

September 27, 2017

The Honorable Lamar Alexander
Chairman
Committee on Health, Education, Labor &
Pensions
United States Senate
428 Senate Dirksen Office Building
Washington, DC 20510

The Honorable Patty Murray
Ranking Member
Committee on Health, Education, Labor &
Pensions
United States Senate
428 Senate Dirksen Office Building
Washington, DC 20510

Dear Chairman Alexander and Ranking Member Murray:

The National Women's Law Center (the Center), an organization that has advocated on behalf of women and girls for forty-five years, writes to express its grave concerns regarding the nominations of Janet Dhillon to be Chair, and Daniel S. Gade to be a Commissioner, of the U.S. Equal Employment Opportunity Commission (EEOC).

The EEOC enforces employment antidiscrimination laws in the private workforce and federal sector, including Title VII of the 1964 Civil Rights Act (including the Pregnancy Discrimination Act), the Equal Pay Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Genetic Information Nondiscrimination Act. Laws interpreted and enforced by the EEOC are critical to workplace fairness and opportunity for women, people of color, LGBTQ individuals, and people with disabilities across the country.

Janet Dhillon's record reveals that her career has been solely dedicated to fighting on behalf of corporate interests, with no public sector service and a lack of experience in civil rights enforcement. Her limited experience and the views expressed at her confirmation hearing, combined with her role in founding and leading the Retail Litigation Center, an organization dedicated to advancing narrow legal interpretations of critical antidiscrimination and labor protections, raise significant concerns about her fitness to lead the EEOC and her commitment to protecting individuals' rights to be free from discrimination in the workplace.

We are also concerned by certain aspects of Daniel Gade's record. While Gade has some government policy experience, including serving on the Domestic Policy Council in the George W. Bush Administration, and on the National Council on Disability, he is not a lawyer and does not have any experience interpreting or enforcing antidiscrimination laws. In the past he has stated that women are not suited to combat roles in the military, although we would like to take him at his word that he no longer holds those beliefs. However, it forms a

troubling backdrop to his statements at the hearing about the scope of Title VII's protections for LGBTQ individuals, raising questions about how he will evaluate sex discrimination claims at the EEOC.

Dhillon's and Gade's records, in conjunction with their refusal at the hearing or in written responses to post-hearing questions for the record (QFRs) to provide details or commitments on critical and timely employment discrimination issues like transparency initiatives to address pay discrimination, and whether federal civil rights law prohibits discrimination based sexual orientation and gender identity, gives us serious concern about their fitness for the positions to which they have been nominated, and the future of civil rights enforcement efforts at the EEOC.

No Commitment to Prioritize Progress on the EEOC's Equal Pay Data Collection

Based on Dhillon and Gade's testimony and responses to QFRs, we are concerned about their commitment to the EEOC's effort to move forward with a crucial initiative to collect pay data from employers to strengthen enforcement of protections against pay discrimination.

This is a critical time in the fight for equal pay. Last year, the EEOC revised the EEO-1, a form it had used for several decades to collect employee demographic information from large employers, in order to solicit additional information about compensation. As approved by the Office of Management and Budget (OMB), the EEO-1 equal pay data collection would have allowed the EEOC to confidentially collect pay data by race, gender, and occupational category from large employers and federal contractors. This pay data collection would have shined a light on gender and racial wage gaps, which stubbornly persist and have remained virtually unchanged for nearly 10 years. But in August, without any notice or opportunity for public comment, OMB issued a "review and stay" of the pay data collection in a terse one-and-a-half page memo to EEOC. OMB claimed the data collection was too burdensome for businesses -- before any employer had even submitted any data -- without offering an explanation or justification for its decision. OMB instructed the EEOC to submit a new proposal and justification for information collection through the EEO-1.

The EEOC must address OMB's expressed concerns and identify a constructive path forward for equal pay enforcement and the collection of pay data. And given OMB's failure to provide EEOC with any timeline for action or guidance for next steps, it is critical that the next Chair develop a transparent process to respond to OMB's purported concerns and move the equal pay data collection forward, including a public hearing and other efforts to engage and solicit input from diverse groups of stakeholders (not just corporate interest groups). Equally critical is commitment to a timeline for promptly completing this process and submitting a revised proposal to OMB for review and approval in the near term, such as the next six months.

Although both nominees expressed support for the collection of pay data from employers by the EEOC, they offered no details or commitment at the hearing or in responses to QFRs regarding a process and timeline to finalize and implement the revised pay data collection. Process and timing matter, because the EEO-1 pay data collection was adopted after an extensive and transparent process over several years, including a public hearing, two rounds of notice and public comment, and detailed documentation by the EEOC of its analysis supporting the pay data collection, published in the Federal Register. In contrast, OMB's decision to review and stay the pay data collection was made with no notice and no opportunity for public input. OMB's brief memo provides no explanation or justification for its decision. But the only specific information that Dhillon offered was concern that the assertions by corporate interests that the data collection was burdensome had not been appropriately considered in the process, despite the extensive stakeholder engagement and analysis underlying the final proposal.

Given their responses and refusals to make commitments on these issues, we are concerned that the nominees could indefinitely delay the process for revisiting the pay data collection and developing an effective and useful revision.

Refusal to Commit to Maintaining the EEOC's Position That Title VII Protects LGBTQ Employees

In response to repeated questioning at the confirmation hearing, both Dhillon and Gade steadfastly refused to commit to maintaining the EEOC's position that discrimination on the basis of sexual orientation or gender identity is prohibited sex discrimination under Title VII. They claimed that because the law was "in flux" due to pending cases and a division between federal civil rights agencies, they want to take a "wait and see" approach, believing Congress and the courts should decide the issue.

The EEOC's position has recently come under attack from the White House and the Department of Justice. The Second Circuit Court of Appeals is considering whether "sex discrimination" includes sexual orientation discrimination in a pending case in which the EEOC and Department of Justice filed separate briefs taking opposing positions. The Supreme Court has been asked to grant review of another case considering the same issue. We are likely to see the same dynamic going forward in cases that challenge gender identity discrimination as a form of sex discrimination.

Dhillon and Gade's "wait and see" response ignores the EEOC's responsibility to enforce and interpret the law, even when courts are not in uniform agreement. It ignores the fact that the EEOC is currently engaged in litigation that presents these very questions and called upon to evaluate complaints and (as to federal employees) adjudicate complaints that present these very questions, making it impossible for the EEOC to sit this controversy out. The failure to

commit to upholding this position indicates that should Dhillon and Gade be confirmed, the EEOC may step back from its mission to promote equal employment opportunity, to investigate incoming charges of discrimination, and to advocate for its legal positions in the courts. Their position demonstrates an unacceptable openness to advocating that that LGBTQ people should not be protected from workplace discrimination by federal civil rights law, and a willingness to sanction employer discrimination.

Finally, we are troubled that the Committee will vote on both of these nominees only 36 hours after they have answered their written post-hearing QFRs, leaving little time to analyze their responses. This is especially worrying, given that their joint confirmation hearing with another important executive branch nominee gave Committee members little opportunity to fully probe their records and views on a range of critical employment discrimination issues. We urge the Committee to revise its policies for the timing of votes on these important nominations.

Thank you for your consideration. If you have any questions, please contact Emily Martin at emartin@nwlc.org.

Sincerely,



Emily J. Martin
General Counsel and Vice President for Workplace Justice



Maya Raghu
Director of Workplace Equality and Senior Counsel