

ALLIANCE AGAINST TRAFFICKING IN PERSONS

“An Agenda for Prevention: Non-Discrimination and Empowerment” (11-12 October 2012)

Panel 2: Exploring Non-Discrimination, Empowerment and the Law

Speaker: **David Lopez, General Counsel, U.S. Equal Employment Opportunity Commission**

Dear Colleagues,

It is an honor to appear before such distinguished colleagues. I am excited about the opportunity to engage in a dialogue and explore the ways in which anti-discrimination laws can serve as a tool to prevent and ultimately eradicate human trafficking.

In a recent landmark speech, President Obama called “our fight against human trafficking one of the great human rights causes of our time.” He referred to human trafficking as “modern slavery” because it is a “debasement of our common humanity, tears at our social fabric, endangers public health and fuels violence and organized crime.”

Under President Obama’s leadership, the United States is working globally with countries around the world to combat trafficking in persons. At home, his administration has invested resources, both in personnel and in money, to fight human trafficking, or as President Obama and others have labeled it: fight against “modern slavery.”

It is estimated that between 14,500 and 17,500 people are trafficked to the U.S. every year. Although the real number is likely much higher as it is estimated that there are close to 27 million victims of modern slavery worldwide. Children comprise 50 % of those trafficked into the U.S. These victims are largely trafficked from the East Asia/Pacific region.

Trafficking victims, men and women of varying ages, are subjected to sexual exploitation and forced labor. In the U.S., while a staggering 46% are trafficked into prostitution, an overwhelming 27% are trafficked into domestic servitude and 10% into agriculture. Victims of forced labor are often found working in factories, restaurant work, construction, housekeeping for the hospitality industry, and other informal labor sectors.

These individuals are most vulnerable to prolonged exploitation because they are often living under economic duress and are unfamiliar with the language and the laws of the United States. They are often threatened with deportation and fear that speaking out will put them and their family in harm’s way.

As General Counsel of the United States Equal Employment Opportunity Commission, I have had the honor of authorizing litigation on behalf of victims of trafficking. I say it is an honor because when you hear the survival stories of these victims and the manner in which they risked their lives to fight for what is just, it is the least that we can do as a federal agency to help them regain their dignity and self worth.

As background, the EEOC is the federal agency in the United States charged with eradicating workplace discrimination based on race, gender, national origin, religion, disability, age, and genetic information. We fulfill our mission through the development of policy, public education and outreach, investigation and informal conciliation, and litigation.

As General Counsel, I am in charge of enforcing the anti-discrimination laws in federal courts throughout the United States. Through this enforcement capacity, the EEOC has developed innovative approaches to enforce the anti-discrimination laws on behalf of victims of human trafficking and other vulnerable workers. It is our position that if you live in the U.S. and work in the U.S. then you have the right to be free from workplace discrimination. Such discrimination can be exploitative and harmful to human dignity, as it is in the case of human trafficking.

Before discussing how our agency has used the anti-discrimination in employment laws to combat trafficking, let me give you a broad overview of the U.S. legal system.

The laws of the U.S. can be enforced by a federal or state agency through criminal or civil actions depending on the laws and the grant of authority Congress or the legislature has given each agency. Under both federal law and state law, there are statutes authorizing both criminal and civil actions against human trafficking. For example, the Department of Justice is authorized to prosecute human trafficking as a federal crime under the Trafficking Victims Protection Reauthorization Act (TVPA) (22 U.S.C. § 7102). A conviction in a criminal prosecution may result in the payment of fines, restitution of property, or incarceration of the perpetrator. However, to establish a criminal violation, the government, as the prosecutor, must demonstrate proof beyond a reasonable doubt. This is a high burden of proof – and while there have been many successes in recent years – the high burden proof is difficult to meet in human trafficking cases.

My agency does not prosecute criminal violations. Instead, the EEOC has authority to bring a civil action under the anti-discrimination in employment laws against the companies (i.e. employers) where the discrimination occurred. Civil lawsuits are designed to ensure make-whole remedies for victims of workplace discrimination, including damages for lost wages and emotional distress. Non-monetary relief, including injunctions, and punitive damages are often also available to deter future violations. The burden of proof in a civil action is a preponderance of the evidence. This is basically a 51% standard and is much lower than the standard of proof for criminal liability.

The EEOC has taken a pioneering role in human trafficking litigation. Through recent cases, the EEOC has demonstrated that private civil law suits and civil law enforcement by federal authorities can be used to protect victims of exploitation in the workplace. Criminal prosecutions used to be the sole avenue for shutting down human trafficking. The EEOC's civil litigation has shown that there are additional tools, and perhaps more effective tools, for fighting human trafficking in the labor market.

Through its enforcement of the anti-discrimination laws, the EEOC has provided victims of trafficking legal redress, in the form of monetary damages, while at the same time has been able to seek changes in the employment practices of the employers.

The EEOC's litigation may serve as a guide for other governments seeking civil redress and/or penalties to combat private employers' unlawful pay practices, immigration violations, hostile environment and unsafe working conditions, false imprisonment and other wrongs in the workplace.

The EEOC enforces Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000(e)) ("Title VII"), which prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin.

The EEOC also enforces the Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. § 621 et. seq.) ("ADEA") which prohibits discrimination on the basis of age (40+). We also enforce the Equal Pay Act of 1963, as amended (29 U.S.C. § 206) ("EPA") which prohibits discrimination in pay because of sex.

Two other laws that we enforce are the Americans with Disabilities Act and the ADA Amendments Act (42 U.S.C. § 12101) ("ADAAA"), which prohibit discrimination because of a person's disability and the Genetic Information Nondiscrimination Act of 2008 prohibiting discrimination because of a person's genetic information. All of these laws prohibit retaliation against a person who files a complaint of discrimination, participates or opposes discrimination.

Throughout the years, the EEOC has worked hard to ensure that immigrant workers and other vulnerable populations are aware of their rights under the anti-discrimination laws. As part of that effort, the Commission held a meeting specifically focused on Human Trafficking where several people testified on the issue and described the need for the federal government to take a proactive role on combating this issue. As a result, the EEOC formed two internal work groups, the Anti-human Trafficking Task Force and the Immigration Work Group, to examine ways in which the Commission could use its resources to prevent human trafficking and exploitation of immigrant workers.

From those two work groups, the EEOC formed the Immigrant Worker Team to develop and implement a comprehensive plan for the EEOC to address the intersection of employment discrimination issues affecting workers of foreign national origin. The Team is focusing on the issues affecting immigrant and migrant workers, in particular the issue of human trafficking.

Soon after the U.S. congress passed the Trafficking Victims Protection Act of 2000, the EEOC began exploring the intersection between labor laws and the anti-trafficking laws. We found that in human trafficking cases, workers were not only subjected to exploitation and forced labor in violation of wage and hour laws under the Fair Labor Standards Act (FLSA) but also subjected to involuntary servitude often due to their national origin and race which violated Title VII.

We also determined that under the various laws, a victim of trafficking could recover a wide array of remedies, including back pay for wages earned and/or lost wages, compensatory damages for emotional distress, punitive damages intended to punish employer for its actions, and injunctive relief to correct unlawful employment practices by establishing large-scale changes in the workplace.

The first case to set the important precedent of applying Title VII to a human-trafficking case was Chellen and EEOC v. John Pickle Company, Inc. The victims were 52 skilled Indian workers who were paid less than minimum

wage (\$1 – \$3.17 hr), restrained in substandard living conditions, and subjected to harsher conditions than the Caucasian, U.S. born workers.

These victims came to the United States filled with hope and excitement about the opportunities that America offered them. Yet, when they arrived, the promises made by the company were not fulfilled. As one of the workers put it, “We were chosen to suffer bad treatment and injustice because we were from India. We were told by the company that Indians were chosen because we come from the part of the world where many people are poor and that we should be happy and not complain about whatever happened to us.”

Although these men were not familiar with the laws of the United States when they came here, but they knew enough to recognize that being forced to work for \$2 or \$3 an hour was unjust; especially when the non-Indian workers were paid much more for doing the exact same work.

Not only were they paid less, all the men were forced to live in a small, cramped warehouse building with small beds, broken toilets and no privacy. They were not allowed to leave the premises, even when they needed medical care, and could not worship on the weekends and the holidays.

After four years of litigation, the court found that both John Pickle and his company were separately liable to the victims, and must compensate them for over \$1.3 million in damages – including back pay under FLSA and Title VII for work done and compensatory and punitive damages.

This was a key victory for the EEOC in the fight against human trafficking, forced labor, and employment discrimination. The judge’s very detailed published decision, will serve as precedent for bringing a civil case with civil remedies against employers involved with the trafficking of people.

While a criminal prosecution against the John Pickle company would have required the government to meet a higher burden of proof, this case demonstrated that even where a case might not rise to the level of a criminal prosecution, employers who have violated federal laws may still be prosecuted to obtain civil law remedies under a “preponderance of the evidence” burden of proof.

The EEOC’s coordination with the DOJ and DHS was also instrumental in the successful prosecution of John Pickle Company. The company had taken advantage of U.S. immigration laws and lied to U.S. consulates to obtain B1 “Visitors Visas” for these highly skilled steel workers. The victim’s B1-Visas were not intended to be used to work or live permanently in the U.S. Once the lawsuit was filed, the workers were able to obtain T visas, which allowed them to remain in the U.S. and participate in the lawsuit. The T visa also allowed them to work and enabled their family members to remain in the U.S. with them. DOJ assisted the workers in obtaining the T-Visas. The T visas are part of the protections offered by the Trafficking Victims Protection Act. Such visas enable persons in the country illegally who may be victims of human trafficking to remain in the U.S. to assist in the prosecution of his or her trafficker.

In another case, EEOC v. Trans Bay Steel, the Commission represented 48 Thai Welders (contracted under H-2B visas) who were recruited to work in California. These workers were confined to cramped apartments without

any electricity, water or gas, had their passports confiscated, and forced to work 14-hour days/ 6 days a week without pay.

As one worker recalled, he dreamed of coming to America to provide a better life for him and his family. He applied for a job as a welder because this offered him an opportunity to earn more money to support his family. He was offered the job but was told that he had to pay 500,000 Bhat (or 12,539 Euros / \$16,340) in fees. He had to pay 60% of it upfront (or 300,000 Bhat/7,523 Euros/\$9,803).

When he arrived in America, he and the other workers were forced to work in a restaurant, first doing construction work and then once the restaurant was opened, working as dishwashers, waiters or cooks. Despite the long hours of work over a three month period, they were only paid \$200 (\$153 Euros). After three months of working in America, this employee realized that the promise to earn \$19 per hour as a welder would not be fulfilled. He knew he had to escape. As it so happened, he met a Thai customer in the restaurant and told him about his situation. This person was able to help him and others escape by putting them in touch with a community based organization (Thai Community Development Center) who referred them to the EEOC.

The EEOC filed a lawsuit against the Trans Bay, alleging that it had violated Title VII by subjecting the workers to national origin harassment and disparate treatment. In 2006, we were able to resolve the case for approximately \$1 million.

Trans Bay entered into a three-year consent decree with the EEOC. Besides the monetary relief, Trans Bay agreed to guarantee the workers future work, provide them housing, including a paying them a housing stipend, pay for tuition and books at a local college for training, provide sponsorships to continue to work in the U.S, guarantee minimum pay and a base pay, and pay the claimants relocation costs, including reimbursement for travel. The consent decree included continued monitoring by the EEOC, reporting obligations, and training for Trans Bay's employees on anti-discrimination laws.

Most recently, the EEOC has been involved in litigation on behalf of a class of intellectually disabled workers who were paid substandard wages as compared to non-disabled workers for approximately two years. Our lawsuit also alleges that the men were subjected to abusive and verbal physical harassment, harsh punishment and their freedom was restricted. They were forced to live in substandard living conditions and failed to provide proper health care.

While initially this case may not appear to be a "human trafficking" case because the workers were U.S. citizens and not recruited internationally for purposes of forced labor, this case is in fact a human trafficking case because the men were recruited to provide labor through the use of fraud or coercion and subjected to involuntary servitude. (As defined under the statute).

In September, the court ordered Henry's Turkey to pay \$1.3 million for lost wages. The remaining claims of harassment and disparate treatment are still pending.

The EEOC is currently litigating two cases against Global Horizons Manpower, Inc., a "labor-recruiting, labor-providing" business. One case has been filed in Hawaii and the other in Washington State. In these cases, the

EEOC represents a class of over 300 similarly situated Thai agricultural workers (H2-A visa) who were subjected to discrimination including harassment, discrimination in terms and conditions, pay, and constructive discharge because of their national origin (Thai) and race (Asian). The employees were also retaliated against, threatened with deportation, prohibited from leaving farms. This is the largest trafficking case brought by the EEOC in agriculture.

The EEOC is also representing a class of over 500 similarly situated Indian nationals (H2-B visa) who were subjected to hostile work environment because of national origin (Indian), race (Asian). This is a case against Signal International. In this case, the EEOC alleges that the employees were also subjected to disparate treatment and retaliation because of their national origin and race in violation of Title VII.

As mentioned previously, an additional protection provided to victims through the Trafficking Victims Protection Act (TVPA) is the availability of visas that would enable victims to remain in the U.S. while their case is being prosecuted. Victims may petition for T or U Visas with U.S. Citizenship & Immigration Services (USCIS). These visas allow individuals to remain in U.S., and work and travel without fear of deportation. The visas can last up to four years and if they meet the requirements of living in the U.S. continuously, they may apply for permanent residency (i.e. greencard). Family members who accompany the petitioner may also be eligible for visas.

The EEOC's successful litigation on behalf of victims of trafficking has been possible because of the courage of victims to come forward and report the abuses, despite the risks involved. It has also been possible due to the hard work and dedication of other federal government agencies and NGO attorneys and experts. The U.S. Department of Justice, Department of Labor, Department of State, Federal Bureau of Intelligence, Freedom Network USA, Catholic Charities USA, Mosaic Family Services, and more have dedicated their expertise and resources to assist the EEOC in these important cases. It's important to remember that coordination within the public sector, with the assistance of the private sector, is key in this nuanced litigation.

In conclusion, I look forward to the opportunity to collaborate with my international partners. No nation can meet this challenge alone. Internationally recognized principles of non-discrimination and equality can be taken further to combat human-trafficking. Together, we can learn from one another, and we can work with one another to end this terrible trade in human lives.

As President Obama said, modern slavery is an injustice, an outrage, and a debasement of our common humanity. Its eradication must be absolute – and now is the moment.