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EEOC Members Move Ahead With Ambitious Agenda

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For Equal Employment Opportunity Commission Chairwoman Jacqueline Berrien, the clock is ticking.

In her first six months on the job, Berrien has staked out an ambitious agenda. She's vowed to reduce the agency's formidable backlog of charges and to bring more high-impact cases involving widespread discrimination. The agency is also digging into the use of credit checks as a barrier to employment, finishing up regulations for the 2008 amendments to the Americans With Disabilities Act, and has laid out new rules dealing with genetic discrimination.

"I'm approaching the work of the agency with a sense of urgency," Berrien said.

Little wonder, for Berrien as well as the majority of the EEOC's other top leaders are serving via recess appointments. Unless confirmed by the Senate, they'll all be gone a year from now, leaving the commission without a quorum or general counsel. The most controversial among them is Commissioner Chai Feldblum, an openly lesbian former Georgetown University Law Center professor who was sharply criticized for signing a petition that some construed as supporting polygamy. At her confirmation hearing, she said she regretted signing the petition and was not in favor of polygamy.

Berrien, a 1986 Harvard Law School graduate who has worked for the National Association for the Advancement of Colored People and the American Civil Liberties Union, is also viewed by some Republicans as suspiciously liberal. As the Cato Institute's Walter Olson put it, the pair "make the Carter [administration] EEOC look like a Chamber of Commerce operation."

The other nominees caught in limbo are Republican Commissioner Victoria Lipnic, formerly of counsel to Seyfarth Shaw, and General Counsel P. David Lopez, a career attorney at the EEOC. All four received recess appointments that expire at the end of 2011.

Their days may be numbered, but in the meantime, Berrien said, "We came ready to work." A top priority is reducing the EEOC's backlog of charges, which at the end of fiscal year 2010, on Sept. 30, stood at a record 86,338 cases. "It's like a black hole," said plaintiffs lawyer George Chuzi, a name partner at Washington's Kalijarvi, Chuzi & Newman.

Berrien acknowledges the problem. "The public expects and needs resolution as promptly as possible," she said. "It's a hardship for employers and employees when charges languish."

RECORD NUMBER OF CHARGES

In its annual report issued on Nov. 15, the agency noted that EEOC staffing levels fell 25 percent during the Bush administration to a near-historic low of 2,176 employees in 2008. At the same time, the workload has steadily increased. In fiscal year 2010, the agency received 99,922 charges of alleged workplace discrimination, the most ever in a year.

Berrien's solution, at least in part, is to add bodies, a move made possible by a significant bump in funding, courtesy of the Obama administration. The agency hired 383 new employees in 2010, including 41 lawyers, and is still growing. She's also committed to "using the resources of the agency to have the broadest possible impact in our litigation

efforts." That means bringing more "systemic" cases involving multiple plaintiffs, a strategy spotlighted in the 2007 E-RACE initiative, which is intended to improve the agency's efforts against "race and color discrimination."

As of Sept. 30, there were 465 systemic investigations under way, according to the EEOC. The agency in fiscal year 2010 filed 20 new suits in federal court with at least 20 known class members -- 8 percent of its caseload, an all-time high. "They're being very aggressive," said Littler Mendelson partner Barry Hartstein, who is based in Chicago. "Jacqueline Berrien is a savvy litigator....They're poised to go great guns."

Systemic cases resolved in 2010 include *EEOC v. Outback Steakhouse of Florida Inc.*, which involved allegations that the restaurant chain failed to hire and promote women. The case settled for \$19 million, split among 3,000 class members. The EEOC also sued Albertson's Inc., alleging that the grocery chain discriminated on the basis of color and national origin and engaged in retaliation. A four-year consent decree calls for \$8.9 million to be distributed to 168 class members.

Another settlement was with Wal-Mart Stores Inc. for \$11.7 million in back pay and compensatory damages for failing to hire women for order-filler positions in its London, Ky., distribution center.

To Sarah Crawford, a staff attorney for the Employment Discrimination Project at the Lawyers' Committee for Civil Rights Under Law, these are the kinds of cases that the EEOC should be bringing. "It's much easier for attorneys in private practice to identify cases where there is blatant discrimination," she said. "But the EEOC can use its resources...to bring the more difficult, systemic cases."

Even lawyers on the other side of the fence, such as Orrick, Herrington & Sutcliffe San Francisco partner Gary Siniscalco, agree. "There's a question whether the U.S. government should be bringing narrow lawsuits, as opposed to looking for cases that really [involve] public policy," he said. "The individual lawsuits should have a purpose to them."

Still, some lawyers feel as though the agency in its quest to rack up multiple victims can be overly aggressive. "If there are three or four plaintiffs, they get really excited, even if it's a really small company," said Chad Shultz, a partner in Ford & Harrison's Atlanta office.

He represents a Mexican restaurant with 22 employees that fired four family members after one complained of sexual harassment. The restaurant now faces EEOC charges of retaliation. "I'm a little bit surprised [the EEOC] is putting in that much effort," he said, adding that his clients found out they were being sued when television crews showed up at the restaurant. "It's such a small business. They can't afford to fight."

In one recent decision from the Southern District of New York, the EEOC was slapped down for being too eager to litigate a systemic case. Judge Loretta Preska on Oct. 25 threw out the EEOC's claims that Bloomberg L.P. illegally retaliated against workers, because she found the agency didn't try hard enough to settle the case before filing suit.

CREDIT CRUNCH

Another area that Berrien called "an emerging issue" is employer use of credit history as a screening tool. The agency held a meeting last month on the topic because "we wanted information about the practice," Berrien said. "There's been an increase in its use, and we wanted to better understand its impact on employees and potential employees."

According to a 2010 survey by the Society for Human Resource Management, 60 percent of companies sometimes use credit checks as part of the hiring process, and 13 percent of companies do it for all employees. The EEOC is concerned that the practice could have a disparate impact on black and Hispanic applicants. Numerous studies have found that communities of color tend to have more credit problems than whites.

In prior guidance, the agency has said that credit checks should be used only if the "information is essential to the particular job in question." Berrien said the commission has made no final decision whether to revise the guidelines.

Pamela Devata, a partner in the Chicago office of Seyfarth Shaw who testified at the meeting, said in an interview that employers have legitimate reasons for using credit checks. "They often can't get the same type of information from any other source," she said. For example, credit checks -- which do not include an applicant's credit score -- list all former employers and "provide insight into a person's financial or fiscal judgment," she said. "Employers are really struggling with what to do."

Perhaps the most widely watched EEOC case now pending deals with both credit and criminal background checks and also raises thorny issues about the statute of limitations for systemic cases in which there is a pattern or practice of repeated violations.

The EEOC sued corporate event planner Freeman Cos. in U.S. district court in Maryland last year, alleging that the company discriminated against African-Americans by using credit history as a hiring criteria, and against black,

Hispanic and white male applicants by considering criminal history. Freeman is represented by former EEOC general counsel Donald Livingston, now a partner at Akin Gump Strauss Hauer & Feld, who said that the rules for conducting such background checks "are not well defined."

To date, the main arguments in the case have revolved around the statute of limitations and available remedies. The EEOC initially went after Freeman for hiring decisions dating back to 2001, alleging that the use of background checks violated Title VII of the Civil Rights Act of 1964. In a major victory, Livingston won partial summary judgment in April, successfully arguing that the government could not challenge hiring decisions that were made more than 300 days before a discrimination charge was filed.

The rationale is highly technical, turning on a close reading of sections 706 and 707 of Title VII, and precedent is limited to a handful of lower-court cases in which judges have split evenly on the issue. But the implications are big -- "the biggest issue now in litigation," said Littler's Hartstein -- if the EEOC can't go back more than 300 days to show a pattern or practice in employment discrimination.

Berrien declined comment on the case. Further oral arguments on another summary judgment motion are scheduled before U.S. District Judge Roger Titus on Friday.

ADA AMENDMENTS

Courtroom fights aside, another key undertaking for EEOC leaders is coming up with final regulations to implement amendments to the Americans With Disabilities Act, which went into effect on Jan. 1, 2009. The amendments expand the definition of disability and mean more employees can be considered disabled, making them eligible for accommodation and protection.

The EEOC issued proposed rules in September 2009, but Berrien would offer no timetable for the release of final regulations. She defended the lag time by pointing out that the EEOC lacked a quorum of commissioners from December 2009 until April 2010. The Society for Human Resource Management is actually encouraged by the delay. "We felt the proposed rules went beyond congressional intent," said Nancy Hammer, manager of regulatory and judicial affairs. "We're hopeful the time delay means they're at least going back and taking a closer look."

The EEOC has managed to move more swiftly in issuing final regulations on GINA, the Genetic Information Nondiscrimination Act of 2008, which makes it illegal to discriminate against employees or applicants because of genetic information. It's the first legislative expansion of the EEOC's jurisdiction since the original ADA was passed in 1990.

Berrien acknowledged a flood of GINA-related litigation was unlikely. "Fifteen or 20 years from now, maybe even five years given the speed of technology, it might be a different situation," she said. "But it's a very important development."

Steptoe & Johnson LLP partner Ronald Cooper, who was general counsel of the EEOC from 2006 to 2008, called the law "a remedy in search of a wrong." Still, he said that it defines genetic information "broadly enough that it's sure to catch some unwary defendant."

Whether Berrien and her fellow recess appointees will be around to see this or other initiatives bear fruit remains unclear. All four nominations are still pending before the Senate Committee on Health, Education, Labor and Pensions. Earlier this month, eight conservative groups including the Traditional Values Coalition, the Eagle Forum and the Committee for Justice sent a letter to Senate leaders warning them not to confirm Berrien and Feldblum during the lame-duck session, citing their "radical and controversial views."

Still, Berrien said she is hopeful she'll be able to serve out the full five-year term of a confirmed commissioner, which would end on July 1, 2014. "I look forward to future action on my nomination," she said. "It's amazing to be a part of the commission."