurance Portability and Accountability Act, and also the Family Medical Leave Act all provide employees a right to privacy with regard to medical information. These various overlapping but non-identical rights to privacy concern such matters as what medical information an employer can seek, when it can seek it, how an employer can use the medical information, where and how the employer must store the information, whom the employer may release the information to and under what circumstances and conditions, including what authorizations to release the employer must obtain.

As was made clear in my interviews with Committee staff at the hearing on April 10, 2018, the wellness rules are an important issue about which Congress is concerned. I do not currently have sufficient information to give an informed answer to this question. Revising the wellness rules will be a function of the Commission itself and not of the General Counsel per se. If I were confirmed as General Counsel and were asked by the Commission to advise on this subject, I would review the court's decision, evaluate the EEOC's process in light of the Administrative Procedures Act, study the issue in collaboration with the EEOC's Office of Legal Counsel, and give the best advice of which I am capable.

2. At your confirmation hearing, we discussed the importance of ensuring that women who are pregnant are not discriminated against. As you know, these protections are codified in Title VII of the Civil Rights Act. And these protections also extend to protecting women from being fired for terminating a pregnancy or contemplating terminating a pregnancy, a component of the law with which you appeared to be less familiar.

Do you commit to further educating yourself on this particular protection? And do you commit to protecting the workplace rights of women who terminate or consider terminating a pregnancy, should you to be confirmed as General Counsel of the EEOC?

If confirmed, I would commit to enforcing the law. Title VII prohibits discrimination "because of [an employee's] ... sex", 42 U.S.C. § 2000e-2(a). Congress made clear in the Pregnancy Discrimination Act that "because of sex" includes "pregnancy, childbirth, or related medical conditions", 42 U.S.C. § 2000e(k). Two Courts of Appeals have held that the PDA protects a woman from discrimination on the grounds that she has had an abortion. *See Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358 (3d Cir. 2008); *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1214 (6th Cir. 1996). No Court of Appeals has held otherwise. This holding comports with the EEOC's position. Under the PDA as it is currently interpreted by the EEOC and the courts, a woman cannot be fired for terminating a pregnancy or contemplating terminating a pregnancy.

Civil Rights and Human Services Subcommittee Hearing  
***“Examining the Policies and Priorities of the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP)”***

Thursday, September 19, 2019  
2:00 PM

**Chairman Robert C. “Bobby” Scott (D-VA)**

- **Chair Dhillon, in December 2016, myself and Sen. Murray wrote the EEOC asking that the Commission provide technical assistance to educate employers on the issue of sexual harassment and assault and the dangers posed to workers—especially those employed in isolated circumstances. Can you tell us whether the EEOC will pursue guidance or provide technical assistance in this area?**

**EEOC Response:** EEOC views preventing and addressing all forms of discriminatory harassment, including sexual harassment and assault, as a priority, and these efforts are an important part of our mission-critical work. Highlighted below is a summary of the work the agency has done to address sexual harassment and assault, including for those workers employed in isolated workplaces.

In an effort to prevent and address discriminatory harassment, the agency deploys significant resources to provide education, training and technical assistance to stakeholders, including employers, through its free and fee-based outreach programs. In Fiscal Year (FY) 2019, EEOC conducted over 613 outreach events, with 120,815 participants, addressing the issue of sexual harassment.

In 2016, the Co-Chairs of EEOC’s Select Task Force on the Study of Harassment in the Workplace issued a report that included detailed recommendations for harassment prevention, effective policies to reduce and eliminate harassment, and recommendations for targeted outreach. The report explored ways to help employers and employees prevent such conduct before it rises to the level of illegal harassment and identified factors that may increase risk for workplace harassment. The report identified isolated workplaces as one of the risk factors for harassment and included specific strategies to prevent harassment in these workplaces.

Building on the work of the Select Task Force, in FY 2018, the EEOC developed and began to offer innovative training programs which go above and beyond traditional anti-harassment training for both employers and employees. The training curriculum is built around the universal desire for a respectful workplace. Rather than teaching solely about unlawful behaviors, each program focuses on a continuum of behaviors that undermine respect, from rude and uncivil behavior to abusive behavior and unlawful harassment. The content may be customized for the workplace and includes a segment for employers to conduct a self-assessment of their own harassment prevention policies and procedures. Since FY 2018, 33,000 individuals have been trained on Respectful Workplace, Leading for Respect and Compliance Training.

EEOC also makes available on its website numerous technical assistance publications that educate employers and workers on the issue of sexual harassment and assault, including issues that may arise in isolated workplaces. These include, among others: *Facts about Sexual*

*Harassment*, <https://www.eeoc.gov/eeoc/publications/fs-sex.cfm>; *Questions and Answers for Small Employers on Employer Liability for Harassment by Supervisors*, <https://www.eeoc.gov/policy/docs/harassment-facts.html>; *Youth at Work: Sexual Harassment is Against the Law*, [https://www.eeoc.gov/youth/downloads/sexual\\_harassment.pdf](https://www.eeoc.gov/youth/downloads/sexual_harassment.pdf); and *Questions and Answers: The Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic or Dating Violence, Sexual Assault, or Stalking*, [https://www.eeoc.gov/eeoc/publications/qa\\_domestic\\_violence.cfm](https://www.eeoc.gov/eeoc/publications/qa_domestic_violence.cfm).

- **Chair Dhillon, are the EEOC staff involved with the charge intake, processing and investigating process required to meet a quota each semester for the number of charge cases they must close? Is there a quota for the number of charges that the EEOC receives that must be classified as A, B, or C charges under the EEOC's Priority Charge Handling Procedure?**

**EEOC Response:** We have not imposed charge closure quotas on EEOC staff; and there is no quota on the number of charges that must be categorized as A, B, or C under our Priority Charge Handling Procedures (PCHP). EEOC staff are dedicated to our mission, to prevent and remedy unlawful discrimination and advance equal opportunity for all in the workplace. Accordingly, we are committed to enforcing the law and providing excellent customer service to the public.

- **Chair Dhillon, can you describe for us the difference between how the EEOC interprets Title VII religious exemption and how the OFCCP proposes to interpret EO 11246 with respect to standards of causation? What are the implications of this for workers and the enforcement of Title VII and EO 11246?**

**EEOC Response:**

The EEOC follows the standard set out in Title VII, at 42 U.S.C. 2000e2(m). It would be inappropriate for me to comment on standards the OFCCP is considering for causation in the context of religious organizations as they are currently in the midst of the regulatory process.

- **Chair Dhillon, with regards to the employer-sponsored wellness regulations what have you identified as the discriminatory practices? How do you intend to address these discriminatory practices in forthcoming rulemaking?**

**EEOC Response:** With regards to employer-sponsored wellness plans, discriminatory practices would include the use or administration of a wellness program in a way that constitutes disparate treatment on any basis prohibited by the EEO laws, maintaining a wellness program that has a disparate impact on the basis of any protected characteristic and that cannot be justified by business necessity (except genetic information, since claims of disparate impact are not currently available under Genetic Information Nondiscrimination Act), or failing to make reasonable accommodations under the Americans with Disabilities Act, so that employees with disabilities can participate in a wellness program.

The forthcoming rulemaking under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA) will address the extent to which employer-sponsored wellness programs may offer incentives for employees to provide health information as part of a wellness program and for employees' family members to provide their own current health status

information when they are offered the opportunity to participate in wellness programs along with employees. Portions of ADA and GINA rules issued in 2016 that addressed this issue were vacated by the district court in *AARP v. EEOC*, 292 F. Supp. 3d 238 (D.D.C. 2017). Once the Commission has approved proposed rules, the public will have an opportunity to comment and the Commission will then issue final rules informed by the public comments.

Portions of the rules not vacated by the district court remain in effect, including: (1) provisions in both rules that employees may not be coerced to participate in a wellness program, and may not be retaliated against, interfered with in the exercise of their ADA or GINA rights, threatened, intimidated, or harassed for refusing to participate, or because their family members refuse to participate; (2) prohibitions on denying health insurance or limiting health insurance for employees or their family members who refuse to participate in wellness programs that collect health information; and (3) confidentiality requirements.

### **Representative Suzanne Bonamici (D-OR)**

- **Chair Dhillon, in the September 12, 2019 Notice of Information Collection Request regarding the EEO-1, the EEOC contends the cost burdens are roughly 10 times higher than previously estimated. EEOC states, “The EEOC has developed a more accurate methodology that deconstructs the total number of reports submitted by report type and by filer type, and then estimates an average burden based on the number and types of reports submitted.”**
  - **How did the EEOC develop the methodology to determine the new cost benefit analysis cited in the September 12<sup>th</sup> information request? Please explain and provide this methodology, as well as any details not included in the September 12<sup>th</sup> Notice.**

### **EEOC Response:**

In March 2019, the EEOC began preparing to seek continued approval of the EEO-1 collection under the PRA. Staff in the agency’s Office of Enterprise and Data Analytics (OEDA) revisited the previous methodology for calculating burden estimates utilized by the EEOC for the EEO-1, taking into consideration GAO and OMB guidance on the appropriate methodology for calculating burden estimates in federal information collections.<sup>1</sup> In light of these considerations, OEDA staff believed

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<sup>1</sup> See Government Accountability Office Report GAO-18-381, “*PAPERWORK REDUCTION ACT, Agencies Could Better Leverage Review Processes and Public Outreach to Improve Burden Estimates*,” July 2018, <https://www.gao.gov/assets/700/693057.pdf>, p. 8, Footnote a to Figure 2. (“A single information collection request may contain multiple burden hour estimate formulas depending, for example, on whether there are different forms or different types of respondents. The total annual burden hour estimate is the sum of all of individual burden hour estimate formulas. If the information request is for the maximum 3-year period, then the annual burden estimate is the average over that 3-year period.”); see also ROCIS HOW TO Guide for Agency Users of the (ICR) Module, April 5, 2017, [https://www.rocis.gov/rocis/jsp3/common/ROCIS\\_HOW\\_TO\\_Guide\\_for\\_AGENCY\\_Users\\_of\\_ICR\\_Module-04052017.pdf](https://www.rocis.gov/rocis/jsp3/common/ROCIS_HOW_TO_Guide_for_AGENCY_Users_of_ICR_Module-04052017.pdf), p. 105, ¶ 12. (“Provide estimates of the hour burden of the collection of information. The statement should:

\* Indicate the number of respondents, frequency of response, annual hour burden, and an explanation of how the burden was estimated. Unless directed to do so, agencies should not conduct special surveys to obtain information on which to base hour burden estimates. Consultation with a sample (fewer than 10) of potential respondents is desirable.

that the EEOC's previous burden estimate for the EEO-1 had insufficiently calculated what the burden would be to submit the data. On May 15, 2019, Janet Dhillon was sworn in as Chair of the EEOC, restoring the EEOC's quorum, which it had lost in January 2019. After Chair Dhillon assumed this role, the Director of OEDA informed her of OEDA's concerns about the previous burden estimates for the EEO-1.

Accordingly, the EEOC re-examined the methodology used to calculate the 2016 burden for the collection of EEO-1 data and concluded that the methodology did not adhere to the standard approach for estimating burden in federal data collections. Unlike the guidance provided by both GAO and OMB, the EEOC had estimated burden at the individual employer level in the 2016 package and not at the individual form level.<sup>2</sup> Not adhering to this standard practice resulted in an extremely low estimate of the burden on employers. Based on the following analysis and as specified below, the EEOC concluded that the burden estimate associated with the EEO-1 is higher than it previously estimated in 2016.

In 2016, the methodology used to calculate the burden relied almost exclusively on the number of employers or “EEO-1 filers” without considering the variation in burden attributable to the different number and types of EEO-1 reports that different employers file. Essentially, the 2016 methodology treated all employers the same. The EEO-1 Instructions direct an employer with only a single location to file one EEO-1 report, while directing an employer with numerous locations to file a corresponding number of EEO-1 “establishment” reports, as well as a headquarters report and a consolidated report.<sup>3</sup> The time and resources used to collect and report

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If the hour burden on respondents is expected to vary widely because of differences in activity, size, or complexity, show the range of estimated hour burden, and explain the reasons for the variance. Generally, estimates should not include burden hours for customary and usual business practices.

\* If this request for approval covers more than one form, provide separate hour burden estimates for each form and aggregate the hour burdens.

\* Provide estimates of annualized cost to respondents for the hour burdens for collections of information, identifying and using appropriate wage rate categories. The cost of contracting out or paying outside parties for information collection activities should not be included here. Instead, this cost should be included under ‘Annual Cost to Federal Government.’”)

<sup>2</sup> The EEOC refers to the various individual EEO-1 forms that employers must file as “reports”. See footnote 3 for an explanation of the types of reports required to be filed.

<sup>3</sup> A single-establishment employer is required to submit only one EEO-1 data report—a type 1 EEO-1 Report. A multi-establishment employer is required to submit several reports: The type 2 ‘Consolidated Report’ must include all employees of the employer categorized by race, gender and job category and the type 3 ‘Headquarters Report’ must include employees working at the main office site of the employer and those employees that work from home that report to the corporate office. In addition, a separate EEO-1 report for the headquarters establishment is required even if there are fewer than 50 employees working at the headquarters establishment. Type 4 ‘Establishment Reports’ must be submitted for each physical establishment with 50 or more employees. Employment data must be categorized by race or ethnicity, gender, and job category. Establishment sites with fewer than 50 employees must submit either a type 8 or a type 6 report. An employer submitting type 8 ‘Establishment Reports’ should submit a separate report for each establishment employing fewer than 50 employees. Like the type 4 ‘Establishment Report’, type 8 report employment data must also be categorized by race or ethnicity, gender, and job category. For type 6 ‘Establishment List’, the establishment name, complete address, and total number of employees must be provided for each physical location where fewer than 50 employees are working. Employers choosing a type 6 data report for each establishment employing fewer than 50 employees must manually enter data categorized by race or ethnicity, gender, and job category to the type 2 ‘Consolidated Report’ to include all company employees. Filers choosing to create a type 8 report for each establishment employing fewer than 50 employees must enter employment data categorized by race or

data for a large number of these reports at different locations, some of which are more detailed than others, is necessarily greater than that needed to prepare a single report or a few reports at one or two locations. Nonetheless, the initial 2016 burden methodology “was [exclusively] based on the number of firms filing one or more EEO-1 reports, not on the number of reports submitted or the number of separate establishments submitting reports.”<sup>4</sup> The final 2016 methodology acknowledged that the number of reports could change the burden on employers, but it still assumed “that the bulk of the tasks performed in completing the EEO-1 report will be completed at the firm level due to the centrality of automation.”<sup>5</sup> Applying this 2016 methodology, the EEOC concluded that “the total estimated *annual* burden hour costs for employers and contractors that will complete both Components 1 and 2 in 2017 and 2018 will be \$53,546,359.08.”

As explained in the September 12, 2019 Notice of Information Collection, in light of the above, the EEOC developed a more accurate methodology that deconstructs the total number of reports submitted by report type and by filer type, and then estimates an average burden based on the number and types of reports submitted.<sup>6</sup> These estimates account for the different amounts of time required for different types of EEO-1 reports,<sup>7</sup> and are based on EEOC experience during the data submission process.

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ethnicity, gender, and job category for each type 8 report. The employment data entered for each such establishment on a type 8 report will automatically populate the type 2 ‘Consolidated Report’.

<sup>4</sup> *Agency Information Collection Activities; Notice of Submission for OMB Review, Final Comment Request: Revision of the Employer Information Report (EEO-1)*, 81 FR 45479, 45493 (July 14, 2016) (“the EEOC [initially] concluded that most employers would be filing the EEO-1 with a digital file upload by the time they file their EEO-1 reports for 2017 and 2018. Therefore, in the 60-Day Notice, the EEOC reasoned that ‘each additional report filed [would have] just a marginal additional cost.’ Accordingly, the burden calculation in the [2016] 60-Day Notice was based on the number of firms filing one or more EEO-1 reports, not on the number of reports submitted or the number of separate establishments submitting reports.”)

<sup>5</sup> *Id.* (“Second, the EEOC no longer assumes that all the EEO-1 reports for 2017 and 2018 will be submitted by one data upload filed by the firm on behalf of all the establishments. While still reflecting that the bulk of the tasks performed in completing the EEO-1 report will be completed at the firm level due to the centrality of automation, the EEOC’s 30-Day Notice recognizes that there are certain tasks that will be performed at the establishment level for employers who enter their EEO-1 data directly onto the Joint Reporting Committee’s secure portal. Therefore, the 30-Day Notice burden calculations are based on the number of hours needed to complete the tasks at the firm level and also at the establishment level for the proportion of EEO-1 filers who do not now use centralized, secure data uploads.”)

<sup>6</sup> See footnote 1, *supra*; see also, e.g., *Mortality in Correctional Institutions*, 84 FR 1507, 1508-09 (2019).

<sup>7</sup> Using Component 1 2017 data as the basis for an example of the new methodology, 75,043 EEO-1 filers submitted a total of 1,597,036 Component 1 reports to the EEOC. Forty percent, or 30,203 filers, submitted a report for only a single establishment. Single establishment filers are referred to as “Type 1” filers by the EEOC. Each Type 1 filer submitted a single report, yielding a total of 30,203 reports in 2017. These Type 1 filers have the lowest burden, with an average estimated burden of 45 minutes annually to complete their submission of Component 1. Multiple establishment filers are referred to as “Type 2” filers by the EEOC. In 2017, Type 2 filers accounted for 60%, or 44,840 filers of Component 1, and in 2017 submitted a total of 1,566,833 reports, or 98% of all Component 1 EEO-1 reports submitted. Type 2 filers have a higher reporting burden because they are required to submit a combination of reports: a type 2 (“consolidation”) report, a type 3 (“headquarters”) report, and a type 4 establishment report, a type 8 establishment report, or a type 6 establishment list for each establishment. The estimated burden for Type 2 filers varies between 3.5 and 9.5 hours, depending on the report type combination. This new method for calculating the filers’ burden yielded a total estimated burden of 7,643,874 hours for 75,043 filers to submit 1,597,036 reports for data year 2017. Per U.S. Department of Labor’s Bureau of Labor Statistics wage rates, the associated total annual burden hour cost is \$297,381,066 for required filers. The EEOC estimates that the total cost of the administration of the EEO-1 Component data collection to the federal government is \$2 million annually.



- **When the Court issued the stay, it found that the EEOC and OMB communicated with the Chamber of Commerce. Please provide details about who the EEOC consulted with both internally and externally when it developed this new cost methodology. Please also provide a detailed explanation and, if it exists, any documentation of these discussions.**

**EEOC Response:** As stated earlier, the new cost methodology for the September 12, 2019, Notice, was the product of the EEOC's career statisticians and data scientists. It was not developed based on any direct consultation with any outside organizations. The Court was addressing the 2017 decision to stay the 2016 Paperwork Reduction Act approval, not the development of the 2019 notice.

EEOC is currently compiling for disclosure documentation of external communications regarding the EEO-1 component 2 pay data collection in response to a FOIA request dated May 8, 2019, by Democracy Forward Foundation (Democracy Forward), which is now also the subject of FOIA litigation.<sup>8</sup> On October 4 and November 25, 2019, the EEOC issued its responses to Democracy Forward's FOIA request. Together, the responses cover the period October 31, 2018, to October 4, 2019, and include responsive email records for that period. Copies of the responsive records the EEOC provided are below.

- **In light of the EEOC's new burden assessment, please explain what efforts are under way to identify comprehensive methods to collect pay data from EEO-1 filers.**

**EEOC Response:** EEOC is committed to transparency; accordingly, we are committed that any future new pay data collection will be established through a Title VII rulemaking process. This will allow for robust public comment and input. It will also ensure that the data collected by EEOC is useful in carrying out the agency's mission and that there is not undue burden on respondents.

- **Is it your view that comprehensive pay data collection from employers is not useful for enforcement purposes? If so, what evidence do you rely on for that conclusion?**

**EEOC Response:** Pay discrimination is a critical focus of EEOC's efforts to prevent and remedy unlawful discrimination, and pay transparency is a useful tool that could aid the agency in its efforts. However, it is critical that any data collection undertaken by the EEOC be thoroughly tested to ensure that it is well-designed and will be useful in the construct of the agency's enforcement and educational responsibilities.

- **Please describe any measures that the agency is taking to identify methods of collecting pay data information outside of an individual investigation.**

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<sup>8</sup> *Democracy Forward Found. v. EEOC et al.*, Civil Action No. 119-cv-2306 (D.D.C.)

**EEOC Response:** EEOC is committed to transparency; accordingly, we are committed that any pay data collection will be established through a Title VII rulemaking process. This will allow for robust public comment and input. It will also ensure that the data collected by EEOC is useful in carrying out the agency's mission and that there is not undue burden on respondents.

As a first step in this process, we are reexamining the EEOC-commissioned 2012 study from the National Academies of Sciences entitled "Collecting Compensation Data from Employers." We are paying particular attention to the recommendations made to the EEOC on the potential benefits and burdens associated with collecting pay data from employers.

- **Chair Dhillon, how many employers have submitted pay data to the EEOC after the D.C. District Court's order to collect pay data as part of the EEO-1 Form?**

**EEOC Response:** As reported in the November 22, 2019 Status Report to the district court, as of that date, 83.5% of eligible filers have completed submission of Component 2 EEO-1 data. This includes 82.7% of filers submitting Component 2 data for calendar year 2017, and 84.2% of filers submitting Component 2 data for calendar year 2018.

- **How will the EEOC use the data that it has received from employers so far?**

**EEOC Response:** What the EEOC will do with any Component 2 data it collects may depend, in part, on the outcome of the appeal currently pending before the D.C. Circuit Court of Appeals.<sup>9</sup> For any data collection, the EEOC recognizes the importance of ensuring data integrity through the comprehensive analysis of data quality and assessment of data utility in a methodologically rigorous and scientifically sound manner, which will determine the appropriate uses of the data.

- **Chair Dhillon, was there any consultation or discussion, formal or informal, with industry or employer representatives about the decision not to seek renewal of the Component 2 pay data collection? Please disclose those representatives and provide a detailed explanation and documentation of these discussions.**
  - **When did that consultation take place?**
  - **Did you have any consultation or discussion with any worker or civil rights representatives, formal or informal, about the decision not to seek renewal of the Component 2 information collection? Please disclose those representatives and provide a detailed explanation and documentation of these discussions.**

**EEOC Response:** EEOC is currently compiling for disclosure documentation of external communications regarding the EEO-1 component 2 pay data collection in response to a FOIA request dated May 8, 2019, by Democracy Forward Foundation (Democracy Forward), which is now also the subject of FOIA litigation.<sup>10</sup> On October 4 and November 25, 2019, the EEOC issued its responses to Democracy Forward's FOIA request. Together, the responses cover the period October 31, 2018, to October 4, 2019, and include responsive email records for that period. Copies of the responsive records the EEOC provided are below.

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<sup>9</sup> Case No. 19-5130 (D.C. Cir.).

<sup>10</sup> *Democracy Forward Found. v. EEOC et al.*, Civil Action No. 1:19-cv-2306 (D.D.C.)

- **Chair Dhillon, at the September 19th hearing, I asked about the status of the EEOC's proposed harassment guidance, which has been pending at the OMB for approximately two years.**
  - **Please indicate when the EEOC's guidance on harassment [sic] be finalized.**

**EEOC Response:**

The harassment guidance was submitted for review pursuant to the OMB interagency coordination and review process governing policy development and associated interactions between agencies. As such, OMB review is an undertaking subject to the deliberative process, which protects the confidentiality of internal, deliberative material, such as documents containing the analyses, opinions, or recommendations of agency staff, and attorney memoranda containing analysis or recommendations. Because disclosure of privileged documents or information to individuals outside the agency, including disclosure in response to your requests, could constitute a waiver of these privileges, the EEOC is unable to provide that information at this time.

- **Have you spoken with OMB and ascertained why it has not finalized the guidance? Please provide information about whether the delay is related, directly or indirectly, to the inclusion of gender identity and sexual orientation as a form of sex discrimination.**

**EEOC Response:**

The harassment guidance was submitted for review pursuant to the OMB interagency coordination and review process governing policy development and associated interactions between agencies. As such, OMB review is an undertaking subject to the deliberative process, which protects the confidentiality of internal, deliberative material, such as documents containing the analyses, opinions, or recommendations of agency staff, and attorney memoranda containing analysis or recommendations. Because disclosure of privileged documents or information to individuals outside the agency, including disclosure in response to your requests, could constitute a waiver of these privileges, the EEOC is unable to provide that information at this time.

**Chair Dhillon, EEOC's Strategic Enforcement Plan (SEP) for FY 2017-2021 continues to prioritize areas identified in the original 2012 plan, including:**

- 1) Eliminating barriers in recruitment and hiring**
- 2) Protecting vulnerable workers, including immigrant and migrant workers, and underserved communities from discrimination**
- 3) Addressing selected emerging and developing issues**
- 4) Ensuring equal pay protections for all workers**
- 5) Preserving access to the legal system, and**
- 6) Preventing systemic harassment**

**Is the EEOC continuing to prioritize these areas for enforcement, and, if so, what are some examples of current enforcement efforts in each area?**

**EEOC Response:** The Commission's goal in identifying a set of substantive area priorities is to ensure that the agency's resources are targeted to advance equal opportunity and freedom from discrimination in the workplace in circumstances where government enforcement is most likely to achieve broad and lasting impact. This is particularly important in integrating the SEP substantive area priorities with the agency's PCHP charge management system, to align enforcement resources with the priorities set forth in the SEP. The Commission takes a multi-pronged response to prevent and remedy unlawful employment discrimination, including education and outreach, enforcement, as well as research and policy development in each of these substantive area priorities. We continue to prioritize these areas in all aspects of our work.

In Fiscal Year 2019, we conducted the following outreach events that support the Strategic Enforcement Plan Priorities:

- Priority 1 – Recruitment/Hiring: 641 events;
- Priority 2 – Vulnerable Workers: 1,071 events;
- Priority 3 – Emerging/Developing Issues: 730 events;
- Priority 4 – Equal Pay: 468 events;
- Priority 5 – Access to Legal System: 737 events; and
- Priority 6 – Systemic Harassment: 1,293 events.

<b>2019 SEP TABLE OF EVENTS AND ATTENDEES</b>		
<b>NATIONAL PRIORITIES</b>	<b>EVENTS</b>	<b>ATTENDEES</b>
<b>Recruitment/Hiring</b>	641	65,541
<b>Vulnerable Workers</b> (includes immigrant/migrant farmworkers, human trafficking, limited English proficiency, re-entry, youth and other vulnerable workers)	1,071	145,927
<b>Emerging/Developing Issues</b>	<b>730</b>	<b>79,020</b>
ADAAA	514	63,960
PDA/ADA	286	17,469
LGBT	325	22,057
Complex Employment Relationships	179	11,336
Backlash Discrimination	165	11,230
<b>Equal Pay</b>	468	97,864
<b>Access to Legal System</b> (includes retaliation, recordkeeping violations, waivers, mandatory arbitration)	737	112,393
<b>Systemic Harassment</b> (includes non-sexual and sexual harassment)	1,293	120,815

In addition to our outreach efforts, during FY 2019 we also focused on the SEP priorities in the agency's enforcement efforts. For example, there were systemic investigations in each of the six priority areas and the majority of our systemic investigations involved one or more of the priority areas. We also conducted successful systemic conciliations in each of the six priority areas in FY 2019. Some of these conciliations were public, including: California Department of Human Resources and Ford Motor Company's Kentucky Truck Plant (SEP 1, hiring (disability)), MedStar Health and Medstar Ambulatory Services (SEP 3 (revised attendance policies to allow for reasonable accommodation), UPS and Cato Corporation (SEP 3, accommodating pregnancy-related limitations), and Barenbrug USA (SEP 5, use of overly broad severance agreements interfering with right to file a charge).

In conciliation agreements that involved strategic priority areas, the EEOC continued to focus on targeted equitable relief, which provides non-monetary and non-generic relief that explicitly addresses the discriminatory employment practices at issue in the case and is designed to prevent similar violations in the future. For example, in one case the employer agreed to appoint an equal

employment opportunity (EEO) consultant, a medical consultant, and an EEO officer to revise its current medical evaluation policies used in hiring and the corresponding medical review process. Another successful conciliation provided for significant changes in how the employer handles sexual harassment complaints, including revisions to its written policies and procedures on harassment, distribution of the revised policies to all new hires and workplace civility and bystander training on sex discrimination and sexual harassment to all employees, including management.

EEOC also continues to prioritize the SEP priority areas in our litigation program. Recent case highlights follow. (NOTE: some of the case examples span multiple SEP priorities, but each case has been listed only once to avoid repetition)

**Priority 1 – Hiring:** EEOC resolved many suits in FY 2019, including class and systemic cases involving discriminatory barriers to recruitment and hiring. For example, in *EEOC v. Marquez Bros. Int'l*, No. 1:17-cv-44 (E.D. Cal. resolved Sep. 17, 2019), EEOC alleged that the defendant failed to hire non-Hispanic applicants for entry-level positions based on national origin and instead hired less qualified Hispanic applicants. The case was resolved by consent decree for \$2 million for around 880 victims of discrimination, plus injunctive relief including a hiring monitor, hiring goals and measures to ensure hiring transparency, and reporting to EEOC. In *Sherwood Food Dist., LLC*, No. 1:16-cv-2386 (N.D. Ohio resolved Oct. 16, 2018), EEOC alleged that the defendant food warehouse engaged in a pattern or practice of failing to hire women into entry-level laborer positions and failed to retain employment applications. The case resolved by consent decree for \$3.6 million for 410 victims of discrimination, plus injunctive relief. In *EEOC v. New Mexico Corrections Dep't*, No. 1:15-cv-879 (D.N.M. resolved Jun. 7, 2019), EEOC alleged that the defendant denied promotions and unfairly disciplined employees based on age, and subjected employees who complained to retaliation. The case resolved by consent decree for \$700,000 for 76 victims of discrimination, plus injunctive relief.

**Priority 2 – Vulnerable Workers:** Many EEOC suits are brought to vindicate the rights of vulnerable workers. In FY 2019, the EEOC resolved numerous cases on behalf of vulnerable workers. For example, in *EEOC v. Favorite Farms, Inc.*, 8:17-cv-1292 (M.D. Fla. resolved Dec. 20, 2018), the EEOC alleged that a male supervisor for a fruit and vegetable grower, subjected a seasonal female farmworker to sexual harassment, including rape, and then suspended her in retaliation for complaining of the harassment. The case resolved by jury verdict in the amount of \$850,000. In *EEOC v. Maritime Auto Wash*, 1:17-cv-02463 (D. Md. resolved Dec. 17, 2018), the EEOC alleged that defendant carwash subjected Hispanic employees to a hostile work environment and disparate terms and conditions of employment relating to assignment of duties, overtime pay, wages, and promotion, and discharged them based on race and national origin. The case resolved by a 3-year consent decree providing for \$300,000 to 9 aggrieved individuals. In *EEOC v. Party City Corporation*, 1:18-cv-00838 (D.N.H. resolved Jul. 12, 2019), the EEOC alleged that a store manager for a party goods retailer failed to hire a qualified applicant for an available entry level position because of her disability, autism, and need to use a job coach as a reasonable accommodation. The case resolved by 3-year consent decree providing for \$155,000, injunctions, revised policies, training and reporting. In *EEOC v. Atlantic Cape Fisheries, Inc., and BJ's Services Co., Inc.* No. 1:17-cv-11860 (D. Mass. resolved Jan. 30, 2019), the EEOC alleged that a male line supervisor subjected female production employees working at a scallop processing facility to sexual advances and unwanted touching, and the case was

resolved by a 4-year consent decree providing for \$675,000 in compensatory damages to 14 victims.

### **Priority 3 – Emerging/Developing Issues**

**LGBT:** In FY 2019, the EEOC resolved the following LGBT discrimination cases by consent decree. In *EEOC v. Apple Metro Corp. d/b/a Applebee's Neighborhood Bar & Grill*, No. 17-cv-4333 (S.D.N.Y. resolved Oct. 25, 2018), EEOC resolved a suit alleging that the defendant permitted co-workers to harass charging party because she is transgender and failed to respond adequately to complaints. EEOC obtained \$100,000 and injunctive relief relating to defendant's harassment procedures and retaliation, as well as training. In *EEOC v. A & E Tire*, No. 17-cv-2362 (D. Colo. resolved Apr. 5, 2019), EEOC resolved a suit alleging that the defendant refused to hire charging party because he is transgender. EEOC obtained \$60,000 and injunctive relief. In *EEOC v. Mejia Corp. d/b/a El Tio Gainesville*, No. 18-cv-1226 (E.D. Va. resolved Aug. 8, 2019), EEOC resolved a suit alleging that the defendant permitted a supervisor and co-workers to harass charging party because he was gay, and to harass another male employee because of his association with charging party. EEOC obtained \$40,000 and injunctive relief.

**Backlash Discrimination (Muslim/Sikh/Arab/Middle Eastern/South Asian):** In FY 2019, EEOC resolved the following strategic priority cases in this category by consent decree. In *EEOC v. United Parcel Service, Inc.*, 1:15-cv-04141 (E.D.N.Y. resolved Dec. 21, 2018), the EEOC alleged that a nationwide package delivery service, maintained a personal appearance policy which prohibited male employees in public contact positions from wearing beards or long hair, and so discriminated against employees wearing beards or long hair due to their religious beliefs and/or practices. Defendant refused to provide reasonable accommodation to the policy, refused to hire and promote individuals whose religion conflicted with the policy, and placed individuals with religious conflicts into positions with no customer contact. The case resolved by 5-year consent decree providing for \$4.9 million to 112 aggrieved individuals, injunctive relief, revised policies and procedures, training and reporting to EEOC. In *EEOC v. Blue Moon Diner*, 1:18-cv-00567 (D.N.M. resolved Nov. 30, 2018), the EEOC alleged that defendant, a 50's-themed diner and ice cream shop, refused to accommodate Charging Party's sincerely-held religious beliefs and instead constructively discharged her from her part-time hostess/cashier position because of her religion, Muslim, when it insisted she not wear a hijab because it was "too Muslim." The case resolved by 2-year consent decree providing for \$25,000, injunctions, revised policies, training and reporting to EEOC.

**Priority 4 – Equal Pay/Pay Discrimination:** In FY 2019, the EEOC favorably resolved seven suits involving pay discrimination, including the following cases. In *EEOC v. Work Services, Inc.*, 3:16-cv-03257 (D.S.C. resolved Nov. 27, 2018), the EEOC alleged that a non-profit company that employs individuals with intellectual and developmental disabilities to process turkeys on a piece-rate basis, discriminated on the basis of disability by paying wages at rates less than required by law and applicable regulations, by providing substandard living conditions and health care, and by restricting freedom of movement, communication, and socialization. The case resolved by a 5-year consent decree providing for \$342,000 to 6 claimants, injunctions, training, and other relief. In *EEOC v. Denton Cnty. Health Dep't*, No. 4:17-cv-614 (E.D. Tex. resolved Oct. 24, 2018), EEOC alleged that the defendant paid a primary care clinician less than male doctors performing equal work, and the case resolved by consent decree

providing \$115,000 to the victim. In *EEOC v. Cummins, Inc.*, No. 3:17-cv-1306 (M.D. Tenn. resolved Mar. 29, 2019), EEOC alleged that the defendant call center failed to pay a female employee equal pay for equal work, and the case resolved by consent decree for \$77,500 for the victim.

**Priority 5 – Access to Legal System (Waiver/Arbitration):** In *Logan v. MGM Grand Detroit Casino*, No. 18-1381 (6th Cir. decided Sept. 25, 2019), the EEOC filed an amicus brief to address a contractual provision that purported to shorten the limitations period for bringing suit under Title VII. The EEOC argued that the provision, which would have required filing suit within six months of the challenged employment action, was unenforceable because it altered the enforcement scheme that Congress crafted. The Sixth Circuit agreed.

**Priority 6 – Systemic Harassment:** In FY 2019, the EEOC resolved three cases alleging systemic harassment. In *EEOC v. Lucinda Management, LLC, Centennial Food Corporation d/b/a IHOP Restaurant, et al*, No. 2:17-cv-02458 (D. Nev. resolved Feb. 19, 2019), EEOC alleged that male coworkers and managers employed by seven IHOP franchises owned and operated by the same individuals subjected female employees to sexual comments and jokes, requests for sex, graphic text messages, unwelcome touching, and in one case, attempted sexual assault, and the case resolved by consent decree providing \$700,000 to 34 victims. In *EEOC v. East Coast Labor Solutions, LLC, et al*, No. 4:16-cv-01848 (N.D. Ala. resolved Feb. 19, 2019), EEOC resolved a suit alleging that 4 related temporary staffing firms discriminated against Hispanic individuals assigned to a poultry processing plant by denying them promised reimbursements for travel expenses; requiring them to live in defendant-provided rundown housing at three times the cost of the market rental rate for their first four months of employment; assigning them to less desirable, more strenuous, lower-paying jobs than promised, and to “Latino-only” production lines, and subjecting them to ethnic slurs, screaming, mocking, and threats of termination by their non-Latino coworkers and supervisors, and the case resolved by consent decree providing \$475,000 to 10 victims.

- **Chair Dhillon, the National Substantive Area Priorities outlined in the SEP states that immigrant and migrant workers are “particularly vulnerable to discriminatory practices or policies.” What is the EEOC doing to address those vulnerabilities?**

**EEOC Response:** The agency is working vigorously to protect vulnerable workers. Who qualifies as a “vulnerable worker” may differ based upon various factors including geography, industry and profession. We are developing plans to increase outreach efforts through the newly formed Vulnerable Worker Task Force Initiative. This Task Force will also analyze ongoing enforcement efforts and provide recommendations on ways to enhance the agency’s efforts. Pursuant to the President’s Interagency Task Force to Monitor and Combat Trafficking in Persons, the Commission is also working to increase awareness of and reduce human trafficking. While vulnerable workers may be harder to reach, and cases may be more difficult to investigate, resources will be allocated appropriately to support this important effort.

Meanwhile, the Commission provides outreach and education to particularly vulnerable communities that may be unfamiliar with our laws, such as those who are new to the workforce or low-skilled workers and new immigrants. Through its robust education and outreach program,



the EEOC strategically targets outreach to vulnerable workers and underserved communities. This focused outreach also includes immigrant and farm worker communities, as well as communities where individuals are reluctant to come forward to complain about employment discrimination. In Fiscal Year 2019, there were over 1,092 outreach events with 141,633 attendees involving vulnerable or underserved communities.

- **Chair Dhillon is the EEOC continuing to focus on “protecting lesbians, gay men, bisexuals and transgender (LGBT) people from discrimination based on sex?”**

**EEOC Response:** We continue to accept and process charges filed by lesbians, gay men, bisexuals and transgender (LGBT) people who allege they have been discriminated against on the basis of sex. To support the agency’s enforcement and advance voluntary compliance efforts, EEOC also conducts outreach and education to employers and workers: we held over 325 outreach events with 22,057 attendees involving LGBT issues in FY 2019.

- **Chair Dhillon how is the EEOC continuing to address “discriminatory practices against those who are Muslim or Sikh, or persons of Arab, Middle Eastern or South Asian descent, as well as persons perceived to be members of these groups, arising from backlash against them from tragic events in the United States and abroad?”**

**EEOC Response:** EEOC continues to vigorously enforce the Religious Anti-Discrimination provision of Title VII. The Commission originally established this designation in 2001 in response to backlash animus triggered by the events of 9/11. In February 2016, we recast the designation to apply to any charges in which there is reason to believe that the conduct surrounding the charge is motivated by anti-Islamic or anti-Middle Eastern sentiments stemming from a belief that the charging party is connected to or sympathetic toward Muslim terrorists, or Islamic terrorist events/incidents.

Since EEOC first began tracking these charges 18 years ago, we have received 1,834 charges alleging that the employer’s actions were spurred by anti-Muslim “backlash” as described above. The merit factor rate (settlements, withdrawals with benefits and reasonable cause findings) for those charges was almost 25%, with the most frequently raised issues being discharge and harassment. In addition, over the same period of time we received more than 12,860 charges alleging discrimination on the basis of Religion – Muslim.

We have focused our outreach efforts on increasing awareness of potential discrimination based on religion, ethnicity, or country of origin with both employee and employer groups. This also aligns with EEOC’s strategic enforcement plan of prioritizing outreach to vulnerable/ underserved groups. Recognizing that Islamic/Muslim religious beliefs are held by members of many different national, ethnic, and racial groups, staff are encouraged to be as inclusive as possible when planning and conducting outreach activities.

- **Chair Dhillon, what is the EEOC doing to focus on “overly broad waivers, releases, and mandatory arbitration provisions” and “employers’ failure to maintain and retain applicant and employee data and records required by EEOC regulations?”**

**EEOC Response:** We continue to receive and investigate charges involving these issues. Our efforts are tailored to the evolving case law. One of the public conciliations we reached this year involved an overly broad severance agreement, which the EEOC alleged interfered with employees' rights to file charges and voluntarily cooperate with the EEOC, as well as legally required disclosures to employees subjected to a reduction in force.

- **Chair Dhillon, what is the EEOC doing to prevent systemic harassment based on sex, race, disability, and other protected characteristics?**

**EEOC Response:** Through our outreach and education efforts we continue to provide training to employee and employers on best practices in preventing all forms of harassment. In FY 2019, the EEOC provided 1,293 education and outreach events on systemic harassment, reaching 120,815 participants. Notably, in FY 2019, EEOC conducted nationwide training on investigating harassment charges which included a section on obtaining effective targeted equitable relief to prevent future discrimination. We also obtained public conciliation agreements in two individual harassment cases (Skyline Unlimited and North Liberty Police Department) to increase public awareness that harassment violates Title VII and employers who engage in harassment will be held accountable.

- **Chair Dhillon, I have heard from many workers, particularly those in the technology industry, who believe they have been dismissed or denied employment because of their age. Do the EEOC’s investigations and enforcement activities confirm what older workers in the technology sector are alleging?**

**EEOC Response:** We are not aware of any specific findings that would confirm the allegations made about age discrimination in the technology sector. However, EEOC will investigate all allegations of age discrimination that we receive to determine whether there is reasonable cause to believe that age discrimination occurred.

### **Representative Marcia Fudge (D-OH)**

- **Chair Dhillon, what is the EEOC's view of the challenges faced by the tech sector? What is the EEOC doing to address the pervasive discrimination in the technology sector?**

**EEOC Response:** We are actively tackling persistent barriers to equal employment in all segments of the economy. We know that the best way to eliminate discrimination is to prevent it in the first place. We provide resources to help employers and employees better understand our laws and the concrete steps they can take to promote compliance through our outreach and education efforts.

EEOC filed five lawsuits in FY 2019 challenging discrimination in the tech sector. All five suits challenge disability discrimination, and involve either hiring, reasonable accommodation, or discharge issues. EEOC favorably resolved four lawsuits in FY 2019 challenging discrimination in the tech sector, all of which involved disability discrimination.

### **Representative Kim Schrier (D-WA)**

- **Chair Dhillon, in the September 12<sup>th</sup> Notice of Information Collection, the EEOC solicits comments on Paperwork Reduction Act (PRA) approval of Component 1.**
  - **Why has the EEOC chosen not to seek comment on its newly developed methodology for its cost burden analysis?**
  - **Why has the EEOC chosen not to solicit comments on its decision not to pursue Component 2?**

**EEOC Response:** The September 12, 2019 *Federal Register* Notice provides for a 60-day comment period on all topics raised, including the new methodology of the cost burden analysis. The EEOC received over 11,000 public comments on the Notice with almost all of them providing comment on the EEOC's decision not to renew the collection of Component 2. The EEOC has posted the comments publicly at <https://www.regulations.gov/document?D=EEOC-2019-0003-0001>

- **Why has the EEOC categorically chosen not to pursue Component 2 rather than first seeking comment on how to collect this data in a way that may be, in the EEOC's eyes, less cost prohibitive?**

**EEOC Response:** Based on the standards of the Paperwork Reduction Act, the EEOC decided it could not justify continued collection of Component 2 considering the new burden estimate when balanced against the unproven utility of the data. EEOC is committed to transparency; accordingly, we are committed that any pay data collection the EEOC pursues will be established through a Title VII rulemaking process. This will allow for robust public comment and input. It will also ensure that the data collected by EEOC is useful in carrying out the agency's mission and that there is not undue burden on respondents.

As a first step in this process, we are reexamining the EEOC-commissioned 2012 study from the National Academies of Sciences entitled, “Collecting Compensation Data from Employers.” We are paying particular attention to the recommendations made to the EEOC on the potential benefits and burdens associated with collecting pay data from employers.

- **Chair Dhillon, did you consult with any outside vendors who provided employer technical support on filing Component 2 about any tools in development or currently available to help reduce “cost burden” as you’ve estimated it?**

**EEOC Response:** The EEOC does not recommend or advocate methods, strategies, or techniques for recordkeeping. The EEOC is responsible for estimating reporting burden. As indicated in the OMB guidance, the agency “Provide[s] an estimate for the total annual cost burden to respondents or record keepers resulting from the collection of information.”<sup>11</sup>

- **Did you do any analysis of whether there are any tools available to assist with the Component 2 pay data collection?**

**EEOC Response:** The EEOC does not recommend or advocate methods, strategies, or techniques for record keeping. The EEOC is accountable for estimating reporting burden. As indicated in the OMB guidance, the agency “Provide[s] an estimate for the total annual cost burden to respondents or record keepers resulting from the collection of information.”<sup>12</sup>

#### **Representative Jahana Hayes (D-CT)**

**During the September 19, 2019 House Education and Labor subcommittee oversight hearing you affirmed that “transparency of pay data is a useful tool” and that “finalizing a transparent pay data collection by the EEOC [is] a priority.”**

- **What initiatives will you undertake to strengthen the ability of the EEOC and the ability of working people to identify and challenge pay discrimination?**

**EEOC Response:** An important part of the EEOC’s mandate is to eliminate pay discrimination based on sex, race, and other bases. The EEOC remains steadfast in its efforts to prevent and remedy unlawful pay discrimination and advance equal opportunity in the workplace. Educating the public about their rights and responsibilities is an essential component of the mission. In FY 2019 alone, the EEOC provided 468 education and outreach events on equal pay, reaching 97,864 attendees. The EEOC also provides important information and resources on compensation discrimination on our website.

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<sup>11</sup>Reference:

[https://www.rocis.gov/rocis/jsp3/common/ROCIS\\_HOW\\_TO\\_Guide\\_for\\_AGENCY\\_Users\\_of\\_ICR\\_Module-04052017.pdf](https://www.rocis.gov/rocis/jsp3/common/ROCIS_HOW_TO_Guide_for_AGENCY_Users_of_ICR_Module-04052017.pdf) page 105, number 13.

<sup>12</sup> Ibid.

Effective enforcement of the laws, including those prohibiting compensation discrimination, is also at the core of our mission. EEOC staff are dedicated to investigating allegations of pay discrimination and seeking redress for those individuals who have been subject to unlawful pay practices. In fiscal year 2018, the agency garnered approximately \$22.1 million through administrative enforcement and litigation on behalf of victims of discrimination whose claims included equal pay violations. More than \$19 million of this came through non-litigation methods, including mediation, settlement, and conciliation.

- **What steps will you take to ensure that the EEOC finalizes a transparent pay data collection after the current collection concludes?**

**EEOC Response:** EEOC is committed to transparency; accordingly, we are committed that any pay data collection the EEOC pursues will be established through a Title VII rulemaking process. This will allow for robust public comment and input. It will also ensure that the data collected by EEOC is useful in carrying out the agency's mission and that there is not undue burden on respondents.

As a first step in this process, we are reexamining the EEOC-commissioned 2012 study from the National Academies of Sciences entitled "Collecting Compensation Data from Employers." We are paying particular attention to the recommendations made to the EEOC on the potential benefits and burdens associated with collecting pay data from employers.

- **During the oversight hearing, you stated that you thought there is a better way to collect pay data than Component 2, and that in 2016 employers and industry groups made suggestions to the EEOC that weren't adopted. What are the specific employer suggestions that you believe should be adopted for a pay data collection that would yield pay data of appropriate utility for enforcement?**

**EEOC Response:** EEOC is committed to transparency; accordingly, we are committed that any pay data collection will be established through a Title VII rulemaking process. This will allow for robust public comment and input, to ensure that comments on any proposed data collection are carefully considered and addressed. It will also ensure that the data collected by EEOC is useful in carrying out the agency's mission and that there is not undue burden on respondents.

As a first step in this process, we are reexamining the EEOC-commissioned 2012 study from the National Academies of Sciences entitled "Collecting Compensation Data from Employers." We are paying particular attention to the recommendations made to the EEOC on the potential benefits and burdens associated with collecting pay data from employers.

- **How would you seek to ensure that critical information about pay and hours worked is collected and submitted by employers?**

**EEOC Response:** EEOC is committed to transparency; accordingly, we are committed that any pay data collection will be established through a Title VII rulemaking process. This will allow for robust public comment and input. It will also ensure that the data collected by EEOC is useful in carrying out the agency's mission and that there is not undue burden on respondents.

As a first step in this process, we are reexamining the EEOC-commissioned 2012 study from the National Academies of Sciences entitled “Collecting Compensation Data from Employers.” We are paying particular attention to the recommendations made to the EEOC on the potential benefits and burdens associated with collecting pay data from employers.

- **Do you believe employers should be required to provide pay data to the EEOC?**

**EEOC Response:** Pay discrimination is a critical focus of EEOC’s efforts to prevent and remedy unlawful discrimination, and pay transparency is a useful tool that could aid the agency in its efforts. However, it is critical that any data collection undertaken by the EEOC be thoroughly tested to ensure that it is well-designed and will be useful in the construct of the agency’s enforcement and educational responsibilities.

**During the oversight hearing you affirmed that the EEOC was committed to undertaking a Title VII rulemaking process to develop a pay data collection that would be useful to EEOC enforcement efforts without imposing an “undue” burden on employers.**

- **When will EEOC initiate such a Title VII rulemaking process?**

**EEOC Response:** EEOC is committed to transparency; accordingly, we are committed that any pay data collection will be established through a Title VII rulemaking process. This will allow for robust public comment and input. It will also ensure that the data collected by EEOC is useful in carrying out the agency’s mission and that there is not undue burden on respondents.

As a first step in this process, we are reexamining the EEOC-commissioned 2012 study from the National Academies of Sciences entitled “Collecting Compensation Data from Employers.” We are paying particular attention to the recommendations made to the EEOC on the potential benefits and burdens associated with collecting pay data from employers. We will proceed as expeditiously as possible, while ensuring that we are carefully weighing the factors that must be considered for an effective rulemaking process.

- **Component 2 was adopted after a lengthy and transparent PRA process that included multiple opportunities for public comment (including by employer stakeholders), public hearings, and extensive explanation by EEOC of its analysis and its decision. What information do you believe a Title VII rulemaking process will yield that wasn’t available through the PRA approval process?**

**EEOC Response:** The rulemaking process has the added benefit of the statutory protections of the Administrative Procedure Act. Furthermore, a rule will be on a more solid legal foundation than simply adding a pay data collection to the EEO-1 through the PRA process. The EEOC intends to use the recommendations of the National Academies of Sciences, as well as other pertinent factors to assess how pay data collections may enhance the EEOC’s enforcement efforts and to determine the burden that the collection and reporting of pay data may impose on respondents and the government.

- **You stated at the oversight hearing that you believe a pilot study would be an appropriate part of that rulemaking process. What is the scope of an appropriate pilot study in your judgment?**

**EEOC Response:** The EEOC believes the process would benefit from a reexamination of the recommendations in the EEOC-commissioned 2012 study from the National Academy of Sciences (NAS), entitled “Collecting Compensation Data from Employers.” Specifically, recommendation 2 details an approach to comprehensive, evidence-based, scientifically sound pilot studies.

- **What steps will you take to initiate a pilot study and when will you take these steps?**

**EEOC Response:** EEOC is committed to transparency; accordingly, we are committed that any pay data collection will be established through a Title VII rulemaking process. This will allow for robust public comment and input. It will also ensure that the data collected by EEOC is useful in carrying out the agency’s mission and that there is not undue burden on respondents.

As a first step in this process, we are reexamining the EEOC-commissioned 2012 study from the National Academies of Sciences entitled “Collecting Compensation Data from Employers.” We are paying particular attention to the recommendations made to the EEOC on the potential benefits and burdens associated with collecting pay data from employers.

**Representative Susie Lee (D-NV)**

**EEOC stated in the September 12<sup>th</sup> Notice that before undertaking a new pay data collection, it should reexamine the recommendations in the EEOC-commissioned 2012 National Academy of Sciences study, “Collecting Compensation Data from Employers.” At the oversight hearing you indicated a pilot study was one of the recommendations in the 2012 National Academy of Sciences report.**

- **When do you anticipate completing that reexamination?**

**EEOC Response:** EEOC is committed to transparency; accordingly, we are committed that any pay data collection will be established through a Title VII rulemaking process. This will allow for robust public comment and input. It will also ensure that the data collected by EEOC is useful in carrying out the agency’s mission and that there is not undue burden on respondents.

As a first step in this process, we are reexamining the EEOC-commissioned 2012 study from the National Academies of Sciences entitled “Collecting Compensation Data from Employers.” We are paying particular attention to the recommendations made to the EEOC on the potential benefits and burdens associated with collecting pay data from employers.

- **What would such a reexamination entail? Will there be an opportunity for members of the public or stakeholders to participate?**

**EEOC Response:** EEOC is committed to transparency; accordingly, we are committed that any pay data collection will be established through a Title VII rulemaking process. This will allow for

robust public comment and input. It will also ensure that the data collected by EEOC is useful in carrying out the agency's mission and that there is not undue burden on respondents.

- **The September 12, 2019 Notice states that “the Commission solicits public comment on its intent to seek PRA approval of Component 1 of the EEO-1 under a new OMB control number to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the Commission’s functions, including whether the information will have practical utility; (2) Evaluate the accuracy of the Commission’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used...”**

**Why doesn’t the September 12, 2019 Notice specifically invite public comment on the EEOC’s decision not to renew Component 2?**

**EEOC Response:** The September 12, 2019 *Federal Register* Notice provides for a 60-day comment period on all topics raised. The EEOC received over 11,000 public comments on the Notice, and almost all of the comments addressed the EEOC’s decision not to renew Component 2. The EEOC posted the comments publicly at <https://www.regulations.gov/document?D=EEOC-2019-0003-0001>



**Andrea Lucas**  
**Nominee to be to be a Member of the Equal Employment Opportunity Commission**  
**U.S. Senate Committee on Health, Education, Labor and Pensions**

**Questions for the Record**  
**April 15, 2020**

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**Question from Senator Scott**

1. Are you in favor of moving forward with a joint employment rule, which would allow for harmonization with recent rules promulgated by the NLRB and the Department of Labor?

Answer to Question 1: The EEOC has announced its intention to issue an NPRM to provide clarity on the question of what actions do, or do not, create a joint employment relationship and to harmonize the EEOC standards on joint employment with rules recently promulgated by the Labor Department and NLRB. I generally support regulatory clarity and consistency and, if confirmed, I would support proceeding with an NPRM that accomplishes these goals. If confirmed, I would consider comments on such a proposed rule with an open mind before deciding how to vote on a potential final rule.

**Questions from Chairman Alexander**

1. There are currently three cases pending before the U.S. Supreme Court that will result in a decision that will govern whether discrimination based on a person's gender identity or sexual orientation in the workplace is covered by Title VII. If you are confirmed, do you commit to following the Supreme Court's decision as to what type of discrimination is covered by Title VII?

Answer to Question 1: Yes, if confirmed, I am committed to enforcing the law as written by Congress and interpreted by the Supreme Court.

2. In the past, EEOC did not seek public comment on their guidance documents prior to publishing them. However, in recent years, EEOC has changed that policy and now takes public comment on guidance documents before they are published. If you are confirmed, will you commit to supporting public comment on guidance before it is published?

Answer to Question 2: Yes. I believe that increased transparency is important, and therefore, if confirmed, I am committed to supporting public comment on EEOC sub-regulatory guidance documents before they are published.

**Nomination of Andrea Lucas, Member, Equal Employment Opportunity Commission  
Questions for the Record, submitted May 1, 2020**

**Responses to Questions from Senator Patty Murray**

1. If confirmed, do you commit to providing briefings on Equal Employment Opportunity Commission (EEOC) business to members of the U.S. Senate Health, Education, Labor, and Pensions (HELP) Committee, including minority members, if requested?

Answer to Question 1: Yes, if confirmed, I am committed to coordinating with the EEOC Chair and my fellow Commissioners to provide briefings.

2. If confirmed, do you commit to answering promptly any letters or requests for information from individual members of the HELP Committee including requests for EEOC documents, communications, or other forms of data?

Answer to Question 2: Yes, if confirmed, I am committed to coordinating with the EEOC Chair and career professional staff to do so, subject to any necessary restrictions in producing information that contains personally identifiable information (“PII”), that is protected from disclosure by statute, is pre-decisional in nature, or to which any other relevant restrictions apply.

3. Do you commit to informing the members of the HELP Committee if you intend to undertake any review or revision of any existing or ongoing EEOC enforcement guidance?

Answer to Question 3: If confirmed, I am committed to coordinating with the EEOC Chair to work with the Committee in its oversight activities.

4. Do you agree that employee access to information regarding pay within a workplace is critical to helping employees determine whether they are being paid less than their peers for discriminatory reasons?

Answer to Question 4: In light of statutory provisions in the Equal Pay Act, Title VII of the Civil Rights Act, the ADEA, and the ADA, the EEOC Compliance Manual recognizes a variety of legitimate factors that may explain pay differences. Transparency of pay data may be useful, provided that the appropriate set of data is disclosed so that it is possible to make meaningful comparisons using that data.

5. Do you agree that employee access to information regarding pay within a workplace should be transparent?

Answer to Question 5: Transparency of pay data may be useful, provided that the appropriate set of data is disclosed so that it is possible to make meaningful comparisons using that data.

6. If confirmed, will you prioritize pay discrimination investigations and ensure that the EEOC continues to pursue litigation against employers for discriminatory pay practices?

Answer to Question 6: If confirmed, I will work with the EEOC's career professional staff, the EEOC Chair, and my fellow Commissioners to ensure that an appropriate amount of the agency's resources are being devoted to enforcement of federal equal pay and pay discrimination laws.

7. What is your opinion of the Office of Management and Budget's (OMB) decision to stay the pay data collection, given that OMB had previously approved the data collection?

Answer to Question 7: I do not have sufficient information about the OMB's processes to respond to this question. If confirmed, I would consult with the EEOC's career professional staff, the EEOC Chair, and my fellow Commissioners to fully understand the administrative history and current substantive and procedural issues surrounding the pay data collection.

8. Do you believe that OMB should fully disclose the basis for its stay, the analysis underlying its conclusion, and the process by which it reached that conclusion, including any outside interest groups with which it consulted?

Answer to Question 8: I do not have sufficient information about the OMB's processes to respond to this question. If confirmed, I would consult with the EEOC's career professional staff, the EEOC Chair, and my fellow Commissioners to fully understand the administrative history and current substantive and procedural issues surrounding the pay data collection.

9. Do you believe that sex-based harassment, including sexual harassment, remains a serious and pervasive barrier to equality, economic security, and workplace safety for women?

Answer to Question 9: Sex-based harassment, including sexual harassment, is a serious issue and an appropriate focus of the EEOC's efforts.

10. If confirmed, what specific steps will you take to combat harassment in the workplace?

Answer to Question 10: If confirmed, I would consult with the EEOC's career professional staff, the EEOC Chair, and my fellow Commissioners to understand ongoing efforts to combat harassment in the workplace, and to identify whether and what additional efforts are needed to prevent such harassment and to appropriately remedy and respond to such harassment if it unfortunately occurs.

11. If confirmed, will you commit to addressing the inappropriate use of mandatory arbitration clauses, which can limit the substantive rights of workers?

Answer to Question 11: If confirmed, I am committed to enforcing federal anti-discrimination laws and to removing any inappropriate barriers to employees seeking to remedy employment discrimination. Although U.S. Supreme Court precedent is clear that employment-related arbitration agreements are enforceable under the Federal Arbitration Act, it is also clear that such agreements do not bind or limit the EEOC, including the agency's ability to investigate in the public interest and to pursue victim-specific relief in litigation on behalf of an employee.

who files a timely charge of discrimination. If confirmed, I would support the EEOC's pursuit of cases on their merits, regardless of the existence of an arbitration agreement between the employer and employee.

12. What were the three most significant cases in which you successfully obtained relief for a worker who brought a workplace discrimination claim? Please also explain why those cases were important to you.

Answer to Question 12: I have dedicated a substantial portion of my practice to pre-dispute and compliance counseling for employers, including counseling related to allegations of workplace discrimination. By its nature, this work is confidential, and therefore I cannot disclose specific matters. But among other things, this work has involved counseling employers on the right answer under the law, including, where appropriate, recommending that an employer should discipline, terminate, or take other corrective action against a supervisor or coworker of a worker raising a workplace discrimination claim and/or take other remedial actions, both in general or specifically with respect to the individual worker raising the claim. In this portion of my practice, I also have assisted employers in instituting or enhancing policies and practices designed to prevent unlawful employment discrimination and harassment, including anti-discrimination and anti-harassment training. In addition, I have advised employers on constructively working with the EEOC, including complying with a multi-million dollar conciliation agreement with the EEOC which, among other things, involved a claims process providing financial awards to hundreds of employees to address employee complaints about alleged workplace harassment and/or retaliation.

13. If confirmed, what steps will you take to eliminate barriers in recruitment and hiring that discriminate on the basis of race, ethnicity, sex (including sexual orientation and gender identity), origin, language, and disability?

Answer to Question 13: If confirmed, I would consult with the EEOC's career professional staff, the EEOC Chair, and my fellow Commissioners to understand ongoing efforts to address discrimination on the basis of protected characteristics, including via impermissible barriers in recruitment and hiring, and to identify whether and what additional efforts are needed to address any such discrimination.

14. Do you agree with EEOC's position in *Lusardi v. Dep't of the Army* (EEOC Appeal No. 0120133395, March 27, 2015) that denying employees access the restroom matching their gender identity is sex discrimination?

Answer to Question 14: The scope of Title VII of the Civil Rights Act is a question currently pending before the U.S. Supreme Court. If confirmed, I am committed to enforcing the law as written by Congress and interpreted by the Supreme Court.

15. Do you agree with EEOC's position in *Macy v. Dep't of Justice* (EEOC Appeal No. 0120120821, April 20, 2012) that discrimination against someone because they are transgender is a form of sex discrimination?

Answer to Question 15: The scope of Title VII of the Civil Rights Act is a question currently pending before the U.S. Supreme Court. If confirmed, I am committed to enforcing the law as written by Congress and interpreted by the Supreme Court.

16. Do you commit to advancing the current EEOC position that Title VII of the Civil Rights Act prohibits employers from discriminating on the basis of sexual orientation and gender identity in circuit courts where the question has not been decided?

Answer to Question 16: The scope of Title VII of the Civil Rights Act is a question currently pending before the U.S. Supreme Court. If confirmed, I am committed to enforcing the law as written by Congress and interpreted by the Supreme Court.

17. The EEOC's Strategic Enforcement Plan for Fiscal Years 2017-2021 currently protects "lesbians, gay men, bisexuals, and transgender (LGBT) people from discrimination based on sex." Do you intend to amend the inclusion of protections for LGBT workers in the strategic enforcement plan?

Answer to Question 17: The scope of Title VII of the Civil Rights Act is a question currently pending before the U.S. Supreme Court. If confirmed, I am committed to enforcing the law as written by Congress and interpreted by the Supreme Court.

18. Courts have long held that legal prohibitions against sex discrimination, including in Title VII of the Civil Rights Act, prohibit discrimination against women for their reproductive health decisions, including abortion.
- If confirmed, will you abide by this longstanding precedent that Title VII of the Civil Rights Act protects against discrimination for reproductive health decisions, including abortion?
  - If confirmed, will you commit to bringing cases against entities that engage in such discrimination based on reproductive health decisions, including abortion, if the facts support such allegations of discrimination?

Answer to Question 18: I have not reviewed the case law in this area to know whether and which courts have defined sex discrimination, including under Title VII of the Civil Rights Act, to include discrimination based on reproductive health decisions, although I am generally aware that Title VII, as amended by the Pregnancy Discrimination Act, defines sex discrimination to include discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions." If confirmed, I am committed to enforcing the law as written by Congress and interpreted by the Supreme Court, as well as interpreted by applicable lower courts in the absence of relevant Supreme Court precedent. If confirmed, I also will work with the EEOC's career professional staff, the EEOC Chair, and my fellow Commissioners to ensure that an appropriate amount of the agency's resources are being devoted to enforcement of sex discrimination laws, including bringing litigation where warranted by the merits of any particular case.

19. What do you think is the appropriate balance of control over cases between EEOC Commissioners and the General Counsel?

Answer to Question 19: I am aware that in March 2020, the Commission modified the delegation of litigation authority from the EEOC Commissioners to the General Counsel. Congress granted the Commission itself the authority to commence or intervene in litigation, and it is my understanding that the recently modified delegation of litigation authority is consistent with that Congressional authority. That said, if confirmed, I would work with the EEOC's career professional staff, the EEOC Chair, the General Counsel, and my fellow Commissioners to better understand the current delegation of cases between EEOC Commissioners and the General Counsel, including learning more about how the new balance of litigation authority is working in practice.

20. EEOC has reportedly directed staff to close charges without full investigations, asserting it has to focus its limited resources “on charges where the government can have the greatest impact on workplace discrimination.” What kinds of charges do you think fall within that category? What kinds of charges do not? Do you believe EEOC investigators should continue to reduce the number of full-fledged investigations conducted each year?

Answer to Question 20: I am not familiar with these reports, and I do not have sufficient information about the EEOC's internal processes, including any guidance to front-line staff regarding the handling and investigation of charges, to respond to this question. If confirmed, I would consult with the EEOC's career professional staff, the EEOC Chair, and my fellow Commissioners to learn more about internal guidance on processing charges and to ensure that an appropriate amount of the agency's resources are being devoted to enforcing federal discrimination laws, including investigating charges.

21. What guidance do you believe EEOC should provide to employers to help them better understand their obligations related to employees who are vulnerable to discrimination?

Answer to Question 21: Earlier this year, Chair Dhillon announced that one of her five priorities in 2020 will be to enhance the EEOC's efforts to reach vulnerable workers, including by making adjustments as necessary to ensure that the EEOC is identifying, reaching, and effectively serving—through outreach, enforcement, and litigation—vulnerable workers. If confirmed, I am committed to learning more about the EEOC's current efforts and any existing or potential guidance in this area, including by consulting with the EEOC's career professional staff and my fellow Commissioners.

22. Subregulatory guidance can be helpful for regulated entities to learn, in detail, how to comply with the law. What is your position on the EEOC's use of subregulatory guidance?

Answer to Question 22: Subregulatory guidance may play a helpful role in explaining the law in a manner that is understandable to regulated entities, workers, and other stakeholders.

23. Given the importance of the EEOC systemic litigation program, if confirmed will you commit to continuing to pursue coordinated, systemic litigation on behalf of individuals subject to discriminatory patterns, practices, or policies?

Answer to Question 23: If confirmed, I would consult with the EEOC's career professional staff, the EEOC Chair, and my fellow Commissioners to better understand the current balance of resources being allocated to systemic investigations and litigation versus addressing the current backlog of individual charges, and to ensure an appropriate amount of resources is being devoted to each type of litigation.

24. Will you pledge that under your leadership the EEOC will not reduce its systemic litigation efforts?

Answer to Question 24: If confirmed, I would consult with the EEOC's career professional staff, the EEOC Chair, and my fellow Commissioners to better understand the current balance of resources being allocated to systemic investigations and litigation versus addressing the current backlog of individual charges, and to ensure an appropriate amount of resources is being devoted to each type of litigation.

25. The EEOC issued its criminal history guidance in 2012. In your opinion, what is the appropriate use of criminal history background checks in an employment application process? When is it unlawful or discriminatory for an employer not to hire workers with criminal histories?

Answer to Question 25: Because an injunction to the EEOC's guidance in this area was recently upheld by the Fifth Circuit in *Texas v. EEOC, et al.*, I do not believe it is appropriate for me to respond to this question. I also am aware that significant sanctions have been assessed as a result of the EEOC's efforts to enforce this guidance through litigation. If confirmed, I would consult with the EEOC's career professional staff, the EEOC Chair, and my fellow Commissioners to better understand the EEOC's enforcement efforts in this area and the issues surrounding the guidance.

26. What initiatives will you undertake to combat discrimination and xenophobia in the workplace as a result of COVID-19?

Answer to Question 26: The EEOC has recently updated its pandemic-related guidance regarding the ADA and the Rehabilitation Act to address examples and information regarding COVID-19, as well as provided multiple updates to a supplemental technical assistance question and answer document addressing COVID-19-related issues relating to the ADA, the Rehabilitation Act, and other equal employment opportunity laws. Chair Dhillon has also issued a statement about unlawful national origin and race discrimination arising out of the COVID-19 pandemic. If confirmed, I would work with the EEOC's career professional staff, the EEOC Chair, and my fellow Commissioners to learn more about the EEOC's efforts in response to COVID-19-related issues, and determine what other initiatives may be necessary and appropriate.

27. How will you ensure the timely processing of incoming complaints due to COVID-19- related discrimination?

Answer to Question 27: If confirmed, I would work with the EEOC's career professional

staff, the EEOC Chair, and my fellow Commissioners to determine how best for the agency to timely address both incoming complaints due to COVID-19-related allegations, as well as the existing backlog of charges.

28. Will you work to produce guidance to discourage discrimination in the workplace as a result of an employee's presumptive COVID-19 status? If so, what additional guidance should the EEOC issue?

Answer to Question 28: As noted in response to Question 22, subregulatory guidance may play a helpful role in explaining the law in a manner that is understandable to regulated entities, workers, and other stakeholders. If confirmed, I would consult with the EEOC's career professional staff, the EEOC Chair, and my fellow Commissioners to determine whether and what potential guidance might be necessary and appropriate for the EEOC to issue regarding discrimination resulting from an employee's presumptive COVID-19 status.

29. If confirmed, what steps will you take to encourage productive bargaining between EEOC and the EEOC Union when negotiating new collective bargaining agreements?

Answer to Question 29: I am not familiar with the EEOC Union and do not have sufficient information about the EEOC's bargaining processes with the union to respond to this question. If confirmed, I would consult with the EEOC's career professional staff, the EEOC Chair, and my fellow Commissioners to learn more about this issue and how best to encourage productive negotiation of any new collective bargaining agreements with the EEOC Union.



**Jocelyn Samuels**  
**Nominee to be to be a Member of the Equal Employment Opportunity Commission**  
**U.S. Senate Committee on Health, Education, Labor and Pensions**

**Questions for the Record**  
**April 15, 2020**

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**Question from Senator Scott**

1. Are you in favor of moving forward with a joint employment rule, which would allow for harmonization with recent rules promulgated by the NLRB and the Department of Labor?

One important role played by the EEOC is to provide guidance, technical assistance and public education to promote understanding of applicable standards and voluntary compliance with the law. I am aware that the EEOC listed the issue of joint employers on its regulatory agenda in November 2019. If I am fortunate enough to be confirmed, I look forward to working with my fellow Commissioners, EEOC staff, and external stakeholders to further understand the issue and provide appropriate guidance under the law.

**Questions from Chairman Alexander**

1. In a 2019 CNN article, where you discussed Title VII and the Title VII cases pending before the U.S. Supreme Court, you stated “the Court’s decision in the pending cases will govern the protections that LGBT people receive in the workplace....” If you are confirmed, do you commit to following the Supreme Court’s decision as to what type of discrimination is covered by Title VII?

Yes.

2. In a 2018 article you authored, you stated “it’s of course important to strike a careful balance between religious liberty interests and civil rights — both are fundamental principles that underlie our democracy.” Can you explain how you would approach balancing those sets of rights when enforcing anti-discrimination laws if you are confirmed?

Religious liberty and civil rights protections both reflect core foundational principles of our democracy. In cases in which those principles conflict, I am committed to serious, thoughtful consideration of all equities in working to identify ways to accommodate competing interests consistent with the law. I am also committed to enforcing Title VII’s provisions relating to religious liberty, including with regard to religious employers and reasonable accommodation for religious beliefs and practices, as well as the ministerial exemption.

3. In the past, EEOC did not seek public comment on their guidance documents prior to publishing them. However, in recent years, EEOC has changed that policy and now takes public comment on guidance documents before they are published. If you are confirmed, will you commit to supporting public comment on guidance before it is published?

Consistent with applicable law, I believe that the Commission's procedures for developing guidance should provide sufficient advance notice to the public, and sufficient specificity about the issues addressed, to enable stakeholders to provide meaningful input before the guidance is finalized. If I am fortunate enough to be confirmed, I look forward to learning about the mechanisms the Commission has in place to obtain that input.