

Commissioner Constance S. Barker

Comments for the Record

February 20, 2013 Public Commission Meeting on the Implementation of the EEOC's Strategic Plan for Fiscal Years 2012-2016

Thank you, Madame Chair. I will keep my remarks brief this morning.

First of all, I would like to express my appreciation to all of the members of the staff who have been involved in implementation of the Strategic Plan and Strategic Enforcement Plan. I know that a lot of hours and work have gone into beginning the process of implementing the Plan and that that is just the beginning of the work that will take place from this point forward.

While I voted against the Strategic Plan, for reasons I will mention later, there are aspects of the plan that, taken in isolation, I agree with. What I did not, and do not now agree with, first and foremost, is the overall emphasis on enforcement instead of prevention, and allocating of the bulk of our resources to discrimination that has already occurred instead of allocating those resources on stopping discrimination from occurring in the first place.

With regard to enforcement, I am very concerned about the Commission's delegation of most of its litigation authority to the General Counsel.

There is a reason why Congress set up the EEOC as a bipartisan Commission of five representing different political views. There is a balance that comes from a bipartisan Commission of five differing views that yields different results than decisions made by just one person. As Commissioners, we have certain fundamental responsibilities, and what responsibility is more fundamental to this bipartisan Commission than decisions to file lawsuits in the Commission's name?

However, imbedded in the Strategic Enforcement Plan is a reaffirmation of an action taken by the Commission some years ago where the then Commissioners, for whatever reasons they may have deemed appropriate at the time, ceded to a single person – the General Counsel – authority to, in most situations, determine for the Commissioners, whether and when the Commission would file lawsuits to enforce the discrimination laws. This ceding of the Commission's responsibility to the General Counsel is generally referred to as "The Delegation."

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 – FY2012, 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.

While I look forward to hearing all of the good things the Commission is accomplishing, unless and until the Delegation to the General Counsel is rescinded and Commissioners are able once again to carry out their fundamental responsibility of reviewing, deliberating and voting on proposed litigation, I do not believe we are doing the job that Congress and the American people expect of us, or that the President appointed us to perform.

As for the Strategic Plan, I voted against it because the EEOC's mission is to stop discrimination. What more effective way to stop it than to prevent it from happening in the first place. It is my opinion that the Strategic Plan and the Strategic Enforcement Plan flip flop the priorities that Congress established for this agency and that together, the two documents cement the role of the EEOC as first and foremost a prosecutorial agency. I do not think that was what Congress intended.

It is my opinion that we have our priorities backwards when we put our primary emphasis on, and the bulk of our resources into what we do *after* discrimination occurs instead of concentrating our efforts on preventing it from happening in the first place. When we look at our nation's changing demographics it is particularly apparent that our priorities as a Commission are upside down. I believe our first priority and the bulk of our resources should be focused on teaching entire new generations of Americans – employers and employees – many of whom have language and cultural barriers -- about the protections our laws give every employee. By focusing our resources on enforcement actions *after* laws have been broken, we are significantly limiting the resources that are available for education and prevention. Unfortunately, the end result is that under the Strategic Plan, we are putting most of our efforts and resources into *locking the proverbial barn door after the horse is out*.

Thank you.