A LOOK INSIDE THE CRYSTAL BALL: EEOC’S STRATEGIC ENFORCEMENT PLAN

Rodney Klein
Education and Training Manager
Dallas District, U.S. EEOC
U.S. EEOC Strategic Plan

- Inventory control
- Systemic investigations
  - Hiring, hiring, hiring
- Harassment and Retaliation
- Human Trafficking
- Partnerships
  - Underserved populations
  - Small businesses
- Streamline technology
  - On-line charge filing
  - Use of social media
Strategic Enforcement Plan

- Adopted by the Commission on 12/17/12
- Targeted Enforcement
  - “broad and significant impact to prevent and remedy discriminatory practices in the workplace.”
- Integrated approach
  - Between offices and staff and other agencies including DOL and OFCCP
- Increased top down leadership by the Commission
- “Identified priorities”
  - “necessitates a paradigm shift to focus on specific priorities”
Strategic Enforcement Plan

1) Eliminating barriers in recruitment and hiring
2) Protecting immigrant, migrant and other vulnerable workers
3) Addressing emerging and developing issues
4) Enforcing equal pay laws
5) Preserving access to the legal system
6) Preventing harassment through systemic enforcement and targeted outreach
Eliminating barriers in recruitment and hiring

- Racial, ethnic, and religious groups, older workers and people with disabilities.
- Exclusion policies, steering, screening tools (e.g. background checks, pre-employment tests, etc.).
- Policies – pattern and practice and adverse impact (systemic and class)
- Background checks
  - arrest and conviction records
Recruitment and Hiring

- EEOC v. Presrite (N.D. Ohio filed Feb. 2011)
  - Failure to hire women for metal forging jobs
  - Resolved 2013 for $700,000 and non-monitory relief including 40 priority hires and revised hiring policy

- EEOC v. Performance Food Group (D. Maryland filed June 2013)
  - Nationwide failure to hire women for operative positions
  - Pending

  - Nationwide age hiring for front of the house positions
Background Checks

- Why is the Commission interested in this?
  - Using blanket policies to exclude applicants for employment based on conviction records, arrest records and credit checks may adversely impact certain protected groups
  - Reports contain errors

- Disparate Treatment
  - Don’t deviate from the policy because an applicant is in a certain protected group

- Adverse Impact:
  - Neutral policy
  - Adverse impact
  - Job related and consistent with business necessity
Two circumstances employers will meet “job relatedness and consistent with business necessity”

- The employer validates the criminal conduct screen for the position in question per the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines) standards (if data about criminal conduct as related to subsequent work performance is available and such validation is possible);

- The employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job (the three *Green* factors), and then provides an opportunity for an individualized assessment for people excluded by the screen to determine whether the policy as applied is job related
Background Checks

- Must show job relatedness and business necessity (*Green v Missouri Pacific Railroad*)
  - The nature and gravity of the offense or conduct;
  - The time that has passed since the offense or conduct and/or completion of the sentence; and
  - The nature of the job held or sought.

- Some level of risk is inevitable in all hiring. It’s ultimately about risk management

- Must accurately distinguish between those applicants who pose an unacceptable risk and those who do not *(be careful of blanket exclusions)*
Background Checks

- **Arrests**
  - An arrest does not establish that criminal conduct has occurred
  - Final dispositions are often not reported
  - An arrest should not be the reason for the employment decision, but the underlying conduct may be a reason, if objectively known
Background Checks (best practices)

- Eliminate policies or practices that exclude people from employment based on any criminal record.
- Train managers, hiring officials, and decision makers about Title VII and its prohibition on employment discrimination.

- Develop a Policy
  - Identify essential job requirements and the actual circumstances under which the jobs are performed.
  - Determine the specific offenses that may demonstrate unfitness for performing such jobs.
  - Identify the criminal offenses based on all available evidence.
  - Determine the duration of exclusions for criminal conduct based on all available evidence.
  - Include an individualized assessment.
  - Record the justification for the policy and procedures.
  - Note and keep a record of consultations and research considered in crafting the policy and procedures.
  - Train managers, hiring officials, and decision makers on how to implement the policy and procedures consistent with Title VII.
Questions about Criminal Records

When asking questions about criminal records, limit inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity.

Confidentiality

Keep information about applicants’ and employees’ criminal records confidential. Only use it for the purpose for which it was intended.
Eliminating barriers in recruitment and hiring (Some things to remember)

- Take a look at recruiting and hiring policies
  - Look for pattern and practice problems (supervisors)
  - Look for adverse impact problems

- Background checks
  - Does the policy create an adverse impact?
  - Is the policy job related and consistent with business necessity
  - EEOC believe blanket exclusions are difficult to argue job related and consistent with business necessity
  - Develop targeted screens using the Green factors
Protecting immigrant, migrant and other vulnerable workers

- Those groups of individuals who are frequently unaware of their rights.
- Disparate pay, job segregation, harassment and trafficking
Protecting immigrant, migrant and other vulnerable workers

- EEOC v. Hill Country Farms d/b/a Henry’s Turkey Services (S.D. Iowa) (2011)
  - Hostile Environment Claims:
    - abusive and verbal physical harassment
    - harsh punishments
  - Terms and Conditions of Employment:
    - freedom restricted
    - substandard living conditions
    - failure to provide proper health care
  - Jury awarded $240 million for disability discrimination and harassment. Largest jury award in agency’s history.
Protecting immigrant, migrant and other vulnerable workers

- EEOC v. Global Horizons, Inc. et. al. (E.D. Wash.) and (D. Haw.) (2011)
  - Largest human trafficking case brought by EEOC
  - Global Horizon and 8 farms engaged in a pattern and practice of national origin (Thai) and race (Asian) discrimination, harassment and retaliation:
    - Trafficked over 400 Thai victims to farms over several years
    - Thai workers recruited from remote areas and charged huge fees to work on farms in U. S.
    - Passports confiscated
    - Movement restricted
    - Denied pay for their work
    - Deprived of habitable living conditions
    - Deprived of food
Some workers subjected to curfews and lived in isolated and remote areas

Many claimants received paychecks for $0 for a week’s worth of work

Workers threatened with deportation if they complained, and, in fact, some were

Del Monte Fresh Produce settled its portion of the lawsuit:

- $1.2 million
- Agreed to institute comprehensive protocol and accountability measures to ensure the farm labor contractors it uses are in compliance with federal law

Lawsuits against other defendants are still pending
Protecting immigrant, migrant and other vulnerable workers (Some things to remember)

- Partner with us to eradicate human trafficking
- Pay attention to religion issues in the workplace and train managers on religious expression and religious accommodation issues
- Remember these groups are often targeted because they are the most vulnerable, so monitor the actions of those who have the power
Addressing emerging and developing issues

- Veterans with Disabilities
- ADA issues (reasonable accommodation, qualification standards, undue hardship),
- intersection of ADA and pregnancy,
- gender stereotyping.
Veterans: Employment

- As of 2011, there were 21.6 million veterans in the U.S.

- 2.4 million veterans have served during the Gulf War II period. 17% of these veterans are women.

- As of the end of Fiscal Year 2011, Gulf War II veterans are experiencing significant unemployment rates: Example: 18-24 year old male Gulf War II vets: 29% (non-vet males of same age: 17%)

- Unemployment rates for veterans generally – about 8%
Veterans: Disabilities

- Gulf War Veterans are more likely to report a service-connected disability than other veterans (26% versus 14% for all veterans). About 3 million veterans have service-connected disabilities.

- Unemployment rates for all veterans – those with disabilities and those without – are about the same – about 8%.

- Unemployment rates for Gulf War II veterans with and without disabilities are about the same – about 12%.
Post-Traumatic Stress Disorder and Traumatic Brain Injury

- Approximately 5000 combat deaths Iraq and Afghanistan
- 30,000 suicides each year – 20% veterans
- State of Minnesota study of returning Guard troops:
  - 25% ran red lights
  - 25% drove down center of road
- DOD lists approximately 32,000 casualties (Iraq/Afghanistan)
- 2008 study - 300,000 vets with PTSD and 320,000 vets with Traumatic Brain Injury
- VA estimates approximately 400,000 vets Iraq/Afghanistan have PTSD
- PTSD: Vietnam = 30%, Iraq/Afghanistan = 20%
- 19% of soldiers Iraq/Afghanistan sustained brain injury from explosive device
- Limited Traumatic Brain Injury is not the result of overt trauma, and the soldier may not even be aware of the injury
- Limited Traumatic Brain Injury and PTSD exhibit similar symptoms
EEOC Charge Statistics

PTSD

Fiscal Year

Post-Traumatic Stress Disorder and Traumatic Brain Injury

- **Possible Symptoms:**
  - Short-term memory loss
  - Lack of concentration
  - Trembling
  - Irritability
  - Restlessness
  - Sensitivity to noise
  - Heightened sense of suspicion

- **Possible Accommodations:**
  - More written instructions
  - More reminders
  - Organizers
  - Allow to tape meetings
  - Reduce distractions
  - Allow I-pod/MP3 Player
  - Natural light
  - Break large assignments into smaller ones

*Not an exhaustive list (see Accommodating Employees with PTSD and Accommodating Employees with TBI, Office of Disability Employment Policy, Veterans’ Employment and Training Service)*
Veterans advocacy organizations and media reports have indicated a bias against veterans in the form of a presumption that they have mental health issues, such as PTSD.
Leave as a Reasonable Accommodation

Why is the Commission interested in this?

- How does an employer look at intermittent or indefinite leave under the ADA?
  - FMLA v ADA (rigid v adaptable)

Current Guidance:

- ADA obligation *may* go beyond FMLA 12 weeks
- Employee only entitled to paid leave to the extent they have accrued paid leave
- Employer has the prerogative to choose between equally sufficient reasonable accommodations
- Cannot penalize employee for being reasonably accommodated
- Must return employee to original position
- Must provide unless doing so creates an undue hardship
Leave as a Reasonable Accommodation

- **Undue Hardship Considerations**
  
i. the nature and cost of the accommodation;

ii. the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

iii. the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

iv. the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.
Leave as a Reasonable Accommodation

- Undue Hardship Considerations
  - “[t]he impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility’s ability to conduct business.” 29 C.F.R. § 1630.2(P)(2)(v).

- Future guidance may address this issue
- Don’t draw arbitrary lines in the sand
- Future guidance may also address the ADA and wellness programs (wellness incentives v. equal opportunity - privileges and benefits of employment)
In Price Waterhouse v Hopkins, 490 U.S. 228 (1989), the Supreme Court found that acting within the context of sex stereotyping is acting on the basis of gender.

Ann Hopkins was denied a partnership at the accounting firm; comments made by decision makers were that she was “macho,” should “take a course in charm school,” and should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”
Gender Stereotyping

“When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment related to the sex of the victim….This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating [Price Waterhouse’s] admonition that an employer may not take gender into account in making an employment decision.” Macy v Dept of Justice (April 20, 2012)
The EEOC takes the position that any sort of transgender discrimination is sex discrimination because it inherently involves taking gender – and therefore sex – into account.

May be helpful to review these policies:
- Harassment
- Codes of conduct
- Dress codes and appearance standards
- Background and security clearance
- Changing ID cards, names, personnel records
- Non-disclosure of medical information
- The use of restrooms, locker rooms and other gender-specific facilities
Pregnancy and Caregiver

- **Pregnancy and the ADA**
  - Is a request for leave because of pregnancy really a request for a reasonable accommodation because of an underlying condition covered by the Act?
  - PDA and equal treatment – does it extend to reasonable accommodation?

- **Caregiver Discrimination**
  - Gender stereotypes: career v. family
Caregiver Discrimination

- Caregivers care for children, the elderly or people with disabilities
- Women comprise approximately 50% of the U.S. workforce, and women with small children are twice as likely to be employed as they were thirty years ago
- Women are denied hire or denied promotions because employers assume a woman with care giving responsibilities will not be reliable on the job
  - The assumption is: with women, it’s family first and career second, and with men, it’s career first and family second
- Women have the legal right to be J. Paul Getty
Caregiver Discrimination (Motherhood Penalty)

- **Motherhood penalty** - when controlling for qualifications, childless women and fathers are generally rated significantly higher than mothers on competency, work commitment, promotability, and hiring recommendations.

- Mothers seen as less reliable and competent than men or women without children – 5% pay gap/child

- Childless women earn 94 cents to a dollar for a childless man, while mothers earn about 60 cents of a father’s dollar.

- Mothers work less and may accept lower wages for more family friendly jobs may explain part of the “motherhood penalty.”

- **Fatherhood Bonus** – when controlling for a number of labor market factors, men of all racial/ethnic groups were compensated more than childless men by about $4,000 to $5,000
Addressing emerging and developing issues (Some things to remember)

- Educate yourself on new laws and court trends
- Learn what topics the Commission is focused on
- Stay alert for new guidance, particularly regarding the ADA and PDA
Enforcing equal pay laws

- Focus on gender, may use directed investigations and Commissioner charges to facilitate enforcement.

Pay Disparity

- Lilly Ledbetter Fair Pay Act
  - Extends the filing date for pay disparity cases

- Title VII of the Civil Rights Act of 1964
  - Connect pay disparity to gender

- Equal Pay Act of 1963
  - Skill, effort and responsibility
  - No connection to gender necessary
Enforcing equal pay laws (Some things to remember)

- Take a look at pay policies. Are they set equally or have the positions evolved over time?
- EEOC has the ability to open directed investigations
- Ledbetter extends the time for the filing of a wage claim
Preserving access to the legal system

- Retaliatory actions,
- overly broad waivers,
- settlement provisions restricting access to Commission.
Retaliation

- Over one third of all charges filed with EEOC in 2013 contained allegations of retaliation, making it the single largest basis the EEOC investigates.
- Taking adverse action against an employee or job applicant because that individual (in good faith) engaged in protected activity such as:
  - Filing a complaint or lawsuit,
  - Making an internal complaint, or
  - Participating in an investigation, including an employer investigation.
  - The underlying claim of harassment or discrimination doesn’t need to be proved.
Preserving access to the legal system (Some things to remember)

- Retaliation, retaliation, retaliation
  - On-going discussion with managers
- Do waivers ask employees to waive future legal rights?
Preventing harassment through systemic enforcement and targeted outreach

- Focus on sexual harassment and harassment related to race, ethnicity, religion and age.
Preventing harassment through systemic enforcement and targeted outreach

- EEOC v. AA Foundries (W.D. Texas Filed Spet. 2011)
  - Race harassment on behalf of multiple victims
  - Jury verdict in Sept 2012 for $200,00 in punitive damages
Preventing harassment through systemic enforcement and targeted outreach (Some things to remember)

- **Me!**
  - Helping begin a change of culture
  - *San Antonio Seminar for Employers (September 15th, Omni Hotel)*
  - Rodney Klein, Education and Training Manager, U.S. EEOC, Dallas District
    - 210.281.7666 (office)
    - 210.693.9618 (cell)
    - rodney.klein@eeoc.gov
QUESTION S
Rodney Klein
Education and Training Manager
Dallas District
U.S. Equal Employment Opportunity Commission
210.281.7666 (office)
210.693.9618 (cell)
rodney.klein@eeoc.gov