Kathryn Watts

Good afternoon everyone. Thank you so much for coming this afternoon. My name is Kathryn Watts I’m one of the Associate Deans here at the law school and it is my pleasure on behalf of Dean Testey and the entire law school community to welcome you here to a conversation between our beloved Professor Eric Schnapper and the EEOC’s counsel, David Lopez. So to kick-off the event I just wanted to briefly introduce the two before turning over the floor to them for their conversation and dialogue.

So to start with, Professor Schnapper, he really doesn’t need any introduction to many of you in the room, I’m sure. He’s been a member of our faculty since 1995 and as many of you know, teaches writing courses, civil rights, civil procedure, and employment discrimination, And he’s also an excellent supreme court litigator. Last year a story was written on him by court reporter Tony Morrow when he was named Appellate Attorney of the Week and Tony Morrow said, ‘If an employment discrimination dispute is before the Supreme Court, chances are Eric Schnapper is on the case working pro bono on the side of the employee.’ He has just an incredible record before the US Supreme Court, having argued more than a dozen cases, having briefed more than eighty other cases and last term alone having argued three cases before the US Supreme Court. So please join me in welcoming Professor Schnapper first.

And now turning General Counsel Lopez. Thank you so much for coming to join us today, we really appreciate it. In 2010, General Counsel Lopez was sworn in as the General Counsel at the EEOC. Prior to becoming General Counsel, he served in the EEOC for approximately fifteen years. He started his career there as Special Assistant to the Commission’s Chairman and he later served as a supervisory trial attorney at the Commission’s Phoenix District Office where he supervised a team of trial attorneys. He is the first General Counsel at the EEOC to be appointed from the ranks of the field attorneys. He has tried various cases at the EEOC and won numerous significant verdicts. For example, he was involved in the Go Daddy.com litigation that was a discrimination cases involving discrimination against a Muslim employee. He was also counsel in an Alamo Rent-a-Car case, the first post-9/11 back lash religious accommodation case that was brought by the EEOC. And there the jury entered a significant verdict, $250,000 of which were punitive damages. Please join me in welcoming Mr. Lopez.

Eric Schnapper

David maybe you could start by tracing the path from when you got out of law school to where you are now. Since, I think, a lot of people here are at the other end of that trail and trying to figure out, of course what lies ahead for them.

David Lopez

Sure and thank you for inviting me. I’ll start a few years before that because I think, in terms of what I did I think a lot of it goes back to an earlier time. I have teenagers now and I’m very...
conscious of the difference between hearing and listening because I tell them something and it
seems to go in one ear and out the other, but I have a lot of faith that at the end of the day, what I
say will at least be digested and thought about because that’s what happened with me. My parents
were very involved with the United Farm Workers Movement in Oregon, I do have a Northwestern
connection. And they would take us to the demonstrations and as a child I wanted to be anywhere
but there because there’s a lot of yelling, there’s a lot of conflict. I love baseball, I love reading, I
was a quiet kid. My parents would always tell me mi hijto you have an obligation to leave the world
in a better place than where you found it, you have an obligation outside of yourself. And I don’t
know what we said back then, but it was the equivalent of ‘whatever’. But what’s interesting is it
always kind of stuck to me and I would sort of go back and forth in terms of what they said. And
when I started college, I went to Arizona State University for college. I was at some party, I was
going to say event, but some party, it was a party, and they were playing some old Spanish music
and I had sort of a moment where I thought of my parents and I thought of my Dad and I thought of
how they used to always play that at the rallies and stuff. And for some reason I started to really
have a greater appreciation intellectually, a greater appreciation emotionally for what they were
doing. And at the time I was an English major but I switched over to political science and my focus
was on the civil rights history of the United States. I did a lot of self-study, there weren’t a lot of
courses on that but I really dug into the history of the United States and the Civil Rights Movement.
And by the time I left college it was really with the goal of becoming a civil rights lawyer in my
hometown of Phoenix. I was in Phoenix at the time. I wanted to return to Phoenix. Phoenix has
always had some issues and I always felt like there was a great need. And I ended up going back
East to Harvard. And I’d never been East of the Mississippi at that time. I know that there is an old
historical theory about how people would move West to sort of renew themselves, to regenerate
themselves, but I was just the opposite, I moved East. I was somebody who would watch Beretta on
TV. Am I dating myself?

Eric Schnapper

No they just have no idea what you’re talking about.

David Lopez

And I’d see the skyline of New York City and I’d see back East and I ended up going back East and
it was kind of a culture shock but I went with an anthropological state of mind. When I was in law
school, I really focused again on employment discrimination law, on civil rights law, I did my paper
with Judge A. Leon Higginbotham on the civil rights law of Arizona. He was a judge on the Third
Circuit, but also a professor. He wrote this wonderful book called In the Matter of Color about
some of the discriminatory codes in history and I sort of used some of his methodology with my
paper. And so that was really my focus.

When I was in Boston, I ended up...I had the intention of going back to Arizona, but I ended getting
peer pressured into going to a party during my second year of law school. It was really at the end of
the first semester of the second year. It was really cold. I never bought golashes. I’m from Arizona.
I’m behind. I’m going through the whole cramming thing. My friend is like, come on you’re going to
this party in Boston. And I was like I really don’t want to go. You need to go. I really don’t want to
go. So I went, reluctantly and at that point, at that event, I met the person I married, so I always tell
my kids, peer pressure sometimes works out.

But because she was in the East Coast, I ended moving to Washington D.C., she was finishing up.
She started a masters program in a year, moved to Washington D.C. and I started with a public
anti-trust firm but at the firm I started my own kind of practice doing employment discrimination
law with, I think my first case was co-counseled with Joe Sellers who was the attorney on the Wal
Mart v. Dukes case. It was a very sharp contrast with being the fourth attorney on an anti-trust case and having my own practice and my own clients and stuff like that and that gave me a lot of latitude to do stuff. But it was basically what I had wanted to do and when I had the opportunity to move over to the Department of Justice Civil Rights Division, I did. And I was able to be a civil rights lawyer with the civil right division under Duval Patrick and the Clinton Administration in the last two years. Just doing cases all over the country and it was absolutely fantastic, I loved it.

And then I ended up getting a call from Gilbert Casellas who was the incoming chair of the Equal Employment Opportunity Commission and he’s like you know I’ve heard that you might be interested in doing some policy work or would you be interested in coming over to work for me? And I’m like sure I’ll talk to you. I talked to him and I ended up getting a job with Gilbert Casellas. And at this time in 1995, it was a major renaissance at the Equal Employment Opportunity Commissioners, probably the best year the Commission has had. Before that what happened is that the agency was really being weighed down by an enormous backlog of charges. There were all sort of administrative inefficiencies at the agency. Every charge that came in the door had to be fully investigated. Every case that went through an investigation where cause is found in conciliation. Do you guys know what conciliation is? Mandatory settlement process. Every case that’s in conciliation had to go up to the full commission with either a positive or negative litigation recommendation from the field. And so I counted this and what it meant is that seventeen lawyers needed to look at a case before it was approved. That’s just bad government. It’s bad government. So when Casellas, he really hit the ground running with the help of a lot of good people. And what happened during that period of time is he really rationalized the process. The agency adopted what’s known as party-charge handling procedures which means that when a charge comes in, you start to designate it by its law enforcement. Because some of the charges are stinkers, frankly. And so they really shouldn’t soak up the resources, But some of them really require a lot of work to ultimately have an impact on discrimination and that did a lot to eliminate the backlog. And then we also developed a national enforcement plan which delegated most of the litigation authority at the commission to the General Counsel's office, and that in turn was delegated to the field.

Now let me just take a pause and say that one of the democratic commissioners was a very well known individual in the disability rights community named Paul Stevens Miller, who recently passed away and of course was a professor here. So Professor Miller, Paul, Commissioner Miller was involved with this at the time. And this was just a wonderful time, I think, to do policy work at the EEOC. But what’s interesting, let me give you a little background about this structure. A five-person bipartisan commission and the bipartisanship has been a benefit for the commission because it’s really enabled the commission to do a lot of really good work during both political seasons. And unlike the DOJ where there’s kind of a counter-reaction, reaction, counter-reaction I don’t think it’s as susceptible to the political changes, you have a lot of very committed civil rights lawyers. So you have a five-member commission. What they do is they vote on policy. They vote on policy and that’s part of the arsenal of tools that the EEOC has, is to vote on policy. The General Counsel’s office is in charge of litigation. All litigation is authorized by the Commission, but like I said much of that has been delegated. Once it’s in litigation, the General Counsel’s office has independent litigation authority. So my report, this is not like the board of directors general counselor, my report is really to President Obama. But of course with the structure, you want to have cooperative relationships. So that’s sort of the general structure of the agency. Our goal is to eradicate discrimination. We do that through policy documents. We do that through regulations. We do enormous outreach to the employer community, enormous outreach to the public interest community. I think most employers are trying to do the right thing. And I think that there’s a very important role for public education in terms of civil rights laws. And I think that most employers will try to voluntarily comply. But if that stuff doesn’t work, then it’s litigation, so that’s basically the general structure.
The problem for me, the problem for me and this is probably a personal problem was that everything happened at such a high level of abstraction and when you do policy work you have to really have the hope that at the end of the day it’s going to make a difference. And at the EEOC there’s sort of the same structure you see in every single war movie. You always watch the war movies and you’ve got the soldiers on the front lines and they’re always complaining about the generals on the hill, it’s like, ‘they don’t know what it’s like to be a grunt on the ground.’ EEOC it’s the same thing. You have headquarters, then you have all the litigating units around the country that were in court everyday and doing the depositions and fighting the good fight. So there’s always this sort of headquarters-field tension that went on. And I think I was naturally more sympathetic because I came out of the civil rights division to doing the litigation and I always felt like, here I am doing this policy stuff, but at a certain level I didn’t know what the heck I was doing because I’d never been at the field level. I didn’t understand how the offices were.

When chairman Casellas left, he’s like what do you want to do. I said, I don’t know. I said, you know I always wanted to go back to Phoenix. And I’d already been in Washington for ten years and I was through. And I ended up going back to Phoenix to work in the field office. And I went down a grade, but it was an opportunity for me to get back home and do what I set out to do which was to be a civil rights lawyer in my hometown. And the field is very different. There’s a lot of collegiality, very few resources. Very hard working, an enormous commitment on the part of our lawyers to civil rights.

So I was out on the field for twelve years, and I’m sure I had my moments because when you do litigation you’re going to have your moments where like, ‘why am I doing this’? Because there’s a lot of fighting, it can be very adversarial, but the chess game can be addictive and to see the benefits of your work at the end of the day, to know that you’ve actually changed somebody’s life and you’ve been able to remedy a wrong, to me that was really the greatest feeling in the world. So I think I was always like, I’m going to just get through this trial and then I’m going to start thinking about what I’m going to do next and I think I did that for twelve years. But it was always like, I can’t leave this case now, I’m very committed to this case. And I did everything. People were like what type of law, what type of cases do you like best? I like them all. We mentioned a couple of religious discrimination cases and those are very important cases for me because I think they vindicate a very important principle of what it means to be an American, the whole idea of religious tolerance.

The Alamo case, for instance, is a case that involved a Muslim woman who wanted to cover her hair during Ramadan. In 2000, she was a customer service representative, they let her do it. In 2001, Ramadan started in October of 2001, they said, ‘You’re not going to do it’. She says, ‘It’s my religion’. They’re like, ‘You’re not going to do it. You’re not going to put that thing on your head.’ Why do I say it like that? She taped it. And so they ended up firing her. We filed an affirmative motion for summary judgement to a recorded decision. We won on affirmative motion for summary judgement. And then we tried the case on damages. And the lawyer on the other side was considered to be the best defense lawyer in town, the best defense trial attorney in town. And what he was counting on, here we are this is 2005, he was basically, look Arizona’s very conservative, you have a Muslim client, they’re not going to give her a lot of money. They don’t care about this. People don’t believe in religious accommodation, they don’t understand it. So he was basically going to try to keep the damages down. We had a judge who circulated jury questionnaires, which is very rare. Because now the whole voire dire process usually is in the morning but this judge recognized the gravity of the case, the potential for prejudice and so she circulated jury questionnaires, and we asked questions about do you believe in reasonable accommodation, do you have opinions of Muslims? And approximately thirty to forty percent of the questionnaires came back with discriminatory comments against Muslims. It was heartbreaking, heartbreaking. But it
also enabled us to eliminate many of the bad jurors for cause. So when we went to trial, we went through the jury selection. Here’s a little secret about trial lawyers, even civil rights lawyers, there are a lot of little chestnuts out there probably EEOC, they’re not based on protected characteristics, but there’s always with the sexual harassment case, ‘you always want to get the middle aged man on a sexual harassment case’, or ‘you don’t want a nurse, because nurses are’...and I don’t know how much of these are empirically based, or based on BS but, ‘you don’t want a nurse because they’re hard bent, and they’ve seen it all and they don’t care about emotional anguish, because they’ve seen worse.’ So there are all these like little chestnuts. So we ended up with a jury of three individuals who basically said they were born-again evangelicals. And then we had three individuals, and there was a little bit of overlap, who had served in the military. And so the way you assess the jury is really hard. We’re the EEOC, we shouldn’t be discriminating, we’re not, but we’re just sort of like, ‘I wonder how this is going to work?’ But then it’s sort of like the light bulb goes off, we don’t have to be defensive because this is America. America, where there’s a tradition of religious freedom and religious tolerance. We were able to wave the flag. We went in there waived the flag and really kind of capped the theme of the case into America’s tradition of religious freedom and religious tolerance. Even during closing, I remember saying, we had basically tried the case even though we had already won determined judgement, went through all the evidence, and in closing I was able to say, ‘we know that Bilan Nur (21:13) wearing a head scarf, doesn’t create a burden. How do we know that? Because she’s been able to sit in this court room under the seal of the United States District Court and the flag of the United States and she hasn’t burdened these hearings, you know that.’ And so we were able to really take it to them and at the end of the day in conservative Arizona, they came back with a big jury verdict including $250,000 in punitive damages. Punitive damages are hard to get in employment discrimination case. So we got a big punitive damages awarded.

Now here’s a little aside and I hope you guys don’t jump on me because this is going to be a little of my anti-law school comment. We were able to talk to the jury afterwards. I had several trials at the EEOC and in Arizona the rule is, every court is different, in Arizona the rule is the jurors can approach you but you can’t approach them afterwards. But we were able to talk to this one time the jury afterward and that was worth one year in law school. Because, folks that’s what it’s all about. Even if the case settles, it’s all about the hypothetical trial at the end of the day. It’s about the trial that both sides are playing about in their mind, and how is this witness going to come across? And are you going to vilify the defendant, we were able to vilify the decision making in this case. And one of the jurors said, we would have given you a million dollars if the guy was still there because the guy basically came across like an idiot. And I think it was so educational. So anyway, that’s what I did in the field.

I did age discrimination cases, a lot of disability. I love disability discrimination cases. I did national origin harassment, sexual harassment. I can talk about those a little bit more, but I was basically...during this period of time, we bought a house, we had three boys that went to the same school six blocks from the house. We were very nested, very nested. I was minding my own business, I just had my patio re-done, I just bought the new barbecue. I had the recliner right where I wanted, I do a lot of reading. I had the recliner right where I wanted where the sun came in in the morning. My whole extended family, so we had all the family barbecues. There is a tradition in my family with my three boys, that we go back to Boston every year. And I take them to Harvard Law School. I take them to Harvard Square and I tell them the story of how I met their mother and how I almost didn’t and if I didn’t, they wouldn’t be there. And we start with that story we walk through how each of them were born and how they grew up and they just love it. It’s like the four guys bonding and my wife does her own thing. So we’re doing that and of course one of the kids has to go to the bathroom.
Let me back up fifteen years. The structure of the agency, you have the chair who’s in charge of the operation, the commissioners who vote on policy. So most of the responsibility rests on the chair, that creates some structural tensions. So I think that when I was at the EEOC, the democrats didn’t always see eye-to-eye. They weren’t like Helsey-welsey and I think it’s happened like that with every commission. They all have strong personalities. They weren’t buds, they’re not hanging out after work. I think that on the issues they see eye-to-eye, but you know...Anyway, fifteen years later, I’m walking, I check my messages, I have a message from Paul Miller. ’Hi this is Paul Miller, I don’t know if you remember me?’ Of course I remember him. ’But I’m working with White House Personnel and I want to run an idea up the flag pole.’ So I’m wow, what’s this all about? So I tell the kids I’m going to call the White House. I don’t want you to interrupt like you always interrupt. Do not interrupt like you always interrupt. So I call I start talking to him he starts talking about you know, the General Counselor’s position and of course two of my kids start fist fighting right in front of me. And I’m trying to be too cool for school, ’Yes, oh yes, of course I remember you. Oh I’d be interested in that.’ And with my hand and my foot and I’m trying to break up the fight. And I ended up losing one of kids that day, but I’m like you know, I have three sons, I just need to get one to the age of majority, so that’s alright. He just disappeared in the Harvard Square. And what he said is, I don’t know if there’s a privilege, but he’s like, ’you know, your boss would piss me off, but you never did.’ And the thing is with Paul because he was a disability rights advocate and Paul Yagasaki, who was also on the commission. Believe me I love Gilbert Casellas, Chairman Casellas, is absolutely fantastic. He came out of a management firm in Philadelphia, so I always liked the two Pauls because they had this sort of non-profit zeal, like they were crusaders and so I would always talk to them. And he was like, ’you are one of the few people who spent time in headquarters and you spent time in the field.’ And then I think he realized what I had been doing in the field and so that’s sort of what I think, what kind of prompted the phone call and maybe he called ten people before and they all said, ”heck no,” whatever. But I think that’s kind of what he said and I think this is the broader context of the Obama Administration really trying to bring people in from the agencies. Because all these agencies have a very unique sub-cultural and there are a lot of weird idiosyncrasies in the agency and it takes a while to sort of understand how the agencies function. And I think there was this assumption that I already knew a lot of people in headquarters and in the field. And so the rest is history. I went through the enormously, enormously excruciating vetting process: background investigation, FBI agents, all sorts of have you ever posted on Facebook, have you ever blogged, what did you say? Let’s look at your tax return for the last-ever type of thing. Does your wife talk to people in foreign countries? Yeah, my wife is a child of Cuban and Chilean immigrants and so she Facebooks in Chile. So you have to write all their names. What are their names, I don’t know. We just know their nicknames, so you don’t know their real names. That whole process was something else. And we ended up moving the whole family back East and that’s it.

Eric Schnapper

Thank you. I’m going to abuse my privilege here and tell a story, but it goes with the story you have about being dragged to these demonstrations. A friend of mine told me a story like that. He was dragging his kids around and they were going to Black Panther demonstrations, actually, they weren’t going to the demonstrations, but they were involved in representing one of the demonstrators and so they would go to the demonstrations from time to time. At the great cause in this era of late sixties, early seventies was Bobby Seal and Erica Hudless who had been charged with murder, they were both eventually acquitted. And he was driving by the demonstrators and they were chanting, ’Free Bobby, Free Erica, Free Bobby, Free Erica,’ waiving their fists and the little kid jumped up in the backseat waivered his fist and said, ’free blind mice!’ So I don’t know what became of him, but that was a famous Black Panther story.
Maybe you could tell us a little bit about how the General Counsel’s office relates to the charge processing side in the commission because they’re really very separate but they need to interface and I’ve never really fully understood that.

David Lopez

Okay, the General Counsel’s offices is under me and it’s in charge of cases once they go into litigation, filing the litigation. The office of bill programs handles the investigation and the charge processing. So if you believe you’ve been a victim of discrimination you would go down to the local EEOC office on Fifth and Marion, I just said the other day Madison, and you file a charge. And we still have a backlog, that’s still a big issue we’re trying to deal with. The case would be assigned to an investigator and the investigator would ask the employer for a position statement and perhaps if the case seems to have legs, we’ll call a few witnesses and try to make a determination. Now what we’re trying to train the investigators to do is to think systemically because the investigators are able to go beyond the four corners of the charge because we’re a law enforcement agency. So it’s sort of like if a cop shows up at somebody’s house, I hope I don’t authorize some unconscionable violation, but if you go to a house on a domestic disturbance call and you go in there and you see a pound of weed, you don’t have to ignore the weed, you can take police action, right? Right. It’s sort of the same thing. If you see a systemic violation or if you find violations against other people, there’s really an obligation to investigate. And what I mean by systemic, are broad practices that affect either an industry, or a region or a group of individuals, discriminatory tests. We’ve had cases involving a pattern of sexual harassment. There’s sort of an assumption, which I think is correct, that in a sexual harassment case, an individual case that you’re bound to find additional victims, that it’s usually never isolated. As a good government measure, we want our investigators to think in terms of systemic violations and see if there are any systemic violations.

So they’ll conduct an investigation and they’ll make a determination. Either cause or they’ll dismiss it, it’s not no cause. Okay, that confuses a lot of people I think there’s a recognition that our resources are limited and we don’t want them to be prejudiced if they want to proceed on their own by the administrative process. So if it goes cause, then there’s the statutory obligation to conciliate which is a confidential process. We’re supposed to resolve the case with the employer and we usually ask for non-monetary relief. We’re a law enforcement agency we don’t just want the monetary relief, we want to make sure the violation doesn’t happen again. So there’ll be a conciliation process. If we conciliate successfully, nobody cares about the case and hopefully the employer will adopt new policies or training or whatever to make sure it doesn’t happen again.

If it fails conciliation, then it will come, theoretically, then it may come theoretically to the office of General Counsel. We have fifteen district offices all over the country. With re-delegation to the field what that means is that the district offices should be very attentive, very attuned to the demographics, to the industry, to the practices in their community. And so they really have a lot of discretion, a lot of autonomy to build their own case load to affect the law enforcement violations in that particular community. So they get a case and they’ll assess it for its litigation potential.

Now that’s sort of the formalistic structure, but what happens informally, what we try to do is we try to make sure the legal units are available at the very early stages to provide legal advice to investigators on cases that have law enforcement potential because you don’t want them to put a lot of time into this case and then at the end of the day, the lawyers are like, ‘you didn’t talk to this witness and I can’t litigate this,’ because by then it had failed conciliation and you really can’t go back. So the idea is to have an ongoing relationship and if the case is not panning out, you do what we call, you re-designate the category. That means the lawyer steps out and you still can go cause on it, but it’s not a potential litigation vehicle. And so what we’re really trying to work at and it works better in some offices...Phoenix is great because there’s just a wonderful culture: the
Investigators would come down, they’d be excited, there’s a lot of interaction, there’s a lot of collegiality. But other offices the investigators aren’t allowed to talk to the lawyers without the supervisor, but it’s really important to have good practices to make sure the cases are developed appropriately.

But they’re two separate units. There’s two separate parts of the agency. And so what it means is that everybody gets mad at the EEOC. Usually not with litigation, they get mad at the enforcement section because these investigators often have a charge inventory of up to two-hundred charges, it’s really hard. It’s the hardest job in the agency, they’re very committed, but they’re just really, really buried under, right? I go to plaintiff’s events: the National Employment Lawyer’s Association and the plaintiff’s lawyers will line up around the door to let us have it, we call, you guys don’t call us back, you guys get the position statement from the employer and you believe them, you don’t investigate.’ Just a whole series of complaints and then our cause rate is less than ten percent, most of the cases are not cause cases. And of course a lot of people think their case is the greatest case in the world but that’s not what happens. So the plaintiff’s lawyers are mad at us, and then I go speak at management groups and they’re mad at us because, ‘you shared a position statement’, and whatever, ‘you don’t return our calls’. And meanwhile most of the investigators aren’t lawyers, they’re sort of between lawyers often. It’s a hard, hard job and I really feel for them. In some ways the biggest challenge the agency faces is how to sort of reduce the backlog, but also make sure that we have more systemic enforcement. And in our agency, these have been treated as mutually exclusive, but they’re not, they’re really not. The whole idea is that if you're able to reduce the backlog, the investigators are going to have more time to conduct their investigation. But what that means is you need to make decisions early and move the cases out so you have more time to focus on the other good cases. And this is not a scientific process, sometimes we get it wrong.

In Phoenix I’d hear about a plaintiff’s verdict, I’d go back and see what we did with the charge, and we dismissed, I’m like, 'okay we blew that one.' But I mean that’s sort of how the process works. So once it gets to legal, by and large, most of the litigation authority is with the district offices except class cases at a certain level will come to me, certain issues come to me, and then the really big class cases that cost over $100,00, cases that involve an emerging issue of law, a novel issue of law, cases that are potentially controversially, those will go to the full commission. Those will go to the seventeen hands and they’ll vote on that. And so there’s really kind of a three-tiered approach.

Now the problem that we face, my diagnosis is that it’s really been good to provide autonomy to the district offices it leads to a lot of creativity. Seattle used to be a district office, there was a repositioning which means basically downgraded but it’s within the San Francisco district office, wonderful attorneys down there fabulous attorneys. And they’ve done some really fabulous stuff in this district particularly in the area of the sexual harassment of women in the agricultural industry. And these are often very hard cases because you often get people who are afraid to come forward, there’s a lot of fear. These are like a lot of cases, I would say, at least in my day, they didn’t teach in law school. And maybe now they’re teaching them in law school But it’s really about providing the safe space for the charging party to come forward, to have enough confidence in the process. I, this is sort of my anti-East Coast bias perhaps, but if everything were still centralized in Washington, I don’t think that those cases would have ever made it out. I don’t think those cases would have made it out. I think it’s really required the local autonomy of the district. The problem is that you have fifteen district offices and they have operated sometimes, it appears like they’re operating as fiefdoms, so you have the problem of reinventing the wheel, you have the problem of not really communicating between the offices and that’s not efficient. One of the big things I’ve been trying to do is to sort of experiment with what we used to call the national law firm, what I call the national law enforcement, which means that the offices are always going to be integrated. They’re always going to have available to them the best thinking from wherever it is in the country. Sometimes I
call it the 'My Cousin Vinny' approach. I don’t know if you guys ever saw 'My Cousin Vinny', which by the way, is considered one of the best legal movies ever. But in 'My Cousin Vinny', Marisa Tomei is able to basically pull victory from the jaws of defeat, she’s the girlfriend of Joe Pesci because she had worked in a garage in Brooklyn and she had all this knowledge about mechanics and stuff like that, and that was what they really needed to save these two guys from the death penalty in Alabama. But it’s really sort of that idea that everybody has some talent to bring to the table. We have people who have industrial organizational backgrounds, we have people who speak Thai, we have people who were farm workers. I want to make sure that we get the best out of everybody because we’re a poor agency and that the talent in one office is not confined to that office, so that it’s available nationwide, but we don’t want to go back to this sort of centralization where five-three pound brains in Washington are telling everyone what to do. You want to multiply the intelligence, you want all the brains operating at full capacity and so that’s one of the challenges that we have at the agency. Let me give you an example of one of the things that we’re trying to do address the issues and that’s with the trial program. In Phoenix, we try a case, we go down to Crazy Jim’s which is the bar. 'Man I shouldn’t have asked that question.' 'Boy remember those discovery disputes that kept us up at night, guess they didn’t really matter at the end of the day anyway, did they?’ And then later on we do a more formal debriefing in terms of lessons learned, blind alley ways, but all that wisdom, that accumulated wisdom would just stay within that office. So we’re trying to figure out a way to keep it within the entire agency so it’s available to everybody. So we do on every trial, on all the big cases, we do these nationwide debriefings. I debrief them where you kind of go through the process. So now everybody can learn from the cases. Now we’re sharing jury instructions, ‘oh you didn’t do that before?’ No we didn’t...jury instructions, motion delemony, debriefings with jurors, anything that helps, we’re trying to make it available to everybody so they always have the best thinking available. Then we’re really working on mentor-ship, on developing the next generation of trial lawyers. We don’t want just five trial lawyers. So every case that we try will have as either a second chair, or sometimes we have a third chair, just sort of a learning position and attorneys who have never tried a case so that they can see the whole mechanics of trying a case. Once you try a case and you move backwards, it’s a whole different thing. It’s a whole different way of looking at you depositions, your discovery because then you see where it all ends up at the end of the day. And so we’re really trying to do that. We’ve been really successful this last year in terms of our jury verdicts around the verdict. We had an attorney in Memphis three years out of law school, tried a case $1.5, three women, sexual harassment case. We’ve had I think six verdicts involving punitive damages around the country. I’m not saying it’s because of the approach, it might just be the law of numbers, but when all the plaintiffs are saying it’s hard to get a good verdict in these tough times I feel pretty good about that and that’s what we’re trying to do. Kind of went on a little bit, I’m sorry.

**Eric Schnapper**

You probably don’t understand this, but many lawyers do model their careers after movies characters and I’m interested to hear about yours. Listen to me, personally I have always sort of thought of myself as following in the footsteps of Elle Woods and I told my class more than once that I think 'Legally Blond' is the best law movie. There are some straight moments there.

What are the litigation priorities that you’ve gotten?

**David Lopez**

There are a few but let me kind of base it in a broader context and I think a broader discussion that we have at the commission. And a discussion where I think I am in some ways, in the minority. Professor Schnapper out of this sort of impact litigation out of NAACP, you have a few cases and they have to be the right cases and they have to have the most impact. That’s very relevant and
pertinent to what we do, but we’re also a law enforcement agency. So the idea of stating your priorities is sort of a double-edged sword. I did the National Enforcement Plan where we sort of set forth the priorities for the commission in 1995 and here’s what happens. It’s like, yeah we don’t have anything for dealing with age discrimination, oh we don’t have anything dealing with race discrimination, oh let’s throw that in. So at the end of the day every single issue is covered because you don’t want to offend any stakeholder group, but you also don’t want to signal to the employer community by leaving stuff off and have them say, ‘hey they EEOC doesn’t care about age discrimination, whoopee.’ And so that’s always a problem with talking about establishing priorities. And that’s sort of the conversation that I’ve had with many of the commissioners. And we don’t want sort of a centralized process because I really do believe the agricultural cases wouldn’t have been done if they were just out of Washington. With all that being said, there are some things that I think the commission seems very important and that I consider very important and I think we’re actually on the same page with a lot of this. We have this whole systemic program. There are two areas in the systemic program that are very much, we really have a lot of leverage and a lot of opportunity in these areas. We’ve done glass ceiling cases, we’ve sued Morgan Stanley for sex discrimination, we sued Sidley Austin for age discrimination. We sued ALPAC, a wonderful case for a glass ceiling case. We’ve done promotional cases. We do a lot of sex harassment cases, a lot of race harassment cases, even today very nasty race harassment cases. But the private bar is doing these cases also, the private bar is doing these cases. What cases can’t the private bar do? Are there areas where we have unique opportunities? And there are two. One is hiring discrimination.

When you apply for a job and you don’t get the job for discriminatory reasons, you usually don’t know it. Because usually the individual who refuses to hire you doesn’t say it’s because you’re Swedish or a woman or whatever. Sometimes that happens, I see those cases, but that’s it. You usually don’t know who got selected instead of you. So you don’t know if it’s somebody who didn’t have any qualifications for the job, you just don’t know. You don’t have that information. And to do a systemic case is even much more difficult because usually you don’t have information about any broad patterns in the workplace. So plaintiffs attorneys really struggle to do these cases to find these cases. But we’re a law enforcement agency. We have subpoena authority, we have investigative authority we’re able to go in and look at the reasons, we’re able to go in and assess the reasons. We’re able to look at broad patterns. We’re able to look at hiring data and say oh my god you haven’t hired a woman in five years. We’re able to do that and that puts us in a really unique position to address hiring discrimination. And I know the commission thinks so as well and their chair Berrien thinks so and how do I know? Because one of the thing the commission does is it holds public meetings on issues relevant to the day. And with this commission we’ve held a public meeting and it’s all on our website and it’s very interesting, on arresting conviction screenings. A very hotly debated issue on the discriminatory impact of arresting conviction screenings, the discriminatory impact of credit screenings. These are employers who will look at your credit rating and will disqualify people if you don’t have a certain credit rating. We held a meeting on the abuse of employers who won’t hire the unemployed. And that’s received a lot of attention. I can talk more about that. And then we held a meeting on district treatment hiring discrimination. District treatment is intentional discrimination. We had a case out of Chicago, we’ve had several cases. And I realize, folks, I realize I don’t get the representative sample. So I went to dinner with a management group in Florida a couple weeks ago and they’re like, ‘hasn’t discrimination disappeared?’ Well I see the cases we litigate, I don’t see the cases we don’t litigate by and large, so my worldview is skewed, granted. But I see the cases where there’s racially coded applications. I see the cases where you have employers who say I’m not going to hire any black people or I’m not going to hire any women, I see the cases where they had. This is district treatment. Have you guys ever seen the show ’What Would You Do?’ Do you know what show I’m talking about? That’s a show, this is a sort of a soft news magazine with John Quinones and what he does is he goes out using actors and they create ethical situations and they want to see how the average Jane or Joe
Schmo on the street will react to these situations. So in one episode and this is on abcnews.com, you can see this, he had two actors one actor played the manager of a coffee shop and the other actor was a deaf woman who went in and wanted to apply for the job. The manager played by the actor said I’m not going to hire any deaf person, you can’t do this job, you’re a danger, da, da, da, all these discriminatory comments. And then the whole idea of the show is they want to see how people react. And so you have some people who are just really embarrassed and they don’t say anything and they just walk away. Then you had a few brave souls who said, ‘I’m never going to come back here again, that’s discrimination’. And then you had two individuals whose faces were blotted out and these were individuals who went up to the manager, who was an actor, and said psst, ‘I work in human resources and here’s what you’re doing wrong. What you’re doing wrong is you’re saying it. Just don’t hire them and don’t say it. It’s not what you doing wrong is discriminating, it’s what you’re doing wrong is you’re expressly discriminating and helping the other side build the case.’ And it’s kind of chilling, and it’s chilling for me because I go out to management groups and I’m like, ‘most employers are complying in good faith.’ And it just makes me look bad. And you see that, you see that and it’s disturbing. So we did something on district treatment hiring discrimination. Hiring discrimination is one are where we can do a lot of stuff. Another area is what I call under-served and vulnerable populations. We have brought cases that deal with interaction intersection between trafficking and national origin discrimination. We brought a case involving Thai workers who were brought over on H2 visas as welders and they were not allowed to work in the job. They were basically shipped out all over California and basically subject to national origin discrimination. They did all sorts of things below the prevailing wage. They were called names based on their national origin and passports were confiscated it was a very sad case. It’s a case of exploitation. Another case in LA, twenty-one women working for a janitorial company. Most of whom were Mexican immigrants, they were working at night at disparate locations. They were subject to sexual assault, sexual harassment. These are hard cases to do. These are not cases that the private bar is taking. But as General Counsel I don’t want any part of the economy to be beyond the reach of anti-discrimination laws. I don’t want any salary safe haven I don’t want employers doing that calculation if people aren’t going to complain that they can discriminate, that people aren’t going to complain so they can discriminate. Because people aren’t going to complain because they either are not sophisticated, or because of cultural barriers, or linguistic barriers or fear. Another case in Muskatine County, Iowa, twenty intellectually disabled workers working at a turkey evisceration plant subject to harassment, including physical harassment: kicked, called names. That is frankly, un-American and it’s not fair to the employers who are trying to do the right thing. I go to these conferences and everyone’s talking about Wal Mart v. Dukes and rule 23. But these cases aren’t rule 23 cases because the private employers aren’t doing it. But it’s really important, it’s really, really important that we make sure that there’s broad enforcement of the anti-discrimination laws, that it’s not just Morgan Stanley, that it’s not just Wal Mart, that it’s poor people, low wage workers. And that’s a major challenge that I think a lot of advocacy groups are working on and it’s something that’s very important to us. So these are two areas. This is for systemic.

Another area that’s really important for me is the full enforcement of the Americans With Disabilities Amendments Act. Do you guys know the history of this? Congress passed the Americans With Disabilities Act in 1990, bi-partisan, revolutionary, major change, allowed disabled workers to obtain economic independence and self sufficiency. In 1999, the Supreme Court in what I consider a major, but not an unprecedented tragedy basically eviscerated the act by creating major hurdles to establishing jurisdictional coverage, to establishing that you are disabled. The language was ‘substantially limited’ you have to prove that you are substantially limited in major life activity. It became very, very hard to do. It’s something you couldn’t do without an expert. And it meant is that for disabilities such as diabetes, epilepsy, cancer, intellectual disabilities, you were basically shut out. So as a lawyer in Phoenix, I had these cases where employers are like, ‘yeah, we didn’t
hire them because they have diabetes, but you can’t establish that that’s a disability under the ADA.’ So Congress as it has done many times before, went back and said, ’look we meant what we said.’ And they adopted the Americans With Disabilities Amendments Act and said that, ‘our intent is broad coverage of disability. We do not want disability discrimination we don’t want these threshold hurdles at the front end’. When we came up with our regs there are several categories that are basically always considered disabilities and for me, when I came in as General Counsel, I wanted to make sure that it didn’t get unraveled again, that we were very proactive about the way that we address coverage and that we were finally able to get to issues of discrimination. And I’m really happy to say that I think this is one of the success stories so far that this particular commission because the commissioners worked on bi-partisan regulations, they did a lot of work on that. The commissioners personally have done a lot of outreach to employer groups, employee groups, on the broad coverage, on the ADA amendment. When that doesn’t work, it comes to me and this last fiscal year, we filed sixty cases under the Americans With Disabilities Amendments Act including cases involving individuals with diabetes, epilepsy, individual disabilities. We settled a case in Chicago involving a woman, who actually unfortunately died before we were able to finish the case, who had brain cancer and she was terminated because of brain cancer. In all of these cases we go in and we try to get consent decrees. All our litigation is in the public sunshine, we try to make sure that discrimination doesn’t recur. So the ADA Amendments Act and disability discrimination is something that’s very, very important and it’s something that I feel very good about. I don’t know how many of you have studied that, there are affirmative defenses that employers will raise under the ADA, but they are hard to prove and before the new act I would say well these are BS but we were never able to get over the coverage hurdle. Now the employers have to really be quick to their evidence and prove that, if they want to win, that someone is a direct threat to himself or others, which is very hard to prove if you do it right, or business necessity. And good things will happen. I think more of these cases will be tried. And so those are some of the areas that we’ve really put a lot of effort in. And the way we’re doing it is we’re getting together different work groups on a lot of different issues. So we have an ADA Amendments work-group of attorneys in the field who have done these cases and they get together and they talk about the issues and they come up with best practices, it’s not like an edict, it’s not a mandate, it’s like this is the best way to plead a case. This is how you try a case. And they’re working on that together and they’re trying to distribute that to the field as part of the national law enforcement agency, it’s one firm and it’s really something that makes me very happy. It’s a real positive development that we’ve had. And now a lot of our lawyers are saying well we want to start a group on this...Do you guys know what ENDA is? ENDA is proposed legislation that would prohibit discrimination based on sexual orientation and when I came in it looked like it was going to be enacted very soon. Now it does not look that way. Many states and local governments prohibit sexual orientation discrimination but the federal government does not and we wanted to hit the ground running. But one thing that we ended up doing is we filed an amicus brief in this case. One of the issues that has been out there is how do you frame an issue involving discrimination involving a transgender individual? It’s sort of this sex-stereotyping theory which everyone accepts, but then there’s one district court opinion that says when you discriminate against someone who is transgender, that is inherently because of sex. We filed an amicus brief taking that position in a district court and that sort of is the policy of the commission. When I say amicus brief, one thing I haven’t mention, let me just mention it real quickly. We have fabulous, fabulous appellate lawyers and Eric knows this, Professor Schnapper knows this and we have probably the most active amicus program in the federal government so we will weight in at the appellate courts mostly on issues that involve our statutes so we’ve weighed in on mandatory arbitration, we’ve weighed in on sexual harassment, we’ve weighed in on racial harassment. And we have our lawyers looking at lexis decisions, they track the decisions, the case comes up it looks like it’s right for involvement, we’ll move in and that’s a very efficient way to make policy, to develop the law and
we try to be very strategic about it. It’s something in the field, I didn’t know about but it’s something that now that I’m at headquarters I brag about a lot. I think that Professor Schnapper knows that we’ve done a lot of this.

Professor Schnapper

Absolutely, terrific work. Maybe to look at as things, a very different part of the agency’s work. You could tell a little bit about this case that was argued in court about a month ago about Hosanna-Tabor’s case. Very difficult constitutional issues and a very different side of the commission’s work.

David Lopez

There is something known as a ministerial exemption and what that basically says that a religious employer is exempt from being sued for discrimination for its employees who are in the ministry. And this has been sort of a court development, not in a statute the different courts have applied different rationales for this document throughout the years, different constitutional pre-exercise, establishment cause, freedom of association. So we had this case in Detroit where a woman was a teacher at a Lutheran school, a kindergarten teacher. And she went on leave for medical issues and she wanted to come back and they weren’t willing to let her come back so she filed a charge with the EEOC. She was still in a suspended state. She filed with the EEOC and the employer says, ‘well you just violated a tenant of our religion that we resolve issues internally.’ And they fired her because she filed charges with the EEOC. Under any other circumstances, this would be a slam dunk retaliation case. But they’re like, ‘we’re a religious employer, this is a woman who was involved in the ministry.’ She was a teacher and most of her work was teaching secular subjects. I think she led her students in prayer three times a day. And we had the case tossed at the district level. It went up to the appellate court, the appellate court says, ‘no, the ministerial exemption doesn’t apply because the primary duties of the job are not ministerial, they’re secular, the primary functions.’ And then the Supreme Court granted cert because they wanted to define the parameters and ratify the existence of the ministerial exemption. And so it went up to the Supreme Court, the EEOC participated. The Supreme Court arguments went through the Solicitor General’s office. We were on the brief and we were very involved in the drafting of the brief. It’s just a fascinating, fascinating issue. I’m always trying to assess how much of an impact it will have but it’s an absolutely fascinating issue because it deals with a classic two values, the value of religious freedom which I sort of waxed patriotic about earlier, and then the value of equal opportunity which is also a fundamental and really patriotic value and they sort of, clash in this case. And so the Supreme Court was trying to figure out whether to draw a line, how to draw a line. The United States went in and says, ‘you need to assess the constitutionality on a case, by case basis. Because if you draw a line, if you draw the boundary to say the ministerial exemption is x, y and z, it’s either going to be either over inclusive, or under inclusive.’ The church came in and basically said, anything the church touches should be exempt, should be covered by the ministerial exemption. And then really the argument was really between the spectrum of, it was sort of assumed that you can’t sue the Catholic church for all male priesthood. The Pope can perform secular functions, this is just one of the hypotheticals, but of course you can’t sue the church because a woman can’t be the Pope. At the other end, if somebody complains about the sexual abuse to outside authorities, that person should not be fired, so that’s sort of the broad spectrum. And then they discuss the employment issues within this spectrum. Justice Flyer, says, ‘I’m flummoxed.’ They were struggling, the judges were struggling. Ginsberg didn’t seem to be struggling. Ginsberg seemed to go after the church’s position and then when the government came up, Scalia went after the government’s lawyer. So I think that Scalia, Thomas, and probably Alito kind of get a sense of where they’re going in terms of the existence of the ministerial exemption and the breadth. Kind of get sense of where Ginsberg is going. Breyer was completely stumped, he was stumped. Kagen was stumped. At one point Scalia says I find the government’s position amazing, and Kagen says, ‘I find it amazing also.’ And of
course me, I’ve been trained when I go down to watch Supreme Court arguments...Have you seen the movie ’West Side Story’? Have any of you seen the movie ’West Side Story’? There’s a scene where Tony and Maria are at the dance and they just focus on each other and the whole world is crowded out and they’re just staring into each other’s eyes. And so when I go to the Supreme Court, that’s me and Justice Kennedy because I’m so used to Justice Kennedy being the swing vote. And so I’m always like, ’okay what’s Kennedy doing?’ And when Scalia talks it’s sort of like the adults in Charlie Brown and I’m just like, what’s Scalia doing? Scalia didn’t ask any questions of the government attorney, not Scalia, Kennedy. Kennedy asks several questions of the church’s attorney, I think pretty hard questions. Do I have any predictions? No. My only prediction is I think there’s going to be more than two opinions here, don’t you think? I think there’s going to be more than two opinions. And different people read what happened differently and there’s some pessimists in our ranks. I just think it’s too early to tell. I think you’re just going to have to wait and see what the Supreme Court did on this case. But I would really encourage you to go to the Supreme Court, what’s the best website to find?

Professor Schnapper

Just go to Supreme Court website and click on old arguments and you can get the transcript right there.

David Lopez

I was on the train going up to Boston about a month ago and there was a young man sitting next to me ready, obviously a law student. And he went to the cafe car and he had the Hosanna-Tabor briefs there and I’m like, ’God what’s that all about?’ And I asked him and he goes, ’oh that’s our moot problem at Yale. We’re doing this issue and everybody’s just kind of pulling their hair about it.’ So he was one of the student advisers and they’re looking at this issue. This is a really, really hard issue. It’s really a clash of values, so we’ll see what happens.

Professor Schnapper

Well thank you.

Kathryn Watts

Yes, thank you so much for joining us and thanking Professor Schnapper for helping to organize, we really appreciated it.