

**BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON WORKFORCE PROTECTIONS
OF THE EDUCATION AND THE WORKFORCE COMMITTEE**

**Hearing on H.R. 4959, “EEOC Transparency and Accountability Act,” H.R. 5422,
“Litigation Oversight Act of 2014,” and H.R. 5423, “Certainty in Enforcement Act of 2014”**

Wednesday, September 17, 2014

10:00 a.m.

2175 Rayburn House Office Building

I. Introduction

Good morning Chairman Walberg, Ranking Member Courtney, and Members of the Subcommittee. Thank you all for the privilege of testifying today. My name is Eric Dreiband, and I am a partner at the law firm Jones Day here in Washington, D.C.

I previously served as the General Counsel of the United States Equal Employment Opportunity Commission (“EEOC” or “Commission”). As EEOC General Counsel, I directed the federal government’s litigation under the federal employment antidiscrimination laws. I also managed approximately 300 attorneys and a national litigation docket of approximately 500 cases. I was privileged to work with many public officials who dedicated their careers to serving the public, enforcing the civil rights laws, rooting out unlawful discrimination, and working to ensure that our nation reaches the ideal of equal opportunity for everyone. These individuals continue their important work. They investigate charges of discrimination. They mediate and conciliate disputes and work with individuals, unions, and employers to resolve very difficult and often painful problems. They pursue enforcement through litigation in the federal courts, at every level up to and including the Supreme Court of the United States. And, these very able EEOC officials have the awesome power of the United States government to back them up.

Any law enforcement agency can make mistakes, no matter how well intentioned its officials. And, any law enforcement agency can, at times, become so convinced of the righteousness of its work and its motives that it can become prone to excess in certain circumstances. This includes the EEOC, which is a federal law enforcement agency that is charged with enforcing very important federal laws against discrimination on the basis of race, color, sex, religion, national origin, age, disability, and genetic information, among others.

It is with this background that I appear here today, at your invitation, to speak about three bills that are pending before this Subcommittee: H.R. 4959, the “EEOC Transparency and Accountability Act”; H.R. 5422, the “Litigation Oversight Act of 2014”; and H.R. 5423, the “Certainty in Enforcement Act of 2014.”

Before I address the specific provisions of these bills, a little background on the structure and powers of the EEOC will be helpful.

II. The EEOC's Structure And Authority

Congress created the Commission when it enacted the Civil Rights Act of 1964.¹ The Commission is “composed” of five members who are appointed by the President with the advice and consent of the Senate.² No more than three of these members can be members of the same political party, and they serve staggered five year terms.³ The President “shall designate” one member to serve as Chair and one member to serve as Vice-Chair of the Commission.⁴ The statute vests the administrative operations of the agency in the Chair, and she has authority to appoint attorneys, administrative law judges, and other employees.⁵ The Commissioners other than the Chair have authority to vote on policy matters presented to them by the Chair; litigation recommendations presented by the General Counsel; petitions to revoke or modify subpoenas; and a few other matters. The Commissioners other than the Chair do not have operational authority over the EEOC's investigators, litigators, or anyone other than their immediate staffs.

When Congress enacted Title VII of the Civil Rights Act, the statute did not authorize the EEOC to sue anyone. The EEOC could receive charges, provide notice of the charges to those named in the charge, investigate charges, and attempt to reach a settlement. The Attorney General's litigation authority was limited to intervening in cases that involved matters of public importance and to bringing pattern or practice lawsuits, which are akin to class action lawsuits that the government can bring to remedy widespread, egregious unlawful discrimination.⁶

In 1972, Congress amended Title VII in multiple ways and, among other things, authorized the EEOC to file lawsuits in federal court. Congress retained Title VII's multi-step administrative enforcement scheme and determined that the EEOC must satisfy several administrative prerequisites before it can file a lawsuit. Congress tied the EEOC's litigation authority to charges of discrimination, and it required the EEOC to notify the respondent of the charge within 10 days and to investigate charges.⁷ Congress also required that “[i]f the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.”⁸ As a

¹ 42 U.S.C. § 2000e-4(a).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Civil Rights Act of 1964, Title VII, §§ 705-07, 78 Stat. 241, 258-62 (1964).

⁷ 42 U.S.C. § 2000e-5(b).

⁸ *Id.*

result, the EEOC must “refrain from commencing a civil action until it has discharged its administrative duties.”⁹

In 1972, Congress also transferred to the EEOC the Attorney General’s authority to bring pattern or practice cases and to intervene in pending litigation against private sector employers and unions.¹⁰ Congress assigned the Attorney General with the responsibility to bring litigation against state governments and agencies, and subdivisions of state governments.¹¹

The 1972 amendments to Title VII also created the position of General Counsel of the EEOC. The General Counsel would be “appointed by the President, by and with the advice and consent of the Senate, for a term of four years.”¹² Congress assigned “responsibility for the conduct of litigation” to the General Counsel and authorized the Commission to “prescribe” other duties for the General Counsel.¹³ Congress also directed the General Counsel to “concur with the Chairman of the Commission on the appointment and supervision of regional attorneys.”¹⁴

Notwithstanding the General Counsel’s responsibility for the conduct of litigation, the Congress vested the Commission with the authority to direct the agency’s attorneys to “appear for and represent the Commission in any case in court.”¹⁵ The EEOC has generally interpreted this to mean that the Commission retains the ultimate authority to authorize the Commission to litigate cases.

In 1996, the Commission adopted its “National Enforcement Plan” (“NEP”). The goal was to “free[] the Commission to focus on policy issues.”¹⁶ To accomplish this goal, the NEP delegated nearly all of the Commission’s litigation authority to its General Counsel.¹⁷

Specifically, the NEP “delegat[ed] to the General Counsel the decision to commence or intervene in litigation in all cases except the following”:

⁹ *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977).

¹⁰ 42 U.S.C. § 2000e-6(c)-(e).

¹¹ *See* 42 U.S.C. § 2000e-6(c).

¹² 42 U.S.C. § 2000e-4(b).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ U.S. Equal Employment Opportunity Commission, *National Enforcement Plan* (1996), available at <http://www.eeoc.gov/eeoc/plan/nep.cfm> (last visited Sept. 11, 2014).

¹⁷ *Id.*

- A. Cases involving a major expenditure of resources, *e.g.* cases involving extensive discovery or numerous expert witnesses and many pattern-or-practice or Commissioner’s charge cases;
- B. Cases which present issues in a developing area of law where the Commission has not adopted a position through regulation, policy guidance, Commission decision, or compliance manuals;
- C. Cases which, because of their likelihood for public controversy or otherwise, the General Counsel reasonably believes to be appropriate for submission for Commission consideration; and
- D. All recommendations in favor of Commission participation as *amicus curiae* which shall continue to be submitted to the Commission for review and approval.¹⁸

These standards are quite vague and therefore give the General Counsel a great deal of discretion in determining whether to send litigation recommendations to the full Commission for an up-or-down vote. More recently, it appears that the number of matters presented to the Commission by the General Counsel has diminished significantly. One current EEOC Commissioner has explained:

Most people I talk to assume that when the Commission files a lawsuit, that lawsuit has first been reviewed, studied, deliberated, discussed and voted on by the Commissioners. People are shocked when I tell them that, in fact, most lawsuits are filed without the Commissioners’ knowledge. For example, last year – [Fiscal Year 2012], 122 lawsuits were filed in the name of the Commission, but under the rules of the Delegation to the General Counsel, only 3 of the 122 lawsuits were sent up to the Commissioners for their review and vote. All the rest were filed without a vote by the Commission.¹⁹

These numbers give the impression of a Commission made up of potted plants and disinterested bystanders.

In December 2012, the Commission adopted its “Strategic Enforcement Plan.” That Plan largely reaffirmed the NEP’s delegation of authority to the General Counsel. It also required that each District Office – of which there are fifteen – “present[]” a “minimum of one litigation recommendation” for “Commission consideration each fiscal year.”²⁰ The Strategic Enforcement Plan does not articulate any criteria for this “minimum.”

¹⁸ *Id.*

¹⁹ Commissioner Constance S. Barker, Comments for the Record, Public Commission Meeting on the Implementation of the EEOC’s Strategic Plan for Fiscal Years 2012-2016 (February 20, 2013).

²⁰ U.S. Equal Employment Opportunity Commission, *Strategic Enforcement Plan* (2012), available at <http://www.eeoc.gov/eeoc/plan/sep.cfm> (last visited September 11, 2014).

This approach does not appear to have worked. To be sure, the Commission's litigation program has had some impressive victories in the last few years, thanks in large part to the very fine work of some highly talented and dedicated lawyers. For example, in 2013, a jury in Iowa returned a multi-million dollar verdict in the Commission's favor after it found that the defendant subjected a group of 32 men with intellectual disabilities to severe abuse and discrimination for a multi-year period. My friend and former colleague, EEOC Regional Attorney Robert Canino successfully tried that case, and I commend him and his colleagues for a very important victory.²¹

Regrettably, however, the Commission has suffered several embarrassing losses.

For example, a federal judge in Iowa dismissed the EEOC's claims for 67 alleged victims of sexual harassment after the judge determined that the EEOC did not comply with its presuit investigation, reasonable cause, and conciliation obligations. The U.S. Court of Appeals for the Eighth Circuit substantially affirmed the district court's decision, and then, in August 2013, the district court sanctioned the EEOC approximately \$4.7 million dollars.²² Unless an appellate court overturns that decision, the American people will have to pay this sanction.

In another case, the Commission brought a very high profile race discrimination class action that alleged that the defendant unlawfully denied employment opportunities to applicants who had poor credit histories. The case was so flimsy that the district court judge dismissed it after she found that the EEOC could not offer admissible evidence that proved any violation. On April 9, 2014, the U.S. Court of Appeals for the Sixth Circuit affirmed the district court's decision and chastised the EEOC because it sued defendants for "using the same type of background check that the EEOC itself uses" and because the EEOC brought the case "on the basis of a homemade methodology, crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted only by the witness himself."²³

In another high profile class action, the Sixth Circuit affirmed a district court's decision to dismiss an EEOC class action and to sanction the EEOC approximately \$750,000. The court found that the EEOC incorrectly claimed that an employer had a policy that excluded anyone with a criminal record and then continued to litigate the case, even though it knew that the employer did not, in fact, maintain the discriminatory policy that the EEOC alleged in its complaint.²⁴

²¹ See EEOC Press Release, "Jury Awards \$240 Million for Long-Term Abuse of Workers with Intellectual Disabilities" (May 1, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/5-1-13b.cfm>

²² *EEOC v. CRST Van Expedited*, No. 07-00095, 2013 U.S. Dist. LEXIS 107822 (N.D. Iowa Aug. 1, 2013).

²³ *EEOC v. Kaplan*, 748 F.3d 749, 750, 754 (6th Cir. 2014).

²⁴ *EEOC v. Peoplemark*, 732 F.3d 584 (6th Cir. 2013).

These cases are not isolated examples:

- The Commission brought a class action lawsuit against an employer that it alleged unlawfully excluded applicants who had a criminal record. The district judge threw the case out after he determined that the EEOC had no admissible evidence of any violation.²⁵
- The U.S. Court of Appeals for the Fifth Circuit affirmed the dismissal of a class action age discrimination suit that challenged an employer's decision to maintain an age 60 retirement policy for pilots.²⁶
- A district court in Alabama dismissed the EEOC's challenge to an employer's policy about hairstyles after it determined that no Title VII precedent supported the Commission's claim and that the employer's policy was lawful.²⁷
- The U.S. Court of Appeals for the Fourth Circuit affirmed an award of nearly \$200,000 in sanctions against the EEOC after it found that the EEOC filed suit against an employer even though its years-long delay in investigating the allegations, and the employer's decision to close the facility where the alleged discrimination occurred, meant that no monetary or injunctive relief would have been possible.²⁸
- A district court in North Carolina sanctioned the EEOC after it found that the EEOC failed to preserve evidence.²⁹
- Federal courts in New York, Arizona, Colorado, Hawaii, California, and Texas, among others, dismissed all or significant portions of EEOC's class action lawsuits because the Commission did not comply with Title VII's multi-step administrative enforcement scheme before it filed suit.³⁰

²⁵ *EEOC v. Freeman*, 961 F. Supp. 2d 783 (D. Md. Aug. 9, 2013), *appeal pending*, No. 13-02365 (4th Cir. Nov. 7, 2013).

²⁶ *EEOC v. Exxon Mobil Corp.*, 560 Fed. Appx. 282 (5th Cir. 2014).

²⁷ *EEOC v. Catastrophe Mgmt. Solns.*, No. 13-00475, 2014 U.S. Dist. LEXIS 50822 (S.D. Ala. Mar. 27, 2014).

²⁸ *EEOC v. Propak Logistics, Inc.*, 746 F.3d 145 (4th Cir. 2014).

²⁹ *EEOC v. Womble Carlyle Sandridge & Rice, LLP*, No. 13-00046, 2014 U.S. Dist. LEXIS 38219 (M.D.N.C. Mar. 24, 2014), *report and recommendation adopted by* 2014 U.S. Dist. LEXIS 58938 (Apr. 29, 2014).

³⁰ *EEOC v. Sterling Jewelers, Inc.*, No. 08-00706, 2014 U.S. Dist. LEXIS 304 (W.D.N.Y. Jan. 2, 2014), *report & recommendation adopted by* 2014 U.S. Dist. LEXIS 31524 (W.D.N.Y. Mar. 10, 2014), *appeal pending* No. 14-1782 (2d Cir. May 15, 2014); *Arizona v. GEO Grp., Inc.*, No. CV 10-1995-PHX-SRB, 2012 U.S. Dist. LEXIS 102950 (D. Ariz. Apr. 17, 2012), *appeal pending*, No. 13-16292 (9th Cir. Jun. 24, 2013); *EEOC v. Swissport Fueling, Inc.*, 916 F. Supp. 2d 1005 (D. Ariz. 2013); *EEOC v. The Original Honeybaked Ham Co. of Georgia, Inc.*, 918 F. Supp. 2d 1171 (D. Colo. 2013); *EEOC v. Am. Samoa Gov't*, No. 11-00525, 2012 U.S. Dist. LEXIS 144324 (D. Haw. Oct. 5, 2012); *EEOC v. Dillard's Inc.*, No. 08-CV-1780, 2011 U.S. Dist. LEXIS 76206 (S.D. Cal. July 14, 2011); *EEOC v. Bass Pro Outdoor World, LLC*, 884 F. Supp. 2d 499 (S.D. Tex. 2012).

The available data does not present a better picture. The EEOC publicizes annual cumulative information about its litigation program that dates back to 1997. According to the EEOC, the Commission recovered \$44.2 million dollars during the fiscal year that ended in September 2012 and \$38.6 million during the fiscal year that ended in September 2013. These are the lowest amounts reported for any fiscal year that is available. By contrast, when I served at the EEOC, the Commission's litigation program recovered an average of about \$140 million each year for victims of unlawful discrimination.³¹

The EEOC sometimes brings hundreds of cases each year. The agency cannot be judged only on those cases in which it was unsuccessful. Nor should anyone suggest that the EEOC's career staff lack a commitment to the agency's core mission of stopping and remedying unlawful employment discrimination. Nonetheless, it takes only a handful of cases in which a court finds that the EEOC used "homemade methodology"³² or submitted statistics with a "mind-boggling number of errors"³³ before the EEOC begins to lose credibility with the courts and, ultimately, with the public.

Two of the bills you are considering today would provide safeguards to ensure that the EEOC does not diminish its credibility as the nation's foremost protector of civil rights in employment. Under current law, the EEOC's General Counsel and Regional Attorneys have almost unchecked discretion to initiate or intervene in lawsuits on behalf of the Commission. H.R. 4959 and H.R. 5422 would limit this discretion and provide for greater reporting of the EEOC's litigation results, in order to hold the agency publicly accountable.

In addition, H.R. 4959 addresses the EEOC's statutory obligation to facilitate dispute resolution prior to litigation. That Bill provides that the EEOC's conciliation efforts before it files a lawsuit must be "bona fide" and "in good faith." Moreover, under H.R. 4959, the EEOC's conciliation efforts would indisputably be reviewable by a court.

III. H.R. 5422 May Restore The Commission's Oversight Of Enforcement

H.R. 5422 would ensure that the EEOC cannot bring major or controversial litigation without a full up-or-down vote by a majority of the Commission. First, it would require the Commission to approve or disapprove by majority vote any cases involving multiple plaintiffs, allegations of systemic discrimination, or pattern or practice claims.³⁴ Second, it would give each EEOC Commissioner the power to require a majority vote on the commencement of any litigation.³⁵ Implementation of these measures would mean that the EEOC's decision to file

³¹ EEOC Litigation Statistics, FY 1997 through FY 2013, *available at* <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm>.

³² *Kaplan*, 748 F.3d at 754.

³³ *Freeman*, 961 F. Supp. 2d at 796.

³⁴ H.R. 5422, § 2.

³⁵ *Id.*

lawsuits would be determined after consideration and deliberation by the five bipartisan members of the EEOC.

H.R. 5422 would neither impede the EEOC's efficient prosecution of civil rights litigation nor interfere with the Commission's ability to focus on policy. As an initial matter, the bill would make Commission approval mandatory only for cases with multiple potential victims. The bill would not require that Commissioners vote on dozens of small-dollar or uncontroversial cases before the Commission files suit.

The bill would, however, increase significantly the number of cases presented to the Commission for a vote. This is not unreasonable. After all, the American taxpayers pay Commissioners and their staff millions of dollars every year, and it is not too much to require that they actually consider whether additional taxpayer resources should be spent litigating EEOC lawsuits. Nor is there any reason to suspect that increased deliberation by the Commission would hinder enforcement. When I served as the EEOC's general counsel, I regularly sent litigation recommendations to the Commissioners for a vote. Nonetheless, the Commission obtained relief for thousands of discrimination victims during my tenure, and the EEOC's litigation program recovered more money for discrimination victims than at any other time in the Commission's history.

IV. H.R. 5422 And H.R. 4959 May Enhance The EEOC's Accountability For Litigation Decisions

H.R. 5422 and H.R. 4959 would both require the EEOC to post data publicly, in an effort to increase public accountability for the agency's litigation decisions. The EEOC already posts some litigation data, and these bills would increase the reporting requirements. Specifically, H.R. 5422 would require the Commission to post information about every lawsuit that it brings pursuant to a vote of the Commissioners, including each Commissioner's vote on the litigation.³⁶

H.R. 4959 has a much more extensive series of reporting requirements specifically related to cases in which the EEOC is sanctioned or ordered to pay fees and costs. The Bill would require the EEOC to track and publicly post data on these cases in conjunction with information regarding whether the litigation was submitted to the Commission for an up-or-down vote.³⁷ These figures would ultimately allow the Commission and Congress to determine statistically whether the Commission's delegation of authority to the General Counsel is undermining the agency's integrity.

H.R. 4959 also contains reporting requirements to Congress. Specifically, in any case where a court orders the EEOC to pay fees and costs or imposes sanctions, the agency's Inspector General would be required to notify the House Committee on Education and the Workforce, as well as the Senate Committee on Health, Education, Labor, and Pensions, and

³⁶ *Id.*

³⁷ H.R. 4959, § 2(a)(1).

conduct an extensive investigation to determine why such an order was imposed.³⁸ This investigation would entail interviews with the EEOC staff involved on the case, estimates of the resources used in prosecuting the case, an explanation of whether the case was brought to a full vote by the Commission, and other relevant information.³⁹ The Bill also would require the Commission to submit a report to Congress about the steps it is taking to reduce instances in which it is ordered to pay fees or is sanctioned.⁴⁰

Increased record-keeping and reporting requirements always run the risk that they may serve no purpose other than to compound bureaucracy. Nonetheless, this legislation would require the EEOC to take a break after a negative outcome in litigation, to step back, and to evaluate why a court sanctioned the Commission. It would also enable the Congress and the public to understand better what happened and why.

V. H.R. 4959 May Hold The EEOC Responsible For Meeting Its Conciliation Obligations

H.R. 4959 would prevent the EEOC from rushing to litigation in another way: it specifically provides for court review of the sufficiency of the agency's conciliation efforts. In addition, it makes clear that the EEOC cannot file a lawsuit without first clearly identifying its claims, and any putative victims thereof, to a putative defendant.

The provisions of H.R. 4959 merely clarify obligations that are already written into Title VII. Title VII outlines a multi-step process that the EEOC must satisfy before it can file a lawsuit. This process requires the EEOC to provide prompt notice of the charge to the employer, investigate the charge, and make a reasonable cause determination if it finds that a violation occurred. Thereafter, the EEOC must "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."⁴¹ The EEOC may file a lawsuit only after it "has been unable to secure from the [employer] a conciliation agreement acceptable to the Commission."⁴²

From 1972 to December 2013, the federal courts policed the EEOC's compliance with its presuit obligations, including the obligation that the Commission conduct meaningful conciliation proceedings as part of an effort to settle any dispute and that the EEOC file suit only if conciliation proves impossible. In December 2013, the U.S. Court of Appeals for the Seventh Circuit became the first court "to reject explicitly the implied affirmative defense of failure to

³⁸ *Id.* at § 4(a).

³⁹ *Id.*

⁴⁰ *Id.* at § 4(b).

⁴¹ *See* 42 U.S.C. § 2000e-5(b).

⁴² 42 U.S.C. § 2000e-5(f)(1).

conciliate.”⁴³ The case, *EEOC v. Mach Mining*, is pending before the Supreme Court of the United States, and that Court may settle the issue once and for all. A decision is expected by June 2015.⁴⁴

H.R. 4959 would settle the issue by statute.⁴⁵ The Bill would require the EEOC to use “good faith efforts” to engage in “bona fide” conciliation.⁴⁶ Section 3(3) of the Bill would require the Commission, at a minimum, to give accused employers:

all information regarding the legal and factual bases for the Commission’s determination that reasonable causes exist as well as all information that supports the Commission’s requested monetary and other relief (including a detailed description of the specific individuals or employees comprising the class of persons for whom the Commission is seeking relief and any additional information requested that is reasonably related to the underlying cause determination or necessary to conciliate in good faith).⁴⁷

Finally, H.R. 4959 expressly provides that an employer may use documents related to the conciliation process in proceedings to test the validity of the EEOC’s conciliation efforts.⁴⁸

Undoubtedly, H.R. 4959 would provide important protections for employers, by requiring the EEOC to give them all of the information necessary to evaluate properly the agency’s settlement demands. In addition, the legislation would pre-empt the “sue first, ask questions later” mentality that has led to highly-publicized EEOC defeats.⁴⁹ By requiring the EEOC to provide all factual and legal bases for its reasonable cause determination and to identify with specificity each employee who was allegedly wronged, H.R. 4959 will ensure that the EEOC returns its focus to conciliation first, and then litigation, as required by the statute.

VI. H.R. 5423 – The Certainty In Enforcement Act Of 2014

I would also like to say a few words about the third piece of legislation this Subcommittee is now considering: the Certainty in Enforcement Act, or H.R. 5423. This Bill responds to new enforcement guidance that the EEOC issued in 2012 about the use of arrest and

⁴³ 738 F.3d 171, 182 (7th Cir. 2013). See also Press Release, U.S. EEOC, *In Landmark Ruling, Seventh Circuit Holds Employers Cannot Challenge EEOC Conciliation* (Dec. 20, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/12-20-13b.cfm> (last visited May 20, 2014).

⁴⁴ The docket number for this case is 13-1019.

⁴⁵ H.R. 4959, § 3.

⁴⁶ *Id.* at § 3(1).

⁴⁷ *Id.* at § 3(3).

⁴⁸ *Id.* at § 3(2).

⁴⁹ See *EEOC v. CRST Van Expedited*, No. 07-00095, 2009 U.S. Dist. LEXIS 71396, at *64 (N.D. Iowa Aug. 13, 2009).

conviction records to make employment decisions. Under the EEOC's guidance, the EEOC presumes that employer use of criminal history information creates a disparate impact that violates Title VII. According to the EEOC, national data shows that African Americans and Hispanics are arrested and incarcerated "at rates disproportionate to their numbers in the general population."⁵⁰ Therefore, the EEOC asserts, "criminal record exclusions have a disparate impact based on race and national origin."⁵¹

The EEOC would impose on the employer the burden of rebutting this presumption during an investigation and would give the employer "an opportunity to show, with relevant evidence, that its employment policy or practice does not cause a disparate impact on the protected group(s)."⁵² This so-called "opportunity" is inconsistent with the burdens of proof enacted by Congress, and it saddles employers with the burden of *disproving* discrimination. The message is clear: if an employer excludes anyone because of a person's criminal history – including convictions – the EEOC will assume that the employer has violated Title VII unless and until the employer proves otherwise.

The EEOC's enforcement guidance was not enacted by notice-and-comment rulemaking, and it is unclear whether the federal courts will endorse it. Nonetheless, many are concerned that the guidance adopts an interpretation of Title VII that would have that statute preempt State and local laws that prohibit the hiring of convicted felons for safety-sensitive positions, such as child care. The Commission's guidance says that "an employer may make an employment decision based on the conduct underlying the arrest if the conduct makes the individual unfit for the position in question."⁵³ But what the EEOC believes makes an individual "unfit for the position in question" is not clear. The Commission's guidance gives only a few examples of what it believes this standard permits, and the Commission's litigation program raises the specter of class action litigation any time an employer excludes any criminals.

For example, in one pending case, the EEOC is suing an employer for violating the "equal employment opportunities" of applicants because the employer allegedly excludes from its workforce those convicted of "Murder, Assault & Battery, Rape, Child Abuse, Spousal Abuse (Domestic Violence), Manufacturing of Drugs, Distribution of Drugs, [and] Weapons Violations," as well as "theft, dishonesty, and moral turpitude."⁵⁴ Does a conviction for murder, rape, and theft make an individual "unfit"? According to the EEOC, an employer must show that its criminal conviction policy "operates to effectively link specific criminal conduct, and its dangers,

⁵⁰ See U.S. Equal Employment Opportunity Commission, *EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (Apr. 25, 2012), available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm (last visited July 23, 2013) [hereinafter "EEOC Criminal Record Enforcement Guidance"].

⁵¹ *Id.*

⁵² *Id.* But see 42 U.S.C. § 2000e-2(k).

⁵³ See EEOC Criminal Record Enforcement Guidance.

⁵⁴ Compl., *EEOC v. BMW Mfg. Co.*, No. 13-01583 ¶¶ 19-20 (D.S.C. June 11, 2013).

with the risks inherent in the duties of a particular position.”⁵⁵ But there are no statistical studies showing that a convicted rapist is more likely to embezzle funds from an employer or that a convicted embezzler is more likely to endanger fellow employees. No company can realistically meet this evidentiary burden.

Worse still, the EEOC’s policy makes it impracticable, if not impossible, to justify consideration of prior felonies as a legitimate employment concern, even though the federal government itself takes account of such prior convictions in its own personnel decisions. The EEOC’s guidance also repudiates what the federal government’s own employment practices make obvious: a person’s history of compliance with the law is relevant to any job. Indeed, the Supreme Court recently upheld the federal government’s inquiry into whether employees of federal contractors used drugs because “the Government is entitled to have its projects staffed by reliable, law-abiding persons” and “[q]uestions about illegal-drug use are a useful way of figuring out which persons have these characteristics.”⁵⁶ The Court emphasized that questions about an applicant’s “violations of the law,” like other questions going to the applicant’s “honesty or trustworthiness,” are “reasonably aimed at identifying capable employees who will faithfully conduct the Government’s business.”⁵⁷

As further proof that prior criminal activity is a legitimate, nondiscriminatory employment criterion, the federal government routinely performs criminal background checks on applicants for the federal workforce. Government regulations require a “suitability” review, which includes consideration of “[c]riminal or dishonest conduct,” because this bears on “a person’s character or conduct that may have an impact on the integrity or efficiency of the service.”⁵⁸ Although the extent to which criminal convictions automatically disqualify former criminals from federal employment is unclear, the relevant point remains: even the federal government believes that prior criminal convictions are presumptively valid and nondiscriminatory factors that are directly tied to the job-related issue of a potential employee’s “character or conduct.”

If the government is entitled to have law-abiding workers, then surely private employers are as well. And it is all the more necessary for employers to exclude risky criminals from its workforce because employers may be ultimately liable, under principles of vicarious liability, for the work-related misconduct of their employees. That private employers might be more reluctant to expose their customers and employees to former criminals provides no basis for condemning such prudence as unlawful discrimination, at least when there is no intent to discriminate against anyone because of their race or other protected characteristic.

Adding to this problem is the fact that several federal, state, and local laws place restrictions on employers’ decisions about whether to hire persons with criminal convictions.

⁵⁵ See EEOC Criminal Record Enforcement Guidance.

⁵⁶ *NASA v. Nelson*, 131 S. Ct. 746, 759-60 (2011).

⁵⁷ *Id.* at 761.

⁵⁸ 5 C.F.R. §§ 731.101, 731.202.

The EEOC's guidance says that "if an employer's exclusionary policy or practice is not job related and consistent with business necessity, the fact that it was adopted to comply with a state or local law or regulation does not shield the employer from Title VII liability."⁵⁹

All of this presents employers with a Catch-22. They must either hire criminals and risk violating these other laws and exposing themselves to lawsuits for negligent hiring. Or, if they do not hire such criminals, they risk an EEOC investigation and class action lawsuit.

H.R. 5423 attempts to address these problems by making it clear that it "shall not be an unlawful employment practice for an employer . . . to engage in an employment practice that is required by Federal, State, or local law, in an area such as, but not limited to, health care, childcare, in-home services, policing, security, education, finance, employee benefits, and fiduciary duties."⁶⁰ This Bill may provide a useful fix that will prevent EEOC's informal guidance from trumping certain State and local laws.

If H.R. 5423 becomes law, the Equal Protection Clause of the Fourteenth Amendment, as well as the equal protection component of the Fifth Amendment, will limit the discretion of Federal, State, and local governments to pass laws that would require employers to engage in discriminatory conduct. Nonetheless, for the purpose of greater clarity, this Subcommittee might consider three amendments to the Bill as it is presently drafted.

First, the Subcommittee may consider revising H.R. 5423 to limit it to laws requiring employers to conduct criminal background checks or credit history checks. This seems to be the primary concern of the Bill and amending it this way would clarify the issue.

Second, the Subcommittee may also consider limiting the bill to allow employers to follow Federal, State or local laws that have a disparate impact on a protected class, so long as the laws are targeted to hiring practices in sensitive industries like healthcare and childcare.

⁵⁹ See EEOC Criminal Record Enforcement Guidance.

⁶⁰ H.R. 5423, § 3. Congress should be aware that two provisions of the Civil Rights Act already speak to pre-emption of State and local laws.

Section 708 of Title VII provides:

"Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment [282] practice under this title." 42 U.S.C. § 2000e-7.

In addition, Section 1104 of Title XI of the Civil Rights Act of 1964 applies to all titles of the Civil Rights Act, including Title VII and establishes the following standard for pre-emption:

"Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof." 42 U.S.C. § 2000h-4.

See also *California Federal Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281-282 (1987), which discusses these statutes.

Third, H.R. 5423 appears to respond to the EEOC's expansive interpretation, in its enforcement guidance, of what may be a disparate impact violation of Title VII. Adding language that specifically addresses disparate impact may help clarify that H.R. 5423 is in no way intended to sanction intentional discrimination.

VII. Conclusion

Thank you again for the opportunity to testify here today. I look forward to your questions.