

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

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

Welcome to Asked and 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. With me today is my co-host and co-chair of the US Data Privacy and Cybersecurity practice, Jena Valdetero, who is joining me because we have a very special guest today who will touch on both data privacy and employment law issues, Commissioner Keith Sonderling of the Equal Employment Opportunity Commission. Commissioner Sonderling, welcome. Would you please explain what the EEOC does in this space?

Keith Sonderling ([00:57](#)):

Thanks for having me, and I appreciate being here. Our mission here is to prevent and remedy unlawful employment discrimination and advance equal opportunity for all in the workplace.

Kelly Bunting ([01:07](#)):

Most employers and employees understand that companies are using artificial intelligence to sift through resumes, look for keywords, and then the artificial intelligence sends the selected resumes onto human resources. So my question to you, Commissioner Sonderling, is what is the harm? I mean, if an employer is only trying to be more efficient by using AI, what's the harm?

Keith Sonderling ([01:33](#)):

So our specific laws are very broad, and it's the big ticket items. When you think about the labor and employment world, our laws protect employees and job applicants, which is going to be very relevant to this discussion, against discrimination against race, color, religion, sexual orientation, pregnancy, national origin, age and disability, and genetic information. And as you'll hear in why it's so relevant to artificial intelligence, the laws apply to all aspects of your employment. So not just the hiring and firing, but promotions, training, wages, benefits. It also prevents retaliation and harassment.

([02:08](#)):

So whether you're aware of it or not, employers are really turning to artificial intelligence to make a lot of decisions that were once made by humans, once made by pen and paper, now being able to used at scale across the board. And not just related to hiring and who we're going to bring in the door, what resumes we're going to look at. There's AI out there that writes job descriptions, screens resumes, chats with applicants, conducts job interviews, then predicts what the salary of the employee should be and if they're going to accept it and then software out there that assesses workers and even software out there that fires workers. So it's so broad in the context of how it's being used. It's out there.

([02:50](#)):

And the reason why we're looking at it and why it's so important in the discussion today is that AI, if it is carefully designed and properly used, it really actually can help a lot of companies move forward with their diversity, inclusion and accessibility by mitigating the risk of unlawful bias, by mitigating the risk of discrimination, by removing the human from that equation. But at the same time, now to directly answer your question, if it's poorly designed and carelessly implemented, AI can discriminate on a scale and magnitude far greater than any one person.

[\(03:26\)](#):

So a lot of these programs, as you think about artificial intelligence broadly, companies, as you know, it's all the news. Companies are spending millions of dollars on it. Very smart computer software engineers are creating new programs to get it in business, and businesses are liking it because it's making it having business decisions done efficiently, economically, reviewing millions of pages in documents faster than any human, allowing companies to make deliveries faster, making widgets faster, you name it. But when it comes to using AI in our space in employment, it's much different because you're dealing with federally protected civil rights and that laundry list of protected characteristics I just told you about.

[\(04:11\)](#):

So efficiency here is a little different. Although there's a lot of benefits to using this, if it's not used properly, we're not getting efficiency, we're getting discrimination larger than one any individual HR manager or human or hiring manager. And that's the real issue when we come talking about AI in the workplace.

Kelly Bunting [\(04:31\)](#):

But discrimination, how? This is what I'm a little confused about. So you've got AI sifting through the resume and picks a resume or it rejects a resume for whatever reason. How is that discriminatory? What are you seeing in that space?

Keith Sonderling [\(04:49\)](#):

Well, there's different ways to look at it and not much different of how we look at humans looking at resumes. So when a hiring manager throws a resume in the trash, you don't know if they don't want to hire that person because they're not qualified, because they didn't like the way the resume looked, or if they were a certain national origin, or they were a certain age. So what we're left with now, it's very difficult to understand why people make a employment decision that's biased.

[\(05:17\)](#):

So that's where the rush to implement AI is coming in. Well, computers can't be biased. They don't have any minds of their own. They're going to do this neutrally, and we can cure discrimination, we can cure bias by removing the source of bias, aka the human, from that decision making. But if it was only that simple... Because as we know, artificial intelligence is largely just replicating human decisions. That's really what it is at its core. And whether you call it artificial intelligence, whether you call it machine learning, whether you call it natural language processing, it's looking for those patterns that it's programmed to look for generally, again, programmed by humans.

[\(05:54\)](#):

So how does it specifically discriminate in our context? Well, there's a few different ways, but not unfamiliar to how, I don't want to say traditional discrimination, non-technical discrimination has occurred. So under our law, there are two theories of discrimination, disparate treatment and disparate impact. Disparate treatment, you think intentional discrimination, disparate impact, you think that unintentional neutral policy that causes discrimination. And related to the disparate impact theory, which is the broader theory where a lot of this AI discrimination discussions are talked about, there's a lot of really interesting examples when it comes to this because the AI is only going to be as good as the data that's fed to it.

[\(06:40\)](#):

And what do we mean by data here in the employment context? The people who are applying, the people who the AI are seeking out to see who may be in the best position to apply for the job based upon the characteristic set. But if the workforce applicant pool is made up of one gender or one race, one national origin, then the AI is just going to replicate what it sees in that dataset and say, "Well, the likely indicators of who we should pick for this job must be of this national origin, of this race, throw in whatever protected characteristic you want in there," and that's just the function of the data set. So the old fashioned, it's not much different than the garbage in garbage out analysis. And that is how a biased decision could make.

[\(07:25\)](#):

And there's a lot of very classic examples of this. Probably one of the most infamous examples of this is one of these resume screening programs was looking at the current workforce of an employer and looking to see what patterns make those top performers so great. And the machine learning ran and it came out and said the most likely indicators of success at this company is being named Jared and having played high school lacrosse. And that was a program used to actually meant to diversify the workforce. But if the indicators are that these certain individuals who share those characteristics, that's what it's going to tell you. So a lot of it is not only in the design when we talk about algorithmic discrimination, but what's being fed to it in the first place. So that's a lot of the unintentional discrimination. Obviously, the computer wasn't looking in that situation for Jared Lacrosse, probably white men, but that was the result of it opposed to what are those actual underlying skills and characteristics that made them such top performers, which is a much more difficult thing to do.

[\(08:30\)](#):

And then of course, with intentional discrimination, how can AI intentionally discriminate? They're not fully... Although there's a lot of new programs out there that they do appear to be humans, they don't have the bias or that decision to say, "I don't want to hire these individual people," and that's where the user comes into play. So you can have the most diverse, perfect data set. And what I mean by that, an applicant pool completely representative of your local hiring area or the perfect applicant pool related to what the job descriptions are, where you have a diverse slate of candidates, and then somebody can go in and tinker with the algorithm and say, "Well, I want to either intentionally eliminate," let's just say, "women from the applicant pool." So with a few clicks, you can scale that or you can do it through, not directly, but saying let's eliminate anyone who went to women's colleges or was in a women's sports club or something related to that, related to your sex.

[\(09:29\)](#):

It may not be direct, but it's going to have the result of that, but it's still intentional because you're intentionally trying to do that, whether it's age, whether it's national origin. You could see with a few clicks how this can intentionally discriminate on a scale and magnitude far greater than we've ever seen before. So for the little practical law example there of the two theories and how it fits into AI, you could see that our existing theories of discrimination can apply equally to how employers are using this on the front end.

Jena Valdetero [\(09:58\)](#):

So I'm thinking about from what you just said, even more implicit type of bias. So are you seeing instances where no programmer is going in and saying, "I don't want someone who went to a woman's college or anyone who has the word woman or diversity in their resume," but things like how you describe the job. So if you think about words that are traditionally associated with male candidates, assertive, aggressive, these very powerful male words compared to women.

Keith Sonderling ([10:31](#)):

Rockstar. Ninja.

Jena Valdetero ([10:32](#)):

Exactly. Braggy words, let's be honest. Compared to women where it may be more team building and collaborative and communicative. And so are you seeing that level, and it's not as overt? What do you do with that?

Keith Sonderling ([10:48](#)):

Well, I'm going to actually flip that on you and say one of the benefits of AI... And when we talk about AI in the workplace for all those different kinds of reasons and tools employers are using it for, there's a lot of potential benefits to remove bias, but as the examples I just gave you, it can also increase bias. So on the job description, there's been historical issues with entering the workforce with job descriptions. And a lot of job descriptions have had longstanding terms, and they're many of the ones you've just mentioned, that studies have shown and academic studies have shown that women more than men are less likely to apply to jobs that have some of those more assertive terms. And that's just conducted by studies.

([11:31](#)):

And that's something that employers have been dealing with. And a lot of the things, if we see where job descriptions come from, a lot of it is because employers are just, what are they doing? They're using old job descriptions that may no longer be relevant to the actual job being used because that's been the job description at their company for decades or they're going online and copying their competitor's job description for a job they want to create. But you have no idea what biases you're putting in there. You have no idea what skills and requirements you're putting in there that may deter certain individuals from protected characteristics from applying.

([12:03](#)):

So that's just the longstanding issue here. But there's AI out there that is actually trying to correct for that. There's AI out there that creates that you can either enter in your own job description or it creates a job description. It goes through and looks at every single word in the job description and compares it with hundreds of thousands of job advertisements and descriptions, and sees the patterns of who have actually applied to those jobs and entered the workforce via those jobs. And it will make recommendations to you by changing certain words, some of those assertive words or making it more gender neutral words. It can actually help increase, diversify the applicant pool coming in, whether it's men, women, or other people historically based upon using algorithms and machine learning.

([12:43](#)):

So that would be a very good use of AI for it to be able to go through and say, "By changing this word, you're likely to increase the applicant pool of females by X amount just by this one word." So that's a very good use of AI. So you could see the issue here is that there's so many great uses and so many potential harms from using the same kind of program for the same entry into the workforce or throughout the workforce of lifecycle.

([13:11](#)):

And that's what my mission has been is just to alert employers in the legal community about, like I said, the promises and perils of each. Because employers are free to use any kind of software they want. That's not the role of the government or the EEOC to say, "Don't use this." But I do think what our role

is, if you're going to use these various programs, here's how the laws apply. Here's how it can potentially help further our mission to advance equal opportunity in the workplace, or here's how it could potentially discriminate if it's not carefully designed and properly implemented.

Jena Valdetero ([14:24](#)):

So what role are we playing with respect to, you can tell companies about this, but obviously, they're going to be held accountable if they end up using AI that has this discriminatory effect. Is that right?

Keith Sonderling ([14:38](#)):

And that's so important for me in my position to say that if you are going to use this, here are the longstanding legal obligations you have. And as we can talk about later, some of the potential changes in the law or regulations. But for now, that's all a distraction. Title VII of the Civil Rights Act has been around since the 1960s. And for each of these uses of technology, that law applies equally. Although the laws may be older, but they're not outdated. So I think it's from our position to saying whatever... And this is where we can be helpful and allow employers to make that decision, whether or not they want to take the risk to use this for the benefit is how are laws applied to each of these new technologies? Whether it's the discrimination side related to some of the examples we've given to, or how individuals with disabilities can use these programs and employers can still be compliant with the Americans with Disability Act.

([15:34](#)):

I see that more of our role in this equation, and if we put that information out there, and employers use some of these programs without taking the advice of how to properly not only design them, but also to actually use them and implement them and things they can be doing, and if they're ignoring that and just using them off the shelf like some other kind of software, and it causes discrimination, there's still going to be liability there. And that certainly is our role on the enforcement side.

Kelly Bunting ([16:04](#)):

Well, the EEOC, just in January, Chair Charlotte Burrows had convened a public hearing. The name was "AI and the Algorithmic Fairness Initiative." And it was like a public hearing. There was a ton of comments that were submitted. Obviously, I mean, this is the EEOC's role is to protect the workplace from discrimination, harassment, retaliation. What did you learn from that? Or can you tell us maybe some of the comments, some of information that came out of that public hearing?

Keith Sonderling ([16:40](#)):

Yeah, let me take a step back. A lot of this started with the EEOC's interest in this. So in October of 2021, we formally launched an initiative, so it became an agency priority. More than me just speaking about it publicly, it then became a formal initiative of the agency. So that allowed our resources to be used, whether they're listening sessions, whether it's convening a formal hearing, whether it's internal training, etcetera. So that came out October, 2021. The announcement in May of 2022, we put out our first guidance in connection with Department of Justice Civil Rights about how the Americans with Disability Act, longstanding law, applies to this technology and how employers have to give employees the same reasonable accommodations in the application process. If they can't use the technology that the technology shouldn't submit, try to take unlawful medical information, employers are not allowed to seek.

([17:33](#)):

So then I would say after that, we had, in January, we had our first formal public hearing on the matter. And this was a full-blown commission hearing. The commissioners were all there. We had 12 different witnesses. The hearing, the full hearing is available on YouTube, and during this hearing, we heard from people in academia, people who were scientists, and then individuals from a trade group from ranging from the ACLU to the US Chamber of Commerce, all with their different various thoughts and a lot of academics, different thoughts about how the EEOC should address this. So speaking with a plaintiff's class action lawyer about the hurdles for employees to know that they're being subject to this technology. Speaking to a defense lawyer, how are we going to help businesses comply with the EEOC's regulations and laws as they're buying this? And in the academia, how should Title VII change? How should some of our testing and standards be applied to this? And then what should we be doing differently related to enforcement here or more pie in the sky changes to Title VII, which obviously, is beyond our control?

[\(18:52\)](#):

So it was a really diverse hearing in the sense where you heard a lot of different opinions. My criticism of the hearing is that there wasn't any tech vendors there, and I think that was a key part of who should have been there. I did bring that up in the sense where a lot of this, and this is really an interesting part, is that the HR tech vendors, they want to be involved in the conversation to their credit. And they want to be able to do this because nobody wants to design a product that's going to violate civil rights, and nobody's going to buy a product that is going to violate civil rights. Maybe people will. I don't know, but certainly would face significant consequences from the EEOC if they did.

[\(19:32\)](#):

So they're a really key part of the ecosystem as well. And I think we are at a unique opportunity where AI vendors in the space, knowing the amount of money is out there, truly thinking and believing that their products can change HR help eliminate bias. And I think they need to be a part of this conversation as well. And normally, look, the EEOC wouldn't be talking to vendors in that sense, but times are changing in that sense, hopefully, moving forward. The next step is now to bring in the vendors into the equation as well.

Kelly Bunting [\(20:02\)](#):

That's what Jena and I were talking about before the podcast, is that it's not so much the employer that's writing this code or creating this software. It's the vendors, and then the employers buy it off the shelf and they figure, "Well, this has got to be compliant with civil rights law because, my goodness, it wouldn't be marketed if it weren't." And yet, we see various lawsuits. We see things happening in the space now of vendors being sued. What can an employer do about that?

Keith Sonderling [\(20:35\)](#):

And the interesting part when it comes to our laws, the EEOC has jurisdiction basically over three parties, unions, staffing agencies, and then the employer. So this whole issue related to vendor reliability, from our perspective, from a federal law enforcement perspective, I don't want to say it's not our concern, but we're doing an investigation. We're looking at the employer. We're looking at who filed a charge of discrimination, and what was the outcome? And whether that outcome was done by a computer or human, we're going to see discrimination. And now how we backtrack it is a different story, and there's potential ways that AI can help in that. But at the end of the day, we're not looking at the vendor. We're not dealing with the vendor. We're dealing with that employer. So it's a very unique situation for employers who are investing in this like they invest in other software where you could just buy it off the rack and let it go.

[\(21:27\)](#):

But here, because of the enormous civil rights implications, it's much different. And what we look at is how did this technology look? How was it applied to your exact workforce, to that job description, to that applicant pool, and what was the results? Opposed to, here's a program where the way it's sold is that it's going to help you with diversity, equity, inclusion, which a lot of these programs are, and here's how it's been successful for other people. Here's how it's been successful in the aggregate. That doesn't matter when it comes to EEOC enforcement. The only thing that matters is that direct use on that direct job advertisement, job description, whatever the use is, and that's where the jurisdiction lies. And that's why it's so tricky, and that's why there's so much additional work when it comes to this, is because it's how it was applied to your company, not how that was applied otherwise.

Jena Valdetero ([22:20](#)):

Sorry. How will the employers necessarily know? So to Kelly's point, you're buying this off-the-shelf software. It's being sold and marketed to you in a way. You're an employer. You're not a software company. You don't know really anything about AI. What are the red flags employers should be looking for in determining whether the AI software that they've hired to actually help get an attractive, a more diverse workforce is doing the opposite?

Keith Sonderling ([22:47](#)):

It's a really great question, and it's a really very tough question to answer in the sense where, look, employers have the buying power, and they're the ones that can ask the very tough questions on the vendors. And how are you going to test for disparate impact? How are you going to put safeguards that it can't be used by an employee to intentionally discriminate? How are you going to help me implement it and test in my company before we ever use it to make a decision on someone's livelihood? And what kind of audits can we do to make sure that the audits that you have shown us are actually compliant with the EEOC's regulations when it comes to applying in our own workforce? How are you going to help us once our data set changes?

[\(23:29\)](#):

I mean, dataset could be just a different job application, could be a different pool. It could just be a different location. There's just a whole host of potential factors that will change the outcome. And how are you going to work with us, vendor, in that position so we feel comfortable that it is now uniquely tailored to our workforce, and now when we deploy it's going to be pretested and audited, and we feel comfortable using it? Opposed to, here you go. It's worked for other people. Good luck.

[\(23:56\)](#):

So I think that interaction in those questions you can ask on the front end, and look, the good vendors will be able to answer that. They'll tell you what statistical methods they're going to use. They're going to tell you how they'll help you apply it in your individual business, and they'll tell you how you can then continue to test it as things change. And the ones who can't answer those questions, it's going to be a different story. So I think a lot of it is the pushback that employers are going to do on the vendors who are selling this product and what kind of, I don't want to say the word guarantee, but what kind of assurances can they get that the vendor will work with the employer with the ultimate liability to make sure that it's properly used?

Kelly Bunting ([24:36](#)):

Right. Because I think employers are just now realizing, like you said, Commissioner Sonderling, the EEOC doesn't really deal with vendors, but who's going to be held liable? It's going to be the employer that uses the vendor's software. So I think as employers start to realize that, the employers will start pushing back, will start demanding some assurance. "Hey, am I going to get into trouble? Am I going to get sued as a company if I use your software?" They are going to start demanding answers, and we've seen it in some of these state laws that have been passed. I think Jena was talking about the new New York state law that just went into effect January 1st of this year, which requires you to audit the methods by which you are using the AI software. Isn't that what that law requires?

Keith Sonderling (25:29):

Yeah. Well, this is a nice segue into what employers are going to face, especially those who operate around the United States and around the globe. And you already have to deal with federal law wherever you are in the United States, but under our laws, look, there's no pre-deployment audits required like a lot of employers do their own employment audits unrelated to being required to. But we're seeing now for the first time, and what you're referring to is the New York City law related to automated employment decision making tools, and New York City was the first to really dive into the actual main use of what employers are using for AI. It was supposed to go in effect in January. It's now pushed back to April, and a lot of that reason is because this is a very complicated area. From my perspective, we should be commending anyone who wants to tackle the very complicated issue of algorithmic discrimination, whether it's states, whether it's other governments. Look, it's a very tough issue that we all care about and we all want to get right.

(26:31):

But at the same time, New York's requirement to do an independent audit, to publish the summary of the results. Well, what does that at specifically mean? If you're going to put new laws on the books for employers like we do in the federal government, there's rulemaking process, there can be interaction, and there's a final rule that is normally done with consultation with the public. And I know they've done some of that in New York, but just the jurisdictional issues for New York City too, which is a very big city and a lot of employers there, who it applies to, who's going to do the audit, what is the audit look like? And those are really tough questions, and those are those million dollar questions that everyone wants to know. And at the end of the day, the only really auditing standard for employment is the four-fifths rule, the Uniform Guidelines of Employment Selection Procedures from the 1978 from the EEOC. And now that's what we do in the EEOC concept for disparate impact. Do we do that in New York?

(27:26):

So a lot of these questions are just really unanswered, and it's making it a really difficult for employers who want to comply, who want to do the right things. Vendors who know they have to comply with this as well, but they don't have that certainty. So that's the drawbacks of having different laws. Now, for instance, in Illinois, they were the first to really dive into this in 2020 with their video facial recognition law. And it basically made, if you're going to use facial recognition during an employment interview, a lot of disclosures, a lot of requirements, a lot of notice to make it to the... And Maryland has something similar where it makes it so difficult. It's hard to almost use it there without the amount of disclosures. So it has that chilling effect for employers in there just saying, "It may not even be worth using facial recognition in video interviews because of all these additional requirements."

(28:12):

So in a sense, with New York and Illinois and Maryland and other states getting involved, at what point is that going to deter employers from actually instituting technology that could be very beneficial? Or for nationwide employers, are they going to then apply those standards across the board? So if I have to



test in New York, am I just going to do it for my workforce everywhere I use AI? Because if the EEOC comes into town to our business, then they're going to be auditing everything, and there's other issues. In New York can only ask you to do the audit of the certain protected classes where the EOCCs says, "Well, you have a duty to ensure that there's no discrimination in all the laws we enforce." So it's a difficult situation for employers right now without that real national standard in a sense. I don't say that in the sense where there are no laws, obviously. I believe that our laws apply to all this technology.

Kelly Bunting ([29:09](#)):

Thank you for joining us for this part one of our conversation with Commissioner Keith Sonderling of the EEOC. This concludes part one in part two, we'll continue the conversation with Commissioner Sonderling.