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

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"

SEPTEMBER 17, 2014

Good Morning Mr. Chairman and Members of the Subcommittee. For almost twenty years as an HR consultant, lawyer at several management-side law firms, and former staff member at the United States Equal Employment Opportunity Commission ("EEOC") and United States Department of Labor ("DOL"), I have dedicated my career to advancing equal employment opportunity.[1] I am pleased to share my experiences with you today as you consider several pending bills that would positively impact the way in which the EEOC does its important work: H.R. 5422, the "Litigation Oversight Act of 2014"; H.R. 5423, the "Certainty in Enforcement Act of 2014"; and H.R. 4959, the "EEOC Transparency and Accountability Act."

My remarks today will focus on three areas of the Commission's work: (1) the Commission's statutory mandate to properly investigate charges and to first eliminate any alleged unlawful practice through informal methods, including conciliation and persuasion; (2) the Commission's authority to enforce the law through litigation when necessary; and (3) the Commission's particular enforcement strategy as it relates to an employer's use of criminal background screens during the employment process.[2] My testimony today reflects my personal views, and not those of Berkshire Associates Inc., any particular employer or other organization.

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While at the EEOC, I was fortunate enough to join a dedicated group of lawyers, investigators, and other professional staff who tirelessly worked towards opening the door of opportunity to all. I am proud of the time I spent at the agency and want to emphasize that, both

[1] I currently serve as the Director of Regulatory Affairs at Berkshire Associates Inc., a certified small business enterprise dedicated to helping employers comply with their equal employment opportunity and affirmative action obligations. Previously, I was a shareholder at a management-side law firm where I regularly represented both large and small employers before the EEOC, including in several systemic discrimination matters. From 2001 – 2006, I served as a senior legal advisor in the EEOC's Office of Legal Counsel and then as a Special Assistant to The Honorable Naomi C. Earp, who at the time was the EEOC's Vice Chairwoman. From 2006-2008, I served as Acting Director of the Division of Policy, Planning and Program Development in the DOL's Office of Federal Contract Compliance Programs.

[2] I request that the Subcommittee accept my detailed written testimony as part of the written record of today's Hearing.

then and now, I share the agency's unwavering commitment to equal employment opportunity. It also is my experience that employers are similarly dedicated to creating fair and inclusive workplaces, where employment decisions are made without regard to race, color, gender, religion, national origin, age, disability, genetic information, or other protected basis. Indeed, my experiences have taught me that not only do most employers want to comply with the myriad of federal, state and local employment laws and regulations they must follow, most also want to do the right thing, even when not required by law.

The EEOC plays an important role in helping employers achieve these objectives. Created by Title VII of the Civil Rights Act of 1964 ("Title VII"), the five-member, bi-partisan Commission was charged with investigating charges of employment discrimination and, when EEOC believes discrimination occurred, attempting to "conciliate" disputes. For nearly seven years, the power of persuasion through this statutorily-required conciliation process was the Commission's only enforcement authority. In 1972, Congress amended Title VII to provide the Commission with the authority to litigate. It was not until almost 25 years later that the Commission delegated this important responsibility to the General Counsel. The goals of the delegation were "increasing strategic enforcement for the General Counsel and field attorneys, freeing the Commission to focus on policy issues, and increasing the efficiency and effectiveness of [the Commission's] litigation program."[3]

Unfortunately, over the last several years, as an outsider now looking in, I believe that the EEOC has strayed far from its original good government mandate of first conciliating disputes. All too often, the EEOC's investigations are long and drawn out, inconsistent, or lacking an overall, cohesive strategy in light of the agency's limited resources. It can become focused on

[3] *See* Equal Employment Opportunity Commission National Enforcement Plan, at Section V, adopted February 8, 1996, available at http://www.eeoc.gov/eeoc/litigation/manual/1-3-b_nep_text.html. Consistent with these goals, the Commission retained its authority to review, deliberate and vote on "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." *Id.* From 1996 until about 2009, the Commissioners also reviewed all cases brought under the Americans with Disabilities Act of 1990 ("ADA"). That is no longer the case, even though the ADA was recently amended and the EEOC itself has indicated that "certain ADA issues, including coverage, reasonable accommodation, qualification standards, undue hardship, and direct threat" and "accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act" are "emerging or developing." U.S. Equal Employment Opportunity Commission, Strategic Enforcement Plan FY 2013-2016, available at http://www.eeoc.gov/eeoc/plan/sep.cfm. The Commission recently reaffirmed its delegation in its latest strategic enforcement plan, and added the requirement that a "minimum of one litigation recommendation from each District Office shall be presented for Commission consideration each fiscal year", apparently because so few litigation recommendations were being presented to the Commissioners. *Id.*

finding the proverbial "needle in a haystack" at the expense of the employer and, in some cases, even the interests of the charging party. Conciliation is often given short shrift, as employers find themselves facing large monetary demands without being given significant facts to evaluate the strength of the EEOC's claims or its investigation. Perhaps most troubling is that some of the EEOC's most recent high-profile work has been based on legal theories with far-reaching public policy implications that may never have been reviewed or approved by the Commissioners.

An enforcement agency can only be truly effective when it is respected by the public it serves. Fifty years ago, Congress wisely recognized this when it created a bi-partisan Commission to lead the country's fight to end racism, sexism and other forms of employment discrimination. Although we have made much progress, this country still needs an EEOC that garners the respect of both workers and the regulated community. Good government principles require that respect to be earned through sound policy-making decisions and thoughtful oversight by those charged with leading the agency.

Experiences During EEOC Investigations

Over the past several years, I have helped employers in varied industries ranging from manufacturing to security to health care respond to charges of discrimination filed with the EEOC. For many of these employers, their experience with the EEOC was their first and only experience with a federal law enforcement agency. I am happy to report that, in many cases, the EEOC investigation was handled professionally, objectively and efficiently.

In other cases, however, the employer was faced with strong-arm enforcement tactics that called into question whether the agency was serving as a neutral fact-finder. Unfortunately, the agency's efforts did not seem to bear any relation to the merits of the underlying claim. These tactics included showing up unannounced at a secure facility with three investigators, demanding immediate access to investigate an alleged harassment claim - even though the alleged victim no longer worked at the facility and there was no threat of further harassment. Other investigations included requests for extensive information in response to an individual charge of discrimination, where the charging party did not even claim that the employer's actions were for the protected reason the agency sought to investigate. In some of these cases, much of the information requested went unreviewed by the agency for months, leaving the employer to wonder whether its employment practices really needed to be changed. Still other investigations included burdensome requests for information followed by a pre-determination settlement demand. The message to the employer was clear – capitulate and pay up or spend money to fight. When the employer declined these alleged "good faith efforts" to informally resolve the matter, some of the charges of discrimination were dismissed shortly after, without further investigation and with a finding of no reasonable cause.

Put yourself for a moment in the shoes of the small business owner, in its very first interaction with a federal enforcement agency. Do these types of investigatory and conciliation tactics garner your respect? Are they examples of good government? Do they advance the agency's statutory mandate to eradicate discrimination through informal methods first?

The Commission's Decision To Delegate Its Litigation Authority

Most employers, and indeed most employees, are surprised, and dare I say, dismayed, to learn that the Commissioners do not deliberate on the filing of most lawsuits brought by the EEOC. Understandably, the public expects that the full force of the Federal government will only be brought to bear after careful deliberation. In the case of the EEOC, Congress determined that the deliberative process should be handled by a group of five appointed officials with diverse backgrounds, experiences, and perspectives.

During my time at the agency in the mid-2000s, the Commission generally reviewed between 50-75 litigation proposals under the agency's delegated authority. Importantly, the number of lawsuits filed by the agency remained steady during this period with the EEOC filing approximately 400 lawsuits each year. Commissioner review did not significantly impede the litigation process or create "back seat driving" as some now allege. On the contrary, it enhanced the process. Quite simply, placing the imprimatur of the whole Commission on a proposed legal theory garners a level of respect that is simply not possible when decisions are made by a single Regional Attorney or even the General Counsel, no matter their skill. Action by the Commission sends the clear and unmistakable signal that the issues being raised are important ones, and that the employment practice being examined is one that is troubling to a diverse group of those committed to civil rights, regardless of party affiliation or business or worker rights experience.

It is my understanding, however, that in recent years, the Commissioners have indeed taken a "back seat" on the road to equal employment opportunity. From 2009-2012, the Commissioners reviewed only a handful of the hundreds of lawsuits filed by the EEOC. This is so even though the cases the Commission brings are getting larger and more expensive as a result of the agency's systemic discrimination initiative. Commissioner input also was minimized even though the EEOC was given authority over new types of employment discrimination and other anti-discrimination laws were amended, which provided the agency with the opportunity to shape the law in new areas.

I also believe that Commissioner review of litigation proposals results in a better allocation of scarce Commission resources. Quite simply, it is hard to understand why the Commission would retain its right to vote on certain procurement matters, such as purchases over $100,000, while forsaking its fundamental obligation to review decisions about litigation that are likely to cost the regulated community, and in recent years, the government itself in

cases of misconduct or poor litigation strategy, hundreds of thousands of dollars. In the business world, similar delegations of authority would be the equivalent of unveiling a new product without the chief executive officer ever knowing about it, or implementing a controversial treatment protocol for hospital patients without careful review by the medical review board.

Commissioner review also can lead to more robust conciliation efforts since the Commissioners regularly review the substance of any conciliation efforts during deliberations. In some cases during my tenure, Commissioner review was the difference between an early resolution and scorched earth litigation. Given some of the concerns I raised earlier about the agency's investigative and conciliation process, regular and thoughtful oversight of the field's conciliation efforts by the Commissioners will help ensure the agency meets its statutory obligation to conciliate charges in good faith.

Perhaps most troubling is the impact of delegated authority on the Commission's policy-making function, one of the stated goals of the agency's initial grant of delegated authority. It is my opinion that delegated litigation authority has not allowed the "Commission to focus on policy issues" nor has it increased the "effectiveness" of the agency's litigation program. In many cases, the agency is making policy through its litigation, announcing new theories of discrimination and novel enforcement positions in press releases issued on the courtroom steps.

The EEOC is not like a private litigant. As a Federal agency, it has a responsibility to consider the "bigger picture" when litigating. It must consider the broader implications of its positions from a policy, legal and practical perspective. It cannot focus solely on the individual litigant, or the merits of a particular case. Indeed, the process by which the EEOC arrives at the decision to litigate is just as important as whether the agency ultimately prevails on the legal theory being advanced. As a former Commissioner cautioned the Commission:

> I am in no way suggesting that the Commissioners should substitute their authority or judgment for the operating arms of the EEOC, but rather the Commissioners must have an appropriate oversight and policy-making role and this is especially true for the systemic program. After all, it is the Commissioners who are responsible to Congress, and who are ultimately held accountable to the people for the actions of the agency.[4]

The Commission's Review Of The Use Of Criminal Background Screens By Employers

The Commission's efforts in one particular enforcement area reinforce the need for some of the good government principles I have discussed today. In April 2012, the Commission issued policy guidance regarding an employer's use of arrest and conviction records when

[4] Testimony Of Leslie Silverman, EEOC Meeting of July 18, 2012, Public Input into the Development of EEOC's Strategic Enforcement Plan, available at http://www.eeoc.gov/eeoc/meetings/7-18-12/index.cfm.

making hiring decisions.[5] Although the policy guidance was voted on by the Commissioners, it was not subject to public comment even though the Office of Management and Budget instructs that "pre-adoption notice and comment can be most helpful for significant guidance documents that are particularly complex, novel, consequential, or controversial."[6] Moreover, the guidance was issued after the EEOC had already initiated several high profile litigation matters regarding this issue, resulting in policy-making at the expense of the employers who were the subject of those early lawsuits.

As this Subcommittee is aware from testimony during earlier hearings about this topic, the EEOC has not fared well with respect to its theory of discrimination in these cases. For example, in a case filed in Michigan in 2011, the agency challenged the employer's alleged blanket policy of not hiring individuals with criminal records as having a disparate impact on African-Americans.[7] The United States District Court for the Western District of Michigan ordered the EEOC to pay more than $750,000 in attorneys' fees and costs after the agency continued to pursue the case even after it learned that the company did not have a blanket no-hire policy. In a Maryland case challenging another employer's use of criminal background screening under the same disparate impact theory, the court recently dismissed the agency's lawsuit finding that its statistical evidence was "rife with analytical errors," "laughable," and "scientifically dishonest."[8]

Unfortunately, even when the Commission did issue guidance, it failed to provide a clear path for employers who must weigh the competing interests of the agency's position and other federal, state and local laws. For example, many states prohibit school districts from hiring individuals with certain criminal convictions for teaching positions. Similarly, under federal and state law, individuals who have been convicted of abuse, neglect or mistreatment of the elderly cannot be employed in most nursing home positions. These are common sense requirements. Yet, under the EEOC's guidance, these employers are now stuck between a rock and hard place. Although they must follow the applicable state law, they also are supposed to conduct an "individualized assessment" of whether the state law requirement is job related and consistent with business necessity. In many cases, these difficult, costly and time-consuming decisions will

[5] *See* Equal Employment Opportunity Commission, Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, No. 915-002 (April 25, 2012), available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

[6] Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3438 (Jan. 25, 2007).

[7] *EEOC v. Peoplemark, Inc.*, 2011 U.S. Dist. LEXIS 38696 (W.D. Mich. Mar. 31, 2011).

[8] *EEOC v. Freeman*, 961 F. Supp. 2d 783, 797-799 (D. Md. 2013).

fall on small businesses, such as small home health care facilities or nursing homes, or school systems where educational dollars are already scarce.

The Commission could have provided these employers with more proactive guidance on how its requirement to conduct an individualized assessment would play out in these real world scenarios. Although I do not know for sure, I suspect one of the reasons that such guidance was not provided is that the underlying facts sometimes matter. Making policy in a vacuum without those underlying facts is challenging, particularly when you are seeking bi-partisan support for a position. What this means now, however, is that these difficult policy decisions may be made through litigation, and under the current system of delegated authority, quite possibly without review and approval by the Commissioners first. Unfortunately, this also means that these litigation policy decisions will be made at the expense of individual employers, many of them small businesses who often cannot afford to engage in expensive litigation with the Federal government.

Conclusion

Ensuring equal employment opportunity for all workers is an important Federal goal. Over the years, this country has made great strides in eliminating employment practices that discriminated against or disadvantaged employees on the basis of their race, color, gender, religion, national origin, age, disability, or other protected status. However, there is still much work to be done.

How that work is accomplished matters. Good government practices require that federal enforcement agencies be held to a higher standard than the private bar. The public rightly expects that an enforcement agency will provide notice of the types of practices that it finds problematic before bringing the full force of the government's litigation authority to bear. In the EEOC's case, Congress also decided that informal methods of conciliation and persuasion must be used first. If we are to succeed in the fight for equal employment opportunity, we need an EEOC that garners the respect of both workers and the regulated community, where the policy is first to "conciliate" in good faith and only then to litigate, and where a diverse group of Presidentially-appointed individuals make the decisions about how the important work of the agency will be done. I encourage Congress to use its authority to reinstate some of these much needed safeguards at the EEOC.

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to share my experiences with you today. I would be happy to answer any questions you may have.