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NOMINATIONS OF P. DAVID LOPEZ TO SERVE AS GENERAL COUNSEL AND CHARLOTTE BURROWS TO SERVE AS A MEMBER OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

HEARING

OF THE

COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS

UNITED STATES SENATE

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

ON

NOMINATIONS OF P. DAVID LOPEZ, OF ARIZONA, TO BE GENERAL COUNSEL, AND CHARLOTTE A. BURROWS, OF THE DISTRICT OF COLUMBIA, TO BE A MEMBER, BOTH OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOVEMBER 13, 2014

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C O N T E N T S

STATEMENTS

THURSDAY, NOVEMBER 13, 2014

NOMINATIONS OF P. DAVID LOPEZ TO SERVE AS GENERAL COUNSEL AND CHARLOTTE BURROWS TO SERVE AS A MEMBER OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

THURSDAY, NOVEMBER 13, 2014

U.S. SENATE,
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,
Washington, DC.

The committee met, pursuant to notice, at 3:30 p.m., in room SD–430, Dirksen Senate Office Building, Hon. Tom Harkin, chairman of the committee, presiding.

Present: Senators Harkin, Alexander, Franken, Murphy, Paul, Hatch, and Scott.

OPENING STATEMENT OF SENATOR HARKIN

The CHAIRMAN. First of all, I apologize for being late—just a vote and some other action. We welcome everyone here. Today, our committee will hold a nomination hearing for Charlotte Burrows to be a commissioner on the Equal Employment Opportunity Commission and David Lopez to be the EEOC General Counsel.

Throughout my career, I have been guided by the vision of an America that is compassionate, just, and inclusive, a society where the government provides a ladder, or sometimes a ramp, of opportunity that will give all people equal access to the American dream. But that ladder cannot function properly if there are barriers of discrimination that unfairly limit opportunities for some Americans to fully participate in the social, political, and economic life of our country.

Over the last 45 years, we have made great strides toward eliminating discrimination in the workplace. The Civil Rights Act of 1964 prohibited discrimination on the basis of race, sex, national origin, and religion. The Age Discrimination in Employment Act, in 1967, prohibited discrimination on the basis of age. The Americans with Disabilities Act, in 1990, and the ADA Act Amendments of 2008 prohibited discrimination on the basis of disability.

These important guarantees, however, are not self-enforcing. They're only as strong as the agency charged with enforcing them, and that's the EEOC. The EEOC's mission is simple: to promote equality of opportunity in the workplace and enforce Federal laws prohibiting employment discrimination.

While much progress has been made in recent decades, discrimination in the workplace continues to be all too common. Too many employment decisions are based on insidious stereotypes and prejudices rather than an employee's talent, ability, and qualifications. Too many hardworking Americans face the harsh reality of getting a pink slip or not being hired at all because of race, sex, national origin, religion, age, disability, or some other irrelevant factor.

The problem is especially pronounced for individuals with disabilities. Less than 30 percent of working-age Americans with disabilities participate in the workforce Think about that. People are always talking about the unemployment rate is now 5.8 percent. Among African Americans, it's about twice that. And people bemoan that and say, "We've just got to reduce unemployment."

Think about this. Over 60 percent of people with disabilities who can work and want to work are not employed. Think about that as a figure for unemployment—two-thirds. Households with an adult member with a disability earn 38.4 percent less than households without an adult member with a disability. So it's income discrimination, too. These facts make it clear that people with disabilities are still encountering road blocks, and that the ADA's goal of economic self-sufficiency is far from being achieved.

While I am optimistic that our amendments to the Rehabilitation Act, contained in the Workforce Innovation and Opportunity Act of 2014—by the way, I might just say that we wouldn't have gotten there without the great help, assistance, and support, advice, and consultation of our Ranking Member, Senator Alexander. We worked 5 years on that bill, and we finally got it through.

But contained within that are some parts that will help us make great progress in the future for people with disabilities. The EEOC will always have an important role to play in combating discrimination and supporting employment opportunities both for individuals with disabilities and, of course, all Americans.

Unfortunately, today's EEOC faces enormous challenges. The Agency has a substantial backlog of almost 71,000 cases, and it takes an average of 267 days to process a discrimination claim. And as we know, all too often, justice delayed is justice denied.

American workers deserve better, especially in these times of economic turmoil, when discrimination often increases and workers who are victims of discrimination face even greater challenges. Now more than ever, we need strong leadership at the EEOC. Both of our nominees are extremely well qualified and have a commitment to public service. They possess the extraordinary skills and experience that will help them advance the EEOC's mission and ensure proper enforcement of some of our most important laws.

I look forward to working with Senator Alexander to move these nominees quickly so they can get to work ensuring fairness and equal opportunity for every American worker.

With that, I recognize our Ranking Member, Senator Alexander.

OPENING STATEMENT OF SENATOR ALEXANDER

Senator ALEXANDER. Thank you, Mr. Chairman, and welcome to the committee.

In 1963, I stood with a lot of other people on the National Mall and heard Dr. King's speech in August of that year, "I Have a

Dream." This Agency was the result of the Civil Rights Act of 1964 that came the next year, and it's very important in our American life. The EEOC receives complaints of discrimination and is charged with investigating those complaints to determine whether or not they have merit, and then attempting to resolve them informally through conciliation and mediation. That's the charge.

I have two primary concerns with the EEOC. First, I believe the EEOC has placed too much emphasis on litigating high profile lawsuits and too little emphasis on dealing with the complaints that have been filed, creating a huge backlog of complaints about discrimination. Second, I don't believe that the Commission has been as transparent as it ought to be in terms of the guidance it issues and its activities. Let me explain a little about that, and then I'll ask questions about that.

The litigation strategy the EEOC is using today is time-consuming, costly, and ought to be the last resort. Last year, more than 93,000 charges of discrimination were filed with the EEOC. About 3,000 of those came from Tennessee. EEOC reports that 70,000 of the 93,000 charges are unresolved and still pending.

A backlog of charges pending is nothing new for the EEOC. So why not spend the time and money you're spending on these high profile lawsuits instead on resolving actual complaints that are filed and are part of the backlog. This desire to win big lawsuits has backfired. Numerous Federal courts have criticized the EEOC's litigation practices. An example is the Kaplan Higher Education Corporation suit. EEOC brought a case and received a sharp rejection by a unanimous three-judge panel in the 6th Circuit Court of Appeals. The Wall Street Journal named it the "Opinion of the Year."

Here's what the court wrote,

> "EEOC brought this 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."

That's embarrassing, to bring a case like that and have a court unanimously say that.

The court also criticized EEOC for bringing a case against Kaplan for using the same type of background check that the EEOC itself uses. EEOC has been ordered to pay attorney's fees in 10 different cases. In six cases, fees were awarded under a rare provision in Title VII of the Civil Rights Act, which is reserved for cases that are, "frivolous, unreasonable, and without foundation," or "continued to be litigated" after those circumstances became present. That's embarrassing, too.

This costs taxpayers money. It hurts the victims of workplace discrimination. I believe the Commission has exercised too little restraint over the General Counsel. I believe the EEOC should immediately reconsider the strong emphasis on lawsuits which are not based on any complaint and do not even have a victim plaintiff.

In recent years, the general counsel has pursued a number of cases without complaints, such as age discrimination cases against large accounting firms whose partners have voluntarily adopted a mandatory retirement age. It's hard to imagine why you would

spend time on that when you have a 70,000 backlog of actual cases of discrimination that are unresolved.

I am also concerned about the lack of transparency in guidance. What I mean is whether you allow the public to comment on the proposed guidance.

Finally—and I'll ask a question about this—in the Affordable Care Act, there wasn't much bipartisan about it. But one bipartisan idea was to encourage wellness. We heard testimony in both the Democratic caucus and the Republican caucus from Safeway and other companies that encourage healthy behaviors in their companies by saying you'll have cheaper insurance if you lead a healthy lifestyle.

The Obama administration had regulations from Treasury, Labor, and HHS that were working just fine until administration officials rewrote them and made it more complicated to have wellness plans. The EEOC has not yet issued regulations about what its attitude will be, yet it's suing companies who are trying to follow the spirit, I think, of the Affordable Care Act on wellness. So I want to ask about that when my time comes.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator Alexander.

We have two excellent nominees with us today. First, we have Charlotte Burrows, nominee to be a commissioner on the EEOC. Ms. Burrows currently serves as Associate Deputy Attorney General at the Department of Justice. Prior to that, she served as General Counsel for civil and constitutional rights to Senator Edward Kennedy on the Senate Committee on Health, Education, Labor, and Pensions—I've heard of that committee—and also the Judiciary Committee.

She also worked in the Civil Rights Division as a trial attorney, and clerk for Hon. Timothy K. Lewis for the U.S. Court of Appeals for the 3rd Circuit. She received an A.B. from Princeton University and J.D. from Yale Law School.

Next is Mr. David Lopez, who is nominated for a second term as General Counsel of the EEOC. Mr. Lopez has been General Counsel since 2010. Prior to that, he served at the EEOC in various capacities for two decades. Mr. Lopez received a B.S. from Arizona State University and a J.D. from Harvard Law School.

We welcome you both here. Both of your testimoneys will be made a part of the record in their entirety, and if you can sum up your testimony in 5 minutes or so, then we'll get to some questions.

Ms. Burrows, would you please start? Welcome.

STATEMENT OF CHARLOTTE A. BURROWS, WASHINGTON, DC

Ms. BURROWS. Certainly, Senator. Good afternoon and thank you.

And thank you also, Ranking Member Alexander, for your time here today.

It's an honor to be here in this committee that meant so much to my former boss, Senator Kennedy. I would like to thank the President for this nomination and to express my deep and abiding appreciation for the support of my family, friends, and colleagues, some of whom are here today. With indulgence, I would like to introduce a few of them.

My father, Dr. Rodney Burrows, who as a former veteran and a former political science professor, instilled in me a respect both for our American democracy and for this committee, this body. I would also like to introduce my uncle, John C. Honor, and my aunt, Vivian Honor, my cousins, Jennifer and John Honor, III, and John's wife, JeVon Honor. My thanks as well to my brother, Bruce Burrows, and my sister, Dr. Stephanie Burrows, for their support and good wishes.

The CHAIRMAN. That's quite a family. Welcome. I'm glad you're all here. Thank you.

Ms. BURROWS. And my husband, Tilman Wuerschmidt, and my son, Cy Alan Wuerschmidt, as well as Toni, my sister-in-law, and Ben and Beyorn Burrows.

In the 50 years since the Equal Employment Opportunity Commission was established, America has made great progress toward achieving the goal of equal employment opportunity. Women are not only entering the workforce in greater numbers, but increasingly are doing so in positions of leadership.

Thanks in large part to the landmark Americans with Disabilities Act, which Chairman Harkin was so instrumental in passing, new doors of opportunity are open to persons with disabilities. More workers than perhaps ever before can be confident that they are judged by their merit and not by their race, color, national origin, sex, religion, disability, or some other irrelevant factor like genetic information.

Despite that progress, unfortunately, we have yet to fully eliminate prejudice and discrimination from the workplace, and the EEOC's mission remains critical. For workers and their families, effective enforcement of our Nation's civil rights laws is vital to ensuring they have an equal opportunity to work hard, succeed, and provide for their children.

Our Nation is strongest when everyone is included and everyone has a chance to contribute. Only when we completely eliminate discrimination from the workplace will our economy have the full benefit of the many diverse talents of American workers.

Quality enforcement is also important for our Nation's businesses, the vast majority of which not only comply with the law, but are at the forefront of ensuring fairness in the workplace. Employers have a great deal of experience about what works to achieve equal job opportunity, and I view the business community as a critical partner in the Commission's work. If confirmed, I look forward to working with all members of the Commission and all interested parties, including this committee, on our common goal of equal employment opportunity.

In my current role as Associate Deputy Attorney General, part of my job has been to address employment issues both in terms of the Federal Government's role in protecting workers and also its status as one of America's largest employers. As such, I must often coordinate with and sometimes mediate between Department litigators who bring plaintiff-side job discrimination cases and those who defend Federal agencies when they are sued as employers. That role has given me insight into the needs and perspectives of both employers and workers and has strengthened my conviction

that there is almost always room for common ground between the two.

Mr. Chairman, I am honored to be considered for this position and for the opportunity to assist in the Commission's critical work. For nearly my entire professional career, I have either worked with the EEOC or sought to enforce or improve the statutes it administers as a career Justice Department litigator in both Republican and Democratic administrations, as a Senate staffer, and in my current role in the Deputy Attorney General's Office at the Department of Justice.

I also have been privileged to work with many of you or your staffs to further the cause of equal employment opportunity. If confirmed, I hope to continue that important work.

I thank the committee for your time and look forward to your questions.

[The prepared statement of Ms. Burrows follows:]

PREPARED STATEMENT OF CHARLOTTE A. BURROWS

Good afternoon, Chairman Harkin, Ranking Member Alexander, and distinguished members of the committee. It is an honor to appear before this committee, which meant so much to my former boss, Senator Kennedy.

I would like to thank the President for this nomination and to express my deep and abiding appreciation for the confidence and support of my family. Some of them are here today, including my father, Dr. Rodney Burrows, who as both a veteran and a former political science professor, helped instill in me respect for our American democracy and the importance of this body. I would also like to introduce my uncle, John C. Honor, Jr., and my aunt, Vivian Honor. My thanks as well to my brother, Bruce Burrows, and my sister, Dr. Stephanie Burrows, for their support and good wishes. The experience of growing up as the middle child between two very different, opinionated and incredibly intelligent siblings helped me to see others' perspectives, to negotiate, and to look for opportunities for compromise—skills that will be useful if I am fortunate enough to be confirmed. I'd also like to introduce my husband, Tilman Wuerschmidt and my son, Cy Alan Wuerschmidt, and to thank them—although words can in no way fully express the debt I owe—for their love, patience, support and many sacrifices throughout my career in public service.

In the 50 years since the Equal Employment Opportunity Commission was established, America has made great progress toward achieving the goal of equal employment opportunity. Women are not only entering the workforce in greater numbers, but increasingly are doing so in positions of leadership. Thanks in large part to the landmark Americans with Disabilities Act, which Chairman Harkin was instrumental in passing, new doors of opportunity are open to persons with disabilities. More workers than perhaps ever before can be confident that they will be judged on their qualifications and performance, not their race, color, national origin, sex, religion, disability, age or genetic information.

Despite that progress, unfortunately, as a society, we have yet to completely eliminate prejudice and discrimination from the work place, and the EEOC's mission remains critical. For workers and their families, effective enforcement of our Nation's civil rights laws is vital to ensuring they have an equal opportunity to work hard, succeed, and provide for their children. Our Nation is strongest when everyone is included, and everyone has a chance to contribute. Until we completely eliminate the barriers of discrimination from the workplace, our economy will continue to be deprived of the full benefit of the many, diverse talents of American workers.

Quality enforcement is also important for our Nation's businesses, the vast majority of which not only comply with the law, but have been at the forefront of ensuring fairness in the workplace. Employers have a great deal of expertise about what works to achieve equal job opportunity, and I view the business community as a critical partner in the Commission's work.

If confirmed, I look forward to working with all members of the Commission and *all* interested parties, including this committee, on our common goal of equal employment opportunity. In my current role as Associate Deputy Attorney General, part of my job has been to address employment issues both in terms of the Federal Government's role in protecting workers *and* its status as one of America's largest employers. As such, I must often coordinate with—and sometimes mediate be-

tween—Department litigators who bring plaintiff-side job discrimination cases, and those who defend Federal agencies when they are sued as employers. That role has given me insight into the needs and perspectives of both employers and workers, and strengthened my conviction that there is almost always room for common ground between the two.

Mr. Chairman, I am honored to be considered for this position and for the opportunity to assist the Commission in its critical mission. For nearly my entire professional career, I have either worked with the EEOC or sought to enforce or improve the statutes it administers—as a career Justice Department litigator in both Republican and Democratic administrations, as a Senate staffer, and in my current role in the Deputy Attorney General's Office at the Department of Justice.

I also have been privileged to work with many of you or your staffs to further the cause of equal opportunity. If confirmed, I hope to continue that important work.

I thank the committee for your time and look forward to your questions.

The CHAIRMAN. Thank you very much, Ms. Burrows. Welcome back to your home base here in this hearing room.

Ms. BURROWS. Thank you.

The CHAIRMAN. Next is Mr. David Lopez.

Mr. Lopez, first of all, before you speak, I want to thank you. You and I have had dealings in the past.

Mr. Lopez, along with his attorneys in Houston, TX.

Mr. LOPEZ. Yes.

The CHAIRMAN [continuing]. Brought a case—and, again, this was not a case where someone had made a complaint. These were individuals with disabilities, intellectual disabilities, who had been hired by a service in Texas and shipped up to Iowa to work in a poultry processing plant. Some of them had worked there for as much as 20 years, if I'm not mistaken, right alongside people without disabilities, people who were making $8, $9, $10 an hour, and they were making 50 cents an hour and were housed in horrible conditions with nothing to show for it.

That case was brought, and if I'm not mistaken, it's still the largest judgment ever obtained by the Federal Government against an entity.

I want to thank you for your leadership on that. I think what that case showed the Nation was that discrimination against people with disabilities is embedded around this country, and it showed that even in this day and age, there are unscrupulous people who will take advantage of the poor and disabled and put them in these kinds of working conditions. As I said, it wasn't that someone filed a complaint. It was through investigations that this was found.

I want to put that on the record. I remember that case very well because it happened in Iowa, and it really, I think, opened a lot of eyes as to what was happening to people with disabilities in our workplaces.

I thank you for your leadership on that, Mr. Lopez. Again, your statement will be made a part of the record, and if you could please take 5 minutes and sum it up, I'd appreciate it.

STATEMENT OF P. DAVID LOPEZ, ARLINGTON, VA

Mr. LOPEZ. Thank you, Chairman Harkin. Chairman Harkin, Ranking Member Alexander, members of the committee, first of all, I am honored and humbled to have been re-nominated by President Obama for the position of General Counsel.

I would like to start out by introducing my family, Maria Leyva, my wife of nearly 25 years, my sons, Javier, Julian, and Luis. Javier is working today. They are quite simply my heart and the reason I get up in the morning.

As Chairman Harkin stated in his introduction, I am a longtime public servant. I joined the Federal Government in 1991, first at the U.S. Department of Justice Civil Rights Division, and then at the Equal Employment Opportunity Commission. Over more than two decades of public service, I have proudly been part of this country's longstanding bi-partisan commitment to ensuring equal employment opportunity.

When President Obama nominated me in 2009 to be EEOC's General Counsel, I observed firsthand that civil rights are not a partisan issue, but an American promise. This year we have celebrated the 50th anniversary of the Civil Rights Act of 1964, including Title VII, a law that has enabled countless individuals to unleash their potential and productivity, and it's fitting that we're here in the Dirksen Building.

The EEOC is a small agency with a big mission: to eradicate employment discrimination. It is truly a little agency that could.

As general counsel, I run the Commission's litigation program, overseeing the agency's 15 Regional Attorneys and a staff of more than 325 lawyers and legal professionals across the country. As I state in my written testimony, I have developed compelling critical cases which we successfully resolved at more than a 90 percent rate, and when unable to resolve, went frequently in front of juries.

We have filed litigation consistent with the guidelines set forth by the Commission to govern the delegation of litigation authority, and I hope to have fostered a culture of inclusiveness and transparency, encouraging our litigators nationwide to operate more collaboratively with each other, other internal partners, as well as with the bar and management groups.

In significant part due to our trial and appellant successes, I was honored to be named by the National Law Journal earlier this year as one of America's 50 outstanding general counsel. I was one of only a small number of public attorneys to have received this award. The National Law Journal recognized me for the dedicated and talented work of my staff across the country and the successful litigation program by any metric.

In accepting this award, I am keenly mindful of the profound impact our work has and our decisions have on companies and workers across the country. These lawsuits often stop longstanding discriminatory practices and provide relief to the victims of discrimination.

You mentioned, Senator, our landmark $240 million trial verdict in Davenport, IA, on behalf of 32 intellectually disabled workers. These workers had been brought to Iowa to work at a turkey evisceration plant. During their employment, they were housed in an old schoolhouse where they were denied access to medical care. They were subject to verbal abuse and sometimes physical abuse. The jury sent the strong verdict that this type of conduct is unacceptable in this country or anywhere in the world.

This victory was personally gratifying for me. As general counsel, I have made robust enforcement of the Americans with Disabilities

Act a top priority. And, indeed, I have submitted a list of cases that we brought. We brought and successfully resolved numerous cases on behalf of individuals with cancer, diabetes, epilepsy, and other conditions difficult to cover prior to the enactment of this Act. We have also successfully brought and resolved our first cases under the Genetic Information Nondiscrimination Act.

In addition to this area of our responsibility, we have a powerful story to tell in many areas. This includes combating sex discrimination in traditionally male professions, combating egregious racial harassment, blatant pregnancy discrimination, and persistent religious discrimination. We have been successful in the courts in securing victories and setting forth important legal principles.

While it's my job as general counsel to be the Agency's chief litigator, and the statute provides me with the authority to conduct litigation, let me be clear. I believe litigation should be the enforcement tool of last resort. I strongly support the agency's efforts to eradicate discrimination through policy guidance, voluntary compliance, and public outreach.

Let me close with some words about our incredible career staff. This past spring, the New York Times ran a story about the men who worked at Henry's Turkey and how they had been all but forgotten for years. The article referred to Robert Canino, our wonderful regional attorney from Dallas and the career commission lawyer who brought this case. The story stated that Robert was the "last best hope for justice" for those discrimination victims.

As both an EEOC trial attorney and more recently as General Counsel, I have personally seen the dedication and skills of these amazing civil servants. Over the past 4 years, they have faced a hiring freeze, significant attrition among their ranks, and furloughs. Yet these professionals have remained steadfast, thoroughly committed to bringing equal employment opportunities for all. They embody the finest and highest ideals of public service, and I am proud to serve with each and every one of them.

Thank you. I would be happy to answer any questions.

[The prepared statement of Mr. Lopez follows:]

PREPARED STATEMENT OF P. DAVID LOPEZ

Good afternoon, Chairman Harkin, Ranking Member Alexander, members of the committee.

My name is David Lopez and I am honored and humbled to have been nominated to serve another term as the General Counsel of the U.S. Equal Employment Opportunity Commission (EEOC).

I have served in the Federal service since 1991, first at the U.S. Department of Justice Civil Rights Division, and then at the Equal Employment Opportunity Commission. Over my more than two decades of public service, I have proudly been part of this country's longstanding bi-partisan commitment to ensuring equal employment opportunity without regard to race, color, gender, religion, national origin, disability, age or genetic information.

When President Obama nominated me in 2009 to be the EEOC's General Counsel, I had served in the career civil service under Republican and Democratic administrations. Throughout my tenure I have observed firsthand that civil rights are not a partisan issue, but an American promise. This year we have celebrated the *50th anniversary of the Civil Rights Act of 1964*, including Title VII—one of the most transformative pieces of legislation in the country's history. Along with subsequent legislation targeting discrimination on other traits like age and disability, it has enabled countless individuals to unleash their potential and productivity, in turn helping to drive our Nation's economic engine.

The EEOC is a small agency with a big mission—to stop and remedy unlawful employment discrimination. To that end, the Agency has carried out its mission consistently and dutifully, decade after decade.

We start with prevention, issuing policy guidance designed to explain employer responsibilities and employee rights under the laws we enforce. We receive and investigate nearly 100,000 private-sector charges per year and resolve the vast majority of them informally, in mediation or conciliation. We devote enormous attention and resources to public outreach and education across the country. When these tools do not work, we also are statutorily directed to file suit to enforce the laws in Federal court.

As general counsel, I run the Commission's litigation program, overseeing the Agency's 15 Regional Attorneys and a staff of more than 325 lawyers and legal professionals who conduct or support Commission litigation in district and appellate courts throughout the Nation.

The public-interest litigation the EEOC chooses to pursue provides a unique deterrent to unlawful discrimination, both for the specific defendant and also for the larger community. And they help inform our tremendous efforts at conciliation and early resolution.

Take, for instance, the landmark *$240 million trial verdict* in Davenport, IA on behalf of 32 intellectually disabled workers. These workers had been brought to Iowa to work at a turkey evisceration plant. During their employment, they were housed in an old schoolhouse in Muscatine, IA where they were deprived of access to medical care, and subjected to verbal and sometimes physical abuse. This one lawsuit may have done more than we can ever know to convey the warning of "never again." This particular piece of litigation filed by the Commission solely to serve the public interest served as a clarion call: That discrimination because of disability cannot and will not stand in Muscatine, anywhere in Iowa, or anywhere in this great country.

We are, of course, proud of the success we've been able to achieve through litigation on behalf of our charging parties. Some of our proudest victories for American workers include a case out of *Georgia*, where we were able to win a victory for a woman unlawfully denied a supervisory position because of her sex and cases out of *Tennessee*, *North Carolina*, and *Texas*, involving employees subjected to egregious harassment based on sex or race. During my tenure, I am proud that we have been able to prevail on behalf of charging parties in more than 60 percent of our jury trials, including 11 of our last 15.

We also have obtained landmark victories in the appellate courts. For example, in *Houston Funding*, a panel of the Fifth Circuit issued a landmark—but common-sense-ruling recognizing that discrimination against a woman because she is lactating is discrimination "because of sex" in violation of Title VII and the Pregnancy Discrimination Act. Additionally, we prevailed before the U.S. Court of Appeals for the Fourth Circuit in our action against *Baltimore County*, where the appeals court agreed with our position that making older workers contribute more to their pensions violates the Age Discrimination in Employment Act.

As general counsel, I have made robust enforcement of the Americans with Disabilities Act a top priority. Indeed, when I appeared before this committee more than 4 years ago I vowed that one of my main goals upon confirmation would be to breathe full life into the recently enacted Americans with Disabilities Act Amendments Act (ADAAA). This would be one of my main goals upon confirmation.

As Chairman Harkin and members of this committee know well, under the "old" ADA, vindicating the rights of people with conditions such as diabetes or epilepsy (and sometimes even cancer) used to be virtually impossible. This had been one of my greatest frustrations over the many years I was in the trenches as an EEOC trial attorney. It was difficult to rectify glaring disability-based discrimination, even in cases where the employer admitted to discriminating based on the worker's medical condition.

But Senators, I am pleased to say that today, in light of your efforts in passing the ADAAA, that we have been successful where before success had eluded us. We now have brought and successfully resolved *numerous cases* on behalf of individuals with cancer, diabetes, epilepsy, intellectual disabilities, and other conditions difficult to cover prior to the passage of this Act. We have also successfully *brought* and/or *resolved* the first cases under the Genetic Information Nondiscrimination Act ("*GINA*").

In addition, in virtually every area under our purview—for instance, in combating sex discrimination in hiring in male dominated professions, or egregious overt racial harassment—we have a powerful story to tell. We have successfully prosecuted a multitude of sex-discrimination cases, including many involving blatant and unabashed pregnancy discrimination. I've observed that, more than 25 years after pas-

sage of the Pregnancy Discrimination Act, pregnancy-related discrimination continues to be among the most overt forms of discrimination we encounter. Fortunately, our *litigation efforts* in this area have had enormous impact for these women and their families.

We have also vigorously prosecuted cases based on religious discrimination. The Supreme Court recently granted our petition for certiorari in our ongoing lawsuit against *Abercrombie and Fitch*. With this case, to be heard this term, the Court will examine Title VII's requirement that companies reasonably accommodate workers' religious beliefs and practices. A group of seven broad-ranging religious groups filed an amicus brief in support of our cert petition. This case illustrates the commitment the EEOC has to protecting the religious exercise of all Americans and underscores the singular role that the EEOC's public-interest litigation can play in helping to clarify the law, and thus, in ultimately bringing greater certainty about legal obligations and rights for employers and employees alike.

While it's my job as General Counsel to be the Agency's chief litigator, let me be clear: I believe litigation should be the enforcement tool of last resort. I do *not* believe in suing first, and asking questions later. During my tenure as GC, I have focused on developing and filing critical cases, particularly those that further the public interest. Indeed, during the past 4 years the number of merits lawsuits we've filed has actually dropped. In fiscal year 2013, for instance, we litigated on the merits only *.0014 percent* of all *charges filed*. That is about one lawsuit for every 1,000 charges. We carefully and deliberately vet our litigation vehicles to ensure effective enforcement nationwide and across the statutes. And we seek approval from the Agency's Commissioners—by law, a bipartisan group—consistent with the guidelines the Commission itself has adopted to govern the delegation of litigation authority.

It bears emphasizing that we end up successfully resolving more than 90 percent of the cases we do file. In practice, this means we are able to secure victim specific relief *and*, as importantly, non-monetary relief such as policy changes and training to ensure the conduct does not recur in the vast majority of our cases. We achieve all this without protracted and unnecessary litigation.

More generally, I have inculcated a culture of inclusiveness and transparency. More than 4 years ago I talked about fostering a "culture of collaboration." True to my pledge, I have cultivated "One National Law Enforcement Agency," encouraging our litigators nationwide to operate more collaboratively and cohesively with each other and other internal partners. This good-government approach has contributed to many of the successes mentioned above. Further, this One National Law Enforcement Agency model has spread beyond the litigation program; it is embodied in the Agency's current *Strategic Enforcement Plan* which enshrines an integrated, cross-functional approach, breaks down silos, and helps ensure we do not reinvent the wheel or repeat mistakes.

As general counsel, I, along with those under my direction, actively and enthusiastically support the Agency's non-litigation enforcement efforts. During my tenure as General Counsel, I believe I personally have engaged in unprecedented levels of outreach to various stakeholder groups across the country, including to bar and management groups. For instance, I have appeared at 7 events over the past 2 months alone where I addressed members of the bar and business community. As I say often at these events, I operate from the premise that the vast majority of employers seek to comply voluntarily with the law and often will take steps beyond the minimal legal requirements to ensure inclusive and fair workplaces.

Let me close with some words about our incredible career staff. This past spring, the New York Times ran an abovefold *story* about the men who worked at Henry's Turkey, and how they had been all but forgotten for years. The article referred to Robert Canino—our wonderful Regional Attorney from Dallas and the career Commission lawyer who developed and tried the case. The story stated that Robert was the "last best hope for justice" for those discrimination victims in Muscatine. That's all in a day's work for EEOC litigators like Robert.

I was honored to be named by the National Law Journal earlier this year as one of America's 50 Outstanding General Counsel, but that award really belongs to my dedicated colleagues at the EEOC who inspire me every day. I have seen up close and personal the unparalleled dedication and skill of these amazing civil servants. Over the past 4 years they have faced a hiring freeze, significant attrition among their ranks, and furloughs. Yet these professionals, who doubtless could pursue other, more lucrative career options, have remained steadfast throughout, more committed than ever to bringing equal employment opportunities for all. They embody the finest and highest ideals of public service. And I'm proud to serve with each and every one of them.

Thank you and I would be happy to answer any questions.

The CHAIRMAN. Thank you very much, Mr. Lopez.

Let me start a round of 5-minute questions, I guess for both of you, but Mr. Lopez first since you're on the EEOC. But the EEOC has done an excellent job, I believe, of reaching out to the business community and giving employers guidance to help them comply with the law. You mentioned in your remarks, in your written statement, that suing is the last resort that you want to do. And many of these things are just solved with conciliation and mediation and that type of thing and guidance directives.

Can you tell us what types of outreach to the business community the EEOC has done, and are there more that the agency should be doing or could be doing?

Mr. LOPEZ. One thing that is important about the Agency's recent strategic enforcement plan is it hopes to make sure that we use all the tools available to us to eradicate discrimination—policy, public education, voluntary compliance—and when those don't work, litigation. I've been strongly supportive of all those efforts of the Commission throughout my tenure.

I think the Commission's performance in this area is certainly reflected in its increasingly successful conciliation rate, and you see the Commission conciliating cases at a much greater rate over the last 4 years. In voluntary resolution of these cases, voluntary compliance, and by any metric, the EEOC has been incredibly successful.

Let me talk a little bit about public outreach. I can't prove this, Senator, but I do believe, because I've been told by my career staff, that I conduct more outreach than any of my predecessors. I speak frequently across the country to employer groups, to bar groups. Over this past couple of months, I've been to North Carolina, actually three times, Alabama, and Florida, speaking to management groups, talking about the work that we do.

When I go there, I tell them at every single whistle stop that I operate from the premise—even on the chief lawyer, I operate from the premise that the vast majority of employers want to voluntarily comply with the law, and they want to satisfy the requirements of the law. I go there and I answer the questions, and I answer the hard questions about the work we do, and I learn so much from them that I am able to roll back into the effectiveness of the program.

Outreach is very, very important, and it's something that I've dedicated an enormous effort to. But I will say it's not just me. It's the entire Commission. The Commission has individuals who conduct outreach, reach out to groups. It has a small business task force. The Commission has been tremendously successful in terms of talking about the work that we do and educating employers as to their responsibilities and employees as to their rights. It's a big part of what we do, and it's something that I support, not only in theory but in action.

The CHAIRMAN. Thank you.

Ms. Burrows, you're going on the Board, I hope, soon. And nationally and in Iowa, the average woman working full time year round is still earning about 77 cents on the dollar of what a man makes. I think that's terrible for families, but it's also terrible for our economy.

In your estimation, what could EEOC do to help stamp out sex discrimination in the workplace? What kind of a vision would you have for the EEOC in addressing this issue?

Mr. BURROWS. Senator, thank you for the question. I think equal pay issues are enormously important, obviously, as the country is coming off of some tough economic times, too, so even more than ever. There are a number of statutes that are already on the books—but to really sort of take a look first at what the current enforcement has been in that area, because I think it should be, obviously, a priority.

For me, the first thing I would want to do is learn more about what the Commission is doing currently on that and seek the views of my colleagues because as you force something toward a priority, then you obviously have resource issues for others to sort of see how that plays together. Really to take some time and look at the charges, what kinds of problems are out there, because sometimes as you look at charges, you can also find some things that either through guidance or other approaches will allow you to do something that takes a broader swath.

But in the first instance, I think it is something that we would need to take a close look at what has been the achievement so far and the views about how to move it forward. But I agree with you. It is a huge issue.

The CHAIRMAN. Thank you both very much. My time is up.

Senator Alexander.

Senator ALEXANDER. Thank you.

Mr. Lopez, is a mandatory retirement agreement in an accounting firm age discrimination?

Mr. LOPEZ. A mandatory retirement agreement, as a general matter, can be age discrimination. But there's a question as to whether the business is covered, whether the individuals in the accounting firm are partners who function as owners of the company, or whether they are employees of the company. The EEOC has set forth guidance on this that talks about at what stage—how you assess whether the individual has sufficient control to be an owner as opposed to an employee.

Senator ALEXANDER. If he's an owner, is it age discrimination?

Mr. LOPEZ. If the individual is an owner, the individual is not covered by the Act, not protected by the Act.

Senator ALEXANDER. Not covered by the Act.

Mr. LOPEZ. And let me say, Senator, if I may, we're not just talking about the Age Discrimination Act. If there's a partner, and the partner functions as an owner, then that individual would not be covered by the Age Discrimination Act or any of the anti-discrimination laws.

Senator ALEXANDER. But you're suing large accounting firms, Deloitte and KPMG, I believe, without a single complaint from an employee originally, alleging age discrimination with mandatory retirement firms.

Mr. LOPEZ. Incorrect, Senator. We're not suing those companies. We are not suing those companies.

Senator ALEXANDER. You're investigating those companies.

Mr. LOPEZ. OK. Let me——

Senator ALEXANDER. Is that correct?

Mr. LOPEZ. Well, I——

Senator ALEXANDER. Yes or no?

Mr. LOPEZ. I can't confirm or deny whether there's an ongoing investigation with respect——

Senator ALEXANDER. Why not?

Mr. LOPEZ. Because of the confidentiality of the statute.

Senator ALEXANDER. But you're required, if a case has a high likelihood of creating public controversy, to submit that case to the Commission for approval before you bring a case.

Mr. LOPEZ. Yes.

Senator ALEXANDER. Let me ask you—given congressional concerns with your investigating partnership agreements, will you agree that in any future cases, if you were to bring a case, you would submit it to the Commission before you do that?

Mr. LOPEZ. If I can unpack that a little bit——

Senator ALEXANDER. I only have a few minutes. So yes or no?

Mr. LOPEZ. I'm not in charge of the investigations. The investigations of the agency——

Senator ALEXANDER. Who brings the cases? You do, do you not?

Mr. LOPEZ. We would file the lawsuits, right.

Senator ALEXANDER. But I'm asking you before you file a lawsuit alleging age discrimination because a partnership agreement includes a mandatory retirement age, would you submit it to the Commission for approval before you do it?

Mr. LOPEZ. It depends on the facts of the case and——

Senator ALEXANDER. So the answer is no, you wouldn't?

Mr. LOPEZ. No, that's not the answer, Senator. The answer is that the Commission has separate delegation criteria and——

Senator ALEXANDER. I'm not asking you that. I'm asking you will you submit every case in the future about age discrimination because of a mandatory retirement age to the Commission for approval before you begin it? Yes or no?

Mr. LOPEZ. I will follow the delegation criteria——

Senator ALEXANDER. Give me a yes or no, please.

Mr. LOPEZ. It depends on the case, Senator.

Senator ALEXANDER. That's not a yes or a no. I really resent the fact that you would come up here and not answer a question yes or no.

Mr. LOPEZ. But it depends on the facts of the case.

The CHAIRMAN. Just a second. I am going to intervene here.

Senator ALEXANDER. Mr. Chairman, you don't need to intervene in my questioning.

The CHAIRMAN. I do need to intervene.

Senator ALEXANDER. I think you do not.

The CHAIRMAN. I do.

Senator ALEXANDER. I've got a right to have an answer. Advise and consent is one of the most important rules of the Senate, one of the most important functions. Now, you've emaciated that by changing a rule. I've got a right to know whether he's going to say yes or no.

The CHAIRMAN. I believe the witness has answered the question by saying it depends on the case.

Senator ALEXANDER. Mr. Chairman, you may have your opinion. I have mine. That is not the question I was asking. I'll ask another question.

Mr. LOPEZ. Senator, if I may, all I'm saying is that the Commission has set forth delegation criteria, and I'll try to follow them scrupulously. But what I will say is that the one instance where I had a case like that before me, I submitted it to the Commission.

Senator ALEXANDER. And they said no.

Mr. LOPEZ. I submitted it to the Commission.

Senator ALEXANDER. And they said no. Correct?

Mr. LOPEZ. Yes.

Senator ALEXANDER. I have a second question on wellness plans. Will you commit to submitting any future litigation regarding employer wellness programs to the Commission for a vote until after the Commission has issued guidance?

Mr. LOPEZ. I will submit—well, what I've done with the last two cases, the merits cases that have been before us, is I've submitted them to the Commission—on the merits cases.

Senator ALEXANDER. The problem is that the Affordable Care Act encouraged wellness programs. You're suing companies that are attempting to provide wellness programs before you've given guidance—before the Commission has given guidance about what companies may do. That's discouraging employers who are trying to give employees cheaper insurance if they lead a healthy lifestyle.

So at least I would think you would wait—as long as there's no guidance from the Commission, you would want to submit a case to the Commission for approval before you bring it. That's my question.

Mr. LOPEZ. We're responsible for enforcing the Americans with Disabilities Act, and under longstanding guidance under the ADA, an employer may not require an employee to disclose confidential medical information unless it's done so voluntarily.

Senator ALEXANDER. So the answer is no. Is it true the Commission has not submitted any guidance yet about how companies may comply with the Affordable Care Act provisions for wellness?

Mr. LOPEZ. Yes. I believe the Commission has not submitted any guidance.

Senator ALEXANDER. But you're suing anyway.

Mr. LOPEZ. The two merits cases I brought were submitted to the Commission based on the facts of the case, and the facts of the case involved in one instance where individuals were cutoff completely from insurance and threatened with unspecified disciplinary action. In the other case, an individual was terminated when the individual objected to participating in the program.

So consistent with the ADA, we brought those suits. But I submitted them to the Commission prior to bringing those suits.

Senator ALEXANDER. Thank you, Mr. Chairman. My time is up.

The CHAIRMAN. Thank you. Let's see. I have in order, Senator Scott is next.

STATEMENT OF SENATOR SCOTT

Senator SCOTT. Thank you. Thank you for your willingness to serve, to both of you.

I would like to continue along the line of Senator Alexander as it relates to the ACA and whether or not it is inconsistent or incompatible with the ADA. So your assertion sounded to me like you were suggesting that the ACA is somehow in conflict with the ADA as it relates to companies being able to provide financial incentives for wellness programs.

Mr. LOPEZ. No, that's not my position. The position is that the ADA and the ACA could be harmonized and presumably will be harmonized. But when we bring the case—when we look at a case to enforce the Americans with Disabilities Act, we look at the guidance that has been established by the Commission.

And under the Commission's 2000 guidance, it discusses under what circumstances medical information could be provided pursuant to a wellness program, and it says that the information must be provided voluntarily, and the guidance says—and this is not guidance I created. It was created before I got there——

Senator SCOTT. I don't want to interrupt you. The real sense of urgency that you have—see, on our side, we get 5 minutes, and Senator Harkin is so quick to cut us off. We want to make sure that we are consistent with our 5 minutes. So I don't want to cut you off unnecessarily.

My question really drills down into the place where we figure out whether or not the guidance that companies are looking for has been requested, and if it was requested and not received, then why are there lawsuits moving forward? I mean, the vast majority of employers want to be consistent and in compliance. They've asked for guidance, yet they have not received guidance. But there is a suit out there versus Honeywell that suggests that they are somehow in conflict with a law without any guidance, even though they asked for the guidance.

Mr. LOPEZ. Honeywell is a different situation because that's not a merits suit, and I can talk about that more if you'd like. But the two suits that we brought were very simply because we believed there was a violation of the Americans with Disabilities Act under longstanding EEOC guidance.

Senator SCOTT. So Honeywell would be different?

Mr. LOPEZ. Honeywell is a different situation because it wasn't a merit suit. What that means is that when we went in there, we were not seeking to end the wellness program, we were not seeking damages, and we were not seeking to stop the testing.

All we were looking for was a little breathing space to conduct the investigation, because under that particular—to know that the medical information, which included the submission of blood samples, that that information was turned over voluntarily. That's what we did in that case.

Senator SCOTT. Back to the case on mandatory retirement agreements, I listened earlier to the fact that many times there are complaints that are submitted—perhaps more than 75,000 complaints still out there not being addressed. And yet there are some suits, some direction by the Commission or by yourself, where there is no complaint and no victim, like Deloitte or PWC, where you submitted it to the Commission and they said don't move forward on that one.

Why the action where there are no complaints, where there are no victims, when we're talking about a voluntary system of retirement?

Mr. LOPEZ. Just because you don't have a charging party doesn't mean you don't have a victim. But let me go back to the——

Senator SCOTT. I would use as a backdrop 75,000 complaints where you do have people who say they are victims, and yet you're heading in the direction where there are no victims, there have been no complaints, and we find ourselves wasting a lot of resources in a direction perhaps without any identifiable person who has suggested that there has been some level of discrimination and/or some concern.

Mr. LOPEZ. Thank you, Senator. In the Commission's 2006 systemic task force plan, the Commission talked about directed charges and Commission's charges as an important tool of the Commission to address discrimination, because in some instances individuals were intimidated from complaining. They didn't know they were discriminated against. That was developed by the Commission. That wasn't developed by me.

As the general counsel, I follow the guidance of the Commission, and there hasn't been anything from the Commission to indicate that we should not bring suits based on directed charges or Commission charges. In fact, recently, in the strategic enforcement plan, the Commission again reaffirmed the importance of using directed investigations, which are a statutory tool, to address issues of violations of the Equal Pay Act.

Senator SCOTT. I think what you'll find here is that our concerns are centered on the fact that there are so many complaints, but so limited resources to go after those complaints, and that we have very serious concerns. I would conclude my remarks by stating the fact that over the last few years, we've seen more than $5 million being paid out by the EEOC because of the lawsuits and challenges they've brought forward.

And some of the comments from some of the courts are very disturbing. In the *Bloomberg* case, it was said that there is a sue first, prove later environment. And in the home nurse case, the court said EEOC's highly inappropriate search and seizure operation, its failure to follow its own regulations, its foot dragging, its errors in communication which caused unnecessary expenses for the company, its demands for access to documents already in its possession, and its dogged pursuit of an investigation where it had no aggrieved person, no aggrieved person, constitutes a misuse of its authority as an administrative agency.

Finally, in *Freeman*, a Federal court found that the EEOC's expert witness analysis contained a mind-boggling number of errors and that its evidence was skewed, rife with analytical errors, laughable, and an egregious example of scientific dishonesty. Our concern—at least my concern is with the limited resources we have, with 75,000 complaints out there, pursuing cases where there is no aggrieved person is hard for us to digest.

Thank you very much.

The CHAIRMAN. I would say to the Senator that the chair did allow him to go over 1 minute and 24 seconds.

Senator SCOTT. Sir, I appreciate that very much. This is a great day.

The CHAIRMAN. But we always go a second round, anyway.

Senator Hatch.

STATEMENT OF SENATOR HATCH

Senator HATCH. Thank you, Mr. Chairman.

Mr. Lopez, traditionally, the Office of General Counsel has published an annual report that details its litigation activities. However, a report has not been published since 2010. Why did these reports stop being published?

Mr. LOPEZ. Really, due to resources, Senator. To be honest, due to resources. We don't have extensive resources. In headquarters, we went through a two and a half year period where there was enormous staff attrition, and, really, the ethic of the program has always been that when we had an opportunity to get positions, which is very rare, we would put those positions out in the field, because a lot of the field offices are really under water.

Senator HATCH. If reconfirmed, will you commit to publishing these reports each year?

Mr. LOPEZ. Yes.

Senator HATCH. The EEOC received a charge on October 16, 2014, and filed suit on October 27, 2014, alleging that an employer's wellness plan violated the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act, or GINA. Given the time lapse of 11 days, how did the EEOC investigate and conciliate this case before filing?

Mr. LOPEZ. Are you talking about the Honeywell matter, Senator? As I mentioned, the Honeywell matter—we went in for temporary relief. The way that the agency is structured is that if a district director—now, the district directors are under the chair—if the district director believes that temporary relief is necessary in order to obtain—to complete the investigation, the ongoing investigation, then the General Counsel can go into court and seek temporary relief.

The reason that I keep emphasizing that this is not a merit suit—the court said that. The court said this is not a merit suit. When the court ruled in Honeywell—because we were not going in there asking for damages. We were not going in there asking for the end of the wellness program, and we were not asking them to stop testing. All we were asking is that they not impose penalties so that any disclosure of medical information could truly be voluntary.

Remember, in this case, the disclosure of medical information included the submission of blood samples. So that really kind of elevated it in terms of the way that we looked at the case.

Senator HATCH. Let me ask a little bit further to see if I can get more information on it. As this involves a novel area of the law and contradicts how other cabinet level agencies interpret wellness plans under the Affordable Care Act, why was this litigation not submitted to the commissioners for review prior to the filing?

Mr. LOPEZ. The Commission, under ADA and GINA, has a statutory right to go in and seek temporary relief. Under the Commission's regulations that preexisted my tenure, the General Counsel

has been delegated the authority to go in and seek temporary relief, presumably because of the ease of getting into court or the quickness in terms of getting into court. That had already been delegated. So what we did in that case was consistent with the authority under the EEOC's regulations.

Senator HATCH. The relative minimal number of cases referred to the Commission during your tenure as General Counsel has been referred to, I think, a number of times during this hearing. In addition, as demonstrated by court decisions, EEOC needs to do a better job of meeting its statutory obligations in figuring out which cases lack merit. I have not heard how you review litigation from the field offices. How many times have you rejected a litigation proposal from the field?

Mr. LOPEZ. From the field offices?

Senator HATCH. Yes.

Mr. LOPEZ. I don't have a number, but we do reject litigation proposals from the field, and, on occasion, we'll send it back for additional conciliation if we think that it's in the public interest. There is a search and review that goes on in my office.

Senator HATCH. That's great.

Let me go to you, Ms. Burrows, and let me ask you this one question. Employers are very concerned that lawsuits are moving forward on wellness plans before EEOC issued any guidelines or issued any guidance explaining how a wellness plan should be structured to avoid discrimination. As the EEOC is an enforcement agency of the Federal Government, how will you monitor the publishing of guidance to comply with the current law?

Ms. BURROWS. Thank you, Senator. First of all, let me say that I think it's clear that this is an area where guidance is necessary. It's in the interest of employers. It's in the interest of employees. And there are enough new obligations on businesses that it makes sense for the Federal Government to help them out on this one.

In terms of finding the right way to issue guidance, I think it's extremely important to have input from everybody so that you know you're getting it right. This is a new statutory obligation on the business community. It's important to find the right balance, and there's a lot at stake.

I think making sure that there's a transparent process, that there's a process that allows the Commission to really understand everyone's perspective, and where the rubber hits the road that you have a very practical solution at the end of it, is something that would be important. I know that the Commission works through public hearings and that sort of thing. Those—you know, the maximum amount of input on something like that makes sense to me.

Senator HATCH. Thank you.

My time is up, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Paul.

STATEMENT OF SENATOR PAUL

Senator PAUL. Mr. Lopez, do you realize how enormous the power would be if we were going to have a government that initiates police action where there are no complaints? I mean, there basically would be no limit to where you could look. So I guess the

first thing that comes to mind is we're going to have the police selling illegal cigarettes, trying to get people to buy them.

The thing is that I imagine you going into a business where there's been no complaint, and you interview someone. You don't get what you need, so you keep asking another question, another question, another question. You finally get to a question where the guy says, "Oh, yes, I'm tired of old people, you know, coming in here," and then all of a sudden—"Oh, my goodness. Now we can do something."

Do you realize the downside of the unlimited nature of going after people with no complaints and what this is going to do to business? Do you not understand that we've got to somehow balance it? We want people to have jobs. You're going after law abiding people where there's been no complaint, and you don't feel at all any compunction or guilt over what you're doing?

How can you show up to work? How can you show up to work with a straight face and prosecute people where there's been no complaint? How can you do this? I don't understand how you wouldn't resign immediately and say this is abhorrent. This is so against what everything America stands for, that you would go after people where there's been absolutely no complaint, run them through the wringer and use the threat of your bully nature of your office to punish business, and as a consequence, punish the workers? I don't get it.

Mr. LOPEZ. Let me say a couple of things. First Senator, my mother owned a shoe store for 15 years, that's the family I grew up in. I understand the challenges of a small business owner.

Senator PAUL. Ask her how she would feel if you came into her business and started harassing her over her hires.

Mr. LOPEZ. Second, let me answer your question with respect to the structure of the agency. I take the cases that are recommended to me from the investigation. I am not in charge of the investigations.

Senator PAUL. But let's say you were. Let's say you were in charge of EEOC and you could make policy. Do you think this policy of entrapment, of going into businesses that have committed no crime and have had no complaint and ginning up and looking for something—isn't that abhorrent? If you were in charge, would you fix it? If you weren't told by anybody, would you commit this crime of entrapment on people? Would you do things differently if you could make the policy?

Mr. LOPEZ. I disagree that what the Commission is doing is entrapment. Let me give you an example.

Senator PAUL. You agree with the policy, then, so don't defer it to someone else. You agree with the policy.

Mr. LOPEZ. Let me give you an example. Most individuals who are discriminated against in the hiring process do not know that they've been discriminated against because employers usually do not say that they've been discriminated against.

Senator PAUL. We're going after mythology, then. You have no idea—the people who have been discriminated against don't know it, and the people who have done it don't know it, and you're going to come in as the arbiter of thought, and you are going to decide what's correct. Realize there's a penalty. We have an enormous

amount of unemployment. Millions of people are unemployed. Do you think you're helping employment or hurting employment?

Mr. LOPEZ. The Commission in 2006 through the systemic task force report said that the use of directed charges and Commission's charges, both authorized under the statute, are important tools of the Commission.

Senator PAUL. Baseless charges.

Mr. LOPEZ. It didn't say baseless.

Senator PAUL. Baseless would be without complaint. You have no base until you go snooping around, looking for a problem that no one complained about. You agree with this policy, then?

Mr. LOPEZ. I agree in some instances you have victims of discrimination who are intimidated to come forward.

Senator PAUL. I just can't imagine—if we were to talk to real people in the real world, they couldn't imagine that you would go after businesses where people don't know they've been discriminated against, there's been no complaint of this, and you would go after and persecute these businesses, and put them through hundreds of thousands of dollars of legal fees. Do you realize there are jobs lost in the process? Do you realize if a business is teetering—whether they survive or not survive—that you can bankrupt a business through the bully nature of your pulpit.

You have 70,000 backlogged cases. Why don't you fix your backlog before you decide to go out and persecute American businesses? For goodness sake, how do you explain your backlog? You have 70,000 cases waiting where people actually had a complaint, a real—maybe valid, maybe not, but at least a complaint. And you're going to go looking for things in businesses that have no complaints. I think it's absolutely inexcusable. I think it's un-American. I think it's dishonorable. I can go on and on and on.

I hope you will rethink your position on these things. It is something that we should eliminate, and I'll do everything possible to make sure you're not allowed to do it anymore.

The CHAIRMAN. I'll say to my friend from Kentucky that we had 32 intellectually disabled individuals working in a turkey plant in Atalissa, IA. Some of them had been working there for as long as 20 years, housed in horrible conditions by their employer. After 20 years, some of them had nothing to show for it, not even a penny to their names—intellectually disabled. They didn't file a complaint with the EEOC. But someone was watching this and tipped them off and said, "You know, there's something funny going on there."

Senator PAUL. That sounds like a complaint.

The CHAIRMAN. No, it wasn't a complaint.

Senator PAUL. I'm not talking about the mentally incompetent. I'm sure we could have——

The CHAIRMAN. It was not a complaint. They started an investigation of a legitimate business that was operating in Atalissa, IA.

Senator PAUL. I have a business in Kentucky, and they will not even reveal who made the complaint or if there's a complaint. And here's my question. How many times are you doing that? Hundreds?

The CHAIRMAN. I'll say to my friend from Kentucky that I'm not certain I'll ever know who tipped them off about that. But they

took it under advisement. They started an investigation and found a cesspit, a cesspit.

Senator PAUL. Shouldn't you be able to confront your accusers?

The CHAIRMAN. And by the way, that company, Henry's Turkey Service, because of the judgment against them of $240 million, went bankrupt.

Senator PAUL. Shouldn't you be able to confront your accuser? In America, should you confront your accuser, or should your accuser be anonymous?

The CHAIRMAN. There was not an accuser. There was a tip-off, and they found that these people had been employed and discriminated against in violation of all kinds of different civil rights acts, but mainly the Americans with Disabilities Act, among others. So I say to my friend that there was no complaint filed. These were intellectually disabled people. They had no knowledge that they were actually being discriminated against.

Senator PAUL. Yes, but here's the thing. We're looking at a service industry. We have a lot of young people working at a restaurant——

The CHAIRMAN. Do you think the EEOC should have investigated that or not?

Senator PAUL. It sounds like yes. But my point is if you have a service industry—restaurants. We have a restaurant chain that's being harassed in my State. They have young people working there. Young people work in the service industry. Is that enough evidence to persecute them for age discrimination? That's ridiculous. It is an absurd abuse of government and should end.

The CHAIRMAN. What the Senator from Kentucky—what I heard him say—I'll check the record. I don't know. But I thought I heard him say it was abuse of government power to investigate these kinds of things when there's been no complaint filed. I just gave an example of one where no complaint was filed, but I thought it was a very legitimate use of the government using the laws that we passed here to go ahead and investigate what someone tipped them off to be a very egregious violation of civil rights laws.

I think in those cases, yes, the government is doing the proper thing by protecting people who otherwise have no one else to protect them. I just wanted to make that case, that it doesn't have to be a complaint at all. I've gone over my time, too.

Senator Alexander.

Oh, I'm sorry. Senator Franken. I apologize.

STATEMENT OF SENATOR FRANKEN

Senator FRANKEN. That's all right. I apologize. I had to go to make quorum at an Energy Committee hearing, and so I missed a lot. I was here for the testimony and some of the questioning. But it got exciting while I was away.

[Laughter.]

That's always good. I understand that we got into the issue of workforce wellness programs.

Mr. LOPEZ. Yes.

Senator FRANKEN. I missed some of that, and I'll read it when I get back. But to me it's an interesting area, because I'm a supporter of wellness programs because I believe in preventive care. I

believe that a healthy diet and exercise and timely medical care can bring—they've been shown to bring down—I don't believe this, I know this—bring down the cost of healthcare, and they improve people's long-term health and short-term health and make them feel better.

But I'm also a strong advocate for privacy and civil rights protections for workers. So I believe these programs have to strike a balance between giving people an opportunity to improve their healthcare outcomes and their costs maybe on their insurance. I know in the Act, we've said that if you smoke, you can be charged more, right? But we also have to respect people's rights and refrain from discrimination. I'm not sure about what the back-and-forth has been.

But, Mr. Lopez, can you speak to how you strike that balance, how your office has been striking that balance? And where have there been some—where is the controversy here? Where have the problems been, and how have you been addressing them? And if there are some that are outstanding that you can't talk too specifically about, could you talk generally about them?

Mr. LOPEZ. I am a supporter of wellness programs. Under the Americans with Disabilities Act, an employer can ask for information pursuant to a wellness program provided that it's turned over voluntarily. Under the EEOC's longstanding guidance, which I think was adopted in 2000, the whole issue of voluntariness looks at whether there are penalties attached to the request for medical information.

I believe you were out of the room, Senator, but I discussed two of the cases that we filed, and in those cases we alleged that the individuals were required to pay all the premiums when they didn't agree with the wellness plan. And in the other case, the employees were told that they would be subject to unspecified disciplinary action and that they had their insurance cutoff altogether.

Senator FRANKEN. That one was not allowed and the first one——

Mr. LOPEZ. Yes.

Senator FRANKEN. Or you took action against the second one?

Mr. LOPEZ. Those are the two merits cases that we filed, and there's certainly recognition that the Commission has not weighed in here. Because of that, those cases went to the Commission for litigation approval, and, presumably, the Commission looked at those cases and said that in those cases, there was sufficient evidence that the information was not being—that individuals were being coerced into involuntarily turning over medical information in violation of the Americans with Disabilities Act.

Senator FRANKEN. What I'm trying to figure out is what's coercive, say you're taking a blood test or some kind of test to determine whether you smoke or not?

Mr. LOPEZ. Yes.

Senator FRANKEN. Can you do that? Is there such a test, a blood test——

Mr. LOPEZ. I don't know.

Senator FRANKEN [continuing]. I guess to find nicotine, right?

Mr. LOPEZ. I don't know if there's a——

Senator FRANKEN. Well, then, I'm asking a hypothetical question that no one knows whether it's a hypothetical or a real question, so let's forget it. Let's go on to my next—OK, cholesterol. But we have no penalties for preexisting conditions. I wouldn't think that having high cholesterol would be a reason for you to be charged more for your insurance.

The CHAIRMAN. This isn't my area.

Mr. LOPEZ. It's not the——

Senator FRANKEN. I'm asking the Chairman a question.

[Laughter.]

The CHAIRMAN. It's not the cholesterol. It's the taking of the blood that can then be used for other reasons, to examine what else may be wrong, or something like that. You can use a blood sample for a lot of things. It could be for cholesterol, but it could be for a lot of other things.

Senator FRANKEN. Oh, I see. Is the part that would draw your scrutiny that it's being used for other things? Or what would bring your attention?

Mr. LOPEZ. If the individual doesn't have a choice as to whether to turn it over, whether the disclosure of medical information is done involuntarily.

The CHAIRMAN. This is a fine point, and the Senator is correct and others who have pointed out—this is a very dicey point, and I've been involved in both sides, on the ADA and also on the wellness provisions. I put it in the ACA. The problem is forcing someone to disclose why they do not want to be a part of the wellness program. That's the problem.

Let's say that I have a certain disability, but I do my job. I function well at my job. I meet all the requirements. But if I don't want to be a part of the wellness program, which means part of it is I have to take a blood test, and I don't want that blood test taken. The problem is being forced to say why I don't want to be a part of that wellness program.

Senator FRANKEN. OK. And is the part that's coercive possibly just the penalty, the financial penalty? Is that what you guys have determined?

Mr. LOPEZ. That is what the Commission's 2000 guidance says.

Senator FRANKEN. OK. I see. There you go. Thank you, and I look forward to voting for you both.

The CHAIRMAN. It is a very fine point.

Senator FRANKEN. It's an interesting area.

The CHAIRMAN. It's a very fine point. I agree.

Senator Alexander.

Senator ALEXANDER. Thanks, Mr. Chairman. Just so I understand, let's say I'm at X Company, following up Senator Franken's question, and they have a wellness program, and I have to give blood to be a part of the wellness program and get lower premiums. If I decline to join the program because I don't want to give blood, is that discrimination?

Mr. LOPEZ. You can voluntarily disclose your blood——

Senator ALEXANDER. But say I——

Mr. LOPEZ. If there are penalties attached to it, then——

Senator ALEXANDER. The penalty would be you don't get the cheaper insurance. Is that right?

Mr. LOPEZ. Yes.

Senator ALEXANDER. And you get a higher premium.

Mr. LOPEZ. Under the Commission's guidance, it talks about penalties as being determined by whether it's voluntary. That's what the Commission——

Senator ALEXANDER. Yes, but that's the whole point of a wellness program. You get a cheaper premium if you lead a healthy lifestyle. So I say I don't want to give you my blood. I don't want to participate in the wellness program. Therefore, I have to pay a higher premium. But are you saying that amounts to discrimination?

Mr. LOPEZ. Not necessarily. It depends on the case, Senator. It depends on the case. But the two merits cases that we filed—in one instance, the employees were subject to unspecified disciplinary action. In the other case, they were cutoff from insurance altogether.

Senator ALEXANDER. Ms. Burrows, I think this emphasizes the importance of guidance so employers can initiate wellness programs wherever they can. And while we're on the subject of guidance, at least once in the last couple of years, you've issued significant guidance without allowing the public to comment on the draft. I'm thinking of the criminal background check guidance.

If confirmed, will you work to allow the public to comment on EEOC's draft guidances before they're issued?

Ms. BURROWS. Thank you, Senator. To clarify, I was not on the Commission and did not take part in the Commission's deliberations on the guidance.

Senator ALEXANDER. Right. Yes. I understand that.

Ms. BURROWS. But, yes, I think it's very important to have input from all the stakeholders. Otherwise, you're not sure you're going to get to the right place.

Senator ALEXANDER. Yes, and input would mean, "Here's the proposed guidance. What do you think about the language of this proposed guidance?" Would that be your idea of input?

Ms. BURROWS. As you've described it, it sounds somewhat like notice and comment kind of rulemaking, and that's one way to——

Senator ALEXANDER. Almost the way you would do it in—but I don't think it's—if you just asked me generally what I think about a wellness regulation, I might be like Mr. Lopez. I might say it could be this, or it could be that, or it could be this, depending on hypothetical. If you lay some language out in front me and say, "This is what we're proposing to do, and you've got a little time to tell us what you think," that is what I would consider to be input on guidance.

Ms. BURROWS. Oftentimes, I think that makes sense, and, certainly, you have to pose the question to the public, however the method is, with enough specificity so that you get a real answer and that you're sure you're having a real back-and-forth dialog.

Senator ALEXANDER. So you're not willing to say that you would ask for public input on a draft guidance before you issued it?

Ms. BURROWS. I think that may be perfectly appropriate on a number of occasions. I don't have any reason to say it would be a bad idea in the example you posed or in any other. But I think that's something—from the outside looking in, not being familiar with how the Commission proceeds, I would want to ask both the

Republican and Democratic members of the Commission what the best way is to approach that problem.

Senator ALEXANDER. I have a growing concern about guidance. I see the value of guidance, as we've talked about in the case of harmonizing ACA and ADA and the wellness issue. It would be a help to employers to have some specific advice about what they can do and what they can't do.

But since those guidances increasingly seem to have the rule of law—that was the testimony I got from the civil rights person at the Education Department—I think if you're going to issue a draft guidance in a significant case, one that might be controversial, like wellness, I think it would be wise to allow public comment on the actual draft of the guidance rather than just collect general opinions on the subject. That's my suggestion.

That's all I have, Mr. Chairman.

The CHAIRMAN. Mr. Lopez, I want to go back to this issue of wellness and penalties. Since I was a chief sponsor of the ADA, and also I was the chief architect of the wellness and prevention programs in the Affordable Care Act, I care about both of those.

The case that we're talking about here—is this not sort of the facts of the case, that the person in this company had—the company had instituted a wellness program that required certain medical examinations and blood tests. This employee declined to participate. The company, Orion Energy in Wisconsin, then shifted the responsibility for paying the entire premium of $413.43 a month to her from the employer.

Mr. LOPEZ. Correct.

The CHAIRMAN. She then had to pay $413.43 more per month.

Mr. LOPEZ. Correct.

The CHAIRMAN. Then she had to pay a $50 monthly penalty for not taking part in the fitness component, and shortly thereafter, she was fired for her refusal to participate.

Mr. LOPEZ. Correct. That's what we allege in the lawsuit.

The CHAIRMAN. Those are the facts of the case.

Mr. LOPEZ. That's what we allege in the lawsuit, yes.

The CHAIRMAN. I've thought about this a lot because I've had similar things coming in to me about wellness programs through HHS, of course, on this. And to the point where someone is penalized drastically for not submitting a blood sample and to participate in a medical examination, it's quite intrusive.

I know a lot of companies have wellness programs that don't require you to do anything like that. But they have wellness programs, and they set up goals. Our goal in this company is to reduce smoking, to reduce BMI, to reduce cholesterol, to do a lot of different things to meet certain wellness programs and prevention.

What we did in the Affordable Care Act—we put in a 30 percent leeway. In other words, an employer can cut their employees' cost of their healthcare by up to 30 percent by participating in a wellness program.

This is not in your bailiwick, but just for general information, we've asked HHS again to look at things like—a company could have a wellness program with—here are the goals. If any employee cannot participate in that wellness program but can meet those goals in other ways voluntarily, that's fine, too.

It doesn't have to be just that prescribed kind of system that they—because everybody is not the same. Not everybody can do the same thing. But if they set up certain goals, there may be other ways for them to voluntarily meet those goals.

The facts in this case were quite egregious, where this person was penalized drastically and then fired because she would not participate in this wellness program and because she wouldn't submit to a medical examination and a blood test. That case is way out there. I'm sure there are others that are much more close to being a fine point of law than that one. That was not a fine point of law.

That's why I said to Senator Franken that sometimes these can be very fine points, and I know that the Commission has to wrestle with these. I assume that as we move forward with both the protection of people under civil rights laws, but also move, hopefully, with better wellness and prevention programs, that these things will tend to kind of sort themselves out. But we can't take one case which is egregious and say this fits everything else. We can't. Egregious cases like this have to be responded to. There will probably be other cases that will be much more finely attuned than something like that.

But it's something that I know the Commission is going to have to grapple with probably in the future. I'm sure this committee under the able leadership of Senator Alexander will be looking at these things down the road, making sure that two things are fulfilled, that we do, in fact, protect people and their rights under the ADA and others and make sure, as Senator Paul said, that the government doesn't go too far in trying to interfere in the business' rights to set up its own wellness programs. These are all things that take time to work out.

So I hope the Commission—Ms. Burrows, you'll be on the Commission. I hope that you will take these things into account and try to examine ways with HHS and through the Affordable Care Act that we can continue to have good wellness programs in our businesses without going to the extent that this company went to.

I didn't ask any questions. I just had that statement. That's all.

Do you have any other questions? Is there anything else that either one of you want to comment on before we call this to a close?

Ms. BURROWS. No, but thank you very much for your time.

The CHAIRMAN. Thank you both very much, and hopefully, we can move these nominees very shortly. We appreciate it.

[Additional material follows.]

ADDITIONAL MATERIAL

RESPONSE BY CHARLOTTE A. BURROWS TO QUESTIONS OF SENATOR ALEXANDER

Question 1. There are currently more than 70,000 charges of discrimination pending at EEOC. If confirmed, would you support EEOC's continuing focus on conducting investigations without an employee charge instead of spending EEOC's resources to eliminate the backlog of employee complaints of discrimination?

Answer 1. If confirmed, I would consider ensuring the timely processing of pending charges a high priority for the Equal Employment Opportunity Commission (EEOC or Commission). When the Commission cannot timely review charges, they may become more difficult to investigate, as witnesses may become unavailable or their memories may fade. In addition, resolving charges promptly provides much-needed closure for both charging parties and employers.

Before reaching any determination regarding the most effective use of Commission resources, I would seek the views of the Chair and each of the other Commissioners, and take those views into account in forming my own judgment.

Question 2. If confirmed, would you bring to the commission any ideas about how to help reduce the backlog?

Answer 2. As noted above, timely resolution of charges should be a high priority for the Commission. As an outsider to the Commission, I do not know what methods the EEOC has already tried in this area, nor with what success. Accordingly, I would approach the question of how to most effectively address the backlog with an open mind and would work to learn more about the issue and to offer concrete solutions to the Office of the Chair.

Question 3. Do you believe the commission should continue to allocate its resources toward a 4-year investigation into mutually agreed upon partnership agreements considering the commission already determined an almost identical case did not merit litigation?

Answer 3. I am not familiar with the specific investigation or the Commission decision to which this question refers and therefore have not formed any view on this matter.

Question 4. What are your views on the use of "testers"—individuals who apply for positions they do not intend to accept for the purpose of determining whether discriminatory hiring processes exist?

Answer 4. I have not worked with testers in employment discrimination suits. I am not aware that the EEOC has used testers in employment discrimination cases. If confirmed, I would want to become more familiar with the issue, and confer with my colleagues on the Commission, stakeholders, and experts, before taking a position.

Question 5a. Some of the current EEOC commissioners have expressed support for increasing the commission's role in approving litigation. If confirmed, would you support that change?

Answer 5a. I am not familiar with the proposal referenced above and therefore have not yet formed a view regarding it. Before reaching a determination regarding the level of the Commission's involvement in litigation, I would want to understand the perspectives of the other Commissioners, EEOC litigators, and stakeholders.

Question 5b. How much involvement do you think the commission should have in litigation decisions?

Answer 5b. It is important that the Commission ensure that the EEOC's litigation effectively furthers the agency's priorities, and if confirmed, I would take seriously the Commission's duty to exercise oversight of litigation. As noted above, however, I would want to consult with others before forming a view regarding the appropriate level of Commission involvement in litigation.

Question 6. If confirmed, would you support including in EEOC's annual Performance and Accountability Report the number of times, and the amounts, EEOC is ordered to pay defendants in attorney's fees and other court costs each year, including those instances where fees were awarded but not necessarily paid?

Answer 6. With respect to decisions about changes to the Commission's annual Performance and Accountability Report, I would seek the views of the Chair and other Commissioners of both parties and all relevant stakeholders before forming my own opinion about what information should be included in the report.

Question 7. What do you believe to be the downsides of publicly circulating—for comment and review—commission guidance at least 30 days prior to implementation?

Answer 7. The Commission's procedures for developing guidance should provide sufficient advance notice to the public regarding the subject matter of the guidance to permit relevant stakeholders to offer meaningful input before the guidance is finalized. I am not sufficiently familiar with the details of the EEOC's procedures for developing guidance to describe potential drawbacks of any particular method for obtaining public input, which are likely to vary depending on the subject matter of the guidance.

Question 8. Do you believe that outside attorneys, employers, employees and their advocates could provide useful comments regarding a draft guidance which may make the guidance more useful?

Answer 8. Yes. I believe that outside attorneys, employers, employees and their advocates, as well as other stakeholders, can provide valuable perspectives to assist the Commission in developing guidance.

Question 9. Thirteen States have restrictions on the use of credit-related background checks in employment. Those laws all include common sense exemptions, including permitting the use of such checks for executive level positions and positions handling cash, credit cards, or sensitive personal information. Do you believe there are instances where the use of credit background checks are relevant, and even necessary, for certain jobs?

Answer 9. Yes. In some instances the use of credit-related background checks in employment can be job-related and consistent with business necessity. Whether a particular employment practice is relevant or necessary would depend on the specific nature of the practice and its application.

Question 10. The EEOC has been criticized by courts and employers for its failure to engage in meaningful conciliation of potential litigation, as required under Title VII of the Civil Rights Act. Stakeholders have expressed concerns ranging from unrealistic proposals for settlement to a capricious mentality providing stakeholders with little information as to the basis for such settlement demands. Are there steps you would suggest to improve the Commission's conciliation processes and maximize its potential for resolving claims short of litigation?

Answer 10. Resolving charges of discrimination without the need for contested litigation conserves the Commission's resources, and serves the interests of both charging parties and employers. Accordingly, successful conciliation should be a high priority for the EEOC. If confirmed, I would seek to learn more about the current conciliation practice and any concerns identified before making suggestions in this area.

Question 11a. On July 14, 2014, the Equal Employment Opportunity Commission (EEOC) issued guidance regarding pregnancy discrimination, entitled "EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues" (2014 guidance). The guidance reaffirmed the commission's December 2000 guidance, entitled "Commission Decision on Coverage of Contraception" (2000 guidance). The 2014 guidance asserts,

> "[e]mployers can violate Title VII by providing health insurance that excludes coverage of prescription contraceptives, whether the contraceptives are prescribed for birth control or for medical purposes."

In reaching this conclusion, EEOC cites the commission's 2000 guidance and the *Patient Protection and Affordable Care Act*; however, the 2014 guidance was issued after the Supreme Court ruled in *Burwell* v. *Hobby Lobby Stores*, *Inc*. (*Hobby Lobby*).

The guidance makes only one mention of the Supreme Court decision, in a footnote, stating:

> "[t]his enforcement guidance explains Title VII's prohibition of pregnancy discrimination; it does not address whether certain employers might be exempt from Title VII's requirements under the First Amendment or the [Religious Freedom Restoration Act]."

Commissioner Lipnic, in her dissenting statement to the 2014 guidance, states the 2014 guidance needs to be,

> "thoroughly reviewed in light of [*Hobby Lobby*], particularly insofar as it held . . . certain employers may *not* lawfully be compelled to provide all forms of contraception." Commissioner Lipnic also states, "[a]t a minimum, the Court's [*Hobby Lobby*] decision dictates a full and substantive review of the

[c]ommission's guidance on this topic, and the strength and validity of its legal position."

Do you believe the 2000 and 2014 guidance are consistent with the *Hobby Lobby* decision? Please be specific and thorough in your analysis.

Answer 11a. In *Burwell* v. *Hobby Lobby Stores*, *Inc*., 134 S. Ct. 2751 (2013), the Supreme Court held that, as applied to for-profit, closely held corporations, the regulations promulgated by the Department of Health and Human Services requiring employers to provide female employees with health care coverage for contraceptives violated the Religious Freedom Restoration Act (RFRA). The *Hobby Lobby* decision addressed only the application of RFRA to the religious objections of closely held corporations regarding HHS' contraception mandate. The case did not involve, and the Court did not address, RFRA's application in the context of claims that an employer's denial of contraceptive coverage for religious reasons constituted sex discrimination in violation of Title VII of the Civil Rights Act of 1964. However, the majority opinion expressly rejected the idea that its holding allows "discrimination in hiring, for example on the basis of race, [to] be cloaked as religious practice to escape legal sanction." *Id*. *at* 2783 (stating that the *Hobby Lobby* decision "provides no such shield" against claims of unlawful job discrimination). As such, neither the 2000 "Commission Decision on Coverage of Contraception" nor the 2014 "EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues," appears to conflict with the Supreme Court's decision in *Hobby Lobby*.

Question 11b. If confirmed, will you commit to a thorough and substantive review of the guidance in light of the Supreme Court's decision in *Hobby Lobby* to ensure the guidance is in accordance with the Supreme Court's decision?

Answer 11b. If confirmed, I will review the EEOC's 2014 guidance on pregnancy discrimination and any decisions of the Supreme Court and lower courts interpreting *Hobby Lobby* to ensure that the guidance comports with relevant case law.

Question 12. If confirmed, will you commit to cooperating with congressional oversight of EEOC, including document requests, and to work with the IG and GAO in any studies/investigations that they may undertake?

Answer 12. Yes.

Question 13. If confirmed and you are asked to personally meet with Members of Congress or their staff, are you willing to do so?

Answer 13. Yes. If confirmed, I would welcome input from Members of Congress and congressional staff.

RESPONSE BY P. DAVID LOPEZ TO QUESTIONS OF SENATOR ALEXANDER, SENATOR ISAKSON, AND SENATOR PAUL

SENATOR ALEXANDER

Question 1. How does EEOC decide whether to spend resources on litigating cases without charges (directed investigations or commissioner charges) verses cases that are based on a charge?

Answer 1. The Office of General Counsel has not considered whether the cases it recommends to the Commission for litigation, or approves for litigation under delegated authority, are based on a directed investigation or Commissioner's charge. By the time a matter reaches the Office of General Counsel for a litigation determination, the evidence of whether discrimination has occurred is well-developed by EEOC investigators reporting to the agency's Office of Field Programs. The focus of litigation determinations is always on the facts, the law and Commission policy and procedures. The nature of the original charge is not determinative.

Question 2. Are you involved in working to eliminate EEOC's backlog of charges? If so, what is your involvement and how do you prioritize that involvement with litigation decisions?

Answer 2. No. The Office of Field Programs, under the Office of Chair, is responsible for the investigation and processing of charges, including reducing the backlog of charges. The general counsel only has authority over the litigation.

Question 3. How do you ensure your decisions not to send cases to the commission are consistent and in accord with the Strategic Enforcement Plan's exceptions to the general counsel's litigation authority?

Answer 3. I scrupulously follow the delegation criteria established by the Commission. Career staff identifies cases that may require Commission review based on the criteria and take appropriate steps to ensure the issues in the case are crystallized and that we have the best estimate of resources required for the case. Then, I re-

view the recommendations. With respect to whether a matter may engender public controversy, I look at previous issues that have engendered controversy, input from the Commissioners, feedback from my numerous stakeholder meetings, and the general environment surrounding an issue.

The Commission established a process in the Strategic Enforcement Plan to examine the effectiveness of delegation. This includes the submission of quarterly reports to the Commission and quarterly meetings. As part of this process, no member of the Commission has identified any case it believes should have been submitted to the Commission for approval by my office that was not.

Question 4. Your office has failed to publish an annual report since 2010. At the hearing, you agreed to resume publishing Office of General Counsel annual reports if confirmed. If you are confirmed, by what date will you commit to publish this report?

Answer 4. The fiscal year 2011 annual report will be published by January 30, 2015.

Question 5. If confirmed, will you include in the Office of General Counsel annual reports the number of times, and the amounts, EEOC is ordered to pay defendants in attorney's fees and other costs each year, including those instances where fees and costs were awarded but not necessarily paid?

Answer 5. Yes.

Question 6. EEOC publicly reports on the number of cases "resolved" instead of wins and losses in the courts. If confirmed, will you include in the Office of General Counsel annual reports the number of cases won, lost, and on appeal each year?

Answer 6. Yes.

Question 7. What specific actions have you taken to review and evaluate EEOC litigation losses? Have you implemented any changes due to EEOC litigation losses?

Answer 7. Last year, the Office of General Counsel was able to resolve or win 93 percent of the cases filed. By any measure, this is outstanding. Still, I believe we can learn from all our cases—both the wins and the losses—and have stressed extensively during my tenure a culture of examining "lessons learned" in order to carry out our law enforcement mission more effectively and efficiently. This includes a personal review of cases where we have been subject to fees; discussions with the attorneys involved; a discussion of the cases on monthly regional attorney calls including lessons for the program; an adjustment of any internal practices, if appropriate, to ensure we improve our law enforcement performance and don't repeat our mistakes; and a broader discussion of the issues in formal training sessions during, for example, our annual Regional Attorney meetings. Additionally, significant adverse decisions are circulated to all attorneys.

Question 8a. In your current role as general counsel, do you play any role in defending EEOC when it has been accused by its employees of discrimination?

Answer 8a. Yes. Internal Litigation Services, a division in the Office of General Counsel, represents the agency when it has been accused by its employees of discrimination. If the matter goes up on appeal, Appellate Services, also a division within the Office of General Counsel, handles the appeal.

Question 8b. If so, does EEOC take the same legal position in those cases as the EEOC does when suing private employers?

Answer 8b. Yes. In fact, Internal Litigation Services was placed under the supervision of the general counsel primarily to help ensure consistency in the legal arguments we make in defensive and affirmative litigation.

Question 9. If confirmed, will you commit to cooperating with congressional oversight of EEOC, including document requests, and to work with the IG and GAO in any studies/investigations that they may undertake?

Answer 9. Yes. This is already a regular practice for the Office of General Counsel. For example, my office regularly participates in meetings convened with GAO at the agency by the Office of Communications and Legislative Affairs.

Question 10a. If confirmed and you are asked to personally meet with Members of Congress or their staff, are you willing to do so?

Answer 10a. Yes. During my tenure as general counsel I have consistently made myself available to meet with Members of Congress. The only member to make such a request was Congressman Tim Walberg. I met with him promptly and participated in subsequent followup correspondence.

Question 10b. On July 14, 2014, the Equal Employment Opportunity Commission (EEOC) issued guidance regarding pregnancy discrimination, entitled "EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues" (2014 guidance). The guidance reaffirmed the Commission's December 2000 guidance, entitled "Commission Decision on Coverage of Contraception" (2000 guidance). The 2014 guidance asserts,

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The guidance makes only one mention of the Supreme Court decision, in a footnote, stating:

> "[t]his enforcement guidance explains Title VII's prohibition of pregnancy discrimination; it does not address whether certain employers might be exempt from Title VII's requirements under the First Amendment or the [Religious Freedom Restoration Act]."

Commissioner Lipnic, in her dissenting statement to the 2014 guidance, states,

> the 2014 guidance needs to be "thoroughly reviewed in light of [Hobby Lobby], particularly insofar as it held . . . certain employers may *not* lawfully be compelled to provide all forms of contraception." Commissioner Lipnic also states, "[a]t a minimum, the Court's [*Hobby Lobby*] decision dictates a full and substantive review of the [c]ommission's guidance on this topic, and the strength and validity of its legal position."

Do you believe the 2000 and 2014 guidance are consistent with the Hobby Lobby decision? Please be specific and thorough in your analysis.

Answer 10b. The EEOC fully considered the *Hobby Lobby* decision prior to issuing the 2014 Enforcement Guidance on Pregnancy Discrimination. The Commission, not the general counsel, establishes policy. This policy, as well as the relevant circuit law, informs the litigation positions. The Commission continues to believe that the decision in Hobby Lobby does not alter the EEOC's Title VII analysis in either the 2000 Commission Decision on Coverage of Contraceptives or the 2014 Enforcement Guidance. The *Hobby Lobby* case addressed only whether the Patient Protection and Affordable Care Act's contraceptive mandate violated the Religious Freedom Restoration Act (RFRA), not the application of the RFRA or the First Amendment to Title VII. The EEOC documents instead explain that Title VII prohibits discrimination against women on the basis of gender with regard to coverage of prescription contraceptives in an employer's health insurance plan. Thus, the Enforcement Guidance is not inconsistent with *Hobby Lobby*; it simply does not address the specific issues raised in that case. To the extent the decision says anything about its applicability outside the context of the specific laws and regulations that were at issue in the case, the Supreme Court noted that the decision provides "no shield" for employers who might assert that their religious beliefs conflict, for example, with Title VII's prohibition on race discrimination.

Question 10c. If re-confirmed, will you commit to submitting all lawsuits predicated upon the 2000 or 2014 guidance to the Commission for a vote?

Answer 10c. I will follow the criteria established by the Commission governing the delegation of litigation authority. The Commission has not required the submission of cases where it has weighed in with policy guidance. Additionally, for the reasons explained above, the decision in *Hobby Lobby* does not alter the EEOC's Title VII analysis in either the 2000 Commission Decision on Coverage of Contraceptives or the 2014 Enforcement Guidance. The 2014 Guidance also deals with many issues apart from the coverage of contraceptives, about which there is well-established Commission policy.

Question 10d. Do you believe the guidance is regarding a developing area of law (given the recent *Hobby Lobby* decision) or has a high likelihood for public controversy?

Answer 10d. There is no case implicating *Hobby Lobby* before me. With respect to the first part, the assessment of whether any case presents an "emerging issue" or meets the criteria of the Strategic Enforcement Plan will be based on the specific facts of the case and any legal issues presented in the case. With respect to the second part, I am sensitive to the scope and intensity of interest surrounding the issue

at the present time. Should this remain constant, depending on the specific facts of the case, this will undoubtedly be a factor in any decision.

SENATOR ISAKSON

Question 1. Recently, EEOC Staff investigated PricewaterhouseCoopers for including a mandatory retirement age in its partnership agreements. As general counsel, you submitted that case to the Commissioners for a vote, but the Commissioners decided against litigation. Why is the EEOC Staff investigating Deloitte for the same type of partnership agreement as PricewaterhouseCoopers, when the Commission already decided the issue did not merit litigation? Are the legal issues any different in the two cases?

Answer 1. Administrative investigations are conducted by the EEOC's District and Field Directors as designated by the Commission. The work of these individuals is governed by the statutory provisions of the Age Discrimination in Employment Act. The key EEOC policy document with respect to partner-employee coverage is the *Compliance Manual Section on Threshold Issues*, first issued on May 12, 2000.[1] The facts of each case are unique. If, based on the facts, the EEOC's investigative staff concludes that discrimination has occurred and conciliation efforts fail, the matter will be reviewed by field legal unit staff and may be referred to the Office of General Counsel with a litigation recommendation. If I ultimately concur in the recommendation, I will apply the standards set forth in the Commission's Strategic Enforcement Plan that govern the circumstances under which litigation should be sent to the Commission for approval.

Question 2. I am concerned that the EEOC is again pursuing partnership agreements relating to mandatory retirement age. As you know, recently the staff pursued a partnership agreement of a large accounting firm but decided to allow the Commissioners to vote on whether to pursue litigation. Since the EEOC is now considering a similar case against another large accounting partnership, will you once again recommend the Commissioners vote on whether to pursue litigation?

Answer 2. See response to Question 1.

Question 3. Recently, the WSJ reported that the EEOC has challenged Deloitte's mandatory retirement age for partners and referenced the testimony of Deloitte's general counsel at a congressional hearing. Do you believe that a congressional hearing as well as the reporting in a major newspaper indicate that this matter is one of public controversy requiring a vote of the Commissioners? If not, why did the EEOC Commissioners vote on a similar case against PwC within the last 2 years?

Answer 3. The Strategic Enforcement Plan (SEP) sets forth the standards that govern the circumstances under which litigation should be sent to the Commission for approval. Under the SEP, the general counsel must send litigation to the Commissioners for approval when the case (1) involves a major expenditure of resources; (2) presents issues in a developing area of law where the Commission has not adopted a position through regulation, policy guidance, Commission decision, or compliance manuals; or (3) the general counsel reasonably believes to be appropriate for submission for Commission consideration because of the case's likelihood for public controversy. Consideration of these factors is dependent upon the interplay of the facts of a particular case or matter and no one factor tends to drive a decision to send a case to the Commission.

Question 4. Do you believe the Commission's rejection of the PricewaterhouseCoopers mandatory retirement case set a precedent the agency should follow unless it provides a compelling explanation of why it is abruptly reversing course? Do you think business would benefit from more transparency and finality about the EEOC's decision-making activities?

Answer 4. I am not privy to what precedential value the Commissioners may place on their decisions or votes on particular litigation matters, nor can I comment on the Commissioners' efforts to make their decision making more transparent. As general counsel, I oversee a program that does its work in the sunshine and as such is subject to scrutiny both by the courts and general public. In my experience as general counsel, the Commissioners have reviewed each case I have sent to them based on the individual facts of that particular case and the law, as set out by the courts, governing each jurisdiction.

Question 5. Is it your goal to change how the accounting profession does business? Is it your view that by definition, large accounting firms cannot be partnerships?

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[1] *See Compliance Manual Section 2: Threshold Issues*, *supra* note 3.

How large is too large? Has the EEOC made any study of the impact that changing the way the accounting profession does business would have on the existing regulatory scheme? Don't all of these questions raise very serious policy questions that should be evaluated before action is taken that may have a profound effect on interstate commerce and the current regulatory scheme?

Answer 5. My goal is to enforce the law as set forth by Congress and the courts and informed by Commission guidance, with respect to all the laws EEOC enforces. I do not have a specific or personal goal to change how the accounting profession does business. Both the Federal courts and the Commission have held that in some instances, individuals who have the job title of "partner" may nonetheless qualify as covered employees under the EEO laws, including the Age Discrimination in Employment Act (ADEA or Act).[2] The Commission-approved policy guidance on this question states that, whether an individual with the title of "partner" actually functions as a partner-owner depends on whether he acts independently and participates in managing the organization, or whether he is subject to the organization's control and therefore is an employee.[3] The Supreme Court specifically approved of the Commission's emphasis on "the common-law touchstone of control" when determining partner-employee coverage under the EEO laws in *Clackamas Gastroenterology Associates*, *P.C.* v. *Wells*.[4] Enforcing the ADEA would not mean that large accounting firms cannot be partnerships. The ADEA language would apply to employees and means that individuals with the title of partner who in fact do have sufficient control over the business will not be treated as employees for purposes of the Act.

Question 6. The mandatory retirement age included in the voluntary partnership agreements entered into by owners of these larger accounting firms actually creates room for growth for employees moving up the corporate ladder. Today, this often includes giving opportunities to minorities and women in the workforce to gain an ownership stake in the companies that they work for. Why have you continued to challenge the mandatory retirement age clause of these firms when they in fact create advancement opportunities for so many individuals of whom the EEOC is meant to protect?

Answer 6. Please see the answer to question 5 above. There is currently no litigation addressing the issue of mandatory retirement age in partnership type entities, nor has any such litigation been filed while I have been general counsel.

Question 7. Do you agree that it is the role of the Commissioners and not you to make policy?

Answer 7. Yes.

Question 8. As the chief lawyer of the EEOC, who is your client? Is it the 5 commissioners as an entity?

Answer 8. As the chief lawyer for the EEOC, my client in EEO enforcement litigation is the public interest. Once a case is filed, the general counsel has independent litigation authority. For defensive internal litigation, my client is the EEOC as an employer.

SENATOR PAUL

Question 1. Under your directive as EEOC general counsel, what quantifiable resources (i.e. time, expenses, employees) have been dedicated to so-called systemic cases investigated by the Commission where no complaint was filed by an actual employee, former employee, or job applicant as opposed to the resources dedicated to complaints filed by an aggrieved party unaffiliated with the EEOC or State agency?

Answer 1. The general counsel does not conduct administrative investigations and does not have statutory authority over those investigations. Rather, the Commission has designated authority to the EEOC's District and Field Directors and the Director of the Office of Field Programs to conduct administrative investigations and conciliations.

Question 2. What percentage of litigated cases under your leadership have been so-called systemic cases where no complaint was filed by an actual aggrieved party? What is the average turnaround time for these cases compared to those where complaint was filed by an aggrieved party unaffiliated with the EEOC or State agency?

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[2] 29 U.S.C. § 621, *et seq*.

[3] U.S. Equal Emp't Opportunity Comm'n, *Compliance Manual Section 2*: *Threshold Issues*, § *III.A.1.d. (May 12, 2000), http://www.eeoc.gov/policy/docs/threshold.html#2-III-A-1-d*.

[4] 538 U.S. 440 (2003).

Answer 2. Of the 106, systemic cases filed during my tenure, 12 or 11.3 percent did not start with an individual charging party. Four cases were based on Commissioner's charges, seven cases were based on ADEA-authorized directed investigations, and one case was based on a third-party charge. As a general matter, investigations opened based Commissioner's charges, directed investigation, and third-party charges will virtually always be based on information from or about an aggrieved party. Most of the cases involved hiring discrimination or age discriminatory retirement plans. We do not maintain information about the length of the case based on the source of the initial charge. Six of the cases were settled immediately without discovery. The remaining cases are ongoing.

Question 3. Under your leadership, the EEOC has pursued unmeritorious cases. One judge even went as far to say that the Commission utilized a "sue first, ask questions later" litigation strategy. What measures are in place to ensure that the cases pursued by the Commission have merit? Since your confirmation on December 1, 2010, what has been the total dollar amount that the EEOC been ordered to pay employers because the Commission pursued litigation without merit?

Answer 3. We thoroughly review the merit of each case by looking at the facts, law of the circuit and credibility of the witnesses before suit is filed. While fees may have been ordered in some cases during my tenure as general counsel based on the court's belief that the suit did not have merit, the vast majority of such fees were awarded in cases that were filed under the authority of prior general counsels and there is only one case that was filed under my authority where such fees have been ordered. Thus, in four cases filed under the authority of prior general counsels, where fees have been ordered and/or paid during my tenure, the amount is $1,163,580. Fees ordered in the case filed under my authority total $98,904, although I note that this case was filed in September 2010.

Question 4. EEOC has the authority to employ individuals commonly referred to as "testers," individuals who apply for jobs they do not plan to accept for the sole purpose of investigating discrimination in the hiring process—when investigating cases. Under your leadership, in how many cases has the Commission used testers either through direct utilization by the Commission or by contracting with third-party entities to deploy testers to investigate hiring practices?

Answer 4. The general counsel does not conduct administrative investigations and does not have statutory authority over those investigations. Rather, the Commission has designated the EEOC's District and Field Directors and the Director of the Office of Field Programs to conduct administrative investigations and conciliations. Under my tenure, no cases have been filed or litigated that involved the use of EEOC testers.

Question 5. Do you believe some jobs can be self-selecting? Do you believe employers can be held liable for discrimination in the hiring process simply because certain classes of people may not be attracted to a particular job or position due to their own preferences?

Answer 5. I do not know what is meant by "self-selecting." However, if the question is whether statistical disparities between groups in certain positions can be non-discriminatory, the answer is yes, of course. Depending on the evidence in the particular case, however, these disparities may also be a reflection of unlawful discriminatory practices.

[Whereupon, at 4:45 p.m., the hearing was adjourned.]

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