



At Work Against Discrimination

EDUCATION IS THE KEY TO PREVENTION

BY JOANNA MASTERSON

The flood of sexual harassment charges filed in the 1990s forced companies to wake up and take note of discrimination in the workplace. Policies were put in place, and the number of sexual harassment charges slowly started to drop.

But construction executives would be remiss to consider the problem solved. Discrimination can pervade all areas of employment—hiring, firing, compensation, recruitment, benefits—and sometimes it becomes a pattern of behavior rather than an isolated incident.

Last year, the Equal Employment Opportunity Commission (EEOC) received 75,428 charges of discrimination stemming from individual claims in which an employee charged an employer with discrimination. A much smaller number of cases involved systemic discrimination—something the EEOC plans to focus on more in the future.

By EEOC definition, systemic cases are “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 Commissioner Leslie Silverman describes these as cases “that have a broad impact ... cases where we’re really making a difference.”

Silverman is leading a task force to examine and strengthen the EEOC’s systemic discrimination program. The idea, she says, isn’t to disregard individual cases, but rather to more routinely and proactively analyze policies and practices that may lead to discrimination on a large scale.

Although systemic cases can grow from an individual charge, they also can be initiated by an EEOC commissioner or a directed investigation. This means that

the EEOC can file a suit against a company even if no employee makes a charge. In these cases, either an EEOC commissioner at headquarters or a district director in the field seeks out evidence that may reveal large-scale discrimination.

This evidence can be gathered from media and anecdotal reports, as well as data on employment trends, demographic changes and economic indicators. Field officers also reach out to stakeholders and community members, have access

to expertise from social science analysts, and review industry literature and EEO surveys. Employers with 100 or more employees must fill out and submit these surveys—which provide a breakdown of the company’s workforce by race and gender—to the EEOC on an annual basis (www.eeoc.gov/eeo1survey/index.html).

BRINGING DISCRIMINATION TO LIGHT

In May 1999, the EEOC sued Rent-a-Center for terminating female employees

and refusing to hire female applicants in Tennessee and Arkansas because of their gender. The EEOC charged the company with systematically eliminating women from its workforce by imposing an unfair

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Leslie Silverman

Laws Enforced by the EEOC

■ **Title VII of the Civil Rights Act of 1964:** Prohibits employment discrimination based on race, color, religion, sex or national origin. Applies to employers with 15 or more employees.

Race: Prohibits employment decisions based on stereotypes of abilities, traits (skin color, hair texture, etc.) or the performance of individuals of certain racial groups. Ethnic slurs, racial jokes and derogatory comments constitute unlawful harassment. Minority employees may not be segregated by physically isolating them from other employees or customer contact. Coding applications/ résumés to designate an applicant’s race constitutes discrimination. Requesting pre-employment information that discloses (or tends to disclose) an applicant’s race suggests race will unlawfully be used as a basis for hiring. However, if racial information is used for affirmative action purposes, tear-off sheets can ensure the information is not a part of the selection process.

Religion: Requires employers to reasonably accommodate the religious practices of an employee or prospective employee, unless doing so would create an undue hardship on the employer. Flexible scheduling, voluntary substitutions, job reassignments and lateral transfers illustrate accommodating an employee’s religious beliefs.

National Origin: Prohibits the denial of employment opportunities based on birthplace, ancestry, culture or linguistic characteristics common to a specific ethnic group. Requiring employees to only speak English at all times on the job is a violation unless the employer shows it is necessary for conducting business. Similarly, if someone is not hired because of an accent, the employer must show that the manner of speaking would have a detrimental effect on job performance. An employer who imposes citizenship requirements or gives preference to U.S. citizens may be in violation unless it is a legal/contractual requirement of the job.

■ **Equal Pay Act of 1963 (EPA):** Protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination. Applies to most employers with one or more employees. Covers all forms of compensation, including salary, overtime pay, bonuses, stock options, vacation/holiday pay, hotel accommodations, gasoline allowances, travel reimbursement and benefits. Pay differentials may be based on seniority, merit, skills, degree of responsibility, work conditions and quality of production, but not on gender. When correcting a pay differential, no employee’s pay may be lowered; instead, the lower-paid employee’s pay must be increased to match.

■ **Age Discrimination in Employment Act of 1967 (ADEA):** Protects individuals who are 40 years of age or older from discrimination based on age. It applies to employers with 20 or more employees, as well as job applicants and those in apprenticeship programs. Employers cannot deny benefits to older employees, and they should not include age preferences, limitations or specifications in job notices.

■ **Title I and Title V of the Americans with Disabilities Act of 1990 (ADA):** Prohibits employment discrimination against qualified individuals with disabilities in the private sector, and in state and local governments. Applies to employers with 15 or more employees. An individual with a disability has a physical/mental impairment that substantially limits one or more major life activities. An employer cannot ask applicants about the existence or severity of a disability, but can ask about their ability to perform the specific job functions. A qualified employee/applicant with a disability can perform the essential job functions, sometimes with reasonable accommodation (i.e., making existing facilities accessible, modifying schedules, modifying equipment, etc.). The employer doesn’t need to lower quality or production standards or provide personal use items (glasses, hearing aids, etc.). Drug and alcohol abuse is not covered by the ADA.

* Information compiled from www.eeoc.gov/policy/laws.html

weight-lifting requirement, assigning them cleaning/clerical duties, and unfairly disciplining them, demoting them and forcing them to resign.

Systemic discrimination is not limited to gender issues. Two years ago, the clothing company Abercrombie and Fitch was charged with violating Title VII of the Civil Rights Act for maintaining hiring practices that excluded minorities and adopting a restrictive marketing image that limited minority employment.

Construction executives should be wary of similar exclusionary practices. Imagine if a contractor of a certain ethnic background only hired workers from the same background. This practice could be considered discriminatory if the hiring decisions were solely based on race or national origin rather than the applicants' skills. Another behavior Silverman says can serve as evidence of discrimination is a contractor that only advertises job openings via word of mouth; doing so eliminates the opportu-

nity for qualified candidates from "outside the circle" to apply.

In 2005, 35.5 percent of all discrimination charges were related to race. Next came sex-based charges (30.6 percent), followed by those related to age, disability and national origin.

Thomas Lenz—counsel for the Los Angeles-Ventura, Southern California and Central California chapters of Associated Builders and Contractors (ABC), and labor attorney with Atkinson, Andelson, Loya, Ruud & Romo in Cerritos, Calif.—says these statistics ring true for an industry in which one third of workers are Hispanic and 9 percent are African American. (Data is based on information from the U.S. Bureau of Labor Statistics' 2005 Household Data Annual Averages.)

"Most common in my firm's experience are issues of race discrimination and sex discrimination," Lenz says. "It seems construction companies have employees that come and go and don't necessarily have the same employees from job to job. Conse-

quently, people might not be on the same page like in other industries."

Bill Pinto, president and chief operating officer of Hardin Construction, Atlanta, says the industry also struggles with the stereotype that construction is a man's world. "There can be an inherent discrimination about women and what they can do in the industry, more so from a field standpoint than an office standpoint," he says. "As an industry, we're still fighting that image."

Going forward, Pinto wonders if the industry will start to see a different kind of discrimination resulting from controversy about undocumented workers. "Without the Hispanic workforce, it would be awfully hard to get construction done in the Southeast. I hope that all the turmoil on how to deal with undocumented workers doesn't create some other level of discrimination."

With these issues in mind, Lenz says contractors would be well advised to remind workers of the rules on a regular basis. "[Systemic discrimination] is really a matter of concern because people at any level of the company can create liability issues," he says. "If employees are not trained, the company is the deep pocket and can easily face a claim for punitive damages."

PREVENTATIVE MEASURES

Silverman and Lenz agree the first step to combating discrimination is to review the laws regulated by the EEOC (see p. 36). Then, contractors should examine their policies and procedures to make sure they not only comply with EEOC regulations, but also prevent situations in which discrimination may occur.

"Self-audits on hiring, pay and promotion are helpful so the employer has a good idea what's going on in their workforce," Silverman says.

Keeping track of whom the company is hiring, whom it is promoting and how much employees are being paid based on position and skills helps executives discover disparities and decide whether bias is to blame. The EEOC requires employers to keep all personnel records for one year, and if an employee is involuntarily terminated, the records should be retained for one year from the date of termination. All payroll records should be kept for three years, and

What happens when a charge is filed?

To start, the EEOC sends a letter to the company stating a charge has been made. (Charges made by individuals must be filed within 300 days of the alleged discrimination.) The letter also provides contact information for the case investigator.

The company may choose to resolve the charge immediately through settlement or, if invited, through mediation. Usually, due to the scope of the charge, systemic offenders are not allowed to participate in mediation. Instead, these employers must try other methods of conciliation, including litigation, if necessary.

EEOC Commissioner Leslie Silverman says about 10 percent of all charges filed are mediated each year, and in 2003 the program achieved a 69 percent settlement rate. Mediation is free and is administered by trained mediators. Participants usually can reach an agreement in a single five-hour session, as opposed to the nearly five months it can take to fully investigate a charge.

According to the EEOC, almost half of mediated cases involve a non-monetary settlement. Plus, mediation can help the parties understand why the employment relationship broke down and may help identify ways to repair the relationship.

If mediation is successful and a settlement is reached, the case is closed. If mediation is not an option or if a settlement cannot be reached through mediation, the case enters the investigation phase. (Mediators must remain neutral and may not disclose information learned during the mediation to investigators.) At this time, the company must provide a statement of position and information on personnel policies and employees available for witness interviews. The EEOC also may request an onsite visit.

After the evidence is gathered and analyzed, the EEOC issues a decision, either finding reasonable cause or no cause that discrimination occurred. If no cause is found, the charging party is issued a Dismissal and Notice of Rights stating he or she has the right to file a lawsuit in federal court within 90 days.

If reasonable cause is found, both parties are issued a Letter of Determination that invites them to resolve the charge through conciliation. If conciliation fails, the EEOC—or the charging party—may file a lawsuit in federal court.

For more information, visit www.eeoc.gov/employers/investigations.html.

—Joanna Masterson

any wage rates, job evaluations or collective bargaining agreements that explain the basis for paying different wages to employees of the opposite sex should be kept for two years. These records are useful should a discrimination charge be filed, but they also can help employers self-regulate.

Silverman also recommends employers take measures to try and eliminate bias during the decision-making process. "There is a certain amount of subjectivity when it comes to hiring," she says. "You

could have a committee so that one person isn't making all the hiring decisions."

Adds Lenz: "Anyone involved in the hiring process must be trained on the law. You don't want to be asking about things that don't relate to the job in question. You don't want to ask about someone's race or national origin or age. If you focus on duties, experience and the ability to perform the tasks that are essential to the job, you will be inquiring into the appropriate areas."

Having accurate job descriptions with specific criteria can help employers identify the type of worker they're seeking and prevent them from making a hiring decision based on anything but that criteria. Employers also must make sure any pre-employment tests administered to applicants are EEO compliant. The same test must be given to all applicants and used as a means to measure skill rather than discriminate based on gender, ethnic group, etc.

Silverman also cautions employers against limiting job postings to certain types of newspapers, websites or office premises. A combination of posting efforts is encouraged to attract all types of candidates. This is important for promotions, too, as all qualified workers should have the opportunity to apply.

Finally, employers must disseminate policy information to employees and train them on how to eliminate discriminatory practices—not just sexual harassment, but other less-publicized forms involving pregnancy, religion and disabilities.

According to Lenz, California has a mandatory sexual harassment training requirement for employers of 50 or more employees. "This is something prudent employers should expand into anti-discrimination training," he says. "Use it as a basis to educate employees on all sorts of things that aren't allowed."

The EEOC Training Institute (www.eetraining.eeoc.gov) offers a variety of programs to aid employers in preventing and correcting discrimination in the workplace. Some district offices offer fee-based training tailored to an employer's needs, but more basic onsite training also is available for free. In addition, the agency offers Technical Assistance Program Seminars, held for one to two days in major cities across the country. The seminars use expert presentations to highlight the latest equal employment opportunity topics.

"It really boils down to education and the culture of companies," Pinto says. "If you have a culture of doing the right thing, then you're going to prevent—if not eliminate—[discrimination] from happening. The message has to come from the top down in any company."

Masterson is staff writer for *Construction Executive*.