

EEOC VC Samuels' Keynote at Workplace Horizons Addresses PWFA, AI, Muldrow & More

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Jackson Lewis Principal and co-leader of the firm's Litigation Practice Group Stephanie Satterfield moderated a keynote presentation by Jocelyn Samuels, Vice Chair of the U.S. Equal Employment Opportunity Commission (EEOC), at Jackson Lewis' Workplace Horizons conference in New York City on April 11, 2024.

Jocelyn Samuels was designated by President Joe Biden as Vice Chair of EEOC on January 20, 2021. She joined the EEOC as a Commissioner on October 14, 2020, and on July 14, 2021, was confirmed for a second term ending in 2026. Immediately prior to joining the EEOC, she served as the Executive Director and Roberta A. Conroy Scholar of Law at the Williams Institute at the UCLA School of Law, focusing on legal and social science research on issues related to sexual and gender minorities. During President Barack Obama's Administration, she served as the Director of the Office for Civil Rights at the U.S. Department of Health & Human Services and as the Acting Assistant Attorney General for Civil Rights at the U.S. Department of Justice, among other positions in the Civil Rights Division. In these capacities, she supervised enforcement of a broad array of civil rights laws through litigation, rulemaking and policy development, and public education. □

Speaking on her own behalf except to the extent that she was explaining official EEOC policy, Vice Chair Samuels discussed critical issues in employment law today including the EEOC's Strategic Enforcement Plan; diversity, equity, inclusion, and accessibility (DEIA) in the workplace; thoughts regarding the then-upcoming *Muldrow v. City of St. Louis* decision; the Pregnant Workers Fairness Act (PWFA); the EEOC's updated harassment guidance; and artificial intelligence (AI) in the workplace.

EEOC's Strategic Enforcement Plan

The EEOC released its Strategic Enforcement Plan for fiscal years 2024 through 2028 on September 21, 2023. The plan outlines the EEOC's priorities and big picture initiatives. Vice Chair Samuel shared that one way the EEOC achieves its goal of promoting inclusive workplaces is to address barriers to hiring and recruitment. She also stated that the agency would evaluate systemic harassment and discrimination against vulnerable and underserved worker populations, such as people with developmental or intellectual disabilities, people navigating literacy or language barriers, immigrant populations and LGBTQIA+ workers. Vice Chair Samuels highlighted pay equity, the use of AI in employment decision-making, and backlash discrimination related to the Israel-Hamas conflict as other issues highlighted in the Strategic Enforcement Plan.

Diversity, Equity, Inclusion, and Accessibility

Corporate DEIA efforts have received significant attention since the U.S. Supreme

Court held that the use of race in university and college admissions is unconstitutional. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 20-1199, together with *Students for Fair Admissions, Inc. v. Univ. of North Carolina*, No. 21-707 (June 29, 2023) (collectively, *SFFA v. Harvard*). In Vice Chair Samuels' view, the *SFFA v. Harvard* decision does not affect corporate DEIA initiatives for three reasons. First, *SFFA v. Harvard* considered race discrimination in the education context and did not touch on the employment context. Second, the Court evaluated the claims in *SFFA v. Harvard* under Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment, rather than Title VII of the Civil Right Act of 1964, the federal law that prohibits employment discrimination based on a variety of protected characteristics. Finally, in *SFFA v. Harvard*, the Court was considering the use of race in making individualized admissions decisions; by contrast, the vast majority of DEIA initiatives are race-neutral programs that apply to everyone in a workplace and do not result in taking race into account in individual employment decisions.

Vice Chair Samuels discussed two examples of the EEOC's position that appropriate workplace diversity training is lawful. In the first, the EEOC filed an amicus brief in a pending Seventh Circuit case in which a plaintiff alleges the defendant retaliated against him in violation of Title VII when it terminated him for his refusal to attend diversity training. Vice Chair Samuels noted that the EEOC declined to take a position on the facts of the case. Rather, the EEOC filed its brief to explain its position that an employer sponsorship of diversity training is not categorically discriminatory such that someone's refusal to attend becomes opposition to discrimination. Acknowledging that not all workplace training is created equal, Vice Chair Samuels informed the audience that "appropriate training really is a valuable tool to enhance compliance with anti-discrimination laws."

In the second example, in March 2024, the EEOC sided with a federal agency in an employee's claim of religious discrimination involving the agency's mandatory diversity training. The employee had filed a charge claiming that the agency failed to accommodate his religious beliefs by not allowing him to opt out of the diversity training that included a segment on respectful treatment of LGBTQIA+ individuals. The EEOC concluded that the training did not seek to change the employee's religious beliefs, but rather to communicate EEO standards and the employer's workplace policies. Moreover, even if the employee had been able to demonstrate that the training conflicted with his beliefs, the EEOC determined that excusing his participation would have represented an undue hardship by compromising the agency's ability to comply with federal EEO requirements.

Closing out her discussion on DEIA, Vice Chair Samuels encouraged employers to continue proactive DEIA efforts designed to break down barriers, create inclusive workplaces and identify emerging problems that could ripen into discrimination. That said, she cautioned employers to ensure the content of any such programs is lawful, and to ensure clear communication with employees about the purpose and goals of the DEIA programs.

Muldrow v. City of St. Louis

Vice Chair Samuels also spoke about the Supreme Court's decision in *Muldrow v. City of St. Louis, Mo.*, which, at the time of the interview, had not yet been released.

In *Muldrow v. City of St. Louis, Mo.*, 144 S.Ct. 967 (2024), the Supreme Court held an employee challenging a job transfer under Title VII of the Civil Rights Act must show the transfer brought about some harm with respect to an identifiable term or condition of employment, but that harm need not be significant. Vice Chair Samuels addressed concerns about the broad implications of the *Muldrow* decision, explaining that the EEOC and the U.S. Department of Justice have long taken the position that Title VII does not require any particular quantum of harm, and that an employment decision that affects the terms, conditions, and privileges of employment is actionable even if a plaintiff does not suffer any financial injury. Vice Chair Samuels said that she anticipated that the *Muldrow* decision would be unlikely to affect the majority of DEIA programs that are carried out in race neutral ways and do not cause harm to any employees.

Pregnant Workers Fairness Act

Vice Chair Samuels discussed the EEOC's final regulation on the PWFA, which had not yet been released at the time of the interview. She encouraged employers to rely on the regulation for clarity on how to interpret the sections of the PWFA that may be unfamiliar to employers. She recognized that employers may have questions about how to accommodate a worker with a temporary inability to perform the essential functions of a job and assured the audience that the EEOC would be providing guidance in the near future.

Artificial Intelligence

Artificial intelligence in the workplace is one of the emerging issues the EEOC addresses in its Strategic Enforcement Plan through the agency's initiative on AI and algorithmic fairness. Technology tools that increase efficiency in hiring are important in the contemporary business context, but Vice Chair Samuels warned that such tools are only as good as the data employers use to train them. She shared an acronym, "RIVMAN," that employers can use as a general (albeit not necessarily complete) guide when considering AI:

- *Record Keeping.* Carefully monitor AI training. Employers must be able to identify issues and modify training models to avoid exclusionary results.
- *Impact.* What impact do selection tools have?
- *Validity.* Conduct validation analyses for selection tools.
- *Multiple Models.* Select the models that have the least disparate impact or the most valid results.
- *Accountability.* Vendors who offer AI-based selection tools and employers that use them may both face responsibility for any resulting discrimination.
- *Notice.* Provide information about AI tools to any employees or applicants subject to them. This is particularly important for people with disabilities who need to know the types of tools the employer uses so they can request appropriate accommodations.

Revised Enforcement Guidance on Harassment

While not released at the time of interview, Vice Chair Samuels briefly discussed the then-upcoming release of the EEOC's updated Enforcement Guidance on Harassment. She noted the prior version of the harassment guidance published by the EEOC was very old and did not reflect more recent developments in case law such as the Supreme Court's decision in *Bostock*, which extended protection for sex discrimination under Title VII to sexual orientation and gender identity, or lessons learned from the MeToo movement. Vice Chair Samuels stated the final guidance would be a useful source of advice for employers as it would provide best practices for policies and procedures to prevent harassment. The EEOC ultimately released its final Enforcement Guidance on Harassment on April 29, 2024.

Vice Chair Samuels' insights underscore the dynamic landscape of employment law. As organizations navigate DEIA initiatives, AI adoption, and legal developments, they should ensure that they are knowledgeable about legal standards and modify practices accordingly. Jackson Lewis attorneys are available to answer questions and provide advice and counsel on these emerging issues.

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