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Panel 1 - Towards Effective Governmental Intervention: Ending Discrimination in the Workplace

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TRANSCRIPT OF VIDEO FILE:

PANEL 1 - TOWARDS EFFECTIVE GOVERNMENTAL INTERVENTION: ENDING DISCRIMINATION IN THE WORKPLACE

BEGIN TRANSCRIPT:

FACILITATOR: Good morning, everyone and welcome to the “Enhancing Antidiscrimination Laws in Education and Employment Symposium”, hosted by the American University *Journal of Gender, Social Policy & the Law*, the *American*, and the National Institute for Workers’ Rights (“Intstitute”). And without further ado, let me pass it off to the Institute’s board president, Rebecca Salawdeh.

REBECCA SALAWDEH: Good morning. Yes, my name is Rebecca Salawdeh and I am the president for the National Institute for Workers’ Rights. At the Institute, we aspire to a future in which all workers are treated with dignity and respect, workplaces are equitable, diverse and inclusive, and the well-being of workers is a priority in business practices. We seek to achieve this vision through research, thought leadership and education for policymakers, advocates and the public. You can learn more about our work either by using the QR code in the program, which is in the chat, or by visiting our website, NIWR.org. Today we are very excited to welcome you to the symposium on “Enhancing Antidiscrimination Laws in Employment and Education”. We would very much like to thank our partner, the *Journal of Gender, Social Policy & the Law*, for their incredible support and work in this program. [00:01:25]

Right now, I have the pleasure of introducing Patrick Patterson, who will be the moderator for our first panel, “Toward Effective Government Intervention: Ending Discrimination in the Workplace”. Patrick Patterson served as senior counsel to the chair of the Equal Employment Opportunity Commission from 2010 until 2014 and was deputy director of the Department of Labor’s Office of Federal Contract Compliance from 2014

until 2017. He previously taught employment discrimination, among other classes and served as the western regional counsel for the NAACP Legal Defense and Educational Fund. Welcome, Patrick.

FACILITATOR: Patrick, you are currently muted. [00:02:21]

PATRICK PATTERSON: Thank you very much Rebecca. I hope I'm unmuted now. As you heard, I am a civil rights lawyer and Rebecca went through my background very quickly. Other panelists in this session have different backgrounds and perspectives. Victoria Lipnic is a Republican former commissioner and acting chair of the EEOC. Carol Miaskoff is a long-time career attorney in EEOC's Office of Legal Counsel, and she now is the legal counsel running that office. Hnin Khaing is a civil rights lawyer who is a former general counsel and now is the interim director of the D.C. Office of Human Rights. [00:03:15]

Our objectives in this panel will be to discuss ways that government antidiscrimination efforts can better serve historically marginalized communities, and to consider how the EEOC can implement change in the face of a federal judiciary that has often, at least in my view, misinterpreted Title VII and other civil rights laws in ways that are antithetical to the purpose of those laws. We want to also call attention to changes that are taking place and may yet take place under the current administration, and we want to suggest ways in which NELA members and other plaintiffs' lawyers can more effectively represent their clients before the EEOC and other agencies.

We would ask that you please submit any questions you have via the Q&A function in Zoom, and we'll try to leave time to address as many as possible at the end of our session. Please remember to use the Q&A function and not the chat function, to ask questions. [00:04:11]

Now to set the stage, I want to start with some things that Congress could do, but almost certainly will not, to advance the cause of and the purpose of the employment discrimination laws. Congress could, for example, overturn court decisions that have approved forced arbitration in employment cases and have limited the scope and effectiveness of the ADEA, among other statutes. Congress could expand the types of employment covered by Title VII and other antidiscrimination laws. For example, they could cover interns, part-time workers, gig workers, independent contractors, and other kinds of employment that we now see in our current economy. Congress could also increase statutory damage caps under Title VII and the ADA, for example. Those have been unchanged since they were first adopted in 1991, but as we all know, a dollar today is worth about half as much as it was then, but those caps have not been changed. All of these changes would improve the effectiveness of our civil rights laws. However, you may have noticed that

Congress has trouble passing anything these days, anything at all, and proposals to strengthen the civil rights laws are not likely to be high on their priority list, given their concerns with things like infrastructure and other issues. So, we will focus on things that EEOC and other agencies have done and still could do under the statutes that are on the books now. [00:05:45]

Now what I have to say today is discussed in more detail in my paper entitled “Reclaiming EEOC’s Mission,” which is available now, I understand, on the National Institute’s website, and maybe someone can put a cite to that in the chat or somewhere where people can see it. I would refer you to that paper if you want more information about what I’m about to say.

One thing to keep in mind is the structure of the EEOC and how that affects what it can and cannot do. Now former Commissioner and former Acting Chair, Victoria Lipnic, is of course the expert on this, and so I will mostly defer to her if she wants to comment further on this subject, but I do want to note that the Commission consists of five commissioners with staggered terms. By statute, three are from one party, two from the other, and the Commission currently has a three-member Republican majority. The first one of their terms to expire runs until July of 2022, so the Republican majority will be there at least until that date, unless one of them leaves sooner for one reason or another and is replaced by a Democratic commissioner, who would have to be confirmed by the Senate. To a large extent, at least from my perspective, the goal of the current majority appears to be not to serve EEOC’s stated mission, which is to prevent and remedy unlawful discrimination and advance equal opportunity in the workplace. Rather, it appears to be to make the Commission as ineffective as possible for as long as possible, as a vehicle for protecting workers’ rights and to thereby curtail the agency’s ability to accomplish its mission. As I said, I think other members of the panel may want to dispute that or may not want to talk about it, but that’s my view. [00:07:36]

Although the two Biden-appointed Democratic commissioners now have administrative control of the agency, as Chair and Vice Chair, the Republican majority, if it continues to vote as a bloc, will remain in control of determining policy, and policy includes the power to adopt, repeal or revise regulations and guidance documents. The current majority is unlikely to vote in favor of overturning any of the policy changes they made during the Trump administration. For example, during that time the EEOC abandoned the collection of pay data as part of the annual EEO-1 reporting process. During that time the EEOC dramatically limited the General Counsel’s and the EEOC Regional Attorneys’ litigation authority, imposing political control over what should be law enforcement decisions. During that time, the EEOC adopted a new compliance manual section on religious

discrimination that enhances the ability of employers to discriminate against workers based on the employer's religious beliefs. I want to note that the OFCCP, where I also previously worked, issued a similar regulation during the waning days of the Trump administration, which allows federal contractors, including for-profit corporations, to discriminate against workers based on the contractors' professed religious beliefs. Litigation was filed challenging that OFCCP rule and on Monday of just this week, the OFCCP, you may be aware, announced that it was rescinding that rule; but at EEOC, the Trump administration's new compliance manual section on religion remains in effect. [00:09:18]

Now, there have been some positive steps by the new administration, to help reclaim EEOC's mission to protect workers' rights. I'm sure EEOC's Legal Counsel, Carol Miaskoff, will have more to say about that and what EEOC is doing now, but here are a few ways that changes have been made and are being made by the EEOC now. The new Chair, Charlotte Burrows, and Vice Chair, Jocelyn Samuels, are now in administrative control of the agency. They are working to reverse the reduction and hollowing out of the EEOC staff that occurred during and even before the Trump administration. Secondly, the previous EEOC leadership had refused to share EEO-1 data with state and local fair employment agencies. That's the data they collect from employers on the picture of employment in those workplaces regarding race, gender, and ethnic composition. The EEOC, during the Trump administration, had refused to share that data with state and local fair employment agencies, such as the one Hnin Khaing works for, even though Title VII required the agency to share that data. Several states sued the agency over this policy, and the EEOC has now reinstated its statutorily mandated obligation. [00:10:44]

Another example: President Biden revoked a Trump executive order that had effectively prohibited federal agencies, contractors, and grantees from conducting meaningful diversity, equity, and inclusion training. The former executive order also provided that teaching what the order called "divisive" DEI, diversity, equity and inclusion concepts could give rise to liability under Title VII, and the order authorized EEOC to issue guidance consistent with that order, an obligation that EEOC has now been relieved of since President Biden revoked the executive order. Finally, Congress repealed a new EEOC regulation that would have severely limited the agency's ability to conciliate cases by compelling extensive disclosures of EEOC's investigative information and legal analysis in every conciliated case. The rule would have made it much more difficult for parties to conciliate and for EEOC to conciliate charges for which reasonable cause had been found. That rule has now been revoked and I do want to say that NELA actively opposed

the rule, and NELA's position was ultimately vindicated when Congress repealed the rule under the Congressional Review Act. So, these are some good steps, in my view, in the right direction, but additional changes in EEOC policy, including changes in regulation and guidance, will have to await the time when a new majority will be in control of the Commission. Let's now hear what our panelists have to say about these issues. [00:12:23]

We're going to start with Victoria Lipnic. She was the Assistant Secretary of Labor and Employment Standards in the George W. Bush administration. She was a commissioner of the EEOC from 2010 to 2017, during the Obama administration. She became Acting Chair of the EEOC from 2017 to 2019, and I want to say that during her decade at EEOC and from my personal experience, she had a well-deserved reputation for bipartisan leadership and independent thinking and working through coalitions to advance the goals of the agency. She focused on harassment, age discrimination and LGBTQ protections, among other things, during her time at the EEOC. She is now head of the Human Capital Strategy Group at Resolution Economics, which provides litigation, consulting, and expert witness services. Vicki will discuss some of the things she learned during her tenure at the EEOC and where she thinks the Commission is headed now, and she will probably disagree with at least some of what I have just told you. Vicki, please take it away. [00:13:34]

VICTORIA LIPNIC: Well thanks very much Patrick, for that introduction. I'm not quite sure what to say about that introduction given the conclusion there. I want to thank, first of all, the American University Washington College of Law, the *Journal of Gender, Social Policy & the Law*, and the National Institute for Workers' Rights, for inviting me to be with you today. That's quite—an introduction, and thank you for the kind words, Patrick, and I want to say during my time at the EEOC, when Patrick was chief counsel to, sadly, the late Jacqueline Berrien, who served as chair. It was—we had a great working relationship and also, Carol Miaskoff, who—as the legal counsel, was integral to pretty much every decision that I was involved with at the EEOC and it's a pleasure to have a chance to be with you. [00:14:40]

So let me make just a couple comments at the outset, since this panel, the title of this panel is “Towards Effective Governmental Intervention: Ending Discrimination in the Workplace”. I want to go back to one thing that Patrick said, and this he details in his paper and in his opening remarks, about well here are the things where, in his view, that the courts have gotten the interpretation of the law wrong, whether it's under the—among the examples that Patrick gives, the Age Discrimination in Employment Act, and there are certainly other examples. [00:15:24]

So first I want to start with partly, sort of the reason for this panel, and as Patrick said—and I will say that also in my background, at one point I was counsel to the House Labor Committee, both in the minority and in the majority, and that was 20 years ago, more than 20 years ago. At that time, it was still the case that when there was a court decision, in particular, if there was a Supreme Court decision that Congress disagreed with, generally, on a bipartisan basis, then Congress would step in and Congress would change the law. One of the very first examples, when I first worked on Capitol Hill, had to do with an interpretation by the Wage and Hour Division at the Department of Labor, in an administrator's opinion letter, which are very significant views about interpretation of the law from the Wage and Hour Division. It had to do with stock options and who was entitled to stock options and how they would be counted in terms of for wage and hour purposes. Everyone in Congress—and, of course, this is the late '90s, early 2000s, where everyone wants stock options, and so, this interpretation, was a very strict interpretation from the Wage and Hour Division; Congress said, "wait a minute that's not right" and immediately stepped in and changed the law. That does not happen so much anymore, even when it's a narrow sort of rifle-shot thing like this wage and hour FLSA interpretation was, or more broadly. And, I think, in terms of civil rights of course, those of us who are and have been civil rights practitioners, we think of the statutes as these monumental achievements --- and certainly Title VII is a monumental achievement, part of the Civil Rights Act of 1964. [00:17:39]

So, you often don't see the kind of rifle-shot things by Congress in response to Supreme Court decisions that would and could make a difference in the face of multiple Supreme Court interpretations, particularly if there's some disagreement about, did the Court get this wrong or was the Court's interpretation too strict. That was a regular thing that used to happen and does not happen so much anymore. Because of that, therefore, as Patrick said . . . And I have to say, and I think that's unfortunate because oftentimes, these debates come down to well whose role is it to interpret the law in a certain way and if Congress represents their constituents who don't like it, then Congress should change it. So, in today's legal and policy environment I think there's often more of that kind of debate, about whose role is it appropriately to be changing or interpreting the law it in a certain way that goes on in the regulatory agencies. Certainly, at the EEOC and I was part of many, many conversations along those lines. But the EEOC is, one enforcement agency. These kind of debates go on at all the enforcement agencies, again because of this, change, I think, that Congress does not act in the way that it did 20 years ago. Having said that, a couple of other things that I want to mention again, in terms of thinking about well, what's effective governmental intervention in trying to end discrimination in the workplace.

[00:19:16]

So first I want to say the idea of ending discrimination in the workplace is a very tall order. In Title VII, the findings itself talk about eradicating discrimination and I always thought that was just a monumental order at some level. We are talking about human beings who are working together and bumping into each other in their workplaces. Of course, now we have highly transformed workplaces in so many ways, both the way we are all meeting today [virtually], but also just the degree to which employees communicate with each other, right, in terms of social media and things outside of the workplace, that gets carried over to the workplace in ways today that, are different than even 15 years ago, and I think that presents a lot of challenges, again, sort of in terms of well how do we end discrimination. [00:20:22]

In terms of the government's role, you know first of all, I want to say that my experience, and as Patrick said, and I was worried that he was sort setting me up as the person who had to carry the entire weight of every decision that over the last, well really over the last two years, that he might have disagreed with—

PATRICK PATTERSON: I wouldn't do that. I wouldn't do that, Vicki.

VICTORIA LIPNIC: (laughs) Thanks, Patrick. So as Patrick said though, it's a five-member commission. The commissioners, there is a lot of back and forth in terms of discussions about the law in terms of policy, what the best way to go is, certainly that was my experience. That was my experience both when Patrick was there with Chair Berrien, under Chair Berrien's successor, Jenny Yang, and then I tried to do that on my own as well when I was serving for more than two and a half years as the acting chair. And I want to point out that in the traditional sense in terms of who controls the majority, so as Patrick pointed out there are—right now it's a majority of Republican commissioners under a Democratic chair, now that will change next year. That was the situation when I was serving as the acting chair. I was the sole—I was the sole Republican member with at first three Democratic members and then two, and but we always tried to work in a very collaborative fashion and find unanimity, I think far more so . . . certainly, I think probably more so than has been over the last year or so, but it's not impossible and you know some of that takes real . . . It takes leadership, it takes—and it takes will on the part of the commissioners for that to happen. [00:22:35]

In terms of a couple things that the government in particular can do, and I'll give you one example, and I'm mindful of the time here. One thing government can do, obviously government has federal enforcement power and that was something that I would always say to in particular, new

attorneys at the EEOC or new investigators at the EEOC: keep in mind that the one thing you have as both an investigator and as a lawyer, as compared to anyone else who might be in practice somewhere, whether they're defending employees or defending employers, you have federal enforcement power and that is an awesome responsibility and an awesome power and you have to exercise that carefully and recognize the power that you have. So, there's that. [00:23:35]

The other thing that government has is a megaphone and the government has a megaphone on issues in ways again, in terms of ending discrimination in ways that many, private organizations, even with the litigation that they bring do not have—the government has a platform. The biggest example, I'll give you of that is, and Patrick and Carol know this very well, when I first came to the EEOC, Jackie Berrien is serving as the chair and I went to Jackie and said, just looking at the cases we had and the press releases that we would put out about cases, this—and this is in 2010, '11 – I asked – “Does anyone think there's a harassment problem happening in our workplaces and how is it possible that this is still the case?” We are 30 years after the Meritor Savings Bank case, the seminal Supreme Court case about sexual harassment. Chair Berrien said, “Why don't you look into this.” I talked to all the district offices they all said yes, but please don't make us bring any more cases, we are so overloaded, you know isn't there something else we can do? Long story short. That ultimately led to, in 2015, under then chair Jenny Yang, we established the Select Taskforce on the Study of Harassment in the Workplace. We brought in outside experts. We issued a report in 2016, 30 years to the day after the Meritor Savings Bank case, and this was 16 months before #MeToo exploded. It was on October 7, 2017, when the New York Times reported the Harvey Weinstein case and at that point in time, fortunately, I mean this is one of those cases where the government, both as enforcer and regulator, is—and this is again, thinking about effective governmental intervention, where sometimes the government is the only, the only thing in town that can recognize something happening. And so we, at that time at the EEOC, were able to see, isn't there something going on about harassment in our workplaces that we ought to be able to speak to somehow, so that when #MeToo exploded, we were able to say hey, here's this report that we did, here are suggestions that we are making about practices that we think employers ought to adopt to really reinvigorate and renew their anti-harassment efforts and oh by the way, we take no pleasure in saying we told you so. So, I'll just, I'll stop there—but again, I think the megaphone is important and that is something that really, the government, like I said, oftentimes the regulator is the only place in town that can sort of recognize a phenomenon happening. [00:26:37]

PATRICK PATTERSON: Thank you, Vicki. I think we can all take your comments to heart, because they're based on your experience about what the EEOC can do. Now we're going to ask Carol Miaskoff to talk about some of the things the EEOC is doing. Carol has been in leadership positions in the EEOC's Office of Legal Counsel for many years. The OLC, as it's called internally, develops proposed regulations and policy guidance, it provides technical assistance to employers and employees, and it coordinates with other agencies regarding the statutes and regulations that EEOC enforces. Carol was named the head of OLC in June of this year. She will talk with us about some of the initiatives the OLC is undertaking now, what the EEOC litigation picture looks like now and what advocates can do to represent their clients in causes more effectively before the agency. Carol. (pause) Carol, I think you may be muted. [00:27:46]

CAROL MIASKOFF: Thank you. Well, all I was saying was thank you to Patrick, thank you to former acting chair Lipnic, thank you to our hosts. Before I sort of dive into what EEOC is doing now and some thoughts about what EEOC can do most effectively in terms of the area that I have spent my career in, which is guidance regulations technical assistance, I did want to say that I agree very much with acting chair, former acting chair Lipnic's assessment of two major points, those points are I too, when hearing the agency's mission of eradicating discrimination, was always—and I don't know if troubled is the right word, but uncomfortable let's say. I think, given unfortunately, just human nature and reality, eradication of discrimination is not a realistic goal. That said, as I spent more and more time in this field and had more and more policy discussions with people within EEOC and outside of EEOC, I came to think that actually framing this as eradicating discrimination, in a sense was a mistake because it reflects a perspective that discrimination is something, is still something that we can push out and get rid of and sort of don't need to reckon with as part of human nature, for better or for worse, on an ongoing basis. So, you know therefore, I think it's really important to have those conversations that we obviously work to reduce significantly, employment discrimination, and that will always be our job. But that said, that we talk realistically about what happens in the workplace, about the way this country's history, legacy, habits, systems, etc., play into that and that long-term, that will be a more effective road for more enduring progress. I actually think the harassment report that former acting chair Lipnic's group issued in 2016 is an excellent example of that, because they did a wonderful deep dive into, I guess we were calling them promising practices then. [00:30:52]

So just for example, one of the ones that I found really helpful, was characteristics that would make a workplace perhaps more susceptible to

harassment. These characteristics, there were like ten of them, they were things we all have and it was suggesting ways to cope with these. So, it was things like if you have, for whatever reason, a fairly homogenous workplace and then you introduce someone who is quite different, that could be a vulnerability for harassment, and you need to proactively see that and watch that and work with that. Another thing is if you have, say a leader who is very powerful, a rainmaker, and there are huge power discrepancies between the rainmaker and everyone else, that also sets up a vulnerability for harassment that needs to be recognized. So, I found that a real important mindset and really influenced the way I came to think about not eradicating discrimination but being real about the human dynamics and the social context. Okay. [00:32:11]

The other thing I would say is that from an institutional perspective, EEOC has legal authorities to write regulations, for example, to litigate, to investigate and enforce. I think that's always a key aspect of what we do and I hand it to EEOC career people who, despite the ups and downs and vagaries of politics and funding, persevere and really care about the people who come to us after going through sometimes really awful discrimination at work, who come to us and the EEOC staff who represent those people and assist those people in resolving their complaints or moving them forward. So, I think that is the heart of what—the heart and soul of what EEOC does, but for what EEOC also is, on a bigger policy front, is in a sense a bully pulpit. At the current time, because of the composition of the commission, as former acting chair Lipnic said and as Patrick said, we are not voting new legally binding regulations or even new guidance documents that would stake out new legal positions for the agency. We are doing what we call technical assistance. [00:34:04]

I wanted to spend some time talking to you about technical assistance, because I think it's one of those inside baseball things. I know when I joined the government and I heard about technical assistance, I thought it was something having to do with computers or you know, (laughs) or fixing something. And then I realized that really, what technical assistance means in the EEOC lingo is when the agency takes established EEOC legal positions, that are established by a document the Commission has approved, which could be obviously regulation, guidance, guidelines. It also could be an appeal from a federal sector decision that the commission has voted on, and those can make new policy. And it can also be a decision on a private sector charge, for example, and the Commission voted on one of those in 2000, on the availability of contraception I think, and that made policy. [00:35:37]

So what technical assistance does is it pulls together this whole kind of . . .

EEOC legal positions and it says okay, this is what we can work with, what are the challenges that are manifest now and how can we bring that to bear to clarify people's rights to help people to clarify for employers, what they should strive for. That is technical assistance. That said, although on one hand I'll be honest as a policy attorney and as a supervisor of some very bright policy attorneys who are dying to sink their teeth into all kinds of new legal issues, it can be frustrating to be in a world where your biggest challenge is to get the words exactly the same as they appeared in a prior document.

You know in a sense it's sort of a lucky moment in that the time when we are doing a lot of technical assistance, is coinciding with the age of very short attention spans, of social media and plain language and writing at a very simple level and just saying yes or no. So that is the kind of writing that technical assistance lends itself to and I think because we are in a social moment of providing, soundbites, for want of a better shortcut or saying it, technical assistance is suited to that and EEOC has issued lots of technical assistance on how the EEO laws apply during the current pandemic.

The bottom line during the pandemic, as someone from within the agency said to me a few days ago, is that the civil rights laws continue to apply during the pandemic, period and honestly, to some degree, that has been at the crux of a lot of the issues that have come up in the workplace, in the last 18, 20 months, that the EEO laws continue to apply. So, the ADA applies, with its restrictions on confidentiality of medical information, on employer medical exams, for example and Title VII applies in terms of potential disparate impact, in terms of discrimination against women, these laws continue to apply and at some very fundamental level, that's what all of our technical assistance says. I think the most—the current example—and this changes at the drop of a hat during the pandemic, is the technical assistance the EEOC put out on October 25th, about religious accommodation and vaccine mandates. Well, you know what? It's the same law that has always applied. What's hard about it is that religious accommodations typically played out as schedule changes, someone could observe certain rituals, now they're playing out as I can't take a shot because of my sincerely held religious beliefs, but the same principles. [00:39:43]

Okay. Another technical assistance I want to point out that we did recently, was on June 15th, which was the one-year anniversary of the Supreme Court's issuance of the Bostock trilogy of decisions, the Commission issued technical assistance on Title VII and LGBTQ coverage, broadly speaking. Okay, as technical assistance, the rule is we could only say things that were already law, so we could recite what Bostock said and we could recite what was established by former Commission votes. And these were all federal

sector decisions where the Commission had voted, for example, about deliberate misuse of pronouns as opposed to accidental misuse, possibly being harassment, about use of bathroom and private facilities, for example, about coverage of transgender people, which was obviously also covered by Bostock. So, we could draw on what was established already. We couldn't get into some of the open and interesting legal issues yet because that would require a vote, but nonetheless, I think at this moment, for EEOC to just reiterate these principles, is important. You know as I was looking at that technical assistance, I realized how basic it is but, in a sense how important it is. I was looking at it again last night and it literally has a question which says, "what kinds of employment discrimination does Title VII prohibit?", and it goes through the laundry list. And I think, although incredibly rudimentary, that has real value as we all start to think post-Bostock, about how Title VII applies to you know, to sexual orientation and transgender status. So, I think it has huge value, going from hiring to harassment, you know to conditions of work, et cetera. [00:41:52]

A few other thoughts. Technical assistance can be informative to people who actually read it, because they can easily understand it. And, in the world of administrative law, the process for government clearance of technical assistance has evolved so that it's now treated process-wise almost the same as a binding regulation and as voted guidance, even though technical assistance does not state any new legal positions. I say almost the same in terms of process, it's not identical. Technical assistance does not have to go out for notice and comments, so that's a big difference, but internal to the government, it does go through the White House, whole White House review process now, which you know certainly earlier in my career, was reserved for major regulations that were going to be legally binding. But now, you know, we put out seven Qs and As about, you know a topic, it goes through full vetting at the highest levels and with other agencies, and the same with other agencies. We get documents from elsewhere in government that are fairly rudimentary but are still going through this sort of full, all government vetting, and that's a change—I think it improves consistency across government. It also slows down considerably, the government's ability to move expeditiously in response to crises and real, you know urgent needs, so it's a plus and a minus. [00:43:43]

The other thing I think is interesting is that again, you know and I, I'm speaking as someone who has been doing this for many years. When I started, EEOC regulation, a binding regulation, might be challenged in court under the Administrative Procedures Act. Now what's happening is, over the last years we've had voted guidance challenged under the Administrative Procedures Act, and now I will tell you, already we have two lawsuits against

our technical assistance we issued on June 15th on LGBTQ+. So, if you really sort of step back from this and look at, I was thinking really, the three branches of government, like Vicki started with, you see the, the sort of, the balance is sort of wobbling and shifting. The Judiciary is getting a lot more influence, Congress is not doing the kind of fixes or actions that it had done, and the Executive is sort of, can I say wiggling and struggling to do its job within the context of an increasingly tight straitjacket. But that said, I always say that the EEOC is the little agency that could and we, we will find a way. You know we'll find a way, we will go out and talk, we will meet with stakeholders,—and then we will do our bread and butter work of investigation and helping people. Okay, that's sort of the process piece. [00:45:49]

I did want to sort of quickly—and I'm probably running out of time here—just mention policy priorities of Chair Burrows. She's talked publicly about three main priorities. One is renewing and increasing our focus on systemic discrimination and primary among that is race discrimination and pay discrimination. She has talked about systemic discrimination as discrimination in the form of broad patterns and cultures of excluding individuals or treating people differently on a protected basis. That includes pay discrimination or tolerating harassment or retaliation. So, it's a very big umbrella but it's a focus generally on those, and then within that context we identified particular cases of merit and other things that we can do. [00:46:53]

The second initiative we are doing is actually—and this is a coordination with NLRB and Department of Labor, an initiative on fighting retaliation, just because you know it is—retaliation is a huge problem, a huge challenge. I would say almost, I think I probably am safe saying almost every harassment charge has a retaliation count to it, I mean it is huge. So, all these three workplace agencies are getting together and doing our best to educate and try to train and to try to get our arms around retaliation for exercising legal rights. [00:47:40]

The next priority is artificial intelligence and hiring technologies. Chair Burrows has announced an initiative. We're going to have an internal working group who will coordinate our litigation and technical assistance or policy in that regard. We also, in part, and I will say credit goes to Vicki on this, we have a very strong technical office now and people who really understand this stuff and are trained in this stuff, so that will make a big difference. The final priority is diversity, equity, and inclusion, which we really almost see, it's traditionally been thoughts of as hiring diversely. We're also looking at it now, as retaining and making a workplace where everyone can really move forward and can contribute. That's part of anti-

harassment, anti-retaliation, systemic issues too, but from the perspective of diversity, equity, and inclusion. [00:48:53]

So, and then finally I'll just add, in terms of staffing, career staffing, folks like me, to build on something Patrick mentioned, I was looking at the numbers last night too and it's really very interesting. EEOC reached its highest number of career employees as of the—as of September 30th, 2011, and that was 2,505. So that was our ultimate high. Our ultimate low since the 1980s, was the end of fiscal year 2020, and that was 1,939. So, we shrunk by a little under 600 staff people in that time and for an agency, a small agency like us, that is a huge hit. Now that was a result of ongoing, I would say, inside the beltway Washington dynamics, both presidential and otherwise, that impact funding that happened over those years. So, I'm not sort of laying it, you know, on the doorstep of anyone particularly but it was the reality, and it really, really did hobble us. And to give you a sense, I guess I've been a manager at EEOC now for close to 20 years and this fiscal year is the first time, fiscal year FY-2022, where we will have automatic backfills when someone leaves or retires, which is something I think in the private sector or other sectors people say well of course. Well, EEOC, in all my 20 years of managing has never had automatic backfills, so you had to get in there and argue and you know, present the merits of why you needed to backfill a position and often you wouldn't get it because there was a more critical job that needed to be filled. So, we now have automatic backfills, which is really going to be huge, and I think stabilize the agency tremendously, so I'm very glad to see that. So, with that, I will sign off for now and pass it on. [00:51:41]

PATRICK PATTERSON: I want to say thank you, Carol. I'm sure we'll get back to you with some questions as we finish the rest of the presentations, but now I want to move on to Hnin Khaing, who is an experienced civil rights lawyer, the former deputy director and later the general counsel at the District of Columbia Office of Human Rights, where she oversaw the legal sufficiency review of all agency decisions. She directed rulemaking and prosecuted probable cause cases before the D.C. Commission on Human Rights. She's now the interim director of the Office of Human Rights and she will discuss the distinct role of state and local fair employment practice agencies like her own, how they collaborate with and how they differ from the EEOC, and what they can do that EEOC sometimes cannot do. So please, Hnin, go ahead. [00:52:42]

HNIN KHAING: Thank you, Patrick and thank you, Washington College of Law and the *Journal on Gender, Social Policy & the Law*. I'm so pleased to be here among what I think of as the greatest legal minds of my time, so I'm very, very excited to be here. So, former acting chair Lipnic, when you said you know, this eradication of discrimination is a tall order, I cannot think

of a director of one of these FEPA agencies that haven't had these conversations where we said this is a tall order, how do we go about achieving this goal. So, I think we can relate to that. [00:53:21]

I'm here to offer a little bit of perspective from a state and local jurisdiction, so I'd say to practitioners and budding lawyers that we have in the room here, the virtual room, to learn about your local civil rights provisions and local FEPAs in your jurisdiction because as Patrick put it, sometimes the EEOC has great enforcement authority but sometimes local rules, local civil rights laws, have expanded coverage. So, I'm going to offer you a little bit of information about the Human Rights Act in D.C. For instance, when I started out my career, which feels like eons ago but compared to Carol and former acting chair Lipnic it's a blip on the radar, we used to learn more about federal court cases, we used to learn more about EEOC guidance to work the discrimination cases. But that's shifting a little bit because as I said, laws are expanding and so with that, federal lawmakers and policymakers are constantly looking at what local jurisdictions are doing in order to expand federal civil rights laws, including Title VII. [00:54:37]

Some of the recent developments that you might have seen are the federal Crown Act. That's already covered under the D.C. Human Rights Act, under Personal Appearance, discrimination against hairstyles, particularly as it affects African Americans. So that's one way that for instance, federal lawmakers are catching up with more progressive local laws. Another is "credit." I used to work at NEFA and when we used to work there, we were advocating for protection from discrimination based on credit, and that's on the books in D.C. Now, you can't discriminate against someone based on their credit information. Criminal records is another one. I think there was a decade or more long of movement to prevent discrimination based on criminal background history, that's on the books in D.C. and in many, many other local jurisdictions in the country. Of course, a huge one is gender identity and expression and I'm so grateful for the Bostock opinion, but at the state and local level, in D.C. for instance, again that's protected, and we've got a plethora of information on that subject matter, including guidance on workplace behavior and conduct, and as Carol was mentioning, use of bathroom, gender pronouns, all of that is in our regulations in D.C. So, in addition to knowing about Title VII, I think as a practitioner and civil rights law [students], you also want to get to know not just the statutes and not just be familiar with the CFRs with respect to Title VII but get to know the regulations that implement things like D.C. Human Rights Act or other local laws that you might have to work with. [00:56:16]

So, with that, I'll expand more on the Human Rights Act. Carol and former chair Lipnic probably already know all of this but for instance, there is a

great difference in coverage of who is an employer and who is covered, right, and that's an important threshold issue to consider if you're a practitioner. Under Title VII¹ it's 15 employees and that was a great progress from 25 to 20 to now 15. In D.C. there's no minimum employees, no minimum, so anyone who employs an employee would be a covered employer under the Human Rights Act. That's a great definition, borrowed from Title VII, an employer who employs an individual, right? So, but there are no minimum employees in DC. But there is also this other little interesting language in the D.C. Human Rights Act that defines an employer "any person acting in the interests of the employer." I know there is that language about agents of the employer in Title VII but this one's a little broader, so what does that mean? That's food for thought there. [00:57:16]

Another similar point of consideration is who is an "employee" under the D.C. Human Rights Act. For instance, interns are covered, and I think, if I'm not mistaken, in Title VII they're exclusively not covered, right? So those are some main differences. Even in the language of the prohibition and prohibiting discrimination, it's different. Under the D.C. Human Rights Act it says you cannot discriminate against someone based, "wholly or partially, based on the actual or perceived race, color, national origin," da-da-da-da, right? Different from the "because of" language in Title VII. So, those are the little things you want to pay attention to, again, if you're in the various jurisdictions and checking out local laws. [00:58:10]

Another of course is the idea of how the coverage and the protected traits themselves are different under Title VII and ADEA and ADA. So, under federal coverage you have about eight protected traits.² In D.C. there are 17 and so why are there so many? I get asked that question all the time, "Why are there so many protected traits?" Because in D.C., and I think as is becoming the intention of civil rights advocates in improving federal law, it is so that we judge individuals based on the merits, not on anything else, so that's why there's so many protected traits in D.C. I've already highlighted some of those for you, including gender identity and expression, which are covered in D.C. but not under federal, sexual orientation, credit. There was a new one added a few years ago, victims of domestic violence. So again, you can't be discriminated against because you're a victim or a family member of a victim of domestic violence. That includes reasonable accommodation to nondiscrimination. [00:59:18]

The other important distinction is the remedies, right? As lawyers, you're interested in what remedy you can obtain for your client. Well, under Title

1. To be covered as an employer under Title VII.

2. Based on combined protected traits in Title VII, ADEA, the ADA and GINA.

VII there's a cap. In D.C. there is no cap, so that's a huge distinction to be mindful of. The other is the administrative process. Under Title VII it's an exhaustion, right, there's an exhaustion requirement to go to the EEOC and then get a right to sue letter so you can go to court, whereas in D.C. and in many other jurisdictions, there is no exhaustion requirements. You can come to a place like my office, the D.C. Office of Human Rights, or you can go straight to court to make your claim. So those are some of the larger differences that you ought to be aware of if you are litigating in this area. [01:00:05]

The other topic I wanted to share with everyone is about EEOC and local FEPA relationship and how we can strengthen that in order to "eradicate discrimination" or mitigate discrimination. So, I can say that in D.C., again, that our D.C. field office director, Mindy Weinstein, and our local offices here in the D.C., Maryland, Virginia area, collaborate very often to think about systemic discrimination that Carol was talking about, to identify ways in which we can identify where those types of systemic issues are occurring in the area, how to pursue it. I think we can improve our efforts to make, perhaps joint investigation, do more joint outreach, because part of eradicating discrimination, part of ending discrimination or attempting to anyway is to educate. And so, I think the more that communities are aware of the different laws that exist, then the better we are served in our ability to enforce these laws. [01:01:12]

The other highlight is that you know, we talk about government intervention, what can the government do. A program that I'm proud of at OHR is part of our enforcement mechanism includes what's called a voluntary compliance program where once the respondent in our office agrees to resolve a case, the respondent will agree to make certain changes, policy changes, and also report any changes or structure to OHR, let's say for a three-year term or a five-year term, or something like that. And so having state and local agencies have more robust programs like that helps to again, mitigate discrimination. [01:02:02]

The last thing I'll touch on a bit in terms of state and local powers is this new development that we have in D.C. now called the Tipped Wage Workers' Fairness Act. I don't know if any of you have heard of that but that's a big law, but part of the piece of that law is to provide sexual harassment training because we know, sexual harassment is very, very prevalent in the tipped wage industry. And so, my office, OHR, is leading that charge to ensure that employers in that industry are providing training to themselves, managers, and staff, and that they have again, a clear policy and structure for reporting sexual harassment claims. So doing more of that is helpful in expanding enforcement and strengthening civil rights laws.

Patrick, you'll tell me if I'm approaching my time. I think I've got about a couple of minutes. [01:03:00]

PATRICK PATTERSON: You do. Go ahead.

HNIN KHAING: Okay. And the last sort of bullet point I had on my mind to share is when we think about again, strengthening civil rights, it's not just about expanding the laws but it's also about thinking about the efficiency of our processes and what's—whether or not it's effective as it is. And so, in my paper, what I am proposing is that we take a look at our discovery rules, you know, and the makeup of the federal rules really have influence, even in local practices. So, we need to look at those rules and make sure to strike a balance between the party's ability to litigate these cases [and the time it takes], because we all know oftentimes, it's an uphill battle to get evidence and relative information from respondents, because they are usually the holder of that information that is needed to effectively litigate these cases. So, what I suggest is that instead of having generalized mandatory disclosures under Federal Rules of Civil Procedure 26, for instance, have specific disclosures that we should require of employers, and perhaps both parties as well. And so, there's one state that I know of that has already done so and that's California, where they have not quite a mandatory disclosure, but they have a form interrogatory, a form for interrogatories and request for admissions, which asks for basic— [01:04:41] [began listing types of information requested on this form].

(audio gap)

PATRICK PATTERSON: I seem to have lost Hnin. Oh, there she is. [01:05:03]

HNIN KHAING: Sorry. Did you guys lose me? The last bit there was whether or not there was prior employment complaint against the defendant in the past ten years. You know how awesome is that? Because how often do the parties fight over how far back people can go back to ask for that type of information. So, I think when you have that sort of specific disclosure that is required, and then having a specific penalty for violating that requirement, could really assist in expediting the time that it takes to litigate these cases, which are anywhere from what, two to five years, sometimes ten years. So, I think we have a long way to go there. But I'll stop there so that we can entertain questions that I'm sure exist in our Q&A. Thank you, Patrick.

PATRICK PATTERSON: Thank you very much and yes, we do have some questions. I would like to start with former Commissioner Lipnic. You heard Carol talk about some of the current Chair's priorities. I wondered if you could give us some observations about what you think EEOC should be doing now, given the current structure of the agency and what's realistic for the EEOC to do now. [01:06:18]

VICTORIA LIPNIC: Sure. Well, I think that Chair Burrows, who I served with at the commission for quite a few years and at one point she and I were the only two members at the commission, and the focus on retaliation, she and I had many discussions about this and as Carol knows, it is kind—is really paired so closely with harassment. In fact, when Chair Burrows, Commissioner Burrows at the time, she and I held a roundtable with a number of industry associations and saw retaliation as really the next natural step from all the attention that the commission and, of course, the #MeToo movement had put on harassment. And of course it, you know it, as Carol said, retaliation is included in probably every harassment claim but it is broader than, you know just harassment related things. So, I think that’s a good and right focus. [01:07:32]

The other thing in terms of the current priorities, and I want to tie this to what Carol was saying about technical assistance and again, with our panel being about effective government interventions, the extraordinary advice that Carol’s office has put out from very early on in the COVID pandemic, has been invaluable to employers as they immediately struggled to figure out how to comply with public health orders and how those inevitably would butt up against the civil rights protections in workplaces. Now we’ve seen it—we’re in the next phase now in terms of vaccine mandates and accommodations but as Carol said, those—the law was there from the beginning but again, thinking of what our panel is about and for our listeners, do not underestimate the avalanche of compliance questions that government agencies get. Every employer, every civil rights group, everyone wants you to answer their question. What do we do in this situation? I mean there are thousands of questions that come into—and I’m sure Hnin knows this too, into any governmental compliance agency and even though in the beginning of the pandemic, March of 2020, that’s the very first time Carol’s office, through the chair’s office, put out the update on the technical assistance guidance. Even though that is longstanding law about the Americans with Disabilities Act, about Title VII and religious protections, telework, issues about telework had been around for more than a decade and certainly Patrick, you’re familiar with that, but again, every—you know employers, because the workplace is so rule oriented and there is so much compliance for workplaces and the rules all bump up against other things, like the wage and hour laws. [01:10:04]

So now—we are compliance nation. I used to say that to my staff, and you know we really, over the last 15 years, two decades, have really become compliance nation and every employer wants you, the regulator, to write their “complete contingent claims contract,” which, of course, as everyone knows who is listening today, you cannot do, there is no such thing. So, the

degree to which those technical assistance documents and in particular, what's happened over the last 19 months and what the EEOC has done from the very beginning of the pandemic, just should not be underestimated. And then back in terms of your question Patrick, about priorities, I think also, just as I was—around the time I was concluding my term at the EEOC, so this is in the spring of 2020, late May, we had the tragic killing of George Floyd, Breonna Taylor, Ahmaud Arbery. And now Chair Burrows, at the time Commissioner, and I and then at the time, Chair Janet Dhillon, but now Commissioner, we immediately . . . I can remember being on the phone with then commissioner, now Chair Burrows, saying, “We have to say something. We have got to say something here.” And so, we were able to draft and put out, I think a pretty powerful statement about the importance of the civil rights laws. And of course, this was as all of the experiences of the country were coming to the forefront in recognizing in particular our long history of race discrimination and trying to overcome that. So, I think Chair Burrows is rightly putting a lot of focus on that issue in terms of systemic discrimination. [01:12:12]

The last thing I want to mention, also to go back to something Carol said and again, thinking of our panel as effective government intervention. This goes to the issue about protection for LGBT individuals. The other thing that federal agencies or like Hnin's agency can do, you have to have short-term strategies, so right now, you have COVID happening, and you've got immediately, what can we do here, and you need long-term strategies. And Patrick, you in particular can appreciate this. In 2010, when I joined the commission, along with Jackie Berrien, the chair, Commissioner Chai Feldblum, the—I, I remember it to this day, when Chair Berrien sent a directive to the field offices to say we [the EEOC] are now going to accept charges where people come to us saying I have been discriminated against based on my sexual orientation or gender identity; we will accept those and investigate them in the language “based on sex” in Title VII. That was a wholesale change. That changed, because before that, if someone had come to the EEOC and said I've been discriminated based on my sexual orientation, the response they would have gotten is “that's not covered under the law and there's nothing we can do for you,” and maybe “go see, your local human rights agency,” as Hnin pointed out. That first step in accepting those charges was a ten-year, and I lived through it, a decade-long effort by the EEOC, and of course many, many advocacy groups, to have federal sector cases, look at the issue, decide the issue, have the general counsel's office bring cases, court by court. It was a decade-long effort to ultimately get a case in front of the Supreme Court, and that is also something in terms of effective government intervention that the agency can do. And it starts at such a basic low level that most of the public, right, is not aware of, we're

not paying attention to. But that memo from Chair Berrien at the time saying here's what we're going to do, we're going to accept these charges now, eventually can make an enormous difference to again, both effective government intervention and in particular, as our panel was talking about, looking at and helping marginalized communities. [01:14:53]

PATRICK PATTERSON: Thank you, Vicki and I too lived through much of that history that you just talked about and I'm just hoping that the Commission gets back to a place where it can take steps like that again. I think we have just a couple more minutes, but I'm going to rely on our organizers to tell us when we're out of time. We do have a few more questions. One, particularly for Carol, is about—and it's related to what, part of what Vicki was just talking about. How has the pandemic affected the Commission's activities and its performance, and also in particular, is there a projected number of disability cases EEOC expects as a result of the addition of the overwhelming number of COVID-19 cases and the guidance, all this guidance and technical assistance the EEOC has issued. So, Carol, can you comment on that? [01:15:42]

CAROL MIASKOFF: Yeah of course. First of all, to back into it, no we can't. We don't predict the number of charges we'll get. We . . . You know, most of the charges we're getting now are related to vaccine mandates and we're getting a lot of those, so that's our sort of short-term window there. That said, in terms of the pandemic's impact on EEOC, we have been 100 percent remote since March 17th, 2020, which is also the first day we put out technical assistance on COVID, on our first remote day, and we have been having listening sessions recently with—we had one with employer groups, one with civil rights groups, about reentry, about what everyone has learned from this protracted period of working remotely, what works, what doesn't work, and we're taking some lessons learned from that going forward. Just as a very small example, we got interesting feedback on doing mediations and doing conciliations, which are two very different things, but doing each of those remotely, you know by Zoom or Teams or something like that. We got feedback mostly from women, working women who were like this is a blessing, I can participate, I can—you know, I don't have to worry about childcare, you know I don't have to take time off, this is a blessing, this is great. I think employers were more tending, especially with conciliations, wanting to have it in person but you know, they're taking all of that into, under advisement as we move forward. What can we learn from this period? [01:17:48]

PATRICK PATTERSON: Okay, thanks Carol. Another question we have for you is this: Given the challenges of budget and staffing, can the EEOC benefit from a greater collaboration with the private bar and what would help

from the private bar? And I think actually any of the three of you can answer that from your perspectives of work, currently or in the past, with your agencies. So, let's start with Carol. [01:18:11]

CAROL MIASKOFF: Well, there's what we can and can't do, I mean we can't refer cases to people in the private bar, but we are always listening to people in the private bar to bring us issues and to bring us matters, sometimes particularly important, sometimes charges, the charging parties are already represented by counsel, who then can move forward. It's also, in terms of our amicus participation, and we haven't talked about that yet, really, that's really important and I really would look to private counsel to call to our attention, any case where you think you know, amicus participation by EEOC could be informative and helpful to the court, and we will make a determination obviously. We can't guarantee participation. [01:19:03]

PATRICK PATTERSON: Vicki, could I ask the same question to you? From your experience, what do you think EEOC could do to work more effectively with private lawyers, or what private lawyers could do to work better with EEOC?

VICTORIA LIPNIC: Well, I think in particular, as Carol just said, the amicus program is enormously important and those issues. And then generally, even at the commissioner level, right, to be in touch with commissioners. They all want to hear from, whether it's advocacy groups or individual attorneys, about what they are seeing and experiencing in their practices, and how they go about bringing their cases. I want to go to Hnin in terms of the—her comments about discovery and you know, those are things that oftentimes, particularly at the commissioner level, you're not really there in the weeds in terms of those cases in the way, for example, that she is suggesting here on these discovery issues and how problematic those could be. [01:20:06]

PATRICK PATTERSON: Hnin, could I also ask you the same question? How do you think the private bar could work more effectively with your agency?

HNIN KHAING: Sure. I think I would echo both Carol's and acting chair Lipnic's sentiments here and say that the key is to keep the lines of communications open, keep talking to us, keep reporting what the issues are. Fortunately, I think I can confidently say I have a great relationship with MWELA³ here in Washington, so we keep those conversations going, but doing that will be tremendously helpful.

PATRICK PATTERSON: Okay, thank you very much. Well thank you

³ MWELA is the abbreviation for the Metropolitan Washington Employment Lawyers Association.

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all, to all of our panelists. I think it's been a terrific discussion. I believe it's time to return control to the organizers, so I'll do that, unless they tell me we have even more time than I think we have. So, let's go back to the symposium organizers please. [01:21:00]

FACILITATOR: Thank you so much. This was a great panel, a great discussion. I know that we all really appreciate and learn so much for you all and if you have any further questions for our panelists, feel free to reach out to us and we can put you in contact if that's all right. But yeah, thank you so much and great job everyone.

CAROL MIASKOFF: Thank you.

[01:21:22]

END TRANSCRIPT

