

July 19, 2012

## EEOC Seeks Input on Developing Strategic Enforcement Plan

By Barry Hartstein

On Wednesday, July 18, 2012, the Equal Employment Opportunity Commission (EEOC) held a meeting in Washington, D.C., where public input was provided on the EEOC's Strategic Enforcement Plan.<sup>1</sup>

The EEOC approved its new Strategic Enforcement Plan (SEP) for 2012-2016,<sup>2</sup> effective February 22, 2012,<sup>3</sup> which includes three elements: (1) strategic enforcement, with increased focus on systemic discrimination claims and increased litigation of systemic cases; (2) education and outreach, including partnering with various stakeholders; and (3) improving operations, particularly focusing on quality control efforts among its offices around the country.

The EEOC's current intent is to issue its SEP no later than September 30, 2012, and follow up with a secondary report in approximately February 2013 that addresses quality control efforts for concerns raised regarding investigations and other issues.

The July 18 meeting included four separate "roundtables:"

- A panel that included two former members of the Commission: (1) former Chair Gilbert Casellas, who was responsible for the last National Enforcement Plan (NEP) issued in 1996 by the EEOC while he served as Chair between 1994 -1998;<sup>4</sup> and (2) former Vice Chair Leslie Silverman, who chaired the EEOC's Systemic Task Force that issued its report in March 2006 finding that combating systemic discrimination should be a "top priority" at the EEOC.<sup>5</sup>

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1 See Press Release, EEOC, *EEOC Holds Unprecedented Public Meeting to Hear Views on Strategic Enforcement Plan* (July 18, 2012), available at <http://www.eeoc.gov/eeoc/newsroom/release/7-18-12.cfm>.

2 See EEOC, *Strategic Plan for 2012-2016*, available at [http://www.eeoc.gov/eeoc/plan/strategic\\_plan\\_12to16.cfm](http://www.eeoc.gov/eeoc/plan/strategic_plan_12to16.cfm).

3 See EEOC Meeting, *EEOC Strategic Plan for Fiscal Years 2012-2016* (Feb. 22, 2012), available at <http://www.eeoc.gov/eeoc/meetings/2-22-12/index.cfm>.

4 See EEOC, *U.S. Equal Employment Opportunity Commission National Enforcement Plan*, available at <http://www.eeoc.gov/eeoc/plan/nep.cfm>.

5 See EEOC Systemic Task Force, *Systemic Task Force Report to the Chair of the Equal Employment Opportunity Commission* (Mar. 2006), available at [http://www.eeoc.gov/eeoc/task\\_reports/systemic.cfm](http://www.eeoc.gov/eeoc/task_reports/systemic.cfm).

- Two panels described as “Private and State and Local Government Sectors” that included educators from several law schools who focus on EEO issues, stakeholder from human rights organizations, a representative from the national Small Business Association, a representative from a state human rights agency, and plaintiff and defense counsel.
- A panel that addressed unique issues involving federal sector employees.
- A final panel included various district directors and regional attorneys from among the 15 district offices around the U.S.; James Lee, Deputy General Counsel of the EEOC and a member of the SES Advisory Council;<sup>6</sup> an EEOC administrative law judge; and a union representative from the National Council of EEOC Locals.

Following presentations from each of the panel members, questions were directed at the panelists by Chair Jacqueline Berrien, the other Commissioners (Chai Feldblum, Constance Barker, and Vicki Lipnic), EEOC General Counsel David Lopez, and the EEOC District Director in Memphis, Katherine Kores, who was invited to provide input on the Strategic Enforcement Plan.

Chair Berrien noted at the outset that the Commission had received 80 submissions in response to its request for comments on a proposed Strategic Enforcement Plan, and stated that additional comments from members of the public could be submitted within 15 days of the July 18 meeting (*i.e.*, until August 2, 2012).

During the initial roundtable, former Chair Casellas commented that the NEP issued nearly 18 years ago was collaborative and bi-partisan and was approved unanimously by the five-member Commission. Commissioner Feldblum made comments that set the stage for one of the central themes discussed throughout the day: (1) how many priority issues can the EEOC tackle; and (2) if there were two to three issues to be addressed, what should they be. Former Chair Caselles responded that “Policy making is not an exact science,” referred to the NEP as an “umbrella,” and then referred to the Local Enforcement Plans (LEPs) that provided some prosecutorial discretion based on the delegation of authority to the local offices. The issue of increased centralized control versus maintaining local authority over investigations and litigation is an issue that clearly will be debated among the Commissioners in finalizing the SEP.

The discussion with the former Commissioners also raised another topic that most likely will be addressed in the updated SEP – the Commission’s Priority Charge Handling Procedures (PCHP), adopted in 1995,<sup>7</sup> in which charges are classified as “A,” “B,” and “C” charges (with the “A” charges receiving the closest attention as possible, including systemic investigations and/or “reasonable cause” findings). The discussion suggested that further clarification may be needed in classifying charges for purposes of investigation and determining how the multitude of charges classified as “B” charges should be handled.

The panelists in the second and third roundtables revealed the diversity of interests that the Commission will need to balance in finalizing the NEP. There clearly was no consensus regarding the issues that should be the top priorities of the EEOC, and the perspective varied in part based on the organization represented in the presentation.<sup>8</sup> Notably, Professor Nancy Eisenberg, who has written extensively on pay discrimination issues, recommended that the EEOC engage in broad based requests for pay data from employers and perform periodic audits to address this issue (similar to OFCCP procedures for government contractors).<sup>9</sup> Another speaker, Mark Bendick, an economist who was one of the plaintiffs’ experts in *Dukes v Wal-Mart*, suggested that the EEOC should focus on “strategic targets” – particular industries where there is “egregious” discrimination.<sup>10</sup>

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6 The SES Advisory Council is composed of: the Director, Office of Field Programs (OFF); the Deputy General Counsel; Associate Legal Counsel, and District Directors from St. Louis, Los Angeles, and Memphis. See Office of Inspector General, OIG Report No. 2007-07-ADV, *Report on the Strategic Management of Human Capital: Succession Planning*, n. 4 (July 2007), available at <http://www.eeoc.gov/eeoc/oig/2007-07-adv-humanacap.cfm>.

7 See EEOC Priority Charge Handling Task Force & Litigation Task Force, *Priority Charge Handling Task Force Litigation Task Force Report* (Mar. 1998), available at [http://www.eeoc.gov/eeoc/task\\_reports/charge\\_handling.cfm](http://www.eeoc.gov/eeoc/task_reports/charge_handling.cfm).

8 As an example, speakers appeared from a broad range of organizations, including the National Immigration Law Center, Consortium on Citizens with Disabilities, the Employment Law Center and the National Small Business Association, to name a few.

9 *EEOC Meeting, Public Input into the Development of EEOC’s Strategic Enforcement Plan* (July 18, 2012) (written testimony of Nancy Eisenberg), available at <http://www.eeoc.gov/eeoc/meetings/7-18-12/eisenberg.cfm>. Based on the Equal Pay Act (EPA), the EEOC can initiate a “directed investigation” and has broad based investigation rights pursuant to investigation procedures adopted from the Fair Labor Standards Act. See 29 U.S.C. §§ 211 (prohibitions relating to the EPA), 206 (“The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment as he may deem necessary or appropriate to determine whether any person has violated any provisions of this chapter”).

10 *EEOC Meeting, Public Input into the Development of EEOC’s Strategic Enforcement Plan* (July 18, 2012) (written testimony of Marc Bendick), available at <http://www.eeoc.gov/eeoc/meetings/7-18-12/bendick.cfm>.

At least one member of the plaintiffs' bar suggested that the investigation process should be more transparent, and that copies of an employer's position statement should be provided to charging parties and/or their attorneys in order to ensure that charges are properly evaluated.

One of the more spirited discussions involved comments by a management attorney who described investigations as "consistently inconsistent" and suggested that the fault does not necessarily lie with the investigator; rather, more supervision is needed by supervisors, district directors, and regional attorneys who ultimately are responsible for the investigation findings and/or litigation of charges. In short, he suggested that greater oversight is needed over the investigation process.<sup>11</sup>

The final panel, which included career personnel involved in the leadership of the district offices, questioned the wisdom of including any directive from the Commission in the final SEP that would limit the delegation of authority and prosecutorial discretion by local EEOC leadership.<sup>12</sup> These panelists underscored the need for flexibility to address local issues of concern, which may be different from a list of priorities established by the Commission. The EEOC's Deputy General Counsel, Jim Lee, echoed the views of the local leadership that directives to the district offices concerning the issues to be focused on as part of the systemic initiative could result in a "disincentive" to pursue claims warranting litigation at the local level.

On the other hand, the EEOC leadership in the field underscored the importance of collaboration among various offices. For example, one district director observed that not all offices have systemic investigators. Another suggestion made was for coordination between offices handling investigations involving similar issues from the same employer.

The New York Regional Attorney, Elizabeth Grossman, also commented on a criticism by members of the management bar—inconsistent approaches taken by different district and/or field offices around the country. Ms. Grossman challenged such an attack, cautioning the Commission against mandating consistent practices among EEOC offices around the country. She described the differences between offices "as a strength," explaining that in different locales there are cultural differences, different histories, different dynamics, and different practices by the private bar.

The final panel also included Gabrielle Martin, who served as the spokesman for the National Council of EEOC Locals. As the "union" spokesman for EEOC personnel in the field, she raised a concern about the EEOC's focus on "the numbers." She even used the example of imposing a certain number of systemic investigations on investigators, suggesting that being "forced to fit" certain charges into a "systemic" investigation was not effective.

Over the coming weeks, as it finalizes and implements the new Strategic Enforcement Plan, the Commission will be considering the various interests and concerns raised at the July 18 meeting and additional comments submitted in the remaining comment period.

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11 *EEOC Meeting, Public Input into the Development of EEOC's Strategic Enforcement Plan* (July 18, 2012) (written testimony of Gary Siniscalco), available at <http://www.eeoc.gov/eeoc/meetings/7-18-12/siniscalco.cfm>.

12 EEOC personnel from the field included Reuben Daniels, Charlotte District Director; William Cash, Little Rock Area Office Director; Elizabeth Grossman, Regional Attorney for the New York District Office; and John Hendrickson, Regional Attorney for the Chicago District Office.