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September 18, 2012

VIA EMAIL at strategic.plan@eeoc.gov
Executive Officer, Office of the Executive Secretariat
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, D.C. 20507

Re: **ACLU Comments on EEOC Strategic Enforcement Plan (Draft 9.4.12 Version)**

To Whom It May Concern:

On behalf of the American Civil Liberties Union (ACLU), a national non-partisan civil liberties advocacy organization consisting of over a half million members, countless additional activists and supporters, and 53 affiliates nationwide, we write to thank you for releasing a draft Strategic Enforcement Plan (SEP) for public comment. We appreciate the opportunity to comment as you undertake the important process of developing a plan to effectively enforce anti-discrimination laws that ensure freedom from discrimination in the workplace.

In June, we joined a coalition letter from the Lawyers' Committee for Civil Rights Under Law, which made recommendations for strengthening enforcement through development of the SEP, as required by the Strategic Plan adopted in February 2012. In particular, the coalition recommended that the Commission focus its resources on the systemic litigation of problems that affect many people, that the Commission identify priorities and put charges of discrimination falling within those priorities on a fast track to enforcement, that the Commission use the private bar more effectively in furthering its goals, and that the Commission partner with more outside organizations in its outreach to workers.

We are pleased that the Commission has drafted an SEP that addressed many of our comments, and takes a targeted approach to enforcement by identifying important priority issues and setting parameters for determining the focus of coordinated enforcement efforts. We commend the Commission for carefully crafting a list of issue priorities in Section III of the SEP, and now write to suggest ways to further strengthen and improve that list in the final version of the SEP.

I. Section III. A. – Criteria for Determining Priorities

In section III.A, which outlines the criteria used to identify national enforcement priorities, the Commission lists "issues that will have a broad impact because of the number of individuals or employers affected" as one determining factor. We strongly support the practice of focusing resources on cases or issues that stand to benefit the greatest number of people by ensuring that large-scale discriminatory practices are stopped and remedied. To this end, we would recommend adding additional language that clarifies how disparate impact cases, which are by definition systemic in nature, fit into this framework, and emphasizing the importance of prioritizing them.

II. Section III. B – Nationwide Priorities

A. Section III.B.1 – Eliminating Systemic Barriers in Recruitment and Hiring

We are glad that the EEOC has designated barriers to recruitment and hiring as one of its priority areas and support EEOC's recognition that, often, it is well-positioned to bring such cases where it already has access to data, documents, and evidence of potential discrimination. As part of this work, we hope that the EEOC will also vigorously enforce the new guidance relating to employment of those with arrests and criminal records, and should undertake employer education to ensure that employers comply with Title VII's anti-discrimination mandate when they undertake background checks.

B. Section III.B.2 - Protecting Immigrant, Migrant, and Other Vulnerable Workers

We thank you for standing up for the rights of groups that are particularly susceptible to employer abuse and least likely to have the tools to fight back. Recognizing that many of the issues you list, including disparate pay, job segregation, and harassment, impact groups other than immigrant and migrant workers, we would also encourage you to expand this category to clearly include other vulnerable populations.

For example, the problem of pay disparity based on sex is a serious and widespread issue of systemic discrimination. Nearly 50 years after passage of the Equal Pay Act, women still make just 77 cents for every dollar earned by men, and the pay gap is even wider for women of color. Because nearly half of American workplaces either discourage or specifically prohibit employees from discussing their pay, it is often impossible for women to find out that they are being paid less than their male counterparts—making this type of discrimination particularly insidious and difficult to combat. Since retaliation in this area is not prohibited nationwide for all workers and women may have little access to information, the Commission's role is particularly critical. The Commission should ensure that class actions, including disparate impact cases, involving pay equity issues are treated seriously and prioritized, as they directly impact a large number of families for whom women are an ever-increasing percentage of breadwinners.

C. Section III.B.3 - Addressing Emerging Issues

We commend the Commission for identifying a number of important emerging issues to be prioritized nationwide, including LGBT coverage under Title VII, accommodations for pregnant workers, and coverage issues for workers with disabilities under the ADA Amendments Act – all vital areas requiring the Commission's attention as both the workforce and legal landscape continue to change and evolve. Below, we recommend a few additions in prioritizing emerging areas.

1. *LGBT Discrimination*

We support the inclusion of coverage for LGBT individuals under Title VII's sex discrimination provisions as such a priority. Following the Commission's important ruling in *Macy v. Holder*[1] earlier this year, this is a logical, though nonetheless significant, next step. The ACLU specifically recommends that the Commission, consistent with its responsibility to lead the federal government's efforts to end workplace discrimination through the development of uniform standards defining the nature of sex discrimination under federal statutes, Executive Order 12067, 43 F.R. 28967, § 1-301(a) (June 30, 1978), develop and issue guidance and best practices for private, state and local employers' compliance with Title VII's prohibition on sex discrimination against transgender employees.

The guidance and best practices should specify standards for compliance with Title VII with respect to confidentiality and privacy, dress and grooming codes, name and pronoun usage, bathroom and locker room usage, and record-keeping and could be patterned after the U.S. Office of Personnel Management's *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*. We additionally recommend the inclusion of coverage for LGBT individuals under Title VII's sex discrimination prohibition in the Commission's education and outreach plans and the incorporation of discrimination against LGBT persons into the Commission's research plan.

2. *Pregnancy Discrimination*

The Commission designated "accommodating pregnancy when women have been forced onto unpaid leave after being denied accommodations routinely provided to similarly situated employees" as an emerging issue and enforcement priority. We applaud the Commission for focusing on this pressing problem, and committing to enforcing laws prohibiting discrimination against pregnant workers.

Employers often respond to minor restrictions on pregnant workers' physical activities – such as a restriction on how much weight they can lift, or an instruction to drink water frequently – by terminating them or placing them on involuntary leave, even though the employer may accommodate other, similarly restricted workers by providing them with modified job assignments during their temporary disability. This problem is particularly urgent for low-wage and blue-collar women workers, whose jobs are more likely to entail

[1] *Macy v. Holder*, EEOC Appeal No. 0120120821, Agency No. ATF-2011-00751 (Apr. 20, 2012) (finding that discrimination based on gender identity, change of sex, and/or transgender status is cognizable under Title VII).

physical labor. Sometimes employers trigger Family and Medical Leave Act (FMLA) violations by forcing pregnant workers onto unpaid leave so that they run out of FMLA-protected leave.

In implementing this enforcement priority, the Commission should issue guidance that employers must extend the same treatment to pregnant workers – including modified duty and light duty assignments – as the employer extends to any other temporarily disabled workers, including those injured on the job, those covered by the ADA, and any other workers similar in their ability or inability to work. Consistent with the Commission's desire to prioritize enforcement efforts that will have a broad impact, the Commission should bring enforcement actions and Commissioners' Charges against larger employers whose company-wide policies and practices violate the Pregnancy Discrimination Act (PDA) by routinely forcing pregnant workers into unpaid leave, while accommodating other workers. The Commission should also coordinate with the Department of Labor to address employer policies and practices that implicate the intersection of Title VII, the PDA, and the FMLA.

Similarly, many women who return to work after having a child face significant discrimination, including refusal of requests to pump breast milk, or retaliation for making such requests, or for using break time to pump. These barriers are experienced at all levels of the economic spectrum, but they can be especially difficult to surmount for low-income women, who typically work on an hourly basis, with less flexibility, less privacy, and fewer benefits (such as paid parental leave) than their counterparts in the professions. Accommodating breastfeeding and lactation is an important part of combating discrimination against women in the workplace. We encourage the Commission to continue to address this emerging issue, and incorporate it as a priority in the SEP. The Commission should issue guidance clarifying that discrimination against breastfeeding workers, such as denying them minor workplace adjustments, is prohibited by Title VII as amended by the PDA.

3. *Religious and National Origin Discrimination*

Finally, regarding the example of a past emerging trend in section III B. 3, we applaud the EEOC's work to address the spike in workplace discrimination based on actual or perceived religion and national origin following the attacks of September 11, 2001. As the Commission has recognized, workplace discrimination experienced by individuals who are - or are perceived to be - Muslim, Sikh, Arab, Middle Eastern or South Asian is, unfortunately, not in decline, but rather has steadily risen. The number of EEOC charges is now even higher than following September 11, 2001. We urge the EEOC to continue its administrative and legal enforcement of charges and cases alleging this sort of discrimination. This trend, regrettably, is no longer "emerging," but is persistent and merits continued emphasis and attention.

D. Section III.B.4 - Preserving Access to the Legal System

In order for individuals to exercise their rights effectively, it is critically important for EEOC to prioritize combatting policies and practices that interfere with access to the legal

system. In particular, conducting targeted outreach to employers and employees about retaliation practices could help create an environment where workers are less fearful of voicing concerns and employers are more willing to take voluntary remedial action, with the goal of reducing charges. If litigation must proceed, we suggest expanding the list of examples of policies and practices that might prohibit individuals from enforcing their workplace rights to include chilling discovery practices. Discovery practices that are designed to chill enforcement by vulnerable populations, such as immigrant workers, are a serious threat to the Commission's ability to enforce the law because they discourage workers from seeking help.

Conclusion

The ACLU strongly supports the Commission's development of a plan for smart, targeted enforcement of workplace anti-discrimination laws that efficiently and effectively allocates EEOC's resources. The draft SEP represents an important step forward in reaching the Commission's goal of ensuring justice and equality in the workplace, and we thank the Commission for the opportunity to provide recommendations for improving it.

Please feel free to contact Senior Legislative Counsel Deborah J. Vagins at (202) 675-2335 or dvagins@dcaclu.org to discuss this matter further. Thank you for your consideration.

Sincerely,

Michael W. Macleod-Ball
Acting Director, Washington Legislative Office

Deborah J. Vagins
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