



The Law and the Message: The Changing Face of the EEOC

RODNEY KLEIN

RODNEY KLEIN EEO TRAINING, LLC

Sorting out the Law and Message

DEI:

The law and the message

LGBT Discrimination:

The law (Bostock), harassment (names, pronouns, and restrooms) and the EEOC

Adverse impact:

The law, the EEOC

The changing face of the EEOC

DEI

DEI

-The Law

It is illegal to discriminate against applicants and employees based on race, color, religion, sex, national origin, age (40 and over), disability and genetic information.

Nothing new

DEI

-The Law

So, what is illegal DEI?

No one really knows

...because no one ever defines it.

But let's start with what we know...

DEI

-The Law

Quotas and preferences

Diversity can become a legal problem when we make it a goal

Goals are often reduced to numbers

Managers feel pressure to take the easiest path to meet those numbers (quotas and preferences)

The goal should be the elimination of barriers to entry

DEI

-The Law

The goal should be the elimination of barriers to entry

A company in San Antonio employs a lot of electricians

- Only 5% of its electricians are Hispanic

- 40% of electricians in Bexar County (San Antonio), where the company exclusively recruits, are Hispanic

The number (5%) is not the legal question. The reason for the number may be. This is why in class cases numbers are rarely probative

DEI

-The Law

Numbers can be red flags

-5% of the people who apply for electrician jobs with the company are Hispanic

Can the employer step up its recruiting efforts for Hispanic electricians in Bexar County? **Absolutely**

Employers have a business interest in creating large applicant pools (law of large applicant pools)

DEI

-The Law

So, what about tangential effects?

Increased recruitment of Hispanic electricians will likely result in more Hispanic hires, which means fewer non-Hispanic hires

The law encourages employers to open up its hiring practices (remove barriers to entry)

Problems come from restricting some to open up opportunities for others

DEI

-The Law

If your goals are non-discriminatory (large applicant pools), and you are removing barriers (instead of restricting groups of people) to meet those goals, then you're following the law

-40% of electrician applicants are Hispanic, but only 5% of hires are Hispanic

Meeting a number may be illegal. It is also lazy. Because it doesn't resolve the underlying problem

DEI

-The Law

EEOC DEI Guidance:

Key phrase – “...affects status or deprives employee of employment opportunities.”

Employee Resource Groups

Don't know why an employer would exclude people from an ERG since the goal is to learn from each other, but if being restricted doesn't “affect status or deprive an employee of an employment opportunity,” then the ERG is not illegal.

DEI

-The Law

Training:

Shouldn't tell employees what to think

We all have opinions and beliefs, even employers. But we must honor and respect the beliefs of those we work with

A difference of opinion does not typically create a hostile environment (example: annual training)

DEI

-The Law

Training:

But you can tell employees how to behave (the law fully supports this)

Training should be based on the law, or the principles of the law.

Should be expressed in a language centered around values most everyone shares – care, respect, fairness, etc.

DEI

-The Law

Keep removing barriers

Failing to remove barriers is restricting

DEI

-The Message

That DEI is inherently discriminatory against certain groups of people. And any attempt to remove barriers for protected groups may result in lawsuits by the groups who benefit from the barrier.

What is DEI?

DEI

-The Message

What is DEI?

Executive orders don't define it.

EEOC doesn't define it.

And as we know, no social media posts define it.

DEI

-The Message

Ambiguous orders create chaos

Chaos creates fear

Fear pushes people to self-restrict

You might win in the 5th Circuit Court of Appeals, but who wants to be in the 5th Circuit Court of Appeals?

DEI

-The Message

EEOC Guidance:

-**May be illegal** if it affects status or deprives employee of employment opportunity.

Could have been stated the opposite way. Programs are legal unless they....

Gives the impression programs are illegal more than they are not.

DEI

-The Message

Not seen any evidence that illegal DEI programs are widespread.

Defense attorneys
General Counsels
Overall numbers
Training lawsuits

DEI

-The Message

Are people (white or male or Christian) sometimes discriminated against? **Yes**

Are these the big issues in employment discrimination? **No**

It sends a message

LGBT Discrimination

LGBT Discrimination

-Bostock

SCOTUS very clear that its ruling rests entirely on Title VII's recognition of two sexes.

No discussion of gender ideology or multitudes of sexes.

In a practical sense, SCOTUS created two new protected classes: sexual orientation and gender identity.

Legally, though, SCOTUS's ruling was simply about sex.

LGBT Discrimination

-Bostock

How?

Title VII is a mixed motive law – sex must be a motivating factor, but it doesn't need to be the only or primary motivating factor.

Sex is baked into the definitions of gender identity and sexual orientation.

- a person who identifies with a gender inconsistent from their **biological sex**
- a person attracted to persons of the same **biological sex**

LGBT Discrimination

-Bostock

The important legal point in Bostock is that an employer who harms an applicant or employee entirely or partially because of their sex violates Title VII.

This means, SCOTUS ruled that sexual orientation and gender identity are unambiguously protected.

LGBT Discrimination

-Beyond *Bostock*

SCOTUS declined to address other issues related to sexual orientation and gender identity

Probably because there are some unique issues connected to gender identity that require some nuance.

Names

Pronouns

Restrooms/locker rooms

LGBT Discrimination

-Beyond *Bostock*

These aren't just legal issues, they're also political

Politics distorts most of the issues it touches – creates its own reality

EEOC has stopped investigating and litigating charges filed by gay and transgender employees

EEOC also wants to rescind its prior guidance on harassment because it discusses harassment based on sexual orientation and gender identity (names, pronouns, restrooms)

LGBT Discrimination

-Beyond *Bostock*

These aren't just legal issues, they're also political

A Federal Judge in the 5th Circuit voided parts of the EEOC's harassment guidance

Ruling centered around the idea that *Bostock* only addressed discharge, not harassment.

Title VII doesn't make that distinction

LGBT Discrimination

-Beyond *Bostock*

So, what do we do?

Don't know:

Follow harassment legal standards. They are based primarily on the impact the behavior has on the victim and on societal standards (subjectively and objectively hostile)

LGBT Discrimination

-Beyond *Bostock*

-Names

One day one of your employees, Mike, comes to work presenting as a woman, announces that she is transgender, and asks everyone to call her Mary. Jane, one of Mary's co-workers, continues to call Mary, Mike, purposely and repeatedly.

Two days later another one of your employees, Bill, says that it violates his sincerely held religious belief to call Mary, Mary. He requests a religious accommodation: to continue to call Mary, Mike.

LGBT Discrimination

-Beyond *Bostock*

-Names

Must provide the accommodation unless doing so creates an undue hardship. If allowing the accommodation results in Mary being illegally harassed, then allowing the accommodation would create an undue hardship (probably).

So, the question is, will being repeatedly and purposely called a name other than the one the employee requested eventually create a hostile environment?

LGBT Discrimination

-Beyond *Bostock*

-Pronouns

Same analysis, but I think we should be cognizant that pronouns involve language rules, and so the courts may view them differently. Don't know.

LGBT Discrimination

-Beyond *Bostock*

-Restrooms and locker rooms

Restrooms involve the issue of privacy

I don't want to see other people

I don't want other people to see me

I don't want to be approached for sex

If the restroom issue does not involve a privacy issue, then barring transgender employees may be legally problematic

Locker rooms are different from restrooms.

LGBT Discrimination

-Beyond *Bostock*

-Conclusion

There is so much confusion around these potential harassment issues that your best course of action is to consult with an attorney and weigh how the behavior is impacting your employee.

Adverse Impact

Adverse Impact

-The Law

Starts with a neutral policy

The policy adversely impacts a protected group

The policy is illegal, unless it is job related and consistent with business necessity.

This means employers can have policies that adversely impact certain protected groups if the policy is connected to the job.

Adverse Impact -The Law

4/5ths Rule

Whatever the hire rate is for the majority group, the hiring rate for the minority group should be 4/5ths of it.

If 50% of all White applicants are hired for a particular job, then at least 40% of all Black applicants should also be hired.

This is not the legal test, but it is a good general measure.

Adverse Impact

-The Law

This means that all policies that adversely impact a protected group need to be validated.

To show that the policy is job related and consistent with business necessity.

RIF criteria, hiring criteria, tests, internal policies and rules, arrest and convictions, English-only, AI

Adverse Impact -The EEOC

Has stopped investigating and litigating adverse impact cases

Hard for plaintiff attorneys to pick up these issues

Adverse impact has been precedent since the early 70's and is part of the Civil Rights Act of 1991.

Discrimination by any other name (the 15th Amendment)

The Changing Face of the EEOC

The Changing Face of the EEOC

The primary mission of the agency is now political, not legal

It is now enforcing only those laws the party in charge likes and not enforcing laws it doesn't

It is deciding which people benefit from the law and which don't

This is a fundamental shift

The Changing Face of the EEOC

This means:

The EEOC is not very objective

Find sources that will objectively advise you on the law and good practice.

EEOC is not the EEO police

Training for Managers

Handle with Care: Managing Behavior and Building Teams Culturally

Legal Training for Managers

EEO Basics for Supervisors

(Discrimination, Harassment, Retaliation, ADA)



Rodney Klein
EEO Training

rk@rodneykleineeotraining.com
210 827 0991

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Rodney Klein
EEO Training

rk@rodneykleineeotraining.com
210 827 0991

Attempts: Brief Observations on Civil Rights, EEO, and the Difficulties of Difference

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rk@rodneynkleineetraining.com

