

Testimony of
Helen Norton

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Testimony of Helen Norton, University of Maryland School of Law
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Civil Rights Division Oversight
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Thank you for the opportunity to testify today. My name is Helen Norton, and I am currently a professor at the University of Maryland School of Law. I served as a political appointee in the Civil Rights Division from 1998 until January 2001, first as Counsel to the Assistant Attorney General for Civil Rights and later as a Deputy Assistant Attorney General for Civil Rights, where my duties included supervision of the Employment Litigation Section.

My testimony will focus on the Civil Rights Division's Title VII enforcement efforts during the Bush Administration. As you know, Title VII of the Civil Rights Act of 1964 forbids job discrimination on the basis of race, color, national origin, sex, and religion. Enacted to bring to life our nation's dream of equal employment opportunity for all, it is among our most important federal antidiscrimination laws.

Congress empowered the Department of Justice to enforce Title VII with respect to state and local government employers. The Attorney General, in turn, has assigned this enforcement responsibility to the Civil Rights Division's Employment Litigation Section. This authority is critically important, as state and local governments employ over 18 million workers in a wide variety of jobs, including sheriffs, teachers, firefighters, bus drivers, police officers, custodians, managers, transportation and utilities workers, and health care providers. Some of these jobs offer entry-level gateways to employment and economic security, while others stand at the top levels of state and local leadership.

State and local governments that discriminate in employment not only unfairly deny access to important job opportunities, but also rob their communities of the talents of a significant segment of the population. Such discrimination, moreover, imposes additional harm by communicating to the public that government is not committed to equality and justice for all.

Despite the importance of its role in securing Title VII's antidiscrimination protections, however, the Civil Rights Division's Title VII enforcement efforts have declined substantially since January 20, 2001. In short, the Division has filed and resolved substantially fewer Title VII lawsuits of all kinds when compared to the previous Administration.

Furthermore, the cases that the Division has filed reveal a disquieting shift in enforcement priorities, as its docket - now significantly reduced -- devotes an even smaller proportion of its resources to job discrimination experienced by African- Americans and Latinos. To be sure, all individuals are entitled to be free of job discrimination based on race, color, national origin, sex,

and religion. But Title VII's enactment - and, indeed, the Division's establishment -- during the civil rights movement came in direct response to the historic, and still continuing, injustice experienced by African-Americans and other minorities. The Division must not retreat from that legacy now.

Please note that Title VII empowers the Department of Justice to bring two types of lawsuits under Title VII. Each serves important, but different, functions. First, Section 707 of Title VII authorizes the Department to bring pattern-and-practice cases against state and local government employers that systematically deny job opportunities to workers because of their race, color, sex, national origin, or religion. Examples of pattern-and-practice cases include intentionally discriminatory practices, such as an employer's consistent refusal to hire people of color, or to assign women to certain jobs, or to pay workers equally regardless of their national origin.

Pattern-and-practice cases also include challenges to facially neutral practices that impose a disparate impact against minorities and/or women without predicting effective job performance. Examples of such artificial barriers to opportunity include a suburban agency's requirement that candidates have lived in the community for at least a year before applying for employment, effectively excluding from consideration people of color living in nearby cities with significant minority populations.

The Division's forceful assertion of its pattern-and-practice authority - including its willingness to bring disparate impact actions -- is essential for at least two reasons. First, cases brought under section 707 carry significant potential to enhance workplace equality because they affect large numbers of employees and target systemic discrimination for reform. Second, these cases' factual and legal complexity demand levels of expertise and resources uniquely held by the Department of Justice and often unavailable to public interest attorneys and other members of the private bar.

Next, section 706 of Title VII empowers the Department of Justice to bring suit against state and local government employers on behalf of an individual victim of discrimination after that individual has filed a charge of discrimination with the EEOC and the EEOC has investigated the charge, found reasonable cause to believe discrimination has occurred, sought unsuccessfully to conciliate the case, and referred the matter to the Division for possible litigation.

The Division's vigorous exercise of its authority under section 706 valuably furthers Title VII's core purposes because it allows the Division to target - and thus help develop the law in -- cases dealing with emerging discrimination issues. It also enables the Division to pursue cases, especially in small communities, that the private bar may be unable to handle.

With this as background, several disturbing trends emerge when we examine the Division's Title VII enforcement efforts since January 20, 2001. Quantitatively, the Division's measurable enforcement activity - in terms of suits both filed and resolved -- has tumbled significantly when compared to that of the previous Administration. Qualitatively, the Division's record reveals a troubling shift in priorities, as it now invests considerably less in cases on behalf of African-Americans and Latinos generally, as well as in pattern-and-practice cases, especially those alleging disparate impact violations and those challenging systemic sex, race, and national origin discrimination.

One especially valuable enforcement measure, for example, examines the number of successful resolutions of Title VII suits through judgments, consent decrees, and out-of-court settlements. Such resolutions directly further Title VII's core purposes by providing compensation for victims of discrimination and securing changes to employers' discriminatory practices. But the Division has resolved only 46 Title VII cases since January 20, 2001, including only 8 pattern-and-practice cases.¹ In contrast, the Division during the Clinton Administration resolved approximately 85 Title VII complaints, including more than 20 pattern-and-practice cases.

Another helpful measure of enforcement activity tracks the number and types of complaints filed under Title VII: so long as illegal job discrimination remains a problem, we should expect continued Title VII case filings. Here, too, the Division's efforts fall significantly short of those under the previous Administration. More specifically, the Section filed a total of only 39 Title VII cases from January 20, 2001 through June 20, 2007 (a period of six years and five months, or approximately 80% of an eight-year Administration). If the Division continues at this pace, it can be expected to file approximately 49 cases over two full terms - just over half of the nearly 90 Title VII complaints filed during the two-term Clinton Administration.

Of the 39 Title VII complaints filed by the Division during the current Administration, only 13 included pattern-and-practice claims brought under section 707.² Only four were brought on behalf of African-Americans and Latinos, only two on behalf of women, two on behalf of white men, one on behalf of Native Americans, and four alleged religious discrimination.

If this pace continues, the Section can be expected to file approximately 16-17 pattern-and-practice cases over two full terms. In contrast, the Section filed approximately 25 such cases during the Clinton Administration.³ Those filings included 13 pattern-and-practice cases alleging race discrimination (several of which also included allegations of national origin and/or sex discrimination) and 12 alleging sex discrimination.

Of the 13 pattern-and-practice claims filed during this Administration, only four - less than a third -- included disparate impact claims. In contrast, the vast majority of pattern-and-practice cases filed during the Clinton Administration involved disparate impact challenges.

Turning to the Division's Title VII docket on behalf of individual victims of discrimination, of the 39 total Title VII complaints filed by this Administration, only 28 included claims of individual discrimination under section 706.⁴ During this Administration, the Division has yet to file a national origin claim under section 706 on behalf of a Latino.

Of the complaints filed under Section 706 since January 20, 2001, 17 alleged sex discrimination, 5 only four included allegations of race discrimination against African-Americans, two included allegations of race discrimination against whites, two alleged religious discrimination, one alleged retaliation, one alleged discrimination against a Native American, and one alleged discrimination against a victim of South Asian national origin (in addition, one race discrimination complaint failed to identify the alleged victim's race, while another involved allegations of race and national origin discrimination on behalf of white, Filipino, Native American, and African-American victims).

If this pace continues, over two full terms the Division can be expected to file approximately 35 cases under section 706. This is just half of the nearly 70 cases⁶ filed under section 706 during the previous Administration, which included ten cases alleging race discrimination (including two alleging discrimination against whites), 3 alleging national origin discrimination, 39 alleging sex discrimination, 11 alleging religious discrimination, and six alleging illegal retaliation against individuals asserting their Title VII rights.

In short, the Division has resolved and filed substantially fewer Title VII lawsuits of all types when compared to the previous Administration. Moreover, it has filed considerably fewer cases of any kind on behalf of African-Americans and Latinos, and it has filed significantly fewer pattern-and-practice cases, especially those alleging disparate impact violations, as well as those challenging systemic sex, race, and national origin discrimination.

This downturn in measurable Title VII enforcement activity is all the more disconcerting given that significantly more attorneys have been assigned to the Employment Litigation Section during the Bush Administration (35-36 lawyers on average) than during the Clinton Administration (30-31 lawyers on average).

Finally, as yet another indication of a disturbing shift in its Title VII enforcement priorities, the Department of Justice has too often failed to defend longstanding government interpretations of Title VII that fulfilled the law's twin objectives of deterring discrimination and compensating victims. Most recently, for example, in *Ledbetter v. Goodyear Tire & Rubber Co.*, the Department filed an amicus brief in the Supreme Court that repudiated the EEOC's position that each paycheck that pays a woman less than a similarly situated man because of her sex is an act of discrimination that violates Title VII. Arguing that the EEOC's reading "lacks persuasive force and is not entitled to deference," the Department urged instead that the plaintiff had lost her right to challenge pay discrimination because she did not do so within 180 days of the pay-setting decision, even if she continued to suffer from unequal pay for years thereafter. The Court sided with the Department by a 5-4 margin just a few weeks ago, but, as Justice Ginsburg noted in dissent, this interpretation frustrates Title VII's core purposes and is woefully out of step with workplace reality. While members of Congress have already introduced legislation to correct this interpretation, the Department's abandonment of the EEOC's position to advocate instead for a cramped understanding of Title VII remains deeply unsettling.

Similarly, the Department of Justice undermined another well-established EEOC position last year in *Burlington Northern & Santa Fe Railway Co. v. White*. That case centered on Title VII's anti-retaliation protections, which bar discrimination against individuals who have asserted their rights under Title VII - for example, by reporting possible discrimination, filing a complaint, participating in an investigation, or testifying at a proceeding. The EEOC had long interpreted this provision to forbid any act of retaliation that is reasonably likely to deter the charging party or others from engaging in protected activity, regardless of whether the employer's retaliation took place on the job or in some other setting. But in its amicus brief to the Supreme Court, the Department instead urged the considerably narrower view that only materially adverse changes in the terms, conditions, or privileges of employment constitute unlawful retaliation. Eight Justices ultimately rejected the Department's position as inconsistent with both Title VII's plain language and its underlying purposes.

Taken together, these developments reveal cause for deep concern about the Department's commitment to the forceful interpretation and enforcement of Title VII's antidiscrimination protections. They represent a troubling retreat from the Division's longstanding leadership role in the ongoing struggle to transform our national promise of equal opportunity into reality. The Division can and should do better in advancing job opportunities for more workers of all protected classes. We can all agree that civil rights enforcement should not be a partisan concern, and we should be able - despite any political differences -- to demonstrate a shared commitment to equal employment opportunity.

1 Enforcement data for the Bush Administration is drawn from the Division's website at <http://www.usdoj.gov/crt/emp/papers.html>, last visited June 20, 2007.

2 Two of these also included claims of individual discrimination filed under section 706.

3 Eight of these also included claims of individual discrimination filed under section 706.

4 Two of these also included claims of pattern-and-practice discrimination under section 707.

5 Two of these also included allegations of race discrimination - one against an African-American and the other against a Native American. I double-counted those claims, including them also in the tallies of cases on behalf of African-Americans and Native Americans.

6 Eight of these also included claims of pattern-and-practice discrimination under section 707.