

Constance Barker

Comments to the Commission

April 25, 2012

Proposed New Guidance: CRIMINAL BACKGROUND CHECKS

I object to – and will vote against – the proposed new Guidance on Criminal Background Checks for 4 fundamental reasons:

First and foremost – I object to the utter and blatant lack of transparency in the approval process. The proposed revision before us today represents a major shift in the advice we have given the American public for the last 22 years. Yet, we are about to approve this dramatic shift in our interpretation of the rights of job applicants and the obligations of America's businesses under Title VII without ever circulating it to the American public for review and discussion. There is absolutely no justification for totally excluding the American people from this process or for this blatant failure to be transparent in how we conduct our business. I am devoted to the issue of civil rights and to the work of this Commission, but if we vote to approve this Guidance today, how can we expect the American people to have confidence that this agency operates openly and with full transparency? We are public servants. We work for the American people. What could possibly justify keeping them from knowing what is in this document before we approve it?

This particular proposed new Guidance – which in reality is a kind of regulation - has tremendous implications for Americans. It is exactly the type of policy shift that we should share with the American people — ask them to take a look, tell us what they think — have we forgotten anything — have we explained things well or is it confusing — and most importantly — how will this impact you. But we didn't do that. Instead, the document was rapidly brought to a vote without the American people ever having a chance to see what is in it. That is just plain wrong.

There are people in the Commission Room today and throughout America who have considerable expertise in the subject the Guidance addresses, yet we are about to give final approval to this draft without ever letting any of these experts or the public at large see a single word that it contains. And, we are approving it without even bothering to submit it to OMB for their expert review.

That begs the question — why? Why don't we want America to see what's in this document before we make it final? We should have spent months reviewing and discussing this with the public as we have other regulatory and sub-regulatory

documents. Yes, the Commission did have a meeting on background checks and did hear from stakeholders on the general subject of the pros and cons of conducting criminal background searches but seeking general input is a far cry from sharing what is in the actual proposed revised Guidance. As soon as a revised Guidance was drafted, the public was shut out.

Here is my second concern: it is my understanding that the Senate Appropriations Committee, Subcommittee on Commerce, Justice & Science — the committee that determines our funding year to year — under the direction of Chairman, Sen. Barbara Mikulski and ranking member, Sen. Kay Bailey Hutchinson, in the Report attached to the Appropriations Bill, specifically addressed their concerns about the haste with which this Commission was proposing to approve changes to the current Criminal Background Checks Guidance and specifically instructed the Commission to (a) engage stakeholders in discussion about the intended changes to the criminal background checks guidance and (b) circulate any proposed changes to the Guidance for public input for at least 6 months before bringing it before the Commission for a vote. When the Senate Appropriations Committee - the Committee that controls our funding – attaches to the bill that will determine our funding – specific instructions to hold off taking any action on this revised Guidance until we have circulated a copy to the public for input for at least 6 months — it seems to me we should take that seriously. So, why is this even on the agenda today? Are we seriously going to just ignore this directive from the Senate Committee that decides our funding?

Especially when – and here's the irony – there is absolutely no need to take action on this today or anytime in the immediate future. What is the big rush to approve this Guidance? What would justify ignoring a Senate Appropriations directive and ignoring our obligation to be transparent with the American people? There have been no changes in Title VII – no new Supreme Court decisions that would compel a single change to our current guidance. In contrast – our Guidance on the use of arbitration agreements in employment contracts has been out-of-date and a misstatement of the law since the first Supreme Court decision on that subject in 1991. As far as I know, there's no effort being made to revise that Guidance.

Thirdly – I object to the guidance because it so obviously exceeds our authority as a regulatory commission. We are an enforcement agency. We have the authority to issue, amend or rescind suitable procedural regulations. We have no authority to make substantive changes in the law by issuing Guidances that go beyond what is contained in the statutes as interpreted by the courts. Our job is to follow Congressional intent and court interpretation — not make new law. No matter how well intentioned we may be — no matter how much a change in the law may be warranted — we simply lack the authority to make those changes through the issuance of Guidances. It is Congress' job — not ours — to weigh the pros and cons of proposed new legislation and approve or disapprove it. We

are not Congress. We are not part of the legislative branch. And, it is the job of the courts to interpret the laws that Congress passes. We are not the courts. We are not part of the judicial branch. Our job is to explain what is already the law — not to expand it. No matter how much some of us may want Title VII to provide additional protections we cannot use our authority to issue guidances, to create new rights or protections that Title VII does not provide. If we think Title VII should be expanded, we should make our concerns known to Congress — not take it upon ourselves to do Congress' job.