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U.S. EEOC Commission Meeting in Miami, Florida

EEOC at 50: Confronting Racial and Ethnic Discrimination In the 21st Century Workplace

Wednesday, April 15, 2015
9:00 am - 12 noon

Miami Dade College
500 NE 2nd Avenue
Wolfson Conference Meeting, Room #7128
Miami, Florida

Good morning Chair Yang, and Commissioners Barker, Feldblum, Lipnic, and Burrows. Congratulations on the upcoming 50th Anniversary of the EEOC on July 5, 2015. It is both humbling and deeply satisfying to consider the enduring changes that have resulted from the Civil Rights movement, the passage of the 1964 Civil Rights Law, and the work of the EEOC.

Thank you for inviting me to speak on racial and ethnic legal barriers in the 21st century workplace. I am speaking on my own behalf. I hope that my service as former general counsel of your agency and my experience representing employers over the past 22 years gives me a perspective that will be helpful to you.

It is wonderful that the Commission is meeting in Miami. I believe the first time the Commission went on the road was in its third year, 1967. The Commission planned its first "hearing," called a "forum," for Charlotte, North Carolina, in the fall of 1966 to disclose racially discriminatory practices in the textile industry. Apparently, North Carolina generated more EEOC charges than any other state. But, because the industry was "hostile and uncooperative," the forum was postponed to January 1967. Still, eight of the 10 companies invited refused to attend and testify.[2]

I. Background of Legal Developments

Race discrimination was the EEOC's first focus in 1965, as well it should have been. The legacy of slavery and its response - the insistence of African Americans to full citizenship - brought the EEOC into being. This is both the 50th anniversary year of the EEOC and 50 years since the release of Daniel Patrick Moynihan's Report on "The Case for National Action." [3] Moynihan

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[2] Hugh Davis Graham, *The Civil Rights ERA: Origins and Development of National Policy, 1960–1972*, at 241 (1990).

[3] http://www.dol.gov/dol/aboutdol/history/moynchapter1.htm

referred to the Civil Rights Movement as "The Negro American Revolution." He rightly called it the "most important domestic event of the postwar period in the United States."

I love the imagery from a July 6, 1964 article in *The New York Times* written by Claude Sitton about occurrences in Jackson Mississippi on the day after passage of the Civil Rights Act. Sitton wrote,

> The attitude taken by the city's white leaders was summed up perhaps by C. A. Tibbetts, manager of the chain that operates the Sun-N-Sand Motel. Shortly after six of the Negroes had registered there, he told newsmen:
>
> > 'We are just going to abide by the law.'

Isn't that wonderful! The Civil Rights Act has passed, and we will "abide by the law." And what a law it was and remains, especially Title VII, which placed the full faith and credit of the United States of America, including our federal judiciary, behind a commitment of equal employment opportunity.

In 1968, the EEOC met in New York, which, with the exception of Washington, D.C., had the highest percentage of white-collar blacks. Still, of the 4,249 New York companies filing EEO-1 reports with the EEOC in 1966, 1,827 reported no black employees at all, and 1,936 reported no Hispanics. There was plenty of work to be done.

The EEOC's second Chair, Stephen Shulman, took great pride in the EEOC's role in the 1960s in developing the law of disparate impact, which was particularly helpful to minorities, because it sped the elimination of irrational hiring barriers that were keeping members of some groups from obtaining jobs. Historian Hugh Graham said that "the agency was prepared to defy Title VII's restrictions and attempt to build a body of case law that would justify its focus on effects and its disregard of intent."[4] And, the EEOC succeeded. In 1971, the Supreme Court accepted disparate impact as a means to prove discrimination in *Griggs v. Duke Power Co.*,[5] observing, "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." The EEOC joined the U.S. Solicitor General, Erwin N. Griswold, on the government's amicus brief.

"Toothless tiger" is the term often used to refer to the EEOC in its pre-1972 days, before it had the power to sue employers believed to have engaged in discrimination. But, *Griggs* and other cases show that to be a bit exaggerated. By being litigation clever, the EEOC had more than mere growl when it came to race and national origin discrimination.

This was shown in 1971, when the EEOC had a hugely significant victory for Hispanics and blacks in the federal Fifth Circuit Court of Appeals in *Rogers v. EEOC*.[6] In an action concerning

[4] HUGH DAVIS GRAHAM, The Civil Rights ERA, at 249–50.

[5] 401 U.S. 424, 431 (1971).

[6] 454 F.2d 234 (1971).

the permissible scope of the EEOC's investigations, the EEOC lawyers, under the direction of the EEOC's third general counsel, Stanley Hebert, urged the court to find that Title VII prohibits a work environment that is hostile to minority workers.

Judge Irving Goldberg, a founder of my law firm, Akin Gump Strauss Hauer & Feld, agreed. He wrote that Title VII's phrase "terms, conditions, or privileges of employment … sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination." The Fifth Circuit held that a Hispanic employee can establish a Title VII violation by demonstrating that her employer created an offensive work environment for employees by giving discriminatory service to its Hispanic clientele.

Fifteen years later, in *Meritor Savings Bank v. Vinson*,[7] the Supreme Court held that the EEOC, Judge Goldberg, and the Fifth Circuit got it right in 1971. And *Vinson* did more. It extended the rule from *Rogers* to Title VII's prohibition of sex discrimination. In the process, it referred to *Rogers* as the first case to recognize a cause of action based upon a discriminatory work environment. Well done, EEOC!

During its first 10 years, the EEOC was extremely active – and successful – in race and national origin discrimination cases before the Supreme Court. The EEOC joined the government's amicus briefs in *Espinoza v. Farah Manufacturing Co.* (1973),[8] *McDonnell Douglas Corp. v. Green* (1973),[9] and *Albemarle Paper Co. v. Moody* (1975).[10] Then, in 1977, it joined the government's brief in *Franks v. Bowman Transportation Co.* (1976),[11] and *Teamsters v. United States* (1977).[12] Each of these cases advanced the ability of blacks, Hispanics and other minorities to seek redress under Title VII in some important respect.

II. Obstacles Persist

Moynihan's 1965 Report observed that blacks had "reach[ed] the highest peaks of achievement. But collectively, in the spectrum of American ethnic and religious and regional groups, where some get plenty and some get none, where some send eighty percent of their children to college and others pull them out of school at the 8th grade, [blacks] are among the weakest." Moynihan called for an expansion of such things as youth employment opportunities, improvements in high-quality education programs, greater housing options, and a broadening of income supplements to combat inequality.

Now, here we sit, 50 years later. The removal of legal obstacles to equality of opportunity has not yet led to equal results for African Americans as a group.

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[7] 477 U.S. 57 (1986).

[8] 414 U.S. 86 (1973).

[9] 411 U.S. 792 (1973).

[10] 422 U.S. 405 (1975); decided 10 days short of the EEOC's 10th anniversary.

[11] 424 U.S. 747 (1976).

[12] 431 U.S. 324 (1977).

It is you who are entrusted with the governmental power that is vested by the people in our EEOC. Plainly, none of us live in the highly charged racial period that typified the world of the EEOC's first Commissioners Aileen Hernandez, Richard Graham, Luther Holcomb, Samuel Jackson, and Franklin Roosevelt, Jr. Our businesses, especially those that compete on a national and international stage, don't shun minorities. Many have built diversity into their business models, understanding its necessity to compete in highly competitive markets. Large corporations have invested in large human resources departments designed to ensure the company's compliance with anti-discrimination laws, and corporate policies require respect for the individual employee and adherence to non-discriminatory practices and procedures.

But many of the obstacles that existed in 1965 persist. Yesterday's concerns about inferior education in segregated schools, is today a problem with the decline in the quality of education in urban schools, coupled with a decline in relatively low-skill, traditional middle class jobs.[13] Higher level, better jobs require higher education, or specialized skills. Many Hispanics face the additional barriers of lack of English language proficiency or legal status.[14] These obstacles exist outside the workplace. The solution to them, if it exists, may be beyond employers' reach. It is beyond my expertise.

3. Internal and External Challenges Confronting Employers in Reducing Barriers

I have mentioned external barriers to some minority groups. Once the individual enters the workplace, these barriers do not disappear. Education and language fluency, especially for recent immigrants, are weights against advancement into higher paying jobs, and may limit geographic placement as well as job placement.

4. Best practices: Pathways to Equality of Opportunity

I am not an expert in best practices. However, I know people who are and I have seen and experienced many different practices, and I have opinions about which of them are most likely to achieve the dual objectives of business success and even-handed diversity, including racial and ethnic diversity.

Here are their characteristics. *First*, the organizational leadership makes diversity a corporate priority. That priority is communicated to the organization by making a business case for diversity that explains how diversity enables the company to accomplish its strategic goals. The business case is understandable and truthful; not propaganda. It is based on the simple principle that "the diversity of individuals and organizations creates an environment where innovation and ideas flourish."

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[13] Arne L. Kalleberg, *Good Jobs, Bad Jobs: The Rise of Polarized and Precarious Employment Systems in the United States, 1970s – 2000s* (Russell Sage Foundation 2011).

[14] Residential patterns may be a severe obstacle to the employment prospects of many blacks and Hispanics, particularly for entry level positions.

One company's business case includes these words from Charles Darwin's, *The Origin of the Species* (1859):

> ...if a plot of ground be sown with one species of grass, and a similar plot be sown with several distinct genera of grasses, a greater number of plants and dry herbage can be raised in the latter than in the former case ...the truth of the principle that the greatest amount of life can be supported by the great diversification of life, is seen under many natural circumstances.

It also includes this statement from the former CEO:

> Character, ability and intelligence are not concentrated in one sex over the other, nor in persons with certain accents, or in certain races, or in persons holding degrees from some universities over others. When we indulge ourselves in such irrational prejudices, we damage ourselves most of all and ultimately assure ourselves of failure in competition with those more open and less biased."

The corporation explained that diversity is *required* to:

- Attract and retain the best talent
- Create an inclusive work environment that fosters innovation
- Promote differing viewpoints to enhance problem solving and decision-making
- Develop a positive reputation in its communities
- Create an inclusive and safe environment

Second, a successful corporate program manages diversity. That means insisting on job-related practices, regularly monitored for disparate impact, and utilization of alternative practices or the modification of current practices to reduce or eliminate the disparate impact when possible.

Third, a successful program includes either formal or informal succession planning that includes monitoring employee development to ensure that minorities are in the pipelines with pathways for advancement. One company that experiments with different ways to move minorities into promotion pathways accomplishes this in some of its districts with "on the bench reports" that identify persons who are promotion-ready for jobs throughout the corporate district and not simply in the single facility where the employee works.

Companies that utilize these measures have moved beyond C. A. Tibbetts' statement, "We are … going to abide by the law," to view diversity as an imperative to a profitable future in global markets where America's diversity provides significant advantages.

4. The Direction of EEOC's work

At the EEOC, there is work to be done. One task is the renovation of the Uniform Guidelines on Employee Selection Procedures, which purport to be based on current developments in the law and industrial psychology, but which have not been revised since enactment in 1978. On May 16, 2007, Kenneth Willner and former EEOC Commissioner, Fred Alvarez spoke at an EEOC Commission meeting and discussed some of the problems with the Uniform Guidelines. I recommend their statements to you.

A second task to consider is measures to ensure that the EEOC retains credibility as an impartial administrator. Advocates deploy logic to support conclusions. Judges reach conclusions by deploying logic. Recent criticisms of the EEOC come from the perception that the EEOC is primarily an advocate for extra-statutory expansion of Title VII. That perception weakens the persuasiveness of the EEOC's guidance and litigation positions.

A third consideration deals with the Quality Control Plan for investigations and conciliations. In my observation, the EEOC as a whole is a more competent organization than at any other time in its history, with few exceptions. Investigators are more knowledgeable, and better trained. They also interact more skillfully and politely with charging parties, respondents and their representatives. Coordination between the investigators and the lawyers has improved investigations.

Moreover, the EEOC appears to proceed purposefully, pursuant to a managed strategic plan. This is highly commendable. In the past, the agency has seemed more charge driven. As a consequence, its practices seemed less cohesive, and its enforcement efforts seemed less coordinated.

I do have suggestions for improvement in investigations and conciliations. Title VII endows the EEOC with powerful tools, including the right to compel witnesses, take testimony under oath, investigate charges, enter and inspect premises and records, require employers to maintain records and make periodic reports, and conduct litigation in its own name on behalf of the public.[15] Taken together, these give the EEOC significant power to encroach on the freedom of our citizens. As a counterweight to this power, Title VII has a conciliatory spirit, calling for the EEOC to cooperate with state and local agencies, offer technical assistance, conduct educational and promotional activities, and seek confidential resolutions of cause findings through "informal methods of conference, conciliation, and persuasion."[16]

In May 2013, former EEOC general counsel Charles Shanor, Ronald Cooper, Eric Dreiband and I provided comments on the EEOC's work that emphasized the conciliatory obligations of the agency. We raised five concerns that we have for cases that have been identified by the field offices as potential litigation vehicles. I highlight two of them here:

[15] Hugh Davis Graham, *The Civil Rights ERA*, at 98.

[16] Title VII §§ 705(g) & 706(b).

First, some field offices do not provide the rationale for their cause findings or their conciliation demands, including rejecting the respondent's requests for information that would enable the respondent to understand the EEOC's claim sufficiently to make a meaningful conciliation proposal. This often places respondents in the unfortunate position of being required to negotiate with no basis to understand or determine the settlement value of the claim, or to know who would receive the settlement proceeds, or who the EEOC believes was subjected to discrimination.

Second, some field offices negotiate during the conciliation process for systemic cases over the waiver of the confidentiality of the conciliated settlement. We believe this to be inconsistent with the intent of Congress.

As the agency continues to consider improvements to the quality control of investigations and conciliations, I hope that you will evaluate these and our other comments.

5. Closing

It is a privilege for me to be here with you today. The EEOC and its commissioners have played a crucial role in opening America's eyes to the destructive force of discrimination, and have brought momentous improvements to our country.