

Inside the Equal Employment Opportunity Commission: An Interview with the Director of the New York District EEOC

by Mark Lee

This year marks the 35th Anniversary of the Equal Employment Opportunity Commission, the principal federal agency charged with enforcing anti-discrimination laws. When it began, the agency was mainly limited to an education and conciliation role. But, in 1972 Congress gave it litigation enforcement powers that have greatly strengthened its impact in many important cases. In the words of current national EEOC Chairwoman Ida L. Castro: "Thirty five years ago, workers were often denied access to better paying jobs simply because of their race, color, gender, national origin or religion... Since the enactment of the 1964 Civil Rights Act, the workplace has changed dramatically. Indeed, the younger generations may find it easy to assume that workplaces have always reflected the rich diversity we commonly find today. Yet, today, the EEOC still finds itself challenging workplace practices that continue to prevent employees from fulfilling their greatest potential. Our workload reflects that glass ceilings, wage discrimination and sexual harassment remain prevalent in our society. In the last decade, we have seen a continuous rise in charges alleging racial and national origin harassment. Age and religious discrimination, as well as hiring and accommodation issues for individuals with disabilities remain at the forefront of our activities."

Spencer H. Lewis, Jr. is the Director of the New York District of the EEOC. He is in charge of the agency's operations in New York, as well as in all the New England states, Puerto Rico, and the Virgin Islands. He first joined the EEOC in 1973 and has led the New York District since 1989. Mr. Lewis received his undergraduate education in History at Lincoln University in Pennsylvania. He then went to the University of Illinois, where he received a M.A. in Labor and Industrial Relations in 1969, and a law degree in 1973.

He was interviewed last year at EEOC district headquarters at the World Trade Center, Manhattan by Mark Lee.

Q: What are the main responsibilities of the New York District office of the EEOC?

SL: The EEOC is a federal agency that enforces federal laws prohibiting various forms of employment discrimination. Title VII of the 1964 Civil Rights Act, the statute that established the agency, bars discrimination against individuals based on their race, color, national origin, religion, or sex. Also we enforce the Age Discrimination in Employment Act banning discrimination against anyone 40 or over based solely on their age. Similarly, we enforce the Equal Pay Act, which prohibits discrimination on the basis of gender among men and women whose jobs are substantively the same. And we enforce the Americans with Disabilities Act which bars discrimination against people based on their physical or mental disabilities. We enforce these laws in both the public sector and the private sector. Federal government employees have rights similar to others, though our procedures differ slightly for them.

Q: How would someone who experienced discrimination on the job go about filing a claim with the EEOC?

SL: The basic way that we enforce the statute begins when individuals complaining to us that they have been discriminated against. Anyone can call or visit our office here at the World Trade Center from 9 a.m. to 5 p.m., Monday through Friday. To file a charge of discrimination, an individual should first talk to an investigator here. They are trained to identify the facts of a case and then try to make a determination whether the facts described can be cast into a charge of employment discrimination. A charge is merely a statement of the facts described by the individual and it identifies the statutes that may have been violated. The charge is an administrative document, it is assigned a charge number, and we may then commence an investigation. We also receive complaints of employment discrimination by letter. If we believe that there probably is a charge of discrimination, we ask these individuals to frame the facts of their claim and have it notarized. This then becomes a charge of discrimination. And sometimes attorneys send us what they think is a charge of discrimination on behalf of their client. Employers are entitled to know when a charge of discrimination has been filed against them. So we give them notice, usually within 10 working days, of any charge filed and we describe the issues involved: for example, promotion, hiring, or terms of employment.

At that point, we have to determine if we are going to investigate a charge and, if so, how much of an investigation to conduct. We have limited resources and our experience has taught us that each charge cannot be investigated in its entirety. But in those cases

where we believe it is likely that the statute has been violated, we will investigate. Sometimes we will send out a letter to employers requesting information about a charge, sometimes we will do on-site investigations, interviewing witnesses.

If we believe that the evidence suggests that a violation of the law is likely to have occurred, we issue a determination. This is administrative, without the force of law. But it is often persuasive to employers. We will then try to work out a negotiated settlement with the employer that ensures that any violation will not continue to occur. And, in cases in which monetary damages were incurred by employees, we seek proper compensation. If conciliation is successful, that's the end of it. But, if the agency and the employer cannot reach an amicable conciliation, then we may file a lawsuit in U.S. District Court. The court will then determine after a trial if there was a violation of the law.

Not all cases have merit. If we don't believe that a charge has enough merit for us to investigate, we dismiss the case. We then issue a "right to sue." This enables the individual to file a lawsuit in U.S. District Court. In other words, before an individual can sue an employer, it is a prerequisite that they first file a charge of discrimination with us and get a "right to sue." The theory here is that individuals have a right to enforce the civil rights law just as does our agency. Most individuals will engage private legal counsel to file such a lawsuit. A small number proceed *pro se*, on their own, and ask the court to appoint a lawyer. Sometimes they may be able to make it more affordable by finding *pro bono* legal help from an attorney willing to volunteer some of his time.

Q: Your office recently obtained the largest EEOC monetary settlement ever won for age discrimination in New York State. Can you comment on this case ?

SL: We settled a lawsuit against an employer called Johnson and Higgins for \$28 million. It resolved an EEOC lawsuit filed in 1993 based on allegations that this insurance brokerage and employee benefits firm, employing 17,000 people nationwide, maintained a mandatory retirement policy. The firm was ordered to end the policy. In that case, members of the board of directors were required to retire at age 62. The Age Discrimination in Employment Act prohibits employers from mandatorily retiring employees, with certain exceptions like public safety officers. Generally, employers cannot force individuals to retire at a certain age.

The lawsuit was significant because it sends a message to employers that such conduct constitutes a violation of the law and that the EEOC *will* enforce the law. Settlements of that magnitude, when reported in the media, alert employers to the fact that mandatory retirement policies violate the Age Discrimination in Employment Act.

Q: Is there a strategy behind seeking such large settlements?

SL: There is a strategy that we try to employ in our enforcement efforts. First, we feel that large settlements are significant, particularly when there's an employer policy that affects a large number of employees. Because, when many people are affected, it says either: (a) the employer is unaware the policy is a violation of the law, or (b) they are aware, but choose to continue enforcing that policy. So, our strategy is to place a lot of emphasis on class cases; that is, on cases where large numbers of employees are affected. When we take that approach, it allows us to direct our resources in a way that gets maximum effectiveness. Utilizing X number of individuals to enforce the law, you try to take those cases most egregious and affecting large numbers of people.

Q: How successful has the EEOC's new mediation program been?

SL: This year we have made substantial progress in our new approach of resolving many claims of discrimination through mediation. In 1991, Congress passed a statute requiring all federal agencies to examine alternative dispute resolution mechanisms to resolve disputes between agencies and vendors, as well as to make some ADM available to the individuals we serve. As an enforcement agency, we have been making sure that individuals have the opportunity to mediate cases, as opposed to an investigation. Mediation differs from more adversarial approaches in that the mediator tries to find a way to get the parties to resolve a dispute, without assessing the merits of the alleged facts. What does that mean? The mediator's role is not to determine if the facts described are true or if a law has been violated. This differs from arbitration or litigation, since the mediator is not trying to weigh the value of the facts of the case. About 40% of employers charged by individuals with discrimination, when offered mediation, have agreed to it. This is the first year that we have been able to make mediation available, and it was successful in resolving over 330 cases.

Q: A number of large companies, including IBM, have recently tried to shift their employees from traditional pension plans to so-called "cash balance pensions." What has the EEOC been doing to respond to workers' concerns that these new plans may be shrinking their pensions?

SL: We have been trying to evaluate if there is a possible violation of the law in these plans. Cash balance pensions are plans that employers only began adopting in the 1990s. We believe, in some instances, that cash balance plans have a disparate impact on older workers. That is, older workers stand to be more adversely affected by these plans. We are now evaluating data on these plans, their impacts on individuals, and to what extent their impacts may violate the Age Discrimination in Employment Act. This is a hot issue because so many employers have adopted them. We don't know if they adopted them in good faith or not. That's one of the things we'll be looking at in our investigations.

We will be developing new regulations on cash balance plans in coordination with other agencies, including the Department of Labor, the Treasury Department, OSHA and others to make sure that the government speaks with one voice on the issue. If there are differences of opinion among the agencies, we seek a negotiated arrangement. The courts will decide if the new regulations are appropriate. We often work with other agencies like the Labor Department and, particularly, the Justice Department's Civil Rights Division, which enforces Title VII against state and local entities.

Q: Working women and immigrants are expected to be a growing share of new workers in coming years. What does the EEOC plan to do to ensure them equal opportunities in the future?

SL: The Equal Employment Opportunity Act of 1972 gave this agency the authority to litigate in U.S. District Court to enforce Title VII of the 1964 Civil Rights Act. Prior to that, it was enforced by the Justice Department and by individual lawsuits. One of our responsibilities under Title VII is to make sure that women, minorities, and national origins groups are not discriminated against. To do this, we make various kinds of analyses of the changing workforce to ensure that any given employer is not grossly under-representing a given group among his or her employees. This gets complex, because the under-representation of a given gender or minority can be a piece of evidence to support a finding of discrimination. So, if the under-representation of such a group can constitute a violation of the law, how can we make employers aware of this?

Through our technical assistance program and the seminars we run, we try to keep employers informed of what the law requires them to do. For example, hiring may be an issue of concern to an employer with an under-representation of women or minorities. If they are sensitive about the increasing share of minorities in their communities, they should take this into account when recruiting and hiring. As a federal agency, our Education Program provides technical assistance as needed to employers who want to comply with the law. Also, through our Outreach Program we try to make sure that we are known to immigrant communities, to Asian and Hispanic communities, and to make sure that they know that discrimination based solely on national origin is against the law. For example, we have had brochures explaining their rights under Title VII translated into different languages, such as Chinese, Vietnamese, Haitian Creole, and Spanish, to reach these communities in the languages that they speak. We tell them that, regardless of their immigration status, discrimination is a violation of the law.

Q: What types of education and training does the New York EEOC now offer to human resource managers and others charged with meeting EEO requirements in hiring, promotions, and other employment matters?

SL: Education is a significant part of our prevention effort. We run 3 or 4 technical assistance programs each year. Our staff has developed curricula to instruct employers on the law. We take various statutes and situations that may arise and convert them into instruction, so that employers know how to avoid violating the law. For example, we may offer a 45-minute class on the law of sexual harassment, that is, on what firms can do to prevent harassment. And we do the same with our seminars on age discrimination.

Q: What is EEOC policy in cases where immigrant or other workers are disciplined for speaking a language other than English in the workplace?

SL: One dimension of national origin discrimination is that some employers may require employees to speak English only. We believe that -- except when it's safety-related or job-related -- employers cannot prohibit individuals from speaking a second language in the workplace. There are circumstances under which employers may put some restrictions on the use of a second language. For example, it may be done in safety situations, if they can demonstrate that safety is a legitimate concern. Otherwise, we see no reason for employees to be restricted on this. It could constitute a violation of Title VII because employers could be singling out individuals based on their national origin, which violates the statute.

Q: What kind of progress do you feel that the local EEOC has made on the issue of sexual harassment? Can you comment on any recent settlements?

SL: The nation as a whole first became aware that sexual harassment is a violation of Title VII in the early 1990s with the allegations of sexual harassment against Clarence Thomas that were publicized during the hearings over his Supreme Court nomination. After that, we noticed substantial increases in the number of charges filed based on sexual harassment. We believe that we have made inroads in identifying sexual harassment. And, when it's egregious and involves large numbers of employees, we have litigated. We recently settled a lawsuit for \$10 million against a firm in which sexual harassment was widespread. We will continue to identify and litigate cases of sexual harassment.

Q: One criticism made about the EEOC is that there's a backlog of cases, which can create long delays between a worker filing a discrimination claim and getting any results. Does the New York District have much of a backlog?

SL: Over the years, the agency did develop a backlog, as the number of cases we took in exceeded the number being resolved. The larger backlogs are, the more difficult it is to work them down, the older the evidence gets, the longer the time it takes to resolve the charges, and the less credibility this agency has. So, back in 1995 the agency made a policy change. We stopped investigating every charge in its entirety. Instead, we only did complete investigations of those cases that were more than likely a violation of the law and

dismissed other cases. This process removed a lot of cases from the backlog. In 1995, about 114,000 charges of employment discrimination were pending. Now it is down to about 42,000 – a decrease of over 70,000. Working the backlog down is significant, because we can get to cases faster and investigate, or send them to mediation. No one wants to wait an indefinite time to find out the results of a case. This has had positive effects both on employers and on individuals bringing the charges.

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**How To Make A Job Discrimination
Complaint with the EEOC:**

Call, write or visit the
New York EEOC District Office
7 World Trade Center, 18th floor
New York, NY 10048-1102
Tel: 212/748-8500
Fax: 212-748-8464
www.eeoc.gov

Recent EEOC Actions against Major Firms

Salomon Smith Barney -- On July 16th, 2001, the EEOC announced a \$635,000 settlement of an employment discrimination lawsuit against Salomon Smith Barney, a subsidiary of Citigroup and the nation's second largest retail brokerage firm. The suit, filed in September 2000 under Title VII, was brought on behalf of 13 current or former employees of Salomon's Greenwich Street Data Center in Manhattan who were subjected to disparate treatment and harassment based on their race and/or national origin. It alleged that Salomon discriminated against African-American, Haitian, Nigerian, and West Indian computer operators, as well as a class of other similarly-situated employees, by "subjecting them to repeated and offensive comments that created a hostile work environment." The suit also charged that the firm paid the class of workers disparate wages and denied them salary increases, promotions, and equal opportunities for promotion because of their race and/or countries of origin. According to EEOC Chairwoman Ida L. Castro. "This case should remind every employer from Wall Street to Main Street that targeting groups of workers for discrimination not only violates the law, it also damages the corporate culture and hurts the bottom line by decreasing productivity and morale."¹

Emery Worldwide -- On July 3rd, the EEOC filed a lawsuit against Emery Worldwide Airlines, at its Priority Mail Processing Center in Kearny, N.J., for discriminating against African-American employees in a wide range of employment matters, including job assignment, overtime, compensation, and disciplinary action. Filed in federal district court here, the suit further states that blacks suffered widespread racial harassment and that one white employee was fired for complaining about the alleged illegal practices. Worsening the race-based differences in treatment, which the EEOC says adversely affected a class of 11 black employees, the agency's suit details acts of harassment such as: "displaying hangman's nooses, using racial slurs and insults, and vandalizing employee automobiles and company trucks driven by black employees. All of these acts were either condoned and/or participated in by managers at Emery. Company officials also retaliated against a number of the class members who exercised their right to contest the conduct," according to the lawsuit.

Wal-Mart -- On June 14, a US District Court in Arizona ruled that Wal-Mart was in contempt of court and ordered the nation's largest retailer to pay \$750,200 in fines, air an explanatory television advertisement, and provide significant remedial relief. The Court Order charges Wal-Mart with failing to comply with a Consent Decree settling an EEOC lawsuit on behalf of disabled employees under of the Americans with Disabilities Act of 1990 (ADA). EEOC has filed 15 lawsuits against Wal-Mart stores across the country for disability discrimination under the ADA since 1994. Of that total, 10 suits are currently pending and five have been resolved including three jury verdicts favorable to plaintiffs.

Mitsubishi Motors -- June also marked the conclusion of EEOC's landmark \$34 million settlement against Mitsubishi Motors of America, the largest sexual harassment settlement in the history of Title VII. Since the 1998 consent decree went into effect, the monetary relief was distributed to more than 400 women, many of whom still work at Mitsubishi's Illinois plant. A blue-ribbon panel of monitors was also established to track Mitsubishi's efforts to comply with the decree.

TWA -- In May, the EEOC announced a \$2.6 million settlement of a lawsuit alleging sexual harassment and retaliation against Trans World Airlines, Inc. (TWA). The suit charged TWA with subjecting female employees at JFK Airport to a sexually hostile work environment since January 1988 and to retaliation for complaining about the discrimination. TWA, which settled the suit without admitting liability, recently filed for reorganization under Chapter 11, and most of its assets have since been purchased by American Airlines.

What Federal Laws Prohibit Job Discrimination?

Civil Rights Act of 1964 (Title VII): prohibits employment discrimination based on race, color, national origin, religion, or sex. Title VII prohibits not only intentional discrimination, but also practices that have the effect of discriminating against individuals because of their race, color, national origin, religion, or sex.

Title VII's broad prohibitions against *Sex Discrimination* specifically cover:

Sexual Harassment - This includes practices ranging from direct requests for sexual favors to workplace conditions that create a hostile environment for persons of either gender, including same-sex harassment. (The "hostile environment" standard also applies to harassment on the bases of race, color, national origin, religion, age, and disability.)

Pregnancy Based Discrimination - Pregnancy, childbirth, and related medical conditions must be treated in the same way as other temporary illnesses or conditions.

Title VII's prohibitions against *National Origin Discrimination* make it illegal to discriminate against an individual because of birthplace, ancestry, culture, or linguistic characteristics common to a specific ethnic group. An English-only rule on the job may violate Title VII unless an employer shows that the requirement is necessary for conducting business. If the employer believes such a rule is necessary, employees must be informed when English is required and the consequences for violating the rule.

Equal Pay Act of 1963: protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination.

Age Discrimination in Employment Act of 1967: prohibits employment discrimination based on age against individuals who are 40 years of age or older.

Americans with Disabilities Act of 1990: prohibits employment discrimination against qualified individuals with disabilities in the private sector, and in state and local governments.

Civil Rights Act of 1991: among other things, provides monetary damages in cases of intentional employment discrimination.

The EEOC enforces all of these laws. Other federal laws, not enforced by EEOC, also prohibit discrimination and reprisal against federal employees and applicants.

What Discriminatory Practices are Prohibited by these Laws?

Under these laws, it is illegal to discriminate in any aspect of employment, including:

- Recruitment, job advertisements, or testing;
- hiring and firing;
- assignment, classification of employees, transfer or promotion;
- training and apprenticeship programs;
- pay, fringe benefits, retirement plans, and disability leave; or
- other terms and conditions of employment.

Source: <http://www.eeoc.gov>