

Speaker 1 ([00:00](#)):

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Kelly Bunting ([00:19](#)):

Welcome to Asked & Answered, GT's Labor and Employment Podcast. I'm your host, Kelly Bunting, and I'm a shareholder in GT's Labor and Employment Practice.

([00:28](#)):

Welcome to Part Two of our conversation with Commissioner Keith Sonderling of the EEOC. You'll remember my co-host, Jena Valdetero, who is co-chair of GT's US Data Privacy and Cybersecurity Practice.

([00:42](#)):

In Part One of the podcast, Commissioner Sonderling was explaining how employers may have to deal with their software vendors to ensure the AI used in HR functions complies with federal discrimination law. We'll now pick up the conversation with Jena's question to Commissioner Sonderling on software vendors.

Jena Valdetero ([01:03](#)):

So a lot of the laws and the frameworks about this concept of consent and providing notice and letting applicants know, "This is the technology that we use." What is your view on why that's important and what that possibly could empower the applicant or the employee to do with that information?

Commissioner Keith Sonderling ([01:24](#)):

Well, this is sort of what I'm asked about enforcement in this area, the lack of cases. And obviously, I'm not discussing any cases related to the EEOC or otherwise, but you haven't seen, in the news, a lot of these cases. You see a lot of fear of them, and I think a lot of that reason is employees don't know they're being subject to this technology, and what rights do employees have when employers are using certain tools during an interview? And this isn't much different than how employers have been using employment assessment testing for a long time, but at least if you're given a test on a piece of paper, and you're taking a test, you're being subject to that test. You know what those tests are generally looking for, because these tests have been used since the Industrial Revolution.

([02:10](#)):

But when it comes to AI technology, that lack of awareness, that, "Okay, I didn't get the job. I got an email saying they went with somebody else who was more qualified." Now, you may just think, "Well, okay, that was human reviewing," and understanding that they picked somebody else. Or you may never know that it was actually done by an algorithm that may have bias in it, and you were actually discriminated by AI. And that lack of awareness there is really challenging, from a law enforcement perspective, that the employees just do not know that they're being subject to this tool. They do not know that it was a decision made, whether by dataset or intentionally using AI to discriminate, versus now, where we're saying, "Okay, well, I was in this meeting, and the hiring manager made a racist comment, so that's why I wasn't hired."

([03:00](#)):

So the older example, the pre-tech examples of discrimination, where it would cause somebody to say, "I'm not getting this job because of the comment made about my age," employees would then file a charge of discrimination on the applicant side, saying they made this comment. "I believe I was not hired because of my age," opposed to an algorithm doing it. You just have no idea.

Jena Valdetero ([03:19](#)):

Well, and let's say if someone isn't hired, and they say, "Well, I know AI was used. I've read some stuff. I watched the John Oliver special about the lacrosse players named Jared. I'm going to go ahead and file a charge every time, because if they're using that technology, there's obviously something out there that I could potentially hang my hat on to make a claim, if I suspect that because I'm a member of a protected class, that that was a factor in not hiring me."

([03:49](#)):

So are we potentially handing employees and applicants just the ability to use enforcement and litigation as a tool any time they don't get hired for a job they wanted?

Commissioner Keith Sonderling ([03:59](#)):

I think it's the same as before, and a lot of this technology is just replicating and amplifying existing decisions. So what's preventing an employee now, every time they don't get a job at any company, just to go file a charge of discrimination, on the basis of whatever protected characteristic that applicant fits into? Of whether just going on their website and saying, "Everyone at this company is of this color or national origin, religion, and I'm not, so I'm going to file a charge of discrimination. That's why I wasn't hired."

([04:29](#)):

So in a sense, although these issues are much broader now, they're much larger, and they're just bigger pools of potential people who are going to be in the mix now, opposed to before. At the end of the day, there's nothing preventing you or anyone else, if you feel like you were discriminated against when you didn't get the job, from just filing a charge of discrimination every time you don't get a job. So it's the same issues now; it's just at scale.

Kelly Bunting ([04:54](#)):

You've said something, or you've referenced something a couple of times, and that's the age of our labor laws. We just had issues with remote workers throughout the pandemic, and the laws that were created, like the FLSA and some of these other laws, that were created in the '30s, for heaven's sakes. Or the Warren Law, that's dealing with one manufacturing plant site. Who really does that any more in the US? In 2023, people work from home. It's a service economy. It's a tech economy. It's not so much a manufacturing economy any more, and I think we're seeing this across the board with employment law, even outside of the EEOC, with the other agencies that enforce such laws, such as the DOL, is the laws that we have today, that we're still trying to abide by, really are not made to fit the modern workforce.

([05:58](#)):

And with this AI push and just how fast things are changing, this is crazy, how fast things have changed in the past 10 years, technology-wise. And will continue to do so, right, Commissioner Sonderling, which is sort of your point? We need new laws, better laws, more I guess up-to-date laws in the US, to deal with technology like this. And I say that because I know you've been really at the forefront of the EEOC, in pushing the EEOC'S cooperation with the EU. Well, in my mind anyway, much more advanced

approach to data privacy, given the GDPR, and to these AI issues. Would you agree with that, and can you tell us a little bit more about what the EU is doing that the US isn't right now?

Commissioner Keith Sonderling ([06:52](#)):

So I will answer that question, but first I have to just give a Washington, DC response, that I believe in separation of powers in the United States. And whether or not we need new laws related to artificial intelligence, that's not my job.

Kelly Bunting ([07:04](#)):

That is not the EEOC'S job.

Commissioner Keith Sonderling ([07:05](#)):

You can contact your elected official to amend the laws or pass new laws or create a new commission. That is up to you. That's why you have a congressman and senator. So I told you it would be a standard Washington, DC response, and you're getting it.

Kelly Bunting ([07:18](#)):

No, no, it's a good response.

Commissioner Keith Sonderling ([07:20](#)):

Yeah, we are a civil law enforcement agency. We can only enforce the laws that Congress has given us to enforce, so that's why I'm very much taking the approach that our laws is all I can deal with, and that our laws apply to this technology. And forget about the technology and let's just look at the results, because that's what the EEOC knows how to do. And if there's discrimination now, how did we get there? Was it through technology, or was it through human decision-making or a combination of both? At the end of the day, that employer's going to be liable for the outcomes of that discrimination. So that's why, in a sense, simplify it, because look, there may be new laws. There may be new ways to deal with technology in the workplace, in consumer business, and that may happen, and then we will have to deal with the enforcement side on that.

([08:02](#)):

But what I can tell you is that there is a lot going on. We heard about in the States, but also in Europe, and they're taking the lead on trying to make a new law related to AI, and Jena can speak much better than I can. Just like they did with GDPR and privacy, they're also seeing this as a way where they can be a global leader. And the proposed EU AI Act, which I'm very familiar with, and I've been speaking with a lot of individuals in the EU of how it's going to work, and it basically takes a risk-based approach to AI. And we don't have anything like this in the United States, where they're saying they're going to categorize the individualized use of AI technology between low-risk and high-risk. And when they're actually saying, "This type of technology is going to be high-risk, it's going to be medium-risk, it's going to be low-risk."

([08:47](#)):

And they've put use in employment in the highest risk category possible, along with dispatch of emergency services, critical infrastructure, and some other categories. So that's certainly how they've assessed this. And what does that mean if you're in a high-risk category? It's subject to robust disclosure requirements, robust auditing requirements, and really significant penalties for violations, if these tools

actually discriminate. So automatically, taking this risk-based approach, they're saying, "If you're going to use AI in employment, it's in the high-risk category. If it's in the high-risk category, here's the things you're going to have to do. And if it still violates this law, here's going to be the pretty significant penalties for use."

(09:35):

But the real key difference between what the EU is proposing and what I said earlier, about what our jurisdiction is, they're looking to make vendors liable for employment decisions. So they're calling a vendor basically anyone who actually creates a product and sells it, or if you're internal, creating your own, and you're putting it for use in your own workforce, you also have that vendor reliability, which is a much different state of affairs. And if that passes, that may significantly change how these products are sold, how they're developed, if the vendor is now going to be liable, as well, like the actual user. And that's just nothing like that in the United States.

Jena Valdetero (10:14):

So what do you think the EEOC wants employers to focus on with AI in the workplace in 2023?

Commissioner Keith Sonderling (10:20):

Well, all the issues we discussed, but really importantly for employers to know, we just put out a draft of our Strategic Enforcement Plan. And this is a document that really guides the agency's enforcement over the next five years, and in that document, there's a whole section on artificial intelligence and how employers are using AI, both from a compliance perspective and an enforcement perspective. So as more tools come online, as employers have more options to integrate AI in the workplace, we need to hear from the public about where we should be focusing both compliance expertise, of how you can implement these in accordance with our longstanding laws, and also our enforcement, and what areas we really need to deal with enforcement in this area, because it is a Strategic Enforcement Plan.

(11:10):

So this is something we need to hear from the public, from groups across the boards, from civil rights groups to employers. Everyone involved in this needs to tell us. Now that we've said publicly that AI is going to be a key enforcement priority area for us for the next five years, we now need the input of how we can actually help these programs be developed, designed, and deployed in accordance with the longstanding civil rights laws. And if they're not, where we need to be focusing our efforts on enforcement, and that is a really public process. But it is certainly going to be a major priority of the EEOC, moving forward, because at the end of the day, the question is no longer, "Am I going to use AI in the workplace?" It's how I'm going to use it and for what purpose, and for what we're concerned is making sure it's being used to help further eliminating bias in the workplace and not creating bias.

Kelly Bunting (12:01):

Commissioner Sonderling, I appreciate it so much. Jena, thank you so much for joining us for this really fascinating discussion, and very timely and very helpful, I think, to employers and employees alike. Now, you had said that the January public hearing is available on YouTube?

Commissioner Keith Sonderling (12:21):

It's available on our EEOC's website. You can actually see all the opening statements in the written testimony. You can get a transcript of it, and also, there's a link to our YouTube, as well, where you can watch the whole hearing on YouTube.

Kelly Bunting ([12:33](#)):

Excellent, and then can we also go to the EEOC website to find the Strategic Enforcement Plan that was just proposed?

Commissioner Keith Sonderling ([12:41](#)):

Everything we've discussed, whether it's the Strategic Enforcement Plan, whether it's the hearing, or other things related to the AI initiative, like the guidance on Americans with Disabilities Act related to use of technology, you can find on [eeoc.gov](http://eeoc.gov).

Kelly Bunting ([12:57](#)):

Eeoc.gov, excellent. Thank you so much.

Commissioner Keith Sonderling ([13:00](#)):

Thank you for having me.

Kelly Bunting ([13:01](#)):

Thank you, everybody. Really appreciate it.