

**NOMINATION OF
SHARON FAST GUSTAFSON
TO BE GENERAL COUNSEL OF
THE EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION**

HEARING
OF THE
**COMMITTEE ON HEALTH, EDUCATION,
LABOR, AND PENSIONS**
UNITED STATES SENATE
ONE HUNDRED FIFTEENTH CONGRESS

SECOND SESSION

ON

EXAMINING THE NOMINATION OF SHARON FAST GUSTAFSON, OF VIRGINIA, TO BE GENERAL COUNSEL OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

APRIL 10, 2018

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C O N T E N T S

STATEMENTS

TUESDAY, APRIL 10, 2018

Page

COMMITTEE MEMBERS

Alexander, Hon. Lamar, Chairman, Committee on Health, Education, Labor, and Pensions, Opening statement	1
Murray, Hon. Patty, Ranking Member, a U.S. Senator from the State of Washington, Opening statement	3

WITNESS

Gustafson, Sharon Fast, J.D., Nominee to be General Counsel of the Equal Employment Opportunity Commission, Arlington, VA	5
Prepared statement	7

**NOMINATION OF
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OPPORTUNITY COMMISSION**

Tuesday, April 10, 2018

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

The Committee met, pursuant to notice, at 2:40 p.m. in room SD-430, Dirksen Senate Office Building, Hon. Lamar Alexander, Chairman of the Committee, presiding.

Present: Senators Alexander [presiding], Cassidy, Scott, Murray, Casey, Baldwin, Murphy, Warren, Kaine, Hassan, and Smith.

OPENING STATEMENT OF SENATOR ALEXANDER

The CHAIRMAN. Good morning.

The Senate Committee on Health, Education, Labor, and Pensions will please come to order.

Today, we are considering the nomination of Sharon Gustafson to serve as General Counsel of the Equal Employment Opportunity Commission.

Senator Murray and I will each have an opening statement, then I will introduce Ms. Gustafson. After her testimony, Senators will each have 5 minutes of questions. I will recognize Senator Scott first for that.

The Equal Employment Opportunity Commission is important to our Nation's workers. It was established by the Civil Rights Act of 1964. It is charged with protecting employees from discrimination at work through enforcement of equal employment opportunity laws.

There are currently three Senate confirmed vacancies at the EEOC; two Commissioner seats and the General Counsel. This Committee held a hearing on Janet Dhillon and Daniel Gade to serve as commissioners on September 19, 2017 and approved their nominations on October 18, 2017. They have been waiting nearly 6 months to be confirmed by the Senate.

Today, we are holding a hearing on the General Counsel nominee, who would have another important role at the EEOC. If confirmed, Ms. Gustafson will be in charge of ensuring compliance with well-established antidiscrimination statutes, including Title VII of the Civil Rights Act, the Equal Pay Act, the Age Discrimina-

tion in Employment Act, the Americans with Disabilities Act, and the Genetic Information Nondiscrimination Act.

When a worker believes they have been discriminated against, they may file a charge of discrimination with the EEOC. The agency will evaluate the case and make a determination about whether it believes unlawful discrimination has taken place. If the charge is not resolved, the Commission may file a lawsuit in Federal Court, as it did 184 times last fiscal year.

Through a delegation of power from the Commission to the General Counsel, Ms. Gustafson will have broad authority to bring these cases to court. If the EEOC decides not to litigate, the worker can still sue in Federal Court.

Many charges are brought each year, and the Commission has struggled for a long time with a backlog of cases. At the end of Fiscal Year 2016, the EEOC had more than 73,000 outstanding charges of discrimination.

The Commission has made some progress. The EEOC received an additional 84,000 charges during the last fiscal year and reduced the backlog to 61,000 total charges pending. Unfortunately, the last General Counsel, appointed by President Obama, made poor decisions in pursuing cases and suffered embarrassing losses in the courts as a result of those decisions.

For example, in one case, the EEOC alleged that a company's use of credit background checks led to race discrimination. A three judge panel on the Sixth Circuit Court of Appeals stated, "EEOC brought its 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."

The EEOC continued to use the same faulty witness testimony in another case, and eventually lost that case, too. In that case, a unanimous three judge panel on the Fourth Circuit Court of Appeals found that there were, "An alarming number of errors and analytical fallacies in the expert witness's reports, making it impossible to rely on any of his conclusions."

I hope Ms. Gustafson will do a better job overseeing the EEOC's litigation and that we do not see these types of rebukes under her leadership.

Her impressive qualifications lead me to believe she will do a better job. After graduating with honors from Georgetown University Law Center, she spent 5 years practicing labor and employment law at Jones Day.

Since 1995, she has represented both employees and employers, and has practiced before the EEOC and the Federal courts, including winning legal protections for pregnant workers nationwide at the U.S. Supreme Court in "Young v. United Parcel Service".

In 2016, the Metropolitan Washington Employment Lawyers Association awarded her its Lawyer of the Year Award, quote, "In recognition of outstanding dedication to Civil Rights, Equality, and Justice."

Ms. Gustafson was nominated on March 20 of this year. On March 29, 2018, the Committee received her Office of Government Ethics paperwork, including her public financial disclosure and ethics agreement. Based on these documents, the OGE determined

that Ms. Gustafson is, quote, “In compliance with applicable laws and regulations governing conflicts of interest.” The Committee also received Ms. Gustafson’s HELP application, this Committee’s application, on March 29, 2018.

I hope once this Committee approves Ms. Gustafson’s nomination, the full Senate will quickly vote on her nomination, as well as the two Commissioners’ nominations who are awaiting consideration on the Senate floor, so they can begin their duties protecting workers.

Senator Murray.

OPENING STATEMENT OF SENATOR MURRAY

Senator MURRAY. Well, thank you very much, Chairman Alexander.

Thank you, Mrs. Gustafson, for being here and your willingness to serve your country in such a critical role.

But before we hear about your experience, and the role of the Equal Employment Opportunity Commission, I would like to, Mr. Chairman, talk a bit about a topic at the forefront of our national conversation.

Sexual harassment and assault in the workplace are nothing new. They are pervasive, systemic, and ongoing in almost every workplace in the country. But for the first time in decades, women and men are coming forward and sharing their stories of harassment and assault. Finally, these men and women are beginning to be listened to and believed. And finally, many of these predators, who took advantage of their position of power, are being held accountable for their actions. These are important first steps, but our work is nowhere near done.

Women in industries outside the spotlight, women who work in low wage industries—including food service, hospitality, farm work, retail—do not have a voice in this conversation. Far too many women who come forward are still not believed, and serial offenders are still being given the benefit of the doubt no matter how many women come forward, including our own President. Moving forward, we should be working to prevent sexual harassment across the country. Not just punishing those with years-long records of abuse.

I am very proud that the female Senators on both sides of the aisle here are taking this issue seriously. There have been a number of steps taken, and bills introduced, to combat and prevent sexual harassment, both here in Congress, and in workplaces across the country.

However, it has been really unfortunate to see a lack of urgency, or action, from Republican leaders here in Congress. Leader McConnell has yet to allow a vote on legislation to reform how sexual harassment claims are handled here in Congress.

Chairman Alexander, as you know, the Democratic Members of this Committee sent us a letter, more than 10 weeks ago, requesting a hearing on workplace sexual harassment. But Members of this Committee have yet to hear on when we will be able to hear from women and men on how harassment has impacted their lives at their jobs and beyond.

It has been almost four decades since this Committee held a hearing on sexual harassment in the workplace. And I think scheduling this hearing will make it clear this is an issue this Committee takes seriously and is focused on. So I hope, Mr. Chairman, that you will work with us and we can get that scheduled.

Now, Mrs. Gustafson, thank you, again, for being here.

From our perspective, from day one, President Trump has rolled back worker protections and made it easier for corporations to take advantage of and discriminate against their workers. He has made disparaging comments and discriminated against immigrants, Muslims, Mexicans, women, transgender individuals, people with disabilities, and more. It is the role of the Equal Employment Opportunity Commission to protect workers from that type of discrimination in the workplace.

Given the President's own views on almost anyone who is different than him, it is critical today that the EEOC remains independent and that those appointed to the Commission make it clear they do not share President Trump's views on race, civil rights, women, people with disabilities, or the LGBTQ community.

Mrs. Gustafson, you mention in your testimony that you have represented diverse clients. But I want to express how deeply concerned I am about your decisionmaking as the top lawyer for the Commission and how it could impact members of the LGBTQ community.

I noted that you are a member of multiple organizations that believe it is appropriate to discriminate against people on the basis of their sexual orientation or gender identity. So I am concerned that you will not be willing to vigorously bring suits to keep workplaces free of discrimination, particularly against LGBTQ individuals.

I am very concerned you will not forcefully defend the rights of LGBTQ employees, and others, when business owners try to use their personal religious beliefs as an excuse to disregard their employees' civil rights.

Additionally, I note that you have extreme views on women's constitutionally protected right to reproductive health services. So I do hope to hear from you today that you will not let those personal views cloud judgment at the EEOC.

I note that you have devoted your career to representing people who have been the victims of discrimination on the basis of sex, race and disability, and that you have helped to break new ground in protecting pregnant workers from discrimination.

But I also see that you have spent your career as the sole lawyer in your practice. So I am concerned with your lack of management experience, as you will now be responsible for managing, and coordinating, and directing hundreds of experienced lawyers in 15 regional offices.

So I hope today in your testimony, and in response to questions, you will be able to address these issues thoroughly.

I believe workers should be able to do their jobs without fear of discrimination. The fact that the Trump administration will not stand up for workers makes it even more critical that our Nation's civil rights enforcement agency is dedicated to equal employment opportunity, and that it is strong, and independent, and effective.

So thank you, again, for being here today.

The CHAIRMAN. Thank you, Senator Murray.

I will introduce the witness in a minute.

Senator Murray mentioned the urgency of dealing with civil rights issues and employment discrimination. Maybe I could ask her if she would work with the Democratic leader to see what she could do about getting a time agreement for confirmation on Janet Dhillon and Daniel Gade to serve as commissioners of the Equal Employment Opportunity Commission.

This Committee approved their nominations October 18, 2017 and they are sitting there, held up by Democrats who do not want us to go forward.

So it seems to me, one strong way to deal with discrimination on civil rights is to fully staff the Equal Employment Opportunity Commission with Commissioners and with the General Counsel, so we could have a prompt time agreement on both those Commissioners and the General Counsel once she is confirmed. That would be one way to deal with the urgency of the need for civil rights.

I am pleased to welcome our nominee, Sharon Gustafson. I thank her for her willingness to serve our country.

I also welcome your family. I see them on the front row, and you are welcome to introduce them yourself, if you would like. I understand your husband and five of your nine children, as well as other family members, are here today.

As I mentioned in my opening statement, Ms. Gustafson has been practicing employment law for 28 years. In 1995, she opened a solo practice in Arlington, Virginia and has been advising employees and employers through her practice ever since.

She is licensed to practice in Virginia, Maryland, and the District of Columbia.

Ms. Gustafson, you may begin your testimony.

STATEMENT OF SHARON FAST GUSTAFSON, J.D., NOMINEE TO BE GENERAL COUNSEL OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ARLINGTON, VA

Ms. GUSTAFSON. Thank you, Chairman Alexander, Ranking Member Murray, and Members of the Committee.

I am grateful to the President for nominating me to the position of General Counsel of the Equal Employment Opportunity Commission, and I am honored to appear before you today to answer your questions.

I am here with my husband, David Gustafson. And as Senator Alexander noted, five of our nine children: Adam Gustafson, Story Jones, Garrett Gustafson, Sonnet Gustafson, Sigrid Gustafson, some well-loved children-in-law, and my granddaughter, Stella Gustafson.

Our Declaration of Independence affirms that all of us are created equal and are endowed by our Creator with inalienable rights: life, liberty, and the pursuit of happiness. For most of us, that pursuit requires a paying job. I am grateful for a Constitution that says we all have, "the equal protection of the laws." I am grateful that civil rights are a bipartisan issue. I am grateful to live under, "a Government of laws and not of men."

Before law school, I worked—sometimes for subminimum wage—as a waitress, a janitor, a telephone operator, a secretary, a paralegal, and a daycare provider. I find it easy to identify with workers at every type of employment, and as a lawyer, it has been my honor to help them protect their civil rights in the workplace.

In 1990, my first assignment as a summer associate at a law firm was to write an article explaining for our clients the newly enacted Americans with Disabilities Act. For weeks, I poured over the statute and the legislative history, and I was hooked on employment law. I revised my schedule for my last year at Georgetown Law School to take labor and employment law classes, and I have been practicing employment law ever since.

My clients have reflected our American melting pot. They have been Black, White, Latino, Asian, Christian, Muslim, Jewish, male, female, gay, straight, able-bodied, and disabled.

In addition to the many employees I have represented over the years, I have also represented employers, some who were wrongly accused of discrimination with respect to the civil rights statutes, and others who were liable for past misbehavior, but were now taking action to make things right.

Most of the time, most of us in America do a pretty good job of treating each other with respect. But civil rights statutes were enacted because sometimes those in positions of power prey on the relatively powerless or discriminate against those who are unlike themselves. In moments of weakness, anger, fear, or ignorance, prejudice and discrimination come out.

I have dedicated my career to listening to peoples' stories and to identifying valid claims, wrongs that cry out to be righted. I have learned to ferret out dishonest or meritless claims, because my livelihood depended on it, and because both employer and employee deserve fair application of laws.

Litigation is a necessary tool. Without it, our civil rights statutes would be meaningless lists of aspirations. But litigation is an expensive, imperfect tool, often a blunt instrument, and resolution of disputes without litigation is an important part of the lawyer's job, just as it is an important part of the EEOC's function.

Consequently, I have resolved, without litigation, many times the number of cases that I have litigated, sometimes in the mediation room at the EEOC or at state and local human rights agencies.

The EEOC surely benefits from having a variety of backgrounds and perspectives represented in its Commission and staff. As is evident, my own experience so far in employment discrimination matters has not been to sit in a high seat, pulling the levers of power. Rather, I have been a solo lawyer most often representing the employee of modest means or the small business employer.

My seat has been in a mediation room, trying to invoke the agency's remedies to help someone get his job back, to help a pregnant woman keep her job, to get compensation for a wrongful termination, or to preserve the reputation of an employer wrongly accused. I think of my work as having been retail, street-level civil rights litigation. If confirmed, I believe my experience would be a wholesome addition to the mix at the EEOC.

The role of the General Counsel is to advise the client agency, to manage its litigation program, and to best use the tool of litiga-

tion to accomplish the mission of the EEOC. I believe in that mission, and if confirmed, I would do my best to fulfill it.

Thank you.

[The prepared statement of Ms. Gustafson follows:]

PREPARED STATEMENT OF SHARON F. GUSTAFSON

Thank you, Chairman Alexander, Ranking Member Murray, and Members of the Committee.

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the EEOC. I believe in that mission; and if confirmed, I would do my best to fulfill it.

Thank you.

The CHAIRMAN. Thank you, Ms. Gustafson, and thanks to you and your family for being here today.

We will now begin a 5 minute round of questions. We will begin with Senator Scott.

Senator SCOTT. Thank you, Mr. Chairman.

Ms. Gustafson, in your introduction, you did a pretty good job of talking about the successful qualities that we admire about you back at home in South Carolina. We are very proud of who you are and what you represent. You have both had the privilege and the opportunity to advocate on behalf of employers and employees, and you did a fine job.

David, thank you for your service as well. It seems like public service is in your DNA.

As you may know, there is a lot of noise on the Hill today about Facebook with their CEO, Mark Zuckerberg, testifying before the Senate. I want to talk about Facebook and a conversation, I think, needs to be had somewhere. I am not on the Judiciary. I am not on the Commerce Committee. So this will be where I have that conversation, and it is about discrimination.

Two Black, Conservative women, Lynnette Hardaway and Rochelle Richardson, better known as Diamond and Silk, built a substantial following on Facebook over the past few years.

Recently Facebook—a company where, at least in terms of their senior leadership, they would have to look up the definition of diversity because they have none—came to the conclusion that their policy team, and I quote, “Their policy team has come to the conclusion that your content and brand has been determined unsafe to the community.” This is Facebook talking to Diamond and Silk suggesting that their content is unsafe for the community.

What is it about two Black women espousing their support of the President of the United States that makes them unsafe for the community?

They are not bullies. They are not violent. They are not inciting riots. I do not always agree with their methodology or even some of their statements, but I do not have to agree with them.

That is the beauty of the First Amendment. Is it not?

Tell me, if they were African-American liberals espousing their views about a liberal political figure, would they, too, be considered unsafe?

I do not think they would.

This would appear to be the height of liberal hypocrisy. Facebook’s support of freedom of speech seems to only include liberal speech. Facebook has decided that they are within their rights to censor certain speech.

Where is the outcry that these two African-American Conservatives have been censored?

Now, some people might say that Facebook is a private company, and that is true. But Facebook is no ordinary technology company. In fact, it is no ordinary company regardless of the industry.

Tens of millions of Americans share huge amounts of their personal lives on this platform. A platform, I might add, that often defends itself using the First Amendment, but does not seem to care about those policies for their users.

Do not get me wrong. If you are Russians trying to influence the election, kick them off. But they did not.

If you are inciting hate and violence, kick them off. Absolutely.

But if you are two African-American Conservative women, sharing your somewhat colorful, but ultimately harmless opinions, I would like to think that is okay for the community.

We put restrictions on banks deemed to big too fail and other large industries, but these huge companies are now deciding that they are arbiters of Americans' constitutional rights.

Last week, it was Citigroup deciding that they do not like the Second Amendment, so they are going to punish business owners. And now we have Facebook deciding that Diamond and Silk do not have the right to speak and the right to their First Amendment. If this were an office environment, I think we would all be appalled.

I just want to know the answer to Diamond and Silk's own question, and this is their question, a simple question: what is unsafe about two Black women supporting the President, Donald J. Trump?

Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Do you have any comment on that, Ms. Gustafson?

Ms. GUSTAFSON. The only comment I would like to make is that I certainly believe in the First Amendment and one of the great things about our country is that we have freedom of speech no matter how liberal we are or how conservative we are. It is part of the great American conversation.

The CHAIRMAN. Thank you, Senator Scott.

Senator Murray.

Senator MURRAY. Well, again, thank you so much for being here.

For several years, the EEOC has vigorously defended LGBTQ workers from harassment and discrimination in the workplace. The EEOC has said the Civil Rights Act forbids employment discrimination because of someone's gender identity or sexual orientation.

In fact, in an important case earlier this year, the EEOC filed a brief supporting LGBTQ workers, who won that case, even as the Trump administration and Attorney General Sessions argued on the other side.

So as I mentioned in my opening statement, I have some concerns about your membership in some organizations that do discriminate against individuals based on their sexual orientation and gender identity.

I wanted to ask you, will you commit to enforcing the Civil Rights Act as the EEOC currently does and protecting workers who are discriminated against based on sexual orientation or gender identity?

Ms. GUSTAFSON. Thank you, Senator Murray.

As the Senate is aware, the make up of the EEOC is not static. Their positions change from time to time. I have no way of knowing

what the Commission will hold at any point in the future. So I cannot commit to supporting a position of yesterday.

But I can tell the Senate that I will commit to cooperating with the EEOC, whatever their positions are, and not doing anything to contradict those positions.

Senator MURRAY. Well, if they decide not to follow current policy, but do not set a new policy, will you continue to bring suits on behalf of workers across the United States who have been discriminated against?

Ms. GUSTAFSON. I would have to look at every charge that was filed, every charge that came to me with a suggestion for litigation, and look at the facts and the evidence of that case. Compare it to the law as it currently stood on the day that it came before me, and make the best decision that I could then about whether or not we should file that case based on the current law.

Senator MURRAY. Some companies have tried to use the Religious Freedom Restoration Act, or RFRA, to allow them to discriminate against their employees, for example, a transgender employee, because they feel following our civil rights laws are inconsistent with their personal religious beliefs.

Do you believe that private corporations should be able to use RFRA that way?

Ms. GUSTAFSON. I have never had a RFRA case. No one has ever come to me with that scenario, so I have not researched that issue.

I do understand the broad outlines of the issue. I understand that under RFRA, the Government may burden the exercise of religion only in situations where there is a compelling Government interest, and it is the least restrictive means available.

As to any particular case, I would have to look at the facts of that case and the evidence, and compare it to the law to have an opinion about how it applied to those facts.

Senator MURRAY. Well, you do know that the EEOC faced that very question in the past year and forcefully argued against RFRA being used to ignore civil rights laws. So I just wanted to make sure you were aware of that.

Ms. GUSTAFSON. Thank you.

Senator MURRAY. Over the last year, a lot of brave men and women, women and men, in all types of jobs, have come forward to share their stories of sexual harassment and discrimination in the workplace. The experiences they have shared made it clear that we all have to do a lot more to make sure that people can speak up to stop harassment without retaliation, and with the confidence that they will be taken seriously.

Led by Commissioners Feldblum and Lipnic, the EEOC has taken strong, bipartisan steps forward on sexual harassment by issuing a report and recommendations in 2016 and draft enforcement guidance last year.

Now, the guidance has not yet been finalized because it is waiting for review and approval by the White House. I hope that comes very quickly. Those are good steps, but it is clear that a lot more needs to be done.

I am very disappointed, again, by what I have said that we have not had a hearing and lack of action on this Committee.

But I wanted to ask you, do you think modernizing our laws and policies can help prevent and address workplace sexual harassment?

Ms. GUSTAFSON. Thank you for the question.

I can tell you from my experience in practicing in employment law for 27 years that sexual harassment is a major problem in the workplace, and it needs to be addressed.

The way, it seems to me, that we can best address it is for the EEOC to file as many of these cases as it can where it has good, valid claims. I think if employers see that the EEOC is really serious about bringing these individual claims and bringing them as frequently as it can bring them, and do a good job, that may help. But it is not a problem that is going away. I hope that we will make more progress.

I think we already have made some progress, but the problem is not going away, and it is because you have new workers coming in to the workplace all the time. There is something about human nature that tempts people to mistreat others in this way from time to time. And so, I am in favor of things that can reduce sexual harassment in the workplace.

I think one of the most important things that can be done is that we can get serious about bringing cases against employers who retaliate against an employee who has a sexual harassment complaint. Retaliation in the workplace is a big problem.

As to whether there are any new laws that should be passed, I am not aware of legislation that is pending about that or anything, and I do not have a personal opinion. I am not sure what you have in mind.

But I believe under the laws that we currently have, we could do a lot more—

Senator MURRAY. Enforcing them.

Ms. GUSTAFSON —to address the problem with enforcement, yes.

Senator MURRAY. Okay. Thank you very much. Really appreciate that.

The CHAIRMAN. Thank you, Senator Murray.

Ms. Gustafson, let me talk with you about wellness in the workplace. It looks like we have conclusively proved that after 8 years, we cannot agree on changing a sentence in the Affordable Care Act, but there is one area in the Affordable Care Act on which there was broad, bipartisan agreement and that was workplace wellness programs.

The Obama administration, in three of its agencies, implemented the Affordable Care Act provisions on workplace wellness with constructive regulations that many companies chose to try to follow.

We have had hearings here on healthcare costs that have reminded us—witnesses from the Cleveland Clinic, Mayo Clinic, other places—that perhaps the single, best way we could reduce overall healthcare costs was to have a healthy lifestyle in this country; that tens of billions of dollars could be saved, as well as with lives extended.

We know that 50 to 60 percent of Americans get their health insurance at the workplace.

Now the EEOC, despite the consensus in Congress and the support of the President and his three agencies, brought a lawsuit against Honeywell in its implementation of the regulations put out by the Obama administration, and issued a couple of regulations trying to interpret those, and their relationship to the Genetic Information Nondiscrimination Act and to the Americans with Disabilities Act.

The long and short of it was the lawsuit was dismissed and the regulations were overturned. And so, now we are back at square one.

So as counsel to the Commission, if you were confirmed and you knew that under the Affordable Care Act, there was broad consensus that we would like to encourage wellness in the workplace, and that both the Obama administration and the Trump administration wanted to do that, how would you approach that?

What advice would you give to employers who may be sitting out there wondering if they move ahead with workplace programs that they might run the risk of a lawsuit from the EEOC, or a new regulation, or a guidance that would overturn what they had set to do?

I, for one, think this is extraordinarily important because I do not think a tactic for encouraging reduction of healthcare costs, and longer lives, and giving incentives to workers in the workplace to lead a healthy lifestyle.

Ms. GUSTAFSON. Thank you, Senator Alexander.

On the wellness issue, I will admit, I have not had a wellness case. Nobody has come to me and said, "I think I have been discriminated against in the workplace because of the wellness program that my employer has. Can you help me with it?"

I know about it from reading the paper. I know what most laypeople know about it. I have looked into it a little bit more, since my nomination was announced just 10 days ago, but I am far from expert on it.

I do know that wellness is a good thing, reduction of healthcare costs is a good thing, and I see that the issues with the incentive program and voluntariness, whether it is really voluntary, I see the privacy issue. I see that these are all reasonable concerns that people have.

I see the importance of employers knowing the rules of the road before they set up their program. So if they are really trying to comply with the law, they will know what the law is and they will not have a problem complying with it.

But this is a policy that is set by the Commission, not by the General Counsel. It will be my obligation, if I am confirmed to this position, to get up to speed on it, and I am sure I will be able to, and to be able to talk intelligently with the Commission about it, to the extent that they want my advice, to give them that.

I think the fact that we have bipartisan support about so much of this is good. We should seize it and make as much progress as we can, but we have to look at the issues carefully, and I am not able to do that today. But I commit to getting up to speed and being able to do it in the future.

The CHAIRMAN. Well, thank you. Your role could be very important because as the Commissioners consider this, they may be look-

ing for ways to avoid the same legal problems that caused the EEOC's lawsuit to be dismissed and two of its regulations to be overturned. And so, your advice could be important.

What we heard in our hearing, to put it generally, from witnesses, was that they did not seem to have that much concern about the interaction of the Americans with Disabilities Act. They might have more concern about the privacy issues that came up, and having good, competent legal advice might help the Commissioners do a better job of pursuing this policy that had such broad support in the Affordable Care Act from both Republicans and Democrats.

Senator Kaine.

Senator Kaine. Thank you, Mr. Chair.

Ms. Gustafson, congratulations on your nomination to this important position.

In the last paragraph of your written testimony, I was listening carefully, you say, "The role of the General Counsel is to advise the client agency, to manage its litigation program, and to best use the tool of litigation to accomplish the mission of the EEOC. I believe in that mission, and if confirmed, I would do my best to fulfill it."

How would you describe to me that mission of the EEOC that you believe in?

Ms. GUSTAFSON. The mission of the EEOC is to maximize compliance with the laws that the EEOC has the jurisdiction to enforce: Title VII, the Equal Pay Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, GINA, all of those laws.

If I were confirmed to this position, it would be my goal to enforce all of those laws over all of the country. I would be looking at both the breadth of the statutes and the breadth of the country in trying to find good cases that could be brought in all of those different areas.

Senator Kaine. Based on your lengthy experience as an employment lawyer, do you ever see a circumstance under which an employment action taken against somebody because they were LGBT would be consistent with the mission of the EEOC as you understand it?

Ms. GUSTAFSON. I am not sure I understand your question. Would you repeat it for me?

Senator Kaine. If an employer takes an action against an employee because of their LGBT status, do you see that as consistent with the mission that you have pledged to fulfill?

Ms. GUSTAFSON. Senator Kaine, I would like to see workplaces where people are judged based on nothing but their ability to do their jobs. I mean, that is the way I think that it should work.

Senator Kaine. This is not a matter of your personal opinion having been a practitioner in the field.

So you would agree with me that someone should not be able to be discriminated against because of their LGBT status, correct?

Ms. GUSTAFSON. I do not know what case you have in mind. I know there are—

Senator Kaine. I am not asking about a case.

Ms. GUSTAFSON. Okay.

Senator KAINE. I am asking about your commitment, as you described it—

Ms. GUSTAFSON. Yes.

Senator KAINE —to a workplace where people are judged based upon the work that they do, and they cannot be discriminated against, for purposes of this question, because of their LGBT status.

Ms. GUSTAFSON. My commitment is to enforce the law, and as the Senate is aware, the law is in flux in this area. We have—

I feel like I am being asked a yes or no question to a very complicated issue.

Senator KAINE. What do you think the law should be?

Ms. GUSTAFSON. We have jurists all over the country, well-intentioned, very intelligent jurists working on these issues, and wrestling with them, and writing lengthy opinions, and lengthy dissents.

Senator KAINE. Do you have an opinion having practiced law in this area for your entire professional career whether someone should be able to be lawfully discriminated against or not because of their LGBT status?

Ms. GUSTAFSON. I would like to see a workplace where nobody is judged based on any factor other than their ability to do the job.

Senator KAINE. Do you have an opinion about whether someone can be discriminated against based on their LGBT status and that would be consistent with or in violation of the Title VII laws?

Ms. GUSTAFSON. I would have to see the facts of the case, and the law that we were trying to enforce, and I would compare the facts and the evidence against the statute.

Senator KAINE. Let me give you a fact. Someone is terminated purely because the employer concludes that they are LGBT and does not want to have them at the workplace for that reason.

Do you believe that is consistent with or inconsistent with the laws of this country and the mission that you pledge to fulfill in your written testimony?

Ms. GUSTAFSON. Well, it looks to me like the way that the law is right now, it depends on what Circuit you are in.

It would be very nice if we had a simple decision either because the Congress had made it clear to us in the statute or because the Supreme Court made it clear to us in a decision.

Senator KAINE. I understand that there is a split in the Circuits. I understand that there is a split between current EEOC practice and a position being taken by the Department of Justice in an amicus brief that they filed in a case.

What is your personal opinion about whether someone being discriminated against is in accord with or violating the civil rights laws that you are pledging to fulfill?

Ms. GUSTAFSON. I do not think my personal opinion is relevant because if I get confirmed to this position—

Senator KAINE. I think I get to decide whether it is relevant. You are asking me to vote for your confirmation.

Ms. GUSTAFSON. I understand, I understand. But I am just saying, I think that if I am confirmed, it will not be to enforce my personal opinion on anything, but rather, to apply the law and enforce the law. And right now—

Senator Kaine. Let me just conclude this way.

Will you agree with me that the law should not allow someone to be discriminated against based on their LGBT status in workplaces in this country?

Ms. Gustafson. I am not in favor of that kind of discrimination, but I think Congress has the right to pass the laws that it believes that the people want passed. We have government by the consent of the governed.

I think that Congress has a right to figure out what it is that the governed want and to pass those laws, and whatever they are, if I am confirmed, I will enforce them.

Senator Kaine. I understand that. But as somebody who has practiced in this area, I suspect you have an opinion.

Well, no further questions. Thank you.

The Chairman. Thank you, Senator Kaine.

Senator Smith.

Senator Smith. Thank you, Chair Alexander and Ranking Member Murray.

Ms. Gustafson, welcome. Thank you for your willingness to serve and also thank you to your family for being here today.

I would like to ask you, if I could, about the question of arbitration and mandatory arbitration.

Our court system and laws are designed to give victims of discrimination the opportunity to seek a remedy in a fair and transparent venue. Yet, we have seen, increasingly commonly, that employers are including these binding arbitration, forced arbitration agreements in employment contracts so that people are required to give up their right, their access to a court system.

My question for you, I am impressed with the practical experience that you have representing both plaintiffs and employers, my question for you is, as an experienced litigator, could you share with us your views on arbitration, binding arbitration, forced arbitration?

Ms. Gustafson. That is an interesting question, and again, I note the same thing that my opinion may not matter because what matters is what the law is. And as I understand it, the law provides for arbitration. And as long as the law applies for it, then it can be done legally.

But I will say, I have represented both employees and employers. And as an attorney for employees, I have never been particularly fond of forced arbitration. And as an attorney for employers, I have helped them write arbitration provisions into their agreements because that is what lawyers do. They look at the tools that are available to the client, they explain those options, and they let the client decide. So that is the best I can say about that.

Senator Smith. Some argue that these forced arbitration clauses are faster and cheaper.

In your experience, have you seen that to be the case?

Ms. Gustafson. No.

Senator Smith. Thank you.

Sometimes there is a concern that is raised about forced arbitration that it seems like it could easily be biased on the side of the employers because, unlike in the court system, the employers are often paying for the arbitrators' fees.

That does happen, right?

Ms. GUSTAFSON. The arbitrations that I have been involved in, I can say there are arbitration rules whereby the arbitrator is not supposed to know who is paying his fee. Whether or not he can figure that out by the wealth of my client and the wealth the company is a question.

Senator SMITH. Right.

Ms. GUSTAFSON. But I do know that we have been assured that the arbitrator is not told who is paying the fee.

Senator SMITH. Yes, but as my mother would say, it does not take a rocket scientist to figure that out. Right?

Ms. GUSTAFSON. Are you asking me to comment on rocket scientists?

Senator SMITH. I am asking you to comment on my mother's wisdom, I guess.

Ms. GUSTAFSON. You might have a wise mother.

Senator SMITH. All right. Well, I am very concerned about this question and especially as we think about people being able to look after themselves and needing to know that they have the ability to go to court when needs be.

We are talking about situations where the balance of power is not equal and not even, which brings me to the next round of questions I would like to ask you about, which is:

I believe one of the most important things we have to do in the Senate is to stand up for people who do not have a lot of power. And this really strikes me as something that happens all the time in workplaces, where the employer does have a lot of power and often the employee does not have a lot of power.

You note this in your testimony when you talk about, you say, "Civil rights statutes were enacted because sometimes those in positions of power prey on the relatively powerless or discriminate against those who are unlike themselves." Maybe this is a little bit of what Senator Kaine was getting at a moment ago.

Could you just talk a little bit about your views on this, what you have seen? This will help me to understand what life experiences you are going to bring to this really important role.

What have you learned about representing people in the workplace who are lower wage workers and what their experience is?

Ms. GUSTAFSON. Some of my favorite clients have been minimum wage workers and subminimum wage workers. I have done, in addition to my work in EEOC, I have done a lot of fairly standard work where I was representing people.

There have been some really heartrending cases out there where people are taken advantage of. I am glad we have the laws to address those things.

I have found that the laws work and I have always counted it an honor to represent people in getting the wages that they are due. I think that is one of those cases I was talking about where it is really a wrong that cries out to be righted when somebody is not paid what they should be paid for the work that they have done.

Senator SMITH. Thank you very much. I know that I am out of time. I just want to note as I am wrapping up that the question

of sexual harassment in the workplace, I think, is a classic example of this where the balance of power is not equal.

I am hoping we can have a hearing about this because I think that it is very important to the conversation that we have in this Committee as we think about how to protect peoples' rights.

Thank you very much.

The CHAIRMAN. Thank you, Senator Smith.

Senator Warren.

Senator WARREN. Thank you, Mr. Chairman.

So according to the EEOC, at least 25 percent of women have experienced sexual harassment on the job, but the real number could be as high as 85 percent. Many more women and men face other forms of harassment and low wage workers, in the hospitality and food service industries, are particularly vulnerable.

This is a serious problem that affects the whole economy. It is bad for business. It is bad for workers. It is bad for workers' health. It is bad for their financial security. And it is just plain wrong.

Congress should be taking a leading role in addressing harassment in the workplace and that is why I called on this Committee to hold hearings on this urgent matter. So let me ask you this, Ms. Gustafson.

If you are confirmed, you will be responsible for bringing harassment and other discrimination cases on behalf of the workers. But according to the Commission, only 6 to 13 percent of workers, who have been harassed, file any kind of formal complaint. Even when workers go to the EEOC, many cases are dismissed without a full investigation.

Based on your work on discrimination cases as an attorney, what are the major barriers that you can identify for workers getting relief from the EEOC?

Ms. GUSTAFSON. I think a major barrier is that it is hard for people to find attorneys. The Metropolitan Washington Employment Lawyers Association is a group of attorneys that take those cases on. I refer a lot of clients there.

I think there is a fear of retaliation; that can be a problem.

Senator WARREN. How about the backlog?

Ms. GUSTAFSON. Sure, absolutely. That is why I feel like one of the best things that the EEOC can do is just to try to process those cases as quickly as possible, and file lawsuits where the cases seem to have merit, and move them on as quickly as possible.

Senator WARREN. How about underfunding of the EEOC?

Ms. GUSTAFSON. I do not have any personal knowledge, since I am not on the inside of the EEOC, about any underfunding issues.

Senator WARREN. Okay.

Ms. GUSTAFSON. But I do know—

Senator WARREN. We can look at backlog, right, as part of this?

Ms. GUSTAFSON. Yes.

Senator WARREN. Let me focus on the backlog, because I think that is a really important point that you raise on this.

The Commission has made progress on its backlog in recent years, but there were still more than 60,000 complaints waiting to be resolved at the end of the last fiscal year. The average wait time for a private sector workers' claim is nearly 300 days.

Now, the Trump administration has proposed decreasing the EEOC's budget, which the Commission's own budget request said would result in a, quote, "Net attrition of investigators."

So in January, I asked for increased funding for the EEOC to help address this problem, and I am glad that the Commission just got its first budget increase in 8 years.

But for the EEOC to really stamp out harassment in America's workplaces, we need to keep fighting for the funding it needs to be able to do its job. If it does not have money, it cannot do its job. So let me ask the question this way.

If you are confirmed as General Counsel, will you commit to advocating for increased funding for the EEOC so that you, and the agency's regional attorneys, are able to do your jobs as effectively as possible?

Ms. GUSTAFSON. I would like to say two things in response to that.

Senator WARREN. Sure.

Ms. GUSTAFSON. The first is that I have a front row seat to these sexual harassment cases. I cannot begin to describe all of them. I have represented women, young women, who have been groped by their bosses.

I have represented a woman here in D.C. who, in her job, she had to change in the locker room, and as she was changing, she found out that there was a man there watching her that she did not know had been there. She complained to management and nothing happened. It happened again, only the next time he barricaded her against the wall and she was in very serious concern for her safety.

So I am saying, yes, I know how serious this problem is. This was a sexual harassment case.

As to the funding, I can commit to doing the best job that I possibly can with the resources that have been given, and then if I see that there is a need for more funding, I would certainly advocate on behalf of the agency for that funding when a budget is being proposed.

Senator WARREN. So you will advocate for increased funding if you see that you need funding in order to be able to do the job?

Ms. GUSTAFSON. Yes.

Senator WARREN. Might we both agree that a backlog that is measured by tens of thousands of people, and 300 days of waiting time, indicates that we may need to put some more resources to dealing with this problem?

Ms. GUSTAFSON. That is a discouraging backlog.

Senator WARREN. Yes, it is a discouraging backlog, and unless you can think of some other reason, it sounds like a backlog because the agency is shorthanded and cannot do its work.

Ms. GUSTAFSON. That may well be true. I do not know from the inside. I am sorry. I just have not been there.

Senator WARREN. Well, we will find out here.

The EEOC has a key role to play in ensuring that all workers in this country can do their job free of harassment and free of discrimination. But Congress has a role here too.

We need to strengthen protections. We need to close loopholes for our most vulnerable workers, and we need to make sure that our

enforcement agencies have the resources they need to be able to enforce the antidiscrimination laws that are on the books.

For that reason, I hope that we will hold hearings on workplace harassment as soon as possible.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Warren.

Senator Murray brought that up. I said I will be glad to consider that and I would ask you to work with the Democratic leaders too. We talked about the understaffing of the EEOC.

One of the glaring errors of understaffing is we have had two Commissioners approved by this Committee since October 18 of last year, and they are both being held up by Democrats on the Senate floor so that we cannot confirm them and staff up the Commission.

So if there is such an urgency about compliance and enforcement with well-established civil rights statutes, I would think we might work together to try to get a time agreement for those two nominees who have been waiting since October, and Ms. Gustafson, if she is also approved by the Committee.

Senator HASSAN.

Senator HASSAN. Thank you very much, Mr. Chair, and Ranking Member Murray.

Good afternoon, Ms. Gustafson. Congratulations on your nomination and to you and your family.

Ms. GUSTAFSON. Thank you.

Senator HASSAN. Thank you for your willingness to serve.

As I know has been discussed and mentioned, you brought a landmark case fighting for the right of women to not be discriminated against in the workplace because they are pregnant. A right that is so important for women and families across our country.

Just as women cannot be discriminated against because they are pregnant, Title VII of the Civil Rights Act protects women from being fired for terminating a pregnancy or contemplating terminating a pregnancy.

If confirmed, will you ensure that the EEOC vigorously fights against this type of discrimination?

Ms. GUSTAFSON. Excuse me, Senator. Did you say that as a provision in Title VII?

Senator HASSAN. Title VII protects the right of women to be free from discrimination based on their decisions about if and when to have a family and whether to continue a pregnancy.

Will you uphold that area of Title VII law and enforce that?

Ms. GUSTAFSON. Two points. No. 1, I would absolutely not be in favor of anybody being fired from a job because of decisions they made related to those issues.

As to what the law requires about it, I am not familiar with the case law, I have to say. I would have to look at it. I have not had anyone ever come to me with that case, so I have not ever done the research. But whatever the law says about that, I would certainly enforce it.

Senator HASSAN. Right. I think we will follow-up with you after the hearing just to exchange information and clarify that. Okay? Thank you for your answer.

Another concern of mine is the issue of litigation to address systemic employment discrimination. I think that is critically important to the work of the EEOC. These cases address employers' patterns and practices of discrimination, often impacting tens of thousands of workers across the country.

By focusing on policies that discriminate, systemic litigation is one of the most efficient ways of ensuring that workers have access to equal opportunity to workplaces free from discrimination. And, in fact, the majority of workers who have benefited from the work of the EEOC's litigation teams over the last 10 years have benefited because the EEOC has pursued these cases of systemic discrimination.

Do you agree that cases investigating and litigating systemic discrimination to be a top priority for the EEOC General Counsel's Office?

Ms. GUSTAFSON. I agree, Senator, that systemic cases are certainly provided for in the law and that there is certainly a place for them.

I have been the lawyer dealing with those individual complaints, those individual charges of discrimination, and there are so many of them. So I have to say that I do think it is important that the systemic cases not take over the litigation at the EEOC to the neglect of these individual charges that are coming in.

Senator HASSAN. But suppose you have an employer with tens of thousands of employees and one or two employees raise issues of discrimination? If the EEOC focuses on, not only those cases, but whether they represent systemic discrimination that could be impacting thousands of other people, you could address discrimination affecting thousands of people in one investigation, rather than insist that each person bring up a charge separately.

Does that not seem like the most effective and efficient way to ensure workplace safety out of fairness?

Ms. GUSTAFSON. I think sometimes it is and I would bring such claims.

But I also believe that one of the best ways to attack discrimination, to get a higher level of compliance with the laws that the EEOC has the jurisdiction to enforce, is to just keep going after those small individual claims and never let up.

I feel strongly that the EEOC should be doing both. Where necessary, where the evidence shows it, systemic cases are important. But if I may—

Senator HASSAN. If I can, I only have about a minute left.

The point I want to make to you is this, that lots of employers, especially large employers with a lot of resources, can play a waiting game. We just heard Senator Warren talking about a 300 day backlog.

If you are an individual with an individual case, who has to go seek out an attorney, arrange, perhaps, a contingency fee arrangement with that attorney, wait 300 days at a minimum to get your case heard, you are less likely to be able to actually get the kind of immediate justice that a systemic investigation result can deliver.

I am very concerned because a lot of large employers can just wait employees out or force them to take very small settlements because the delay will be so expensive and costly for the employee.

So I am running out of time, but I would just like you to consider the value that systemic investigations and litigation can bring to thousands of people, so that we can try to make sure that we are curing discriminatory policies at their root, and delivering justice to large numbers of employees all at once.

With that, I am out of time. Thank you, Mr. Chair.

Ms. GUSTAFSON. Senator Alexander, may I just address that briefly?

The CHAIRMAN. Yes, of course, Ms. Gustafson.

Ms. GUSTAFSON. I do think that it is true that we should be concerned about backlog and I do think there is a place for these systemic cases, and where the evidence shows that, I would commit to bringing them.

But I just wanted to note that the small, individual cases, there are so many of them that keep being filed that need to get attention too.

For example, just yesterday afternoon, in a very short window, I got a call from a Middle Eastern man with an age discrimination claim, an African-American woman with a disability claim, a pregnant woman calling on behalf of herself and one other pregnant woman who was her coworker with these pregnancy discrimination claims. This morning, I got a call from a woman with a sex discrimination claim.

There are so many of these small, individual cases and my point is that I think the EEOC needs to be very serious about pursuing those cases as well.

Senator HASSAN. Mr. Chair, if I may?

I thank you for that. My point is that you might be able to lower the number of those individual calls if your agency investigates those employers on a systemic basis.

Ms. GUSTAFSON. When the evidence shows that, you are right. That is what should happen.

Senator HASSAN. Thank you very much.

Thank you, Mr. Chair.

The CHAIRMAN. Thank you, Senator Hassan.

Senator Murray, do you have any other questions or comments?

Senator MURRAY. Thank you, Mr. Chairman.

I know Senator Baldwin is going to walk in, in a minute and had some questions. But while she is on her way, I did, in my opening remarks, mention management experience. You are going to be managing 15 offices and hundreds of experienced attorneys.

Can you talk with us a little bit about your experience in managing a large agency?

Ms. GUSTAFSON. I do not have experience managing a large agency. So that is an easy point to make.

But I will also say that I have, for the many, many years, been helping employers make management decisions about their workplaces and I continue to do that.

I have been on the governance committee of a seminary where we are responsible for the management of that seminary with multiple satellite campuses.

I know that the EEOC has a good career staff. I would be taking advantage of them and their expertise, and I think I could do that.

Senator MURRAY. Do you know what your management style is?

Ms. GUSTAFSON. My management style?

I know what my management style is in terms of managing the attorneys who occasionally have worked for me or the people in my household. And it has to do with really encouraging what is done well and really lighting a fire under people when they need to do more.

Senator MURRAY. Okay. Thank you, Mr. Chairman.

I do not have any other questions. I do want to submit some for the record.

I understand Senator Baldwin is on her way.

The CHAIRMAN. I will be glad to, as a courtesy to Senator Baldwin, wait for her.

I would just observe, Ms. Gustafson, that I listened carefully to the discussion with you and Senator Hassan, and I understand the Senator's concern and yours. But just as one Senator, I like to focus on the claims. I mean, if we are going to hold out to the public at large that if they file a claim or a charge with the Equal Employment Opportunity Commission that they will be heard and that they will be reviewed.

If too many of the resources are spent on systemic cases pursuing novel legal theories—particularly those that have received the kind of almost, let us say, very unusual rebuke from three-judge panels in both the Third and Fourth Circuit—I think the people you described and who you have represented for years will be much better off if you worked that backlog down as much as possible, and hold out to people the hope that they will be heard if they file.

One other thought is, do you understand the difference between a guidance and a regulation?

Ms. GUSTAFSON. I do.

The CHAIRMAN. Do you know that under both President Obama and President Trump that a guidance is not legally binding?

Correct?

Ms. GUSTAFSON. I know the guidance does not have the weight—

The CHAIRMAN. Force of law.

Ms. GUSTAFSON —of law, the force of law that a regulation has.

The CHAIRMAN. Right. That is my point. A regulation would have the force of law properly adopted and given public comment, but a guidance would not.

Even though some guidances have broad application and broad effect, would you agree with the practice of asking for public comment at least for guidances that have broad effect or are controversial?

Ms. GUSTAFSON. I like the idea of public comment even for guidance. I understand that it may not be legally required, but it seems to me that we could all benefit from having all the stakeholders speak into the issues that guidance is being issued on.

The CHAIRMAN. Congress has granted to the EEOC the authority to bring litigation. In 1996, EEOC delegated this litigation authority to the General Counsel with limited exception.

The Commissioners are supposed to be presented with the opportunity to vote in cases involving a novel area of law. My sense is that the Commissioners should be more active in considering important areas of law.

What is your attitude toward this delegation of authority to the General Counsel? And in what instances should the Commission itself step in?

Ms. GUSTAFSON. I understand that the Commission is the one with the authority to decide how much of their authority they want to delegate. I do understand that they have delegated quite a bit of authority. There are five categories of cases that they have asked the General Counsel to refer back to them for discussion before those cases get filed.

One of them is novel questions of law. I would certainly abide by that, and I recognize the fact that the Commission has the right to pull back delegation if it wants to, to redistribute it as it thinks appropriate. I would cooperate with whatever delegation I was given, and I do not have any position at all about whether they should take some of that back.

The CHAIRMAN. Thank you.

Senator Baldwin.

Senator BALDWIN. Thank you, Mr. Chairman and Ranking Member for this opportunity.

I wanted to follow-up with you on an issue that, I believe, Ranking Member Murray and Senator Kaine raised about Title VII.

I strongly support the EEOC's decisions that make it clear that Title VII's sex discrimination provisions are properly understood to prohibit discrimination based on both gender identity and sexual orientation, a position that has been affirmed by a number of Federal Courts including the Seventh Circuit, which includes my home State of Wisconsin.

I applaud the Commission for its enforcement efforts consistent with this position on behalf of LGBTQ workers.

For example, in July 2017, the agency brought suit against a Georgetown restaurant on behalf of a young, gay man who was subjected to harassment because of his sexual orientation resulting in a \$50,000 settlement, and changes to the employer's policies, and training to address discrimination and harassment.

In May 2016, the Commission secured \$140,000 settlement and policy changes on behalf of a transgender woman who was blocked from doing her job as an I.T. contractor at a Minnesota college when she announced her intent to transition from male to female.

Ms. Gustafson, do you agree that the EEOC's current position is that Title VII's provisions on sex discrimination is properly understood to prohibit discrimination based on both gender identity and sexual orientation?

Ms. GUSTAFSON. Senator Baldwin, thank you for the question.

You have raised issues that are currently in litigation and I do not want to comment on any of those particular cases because I do not want to prejudice the litigation in any way for either side.

But I do note that the EEOC is the body with the authority to issue the policy of the EEOC. The General Counsel does not come up with the policy of the EEOC. That would not be my job. That would be the EEOC's job.

I note that there is currently a Circuit split on these issues. As the Senate is well aware, there is a lot of change taking place in the courts about this. We are in an era of flux.

What I can tell you is that any case that came to me, I would carefully compare the facts of the case and the evidence with the current law at the time that it came to me, and I would enforce the law as it was then.

Senator BALDWIN. Are you aware of how long the Commission has had this as precedent? In other words, that Title VII prohibits discrimination based on both gender identity and sexual orientation?

Ms. GUSTAFSON. Are you asking me if I know when they began to hold that position?

Senator BALDWIN. Yes.

Ms. GUSTAFSON. I do not.

Senator BALDWIN. You talk about this issue being currently in litigation, but what is your role in terms of defending the Commission's interpretation?

Ms. GUSTAFSON. My role, as I understand it from the statute and from the EEOC policy manual discussing the role of the General Counsel, is that my position would be to advise them about the law when they requested advice and to bring the cases as they came up. Sometimes with authority that I would have and sometimes with authority from the EEOC because the EEOC directed those cases, and I would cooperate with them on that.

Senator BALDWIN. Is it your thought that your position would require you to proactively disagree with prior General Counsels' advice to the Commission?

Ms. GUSTAFSON. No.

Senator BALDWIN. Workplace harassment remains an unacceptable reality that threatens the safety and economic security of far too many people working to build a better future for themselves and their families.

I believe that if you work hard and you play by the rules, you ought to be able to have the opportunity to get ahead.

In 2013, the Supreme Court issued a decision "Vance v. Ball State" that made it much harder to hold employers accountable for the harassment employees face at the hands of direct supervisors. Under this decision, only people with the power to hire and fire are considered supervisors under Title VII.

In reality, lower level supervisors can have enormous authority over their subordinates, particularly in low wage occupations like childcare workers and cashiers, where women make up the significant majority of workers.

It is why I introduced legislation, the Fair Employment Protection Act that simply reverses the Vance decision.

Do you agree that in light of "Vance", the EEOC would benefit from legislation that provides clear authority to pursue claims of harassment by middle managers?

Ms. GUSTAFSON. Excuse me for making you repeat this, Senator Baldwin. What court did you say issued that opinion that you are talking about, the "Vance" opinion?

Senator BALDWIN. The U.S. Supreme Court.

Ms. GUSTAFSON. Okay. Thank you. I thought that is what you said and I wanted to clarify that.

If the U.S. Supreme Court has ruled on an issue, that is the law of the land, and I would enforce that law whatever it is. There is no doubt about that and that is what I would be bound to do, to use the law, as it stands, and enforce that law.

If the Senate were to pass a law that changed that, of course, I would enforce whatever the new law was about that.

I do know that sometimes my work as a plaintiff's employment lawyer has caused me, in discovery, to have to work to find out who the true decisionmakers were. They were not always who they appeared to be from the outside of the case.

The CHAIRMAN. Thank you.

Senator BALDWIN. One quick follow-up?

The CHAIRMAN. Okay.

Senator BALDWIN. Do you believe that a supervisor has to have hiring and firing authority to be a supervisor?

Ms. GUSTAFSON. I do not think my position on that matter, matters because I would just be enforcing the law and not my personal opinions about that, and I do not have any personal opinions about that.

I understand that there is a list of factors that are considered. I would look at those lists of factors under the law and apply them.

Senator BALDWIN. Okay.

The CHAIRMAN. Thank you, Senator Baldwin.

If Senators wish to ask additional questions of the nominee, questions for the record are due by 5 p.m., Thursday, April 12.

For all other matters, the hearing record will remain open for 10 days. Members may submit additional information for the record within that time.

The CHAIRMAN. The next meeting of our Committee will be tomorrow morning at 10 a.m. on, "The Opioid Crisis Response Act of 2018," that Senator Murray and I have worked on with almost every Member of the Committee.

Thank you for being here today.

The Committee will stand adjourned.

[Whereupon, at 3:50 p.m., the hearing was adjourned.]