

Written Testimony of Devon Westhill, President and General Counsel, Center for Equal Opportunity

Hearing of April 28, 2021 - The Civil Rights Implications of the COVID-19 Pandemic

Chair Burrows, Vice Chair Samuels, and distinguished Commissioners, thank you for the invitation to provide my testimony on “The Civil Rights Implications of the COVID-19 Pandemic.” As my invitation to testify at today’s hearing indicated, this is a critically important issue, and I am honored to have this opportunity to address it.

My name is Devon Westhill and I am the president and general counsel of the Center for Equal Opportunity (CEO). CEO is a non-partisan, non-profit research and educational organization. For more than 25 years, CEO has conducted studies and produced reports, monitored and advised on government action, and educated the public with the singular goal of promoting colorblind equal opportunity and nondiscrimination in America. For example, my predecessor, Roger Clegg, has previously testified before this agency.¹ CEO has also participated as amicus curiae in numerous Supreme Court cases regarding disparate treatment on the basis of race or ethnicity including in the case of *Students for Fair Admissions v. Harvard* currently on petition for certiorari.²

Relevant to my testimony, I should also state that during the worst of the COVID-19 pandemic, and the racial turmoil we experienced in 2020 after the killing of George Floyd, I served as the top civil rights official at the United States Department of Agriculture.

My remarks cover how some efforts to address damage from the COVID-19 pandemic are discriminatory and are harmful to the workforce. Further, I address the importance of this independent body not just to avoiding similar pitfalls and enforcing workplace antidiscrimination law but also, to embracing its critical place in American society at a dire time for civil rights in our nation’s history.

I. CONNECTION BETWEEN COVID-19 PANDEMIC AND RACIAL UNREST

A combination of the COVID-19 pandemic and racial tumult that we have been facing has supercharged the motivation of many to assess how distinct groups of American citizens have been differently affected by the pandemic.

I have read and discussed allegations that, for example, a surge in violence directed at Asian Americans is a consequence, in part, of the COVID-19 pandemic. I have also heard the suggestion that black Americans and other individuals of color have been both disproportionately stricken by the virus and more acutely affected by it. Further, I have read about and discussed the contention that women have and will bear a greater burden from the pandemic by, for example, a

¹ See e.g. Roger Clegg, *Statement of Roger Clegg, President and General Counsel, Center for Equal Opportunity*, EEOC (Feb. 28, 2007), <https://www.eeoc.gov/statement-roger-clegg-president-and-general-counsel-center-equal-opportunity>; Roger Clegg, *Statement of Roger Clegg, President and General Counsel, Center for Equal Opportunity*, EEOC (Feb. 28, 2007), <https://www.eeoc.gov/meetings/meeting-february-28-2007-launch-e-race-initiative/clegg>.

² See also *Ricci v. DeStefano*, 557 U.S. 557 (2009); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

decrease in potential earnings over their careers because of their disproportionate exit from the workforce to perform necessary and unexpected domestic duties over the last year. A report from the World Economic Forum, for example, predicts that because of the COVID-19 pandemic the Global Gender Gap between men and women in the developed world has widened by 36.1 years, making gender parity now impossible for 135.6 years.³

I do not here intend to take a position on any of these claims. It is enough to say that numerous factors contribute to various impacts on any group or community such as income, geography, work industry, routine, and beliefs, among many others. So, we ought to carefully and thoughtfully analyze the ways in which the COVID-19 pandemic has affected our country and the world. It is good and serious work and I am personally interested in it. For example, my four-year-old daughter, Madeline, is of mixed black, white, and Vietnamese ethnicity. As a young multiracial female, I want to remove any impediments she may face for those immutable characteristics face to equal opportunity. But, I also want that for my son, Benjamin, and every other man, woman, and child in this country.

My fear, and what I want to turn our attention toward, is that our governments—federal, state, and local—, nonprofit organizations, businesses, and social institutions are damaging that possibility. Their choice of poison is race and ethnicity-based solutions to disparities we see that have been, we are told, exacerbated by the COVID-19 pandemic and made more evident by the racial discord we have been recently facing. The ultimate goal with these efforts is to achieve equal outcomes rather than to ensure equal opportunity—the latter being, of course, the remit of this agency. The result has been discrimination against and hostility toward certain identities that are disfavored.

Examples abound that the COVID-19 pandemic is being used as an excuse to discriminate on the basis of race, ethnicity, and sex. These examples foreshadow a major challenge to the EEOC's mission to "advance equal opportunity for all in the workplace."

II. EMPLOYERS, EMPLOYEES, AND ENTREPRENEURS OF ALL KINDS ARE HARMED BY DISCRIMINATORY MEASURES TO CONFRONT FALLOUT FROM COVID-19 PANDEMIC

Small business owners and their employees have been deeply affected by the shutdowns and restrictions implemented to safeguard public health during the pandemic. A study released by the U.S. Small Business Administration Office of Advocacy indicated that the total number of people self-employed and working declined by over 20% in April 2020 from its level in April 2019.⁴ The same report indicates the locations that saw the most severe declines were in major metropolitan areas like Washington D.C., San Francisco, New York, Philadelphia, and Los Angeles. These areas were known for particularly stringent limits on business operations, some of which are still in place today. It is no surprise then to learn that these areas with high concentrations of black and Asian American-owned small businesses would produce the severest

³ *Global Gender Gap Report 2021*, WORLD ECONOMIC FORUM (Mar. 2021), http://www3.weforum.org/docs/WEF_GGGR_2021.pdf.

⁴ Daniel Wilmoth, *The Effects of the COVID-19 Pandemic on Small Businesses*, SBA (Mar. 2021), <https://cdn.advocacy.sba.gov/wp-content/uploads/2021/03/02112318/COVID-19-Impact-On-Small-Business.pdf>.

declines in black and Asian American-owned businesses as the Small Business Administration report reflects.

However, if one maintains an undue focus on demographics, one can lose the forest for the trees. That is, one in every five small businesses closed, perhaps permanently, at the very beginning of the pandemic. It grievously harmed all of them regardless of racial or ethnic identity. That is to say nothing of the other small businesses that struggled successfully to remain outside of that miserable statistic—at least until that early point—but still suffered tremendous hardship—again, of every conceivable demographic.

It is reasonable to think the government that did so much to contribute to this pain would be expected to help alleviate it. That is what barber Etienne Hardre in Colorado Springs thought when Governor Jared Polis signed COVID-19 relief legislation to provide millions of dollars to small business owners. Unfortunately for Mr. Hardre, he was ineligible because he was not a racial minority covered by the law.⁵ So, too, was Portland, Oregon coffee shop owner Maria Garcia excluded from COVID relief legislation in her state because she is not a black business owner as required by the law.⁶

Therefore, Mr. Hardre and Ms. Garcia, their employees, their families, and the many others in the same position where such discriminatory laws and policies are being implemented may fail simply because they are not the right race. These discriminatory barriers will reverberate throughout the workforce.

Still more employers, of any size, may find their greatest barrier to rebuilding after the pandemic is the difficulty in finding qualified, vaccinated applicants to hire. Reports have surfaced across the country that state and local authorities have sought to prioritize vaccinations for its residents on the basis of their race or ethnicity.⁷ These schemes are not only unlawful, unscientific, and un-American, they are dangerous.

A regime in Virginia and another in Rhode Island, for example, have been accused of substantially slowing the rate at which distribution centers are able to provide inoculations by

⁵ *Hardre et al. v. Markey Et al.: Colorado barbershop owner fights for his right to equality before the law*, PACIFIC LEGAL FOUNDATION (2021), <https://pacificlegal.org/case/hardre-et-al-v-markey/>

⁶ James Huffman, *Oregon's Segregated Covid Relief Fund Is Blatantly Unconstitutional*, WSJ (Dec. 4, 2020, 1:51 PM), <https://www.wsj.com/articles/oregons-segregated-covid-relief-fund-is-blatantly-unconstitutional-11607107890>.

⁷ See e.g. Devon Westhill, *Restricting COVID-19 vaccine based on race or ethnicity*, WASH. TIMES (Mar. 3, 2021), <https://www.washingtontimes.com/news/2021/mar/3/restricting-covid-19-vaccine-based-on-race-or-ethn/>; Isaac Schorr, *Vermont Endorses Racial Preferences in Medicine*, NAT. REV. (Apr. 2, 2021), https://www.nationalreview.com/corner/vermont-endorses-racial-preferences-in-medicine/?utm_source=recirc-desktop&utm_medium=homepage&utm_campaign=right-rail&utm_content=corner&utm_term=first; John Hinderaker, *Is Race Discrimination Legal, or Not?*, POWERLINE (Apr. 9, 2021), https://www.powerlineblog.com/archives/2021/04/is-race-discrimination-legal-or-not.php?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+powerlineblog%2Flivefeed+%28Power+Line%29.

excluding from service white vaccine seekers.⁸ There are now, too, broader efforts to deliver healthcare services according to race as a result of “deja-vu” epiphanies brought on by the COVID-19 pandemic about the perceived lack of racial equity in health care.⁹ The implications for the workforce are clear if employers cannot find workers because large portions of the American population is being excluded from vaccination and other healthcare on the basis of their race or ethnicity.

I would be remiss if I did not mention the federal COVID-19 relief bill that provides debt relief to farmers who have been devastated by the pandemic. As a USDA official during the height of the pandemic, I am familiar with the struggle American farmers faced to maintain their livelihoods while many still participated in USDA programs like “Farmers to Families Food Box” that enabled farmers to serve provisions to their even needier neighbors. I never heard of these farmers restricting these food boxes on any basis—especially not race. However, the federal COVID-19 relief bill debt provision does precisely that—no white farmers are eligible.¹⁰ This race-discriminatory law could have enormous ripple effects in the workforce and the agricultural supply chain that supports it.

Finally, lest I be accused of picking on government, from iconic American brand Coca-Cola to United Airlines to the NASDAQ stock exchange, the business world has been tripping over itself in a mad dash to implement race and sex quotas and timetables in all manner of employment matters including training, hiring, staffing, assigning work, and board representation. Again, the motivation for many of these efforts is an apparent realization, sparked by the pandemic and made clearer by American racial turmoil, that employees of color are unduly disadvantaged compared to white employees.¹¹

In January 2021, Coca-Cola General Counsel Bradley M. Gayton sent a letter threatening to reduce fees or to terminate altogether relationships with law firms that do not place a certain percentage of ‘diverse’ and ‘Black attorneys’ on legal work performed for the company.¹² Earlier this month, United Airlines CEO Scott Kirby announced that he was setting the year 2030 as the deadline for his goal to increase the proportion of women and minority pilot trainees in the airline’s academy to over 50%.¹³ The NASDAQ stock exchange has submitted a proposal to the Securities and Exchange Commission to require listed companies to place at least two non-

⁸ Hans Bader, *Rhode Island wasted vaccine by excluding whites from big COVID vaccination event*, LIBERTY UNYIELDING (Apr. 12, 2021), <https://libertyunyielding.com/2021/04/12/rhode-island-wasted-vaccine-doses-by-excluding-whites-from-big-covid-vaccination-event/>.

⁹ Bram Wispelwey and Michelle Morse, *An Antiracist Agenda for Medicine*, BOSTON REVIEW (Mar. 17, 2021), <http://bostonreview.net/science-nature-race/bram-wispelwey-michelle-morse-antiracist-agenda-medicine>.

¹⁰ Valerie Richardson, *House Republican Seek to Ban Race-Based Stimulus Funding for Non-White Farmers*, WASH. TIMES (Mar. 31, 2021), <https://www.washingtontimes.com/news/2021/mar/31/house-republicans-seek-ban-race-based-stimulus-fun/>.

¹¹ Kweilin Ellingrud et al., *Diverse employees are struggling the most during COVID-19—here’s how companies can respond*, MCKINSEY & CO. (Nov. 17, 2020), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diverse-employees-are-struggling-the-most-during-covid-19-heres-how-companies-can-respond>.

¹² Caitlin Keniston, *Coca-Cola GC Issues Open Letter on Outside Counsel Diversity Guidelines*, AALM (Feb. 13, 2021), <https://attorneyatlawmagazine.com/coca-cola-gc-issues-open-letter-outside-counsel-diversity-guidelines>.

¹³ Errol Barnett, *United Airlines Is Announcing Its New Plan To Train 5,000 Pilots By 2030 With At Least Half Being Women Or People Of Color*, YAHOO! NEWS (Apr. 6, 2021), <https://news.yahoo.com/united-airlines-announcing-plan-train-220500469.html>.

heterosexual, non-white, non-male, directors to their boards within a certain timeframe or publicly explain why they have not complied with this mandate.¹⁴

One must suspend disbelief to hold that, for example, when law partners determine who will perform the legal work for its mega-client Coca-Cola, or when the United Airlines pilot trainee admissions office must determine who will be admitted to its program, or when a NASDAQ stock exchange listed company seeks a new board member, or when any hiring manager of any company whose leadership has committed to certain race, sex, or sexual orientation quotas and timetables that they will focus, as they all should, exclusively on selecting the most qualified candidate. The more likely scenario is that these decisions to some degree or other will be influenced by the desire to meet the announced quotas on time. No matter one's view on diversity and inclusion efforts generally, the establishment of race and sex quotas in the workplace to achieve it always injects as a factor in employment decisions the race, ethnicity, or sex of applicants, employees, consultants, contractors, etc., in order to achieve some predetermined composition. That is flatly discriminatory and violative of Title VII's ban on race, color, and sex discrimination.

These are only a handful of many examples of this kind driven by the challenges brought on by the COVID-19 pandemic and the American racial uproar. That is, discriminatory treatment by various institutions of American life all with a distressing effect on the civil rights of workers in one way or another.

I, and many others, have spoken and written on how these cases potentially violate any manner of laws including federal and state constitutions, Title VI and VII, and federal and state caselaw. Not all of which can or should be addressed pursuant to the authority of this body and so I will not present them all here. I am content that others are litigating them in the courts.

Instead, I want to implore this independent agency to develop and advance solutions to real problems in a way that treats everyone equally, to resist the agenda that is sweeping across the country that suggests we must discriminate against certain of our fellow American citizens for the sake of equity of outcome for others, and to embrace its role as a uniquely situated institution.

III. GOVERNMENT LEADERS ARE FUELING DISCRIMINATORY PRACTICES THROUGH RHETORIC

I believe that the COVID-19 pandemic and the racial unrest in America has inspired businesses, nonprofits, civic institutions, and governments at every level to embed—or simply further entrench, as the case may be—discrimination into its operations and actions. But that is not all.

Additional fuel for this fire, sweeping across the country, are clear signals being received by the public from top governmental officials such as President Joseph Biden who has established an

¹⁴ 19b-4, NASDAQ STOCK MARKET LLC (Dec. 1, 2020), <https://listingcenter.nasdaq.com/assets/RuleBook/Nasdaq/filings/SR-NASDAQ-2020-081.pdf>.

“ambitious whole-of-government equity agenda,”¹⁵ and CDC Director Rochelle Walensky who has suggested that racism against individuals of color is a “serious public health threat,”¹⁶ and the current top civil rights official at DOJ Pamela Karlan stating the division’s plan “to address longstanding disparities for Black, Indigenous, Latino, AAPI, and other people of color, as well as people with disabilities” highlighted by the COVID-19 pandemic by “[c]ollect[ing] data to monitor, track, and ensure equitable outcomes.”¹⁷

With no mention of equal treatment for all, announcements such as these indicate to the country that race, color, and sex-based law and policy is in vogue, will only increase, and is encouraging—if not pressuring—many institutions to support or engage in discriminatory activities for the sake of “equity.” Fortunately, as an independent agency, this body is not beholden to the agenda of any presidential administration. It has the freedom to publicly and courageously chart a different path—one of equal opportunity, not equity of outcome—and it should do so.

IV. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION INFLUENCE IS NEEDED

In my invitation to speak at this hearing, I was asked to provide my “thoughts on the direction of the EEOC’s efforts in this area and potential actions the agency can take.” Part of my response is to ask simply, what would the Commission do in any of the instances I listed of overt racial discrimination if the circumstances were switched? That is, what if a Fortune 500 company announced a policy that favored hiring or promoting straight white males? The obvious answer is that investigations, lawsuits, and all manner of other actions would be taken to address that race and sex injustice. That is the test today. I believe, as civil rights defender Ward Connerly commented when discussing his contributions to the recent defeat of Proposition 16 in California, the test for whether people truly care about civil rights is “when they will defend the right of a white person—a white male—to be treated equal to everyone else.”¹⁸

Unfortunately, in many instances, we are seeing the bedrock American principle of equal opportunity damaged. When this agency is presented with an allegation of workplace discrimination that falls under its authority to address, my hope is that it will apply the above test and enforce our antidiscrimination laws for the benefit of all. This body, though, also has tools available to it outside of its strict enforcement and guidance authority.

¹⁵ Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 Fed. Reg. 7009-13 (Jan. 25, 2021), *available at* <https://www.federalregister.gov/documents/2021/01/25/2021-01753/advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government>.

¹⁶ Media Statement from CDC Director Rochelle P. Walensky, MD, MPH, on Racism and Health, CDC (Apr. 8, 2021), <https://www.cdc.gov/media/releases/2021/s0408-racism-health.html>.

¹⁷ Pamela S. Karlan, *Statement by the Principal Deputy Assistant Attorney General for Civil Rights Leading a Coordinated Civil Rights Response to Coronavirus (COVID-19)*, DOJ (Apr. 2, 2021), <https://www.justice.gov/opa/pr/statement-principal-deputy-assistant-attorney-general-civil-rights-leading-coordinated-civil>.

¹⁸ Tunku Varadarajan, *The Duo That Defeated the ‘Diversity Industry’: Californians rejected racial preferences even more soundly this year than in 1996. Will the Supreme Court reverse itself next?*, WSJ (Nov. 20, 2020, 3:33 PM), <https://www.wsj.com/articles/the-duo-that-defeated-the-diversity-industry-11605904415>.

To achieve the EEOC vision of creating “[r]espectful and inclusive workplaces with equal employment opportunity for all,” it must not only enforce the laws that combat workplace discrimination, but also proactively prevent it, advance colorblind policies and initiatives, and use its megaphone to push back against the discriminatory statements and activities harming employers, employees, entrepreneurs, and myriad others within and supported by the American workforce.

This agency is faced with a momentous opportunity and responsibility to be a bulwark against intentional and overt discrimination, at a minimum. The Commission must take every opportunity to clearly and forcefully denounce and, when appropriate, prosecute such instances for the sake of and in support of our diverse workforce, our American values, and our common humanity. The COVID-19 pandemic cannot be an excuse to treat people differently in ways that violate any of our civil rights laws and the principles like equal opportunity that undergird them—there is no pandemic exception to this.

Again, I thank you for the opportunity to provide my testimony and look forward to your questions.