Drafting Position Statements to Mitigate EEOC Full-Scale Investigations and Lawsuits
Strategic Techniques to Address Claims of Failure to Hire, Equal Pay, Class vs. Individual and More

WEDNESDAY, APRIL 30, 2014
1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today’s faculty features:

William J. Anthony, Shareholder, Jackson Lewis, Albany, N.Y.
Richard S. Cohen, Shareholder, Jackson Lewis, Phoenix
Paul Patten, Shareholder, Jackson Lewis, Chicago
Shelley Carthen Watson, Senior Associate General Counsel, University of Minnesota, Minneapolis

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Drafting Position Statements to Mitigate EEOC Full-Scale Investigations and Lawsuits
EEOC adopts systemic initiative in 2006.

Reiterates focus on systemic litigation in strategic plan approved February 22, 2012.

Strategic Enforcement Plan issued on December 17, 2012 identifies six nationwide priorities.

“Targeted enforcement”

- Deeper dives during investigations
- Expect more lawsuits
Identifies the Commission’s nationwide priorities:

- Eliminating systemic barriers to recruitment and hiring
- Protecting immigrant, migrant, and other vulnerable workers
- Addressing emerging issues
  - ADA issues, LGBT coverage under Title VII, pregnancy-related discrimination, aging workforce
- Enforcing equal pay laws
- Preserving access to the legal system
- Combating harassment through systemic enforcement and outreach
Issues with broad national impact

Developing areas of law (LGBT, pregnancy-related limitations under ADA)

- *E.g.*, *EEOC v. Boh Brothers Constr. Co.* (5th Cir. 2013)

Vulnerable workers (immigrant, migrant workers, disabled)

Issues that may be best addressed by the agency given access to data and research

Discriminatory practices that impede or impair full enforcement of anti-discrimination laws
Target employers in bigger, more costly systemic discrimination suits

Investigators looking to turn individual cases into systemic cases

Nearly every individual charge of discrimination is a potential systemic EEOC investigation and class-wide lawsuit
Systemic claims challenging hiring/promotion practices

- Statistical analyses reveal that pre-employment screening assessments may have disparate impact under Title VII.

- The bigger the data set, the more people being pushed through these assessments, the greater the risk for the employer.

  - EEOC v. Dolgencorp LLC d/b/a Dollar Gen., N.D. Ill. (Jun. 11, 2013)
  - EEOC v. BMW Mfg Co. LLC, D. S.C (Jun. 11, 2013)

But agency has had little success in existing cases.

  - EEOC v. Peoplemark, Inc. (W.D. 2011)
  - EEOC v. Freeman (D. Md. 2013)
  - EEOC v. Kaplan Higher Ed. Corp. (6th Cir. 2014)
ADA claims

- *EEOC v. All Star Seed d/b/a Eight Star Commodities* (C.D. Cal.)
  - Suit filed in Sept. 2013 alleging discrimination based on disability and genetic information where pre-employment physical exam revealed family medical history.
  - Even though not expressly one of the top six national priorities, disability claims were chart-topper for EEOC in 2013.

LGBT claims

Religious discrimination claims (up 33% in 2013)

GINA suits

- *EEOC v. Founders Pavilion Inc.* (W.D.N.Y. 2014)
Top priority for EEOC right now.

EEOC will focus on all aspects of employers’ pre-employment selection processes including:

- Pre-employment tests/online assessments
- Criminal background checks
- Credit checks
- Physical fitness tests
- Drug screens

Count on EEOC following through with this priority!
Shelley Carthen Watson
Senior Associate General Counsel
University of Minnesota, Minneapolis
carth001@umn.edu
STANDARDS FOR SELECTING SYSTEMIC RESPONDENTS

- EEOC treats cases identified as involving “systemic discrimination” where the “patterns of employment discrimination are the most severe, and where maintenance of a successful ‘systemic case’ will have a significant positive impact on the employment opportunities available to minorities and women.” EEOC Compl. Man. § 16.1.
STANDARDS FOR SELECTING SYSTEMIC RESPONDENTS

• Policies which result in low utilization of available minorities and/or women
• Employment of a substantially smaller proportion of minorities and/or women than other employers in the same labor market who employ persons with the same general level of skills
• Employment of a substantially smaller proportion of minorities and/or women in higher paid job categories than in lower paid categories
STANDARDS FOR SELECTING SYSTEMIC RESPONDENTS

• Specific recruitment, hiring, job assignment, promotion or discharge policies and practices that have an adverse impact on minorities and/or women

• Employment practices that have the effect of restricting or excluding available minorities or women, and who are likely to be used as a model for other employers due to the number of their employees, their competitive position in the industry, or their impact on the local economy

• Employers with large turnover or expanding employment opportunities whose practices may not provide available minorities and women with fair access to job opportunities.
RED FLAGS THAT THE EEOC IS PURSUING A SYSTEMIC INVESTIGATION

- Multiple charges with similar allegations filed in a short period of time
- Allegations in an individual charge suggesting that a group of employees may have been impacted
- The charge provides little information to regarding what policies or practices are under investigation
- No request to mediate
- Requesting nationwide information when the charge appears to address local issues
RED FLAGS THAT THE EEOC IS PURSuing A SYSTEMIC INVESTIGATION

- Requesting information about policies or selection criteria beyond that referenced in the charge
- Requesting data involving applicants or positions not covered by the charge
- Requesting information about how selection criteria is relevant to job performance
- Requesting HR database information
- Questionnaires or surveys sent by EEOC to employees concerning specific policies or practices
- Requesting on-site interviews for a large number of employees
INITIAL STEPS

- Treat this like a potential class action
- A thorough investigation is more important than ever
- Determine timeliness for acts referenced in the charge
- Preserve documents
- Enact safeguards against retaliation
- Determine who will do the investigation
- Establish a point of contact with the EEOC
- If there is a possibility the charge will turn into a systemic case, consider resolving the individual case early
- If a pending individual charge raises questions regarding an entire class of employees, consider whether policy or procedure changes might be useful.
- Be prepared for multiple rounds of requests for information
INVESTIGATION GUIDELINES

• Determine whether the charge resulted from an isolated incident or from an established practice or policy
• Obtain relevant documents
• Obtain comparator information
• Clean and analyze data before sharing with the EEOC
INVESTIGATION GUIDELINES

• Determine what information is available in response to information requests
• Consider potential objections to narrow the scope of information to be provided
• Contact the EEOC investigator and discuss what was learned from the due diligence
INVESTIGATION GUIDELINES

• Identify and interview key individuals and witnesses, as well as authors of any documents that are not self-explanatory
• Identify former applicants and employees who may support the EEOC’s theories
• Prepare for EEOC interviews
EEOC Can Challenge Anything It:

- Investigated After Something Reasonably Came to Its Attention;
- Found Cause to Believe was Discriminatory; and
- Attempted to Conciliate in Good Faith
Position Statements
Policies/Guidelines/Code of Conduct
Spreadsheets or Other E-Data
Discussion of ALL Hiring or Promotion Procedures
EEOC Considers Position Statements Optional

Because of optional nature, do not feel compelled to explain charging party’s employment or company’s policies in complete detail

Tell the truth

Show that “justice” was done
- If current employee, implement non-retaliation guidance on need to know basis
- Establish point of contact, e.g., attorney appearance
- Find out if charging party has an attorney
- Determine timeliness for acts referenced in charge
- Secure relevant documents
State company’s position persuasively

Request a no probable cause finding

Explain company’s EEO policies and if appropriate, training and complaint procedures

Charging party’s employment history

Explain non-discriminatory/business reasons for disputed decisions

Lengthy discussions of legal precedent are usually unnecessary
Providing policies that may have a disparate impact or demonstrate lack of accommodation

Lists of employees treated in a like manner (sometimes necessary when responding to state FEPA charges)

Background showing the size of the company, especially if charge is filed against subsidiary
ABC Widget Distribution, Inc.

Barry Aggressive
Investigator
Equal Employment Opportunity Commission
55 Litigation Way
Anywhere, USA 99999

Re: Smith v. ABC Widget Distrib.,

Dear Mr. Aggressive:

ABC Widget Distribution, Inc., ("ABC") hereby files its statement of position denying the allegations of race and disability discrimination filed by former employee John Smith ("Charging Party").

Background

Founded only 30 years ago, ABC has grown by acquisition to become the largest widget distributor in the United States. ABC employs 35,000 persons in delivery and distribution centers positions in 49 states.

Smith and All ABC Employees are Treated Equally

ABC is fully committed to treating all employees, disabled and non-disabled, in a non-discriminatory manner. See Complete Handbook of Policies attached as Ex. 1. In order to maintain staffing levels, ABC utilizes a no-fault attendance policy. Under this consistently applied policy, ABC terminates any employee if he/she accumulates 12 attendance points in a rolling 12 month period. Charging Party was treated the same as other non-disabled employees-Charging Party was terminated when his absences resulted in him exceeding 12 points.

To demonstrate that ABC consistently applies its no-fault attendance policy, attached is a chart demonstrating this fact. The chart shows that over the past year, ABC has terminated 72 other employees for violating ABC’s no-fault attendance policy.
Types of Claims

- Class vs. Individual Claims
- Failure to Hire Claims
- Equal Pay Claims

Narrow Scope and Individualize!
How is the Company’s Data Stored?

Employee Handbook with EEO policy

Company Organization Chart/Structure Nationwide

List of all Stores Nationwide with Addresses, Names, Phone Numbers for All Managers

All Those Hired (promoted) Nationwide into the Relevant Position
Focus on comparable employees reporting to the same supervisor, at the same facility

Focus on employees engaging in exactly the same misconduct

Focus on comparable employees within 300 days of the filing of the charge
EEOC’s RFI’s are Informal Requests Only
EEOC will have to Serve a Subpoena
Five Days (excluding Saturdays, Sundays, and federal holidays) to File a Petition to Revoke or Modify
Chances of Success with District Court Judge?
Chances of Success on Appeal?
The Potential for a Pyrrhic Victory
Negotiate Up the Organizational Chain of Command

Unilaterally provide a sufficient subset of information requested and explain how the subset is sufficient
Special Investigations

- Title VII, ADA, GINA Commissioner Charges
- ADEA/EPA Directed Investigations
Number of Employees In the Organization At All Locations: Please check ( ) one:

- Less Than 12
- 15 - 100
- 101 - 200
- 201 - 500
- 500 or more

4. Your Employment Data (Complete as many items as you can)

   Date Hired: ____________________  Job Title At Hire: ____________________
   Pay Rate When Hired: ______________  Last or Current Pay Rate: ______________
   Job Title at Time of Alleged Discrimination: ____________________
   Name and Title of Immediate Supervisor: ____________________  Job Title Applied For: ____________________
   If Applicant, Date You Applied For Job: ____________________  Job Title Applied For: ____________________

5. What is the reason (basis) for your claim of employment discrimination?

   For example, if you are over the age of 40 and feel you were treated worse than younger employees or you have
   other evidence of discrimination, you should check ( ) AGE. If you feel you were treated worse than those not of
   your race or you have other evidence of discrimination, you should check ( ) RACE. If you feel the adverse treatment
   was due to multiple reasons, such as your sex, religion and national origin, you should check all three. If you
   complained about discrimination, participated in someone else's complaint, or if you filed a charge of discrimination
   and a negative action was threatened or taken, you should check ( ) RETALIATION.

   Race  ☐  Sex ☐  Age ☐  Disability ☐  National Origin ☐  Color ☐  Religion ☐  Retaliation ☐  Pregnancy ☐
   Other reason (basis) for discrimination (Explain): Because we are refugees.

6. What happened to you that you believe was discriminatory? Include the date(s) of harm, action(s) and
   includes the name(s) and title(s) of the person(s) who you believe discriminated against you. (Example: 1/12/96 --
   Written Warning from Supervisor, Mr. Johnson)

   A) Date: ____________________  Action: ____________________
   Name and Title of Person(s) Responsible: ____________________

   B) Date: ____________________  Action: ____________________
   Name and Title of Person(s) Responsible: ____________________

   Describe any other action you believe were discriminatory.
   ____________________

   ____________________

   ____________________

   ____________________

   (Attach additional pages if needed to complete your response.)
Number Of Employees In The Organization At All Locations: please check ( ) one

- Less Than 15
- 15 - 100
- 101 - 200
- 201 - 500
- More 500

4. Your Employment Data (Complete as many items as you can)

- Date Hired: 1/20XX
- Job Title At Hire: [Redacted]
- Pay Rate When Hired: [Redacted]
- Last or Current Pay Rate: [Redacted]
- Job Title at Time of Alleged Discrimination: [Redacted]
- Name and Title of Immediate Supervisor: [Redacted]

If Applicant, Date You Applied for Job: [Redacted]
Job Title Applied For: [Redacted]

5. What is the reason (basis) for your claim of employment discrimination?

For example, if you are over the age of 40 and feel you were treated worse than younger employees or you have other evidence of discrimination, you should check ( ) AGE. If you feel that you were treated worse than those not of your race or you have other evidence of discrimination, you should check ( ) RACE. If you feel the adverse treatment was due to multiple reasons, such as your sex, religion and national origin, you should check all three. If you complained about discrimination, participated in someone else's complaint or if you filed a charge of discrimination and a negative action was threatened or taken, you should check ( ) RETALIATION.

Race ( ) Sex ( ) Age ( ) Disability ( ) National Origin ( ) Color ( ) Religion ( ) Retaliation ( ) Pregnancy ( )

Other reason(s) (basis) for discrimination (Explain): We are [Redacted] because [Redacted].

6. What happened to you that you believe was discriminatory? Include the date(s) of harm, as well as the action taken (Specify). (Include the name(s) and title(s) of the person(s) who you believe discriminated against you. Examples: 10/02/06 - Written Warning from Supervisor, Mrs. John Soto)

A) Date: [Redacted]
Action: [Redacted]

B) Date: [Redacted]
Action: [Redacted]

C) Date: [Redacted]
Action: [Redacted]

Describe any other actions you believe were discriminatory.

[Redacted]

[Redacted]

[Redacted]

(Attach additional pages if needed to complete your response.)
CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974. See attached Privacy Act Statement and other information before completing this form.

Candidate Name: William R. Aguak

Charge Presented To: EEOC

Arizona Attorney General's Office, Civil Rights Division

Name

EEOC Case No(s):

540-2007-80087

Address

8410 North 84th Avenue, Glendale, AZ 85302

Redacted

City, State and Zip Code

(602) 847-2243

Date of Birth

REDACTED

Name

Employer

Office

Redacted

City, State and Zip Code

Phoenix, Phx. Phone Area Code

(602) 273-3662

Name

City, State and Zip Code

Phoenix, Phx. Phone Area Code

(602) 273-3662

Street Address

4200 East Airline Drive, Phoenix, AZ 85034

City, State and Zip Code

No. of Employees

201 - 500

No. of Owners

No. of Owners

Street Address

Date of Dismissal/Dismissal

04/27/2007

Collected

Later

Disability Discrimination Based On:

X RACE

SEX

RELIGION

NATIONAL ORIGIN

DISCRIP据了解

SIGNATURE (Specify below)

X CONTRA DISCRIMINATION

THE PARTICULARS OF THE DISCRIMINATION: (See attached page)

Personal Harm:

I have been an employee in good standing holding the position as Fsuit.

Since the time of my hire and continuing to date, my African co-workers and I have been repeatedly disrespected by our direct report, Christian Pelkey. Mr. Pelkey, on a routine, daily basis, refers to those of us under his authority who are Black and of Nigerian/Sudan ancestry as "Black Monkey." This derogatory, hurtful and extremely inappropriate term has been used by Pelkey as a replacement for each of our given names - particularly when he reprimands any one of us.

At no time does Pelkey use this highly offensive term to address any employee who is not either Black or of Nigerian/Sudan descent. On more than one occasion, Pelkey was asked to refrain from the racial slur; however, his behavior did not change. Further, in or about May 2007, and in an attempt to resolve the escalating hostile work environment created by these circumstances, my co-workers and I appealed to Jim Vasco, General Manager, for help in resolving this situation. The employer has not responded with any effective corrective action and so Pelkey's harassment persists.

I believe I have been discriminated against because of race, Black, and national origin, Sudan, in violation of Title VII of the Civil Rights Act of 1964, as amended.

Signed: William R. Aguak

(Handwriting)

Date: 7/19/07

Complaint Party Signature

If you or anyone that has been told the above charge to be false or incorrect, please sign below.

Handwriting: William R. Aguak

Date: 7/19/07

Legally Binding Statement: I swear to state the facts above to be true and correct.

Handwriting: William R. Aguak

Date: 7/19/07
**CHARGE OF DISCRIMINATION**

This form is authorized by the Privacy Act of 1974, Title 5, U.S.C. 552(a)(4). The information is necessary for processing your complaint. A failure to answer some of the questions may delay the processing of your charge.

**Data and Access Fees**

<table>
<thead>
<tr>
<th>Arizona Attorney General's Office, Civil Rights Division</th>
<th>EEOC</th>
</tr>
</thead>
<tbody>
<tr>
<td>Name: Mr. Alor Kuat</td>
<td>540-2007-03630</td>
</tr>
<tr>
<td>Address: 4444 West Lupine Avenue, Glendale, AZ 85304</td>
<td></td>
</tr>
<tr>
<td>Employer's Name: Mr. Alor Kuat</td>
<td></td>
</tr>
<tr>
<td>Employer's Address: 4200 East Ahlans Drive, Phoenix, AZ 85034</td>
<td></td>
</tr>
</tbody>
</table>

** Discrimination Based On:**

- [X] Race
- [ ] Age
- [ ] Disability
- [ ] National Origin
- [X] Retaliation
- [ ] Religion
- [ ] Sex
- [ ] Other (Specify below)

**Date(s) of Discrimination:**

<table>
<thead>
<tr>
<th>Start Date</th>
<th>End Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>04/27/2007</td>
<td></td>
</tr>
</tbody>
</table>

**Particulars of Alleged Discrimination**

I have been an employee in good standing holding the position as Fueiler.

Since the time of my hire and continuing to date, my African co-workers and I have been repeatedly disrespected by Christopher Pelkey, Operations Manager. Pelkey refers to those who are Black and of Nigerian / Sudan ancestry as "Black Monkey." This derogatory, hurtful and extremely inappropriate title has been used by Pelkey as a replacement for our given names - particularly when he reprimands any one of us. Further, Pelkey has subjected my co-workers and I to other degrading remarks such as, "What are you eating, monkey soup?" He has said this on more than one occasion in the presence of others.

At no time does Pelkey use this highly offensive term to address any employee who is not either Black or of Nigerian / Sudan descent. Pelkey has been asked to refrain from the racial slur and comments, however, his behavior did not change. Further, in or about May 2007, and in an attempt to resolve the escalating hostile work environment created by these circumstances, my co-workers and I appealed to Jim Veroen, General Manager, in writing, to help us with this relentlessly degrading issue. The employer has not responded with any effective corrective action and so Pelkey's harassment persists.

I believe I have been discriminated against because of race, Black, and national origin, Sudan, in violation of Title VII of the Civil Rights Act of 1964, as amended.

I hereby charge the State of Arizona, including the Department of Administration, the Office of the Attorney General, or both, and myself.

I declare under penalty of perjury that the above is true and correct.

Date: 8-12-08

[Signature]

[Signature]

[Signature]
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
INTAKE QUESTIONNAIRE

Please immediately complete the entire form and return it to the U.S. Equal Employment Opportunity Commission ("EEOC"). REMEMBER, a charge of employment discrimination must be filed within the time limits imposed by law, generally within 180 days or in some places 300 days of the alleged discrimination. Upon receipt, this form will be reviewed to determine EEOC coverage. Answer all questions as completely as possible, and attach additional pages if needed to complete your response(s). Incomplete responses may delay further processing of your questionnaire by EEOC. If you do not know the answer to a question, answer by stating "not known." If a question is not applicable, write "n/a."

(PLEASE PRINT)

1. Personal Information

Last Name: [Name]
First Name: [Name]
Street or Mailing Address: [Address]
City: [City]
State: [State]
Zip: [Zip]
Phone Numbers: Home: ( ) Work: ( ) Cell: ( ) Email Address: [Email]
Date of Birth: [Date]
Sex: Male □ Female □ Race: [Race]
National Origin/Ethnicity: [Origin/Ethnicity]
Do you have a Disability? Yes □ No □
Provide the Name of a Person we can contact if we are unable to reach you:
Name: [Name]
Relationship: [Relationship]
Address: [Address]
City: [City]
State: [State]
Zip: [Zip]
Home Phone: ( ) Other Phone: ( )

I believe that I was discriminated against by the following organization(s): (Check those that apply)
- Employer □ Union □ Employment Agency □ Other (Please Specify) □

2. Organization Contact Information

Organization #1 Name: [Name]
Address: [Address]
City: [City]
State: [State]
Zip: [Zip]
Phone: ( )
Type of Business: [Business]
Job Location if different from Org. Address: [Location]

Human Resources Director or Owner Name: [Name]
Phone: ( )
Number of Employees in the Organization at all locations: Please check one below:
Less than 15 □ 15 - 100 □ 101 - 200 □ 201 - 500 □ More than 500 □

3. Organization Contact Information

Organization #1 Name: [Name]
Address: [Address]
City: [City]
State: [State]
Zip: [Zip]
Phone: ( )
Type of Business: [Business]
Job Location if not at Org. Address: [Location]

Human Resources Director or Owner Name: [Name]
Phone: ( )

E0000619
Number Of Employees In The Organization At All Locations: please check (f) one
Less Than 15 □ 15 - 100 □ 101 - 200 □ 201 - 500 □ More 500 □

4. Your Employment Data (Complete as many items as you can)
   Date Hired: __________________________________________
   Job Title at Hire: ______________________________________
   Pay Rate When Hired: _______________________ Last or Current Pay Rate: _______________________
   Job Title at Time of Alleged Discrimination: _____________________________
   Name and Title of Immediate Supervisor: _______________________________
   If Applicant, Date You Applied for Job: ____________________________
   Job Title Applied For: ____________________________________________

5. What is the reason (basis) for your claim of employment discrimination?
   FOR EXAMPLE: if you are over the age of 40 and feel you were treated worse than younger employees or you have
   other evidence of discrimination, you should check (ME). If you feel that you were treated worse than those
   set of your age or you have other evidence of discrimination, you should check (ME). If you feel the adverse
treatment was due to multiple reasons, such as your age, religion and national origin, you should check all three. If you
   complained about discrimination, participated in someone else's complaint or if you file a charge of discrimination
   and a negative action was threatened or taken, you should check (RE).
   Race □ Sex □ Age □ Disability □ National Origin □ Color □ Religion □ Retaliation □ Pregnancy □
   Other reason (basis) for discrimination (explain): ____________________________

6. What happened to you that you believe was discriminatory? Include the date(s) of harm, action(s) and
   include the name(s) and title(s) of the person(s) you believe discriminated against you. (Example: 10/02/06
   Writed Warning from Supervisor, Mr. John Smith)
   A) Date: ___________________ Action: ____________________________
   _________________________________________________________________
   Name and Title of Person(s) Responsible: ___________________________
   B) Date: ___________________ Action: ____________________________
   _________________________________________________________________
   Name and Title of Person(s) Responsible: ___________________________
   Describe any other actions you believe were discriminatory.
   _________________________________________________________________
   _________________________________________________________________
   _________________________________________________________________
   _________________________________________________________________

   (Attach additional pages if needed to complete your response.)
CHARGE OF DISCRIMINATION

This form is required by the Privacy Act of 1974. It asks for personal information to be used for processing this form.

Arizona Attorney General's Office, Civil Rights Division
and EEOC

Date of Filed 04/27/2007

Employee's Name: Galindo, Ken G. (REDACTED)

Address: 4200 East Airlane Drive, Phoenix, AZ 85034

Charge Presented To: Agency(ies) Charge No(S):

☐ FEPA
☒ EEOC

Charge Presented To: Agency Charge No(S):

Employer: PDEA

Location: PDEA

City: Phoenix

State: AZ

ZIP Code: 85034

City: Phoenix

State: AZ

ZIP Code: 85034

I hereby certify that I am an employee of PDEA and that I have not been terminated or otherwise disciplined for refusing to comply with the requirements of this form.

I certify that the information I have provided is true and correct.

Date: 04/27/2007

Signature: Ken G. Galindo

Personal Harm:

Since about April 6, 2004, I have been an employee in good standing holding the position as Fueler.

For about the last two years and continuing to date, my African co-workers and I have been repeatedly disrespected by our direct reports, Christian Pelkey, Operations Manager. Pelkey, on a routine, daily basis, refers to those of us under his authority who are Black and of Nigerian / Sudan ancestry as "Black Monkey." This derogatory, hurtful and extremely inappropriate title has been used by Pelkey as a replacement for each of our given names - particularly when he reprimands any one of us.

At no time does Pelkey use this highly offensive term to address any employee who is not either Black or of Nigerian / Sudan descent. On more than one occasion, Pelkey was asked to refrain from the racial slur, however, his behavior did not change. Further, in or about May 2007, and in an attempt to resolve the escalating hostile work environment created by these circumstances, my co-workers and I appealed to Jim Vesovic, General Manager, for help, to help us with this extremely degrading issue. The employer has not responded in any effective corrective action and so Pelkey's harassment persists.

I believe I have been discriminated against because of race, Black, and national origin, Sudan, in violation of Title VII of the Civil Rights Act of 1964, as amended.

I hereby certify that I have not been discharged, transferred, or otherwise disciplined for refusing to comply with the requirements of this form.

I am aware that if I am found to have provided false information, I may be subject to fines and imprisonment.

Date: 04/27/2007

Signature: Ken G. Galindo
Charge No.: 540 2007 03847
Garang Ker Guot
2214 North 11th Drive
Avondale, AZ 85323
Charging Party

4205 East Alindor Drive
Phoenix, AZ 85034
Respondent

DETERMINATION

I issue the following determination on the merits of this charge.

Respondent is an employer within the meaning of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, and the Americans with Disabilities Act of 1990 ("ADA"), as amended. Timeliness and all other requirements for coverage have been met.

Charging Party alleged that he was discriminated against in violation of Title VII based upon his race, black, and national origin, Sudanese, in that he was subjected to repeated, offensive racial comments by one of Respondent's operations managers. Charging Party stated that comments made by the management official included referring to him and his Black counterparts as "monkeys." Charging Party further maintains that after he complained to the Respondent's general manager about the harassment, the Respondent did not take prompt, corrective action.

Like and related to and growing out of this investigation was evidence that the Respondent subjected Charging Party to race, color, and national origin, African and/or Sudanese, harassment.

I have considered all the evidence obtained during the investigation and find that there is reasonable cause to believe that there is a violation of Title VII in that the Respondent subjected the Charging Party to race, color, and national origin, African and Sudanese, harassment.

Like and related to and growing out of this investigation was also evidence that Respondent's pre-employment application process included an " Applicant Drug Screen Consent Form " and " Medication List " which makes prohibited medical inquiries of applicants for drug screening and use of medications.

Section 102(e) of the ADA makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment ..." In addition, section 102(d) of the ADA and 29 U.S.C. § 12112, prohibits an employer from making any pre-employment inquiries about a disability, or about the nature or severity of a disability, on applications forms, in job interviews, and in background or reference checks.

E0000602
May 24, 2011

JOHN R. PBAKE
21501 N. KVTH AV
GLENDALE AZ 85308

NOTICE OF CLASS LITIGATION

Equal Employment Opportunity Commission v. [Redacted]
U.S. District Court for the District of Arizona
2:10-CV-00191-APX-GMS

Dear JOHN R. PBAKE:

If you are a current supervisor or manager of [Redacted] please ignore this letter since it was sent to you without knowledge that you held such position.

I am a Trial Attorney for the U.S. Equal Employment Opportunity Commission ("EEOC") in the Phoenix, Arizona District Office. The EEOC is the U.S. government agency responsible for enforcing federal employment discrimination laws, including Title VII of the Civil Rights Act of 1964 to prevent unlawful employment practices on the basis of race, national origin, and/or color.

On September 30, 2010, the EEOC filed a lawsuit against [Redacted] in federal court alleging that the [Redacted] violated Title VII by subjecting a class of [Redacted] (including [Redacted], [Redacted], [Redacted], and [Redacted]) to a racially hostile work environment.

You have been identified as a current or former employee of [Redacted]. As a result of that employment, you may have information about the employment practices or conditions described in this letter. If you have such information, please contact the EEOC with your observations. The EEOC would be interested in discussing these facts with you.

If you personally suffered or experienced what you believe to be discrimination based upon race, national origin, and/or color while you were employed at [Redacted], the EEOC would like to discuss those facts with you.

If you are interested in having the EEOC determine whether it will seek relief for you as a potential claimant in the lawsuit against [Redacted], please complete the enclosed participation form.

Sincerely yours,

[Redacted]
Employers must change how they evaluate and respond to charges, even those that involve single, alleged victim.

Handling the “request for information” from EEOC.

Use caution in defending charges by citing to uniformly enforced policies or providing data about diverse workforce.

Ask EEOC to explain nature and scope of its investigation and identify all known aggrieved individuals.

Document all efforts to act reasonably and cooperatively with EEOC during investigative process.
Conduct preventive analyses with data from selection processes.

Validate pre-employment tests with statistical analyses.

Periodically conduct preventive compensation analyses.

Cover internal analyses with attorney-client privilege.

Comprehensive diversity and inclusion (D&I) program.

Independent, objective assessments of workplace.

Stay current with legal trends.