

EEOC Commissioners Review Regulations, Policies, Priorities

By Aaron Halegua

According to Equal Employment Opportunity (EEOC) Commissioner Chai R. Feldblum, “As a government agency, our job is to put out clear guidance” on the contours of discrimination law so that employers “don’t first discover [the law’s requirements] when they get sued.”

Feldblum and fellow Commissioner Victoria A. Lipnic appeared on a panel at the Fifth Annual Section Conference in Seattle, where they addressed the EEOC’s statutory mandate of stopping unlawful discrimination and described the agency’s efforts toward fulfilling that role. The panel was moderated by Barbara Berish Brown of the Washington, D.C., office of Paul, Hastings, Janofsky & Walker.

The commissioners discussed several examples of providing guidance, including the recent regulations on the Genetic Information Nondiscrimination Act (GINA) and proposed Age Discrimination in Employment Act regulations that they “hope” will be issued by summer. In each instance, the panelists stressed their commitment to adhering to Congress’s intent and providing clarity. Feldblum recalled being unable to support a very pro-employee provision in a draft of the GINA regulations because she viewed it as inconsistent with congressional intent.

Commissioner Lipnic stated that in approving GINA, Congress “did not mean in any way to stifle ordinary conversation in the workplace” or to prohibit a long-term supervisor from inquiring, “How is your mother?” The tougher question is what subsequent questions are permissible.

While they had hoped the guidance would reassure employers by highlighting what they *can* say, the commissioners said they were dismayed that so much attention has been placed on what is prohibited. Commissioner Lipnic summarized the EEOC’s position as stating that “of course” it is permissible to ask “follow-up questions, just not probing ones.”

The commissioners also described the EEOC’s amicus program as another place “where EEOC speaks its position on the law.” The panelists reported that in fiscal year (FY) 2011, the commission filed 29 amicus briefs. Technically, the full commission must vote on each brief before it can be filed, although in practice, a memo is circulated outlining what the brief will argue, and the commissioners vote based on that information. The panelists noted some issues that have been addressed in recent briefs, such as reassigning employees to vacant positions and pleading standards after the *Iqbal* decision.

On the enforcement front, Feldblum noted, “We cannot do more than we have the people power to do.” Because it is clear that Congress will not increase the agency’s staff, the fundamental question is how to do more with the people the commission already employs.

A priority of the commission is to improve the charge-handling “triage system” it started in the 1990s. The EEOC classifies each charge as an A, B, or C, which translates into those where it is likely that discrimination will be found to be a reasonable cause, where it is unlikely, and where more information is needed. Because this system is intended to allow charges with greater merit to be processed more quickly, the commission is committed to ensuring that it is implemented appropriately.

The commission also is striving to increase the number of cases the agency brings in court by delegating significant authority to file suit to the agency’s general counsel, who then can delegate that authority to the regional attorneys. The panelists reported that of the more than 200 cases filed in FY 2011, the commission voted on only 11.

Feldblum also emphasized the importance of commissioner charges, stating they are “key in doing a more targeted, focused approach to stopping employment discrimination.” Because these charges

were “more likely to get at systemic discrimination,” Feldblum stated that she supported putting more resources into such charges. While she noted there is nothing in the statute that requires a commissioner charge to address “systemic” discrimination, Lipnic pointed out that the EEOC is very unlikely to sign a commissioner charge where the case presents only statistical evidence and nothing more.

Providing insight into future policies the agency might adopt, the commissioners acknowledged that the EEOC is funding a study by the

National Academy of Sciences concerning what a reporting requirement about employer compensation systems might look like and how it might be analyzed. Moderator Brown noted that it will be interesting to see whether the EEOC will get involved in new questions that have arisen after the Supreme Court’s decisions in *Concepcion* and *Wal-Mart Stores*. ■

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