

# Lawyer Insights

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## Lipnic's EEOC: A Look Into The Future Through The Past

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The U.S. Equal Employment Opportunity Commission announced in late January that President Donald Trump nominated Commissioner Victoria Lipnic to serve as the commission's acting chair. The EEOC's leadership is composed of the chair, vice chair and three commissioners, with the chair having considerable influence over the Commission's direction. The comments Lipnic has made during her first couple of months as acting chair, and her prior actions as a commissioner, give the public a glimpse into the direction that she intends to take the EEOC.

By way of background, Lipnic was first appointed to the EEOC by President Barack Obama in 2010 through recess appointment. She was subsequently nominated to a second term and confirmed by the Senate in late 2015. Prior to joining the EEOC, Lipnic worked in private practice as a management-side attorney in Washington, D.C., this coming after she served as assistant secretary of labor for employment standards at the U.S. Department of Labor from 2002 through 2009. Lipnic also served as workforce policy counsel to the Committee on Education and the Workforce in the U.S. House of Representatives, worked as in-house counsel for labor and employment matters to the U.S. Postal Service, and served as a special assistant for business liaison on the staff of then-U.S. Secretary of Commerce, Malcolm Baldrige.

Since being named acting chair, Lipnic's few public comments offer modest insights into her intentions. For example, regarding the EEOC's recent regulations requiring employers with 100 or more employees to disclose pay data by gender, race and ethnicity on their EEO-1, Lipnic has indicated that the EEOC should re-evaluate the costs and benefits of such measures. Additionally, Lipnic also anticipates that Age Discrimination in Employment Act and equal pay issues will be given a higher profile under the new administration, as well as a renewed focus on job growth and collaboration with employers. In terms of equal pay, Lipnic has publicly stated that the commission should also consider the concept of "occupational segregation," which is a form of wage discrimination that pushes women and other minorities into lower-paying job categories. Her previous actions as an EEOC commissioner offer greater insights into the commission's future.

### Significant EEOC Opinions, Guidance and Reports During Lipnic's Tenure

Lipnic served as an EEOC commissioner at a time when the commission addressed several key issues that defined its progressive agenda under the Obama administration. First, the commission decided three cases involving LGBT issues in the realm of Title VII sex discrimination. In *Macy v. Holder*, the commission issued a key opinion regarding Title VII's coverage of transgender discrimination cases. The case involved a job applicant to the Bureau of Alcohol, Tobacco, Firearms and Explosives, who initially

presented as a male and but later informed the bureau that she was transitioning from male to female. Shortly thereafter, the bureau informed the applicant that the position was being given to another candidate who was further along in the application process, despite initial assurances that she would be awarded the position. After considering the applicant's Title VII claim based upon sex, gender identity and sex stereotyping, Lipnic joined Democratic commissioners in determining that transgender discrimination is discrimination on the basis of sex in violation of Title VII.

In *Lusardi v. Department of the Army*, the EEOC continued on its course of raising the profile of transgender discrimination issues, yet this time, without Lipnic's support. The case involved the Army's refusal to allow a transgender employee (male to female) from using the women's restroom, in addition to her supervisor's alleged harassment on the basis of her transgender identity. The commission found that the employee proved she was discriminated on the basis of sex because she was not permitted to use the women's restroom and was the victim of a hostile work environment because the Army permitted her supervisor to refer to her by her male name and other male pronouns after it was aware of her female gender identification. Lipnic did not offer a written dissent to the decision.

In *Baldwin v. Foxx*, the commission addressed Title VII's coverage of claims based upon sexual orientation discrimination and determined, again without Lipnic's support, that claims grounded upon such a basis are covered under the statute and fall under the EEOC's jurisdiction. Although the commission did not determine the merits of the claim, the facts involved a gay temporary air traffic control specialist who was not selected for a permanent role with the Federal Aviation Administration. The employee alleged that he was not selected due to his sexual orientation in violation of Title VII. The commission asserted jurisdiction over the claim and remanded for the Federal Aviation Administration's determination of the merits. Lipnic again did not provide a written dissent to the decision.

In addition to commission decisions establishing LGBT policy, the EEOC addressed other significant workplace issues through guidance and reports. In 2014, the EEOC issued its controversial "Enforcement Guidance on Pregnancy Discrimination," which served as an update to the EEOC's position on how pregnancy-related disabilities interact with various federal employment statutes. In that guidance, the EEOC took the following positions: (1) providing light duty only to employees with on-the-job injuries violates the Pregnancy Discrimination Act; (2) an employer must provide accommodation to an employee with a normal and healthy pregnancy; (3) specific employer inquiries or discussions regarding an employee's pregnancy may provide indicia of discrimination; and (4) an employer health insurance plan must cover prescription contraceptives on the same basis as prescription medications that treat other medical conditions.

The pregnancy guidance was only approved by three commissioners, with Lipnic being among the dissenters. In her written dissent, Lipnic first opposed the pregnancy guidance based upon "procedural concerns," which highlighted her belief in the limited role of the enforcement agency. Lipnic opposed the timing of the guidance as the U.S. Supreme Court was set to decide its "most significant questions" in *Young v. UPS*, such questions including the appropriate comparators to a pregnant worker and the treatment that such worker may be entitled to under the Pregnancy Discrimination Act. In addition, she opposed the guidance's position concerning the provision of contraception, which she explained was already "overtaken" by the Supreme Court's decision in *Burwell v. Hobby Lobby Stores*.

Lipnic further asserted that several of the pregnancy guidance's key positions have been rejected by the courts and are not supported by "any meaningful legal analysis." Lipnic specifically raised legal error in the guidance's assumption that all nonpregnant workers who are unable to work compose a "monolithic and homogenous bloc" with pregnant workers, when in fact, such workers may be entitled to accommodation, leave or other benefits under a wide range of different laws or policies. Lipnic also contested the application of reasonable accommodation to pregnant workers when nothing in the law or legislative history of any relevant statute provides for such application. In assessing the guidance's

position that an employer's inquiries into a worker's pregnancy may be indicia of discrimination, Lipnic asserted that the prohibition essentially forbids the parties from doing the right thing, which is "to develop a plan to address the employee's needs and schedule, while ensuring that necessary work is completed, transitioned or shifted as appropriate, and the like."

The commission also focused on harassment in the workplace, and Lipnic co-chaired the EEOC Select Task Force on the Study of Harassment in the Workplace with Democratic commissioner Chai Feldblum. The task force's report emphasized the business justifications for employers taking meaningful steps to prevent workplace harassment, which may significantly impact bottom-line performance. The report makes several creative recommendations for employers, which include concepts related to bystander intervention, civility training, setting examples from the top of the organization, and the importance of confidentiality and anti-retaliation in reporting harassment.

Lastly, the EEOC issued its guidance on criminal background checks in 2012, which Lipnic supported along with the Democratic commissioners. The guidance discourages blanket exclusions of individuals convicted of crimes and encourages individualized assessments of whether an employer's criminal conduct exclusion is job-related and consistent with business necessity. Although asserting that the guidance was deserving of bipartisan support as it tracks established policies, Lipnic did express that Title VII does not invariably require an individualized assessment, particularly in clear-cut cases where an applicant's criminal record is inherently inconsistent with the nature of a particular business.

### **What this Means for the EEOC Under Lipnic?**

To the extent that we can look to the past to predict the future, Lipnic's previous actions and contributions to the commission reveal ideologies she may very well apply in leading the EEOC's policy agenda. First, Lipnic supports the notion that the EEOC serves a limited role as an enforcement agency, as she has opposed EEOC actions which arguably conduct legislative functions. Thus, Lipnic will likely rein back on the commission's more progressive or activist policy efforts supported by the previous administration. Second, and related to the first point, Lipnic has demonstrated a strong inclination to defer to federal court rulings and legal precedent, as she has dissented against commission guidance and opinions that arguably strayed from federal court determinations, legislative history and/or plain statutory text. Accordingly, in relation to EEOC opinions or guidance, Lipnic will likely take steps to ensure that such actions are tailored to not conflict with established precedent or interfere with pending judicial proceedings.

Third, Lipnic has demonstrated an awareness of the administrative burdens that EEOC requirements often place on employers, while also communicating that job growth should be a goal that the commission supports rather than hinders. As a result, we can fairly expect Lipnic to strive for commission opinions and guidance that are tailored so that that burdens placed upon employers do not unreasonably outweigh the benefits offered to employees. Lastly, and serving more as a wild-card factor, Lipnic has demonstrated political and ideological flexibility, from her initial selection to the commission by Obama, to the multiple times she supported the more progressive actions of her Democratic colleagues. Thus, we can also expect her to press for pragmatic and reasonable guidance and opinions, although any compromise will likely be restrained by the more conservative principles Lipnic has applied to her past actions.

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