

EEOC Commissioner Andrea Lucas Discusses Workplace DEI

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Jackson Lewis Principal and Board Member Tanya Bovée interviewed U.S. Equal Employment Opportunity Commission (EEOC) Commissioner Andrea Lucas at Jackson Lewis' Workplace Horizons conference in Las Vegas on April 17, 2024.

Andrea Lucas has served as a Commissioner on the EEOC since 2020. As part of her work educating employers, employees, and other stakeholders about the laws the EEOC enforces, Commissioner Lucas writes and speaks frequently about hot topics and emerging issues in employment law, including on corporate diversity programs; religious discrimination, accommodation, and inclusion; accommodations for pregnancy, childbirth, and related medical conditions; and disability accommodations. Before her appointment to the EEOC, Commissioner Lucas was a member of the labor and employment and litigation practice groups of Gibson Dunn and was based in the firm's Washington, D.C. office.

Stressing that she spoke on her own behalf and was not communicating official EEOC policy, Commissioner Lucas shared her focus on addressing what she sees as problematic “culturally acceptable biases,” particularly discrimination related to pregnancy, age, religion, and disability.

During the interview, Commissioner Lucas offered key points for employers to consider when evaluating their diversity, equity, and inclusion (DEI) policies. Commissioner Lucas first reminded the audience that there's no separate concept of “reverse” race or sex discrimination under Title VII: “there's just discrimination,” no matter which race or sex is harmed or benefits. Title VII and Section 1981 of the Civil Rights Act of 1964, which prohibits race discrimination in contracts, “don't apply only to historically underrepresented employees or BIPOC or whatever acronym you might be using.” She explained, “They're for everyone.”

Commissioner Lucas next reiterated that “[e]mployers in general are not permitted to take any employment actions motivated by race or sex,” not even as a “plus factor or a tiebreaker or a tipping point.” Commissioner Lucas also emphasized that Title VII applied to all employment actions affecting “terms, conditions, and privileges of employment,” and therefore DEI initiatives are subject to the same legal scrutiny as hiring, firing, and pay practices, a point underscored by the U.S. Supreme Court in *Muldrow v. City of St. Louis*.

Commissioner Lucas closed with a caution that while voluntary affirmative action plans can be legal under a narrow exception to Title VII provided by Supreme Court precedent, employers must construct, validate, and implement them properly to avoid violating Title VII and that this is a challenging bar to meet. Among other considerations, voluntary affirmative action plans are lawful only if they address concrete instances of past discrimination or correct substantial statistical disparities or imbalances in a traditionally segregated job category. She stressed the importance of using accurate data to assess an employer's workplace demographics. Ultimately, Commissioner Lucas expressed

skepticism that employers setting race- or sex-based workforce representation “goals” (whether or not the employer officially characterizes its program as a voluntary affirmative action plan) are getting it right.

Commissioner Lucas also cautioned employers to not limit their understanding of how discrimination could arise in their workplaces, by understanding it as a “black-white binary that only goes one direction,” that is, only guarding against discrimination against Black employees by White employees. Rather, employers are responsible for preventing discrimination against anyone, including against biracial employees or between or among people of the same race or ethnicity, as well as discrimination against racial “majority” groups.

Commissioner Lucas encouraged employers to turn to experienced legal professionals to review “every single piece of diversity work product,” calling it the best way to make sure employers are on the right track. Jackson Lewis attorneys are available to answer questions and provide advice and counsel on how to navigate the current corporate diversity landscape.

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