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Running Your Business: EEOC Initiatives Require Operators To Be Proactive In Preventing Discrimination Lawsuits

By *Kenneth N. Winkler*

It has been said that litigation is the legal right that guarantees every corporation its decade in court. Sadly, this has become a reality for many restaurant operators. Every day a new headline reveals the filing of a class action lawsuit or a high-dollar settlement. If you feel that your attention is too often focused on legal compliance and troubled employees, you are not alone. Title VII, the ADEA, the ADA, the FMLA, the FLSA, OSHA and employing authorized workers are just a few of the issues that keep operators up at night.

Taking a few proactive measures, however, can go a long way to prevent litigation and allow you to redirect your focus to operations. A good starting point is to understand what types of claims can expose your restaurant to significant liability. Just as there are trends in concepts and cuisine, there are trends in the law. The Equal Employment Opportunity Commission ("EEOC"), the federal agency designated to enforce discrimination laws and investigate charges of discrimination, is not shy about what efforts it is taking to combat certain types of discrimination. All of the EEOC's major initiatives are publicized on its website at www.eeoc.gov and referenced in its press releases. By paying attention to EEOC developments and initiatives, an employer can become aware of issues that may pose significant risk to its operations and take the appropriate measures to ensure compliance.

This article discusses three (3) areas of the law that the EEOC has aggressively pursued, especially against restaurants: race discrimination; sexual harassment involving teenage workers; and national origin discrimination. In some situations, employers are sued for a multitude of discriminatory acts. For example, earlier this year, a New York geriatric center agreed to pay \$900,000 to end a class action lawsuit based on race and national origin discrimination brought by the EEOC. The lawsuit alleged that the center permitted harassing comments

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based on race and/or national origin by its managers and residents against the workers, who served in various departments including food service. The EEOC said the center also prohibited Haitian employees from speaking in Creole while allowing other non-English languages to be spoken at the facility; subjected black and/or Caribbean employees to stricter disciplinary actions as compared to others; and retaliated against those who brought these issues to management. In addition to monetary payment to the claimants, the settlement requires the facility to hire a qualified human resources professional, implement anti-discrimination policies and procedures, conduct extensive anti-discrimination training, and report internal complaints of discrimination to EEOC over a five-year period. The EEOC trial attorney handling the case confirmed that "[c]ases involving race and national origin are EEOC priorities." As explained below, these "hot" topics continue to challenge employers in all industries, especially restaurants.

Race Discrimination

In Fiscal Year 2006, the EEOC received 27,238 charges alleging race-based discrimination, accounting for 36 percent of the agency's private sector caseload. Historically, race-based charges have been the most frequent type of filing with EEOC offices nationwide. In an effort to combat racial discrimination in the workplace, the EEOC launched its E-Race Initiative. Through E-Race ("Eradicating Racism and Colorism from Employment") the EEOC has vowed to identify issues, criteria and barriers that contribute to race and color discrimination, explore strategies to improve the administrative processing and the litigation of race and color discrimination claims, and enhance public awareness of race and color discrimination in employment.

Of particular concern to the EEOC are new forms of discrimination resulting from multi-dimensional demographics, overt acts of discrimination such as the display of nooses in the workplace and facially neutral employment criteria that are significantly disadvantaging applicants and employees on the basis of race and color. For example, selection decisions based on names, arrest and conviction records, employment and personality tests, and credit scores will be highly scrutinized by the EEOC as they may disparately impact people of color. The EEOC is also concerned about an employer's reliance on new technology in job searches, such as video resumes, as the use of such technology could lead to intentional race or color discrimination based on appearance or a disproportionate exclusion of applicants of color who may not have access to broadband-equipped computers or video cameras. The EEOC's launch of the E-Race Initiative

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demonstrates that the EEOC intends to continue its aggressive prosecution of race-based charges.

Recent cases show that race discrimination remains a serious problem. Ryan's Restaurant Group, Inc. agreed to pay \$41,000 to a former black employee to settle an EEOC race bias suit. The EEOC charged that Ryan's violated Title VII when it created and condoned a racially hostile work environment at its Jasper, Ala., restaurant. The alleged harassment included the display of hangman's nooses by the restaurant's manager. The employee complained about the workplace nooses, the EEOC said, and was fired in retaliation. The terms of the settlement also include requirements for anti-discrimination training.

On June 8, 2007, the EEOC announced a \$500,000 settlement with a Michigan steel tubing company. The EEOC had alleged that Michigan Seamless Tube, after purchasing the assets of its predecessor company, refused to hire a class of African American former employees of the predecessor. In addition to the cash settlement, Michigan Seamless is also required to recruit black applicants by a variety of methods, and will provide training on anti-discrimination laws to all its employees, managers and executive officers.

Teenage Sexual Harassment

The EEOC has experienced a significant increase in the number of complaints it has received by young workers alleging harassment in the workplace. In response, the EEOC launched its youth@work initiative in 2004 to combat this disturbing trend. The initiative is designed to educate young workers so that they have a better understanding of their rights and responsibilities at work and will be better equipped to identify improper workplace behavior and protect themselves in the workplace against harassment. The youth@work initiative has three main components: (1) a website dedicated to educating teenage workers about their equal employment opportunity rights and responsibilities; (2) outreach events by EEOC commissioners and field office staff for high school students, youth organizations and small businesses that employ young workers; and (3) partnerships with business leaders, human resource groups and industry trade associations.

The EEOC has stated publicly its belief that young workers are particularly vulnerable to discriminatory acts, especially sexual harassment. EEOC Chair Naomi C. Earp, has stated "Each year, millions of teens work part-time or during the summer, and EEOC is committed to working with employers to help ensure that every teen's first work experience is a positive one. While the Commission strives

to proactively prevent discrimination through education and outreach as a first resort, we will not hesitate to use our litigation tools when necessary." Restaurants are clearly on the EEOC's radar as indicated by one EEOC Regional attorney's statement: "Our office sees sexual harassment in all sorts of workplaces across the board - especially in restaurants. Women servers seriously in need of work - and who may be living pay check to pay check - are too frequently treated as if working in a cesspool of sexual misconduct is an expected part of the job. . ."

Restaurant operators should take these statements seriously. Indeed, the EEOC's youth@work website provides several examples of lawsuits it successfully pursued against restaurants. In one highlighted case, the EEOC obtained a \$150,000 settlement to resolve a lawsuit against a Mexican restaurant after a 19 year female was sexually harassed by her manager.

The EEOC recently settled a lawsuit against GLC Restaurants, Inc. for \$550,000 and substantial remedial relief on behalf of a class of teenage workers who were sexually harassed by a middle-aged male supervisor, including unwanted touching and lewd comments. In addition to paying \$550,000 to the eight young women, the EEOC settlement, by consent decree, requires GLC to provide training and other relief aimed at educating its employees about sexual harassment and their rights under Title VII of the Civil Rights Act.

As more and more teens enter the workplace, teenage sexual harassment cannot be ignored.

National Origin Discrimination

National origin discrimination means treating someone less favorably because he or she comes from a particular place, because of his or her ethnicity or accent, or because it is believed that he or she has a particular ethnic background.

Since September 11, 2001, the Equal Employment Opportunity Commission (EEOC) and state and local fair employment practices agencies have recorded a significant increase in the number of charges alleging discrimination based on religion and/or national origin. In Fiscal Year 2006, the EEOC received 8,327 charges of national origin discrimination. Monetary benefits for charging parties totaled \$21.2 million (not including monetary benefits obtained through litigation).

Many of the charges have been filed by individuals who are or are perceived to be Muslim, Arab, South Asian, or Sikh. These charges most commonly allege harassment and discriminatory discharge. National origin harassment can

include ethnic slurs, jokes, offensive or derogatory comments, or other verbal or physical conduct based on an individual's national origin. Given the diversity of workers employed in restaurants, it is not surprising that national origin discrimination has been a longstanding problem in the industry. In June 2007, a jury awarded more than \$287,000 in a religious discrimination suit against Alamo Car Rental brought by the EEOC. The lawsuit alleged that Alamo committed post-9/11 backlash discrimination based on religion when it fired a Somali customer sales representative in December 2001 for refusing to remove her head scarf during the Muslim holy month of Ramadan.

Cases alleging national origin discrimination also frequently involve an employer's enforcement of an English-only rule, which requires employees to speak only English at all times on the job. Such a rule is unlawful unless it is necessary for conducting business or ensuring the safety of others. English-only rules received national attention when a lawsuit was filed against Daniel Boulud, Chef-Owner of many of New York's finest restaurants. Among the allegations were claims that managers yelled racial slurs and banned Spanish in the workplace but permitted English and French to be spoken.

What Should Restaurants DO?

Given the litigation landscape, restaurants must take proactive steps to prevent discrimination from occurring in the workplace. While many of the following suggested measures may seem obvious, they are too frequently ignored.

- **Have an effective EEO Policy:** Implement an employee handbook that includes an Equal Employment Opportunity policy that is adhered to and supported by upper management. In this regard, implement policies and practices designed to widen and diversify the pool of candidates considered for employment openings and promotions. Ensure that promotion criteria are made known, and that job openings are communicated to all eligible employees.
- **Have an effective Harassment Policy:** Design, implement and enforce a harassment policy that clearly prohibits all forms of discrimination including, but not limited to, racial discrimination and harassment and national origin discrimination. Many employers have sexual harassment policies, but fail to specifically prohibit other forms of discrimination. A sound policy should contain: (1) an explanation of what conduct is prohibited; (2) a clearly described complaint process that provides multiple, accessible avenues of complaint; (3) assurance that the employer will protect the confidentiality of the complaints to

the extent possible; (4) assurance that complaints will be taken seriously and investigated promptly and fairly; (5) assurance that the employer will take prompt and appropriate corrective action if it determines that a violation of the policy has occurred; and (6) assurance that employees will not be retaliated against for filing a complaint or participating in an investigation. Make sure the policy can be understood by an average teenager.

- **If you have name tags, use them.** Encourage all managers and staff to call other employees by their name. Insensitivity leads to trouble as does namecalling, even if done to be funny.
- **Train.** Management and staff should receive periodic training on all forms of discrimination and not just sexual harassment. A policy is worthless if it is neither understood nor followed. To combat teenage harassment, restaurants should also provide training specifically geared toward teenager workers and for managers who may supervise teenage workers. The restaurant should also maintain records of all training including the dates of the training, signatures of the attendees, and copies of all training materials.

While no measures are full-proof, hospitality employers can significantly reduce the likelihood of being sued for discrimination by implementing sound policies and procedures and investing the time and resources to properly train management and staff about such policies. It is also recommended that operators build a relationship with outside legal counsel to help draft effective policies and to provide advice when needed to avoid potential problems.

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