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EEO Law and Diversity Update*

By Gilbert F. Casellas

> *The pluralism of our society is mirrored in the workplace, creating endless occasions for offense. Civilized people refrain from words and conduct that offend the people around them, but not all workers are civilized all the time.*
>
> Judge Richard Posner
> writing in *Yuknis v. First Student, Inc*.

Introduction

May 2007 saw major developments from the U.S. Supreme Court on pay equity and the Equal Employment Opportunity Commission (EEOC) on "family responsibilities discrimination." In addition, a global employer with multiple sites operated by different subsidiaries could not avoid liability for a national origin discrimination claim. Subtler, "second generation" discrimination is being alleged by African Americans in two separate lawsuits, one against Bank of America and one against UBS Financial Services. In the UBS case, African American brokers accuse it of racial bias because they were steered to an office known as "the diversity office," which targeted African American customers rather than being integrated into existing branch offices. Finally, it appears that the EEOC is ramping up its E-RACE and systemic case focus around the country.

Significant EEO Court Decisions and Resolutions

Wage Discrimination Challenge Rebuffed

The U.S. Supreme Court limits employees' ability to challenge the discriminatory effects of pay decisions. In a win for employers, the high court strictly construed and applied the statutory time limit for filing a claim for wage discrimination under Title VII. In a 5-4 decision written by Justice Alito, the Supreme Court upheld the Eleventh Circuit's holding that Lilly Ledbetter's Title VII pay

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discrimination claim was untimely. The Court rejected all of her arguments, concluding that:

- the EEOC charging period is triggered when a discrete unlawful employment practice takes place;
- each paycheck constituted such a discrete act;
- current effects of prior discriminatory acts cannot breathe life into prior, uncharged discrimination;
- Ledbetter could not shift the intent from one act (the act that consummates the discriminatory employment practices) to a later act (issuance of paychecks) that was not performed with bias or discriminatory motive; and
- the short EEOC filing deadline reflects Congress' strong preference for the prompt resolution of employment discrimination allegations.

In a dissent written by Justice Ginsburg, the minority argued that the unlawful practice in question was the *current* payment of a salary infected by gender-based discrimination, which occurred each time Ledbetter received a paycheck. In other words, Ledbetter should have been able to allege a single "cumulative" wrong consisting of a succession of acts. *Ledbetter v. Goodyear Tire & Rubber Co.,* U.S. S.Ct., No. 05-1074, May 29, 2007.

Sex and National Origin Claims Allowed Though Separate Companies

An employee of Puerto Rico subsidiary can hold the company liable for harassment and other actions that occurred while on loan to Mexican affiliate. Kathleen Torres-Negron who worked for Merck Sharp & Dhome in Puerto Rico (Merck-PR) was transferred to Merck Sharp & Dhome de Mexico S.A. de C.V. (Merck-Mexico) on a temporary assignment. She claimed that her colleagues at Merck-Mexico made negative and harassing comments about her gender, her U.S. citizenship, her U.S. salary, and her Puerto Rican accent and disparaging comments about her being a Puerto Rican woman. The U.S. District Court in Puerto Rico dismissed her case because she failed to show that Merck-PR was liable for the alleged harassment in Mexico as the alleged harassers at Merck-Mexico were third parties and not agents of her employer, Merck-PR, and that her employer, Merck-PR, had no control over the actions of those working for the Mexico subsidiary. In reversing, the federal appeals court for the First Circuit held that she could proceed under the "single employer" theory because the two nominally separate companies were so interrelated that they constituted a single employer. Of particular

significance were the facts that the parent company, Merck & Co., had centralized human resources and personnel policies, a unified system through which all expatriated employees were funneled, and a company-wide professional ethics policy. *Torres-Negrón v. Merck & Co.,* 1st Cir., No. 06-1260, May 23, 2007.

Sexual Harassment by Different Managers in Different Areas

The federal appeals court for the Seventh Circuit reversed a ruling that had dismissed a sexual harassment hostile work environment claim brought by a female factory worker. The appeals court held that although she had experienced two distinct episodes of hostile work environment harassment in different areas of the plant, she had only one employer, remained within a single chain of command, and the same people controlled how the employer addressed workplace problems. *Isaacs v. Hill's Pet Nutrition,* 7th Cir., No. 06-2201, May 4, 2007.

Sexual Harassment

Sexually derogatory email still considered harassing even if not directed to the victim. A female sales manager's sexual harassment claim was allowed to proceed even though vulgar and offensive emails about her genitalia were not sent to her. In reversing the district court, the federal appeals court for the Tenth Circuit stated: "We have never held, nor would we, that to be subjected to a hostile work environment the discriminatory conduct must be both directed at the victim and intended to be received by the victim." The appeals court also found fault with the trial court's breaking apart the individual incidents and not perceiving the cumulative effect of the bad behavior. *EEOC v. PVNF LLC d/b/a Big Valley Auto & Chuck Daggett Motors,* 10th Cir., No. 06-2011, May 14, 2007.

Accommodating Disabilities

Shift rotation on packaging plant line was an "essential function" of the employee's job that could not be accommodated. The employee sought to be placed on a fixed daytime schedule to accommodate his diabetes which was difficult to control. The employer declined to maintain him on the same shift without hardship to his coworkers and instead offered him a different position that would allow him to work a straight shift. The federal appeals court for the Eighth Circuit in upholding the dismissal of the employee's claim stated that "P&G does not have to exercise the same business judgment as other employers who may believe a straight shift is more productive. It is not the province of the court to question the legitimate operation of a production facility or determine what is the most productive or efficient shift schedule for a facility." *Rehrs v. The Iams Company and Procter and Gamble, Inc.,* 8th Cir., No. 06-1609, May 15, 2007.

Disability

"The ADA is not an affirmative action statute." The federal appeals court for the Eighth Circuit joined with Seventh Circuit holdings and concluded that a disabled individual is not entitled to the job without competing for it with other employees. It held that the ADA "does not require an employer to reassign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate." The decision adds to a split in the circuit courts on the issue. *Huber v. Wal-Mart Stores,* 8th Cir., No. 06-2238, May 30, 2007.

Race

African American truck drivers allowed to pursue class action against Wal-Mart. The two named plaintiffs who were rejected for driver jobs with Wal-Mart Transportation claim that the company's "word of mouth" recruitment policy and subjective hiring produced an adverse impact on African American drivers. They presented expert analyses to show that the proportion of black drivers hired was smaller than the expected proportion based on the number of available black drivers. *Nelson v. Wal-Mart Stores, Inc.,* E.D. Ark., Nos. 2:04-CV-00171 and 2:05-CV-00134, May 16, 2007.

Age

Sprint Nextel agrees to pay $57 million to settle age discrimination claims. The lawsuit was filed in 2003 following a reduction-in-force. The class consisted of nearly 1700 employees who claimed that they were singled out because they were older. *Williams v. Sprint/United Management Co.,* U.S. D.C., Kan., No. 03-CV-02200.

Sexual Harassment

Applebee's Restaurant in Rockford, Illinois settles for $300,000. In the April Update, we reported on EEOC's suit against an Applebee's restaurant in Aurora, Illinois and noted another EEOC suit against an Applebee's in Rockford, Illinois. This settlement involves fourteen current and former bartenders and waitresses who claimed sexual harassment that dated back to 1997 and included inappropriate physical contact. *EEOC v. The Bloomin'Apple Rockford LLC,* N.D. Ill., No. 04 C 50375, May 29, 2007.

Significant EEO Lawsuits Filed

EEOC Accuses Cisco of Race and Color Discrimination Against Job Applicants

Perhaps signaling the start of its systemic litigation focus and its E-RACE Initiative, the EEOC reviewed five separate complaints from African American and Asian American job applicants from Texas and Tennessee and has accused Cisco of demonstrating "an ongoing pattern and practice of not hiring qualified, minority candidates based on their race, color and national origin." The allegations are contained in letters to Cisco and represent the first stage of the administrative process.

EEOC Settles Three Race-Discrimination Cases in Alabama and Mississippi

In another possible example of its E-RACE initiative, EEOC settled three race discrimination lawsuits for a combined total of about $500,000 and injunctive relief, including a class case against Pemco Aeroflex, a Birmingham-based aerospace and defense company, involving nooses, swastikas and other threatening symbols. An EEOC press release on the subject is available [here] [http://www.eeoc.gov/press/5-31-07.html].

African American Brokers Accuse UBS of Operating a Second Class "Diversity Office"

Seven African American brokers claim that UBS Financial Service established and staffed a suburban Washington, D.C. office predominantly with African American brokers in order to draw business from clients of the same race, but that it did not provide it with the same staff and technical support as other offices with mainly white brokers. The complaint states: "Rather than hire and integrate more African-Americans into its existing branch office network, UBSFS decided to create the Largo diversity office as a separate 'ethnic' office to garner business from 'ethnic' clients." The suit claims that the office received less support staff training and resources, that its resident manager had little independent authority and was given little time to manage, train and advise his staff of new, inexperienced brokers. *Barham v. UBS Financial Services Inc.,* D.D.C., No. 1:07-cv-00853.

African American Financial Advisors Accuse Bank of America of "second generation" Bias

In a class action lawsuit filed in the federal district court in Massachusetts, five African-American current and former financial advisors claim that subtler, "second generation" forms of discrimination existed that prevented them from succeeding. The plaintiffs, who worked in Atlanta, St. Louis and South Florida, claim that training, territory and work assignments as well as access to financial accounts were not made available to them and when they complained, were told that clients were more comfortable dealing

with professionals of their own race. Other allegations included being passed over for promotions in favor of white coworkers with fewer qualifications and being provided with fewer resources, such as training, allocation of accounts and administrative support. *Turnley, et al. v. Banc of America, etc.* (D. Mass).

Female Lawyer Sues General Electric for Sex Discrimination

Lorene F. Schaefer filed suit in Connecticut federal court accusing General Electric of systematically discriminating against women in pay and promotions and seeking on behalf of as many as 1700 women more than $500 million in damages. She claims that "an absolute glass ceiling" caused her to be removed as general counsel of GE Transportation. She accuses the CEO of GE Infrastructure-Rail of interrupting and talking over women at meetings, yelling and cursing, inviting male colleagues to poker games and not inviting women to a number of important meetings. She also claims that she was hired into her job at a level below her male predecessor and below that of most other general counsel at comparable or smaller GE units.

Legislative and Policy Pipeline

Pay Equity

Wasting no time, several members of Congress will introduce legislation to address the Supreme Court's recent decision in *Ledbetter v. Goodyear Tire & Rubber*. The day following the decision, Senators Ted Kennedy (D-Mass.), Tom Harkin (D-Iowa), Hillary Clinton (D-N.Y.) and Barbara Mikulski (D-Md.) announced that they will introduce a bill during the week of June 4th to remove "the technical hurdle" created by the *Ledbetter* decision, which will make it harder for employees to challenge continuing and cumulative effects of past discriminatory pay decisions. Representatives Rosa DeLauro (D-Conn.), George Miller (D-Calif.) and Eleanor Holmes Norton (D-D.C.) will introduce companion legislation in the House.

Family Responsibilities Discrimination

The May Update reported on the EEOC's April meeting at which it heard from experts on the issue of work-family balance. At one of its May meetings, following additional testimony from experts on "best practices," the commission issued a new enforcement guidance on how disparate treatment of employees who care for children, parents or other family members may violate Title VII or the Americans with Disabilities Act. The new guidance, titled "Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities," is not intended to create a new protected category of employees. Instead, it is designed to make clear that disparate treatment of employees who need to care for children, parents or

disabled family members can be unlawful discrimination under existing Title VII or ADA precedents.

EEOC Holds Hearing on Testing and Selection Procedures

At a May 16 meeting, the Commission heard from a broad range of experts on emerging trends in workplace testing and selection procedures, including the increased use of personality and integrity tests.

Air Line Pilots Association Drops Opposition to Raising Age Limit to 65

The May Update reported on a lawsuit by three airline pilots challenging the FAA rule that mandates retirement at age 60 and referenced the longstanding opposition of the Air Line Pilots Association (ALPA) to such a change. At a meeting of its executive board on May 24th, ALPA ended its opposition to raising the mandatory retirement age for commercial pilots to 65 from 60. Its action followed approval days earlier by the Senate Commerce, Science and Transportation Committee of an increase in the retirement age as part of a broad federal aviation bill.

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* A version of this article was first published on June 5, 2007 and is available at *DiversityInc.com*. The content that appears here has been reproduced with permission.

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