
EEOC's New Guidelines on Workplace Bias:
What Employers Need to Know

by Leslie W. Ehret, Partner, Frilot Partridge



EEOC FIGHT AGAINST SYSTEMIC DISCRIMINATION -- PRIORITY

On April 4, 2006, the EEOC announced that it was making the fight against "systemic discrimination" a "top priority." To that end, the Commission will focus nationwide on investigating and litigating systemic discrimination cases. "Systemic" discrimination cases are those "pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location." Systemic investigations and litigation will be handled by the field offices, not the Commission's headquarters. The purpose of this new approach is to focus more attention on systemic discrimination and not solely on the allegations raised in individual charges.

Thereafter, on April 19, 2006, the EEOC issued new policy guidelines specific to race and color discrimination. According to the EEOC, race remains the most alleged basis of employment discrimination charges, accounting for 35.5 percent of the charges received by the Commission in 2005. These guidelines are found in Section 15 of the Compliance Manual and are summarized below. See www.eeoc.gov/policy/docs/race-color.pdf. The new guidelines provide an overview of what type of conduct the Commission will focus on during its investigation of race and color discrimination charges. The guidelines provide investigators guidance and contain recommendations for employers to take proactive steps to prevent discrimination. The Commission believes the new guidelines will assist employers, employees and the EEOC staff to understand how Title VII applies to a "wide range of contemporary discrimination issues."

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OVERVIEW

Title VII prevents race discrimination based on racial or ethnic ancestry, an individual's physical characteristics (color, hair, facial features, height, weight), race-linked illnesses, cultural characteristics (name, dress, grooming practices, accent, manner of speech), perception, association, subgroup or race plus attributes, and reverse race discrimination. Title VII also prevents color discrimination. Color discrimination occurs when the discrimination is based upon the lightness, darkness or other color characteristic of the individual.

I. EVALUATION OF EMPLOYMENT DECISIONS

A. Disparate Treatment Claims

In cases involving disparate treatment, employers will be found to have violated Title VII if their decisions are driven by racial animus, racial stereotyping or bias, racial steering or assignment, or yielding to customers' racial preferences.

Potential evidence used by the Commission in disparate treatment claims include:

- o Race-related statements made by decision makers or persons influential to the decision: Statements (oral or written) that include "slurs" and "code words" will be evaluated. Witness credibility is key.
- o Comparative treatment evidence: Was the claimant treated differently than similarly situated persons of a different race? If the answer is yes, this will be probative of discrimination. Consistent treatment of similarly situated persons of different races should be shown.
- o Relevant background facts: Used to determine an employer's state of mind and can also be used to reveal other potential violations of Title VII. How did the employer treat other employees or customers? Does the employer have race-related attitudes? How is the work environment generally?
- o Relevant personnel policies: Did the employer deviate from an applicable personnel policy or practice? If the answer is yes, this could support an inference of a discriminatory motive.
- o Decisionmaker's race: This is not controlling but may be relevant. There is no presumption that a person would not discriminate against members of his/her own race.
- o Statistical evidence: The more racially diverse the workforce, the less credible the claim of discrimination. Statistics can also be used in determining the existence of a systemic pattern or practice of discriminating.

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The employer's credibility will be "key." If the employer's reasons are unsupported by the facts, vague, or appear to be fabricated or after the fact, an employer's credibility will be called into question. Even if the employer lacks credibility, however, there should be no finding of discrimination if the evidence reveals its motivation was not race or color.

In disparate treatment cases, the guidelines call for review of "pattern or practice" discrimination; statistical or other evidence that shows discrimination to be the employer's standard operating procedure. Employers should offer nondiscriminatory factors that explain any disparity. Such factors include the racial makeup and qualification of the applicants and the general labor market. The statistical disparity must be statistically significant to support a pattern or practice claim. Field investigators are advised to consult with headquarters for assistance in this area.

B. Disparate Impact Claims

The Commission's goal is to remove barriers not intended or designed to discriminate but operate as "built in headwinds" for a protected class and are not related to job capability. Seniority systems are exempt from disparate impact challenges. The following practices are not exempt:

- o Recruitment practices
- o Hiring and promotion criteria
- o Layoff and termination
- o Appearance/grooming standards
- o Education requirements
- o Experience requirements
- o Employment tests

If the employer's policy is deemed to have a disparate impact, the employer will be required to demonstrate that the policy is job-related and it is consistent with business necessity. If the employer succeeds on making this showing, the claimant will need to demonstrate there is a less discriminatory alternative that meets the employer's business needs and his/her employer has refused to adopt it.

II. EVALUATION OF EQUAL ACCESS TO JOBS

RECRUITING: Employers cannot use recruitment practices that purposefully discriminate on the basis of race or disproportionately limit employment opportunities because of race. The following practices should be avoided:

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- o Recruiting from racially segregated sources, certain neighborhoods, schools, religious institutions, or social networks.
- o Using advertisements based on race or color (or other protected traits).
- o Asking employment referral agencies not to refer or search for candidates of a particular race.
- o Using race as a screening criteria or a criteria that has a disparate racial impact.

HIRING & PROMOTION: It remains the employer's business judgment to determine who should be hired or promoted. However, race cannot be used in these decisions. Promotions and hires based on job-related abilities using uniform and consistent standards is a way to avoid liability.

- o Apply the same selection criteria in the same way to persons of different races.
- o Reasons for the decision must be credible and supported by the evidence.
- o Do not use selection criteria that measure differences between racial groups not related to the job.
- o If the standard has a significant impact based on race, the employer must demonstrate the standard is job-related and consistent with business necessity.
- o Employers must use caution with educational requirements to ensure they do not have a disparate impact and exceed what is necessary to perform the job.
- o Tests that have a disparate impact on race must be validated pursuant to the Government's Uniform Guidelines on Employee Selection Procedures.
- o The test, even if validated, may still be in violation of Title VII if there is another less discriminatory alternative that serves the employer's needs and it fails to use it.
- o Employers cannot reject persons of one race who have conviction records and accept similarly situated applicants of another race.
- o Employers must be able to justify criteria as job-related and consistent with business necessity by showing it considered the nature and gravity of the offense, the time that has passed since the conviction or completion of sentence, and the nature of the job held or sought.
- o When a rejection is based on arrest records, the employer must show the records are not only related to the job but that it evaluated whether the applicant or employee actually engaged in the misconduct.

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- o Employer policies that relate to off-the-job conduct are also subject to challenge.

DIVERSITY & AFFIRMATIVE ACTION: Employers who change hiring practices to facilitate diversity must ensure that the practice minimizes the disparate impact on any racial group. Employers who implement a voluntary affirmative action plan must ensure it is legal under Title VII.

III. EVALUATION OF OPPORTUNITY FOR JOB SUCCESS

RACIAL HARASSMENT: Work environments must be free from racial harassment. To trigger liability, the conduct must be unwelcome and it must be sufficiently severe or pervasive to alter the terms and conditions of employment in the mind of the victim and from the perspective of a reasonable person in his/her position. This is a case-by-case analysis.

- o Conduct must not be solicited or incited by the employee: Was the employee a willing participant?
- o Relevant factors are the frequency of the conduct, its severity, whether it was physically threatening or humiliating, whether it unreasonably interfered with the employee's work performance, and the context in which it occurred.
- o Single or isolated incidents are generally not enough to create an abusive environment.
- o If the single incident is physical or threatens racially motivated physical assault, it may be sufficient to violate Title VII.

Employers are generally responsible for the conduct of their supervisors. If supervisory discrimination results in a tangible employment action, the employer is liable. If there is no tangible action, an employer can avoid liability by showing it exercised reasonable care to prevent and promptly correct any harassing behavior and the employee unreasonably failed to take advantage of any preventive or corrective opportunities or to avoid harm. If the harasser is an owner, president, partner or officer, or a "proxy" of the organization, there is no affirmative defense available, even if there is no tangible action. If the harasser is a coworker or non-supervisory employee, the employer will be liable if it knew or should have known about the conduct and failed to take prompt and corrective action.

RACIAL BIAS: Race bias cannot affect work assignments, performance measures, pay, training, mentoring, networking, discipline, or other terms, conditions, or privileges of employment.

- o Work must be distributed without regard to race.

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- o Performance evaluations, training and feedback cannot be affected by racial bias.
- o Employees cannot be excluded from networks because of racial bias.
- o Appearance standards generally must be neutral and consistently applied to all races and ethnic groups. Use caution with height and weight standards. These have been challenged as having disparate impact.
- o Dress codes must treat racial and ethnic attire that complies with the code in the same manner as other complying attire.
- o Neutral hairstyle rules are permitted as long as the rules respect racial differences in hair textures.
- o Employers must make exceptions to no-beard policies for men with pseudofolliculities barbae unless being clean-shaven is job-related and consistent with business necessity.
- o All forms of compensation must be given without regard to race.
- o Discipline and discharge decisions must be enforced evenhandedly without regard to race.

RETALIATION: Employees are to be free from retaliation for opposing discrimination or participating in an EEOC proceeding by filing a charge, testifying, assisting or participating in any manner in an investigation, proceeding or hearing under Title VII.

IV. STEPS TO PREVENTION

The new guidelines provide examples of steps an employer can take, a proactive approach, to prevent or reduce Title VII violations. The EEOC lists the following steps:

- “Develop a strong EEO policy that is embraced by the CEO and top executives; train managers and employees on its contents; enforce it and hold company managers accountable.
- Make sure decisions are transparent (to the extent feasible) and documented. The reasons for employment decisions should be well explained to affected persons. Make sure managers maintain records for at least the statutorily required periods.
- Recruit, hire, and promote with EEO in mind by implementing practices designed to widen and diversify

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the pool of candidates considered for employment openings, including openings in upper-level management.

- Monitor for EEO by conducting self-analyses to determine whether current employment practices disadvantage people of color, treat them differently, or leave uncorrected the effects of historical discrimination in the company.
- Analyze the duties, functions, and competencies relevant to jobs. Then create objective, job-related qualification standards to those duties, functions, and competencies. Make sure they are consistently applied when choosing among candidates. Identify and remove barriers to EEO, such as word-of-mouth recruiting in a workforce that does not reflect the diversity of the qualified labor market, or employment tests if they cannot demonstrably be tied to job performance and business necessity.
- Develop the potential of employees, supervisors, and executives with EEO in mind by providing training and mentoring to give workers of all backgrounds the opportunity, skill, experience, and information necessary to perform well and to ascend to upper-level jobs.
- Make sure promotion criteria are made known and job openings are communicated to all eligible employees.
- To protect employees from unlawful racial (and other) harassment, employers should adopt a strong anti-harassment policy, periodically train each employee on its contents and procedures, and vigorously follow and enforce it. The policy should contain:

A clear explanation of prohibited conduct, including examples;

- Clear assurance that employees who make complaints or provide information related to complaints will be protected against retaliation;
- A clearly described complaint process that provides multiple, accessible avenues of complaint;
- Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;
- A complaint process that provides a prompt, thorough, and impartial investigation; and
- Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.

- Monitor compensation practices and performance appraisal systems for patterns of potential discrimination. Make sure performance appraisals are based on employees' actual job performance. Ensure consistency, i.e., that comparable job performances receive comparable ratings regardless of the evaluator and appraisals are neither artificially low nor artificially high. Allow employees, without

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negative consequences, to have their appraisals reviewed and corrected when appropriate.

- Develop the potential of employees, supervisors, and executives with EEO in mind by providing training and mentoring that offers workers of all backgrounds the opportunity, skill, experience, and information necessary to perform well, and to ascend to upper-level jobs.
- Promote an inclusive culture in the workplace by inculcating an environment of professionalism and respect for personal differences. In addition, employees of all backgrounds should have equal access to workplace networks.
- Foster open communication and early dispute resolution. This will minimize the chance of misunderstandings escalating into legally actionable EEO problems. In addition, an alternative dispute resolution (ADR) program can resolve EEO problems without the acrimony associated with an adversarial process. Importantly, however, even if there is such a program, an employee still is free to file a charge of discrimination with EEOC, and utilizing a company grievance procedure or other ADR mechanism does not suspend the running of the time period for filing an EEOC charge. As a best practice, however, employers should consider expressly waiving in advance any defense related to an employee's failure to adhere to the charge-filing time period if the employee properly utilizes the employer's ADR program.
- Protect against retaliation. Provide clear and credible assurances that if employees make complaints or provide information related to complaints, the employer will protect employees from retaliation and consistently follow through on this guarantee." (See Compliance Manual, Section 15 – IX Proactive Prevention).