

Via U.S. Mail

May 22, 2013

Hon. Jacqueline Berrien, Chair
United States Equal Employment Opportunity Commission
131 M Street, N.E.
Washington, DC 20507

Re: National Origin Discrimination – Follow Up Regarding Retaliation and Language Access

Dear Chair Berrien,

Thank you for meeting with our coalition of organizations on Thursday, May 2, 2013. We very much appreciate the thoughtful discussion regarding the Equal Employment Opportunity Commission's Strategic Enforcement Plan. We were pleased to learn that the EEOC is in the process of considering many of our recommendations. Once the EEOC completes this process, we would appreciate being informed of the recommendations that the EEOC ultimately adopts. Alternatively, we plan to follow up in the near future in case we, as advocacy organizations, may assist further in implementing changes to the EEOC's policies regarding language discrimination, workplace segregation, the Compliance Manual, and overlapping categories of discrimination.

In addition, we also understand that there are two areas of concern that require more immediate collaboration. More specifically, we are writing to follow up on our discussion regarding the best practices the EEOC might adopt in order to (1) effectively respond to employers who retaliate against workers asserting their employment discrimination rights and (2) ensure Limited English Proficient workers are not precluded from accessing the EEOC's services.

I. Retaliation

Employer retaliation is a powerful deterrent to workers seeking to enforce their rights under anti-discrimination laws. Not only does retaliation adversely impact the workers who are directly affected, but it also sends a strong message to co-workers that they complain at their peril. Moreover, retaliation significantly hampers the EEOC's enforcement mission when employers think they have license to retaliate against workers who file claims.

Our May 2, 2013 meeting included some conversation about anti-retaliation practices and remedies for unauthorized workers in the context of the pendency of a comprehensive immigration bill in the Senate. We are including in this letter only best practices that either affect all workers or that should be adopted regardless of whether immigration reform is enacted. As we mentioned in our meeting, we will follow up with your offices with additional recommendations as the national debate around immigration reform continues.

Unsupported Assertions of Immigration Status as Potential ULPs

Further, Regions may consider whether a charged party commits an independent violation of Section 8(a)(1) where, without evidence of an employee's disabling status, it issues Board subpoenas for the employee's work authorization documents for purposes of harassing the employee.¹

The EEOC should consider, in appropriate cases, adding retaliation charges against employers who persist in efforts to discover a worker's immigration status during the course of litigation.

2. Reinstatement offers conditioned on re-verification of immigration status.

In the same General Counsel memorandum mentioned above, the NLRB adopted a policy that reinstatement offers will not be considered valid if conditioned on re-verification of employment status.² The EEOC should adopt a similar practice in its litigation of discrimination claims.

3. Ensure workers can pursue prosecutorial discretion.

In 2011, the Director of Immigration and Customs Enforcement issued a memorandum that provides protection for workers engaged in labor disputes and who are arrested by ICE agents.³ In that memo, Director Morton stated that, "it is generally against ICE policy to remove individuals in the midst of a "legitimate effort to protect their civil rights or civil liberties."⁴ EEOC can assist immigrant victims of discrimination to ensure that they are not removed from the country while a discrimination claim is pending. EEOC should consider offering workers concerned about retaliation a letter that they could present to ICE agents that would inform ICE that the worker intends to request an exercise of prosecutorial discretion. Workers should also be instructed to contact EEOC in case of any action by ICE. The Southern Poverty Law Center, for example, uses a sample letter that is included here.

4. Pursue U and T visas in appropriate cases

EEOC was the first federal agency to begin certifying U visas, in 2008. We commend the agency for that action, and for the recent adoption of an improved U visa policy.⁵ We ask that the EEOC continue to consider workers' eligibility for U visas in response to an individual's or an advocate's request. In addition, we ask that the EEOC build on its impressive record of support for immigrant workers by adopting a T visa certification protocol, as further developed in an April 4, 2013 letter signed by nearly 50 organizations and submitted to Chair Berrien and General Counsel Lopez.

¹ NLRB, Office of the General Counsel, Case Handling Instructions for Compliance Cases after Flaum Appetizing Corp., 357 NLRB No. 162 (December 30, 2011), issues May 4, 2012, *available at* http://www.unioncounsel.net/developments/immigration/news/case_handling_instructions.pdf

² *Id.* at 2.

³ John Morton, Director of ICE, "Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs" at 1 (June 17, 2011), *available at* <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>.

⁴ *Id.*

⁵ EEOC Procedures Requesting EEOC Certification for U Nonimmigrant Classification (U Visa) Petitions in EEOC cases, 2013 *available at* http://www.eeoc.gov/eeoc/foia/u_visa.cfm

II. Language Access

We also appreciated hearing the EEOC's comments with regard to equal access for Limited English Proficient (LEP) individuals. We would like to offer suggestions for practical steps the Commission can take to remedy the current obstacles limiting LEP individuals' access to the EEOC's services.

We are aware of numerous LEP charging parties in various regions who speak Spanish as their primary language whom the EEOC has asked to provide their own interpretation or to wait while their case's investigation or litigation is delayed due to the EEOC's limited ability to communicate with LEP individuals. During our conversation, the EEOC acknowledged the lack of readily available interpretation and other language access measures for LEP individuals, but suggested that this is not a problem for LEP charging parties who speak Spanish as their primary language. To be clear, this is a significant problem not only for speakers of languages other than English and Spanish, but also for Spanish speakers.

While redoubling its efforts to fully implement its LEP plan, we believe that the EEOC should ensure that each office has an updated, operable list of interpretation and translation services in all applicable languages, along with access to a language line that may be called to meet urgent interpretation needs.

One way to develop a complete and accessible list of available interpreters, as we discussed during our productive conversation, could be to share language access resources with other labor and employment agencies and with social services agencies. While the use of staff of Immigration and Customs Enforcement and other law enforcement staff for interpretation has a chilling effect on many LEP individuals' ability to speak freely about their cases, this is not likely to be the case with regard to staff of, for example, the Department of Labor, the National Labor Relations Board, the Department of Housing and Urban Development, or the Department of Health and Human Services. Use of centralized interpretation or translation services across offices or agencies is a common approach to expanding language access. See Grantmakers Concerned with Immigrants and Refugees, "Immigrant Integration Toolkit" at 64, http://www.gcir.org/system/files/59-70_lang_access.pdf.

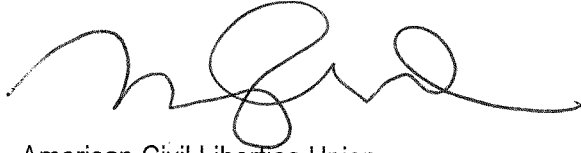
The EEOC could also consider another successful LEP access practice undertaken by some government agencies: funding, through small grants or on a contract basis, community organizations to provide interpretation and translation services to help LEP individuals gain access to government services. See "Immigrant Integration Toolkit" at 62. Even where the EEOC finds that small grants to or contracts with community organizations to provide language access services are not feasible, it should at least identify any organizations of volunteer interpreters to regional and local staff where they might provide language services at no cost. Such lists can be developed or enhanced using sources such as the national interpreter and translator associations identified on the unified federal LEP access site, http://www.lep.gov/interp_translation/trans_interpret.html.

III. Conclusion

We welcome further engagement with the EEOC on how to protect workers facing retaliation from employers and how to ensure that all charging parties and prospective charging parties are able to access the Commission's services, without regard to language. Please let us know who we should follow up with for further discussion of our recommendations and how we, as advocacy organizations, can be of any assistance in implementing them. You may contact Marsha Chien at The Legal Aid Society – Employment

Law Center at 415 864-8848 x.217 and/or at mchien@las-elc.org. We look forward to hearing from you at your earliest opportunity.

Kind Regards,

A handwritten signature in black ink, appearing to be 'M. Chien', with a stylized, flowing script.

American Civil Liberties Union
Asian Pacific American Legal Center
The Legal Aid Society – Employment Law Center
National Employment Law Project
Southern Poverty Law Center
Council on American-Islamic Relations - Chicago

cc (via email):

P. David Lopez
Lucila Rosas
Awo Sarpong Ansu

Enclosures

1:34PM

NO. 6263 P. 2



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
District Office

Ridgo Park Plaza
1130 22nd Street, Suite 2000
Birmingham, AL 35205
National Contact Center: 800-669-4000
National Contact Center TTY: 800-669-6820
Birmingham Status Line: 866-408-8075
Birmingham Direct Dial: (205) 212-2148
TTY (205) 212-2112
FAX (205) 212-2105

RE: Charge of Discrimination filed by [REDACTED] vs.
[REDACTED]
Charge Number [REDACTED]

Dear Sir:

The Commission is currently conducting an investigation based on allegations of violation of Title VII of the Civil Rights Act of 1964, as amended and the Americans with Disabilities Act, as amended. In this regard, allegations have now been made by or on behalf of the Charging Party in the charge being investigated by us that Respondent is engaging in discriminatory and retaliatory conduct towards the Charging Party and persons identified as being within the class of aggrieved individuals.

The Commission will make a preliminary inquiry to determine if retaliation is occurring as a result of the charges now pending for investigation. The Commission has currently made no final determination regarding the merits of the underlying charge of discrimination. However, the preliminary inquiry will focus on whether retaliation is occurring and, if so, whether (1) there is a significant risk that the Charging Party and/or the Commission will likely suffer irreparable harm because of retaliation; or (2) there is a significant risk of irreparable harm to the Commission's ability to investigate the charge of discrimination caused by post charge conduct or (3) there is a substantial risk that retaliation may discourage others from providing testimony or from filing additional charges based on the same or other alleged unlawful acts.

If necessary, the Commission may seek temporary injunctive relief before final disposition of a charge when a preliminary investigation indicates that prompt judicial action is necessary to carry out the purposes of Title VII or of the ADA.

You must take prompt and affirmative measures to maintain, preserve, and safeguard against disposal, destruction, or any other damage to any and all documents in its possession or control relating to its recruitment, employment, and other practices that may be potentially relevant to this potential litigation, including but not limited to any relevant activity in [REDACTED]

[REDACTED] We ask that you specifically ensure that the company provide this instruction to its agents, employees, contractors, recruiters, and any persons conducting business related to [REDACTED]'s recruitment, employment and operations during any time that [REDACTED] hired and employed our clients and all other times relevant to this investigation and potential litigation. In addition, we ask that [REDACTED], their agents, representatives, and any counsel it may retain takes affirmative steps to ensure and monitor compliance with an appropriate "litigation hold" until any discovery is completed and issues of relevance are determined by the Court. Zubulake v. USB Warburg, 229 F.R.D. 422, 432 (S.D.N.Y. 2005) ("In short, it is *not* sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched.").

Please also be advised that electronically-stored information is an important and irreplaceable source of evidence in the above-referenced matter. The laws and rules prohibiting destruction of evidence apply to electronically stored information in the same manner that they apply to other evidence. Due to its format, electronic information is easily deleted, modified or corrupted. Accordingly, [REDACTED] must take every reasonable step to preserve this information until the final resolution of this matter.

As you are well aware, a party's failure to affirmatively preserve documents related to a potential or pending suit — including a party's failure to instruct subordinates and others within its control to refrain from destroying, altering, or discarding documents—can lead to severe sanctions and a finding of an adverse inference against the non-producing party. See, e.g., Inventory Locator Service, LLC v. Partbase, Inc., Case No. 02-2695, 2005 U.S. Dist. LEXIS 46252, *35 (W.D. Tenn. 2005); Zubulake, 229 F.R.D. at 427 (S.D.N.Y. 2005); ABC Home Health Servs. v. IBM Corp., 158 F.R.D. 180 (S.D. Ga. 1994).

Please provide a copy of this letter to your attorney, if you are represented by counsel, and/or to the person or persons whose job responsibilities cover the matters addressed herein, and those who are in control of any media on which relevant electronic information may be stored. If this correspondence is unclear in any respect, please contact Mónica Ramírez at 334-956-8427 or Tom Fritzsche at 404-521-6700.

We will take any and all necessary measures to safeguard our clients' rights, including continuing to immediately inform the EEOC of any additional retaliation our clients may experience.

Sincerely,

Mónica Ramírez (w/permission)
Mónica Ramírez
Admitted only in Florida
by TF

Thomas Fritzsche
Thomas Fritzsche
Admitted only in Georgia

[REDACTED] 1:34PM

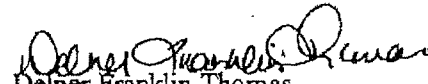
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Letter to [REDACTED]
[REDACTED]

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This correspondence is notice to you that the Commission is required to make this preliminary inquiry and may solicit information from you in this regard. It is also a request that if you discover any retaliatory conduct is occurring, the conduct should immediately cease.

Very truly yours,


Delner Franklin-Thomas
District Director

cc: Legal Representative for [REDACTED]
Tom Fritzsche
Immigrant Justice Project
233 Peachtree Street NE, Suite 2150
Atlanta, Georgia 30303



A Project of the Southern Poverty Law Center

233 Peachtree Street NE, Suite 2150
Atlanta, GA 30303
T 404.521.6700 F 404.221.5857
Toll Free 1.800.591.3656
www.splcenter.org

[REDACTED]

Via Facsimile and U.S. Mail

To Whom This May Concern:

I am writing to advise that the Southern Poverty Law Center represents the following individuals: [REDACTED]

[REDACTED] As you are aware, our clients were jointly employed by [REDACTED] and [REDACTED] at varying times in 2011 and 2012. A number of our clients have filed charges of discrimination with the Equal Employment Opportunity Commission ("EEOC") against you for discrimination and/or retaliation that they suffered while they worked for you. In addition, many of your other current or former employees are witnesses to the discriminatory actions against our clients and other workers. All of these workers have federal rights that protect them from discrimination and retaliation by their employers.

After our clients filed their charges of discrimination, they claim that [REDACTED] has threatened and harassed them: you have threatened to evict them from their apartments, have turned off their electricity to force them out of the apartments, and have attempted to force them to take jobs at other locations, among other steps. We are writing to advise that we consider all of these actions to be retaliatory, in violation of Title VII. We have informed the Equal Employment Opportunity Commission of the additional retaliatory actions that your company is taking against our clients.

We demand that you immediately cease and desist from improperly evicting our clients, denying them basic utilities, and from taking any additional retaliatory actions against our clients.

In addition, given that a federal investigation is currently pending against your company's employment practices, with the possibility of future litigation, [REDACTED] has the affirmative obligation to guard against spoliation of any and all relevant documents, files, correspondence, audio or visual recordings, photos, payroll records, personnel files, employment records, medical records, policies, postings, electronic data and/or records, and any other items that potentially will lead to the discovery of information relevant to any future civil lawsuit.

[date]

To the Immigration and Customs Enforcement Agency and other Law Enforcement Officials:

The following individual is involved in a Labor Dispute with [employer] and has engaged in protected concerted activity to challenge fundamental terms and conditions of employment with [employer] including unpaid minimum wages:

[employer] and its agents have already made unlawful threats against workers participating in this dispute in violation of Fair Labor Standards Act 29 U.S.C. § 215(a)(3) and section 8 of the National Labor Relations Act.

To ensure that ICE is not involved in action that may interfere with or retaliate against this worker for exercising his legal rights pursuant to Operating Instruction 287.3a, no further action should be taken on his case without the review of the District Counsel and approval of the Assistant District Director for Investigations or an Assistant Chief Patrol Agent.

Please immediately contact the Immigrant Justice Project, Southern Poverty Law Center at 1-800-613-0342, to discuss any further action by the Immigration and Customs Enforcement Agency against any worker appearing on this list.

For more information, please consult Operating Instruction 287.3a (Revised 12/04/96; Added to INSERTS April 1999), redesignated as 33.14(h) of the SAFM) and the Nov. 23, 2003 USDOL Memorandum of Understanding.

Sincerely,

[attorneys]