

Responding to Allegations of Systemic Discrimination: Policy and Practice Issues for Employers

Gerald Calvasina
Southern Utah University

Richard Calvasina
University of West Florida

Eugene Calvasina
Southern University

In 2005, Equal Employment Opportunity Commission (EEOC) Chair Cari M. Dominguez created a task force to assess how the EEOC was addressing “systemic discrimination”. Systemic discrimination cases involve allegations where a “pattern or practice, policy and/or class [cases] where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location” (EEOC, 2006). The purpose of this paper is to assess the EEOC Systemic Task Force’s recent focus on systemic discrimination allegations in order to make recommendations to enable employers to comply more easily with EEOC regulations.

INTRODUCTION/HISTORY

The Equal Employment Opportunity Commission’s (EEOC) Systemic Task Force has defined systemic cases of discrimination as a “pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location” (EEOC, 2006). The genesis of the EEOC’s focus on systemic discrimination began in 1972 with amendments to Title VII of the 1964 Civil Rights Act. The 1972 amendments to the act granted the EEOC litigation authority and transferred the authority to pursue “pattern or practice” cases under Section 707 of Title VII from the U.S. Department of Justice to the EEOC (EEOC, 2006). Armed with this new authority, in 1973 the EEOC created task forces in their headquarters to conduct nationwide systemic investigations. These newly created taskforces targeted four of the country’s largest employers – General Electric, General Motors, Ford, and Sears (EEOC, 2006).

In 1974, the EEOC created the first systemic program in field offices and established “707 units” in Regional Litigation Centers that were responsible for addressing “pattern or practice” discrimination under Section 707 of the Act. These new units initiated a large number of systemic investigations but due to insufficient resources, a large backlog of charges ensued (EEOC, 2006).

Over time, the EEOC has reorganized its efforts to combat systemic discrimination with significant changes to the agency’s efforts occurring in 1995. In that year, then EEOC Chairman Gilbert Casellas, issued a directive that eliminated headquarters oversight of the field offices systemic programs (EEOC,

2006). While the EEOC's focus to investigating and prosecuting allegations of systemic discrimination have changed over time, its resolve and focus on attacking systemic discrimination in the workplace has not waned.

In 2005, Chair Cari M. Dominguez charged a new task force with reassessing how the EEOC addresses systemic discrimination, and with recommending new strategies for enhancing the EEOC's systemic program. The task force, led by EEOC Commissioner Leslie E. Silverman, developed recommendations designed to enhance and refocus the EEOC's efforts to combat systemic discrimination. The task force concluded that "fundamental change" in how the EEOC's systemic program was operating was needed to effectuate the EEOC's objectives regarding systemic discrimination (2006).

SYSTEMIC INVESTIGATIONS

Over time, the EEOC's focus on systemic discrimination cases has yielded some impressive results. In FY 2013, the EEOC reported that it was able to resolve 300 systemic investigations. Sixty-three of those investigations were resolved through the EEOC's conciliation process. The EEOC also secured over \$40 million in relief through its systemic investigation efforts benefiting more than 8,300 individuals (EEOC P & A Report, 2013). The EEOC detailed a number of those resolutions from 2013 in its P & A Report and examples of those are in Table 1.

TABLE 1
EEOC CASE RESOLUTIONS 2013

- The EEOC successfully resolved two major systemic investigations of staffing agencies through its conciliation process after issuing findings of discrimination against the firms. In the first, the EEOC found that a staffing agency engaged in a pattern or practice of classifying and failing to refer job applicants based on their race, color, sex, national origin, age or disability. Under the agreement, the company agreed to pay \$920,000 to individuals affected by the discriminatory practice, and to alter its practices to ensure future compliance with the anti-discrimination laws. In the second, the EEOC reached a successful conciliation agreement with a staffing firm after finding that the staffing agency refused to hire, refer and assign individuals for jobs based on race, sex, disability, and in retaliation for engaging in activity protected under the anti-discrimination statutes. Terms of the conciliation agreement included \$400,000 in back pay to class members; job placement for persons who had not been referred prior to the EEOC's findings; resume assistance to class members; changes in the staffing firm's practices and procedures; training for employees; and monitoring by the EEOC of the company's employment actions for the duration of the agreement.
- After a finding that a food production company discriminated against a class of African Americans through its recruitment and hiring practices, a successful conciliation agreement was reached with the company. Under the agreement, the company will pay over \$900,000 to persons denied work because of their race, and institute non-discriminatory recruitment and hiring practices.
- A nationwide systemic investigation of a major retail establishment was successfully resolved by a conciliation agreement when the employer agreed to pay \$2.3 million to a class of 76 individuals whom the EEOC found were denied reasonable accommodation under the ADA. Under the agreement, the employer has also agreed to make significant changes to its reasonable accommodation policies and practices nationwide; to conduct issue specific training for employees on the ADA and reasonable accommodations; and to provide reports to the EEOC so that its compliance with the ADA can be monitored over the three-year period of the agreement.
- The EEOC reached a conciliation agreement with an employer that will provide \$21.3 million to a class of African Americans subjected to racial discrimination. The agreement followed findings by the EEOC that the employer had engaged in a range of racially discriminatory practices, including harassment, denial of promotions, and unfavorable job assignments. The agreement stems from a systemic investigation launched after 78 charges were filed with the EEOC, and will provide relief to over 200

individuals. The Conciliation Agreement mandates that the employer establish a personnel system that will ensure posting of future vacancies and promotional opportunities, and the implementation of a new HR database system to track applicant data. The Agreement also requires that the company appoint an EEO Coordinator to oversee the creation and distribution of new anti-discrimination policies, ensure that any future discrimination complaints be properly investigated internally, and to conduct EEOC-approved training to all management and staff members.

- The Commission continued its enforcement efforts to address employer policies requiring background screening that do not comport with federal anti-discrimination law and EEOC policy. Several of these systemic investigations were resolved after the EEOC found that the employer’s background check policy discriminated against African Americans, and led to conciliation agreements under which the employers agreed to modify their respective screening policies. Conciliation agreements were reached with a nationwide trucking firm, a major U.S. fast food chain, and a car service chain with multiple facilities.

- The Commission resolved two systemic sexual harassment cases after issuing findings of discrimination, each resulting in monetary relief of \$1 million or more. In the first case, the EEOC found that an employer had subjected female employees to widespread sexual harassment. The company agreed to pay over \$1 million to a class of at least 22 women who faced harassment. Additionally, the company agreed to major operational changes, including installing a human resources staff member at the worksite, training of its employees, and monitoring by the EEOC over the five year term of the agreement.

In the second, the EEOC successfully conciliated a systemic investigation after it determined that a class of females was subjected to sexual harassment. The conciliation agreement included \$1 million in damages for four persons who had filed charges with the Commission and approximately 25 additional class members, issue-specific training for employees on preventing sexual harassment in the workplace, procedural/practice changes in how the employer responds to complaints of sexual harassment, and the EEOC’s monitoring of Respondent’s compliance with federal laws prohibiting sexual harassment.

(EEOC P & A Report, 2013, pp. 32 – 33)

SYSTEMIC LITIGATION

In FY 2013, the EEOC filed 21 systemic lawsuits that challenged “a variety of systemic discrimination, including challenges to patterns or practices of refusing to hire applicants based on race or sex, criminal record policies that disproportionately screen out African American applicants, pre-offer medical inquiry and examination policies that violate the ADA or GINA, reductions in force that target older employees, and unequal pay practices” (EEOC P & A Report, 2013, p. 33). Table 2 contains settlements highlighted by the EEOC in the agency’s 2013 Performance and Accountability Report.

**TABLE 2
SETTLEMENTS HIGHLIGHTED BY THE EEOC IN THE EEOC’S 2013 PERFORMANCE
AND ACCOUNTABILITY REPORT**

EEOC v. Burger King/Carrols Corp
EEOC v. Mesa Systems
EEOC v. Interstate Distributor Company
EEOC v. Presrite
EEOC v. Hamilton Growers
EEOC v. Dillards

(EEOC P & A Report, 2013, p. 34)

The consent decree settlement negotiated by the EEOC with Burger King/Carrols Corp, the “world’s largest Burger King franchisee”, was the end result of 15 years of litigation regarding allegations of

sexual harassment and retaliation at company restaurants in 13 states (Smith, 2014 and EEOC Press Release A, 2013). The lawsuit alleged a wide variety of harassment against 89 female employees, many who were teenagers, and ranged from obscene comments, jokes, and propositions, to unwanted touching, exposure of genitalia, strip searches, stalking and rape, behavior that was perpetrated by managers in the majority of cases (EEOC Press Release A, 2013). Under the terms of the consent decree, the company will in addition to paying \$2.5 million in compensatory damages and lost wages to the 89 victims, will also be required to implement a variety of changes including the development of new processes to prevent and respond to harassment allegations. Changes include enhanced training for managers, improved mechanisms for tracking harassment complaints, notices detailing resolution of the lawsuit to be posted at all Carrol's domestic Burger King locations, and an injunction prohibiting further harassment and retaliation (EEOC Press Release A, 2013).

In the Interstate Distributor Company (IDC) case, the consent decree settled a lawsuit that resulted from a systemic investigation led by the EEOC's Denver Field Office. The EEOC alleged in the suit that IDC, a nationwide trucking firm, unlawfully denied reasonable accommodations and terminated over 400 employees under its maximum leave policy (EEOC Press Release B, 2012 and EEOC P & A Report, 2013). In the suit, the EEOC also alleged that the company would automatically terminate employees rather than determining if it would be reasonable to provide additional leave as an accommodation (EEOC Press Release B, 2012). The three-year consent decree the company agreed to includes \$4.25 million in monetary relief, injunctions against the company regarding further discrimination or retaliation based on disability, requires the company to revise its policies and to include reasonable accommodations for persons with disability, mandatory training for all employees regarding the firm's ADA policies, and the appointment of an internal consent decree monitor to ensure compliance with the decree (EEOC Press Release B, 2012).

In the Dillard's systemic discrimination case settled in 2012, the national retail chain agreed to pay \$2 million in monetary relief and to commit to extensive, company-wide injunctive relief to settle the class action disability discrimination lawsuit originally filed in 2008 (EEOC Press Release C, 2012). The original plaintiffs in the case alleged that they had been discriminated against for failure to comply with Dillard policy that required them to disclose the nature of their medical conditions to be approved for sick leave. The EEOC argued that the policy violated that ADA which prohibits employers from inquiring into the nature of an employees unless it can establish business necessity (EEOC Press Release C, 2012). In addition to the usual reporting requirements associated with these types of settlement agreements, Dillard also agreed to hire an outside consultant to facilitate development of appropriate policies and practices and to help develop and implement training for all employees (EEOC Press Release, 2012).

This increase in the number of systemic cases has been in part attributed to the EEOC's "expanded use of technology that makes it easier to identify systemic violations and manage systemic investigations and litigation" (Smith, 2014). Other "experts in EEOC law" attribute the increase in systemic investigations to the "much more aggressive" approach taken by the EEOC advanced by the Obama administration (Bunch, 2014). Others cite the "forceful Posture of the government's equal -employment-opportunity arm, the commission's sweeping agenda and recent rule changes" as further evidence supporting criticism of the EEOC (Bunch, 2014).

One strategy utilized by the EEOC as part of their "aggressive" pursuit of systemic discrimination includes partnering with other federal agencies to share information in support of systemic investigations (Stanton and Giraudo, 2014). The EEOC, the Office of Federal Contract Compliance Programs (OFCCP), and the Federal Trade Commission (FTC) have been jointly focusing on the use of criminal background checks by employers (Stanton and Giraudo, 2014 & Sperry, 2014). The EEOC reached a settlement agreement with PepsiCo in 2012 settling EEOC allegations that the Pepsi's criminal background screening policy discriminated against blacks. As part of the agreement, Pepsi paid \$3.13 million dollars to victims and "agreed to change its screening policy to remove "roadblocks" for blacks with criminal histories" (Sperry, 2014).

The EEOC and the FTC also co-published guidance documents focusing on "best-practices" guides for employers regarding the use of background checks in employment selection processes (Maurer, 2014

& EEOC, 2014). As Maurer noted, the joint announcement by the agencies did “not introduce any new agency guidance”, but additional “best practices” guidance. The announcement should serve as increased support for the federal government’s focus on systemic discrimination (Maurer, 2014). In addition to its focus on race discrimination, the EEOC has also signaled that it will step up its efforts regarding national origin discrimination (Shelby, 2014 & EEOC, 2013).

The EEOC FY 2013 P & A Report also detailed the EEOC’s Strategic Plan for FY 2012 through 2016 and noted the importance of the agency’s systemic enforcement program as “a top agency priority” (EEOC P & A Report, 2013). In the 2013 P & A Report the EEOC also “declared its commitment to combating systemic discrimination in its new Strategic Enforcement Plan, particularly with respect to barriers to recruitment and hiring, discriminatory policies that affect vulnerable workers, discriminatory pay practices, retaliatory practices and policies, and systemic harassment” (EEOC P & A Report, 2013, p. 31).

WHAT SHOULD EMPLOYERS DO?

All employers subject to laws enforced by the EEOC should be aware of the commission’s “aggressive” focus on enforcement associated with its systemic discrimination program. The EEOC’s approach to enforcement has been characterized by a number of attorneys as overly aggressive and “forceful” (Bunch, 2014). One attorney, with experience in and outside of the EEOC characterized EEOC staffers as viewing their work “as God’s work”, and “that employers, especially the ones they were currently suing, were malevolently unenlightened, law-flouting discriminators that would discriminate, harass and retaliate with reckless abandon without their vigilance and the threat of liability” (Bunch, 2014).

Former EEOC staffer Merrily Archer, goes on to note that the EEOC’s “zealous black-hat, white-hat approach” is designed not so much to reduce discrimination but to “make new employment law and claim bureaucratic victories” (Bunch, 2014). Additionally, Archer believes that the EEOC’s strategy is designed to obtain quick settlement agreements from employers and avoid lengthy court battles. Executives and human resource professionals of employers that find themselves facing EEOC systemic investigations are advised to make sure they are properly prepared to respond to the EEOC’s aggressive tactics (Bunch, 2014).

Organizations looking to stay off of the EEOC’s systemic discrimination program’s radar face a tall task. “Best practices” suggestions like regular audits of policies and procedures are no guarantee, yet are a necessary first step if organizations are to reduce their risk of discrimination allegations (Stanton and Giraudo, 2014). As part of the audit process, the impact policies and decisions have on members of protected groups should be monitored. Conducting internal statistical analysis as part of the audit process can be useful but is not without risk. Stanton and Giraudo note that some courts do not recognize the confidentiality of this type of analysis, the information generated by the employer could be used against it (Stanton and Giraudo, 2014). Employers are advised to be sure to consult competent legal counsel before proceeding with these types of audit to ensure the confidentiality of the audit information. Employers should also be ready to act on the results of the audit and make necessary changes to policies and procedures causing a disparate impact on protected groups of employees (Stanton and Giraudo, 2014).

Statistical analysis of the impact of decisions is not new, but employers need to become aware of a “new twist” regarding discrimination that has recently been identified called “steering” (Bruce, 2014). According to Dr. Bruce, “steering may be charged when people in a protected class are steered to jobs with lower long-term potential than other similar jobs” (Bruce, 2014). Bruce cited a recently settled case that resulted from an OFCCP compliance evaluation involving G&K Services. According to Bruce, G&K Services had practices that assigned workers to jobs with different pay rates on the basis of gender. The settlement resulted in payment of \$265,983 in back wages to female workers “steered into the lower-paying jobs” and \$23,968 in back wages to “male job applicants who were denied the opportunity to compete for open lower-paying laborer positions” (Bruce, 2014). So, in addition to examining the short

run impact of hiring decisions, employers must also examine the long run impact of “steering” applicants into lower paying positions.

Employers that want to consider the backgrounds of applicants should also make themselves aware of the EEOC and Federal Trade Commission (FTC) regulations. The FTC enforces the Fair Credit Reporting Act (FCRA) and requires employers to follow certain procedures when utilizing third parties to conduct background checks and when taking an adverse action based on background information obtained through a third party. Employers are required to inform an applicant in a stand-alone format that they are employing a third part to conduct a background investigation and that the information might be used in the decision making process. The employer must also obtain the applicant’s permission to conduct the background investigation and notify the firm utilized to conduct the investigation that the applicant has been notified. Before the employer can take an adverse employment action against the applicant, the employer must give the applicant or employee notice that includes a copy of the report utilized to make the decision and “A Summary of Your Rights Under the Fair Credit Report Act”(EEOC, 2014).

Additionally, employers who generate background information must also be aware of rules and procedures required for disposal of the information once a decision has been made. The general rule for employment records, regardless of whether or not the applicant was hired, is that all records related to hiring must be kept for one year after the records were made, or after a personnel action was taken, whichever comes later (EEOC, 2014). For government contractors with 150 employees and a contract of at least \$150,000, educational institutions and state and local governments, the requirements are extended to two years (EEOC, 2014). The FTC also has additional requirements associated with disposal that emphasize making sure that records are disposed of securely (EEOC, 2014).

The federal government’s expansion of employment law regulations and guidelines has been well documented (Grossman, 2013). In addition to the focus on systemic discrimination, the Obama administration has a number of other regulatory proposals in process that will complicate human resource decision making and compliance for the foreseeable future.

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