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June 19, 2012

Hon. Jacqueline Berrien, Chair
Equal Employment Opportunity Commission
131 M Street, N.E.
Washington, D.C.

Hon. Constance Barker, Commissioner
Equal Employment Opportunity Commission
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Hon. Chai Feldblum, Commissioner
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131 M. Street, N.E.
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Hon. Victoria Lipnic, Commissioner
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Re: EEOC Strategic Enforcement Plan

Dear Chair Berrien and Commissioners:

Thank you for inviting comments on the Commission's development of a new Strategic Enforcement Plan to guide its enforcement efforts over the period 2012-2016. This letter is submitted on behalf of the organizations that are identified below, many of which are participants in the Employment Task Force of the Leadership Conference on Civil and Human Rights.

We wholeheartedly support the Commission's emphasis on systemic litigation as a major priority in the legal enforcement program as set forth in the Strategic Plan adopted by the Commission in February 2012. We also support the Commission's strategy of improving case management of priority matters. Below we offer a number of suggestions, that are informed by the experiences of our organizations and their members, which we believe could facilitate and enhance the Commission's implementation of its Strategic Plan. We also encourage the Commission to leverage the resources available within the private bar by establishing procedures for working with the private bar, particularly in connection with the priorities identified in the Strategic Enforcement Plan. Finally, we support the Commission's intention to use community based organizations in outreach efforts directed to vulnerable workers and underserved communities and we urge that the Commission include national membership based organizations in establishing such partnerships for outreach efforts.

I. The Commission Should Concentrate Resources to Target Problems and Issues that Affect Large Numbers of Workers and/or on Problems and Issues that the Commission Can Address More Effectively than Private Parties working through Private Legal Counsel.

Our organizations strongly endorse the Commission's emphasis on systemic litigation (operationally defined by the Commission as cases involving 20 or more employees). The Commission described this emphasis in the FY 2013 Budget Justification to Congress:

... the Commission will continue to place a high priority on bringing suits challenging systemic discrimination. Recognizing its resource limitations, the Commission has long emphasized that the litigation program should focus on issues which have the potential to impact multiple workplaces or large groups of employees, address emerging or novel issues where the agency's expertise may be especially critical to achieving a successful outcome, and encompass individual cases where broader law enforcement goals can be advanced with the successful resolution of the case. (Page 28)

There are a number of particular types of discrimination our organizations have identified where the Commission's resources, ability to access information and procedural advantages place it in a much better position than private parties to pursue litigation. We note a number of examples:

- Issues in Hiring: Hiring discrimination is extremely difficult for individuals to prove. The investigative powers and other resources of the Commission give it the ability to accumulate the systematic evidence of hiring patterns to which private individuals cannot easily obtain access prior to initiating litigation. In light of the current pleading standards imposed by some federal courts,¹ it is critical for parties challenging hiring discrimination to have a substantial factual basis before seeking to bring the matter before the court. In most circumstances, only the Commission has the resources to gather this information.
- Issues involving Pattern and Practice Discrimination: The Supreme Court's decision last year in *Wal-Mart v. Dukes*² has created many barriers to private plaintiffs' ability to successfully pursue Rule 23 class actions or pattern-or-practice lawsuits. Although a few district courts have been receptive to imposing the strictures of the *Wal-Mart* analysis on the Commission in its pattern-or-practice lawsuits, our organizations believe there is no sound legal basis for applying any of the *Wal-Mart* limitations to pattern-or-practice matters brought by the Commission since Rule 23's requirements are inapplicable in pattern or practice cases brought by the Commission. Given the increasing difficulties for private plaintiffs to meet the current standards for certifying a class in employment

¹ See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

² 131 S.Ct. 2541 (2012).

discrimination actions, the Commission's ability and willingness to bring pattern-or-practice suits has assumed greater importance than ever.

- Cases involving Disparate Impact Discrimination: Disparate impact cases that, by definition are systemic in nature, and should have priority in the Strategic Enforcement Plan include cases involving non-job related physical hiring requirements that have an adverse impact on female applicants³, the exclusion of applicants or employees based on criminal or credit histories unrelated to the job at issue,⁴ employment policies and practices that have a disparate impact based on pregnancy and pregnancy-related status and policies and practices that have a disparate impact on workers with disabilities.⁵
- Issues involving systematic pay disparities: the Commission's resources also are needed for enforcement actions, utilizing Title VII, the Equal Pay Act, or both, against employers with widespread pay inequities between male and female employees that are unexplained by gender neutral factors.⁶

Our organizations also believe that the priorities for Strategic Enforcement Plan litigation should include defining the contours of newly enacted legislation and evolving law consistent with the litigation priorities stated by the Commission in the FY 2013 Budget Justification to Congress (page 29), and enforcing, through litigation, recently announced policy developments. Some examples include:

- The Americans With Disabilities Act Amendments Act (ADAAA) enacted in 2009. As discussed above, enforcement efforts under the ADAAA should include addressing the interaction of the ADAAA and the Pregnancy Discrimination Act (PDA), making explicit that, in many instances, employers' duty to accommodate under the amended Americans With Disabilities Act (ADA) will extend to a duty to accommodate women who require adjustments to work rules as a result of pregnancy or childbirth.
- The Commission has recognized discrimination due to an individual's transgender status as discrimination "because of her sex." Closely related is the need for the Commission to

³ The Department of Justice is currently prosecuting a case on behalf of women in Massachusetts that challenges on disparate impact grounds the physical abilities test the Commonwealth administers to applicants for correctional officers with the Massachusetts Department of Corrections. *United States v. Commonwealth of Massachusetts*, Civil Action No. 1:09-cv-11623 (filed 9/28/09).

⁴ See Enforcement Guidance on Consideration of Arrest and Conviction Records in Employment Decisions, adopted April 25, 2012. The Commission should enhance the effectiveness of enforcement with respect to credit history disqualifiers by issuing enforcement guidance on credit history records.

⁵ People with disabilities have an unemployment rate that is 85% higher than the rest of the population (according to 2011 Dept of Labor data).

⁶ As with hiring cases, pay disparity cases are very difficult for private parties to bring because most employers refuse to share compensation information among their employees and prohibit employees from disclosing information about their own compensation to each other.

enforce protection of individuals who suffer discrimination based on stereotypes regarding same-sex sexual orientation.⁷

In addition, our organizations urge the Commission to include with the priorities of the Strategic Enforcement Plan other issues that are recognized as affecting large numbers of workers, such as the discrimination against pregnant workers and caregivers (as discussed below) that was the subject of a recent Commission meeting. Specifically:

- We urge the Commission to make enforcement of laws prohibiting discrimination against pregnant workers a priority. Enforcement of the PDA is particularly necessary given recent amendments to the ADA that have important implications for pregnant workers. The ADA now requires accommodation of many employees with disabilities that render them, in their ability or inability to work, similar to employees with typical pregnancy symptoms. Challenges to employers' discriminatory provision of light duty assignments, paid leave, and other workplace accommodations that adversely impact pregnant women should be a particular focus of the Commission. Title VII also protects workers from discrimination based on sex-linked traits such as lactation, and explicitly ensures that it will be interpreted to cover conditions related to pregnancy and childbirth. The Commission should continue to enforce Title VII's protections that prohibit discrimination against women who are lactating or pumping breastmilk at work.
- The Commission should vigorously enforce Title VII with respect to employers that discriminate against caregivers and those who take time off or work a reduced schedule to engage in such care. Frequently such discrimination is rooted in gender stereotypes about the proper family caretaker roles of men and women.

Finally, the Commission should take a vigorous enforcement position with employers who force their employees into arbitration with class waivers.

⁷ The Commission's enforcement of protections for transgender individuals could also be enhanced by issuing guidance for employers' compliance with Title VII through adopting workplace standards related to transition in the workplace, dress and grooming codes, pronoun usage, and bathroom usage.

II. The Commission Should Create Processing Protocols that Identify Early Those Charges of Discrimination Within the Scope of Strategic Enforcement Plan and Process Those Charges Expeditiously.

Strategy I.A.2 of the Strategic Plan for 2012-2016 states that the Commission will “Rigorously and consistently implement charge and case management systems to focus resources and enforcement on the EEOC’s priorities.” We wholeheartedly endorse this broad objective statement, and we encourage the Commission to consider the adoption of specific steps that will expedite processing of Charges that fall within the scope of the Plan’s priorities. Such steps include, but are not limited to, the following: (1) improving efforts to identify such Charges early and consistently; (2) assigning priority Charges to experienced investigators; (3) creating clear channels for investigators to seek and receive assistance from staff attorneys from the very beginning of the investigation through final disposition; and (4) establishing target time frames for Charge dispositions that will enable the Commission to move to enforcement action more promptly.

For the Plan to achieve maximum effectiveness in enforcement, the Commission should adopt procedures for moving Charges of Discrimination from intake process to enforcement expeditiously. The pace of Commission investigations and the length of time required for the Commission to decide whether to bring enforcement actions has traditionally been a source of frustration for employees, employers, and private legal counsel for both the complainant and respondent. The Commission has made gradual progress in increasing the percentage of Charges in which investigations are concluded within the target 180 days, but the experience of our organizations is that this target is met primarily with Charges where disposition is either an individual monetary settlement (e.g., via early mediation), issuance of a Notice of Right to Sue without a determination, or where the Commission, with little investigation, determines there is “no reasonable cause” that the Charging Party suffered discrimination. The decision for the Commission to find probable cause or to initiate an enforcement action consistently takes much longer, even in individual cases, which we understand have traditionally been more than 90% of the enforcement actions The Commission has filed.⁸

The Commission’s selection in the Strategic Enforcement Plan of issues to which to devote priority attention and resources can provide the impetus for the Commission to explore alternate administrative techniques to expedite investigations and decisions in these critical areas. We recommend that the Commission include in the Strategic Enforcement Plan a *commitment to*

⁸ One source of this statistic is the Budget justification submitted to Congress a few months ago, where the Commission states that the goal in the near future is to initiate 209 litigation enforcement matters each year, with twenty of those being “systemic” matters that involve alleged discrimination affecting at least 20 workers. FY 2013 Budget Justification.

expedited processing of Charges of Discrimination that are within the scope of the Plan's priorities and identify specific procedures for achieving expedited processing.

Detailed specification of appropriate administrative methods is beyond the scope of these comments, but based on the experience of many private counsel who have represented parties before the, we offer the following suggestions for the Commission's consideration in its development of processing protocols for priority Charges:

- Develop checklists⁹ that are based on the specified characteristics; where the Commission's technical environment permits, these checklists could be completed on each Charge in a web-based database; alternatively, the checklist could be completed in hard copy in reference manuals available to relevant staff.¹⁰
- Involve experienced staff attorneys to assist investigators in the drafting of pro se priority charges. Frequently, charging parties presenting charges raising systemic claims will contact the EEOC pro se. These unrepresented charging parties will rely on EEOC intake workers or investigators in drafting their charges of discrimination. The experience of many private attorneys who are subsequently retained by the pro se charging parties is that the EEOC will have drafted the charge in narrow terms that effectively preclude or make it very difficult for the charging party to litigate the claims on a class basis or pursue the claim under all available theories of discrimination.
- Using the checklists completed on each Charge, develop procedures for early review – for example, by an experienced supervisor – of Charges with priority for enforcement and *prompt assignment of these Charges to experienced investigators.*
- Designate one or more experienced staff attorneys in each office to consult with investigators on “priority Charges” at an early stage of the investigation to assist in identifying information the investigator should request from the employer and to provide advice or assistance in formulating and drafting requests for information, and establish benchmarks for the percentage of “priority Charges” for which each investigator should request assistance from staff attorneys in formulating requests to the employer for information.
- Alert investigators to the special requirements for record-keeping and affirmative action plans that Executive Order 11246 imposes on employers who have substantial contracts

⁹ The use of checklists has been found to be extremely effective in improving the reliability of performance and efficient completion in providing many services. For a discussion of the use of checklists in medical practice, see Atul Gawande, *The Checklist Manifesto: How to Get Things Right* (2011).

¹⁰ If web-based databases are not available, perhaps hard copy forms could be developed that could be processed by optical scanning machines, similar to counting votes in many modern elections.

with federal agencies and train investigators in effective means of incorporating in requests for information the types of data required to be maintained by those employers under Executive Order 11246.

- Instruct investigators to solicit from experienced Title VII attorneys representing complainants *suggestions for information to request of the employer* and encourage inclusion of the suggested requests in the investigator's submissions to the employer.
- Revise the Commission's current practice that limits disclosure of the respondent's Position Statement to the complainant or his or her attorney and instead require the investigator to *provide a copy of the employer's Position Statement to the employee* to enable the employee to respond as fully as feasible.
- To assure timely completion of the investigation: (i) establish a benchmark time frame (e.g., 180 days for individual or multiple named Charging Parties, one year for class actions, pattern-or-practice Charges or other systemic investigations) as a *target for completing the initial investigation and preparing a recommendation*, which recommendation either explains a proposed disposition or describes and justifies a proposed extension of time for the investigation; (ii) encourage investigators to consult with one of the designated staff attorneys for assistance in assessing what recommendation to make, particularly in those cases where a Charging Party is represented by experienced Title VII counsel who has submitted arguments in support of (1) an enforcement action by the Commission, (2) a finding of reasonable cause, and/or (3) specific additional investigation of the Charge.

The Commission's staffing levels are inadequate to process the volume of Charges of Discrimination filed each year. This has allowed the existing persistent pattern and deficiencies of investigations to evolve and continue. That pattern, in the experience of our member organizations, often includes investigations interminably delayed and then ended without substantial explanation; investigations that fail to produce sufficient data to enable the employee and her counsel to make an informed evaluation of the strength or weaknesses of the case; systemic investigations that drag on for four or five years without any established deadline for final Commission action, or continued investigation by the EEOC well after the private parties have settled the case.¹¹ (One former employee of the Commission remembers a systemic investigation that was terminated many years ago – with no action taken – over the objection of staff who wanted to continue the investigation that had been pending for 13 years.)

¹¹ Under the latter scenario, the EEOC's inability or refusal to close the case often results in a delay in the complaint obtaining the relief agreed upon in the private parties' settlement, since the employer, understandably, often predicates settlement of the charging parties' claims, upon closure of the EEOC investigation.

In contrast, if the priorities of the Strategic Enforcement Plan are limited in number, with the scope of the priorities clearly described, it should be feasible for the Commission to adopt alternative administrative measures like those set forth above. We have tried to focus attention on proposals that would provide simple, objective criteria to improve efficiency and provide a basis for holding staff accountable for performance, without creating goals for substantive outcomes that could skew the quality of the evaluation of individual cases. Specific protocols and procedures must be developed by Commission staff, with the aid of appropriate consultants.

III. The Commission Should Create Effective Methods for Investigations and Enforcement Actions Conducted by the Commission to Enhance the Ability of the Private Bar to Further the Objectives of the Strategic Enforcement Plan.

The Commission has a staff of about seven hundred investigators and a few hundred attorneys. There are thousands of attorneys in private practice and working with advocacy organizations and legal services programs who regularly represent charging parties before the Commission. A substantially larger number of corporate and in-house attorneys advise and represent employer-respondents.

One of the Commission's considerations in fashioning the Strategic Enforcement Plan should be to harness the experience and resources of these attorneys and organizations to achieve the goals of the Plan. To this end, the Plan should include measures that enable respondents' counsel to serve their clients more effectively and to motivate employers to voluntarily adopt new employment policies and practices that are consistent with and further the goals of the priority issues in the Plan.

As suggested above in Section II, one of the best motivators of improved compliance by employers is prompt, vigorous enforcement actions by the Commission on behalf of complainants who file meritorious Charges of Discrimination. Measures, such as those outlined in Section II, that will enhance the efficiency and effectiveness of, and expedite investigations and decisions to initiate enforcement actions should motivate employers to correct discriminatory employment practices.

Attorneys representing charging parties file thousands of employment discrimination cases in federal courts each year. There is also a brisk practice in some state courts under state fair employment practices acts. Cases brought by private counsel far outnumber the Commission's annual filings of fewer than 300 cases (many of the new cases filed each year by the Commission being settled at the time of filing or shortly thereafter). The Commission projects reducing this number to about 200 new cases per year while increasing the number of systemic matters from 14 in FY 2011 to a goal of 20 in FY 2012 and 2013. (FY 2013 Budget Justification at page 29.) We offer the following suggested ways the Commission can enhance the effectiveness of private parties and their attorneys serving as "private attorneys general" in the enforcement of fair employment laws:

- The Commission could contribute greatly to cooperation with private counsel by establishing a unit of attorneys in the national office that would serve as a conduit or liaison between private counsel – both for employees and employers – who encounter non-responsiveness from investigators on priority Charges. Such a unit could develop standard policies and practices for aiding counsel in getting timely and straightforward responses from the investigative staff. One function of such a unit might be to give the national office a sense of whether there are patterns of inadequate investigations in some field offices that could profitably be addressed through additional training, closer supervision or other means. The unit also might be used to assess whether investigations need to be transferred to more experienced investigators, or to suggest or direct the investigator to seek the assistance of designated attorneys who are responsible for providing early consultation on priority Charges. Either of these practices would serve the dual function of providing (1) the private bar with an identifiable entity within the Commission to contact whenever an investigation that is supposed to have priority lapses into prolonged inaction or non-responsiveness and (2) the Chair and the Commissioners with a contact point for assessing the quality of investigations across the Commission’s many diverse regions.
- Attorneys for charging parties are often frustrated when investigators are unwilling to explain fully the data and other information collected in the course of the investigation and how that information led the investigator to conclude there was “no reasonable cause” to believe discrimination had occurred. This is particularly harmful to the interests of charging parties in complex cases, such as one where the employee’s initial burden will be to show disparate impact, preferably from the “applicant flow” data available to the employer. One of our organizations recently evaluated a case where disparate impact of the use of the employer’s use of criminal history disqualifiers in hiring appeared to be highly likely, but after the Commission dismissed the Charge, the investigator and her supervisor refused to explain what statistical analysis they had performed on tens of thousands of applicant records in a digital database. Our organization was left with the impression, which could neither be confirmed nor dispelled, that the investigator and supervisors had simply concluded that the case had too many complexities to be selected for enforcement action by the Commission and therefore chose to close the investigation, without gathering and analyzing the statistical data that would have revealed whether the hiring criteria had a disparate impact on the protected group on which the charging party was a member. It is possible that in that case the employer had met its burden, under the recent Enforcement Guidance on Consideration of Arrest and Conviction History, of showing that its particular criminal history screen did not have an adverse impact on minority workers – but the staff’s defensive and non-responsive reactions to inquiries from private counsel made it impossible to determine whether the EEOC had conducted the analysis, and if so, what

the analysis had shown, and whether there is a basis to pursue the claim on behalf of this or other similarly situated rejected applicants for employment with this respondent.¹²

- The Commission could greatly facilitate private enforcement of systemic actions by establishing a policy that facilitates production, in response to FOIA requests, of the class-wide data, particularly in digital form, that is produced by the employer in the Commission's investigation of Charges that include class or pattern-or-practice allegations. Our colleagues' experience is that such data is virtually always withheld from the responses to FOIA requests.
- We understand, given the limited resources of the Commission and the huge volume of filings it receives each year, that the Commission must be selective in the number of cases it prosecutes each year. However, attorneys affiliated with our organizations report that they often encounter investigators who are unwilling to share with them information they have gathered in cases that the Commission declines to bring, that would nonetheless assist the charging parties' attorneys in assessing the strengths and weaknesses of cases to determine whether there are bases for private suits.¹³ The Commission should consider developing training for investigators, and procedures for participation of staff attorneys, designed to help investigators recognize the importance of this evidence-gathering function in cases within the priorities set for the Strategic Enforcement Plan. The private plaintiffs' bar recognizes that the Commission's resources are strictly limited, but effective use of those resources could help employees and their attorneys have greater confidence in bringing private enforcement actions.

IV. Outreach to Vulnerable Workers and Underserved Communities Should Utilize, Where Available, Partnerships of the Commission with National Organizations as Well as Local Community Organizations.

Our organizations also agree with the Commission's Strategy II.A.1, i.e., "Target outreach to vulnerable workers and underserved communities." The Strategic Plan contemplates that the Commission will create "significant partnerships" with community groups and local institutions to aid the outreach process. The Plan notes that the definition of "significant partnerships" will be developed and published by the Commission later this year. Our organizations recommend that the Commission include national membership based groups and national networks within these "significant partnerships" for outreach efforts.

¹² In that case the staff initially agreed to produce the computer database, with personal identifiers removed, in response to counsel's FOIA request, but four months after the Commission issued the Notice of Right to Sue no database has been produced.

¹³ Charging parties' counsel's access to information gathered in the investigation is especially important given the heightened pleading standards articulated by the Supreme Court in recent years. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

Conclusion

Our organizations strongly endorse the efforts of the Commission to develop priorities for the Strategic Enforcement Plan that will help guide the Commission's effective allocation of its scarce enforcement resources. We also endorse the Commission's commitment to developing more effective administrative measures to assure the prompt identification and expeditious investigation and processing of Charges, and decisions on enforcement actions consistent with the priorities set by the Strategic Enforcement Plan. We urge the Commission to modify its practices – and if necessary, its formal policies – with regard to sharing with counsel for charging parties the information it obtains in investigations of charges on which the Commission determines not to bring its own enforcement action: such information sharing is essential to enabling private counsel to function as “private attorneys general” in bringing cases on behalf of aggrieved individuals.

Respectfully submitted,

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