Via Electronic Mail

November 12, 2013

Equal Employment Opportunity Commission
131 M Street, N.E.
Washington, D.C. 20507
Commissionmeetingcomments@eeoc.gov

Re: *Five Recommendations For Combating National Origin Discrimination*

Dear Commissioners:

We would like to commend the EEOC for calling a public hearing to increase public awareness about national origin discrimination and for adopting a Strategic Enforcement Plan ("SEP") that recognizes the importance of protecting immigrant, migrant, and other vulnerable workers from harassment and other discriminatory practices. Considering comprehensive immigration reform is on the forefront of national discussion, we believe the time is ripe for strengthening measures against national origin discrimination and other workplace protections for immigrant and national origin minority workers. As organizations that advocate on behalf of national origin minority communities, we have long represented clients who have confronted discrimination, harassment, and retaliation due to their ethnicity, English language abilities, and/or perceived immigration status, and who often have difficulty asserting their workplace rights. Based on our collective experience, we have five policy recommendations that we hope assist the EEOC in ensuring we meet our shared goal of protecting the civil rights of immigrant and national origin workers.

1. The EEOC should explicitly acknowledge the interplay between national origin, race, and religion in discrimination claims

Bias is fluid, and is often based on animosity towards "otherness" that encompasses a number of protected classes. For example, a complainant facing discrimination based on her actual or perceived connection to the Arab world or the Middle East may have claims of race, national origin, and/or religious discrimination, depending on the biases exhibited. It is important for the EEOC to take this fluidity into account in the course of investigating discrimination charges. Where appropriate, EEOC investigators should: (1) preserve all of the potential bases for discrimination by actively amending the charges to include all relevant protected bases for discrimination, (2) ensure that findings of fact detail all of the potential bases for discrimination, even if broader than the initial charge or broader than the initial narrative supporting a claimant's charge, and (3) train investigators to identify cases where discrimination may be based upon a number of protected and intersecting classes, and to respond appropriately.

2. The EEOC should strengthen its effort to combat language discrimination.

Language discrimination is in many cases a proxy for national origin discrimination. To economically and psychologically penalize a person for practicing her native tongue or speaking English with an accent is to strike at the core of ethnicity and stigmatize national origin minorities. Indeed, our organizations have seen a sharp rise in the number of cases where employers implement speak-English-only policies, apply unnecessary English language proficiency requirements, and engage in accent discrimination. In certain cases, employers enforce speak-English-only policies in such a draconian manner that the enforcement itself amounts to harassment and relegates many Spanish-speaking employees and other bilingual workers to second-class status.

To prevent the further marginalization of national origin minorities, the EEOC should (1) clarify that speak-English-only policies may result in the creation of hostile work environments, even if those policies are not in effect at all times, (2) reaffirm the presumption, reflected in 29 C.F.R. § 1606.7, that speak-English-only policies have an adverse impact on national origin minority workers regardless of the employees' "ability to comply," (3) expressly recognize sociolinguistic research on code-switching, i.e., the tendency for bilinguals to unconsciously switch between English and another language, (4) reject employers' conclusory assertions of business necessity and carefully scrutinize reliance on "co-worker morale" and/or "customer preference" rationales for speak-English-only policies and English proficiency requirements, (5) ensure any English proficiency requirement be narrowly tailored to the level of such proficiency required by the job, (6) insist on "a searching look" into an employer's proffered reasons for when an employer uses accent as a basis for adverse employment decisions and require the employer to do something more than articulate a reason that has only facial plausibility, and (7) consider addressing the issue of listener bias, which may skew an employer's perception of whether the accent of the employee in fact interferes materially with her job performance.

3. The EEOC should explicitly recognize that workplace segregation constitutes discrimination.

Employers increasingly invoke their "corporate image" as a reason for segregating employees from customers and the general public. However, "corporate image" may be related to the employer's misguided conception of its customers' preferences, which the EEOC already rejects as a basis for discriminating against workers. Given that workplace segregation is repugnant and merely echoes our country's once misplaced faith in "separate but equal," the EEOC should clarify in its guidance documents, training materials, and policy statements that segregation on the basis of any protected category violates Title VII regardless of whether the segregated employee experiences economic harm.

4. The EEOC should adopt practices in use by other governmental agencies to prevent retaliation.

Though illegal, retaliation against employees who assert their workplace rights frequently occurs in the United States. In particular, employers and their agents are far too often ready, willing, and able to use a worker's perceived immigration status as a tool to defeat Title VII claims. When workers are reluctant to come forward with Title VII complaints, the most egregious violations may not come to the EEOC's attention, undermining its ability to enforce the law. To ensure that the most vulnerable workers have access to legal protection, the EEOC should adopt three best practices in use by other labor agencies: (1) issue a letter to employers in every case warning them that taking adverse action against a charging party, including discharge, threats, or making reports to immigration authorities, is illegal, (2) notify charging

parties that they should contact EEOC if any retaliation occurs, and (3) where retaliation does occur, put in place a "rapid response" plan to contact employers, warn them that retaliation is unlawful, and demand reversal of any retaliatory action.

5. The EEOC should ensure linguistic access to its investigative, conciliatory, and litigation services.

Providing equal access to investigation and conciliation procedures as well as to legal representation is essential to the EEOC's efforts to end national origin discrimination. To accomplish equal access to the EEOC's services, the EEOC should (1) renew its pledge embodied in the Plan of the Equal Employment Opportunity Commission for Improving Access to Services for Persons with Limited English Proficiency ("LEP Access Plan"), (2) reconsider the practicability of requiring employees to follow an employer's reporting procedures when the employee fails to timely report harassment because of a lack of language access; (3) ensure that prompt, high-quality interpretation services are available to and used by EEOC intake workers receiving EEOC discrimination charges, EEOC investigators when discussing a charge with a charging party or witness with limited English proficiency, and EEOC staff pursuing cases in litigation; and (4) ensure charging parties and potential charging parties, as well as witnesses, are not asked to provide or pay for their own interpreters, and are not subjected to delay in filing or pursuing a charge because the EEOC lacks sufficient interpretation capacity.

In conclusion, we believe the EEOC's public hearing will be beneficial in initiating a discussion about the above policy recommendations regarding national origin discrimination. While we recognize some of the recommendations may be more difficult to adopt than others, we believe all are necessary to protect immigrant, migrant, and other vulnerable workers from harassment, trafficking and other discriminatory practices. We look forward to working with the EEOC on these and the other challenges facing immigrant and national origin minority employees.

Kind regards,

American Civil Liberties Union
Asian Americans Advancing Justice – Asian Law Caucus
Asian Americans Advancing Justice – Los Angeles
Equal Rights Advocates
Centro de los Derechos del Migrante, Inc.
Council on American-Islamic Relations - Chicago
Empire Justice Center
Friends of Farmworkers
Greater Boston Legal Services
Professor Tanya Hernandez – Fordham University School of Law (for identification purposes only)
The Immigrant Worker Center Collaborative
The Legal Aid Society – Employment Law Center
La Raza Centro Legal
Lawyers' Committee for Civil Rights and Economic Justice
Professor Beth Lyon – Director of the Farmworker Legal Clinic at Villanova University School of Law (for identification purposes only)
Maintenance Cooperation Trust Fund

National Employment Lawyers Association / Illinois
National Employment Law Project
National Guestworker Alliance
National Immigration Law Center
New Mexico Center on Law and Poverty
Professor Sarah Paoletti – Director of the Transnational Legal Clinic at the University of Pennsylvania School of Law (for identification purposes only)
Public Justice Center
The Sikh Coalition
Southern Poverty Law Center
Worker Justice Center of New York
Workplace Justice Initiative
Worksafe
Voces de la Frontera