



March 28, 2023

Jamie Williamson, Director
Debra Lawrence, Regional Attorney
Philadelphia District Office
U.S. Equal Employment Opportunity Commission
801 Market Street, Suite 1000
Philadelphia, PA 19107-3126

Investigation Request: The Hershey Company

Dear Ms. Williamson and Ms. Lawrence:

America First Legal Foundation (“AFL”) is a national, nonprofit organization working to protect the rule of law, due process, and equal protection for all Americans. We write, pursuant to 29 C.F.R. § 1601.6(a), seeking issuance of a Commissioner’s charge for an inquiry into individual or systemic discrimination by The Hershey Company (“Hershey”).¹

Hershey is a publicly traded corporation with its corporate headquarters located at 19 East Chocolate Avenue, Hershey, PA 17033. Federal law makes it unlawful for an employer to discriminate against an employee or potential employee “because of such individual’s race, color, religion, sex, or national origin.”² However, Hershey publicly admits to engaging in such discrimination.

In a February 28, 2023, press release, Hershey announced its policy and practice of illegally discriminating based on sex and using sex-based quotas in hiring. It said, “In alignment with the company’s enterprise diversity, equity and inclusion (DEI) framework, Hershey is well on its way to meeting its ambitious *goals of 50% gender representation across its workforce and 42% of its leadership by 2025.*”³ The release affirms that “Gender equity [sic] serves as a key element of the company’s enterprise DEI strategy” and contains a link to the Company’s 2021 ESG Report.⁴

The 2021 ESG Report, in turn, confirms that Hershey’s employment practices are predicated on unlawful and pernicious race, color, sex, and/or national origin

¹ Copies of this letter are also addressed to each Member of the Commission and AFL makes the same request of them pursuant to 29 C.F.R. § 1601.6(a).

² 42 U.S.C. § 2000e-2(a).

³ Hershey, *Hershey Mentors Women and Girls as Future CEOs During Women’s History Month*, (Feb. 28, 2023), <https://bit.ly/3YVV0Oo> (emphasis added).

⁴ *Id.*

discrimination. For example, in a section titled “Our People,”⁵ Hershey reports it has quotas to ensure “30–40% people of color [sic] representation across U.S. employees.”⁶ Hershey’s workforce composition data from 2019 through 2021 is particularly instructive, further demonstrating that the corporation’s hiring and promotion policies and practices are infused with unlawful considerations.⁷

Additionally, the 2021 ESG Report confirms that the corporation is engaging in unlawful race, color, and national origin discrimination regarding job training programs. It is illegal for any employer “to “ discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.”⁸ However, the corporation’s ESG Report, titled “More Pathways to GROW,” states that for the purpose of “Developing Diverse [sic] Talent,” the corporation has “created new commercial acumen training. The five-month curriculum is designed to build the business acumen of diverse [sic] talent. The training covers financial acumen, project management, problem solving, strategic thinking, emotional intelligence and influencing skills.”⁹

Concerningly, this training program’s eligibility appears to be conditioned on race and gender, as Hershey states, “We continue to invest in early-in-career and mid-career development and training to develop commercial skills and career building for POC and women.”¹⁰ The corporation attempts to justify discriminating based on a worker’s race, color, sex, and/or national origin in the name of “actively recognizing and developing talent that has traditionally been underrepresented.”¹¹

A Commissioner’s charge is particularly appropriate here because there is ample reason to believe that the company has knowingly and intentionally violated federal law and will continue to do so. As early as 2019, Hershey’s was aware that its unlawful employment practices were creating legal risk.¹² Regardless, the corporation has chosen to promote and use employment practices that are both

⁵ The Hershey Co., 2021 ESG Report at 74 (May 31, 2022), <https://bit.ly/3JybrKX>.

⁶ *Id.* at 67, 70, “People of color” is a phrase without fixed or discernable legal meaning. The corporation’s definition is “People of Color (POC): Refers to Black, African American, Hispanic/Latino, Asian/Asian Pacific Islander, Hawaiian Pacific Islander and those who identify as two or more races.” Hershey’s definition is arbitrary and incoherent. If the ESG report is accurate, then it race, color, and national origin are unlawfully driving the corporation’s employment and contracting practices.

⁷ *Id.* at 75–79.

⁸ 42 U.S.C. § 2000e-2(d).

⁹ *Id.* at 71.

¹⁰ *Id.*

¹¹ *Id.*

¹² Blake Brittain, *Ex-Hershey IP Attorney Loses on Race, Gender Bias Claims*, BLOOMBERG LAW (Nov. 4, 2019) available at <https://bit.ly/3JT0ncM>, *see also Ehresman v. The Hershey Co.*, 2019 WL 5692767, Civil Case No. 1:19-cv-212 (M.D. Pa. Nov. 04, 2019) (the plaintiff sued Hershey for race and gender discrimination, but the court found that the severance agreement terms contractually barred the claims).

patently illegal and deeply harmful.¹³ Discrimination based on immutable characteristics such as race, color, national origin, or sex “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone.”¹⁴ More broadly, Hershey’s employment practices foment contention and resentment—they are “odious and destructive.”¹⁵ It truly “is a sordid business, this divvying us up” by race or sex.¹⁶

Thank you in advance for your consideration. Please feel free to contact me if you have any questions.

Sincerely,

/s/ Reed D. Rubinstein

Senior Counselor and Director of Oversight
and Investigations
America First Legal Foundation

Cc: The Honorable Charlotte A. Burrows, Commission Chair
The Honorable Jocelyn Samuels, Commission Vice Chair
The Honorable Keith E. Sonderling, Commissioner
The Honorable Andrea R. Lucas, Commissioner

¹³ We also note that Hershey’s contracting practices facially violate 42 U.S.C. § 1981. Specifically, the corporation claims to be steering tens of millions of dollars in business to persons based on their race, color, sex, and/or national origin. See 2021 ESG Report at 70.

¹⁴ *Brown v. Bd. of Education*, 347 U.S. 484, 494 (1954).

¹⁵ *Texas v. Johnson*, 491 U.S. 397, 418 (1989).

¹⁶ *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part).