

**Testimony of Christine L. Owens, Executive Director
National Employment Law Project
Before the
Equal Employment Opportunity Commission
Meeting on**

**“Out of Work, Out of Luck? Denying Employment Opportunities to
Unemployed Job Seekers”**

February 16, 2010

The National Employment Law Project (NELP) commends the Equal Employment Opportunity Commission (EEOC) for its concern about **employer exclusion of the unemployed from job opportunities**. We appreciate the opportunity today’s forum provides for NELP and others to address this important issue.

NELP is a national non-profit organization that engages in research, education, and advocacy on behalf of low wage and unemployed workers and individuals facing unfair and unlawful barriers to employment. Through our dedicated website for unemployed workers (www.unemployedworkers.org) and our close partnerships with state-based organizations, NELP maintains ongoing and direct contact with jobless workers that informs our awareness of the problems they face and the policies and strategies needed to support their return to work. The arbitrary employment barriers facing the long-term unemployed are reminiscent of those confronting another group of workers for whom we advocate, individuals with criminal records. NELP’s efforts to restore employment opportunities for the latter group include an extensive Title VII program combining outreach and case development, training, policy advocacy and litigation, all focused on reinvigorating enforcement of and compliance with Title VII’s prohibition of selection procedures that have a disparate impact on protected classes.

At NELP, we believe that the best way to create a healthy, sustainable and growing economy is for the public and private sectors to work together to boost job creation and ensure that all who want to work have access to jobs for which they are qualified. That means, among things, eliminating arbitrary employment barriers that operate to weed out qualified and interested job applicants based on biased assumptions or on objective practices that have a disproportionately harsh impact on identified groups.

Excluding unemployed workers from consideration for jobs is one such barrier, which is not only unfair but also may violate basic civil rights protections because of the disparate impact of such policies on older workers, workers of color, women or other protected groups. At a moment when we all should be doing whatever we can to open up job opportunities to the unemployed, it is profoundly disturbing that the trend of deliberately excluding the jobless from work opportunities is on the rise.

The Jobs Crisis Facing the Unemployed: As the jobs crisis persists, millions of unemployed workers are facing the bleakest employment prospects in a generation. NELP estimates that throughout 2010, 3.9 million unemployed workers exhausted all of their unemployment benefits without finding new work. And while some of those have presumably found employment by now, the Congressional Research Service estimated that in October 2010, there were roughly 1.5 million very long-term unemployed workers—that is, jobless workers who had been unemployed for 99 weeks or longer.¹

Meanwhile, although the official unemployment rate dipped again in January, employers added only 36,000 jobs to their payrolls. We have 2.2 million fewer jobs overall today than ten years ago, while the working age population has grown by almost 10 million. Simply returning to where we were at the beginning of the recession would require that the economy add roughly 11 million jobs; the addition of only a little more than one million since job growth resumed in March 2010 has hardly made a dent in our huge jobs deficit.

The recent dip in the overall unemployment rate is a misleading sign with respect to the economy's overall health: A principal reason for the dip is that the number of persons marginally attached to the labor force—that is, they want jobs and are available to work, and have looked in the last year but not the last month—rose to 2.8 million in January, the highest number on record. There are still roughly five officially unemployed job seekers for every new job opening, which accounts for the Great Recession's record levels and rates of long-term unemployment.

The dire job market has made it essential that Congress and the Administration maintain the most robust program of unemployment insurance benefits in the nation's history. But what's needed most—and what all unemployed workers most want—is jobs. Meeting that need requires sound public policies that help encourage job growth and a willingness on the part of employers to make job openings equally available to all qualified job seekers, without regard to their current employment status. Sadly, as this forum illustrates, it appears that in some cases the latter is not happening.

Unemployed Need Not Apply: Stories suggesting systematic exclusion, often blatant, of unemployed workers from consideration for jobs began to emerge early last summer. In May and June, local media in Atlanta along with *The Huffington Post* and *CNNMoney.com* reported that Sony Ericsson, a global phone manufacturer that was expanding operations in Georgia, had posted a job announcement for a marketing

¹ U.S. Congressional Research Service, "The Trend in Long-Term Unemployment and Characteristics of Workers Unemployed for More than 99 Weeks," (R41559; Dec. 20, 2010), by Gerald Mayer., p. 5.

position that explicitly said “No Unemployed Candidates Will Be Considered At All.”² Similar accounts of such exclusions reported around the same time included:

- An ad posted on **The People Place** (a job recruiting website) by an anonymous Angleton, Texas electronics firm seeking a “quality engineer;” the ad specified the company would “not consider/review anyone NOT currently employed regardless of the reason;”³
- A Craigslist posting for assistant restaurant managers in Edgewater, N.J., flatly requiring that applicants “Must be currently employed;”⁴
- Numerous listings for grocery store managers throughout the Southeast posted in the spring by a South Carolina recruiting firm, Latro Consulting, which included restrictions against considering unemployed applicants; the restrictions were removed after *CNN Money.com* inquired about the practice.⁵

Subsequent reports confirm that the practice of including bans on unemployed applicants in job ads has continued. See, for example, “Outlook poor for long-term unemployed,” *The Atlanta Journal Constitution*, October 4, 2010 (<http://www.ajc.com/business/outlook-poor-for-long-657702.html>); “Employers Continue to Discriminate Against Jobless, Think ‘The Best People Are Already Working’,” *The Huffington Post*, October 8, 2010 (http://www.huffingtonpost.com/2010/10/08/employers-continue-to-dis_n_756136.html); “Long-term unemployed face stigmas in job search,” *USA Today*, January 23, 2011 (http://www.usatoday.com/money/economy/employment/2011-01-23-longterm-unemployed_N.htm); “How Employers Weed Out Unemployed Job Applicants, Others, Behind The Scenes,” *The Huffington Post*, January 14, 2011 (http://www.huffingtonpost.com/2011/01/14/unemployed-job-applicants-discrimination_n_809010.html).

While refusal to consider the unemployed is sometimes overtly noted in ads, at NELP we also hear regularly from unemployed workers—mostly older workers—who despite years in the labor force and significant directly relevant experience are nevertheless told they will not be referred or considered for employment, once recruiters or potential employers learn they are not currently working.

² 11Alive.com, “Job Listing: Unemployed Need Not Apply,” http://www.11alive.com/rss/rss_story.aspx?storyid=144719, May 31, 2010; Laura Bassett, “Disturbing Job Ads: ‘The Unemployed Will Not Be Considered’,” *The Huffington Post*, http://www.huffingtonpost.com/2010/06/04/disturbing-job-ads-the-un_n_600665.html, June 4, 2010, updated Aug. 8, 2010; Chris Isidore, “Looking for work? Unemployed need not apply,” *CNNMoney.com*, http://money.cnn.com/2010/06/16/news/economy/unemployed_need_not_apply/index.htm, June 16, 2010.

³ Bassett, “Disturbing Job Ads,” op. cit.

⁴ Ibid.

⁵ Isidore, op. cit.

That happened to 53-year-old Michelle from Illinois, who wrote us that after working successfully for 19 years as an IT help supervisor, she was laid off in 2008 due to the downturn. Many months into her job search, a headhunter contacted her, excited about her qualifications for a position he was retained to fill. The excitement faded, however, when he learned she had been unemployed for more than a year. As Michelle put it, “When he realized this, he was very apologetic, but had to admit to me that he would not be able to present me for an interview due to the ‘over 6 month unemployed’ policy that his client adhered to.” The headhunter, she told NELP, explained that his client expressly prohibited him from referring workers who had been unemployed for six months or more. When we last spoke to Michelle, she was still unemployed, had exhausted all unemployment benefits, was restructuring her mortgage, and had applied for SNAP (food stamps) and welfare—a first for her.

Kelly a 45-year-old former operations analyst in Colorado, wrote describing a similar experience. She responded to a local staffing firm’s November 2010 posting for a financial systems analyst experienced in implementing a software package she had put in place in her previous job. The agency called her immediately but after learning of her unemployment, the recruiter’s enthusiasm cooled. The recruiter told Kelly that she would submit her resume but that her “long employment gap was going to be a tough sell.” Kelly later followed up to express her continuing interest but was not called for an interview.

Similarly, 44-year-old Angela of Texas, an experienced pharmaceutical sales rep who had posted her resume online, wrote to share an email she had received from an executive recruiter for a bio-pharmaceutical company seeking a specialty sales rep. The recruiter had sent the email after seeing her resume—but the outreach was of little value to her, since the email included an express caveat, required by the employer, that “Candidates must be currently employed in pharmaceutical sales, or have left the industry within the last six months.”

Finally, there’s 55-year-old Ginger from California, who wrote to tell us about receiving a call from a recruiter for a six-month contract position as a software systems engineer. The recruiter thought she was a good fit for the job but upon learning of her unemployment, told her she could not submit her resume because she had not worked in the past six months.

Excluding the Unemployed Becoming Business as Usual: There is no official data on how frequently unemployed workers are denied consideration for jobs because of their employment status, but the brazenness of the ads described above and the experiences jobless workers shared with us suggest the practice is fairly common. That suspicion is borne out by comments of human resource consultants and recruiters willing to go on record about the practice. Rich Thompson, vice president of learning and performance

for Adecco Group North America, the world's largest staffing firm, told *CNNMoney.com* last June that companies' interest only in applicants who are currently working "is more prevalent than it used to be...I don't have hard numbers," he said, "but three out of the last four conversations I've had about openings, this requirement was brought up."⁶ Similarly, Lisa Chenofsky Singer, a New Jersey human resources consultant specializing in media and publishing jobs, commented that, "Most executive recruiters won't look at a candidate unless they have a job, even if they don't like to admit it." According to Ms. Singer, the first question she is generally asked when recommending a candidate is whether the candidate is currently working—and if the candidate is unemployed, the recruiter is not interested.⁷

A January article posted on **The Ladders**, an online job search resource site, further corroborates the widespread exclusion of jobless workers from employment opportunities ("Uninterested in the Unemployed," <https://recruit.theladders.com/recruiter-resource-center/uninterested-in-unemployed>). According to one quoted source, Matt Deutsch, communications coordinator at TopEchelon.com, the tendency to exclude the unemployed is "growing." Deutsch said:

Not all companies are doing this, but it certainly has become an issue. What's startling are the lengths to which companies and recruiters are going to communicate this, such as including the phrase 'Unemployed candidates will not be considered' right in the job posting.⁸

Deutsch speculates that some companies may rationalize the exclusion on the assumption that the best candidates are likely to be those who are currently working. But in an economy with such high unemployment, he notes, it is simply not "100 percent true" that being employed is a proxy for suitability for a position. More likely, Deutsch says, firms are inundated with applications and screening out the unemployed is "a pretty simple metric that can easily reduce their workload..."⁹

Other staffing firm industry specialists similarly confirm that the unemployed need not apply. Amherst Healthcare headhunter Isang Inokon told *The Huffington Post* at the end of last year that "he has trouble placing jobless pharmacists because the reality of today's job market is that employers 'want somebody who's wanted'"—that is, already

⁶ Isidore, op. cit.

⁷ Ibid.

⁸ Sharon L. Florentine, "Uninterested in the Unemployed," *The Ladders*, <https://recruit.theladders.com/recruiter-resource-center/uninterested-in-unemployed>, Jan. 2011.

⁹ Ibid.

employed.¹⁰ Another executive recruiter who has worked for major staffing firms for 20 years said, “There’s a lot of dirty stuff going on, a lot of hush-hush discrimination, I can assure you. As a recruiter,” he said, “you get an HR director on the phone, and they tell you point blank, ‘We want somebody ... [who] currently has a job. We don’t want to see a resume from anyone who’s not working.’ It happens all the time.”¹¹

In sum, there is a disturbing and growing trend among employers—honored by staffing firms—to refuse to consider the unemployed for available job openings, regardless of their qualifications. This refusal is often explicitly manifested in job ads that include restrictive language specifying that only currently employed candidates will be considered; or that no unemployed candidates will be considered, regardless of the reason for unemployment; or no candidate unemployed for more than a certain period (e.g., six months) will be considered. Employers or staffing firms questioned about such ads typically pull the ads or delete the exclusionary language, but that does not signal that they will not apply the exclusion in the selection process. Even more insidious, staffing firms and recruiters are aware of and honor employers’ preferences for candidates who are currently working, sometimes explicitly acknowledging to unemployed candidates that they are doing so but more often than not, simply not providing the reason the candidate will not advance through the process.

Blanket Exclusions of the Unemployed Has a Disparate Impact on Workers Protected Under Title VII and the ADEA: Both Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000e *et seq.*, and the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, make it unlawful for employers to engage in practices that “limit, segregate, or classify” individuals in ways that will limit or deny employment opportunities based on race, gender, color, religion, ethnicity or age. Practices neutral on their face nevertheless violate Title VII and the ADEA if they have a disparate impact on members of protected classes. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Smith v. City of Jackson, 544 U.S. 228 (2005)

Other witnesses are addressing the impact that refusal to consider the unemployed has on women, people of color, people with disabilities and other groups hit hard by unemployment. NELP’s testimony speaks largely to the impact of this exclusion on older workers. We note, however, that the evidence is strong that excluding unemployed workers from job consideration will have a disparate impact on people of color, and this is particularly true for African Americans. In January 2011, when the official

¹⁰ Laura Bassett, “Employers Won’t Hire The Jobless Because of the ‘Desperate Vibe’,” *The Huffington Post*, http://www.huffingtonpost.com/2010/12/03/employers-wont-hire-the-u_n_791710.html, Dec. 3, 2010, updated Feb. 2, 2011.

¹¹ Laura Bassett, “How Employers Weed Out Unemployed Job Applicants, Others, Behind the Scenes,” *Huffington Post*, http://www.huffingtonpost.com/2011/01/14/unemployed-job-applicants-discrimination_n_809010.html, Jan. 14, 2011.

unemployment rate overall was 9.0 percent, the unemployment rate for African Americans was 15.7 percent, compared with only 8.0 percent for white workers. That means that the share of African American workers adversely affected by an employer ban on considering the unemployed is almost twice as large as the share of white workers affected by the exclusion.

The impact of excluding unemployed workers from job consideration is real and substantial for older workers as well. That's because the persons most likely to be most affected by discrimination against the unemployed are those who have been unemployed longest; and long-term unemployment is far more likely among older unemployed workers than among their younger counterparts.

As described in the preceding sections, bans on considering unemployed workers for jobs are often linked to the duration of individuals' joblessness; candidates unemployed six months or longer are out of luck. Even absent such an explicit time limitation, longer spells of unemployment are more likely to be obvious to employers and recruiters than shorter spells, and hence, will more readily trigger the assumptions that underlie exclusion of unemployed workers from job consideration.

Among unemployed workers, older workers are much more likely than their younger counterparts to experience long periods of unemployment that undermine opportunities to return to work. As shown in **Table 1**, older workers (55-64, or 65 and older) are almost equally likely to have been unemployed for a year or more as they are to have been unemployed for less than six months (more than 40% of older workers in each category). Younger workers, on the other hand, are far more likely to experience relatively short durations of unemployment than long-term unemployment, with more than 60 percent of workers younger than 35 years old unemployed for six months or less compared to less than a quarter unemployed for more than a year. Thus, a policy that excludes applicants from consideration based on duration of unemployment will fall more harshly on older unemployed workers.

Data about average durations of unemployment further underscore the disparate impact policies excluding persons unemployed for six months or longer will have on older jobless workers—an impact that has intensified as the jobs recovery has limped along. The average duration of unemployment is correlated with age of unemployed workers: the older the jobless worker, the longer (on average) the unemployment spell. Average durations of unemployment have grown over the past year. In January 2010, unemployed workers between the ages of 45-54 averaged 33.6 weeks of joblessness, compared to 42.0 weeks in January 2011. For unemployed workers between the ages of 55 and 64, the average duration rose from 37.4 weeks in January 2010 to 43.0 weeks in January 2011. And for those older than 65 years, average duration of unemployment as

of January 2010 was 30.7 weeks, compared with 49.3 weeks as of January 2011. (See **Table 2**)

Thus, NELP believes that excluding the long-term unemployed from consideration for jobs will typically have an age-based disparate impact that can be justified only through an affirmative showing that a reasonable factor other than age justifies the practice. Similarly, as other witnesses will discuss in more detail, we believe these exclusionary practices have a disparate impact on people of color, especially African Americans, who experience unusually high rates of unemployment and long-term unemployment.

Advancing Other State and Federal Remedies: The critical first step toward addressing this disturbing practice of shutting unemployed workers out of jobs is happening today--exposing the practice, exploring its legality, calling out employers and staffing firms that engage in it, and educating the public about its devastating impact on workers who need jobs, their families and communities. Excluding unemployed workers from employment opportunities also has serious negative consequences for the economy overall, increasing personal indebtedness, bankruptcies, and foreclosures; destroying credit; and diluting America's storehouse of human capital. Raising public and policy-maker awareness of this practice is thus both timely and critically important.

Next, it's important to explore every available legal option to prevent this practice from spreading and cause even more damage at a time when workers are already suffering from record rates of joblessness. NELP strongly encourages the EEOC to review application of Title VII, the ADEA and the ADA to situations in which employers and/or staffing firms explicitly exclude unemployed workers from job consideration solely because of their unemployed status, or where investigations—either based on charges filed with the EEOC or initiated by the EEOC through a commissioner's charge or directed investigation—support findings that respondents refused to consider unemployed workers or long-term unemployed workers for job openings, regardless of their qualifications.

But it's not up to the EEOC alone to help turn this situation around. In addition, the EEOC should encourage state fair employment practice agencies to monitor these practices locally – holding their own forums, as the EEOC has done – and use their statutory authorities to challenge it. Congress and the state legislatures should hold hearings and, if needed, develop new laws to address the issue, perhaps building on state laws that now bar retaliation against workers who file unemployment claims.

At least one state, New Jersey, is also exploring legislation (Assembly bill no. 3359) that would make it unlawful for employers or their agents to include language in job postings that limits the applicant pool to only those individuals currently employed. The measure would impose civil penalties of up to \$5,000 for first offenses and up to

\$10,000 for subsequent offenses. The legislation passed the New Jersey legislature but was “conditionally” vetoed by the Governor, and returned for consideration of his specific objections. Its review is ongoing.

CONCLUSION

The purpose of 20th century fair employment laws – whether banning discrimination based on race or gender, age, national origin, disability status or otherwise – was to erase the biases that had defined America’s workplaces and remove arbitrary barriers that deny employment opportunities to qualified individuals. Today’s working families, particularly those enduring unemployment, face a monumental economic crisis that is exacerbated by employers’ refusal to consider unemployed workers for jobs—a refusal that falls especially harshly on older workers, African Americans and other protected groups. At a moment when we have so far to go to rebuild a sustainable economy that works for all, we hope employers will voluntarily step up, end the exclusion of unemployed applicants, and make job opportunities equally available to all who qualify. Many employers do so. But given the pervasiveness of the practice of excluding the unemployed and its implications for jobless workers and the economy, relying on the good will of employers is not enough. The EEOC should continue to explore this problem and utilize its authority to restore the promise of equal opportunity for all.

Table 1: Unemployment by Age
(Taken from Pew Center analysis of Current Population Survey, Dec. 2010)

| | Under 20 | 20-24 | 25-34 | 35-44 | 45-54 | 55-64 | 65+ | Total |
|--------------------|---|--------|--------|--------|--------|--------|-------|---------|
| | In thousands | | | | | | | |
| Employed | 4,116 | 12,611 | 30,384 | 30,528 | 33,244 | 21,901 | 6,376 | 139,159 |
| Unemployed | | | | | | | | |
| <26 weeks | 970 | 1,336 | 1,965 | 1,340 | 1,281 | 697 | 206 | 7,796 |
| 27-51 weeks | 125 | 306 | 451 | 391 | 417 | 229 | 60 | 1,979 |
| >52 weeks | 167 | 448 | 875 | 860 | 1,037 | 626 | 209 | 4,221 |
| TOTAL | 1,262 | 2,090 | 3,291 | 2,591 | 2,735 | 1,552 | 475 | 13,997 |
| Labor Force | 5,378 | 14,701 | 33,675 | 33,119 | 35,980 | 23,452 | 6,851 | 153,156 |
| | As Percentage of Unemployed (Within Age Band) | | | | | | | |
| Unemployed | | | | | | | | |
| <26 weeks | 76.9% | 63.9% | 59.7% | 51.7% | 46.8% | 44.9% | 43.4% | 55.7% |
| 27-51 weeks | 9.9% | 14.6% | 13.7% | 15.1% | 15.3% | 14.7% | 12.7% | 14.1% |
| >52 weeks | 13.2% | 21.4% | 26.6% | 33.2% | 37.9% | 40.3% | 43.9% | 30.2% |

Data is not seasonally adjusted

Source: **Addendum: A Year or More: The High Cost of Long-Term Unemployment**, Pew Fiscal Analysis Initiative, Pew Charitable Trusts, http://www.pewtrusts.org/our_work_detail.aspx?id=988, January 2011

**Table 2: Average Duration of Unemployment by Age
January 2010, January 2011**
(Source: Bureau of Labor Statistics, Household Data, Table A-36)

| | January 2010 | | January 2011 | |
|------------------|-------------------------|-----------------|-------------------------|-----------------|
| | Weeks unemployed | | Weeks unemployed | |
| Age group | Average (mean) duration | Median duration | Average (mean) duration | Median duration |
| Total, 16+ | 28.9 | 18.6 | 35.5 | 19.9 |
| 16-19 | 20.8 | 12.2 | 21.4 | 11.7 |
| 20-24 | 24.3 | 14.2 | 28.5 | 15.5 |
| 25-34 | 28.3 | 19.1 | 32.8 | 17.8 |
| 35-44 | 27.7 | 17.0 | 38.5 | 22.6 |
| 45-54 | 33.6 | 24.1 | 42.0 | 27.5 |
| 55-64 | 37.4 | 28.4 | 43.0 | 26.8 |
| 65% | 30.7 | 22.5 | 49.3 | 31.8 |

Data not seasonally adjusted
NELP analysis of CPS data