



**Testimony of Sherrilyn Ifill  
President and Director-Counsel  
NAACP Legal Defense and Educational Fund, Inc.**

**Before the United States House of Representatives  
Committee on Education and the Workforce  
Subcommittee on Workforce Protections**

**Hearing on  
“The Regulatory and Enforcement Priorities of the EEOC:  
Examining the Concerns of Stakeholders”**

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Good morning Chairman Walberg, Ranking Member Courtney, and members of the Subcommittee. My name is Sherrilyn Ifill. I am President and Director-Counsel of the NAACP Legal Defense & Educational Fund, Inc. (“LDF” or the “Legal Defense Fund”). Thank you for the opportunity to testify in this morning’s hearing, which will allow stakeholders to express our perspectives about the United States Equal Employment Opportunity Commission’s (“EEOC” or the “Commission”) recent regulatory and enforcement priorities. As I will explain in greater detail during my testimony, the EEOC has, throughout its nearly 50 year existence, played a pivotal role in assuring that all Americans have access to equal opportunity in the workforce and that there are adequate protections in place so that unlawful employment discrimination is quickly identified and remedied. Despite the tremendous strides we have made as a nation towards equal opportunity, the EEOC continues to remain an incredibly important and necessary federal agency.

LDF, which was founded by Thurgood Marshall in 1940, is the nation’s oldest civil rights law organization. Throughout our history, we have relied on the Constitution, as well as federal and state civil rights laws, to pursue equality and justice for African Americans and other people of color, and have worked to create an anti-discrimination principle that applies to employment, public accommodations, education, housing, political participation, and criminal justice.

Next month, we will celebrate the 50th Anniversary of the Civil Rights Act of 1964. Without question, the Civil Rights Act of 1964 is one of the most important pieces of civil rights legislation ever enacted by Congress to ensure that our country keeps its promise of equality and justice. While the Civil Rights Act of 1964 included a number of anti-discrimination provisions, including the prohibition of discrimination in public accommodations, it is perhaps best known for Title VII, which outlawed discrimination in employment on the basis of race, color, religion, sex, or national origin.<sup>1</sup> As Professor Robert Belton, a former LDF lawyer who litigated some of the first cases under Title VII and became a renown employment discrimination scholar, observed: “Of the eleven titles in the Civil Rights Act of 1964, Title VII has emerged as having the most significant impact in helping to shape the legal and policy discourse on the meaning of equality.”<sup>2</sup> The creation of the EEOC as the agency charged with receiving, investigating and referring complaints of employment discrimination for litigation, was a core aspect of the bipartisan compromise that resulted in Title VII.

Since the enactment of Title VII, LDF has worked to enforce this landmark statute, challenging discriminatory practices of both private and public employers, and serving on the front lines of many great civil rights battles seeking equal opportunity in employment for all.<sup>3</sup> From this vantage point, the Legal Defense Fund has had an unique opportunity to observe the work of the EEOC and to assess its effectiveness. Indeed, beginning in 1965 when the EEOC opened its doors for the first time, we litigated many of the seminal cases that initially interpreted

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<sup>1</sup> 42 U.S.C. §§2000e et seq.

<sup>2</sup> Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 Hofstra Lab. and Emp. L.J. 431, 432 (2005).

<sup>3</sup> See, e.g., *Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010); *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867 (1984); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

the meaning and scope of Title VII, including *Griggs v. Duke Power Company*<sup>4</sup> and *Albemarle Paper Company v. Moody*.<sup>5</sup> And within the first year of the EEOC's operation, LDF filed nearly a thousand complaints of racial discrimination with the Commission.<sup>6</sup> As such, we fully understand and appreciate the role that Title VII has played in literally changing the face and composition of the American workforce.

Today, we too often accept the integration of the American workforce without recognizing the role that the EEOC and Title VII have played in helping to open doors to employment and opportunity that were closed simply because of an applicant or worker's race or gender. We forget that it is only within the last 50 years—a period shorter than my lifetime and perhaps than many of yours—that American workers have enjoyed legal protection from discrimination based on race, sex, national origin and color. Just as the Civil Rights Act of 1964 made possible the diversity we have come to take for granted in restaurants, here at Union Station in Washington, D.C, and in courthouses and hotels throughout this country, so too did Title VII and the EEOC make possible the diversity in the American workforce that is reflected in offices, factories, stores and businesses throughout this country.

The EEOC, like Title VII more generally, was designed to achieve its goals, as much as possible, through cooperation, voluntary compliance, and informal conciliation.<sup>7</sup> However, it has also been long recognized, especially by the Equal Employment Opportunity Act of 1972,<sup>8</sup> which significantly expanded the EEOC's enforcement authority, that the Commission also needs to rely on litigation as another tool to ensure that employers are compiling with federal anti-discrimination laws.

There is no question that the EEOC has been incredibly successful in redressing various forms of employment discrimination. The Commission has been a driving force in dismantling segregated workplaces, removing unnecessary and discriminatory employment barriers and obstacles, and ensuring that the promise of equality at work could be realized for millions of Americans. The EEOC's local and regional offices have often been relied upon by communities of color and other historically marginalized populations for redressing discrimination and harassment often suffered on a daily basis. For example, in Birmingham, Alabama, the local EEOC office was known to many in the African-American community, not by its title or as a government agency, but simply as the "2121 Building," because this was the address one visited in downtown Birmingham if one was seeking protection from discrimination on the job. In fiscal year 2013, the EEOC negotiated 5,927 settlements and successfully conciliated nearly 1,000 charges of discrimination with respect to Title VII alone.<sup>9</sup> During that same period, the

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<sup>4</sup> 401 U.S. 424 (1971).

<sup>5</sup> 422 U.S. 405 (1975).

<sup>6</sup> Jack Greenberg, *Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution*, 304-05 (1994).

<sup>7</sup> See *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367-68 (1977) ("Congress, in enacting Title VII, chose cooperation and voluntary compliance . . . as the preferred means of achieving its goals.") (internal quotation marks and citation omitted).

<sup>8</sup> 42 U.S.C. §2000a.

<sup>9</sup> Equal Opportunity Employment Comm'n, Title VII of the Civil Rights Act of 1964 Charges (including concurrent charges with ADEA, ADA and EPA) FY 1997-FY 2013 (2014), <http://eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm>.

Commission litigated 148 lawsuits under the array of federal statutes it has authority to enforce, including Title VII (78 lawsuits) and the American with Disabilities Act (“ADA”) (51 lawsuits), recovering nearly \$40 million in monetary benefits for victims of discrimination.<sup>10</sup>

Despite the tremendous progress made in ensuring equal opportunity in the workplace, sadly our work in eliminating discrimination in the American workplace is far from over. The EEOC plays a critical role in the ongoing work of eradicating employment discrimination. This work goes to the very core of what we aspire to be as a nation—a place where no one can be barred from employment simply based on stereotypes about their fitness for work, racial animus or hostility. The ability to obtain employment, to be promoted at one’s place of employment based on the successful performance of work, and to be appropriately and equally compensated for that work as similarly situated workers, goes to the principle of dignity that Title VII was designed to protect.

But discrimination still remains a pervasive problem in far too many workplaces all across the country. One need look only to recent EEOC court victories to understand that even the most pernicious forms of racism on the job unfortunately still exist. In 2012, a Texas jury awarded punitive damages to three African-American manufacturing employees subjected to racially offensive slurs and a noose in the workplace, including use of the “N” word by a top plant official who responded to complaints about the noose with the comment, “You people are too sensitive.”<sup>11</sup> Last year, a North Carolina jury unanimously found that African-American truck drivers, who were called the “N” word, “monkey” and “boy” and threatened with nooses by a manager and a co-worker, were harassed and retaliated against because of their race.<sup>12</sup> Earlier this year, the EEOC secured relief for an African-American technician in Arkansas who was subjected to racially offensive language and visited at home in the middle of the night by two white co-workers threatening to kill him if he complained further about racial harassment.<sup>13</sup>

As an organization with an active employment discrimination docket, we at Legal Defense Fund know only too well that employment discrimination against African Americans and other protected classes continues to exist. We recently settled a class action employment discrimination case against the national women’s clothing retailer Wet Seal; the lawsuit alleged that top executives at Wet Seal directed senior managers to get rid of African-American store management and replace them with white employees for the sake of its “brand image.”<sup>14</sup> For example, one senior Wet Seal executive ordered a district manager to “clean the entire store out” after observing numerous African-American employees working there.<sup>15</sup> We also recently successfully concluded our representation of thousands of African Americans in Chicago who were unlawfully denied jobs as firefighters in a case that worked its way up to the United States

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<sup>10</sup> Equal Opportunity Employment Comm’n, EEOC Litigation Statistics, FY 1997 through FY 2013 (2014), <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm>.

<sup>11</sup> Press Release, Jury Says AA Foundries Must Pay \$200,000 for Creating Racially Hostile Work Environment (Sept. 27, 2012), <http://www.eeoc.gov/eeoc/newsroom/release/9-27-12g.cfm>.

<sup>12</sup> Press Release, Federal Court Grants Injunction Against A.C. Widenhouse in EEOC Race Harassment Case (Mar. 8, 2013), <http://www.eeoc.gov/eeoc/newsroom/release/3-8-13.cfm>.

<sup>13</sup> Press Release, MMR Constructors Settles EEOC Racial Harassment Lawsuit (Jan. 27, 2014), <http://www.eeoc.gov/eeoc/newsroom/release/1-27-14.cfm>.

<sup>14</sup> Complaint at 8, *Cogdell v. Wet Seal*, No. 12-01138 (C.D. Cal. July 7, 2012).

<sup>15</sup> *Id.* at 7.

Supreme Court.<sup>16</sup> And not long ago, the United States Court of Appeals for the Eleventh Circuit agreed with our position in *Ash v. Tysons Foods* that a white supervisor calling a black employee “boy” was evidence of racial animus that could support a finding of employment discrimination.<sup>17</sup> Sadly, these are only a few of the countless other recent and present-day examples of continued discrimination and harassment in the workplace.

In fiscal year 2013 alone, the EEOC received nearly 94,000 charges of discrimination.<sup>18</sup> Of those charges, 33,068 (or 35.3%) involved allegations of racial discrimination, 27,687 (or 29.5%) involved allegations of sex discrimination, 25,957 (or 27.7%) involved of discrimination based on disability status, and 21,396 (or 22.8%) involved allegations of age discrimination.<sup>19</sup> The number of filed charges, however, does not come close to fully representing the millions of Americans who still endure unlawful discrimination and mistreatment in their workplaces. For example, recent national surveys show that approximately one out of every four working women and one out of every ten working men have experienced some form of harassment while on the job.<sup>20</sup> Many of those workers, however, never report that harassment or file a charge of discrimination.

The recent economic downturn has only served as another painful reminder of the continued existence of employment discrimination in the workplace. While nationwide, the unemployment rate is around 6.0%; for Latino-Americans the rate is 8.6%, and for African-Americans it is 12.2%. Discrimination in hiring remains a key factor for these large and unacceptable racial disparities. For example, an empirical study has demonstrated that resumes with “white sounding” names were 50% more likely to receive a callback than comparable resumes with African-American sounding names.<sup>21</sup> Similarly, racial minorities receive inferior initial and final offers from employers than their white counterparts.<sup>22</sup>

We commend the EEOC’s decision to continue to prioritize the initiative revitalized under President George W. Bush’s administration of focusing the Commission’s resources on redressing systemic discrimination—i.e., pattern or practice, policy and/or class-wide investigations and litigation where the alleged discrimination has a widespread impact on an industry, employer, or geographic area. The EEOC’s Systemic Task Force, which was established in 2005 under the direction of then-EEOC Chair Cari Dominguez and led by then-Commissioner Leslie Silverman, was premised on “the recognition that the Commission cannot

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<sup>16</sup> *Lewis v. City of Chicago, Ill.*, 560 U.S. 205 (2010).

<sup>17</sup> *Ash v. Tyson Foods, Inc.*, 664 F.3d 883 (11th Cir. 2011).

<sup>18</sup> Equal Employment Opportunity Comm’n, Charge Statistics FY 1997 through FY 2013, (2014), <http://www1.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

<sup>19</sup> *Id.*

<sup>20</sup> Gary Langer, *One in Four U.S. Women Reports Workplace Harassment*, ABC NEWS, Nov. 16, 2011, <http://abcnews.go.com/blogs/politics/2011/11/one-in-four-u-s-women-reports-workplace-harassment/>.

<sup>21</sup> Marianne Bertrand and Sendhil Mullainathan, *Are Emily and Brendan More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV., 991, 998 (2004).

<sup>22</sup> John A. List, *The Nature and Extent of Discrimination in the Marketplace: Evidence from the Field*, 119 Q. J. OF ECON. 49 (2004).

effectively combat discrimination without a strong nationwide systemic program.”<sup>23</sup> We could not agree more.

While individual claims have a place on the Commission’s docket, it is imperative that the EEOC continue to maximize its impact by prioritizing systematic enforcement and litigation. The litigation of systemic discrimination claims is very costly, often complicated and is regularly protracted and hotly contested. Simply put, they are some of the hardest and most complex cases to litigate. And that is why they are precisely the types of cases which the federal government should be bringing. Our country cannot hope to rid the workplace of employment discrimination on an individual case-by-case basis. Moreover, many of these cases would never be prosecuted by the private bar or civil rights organizations with limited resources, especially when the discrimination is occurring in underserved communities or the likelihood of obtaining significant monetary relief is minimal. An emphasis on systemic enforcement makes perfect sense strategically because it allows the EEOC to address and remedy workplace discrimination on a large scale. As such, the EEOC was wise to recently develop a new Strategic Enforcement Plan, which will allow the Commission to focus its own limited resources on the areas where discrimination remains entrenched and far-too-common.<sup>24</sup>

The Commission’s recent victory in *EEOC v. Hill Country Farms, Inc.*,<sup>25</sup> serves as a powerful reminder of the impact of the EEOC’s focus on systemic and strategic enforcement. In that litigation, the EEOC represented 32 men with intellectual disabilities who were subjected, over the course of more than two decades, to harassment and discrimination, including verbal and physical abuse and sub-standard and otherwise deplorable living conditions.<sup>26</sup> As a result of the EEOC’s advocacy, an Iowa jury awarded the men damages totaling \$240 million. And earlier this year, the EEOC reached a \$1.4 million settlement with JPMorgan Chase over allegations that the company maintained a sexually hostile work environment towards female mortgage bankers who worked at an Ohio location.<sup>27</sup> The settlement also requires JPMorgan to revise its data retention procedures in order to prevent future harassment.

We also applaud the EEOC’s continued reliance on disparate impact liability as a tool through which to prove unlawful discrimination. The United States Supreme Court, in its landmark decision, *Griggs v. Duke Power Co.*, recognized that Title VII not only prohibits overt racial discrimination, but also “practices, procedures, or tests neutral on their face, and even neutral in terms of intent” that “operate to ‘freeze’ the status quo of prior discriminatory

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<sup>23</sup> Equal Employment Opportunity Comm’n, Systemic Task Force Report to the Chair of the Equal Employment Opportunity Commission, [http://www.eeoc.gov/eeoc/task\\_reports/systemic.cfm](http://www.eeoc.gov/eeoc/task_reports/systemic.cfm).

<sup>24</sup> In the Strategic Enforcement Plan, the Commission identified six areas of enforcement priorities, including: (i) eliminating barriers in recruitment and hiring; (ii) protecting immigrant, migrant, and other vulnerable workers; (iii) enforcing equal pay laws; and (iv) preserving access to the legal system. Equal Employment Opportunity Comm’n, Strategic Enforcement Plan FY 2013-2016, <http://www.eeoc.gov/eeoc/plan/sep.cfm>.

<sup>25</sup> *EEOC v. Hill Country Farms, Inc.*, 13-2796, 2014 WL 1813434 (8th Cir. May 8, 2014).

<sup>26</sup> Press Release, Equal Opportunity Employment Comm’n, Jury Awards \$240 Million for Long-Term Abuse of Workers with Intellectual Disabilities (May 1, 2013), <http://www.eeoc.gov/eeoc/newsroom/release/5-1-13b.cfm>.

<sup>27</sup> Press Release, Equal Opportunity Employment Comm’n, JPMorgan Chase Will Pay \$1,450,000 to Resolve EEOC Class Sex Discrimination Lawsuit (Feb. 3, 2014), <http://www.eeoc.gov/eeoc/newsroom/release/2-3-14.cfm>.

employment practices.”<sup>28</sup> Disparate impact is now more important than ever, especially given that subtle and sophisticated types of discrimination are more commonplace in today’s society than instances of overt racial animus. The success of the Civil Rights Movement and the legislation it produced means that racial discrimination is no longer socially acceptable. This cultural change has helped reduce some racial discrimination. In other instances, however, discrimination has been driven underground, where it is vibrantly practiced but masked by code-words and pretexts. As the United States Court of Appeals for the Third Circuit has explained:

Anti-discrimination laws and lawsuits have “educated” would-be violators such that extreme manifestations of discrimination are thankfully rare. Though they still happen, the instances in which employers and employees openly use derogatory epithets to refer to fellow employees appear to be declining. Regrettably, however, this in no way suggests that discrimination based upon an individual’s race, gender, or age is near an end. Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms. It has become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality discriminatory behavior. In other words, while discriminatory conduct persists, violators have learned not to leave the proverbial “smoking gun” behind.<sup>29</sup>

Disparate impact cases are often extremely challenging and can be very costly, especially given that they often involve analyzing large sets of data and require the retention of legal experts. But, if we are committed to ridding our nation’s workplaces of unlawful discrimination, these are precisely the types of cases the EEOC needs to be litigating.

The EEOC’s recent actions around the misuse of criminal background checks in employment highlight the ways in which the Commission is working to address and remedy discriminatory barriers that have disparate impacts on protected classes. In recent decades the number of Americans who have some sort of criminal record has increased significantly. Incarceration rates in the United States have more than tripled since the 1980s.<sup>30</sup> As a result of this increase, the United States currently constitutes approximately five percent of the world’s population but holds 25% of the world’s prison population.<sup>31</sup> This rapid increase is largely attributable to the increased incarceration of non-violent drug offenders over the last three decades. Racial minorities have been hit hardest by this national trend. The prevalence of arrest rates and criminal convictions are far higher among African Americans and Latinos than for whites.<sup>32</sup> These racial disparities are not explained by disproportionate rates of criminal

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<sup>28</sup> 401 U.S. at 430 (1971). Congress codified disparate impact liability under Title VII in the 1991 Civil Rights Act. See The Civil Rights Act of 1991, Pub. L. No. 102-166.

<sup>29</sup> *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1081-82 (3d Cir. 1996).

<sup>30</sup> U.S. Dep’t of Justice, Bureau of Justice Statistics, *Correctional Populations in the United States 1998* (2002); Paige M. Harrison & Allen J. Beck, U.S. Dep’t of Justice, Bureau of Justice Statistics, *Prisoners in 2003* (2004).

<sup>31</sup> Marc Mauer, *Race to Incarcerate*, 15-14 (1999).

<sup>32</sup> Recent statistics from the FBI show that African Americans accounted for more than 3 million arrests in 2009 (28.3% of total arrests), even though they represented just 12.9% of the general population; whites, who formed 75.6% of the general population, accounted for fewer than 7.4 million arrests (69.1% of total arrests). Crime

activity—one study found that in 2005, African Americans represented 14% of current drug users, yet they constituted 33.9% of persons arrested for drug offenses<sup>33</sup>—but rather, demonstrate the roles that racial profiling and discriminatory criminal justice policies have played and continue to play in our criminal justice system.<sup>34</sup>

In response to this growing trend, two years ago, the EEOC, in a bipartisan manner, issued enforcement guidance on employers' consideration of arrest and conviction records when making employment decisions.<sup>35</sup> The EEOC's guidance was designed to consolidate, clarify, and update prior guidelines the Commission had promulgated on the topic, guidelines—initially issued in 1987 when now-Supreme Court Justice Clarence Thomas was serving as Chair—that had become outdated and did not reflect recent factual and legal developments.<sup>36</sup> It is important to note that the EEOC's guidance does not prevent or discourage the use of criminal background checks. Instead, it clearly sets forth how employers' use of criminal history information can, in some instances, violate Title VII. First, the EEOC, relying on social science research showing that African-American job applicants without criminal records are less likely than white applicants with criminal records to get called back for interviews or receive offers of employment,<sup>37</sup> discusses how employers can violate Title VII's disparate treatment provision if

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in the United States, 2009 U.S. Department of Justice — Federal Bureau of Investigation (Sept. 2010) tbl. 43, <http://www2.fbi.gov/ucr/cius2009/arrests/index.html>. Among persons arrested on felony charges in 2006, 29% were white, while 45% were black and 24% were Latino. Bureau of Justice Statistics, U.S. Dep't of Justice, *Felony Defendants in Large Urban Counties, 2006*, app. tbl. 2 (2010). Similar disparities are seen in conviction rates as well. One recent estimate found that nearly one-fourth of the black adult male population (23.3%) has at least one felony conviction but is not currently under any form of criminal justice supervision, while that figure is only 9.2% for the adult male population as a whole. Christopher Uggen, Jeff Manza & Melissa Thompson, *Citizenship, Democracy and the Civic Reintegration of Criminal Offenders*, 605 *Annals Am. Acad. Pol. & Soc. Sci.* 281, 288 & tbl. 2 (2006); see also Marc Mauer and Ryan S. King, *Uneven Justice: State Rates of Incarceration by Race and Ethnicity*, 3 (2007), [http://www.sentencingproject.org/doc/publications/rd\\_stateratesofinbyraceandethnicity.pdf](http://www.sentencingproject.org/doc/publications/rd_stateratesofinbyraceandethnicity.pdf) (finding African Americans incarcerated 5.6 times rate of whites, Hispanics incarcerated at 1.8 times rate of whites).

<sup>33</sup> Marc Mauer, *Justice for All? Challenging Racial Disparities in the Criminal Justice System*, Am. Bar Ass'n (2010). A recent report by the American Civil Liberties Union ("ACLU") found that "Black people are 3.7 times more likely to be arrested for marijuana possession than white people despite comparable usage rates." Press Release, ACLU, *New ACLU Report Finds Overwhelming Racial Bias in Marijuana Arrests* (June 4, 2013), <https://www.aclu.org/criminal-law-reform/new-aclu-report-finds-overwhelming-racial-bias-marijuana-arrests>.

<sup>34</sup> See, e.g., Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010); Marc Mauer, *Mass Imprisonment and the Disappearing Voters*, in *Invisible Punishment* 53 (Marc Mauer & Meda Chesney-Lind eds., 2002) (discussing war on drugs).

<sup>35</sup> Equal Employment Opportunity Comm'n, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, as amended, 42 U.S.C. § 2000e et seq. (April 25, 2012).

<sup>36</sup> See Equal Employment Opportunity Comm'n, *Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964* (Feb. 4, 1987); Equal Employment Opportunity Comm'n, *Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment* (July 29, 1987); Equal Employment Opportunity Comm'n, *Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964* (Sept. 7, 1990).

<sup>37</sup> One study, demonstrated that White job applications with a criminal record who had the same qualifications as African-American applicants without criminal record were three times more likely to be invited for interviews than the African-American applicants. Devah Pager, *The Mark of a Criminal Record*, 108 *Am. Journal of Sociology* 937, 957-60 (2003). The results of that study, which provides powerful evidence that some employers may be discriminated against African American applicants, and especially those with criminal records, has been replicated in other research. See, e.g., Devah Pager, Bart Bonikowski, & Bruce Western, *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 *Am. Sociological Rev.* 777, 785 (2009).

they treat similarly situated individuals with criminal histories differently because of their race. The guidance goes on to explain that even criminal records policies that are facially race-neutral can result in disparate impact liability if they disproportionately impact racial minorities (or other protected groups) and are neither job related nor consistent with business necessity. In order to avoid violating Title VII, the guidance recommends employers, when developing criminal records policies, consider three sensible factors: (i) the nature and gravity of the prior criminal conduct, (ii) the time that has elapsed since the prior criminal conduct, and (iii) the nature of the job held or sought.<sup>38</sup> The EEOC's guidance makes clear that consideration of these factors is important for ensuring that exclusions based on criminal records are not overly broad, but are related to the positions at issue and necessary from a business perspective.

The EEOC's work on the guidance is not only commendable, it is also consistent with the growing national and bipartisan consensus that we need to rethink our criminal reentry systems to ensure that millions of Americans who have a criminal record, but who have paid their debt to society and are qualified for work, are not unjustly denied the opportunity to reintegrate back into society by the misuse of criminal background checks. To allow the presence of an arrest or conviction record to bar an individual from meaningful employment forever, would deny to millions that most powerful and important American opportunity—a second chance. For the Legal Defense Fund, ensuring that those with criminal records are not arbitrarily barred from employment opportunities, is a key focus of our employment discrimination work. We regard the EEOC's leadership in this area as just one example of how the Commission continues to carefully and thoughtfully recalibrate its regulatory and enforcement agenda to respond to trends and shifts in employment discrimination.

The eve of the 50th anniversary of the Civil Rights Act of 1964 provides a timely opportunity to pause and consider the regulatory and enforcement priorities of the EEOC. Undoubtedly, the EEOC should be applauded for the tremendous role it has played in helping to ensure that American workers are not being denied equal opportunity based on race, national origin, sex, age, religion, disability, or any other protected category. But, the EEOC's work is far from over. The Commission must continue its work of developing new and innovative ways to combat unlawful discrimination. As Naomi Earp, who served as Chair of the EEOC under President George W. Bush once remarked: "New times demand new strategies to stay ahead of the curve. These old evils are still around in new forms and [the Commission] intend[s] to act vigorously to eradicate them."<sup>39</sup> As such, we should also take this opportunity to ensure that the EEOC has the resources it needs to continue its critically important work, including systemic enforcement, to make sure that no one in this country is denied equal opportunity and fair treatment in the workplace.

Thank you for the opportunity to testify today. I would be happy to answer any questions.

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<sup>38</sup> These factors, also known as the "Green factors," are based on a 1975 decision by the United States Court of Appeals for the Eighth Circuit. *See Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290 (8th Cir. 1975). In that decision, the court concluded that an employer's policy that disqualified applicants for employment for any criminal conviction other than a minor traffic offense violated Title VII's disparate impact protections.

<sup>39</sup> Press Release, Equal Employment Opportunity Comm'n, Naomi C. Earp Takes Office as EEOC Chair (Sept. 6, 2006), <http://eoc.gov/eoc/newsroom/release/9-6-06.cfm>.