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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

Courts no longer slow down during the summer, though the number of decisions with particular significance to diversity practitioners were fewer than in previous months. As in the past, this issue attempts to highlight developments in the law, legislation and policy that impact workforce diversity policies and programs as well as risks that may be embedded in well-established anti-discrimination/diversity programs. For example, this month's cases suggest:

- that employers should provide non-English speakers with means to complain about harassment;
- how a cultural diversity report was used to support a reverse discrimination claim; and
- how anti-discrimination and harassment policies without active enforcement can still lead to punitive damages.

On the international front, China's nearly 800 million workers will soon be covered by anti-discrimination laws while France has imposed criminal liability for race discrimination on a major company.

### Select EEO Court Decisions and Resolutions

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### ***Caesars Palace Pays \$850,000 to Settle Sexual Harassment/Retaliation Suit***

Latina kitchen workers claimed that male supervisors forced them to have sex or be fired. The settlement filed in Nevada federal court resolved a case brought by Equal Employment Opportunity Commission (EEOC) on behalf of the female workers, most of whom only spoke Spanish. Under the terms of the settlement, the company will be required to provide training to all employees in English or Spanish, report semi-annually to EEOC about its employment practices for three years and revise its employment policies and procedures. According to EEOC's regional attorney, the lesson for employers is that they "need to ensure that their policies and procedures provide adequate avenues for complaint and redress to non-English speakers." *EEOC v. Caesars Entertainment Inc., et al.*, D. Nev. No. 2:05-cv-00427 (Aug. 20, 2007).

### ***New Orleans District Attorney Loses Reverse Discrimination Appeal***

In a case that received much publicity, a federal appeals court affirmed a decision against New Orleans' African American district attorney who was charged with discrimination by terminating a group of white employees. The suit arose from the district attorney's actions shortly after his election when he appointed a transition team to evaluate non-attorney staff. According to the lawsuit, within 72 days of his election the composition of the non-attorney staff changed from 77 whites and 56 blacks to 27 whites and 130 blacks. The DA's defense was that he was attempting to surround himself with persons, regardless of their race, who he knew supported him. He also had pledged during his campaign to hire a staff reflective of New Orleans' racial composition. The one bit of evidence that hurt the DA's case was a "Cultural Diversity Report" that had been prepared by his transition team. The court treated the report as an affirmative action plan "to focus on race in employment decisions and an intent to achieve a desired racial balance." As such, it violated longstanding Supreme Court precedent and EEOC regulations that prohibit an employer's voluntary efforts to achieve or maintain racial balance absent specific findings of past discrimination and manifest imbalance. *Decorte v. Jordan*, No. 05-31042 (5th Cir. Aug. 15, 2007).

### ***San Diego Firefighters Claim Sexual Harassment after Being Required to Attend Gay Pride Parade***

The four firefighters filed requests for right-to-sue letters with California's Department of Fair Employment and Housing claiming that they were harassed and humiliated by parade goers through

gestures and verbal abuse and were even taunted by Christian groups who were protesting the parade. The firefighters claim that they took part in the parade to avoid any disciplinary action. Although not expressly claiming a religious accommodation claim, one of the firefighters stated, "I was forced into a situation that would compromise what I hold true and what I believe in, my reputation, my character, my integrity, my morals, and my religion." San Diego's fire chief who is a lesbian has apologized for any harassment the firefighters may have suffered. *Requests for Right-to-Sue Notices filed on behalf of John C. Ghiotto, Jason Hewitt, Chad S. Allison and Alexander R. Kane* (Aug. 1, 2007).

#### ***Nationwide Disability Class Action against UPS Is Certified***

A federal judge in Pittsburgh certified a class action on behalf of current and former United Parcel Service (UPS) employees who claimed that they were prevented from returning to work from medical leave unless they were "100 percent healed." In her 200-page decision and first-of-its-kind ruling, the judge permitted the named plaintiffs to proceed with their claims under the Americans with Disabilities Act by using the pattern and practice framework for proof used in Title VII cases. The number of class members could exceed thirty thousand. UPS plans to appeal the class certification ruling. *Hohider v. United Parcel Service Inc.*, No. 04-363 (W.D. Pa. July 16, 2007).

#### ***Sexual Harassment Claims against Caterpillar to Proceed to Trial***

In an action brought by the EEOC on behalf of current and former employees at Caterpillar's Aurora, Illinois plant, a federal judge has allowed five separate claims of harassment to proceed to trial. What may be of particular interest and significance to diversity professionals was the court's ruling to allow the claim of punitive damages to proceed: "[A]lthough the existence of a harassment policy is relevant in evaluating defendant's good faith, it is not alone sufficient to protect defendant from an award of punitive damages.... Defendant must not only develop anti-discrimination policies, but must also show the 'active enforcement of its mandate.'" *EEOC v. Caterpillar Inc.*, No. 1:03-cv-05636 (N.D. Ill.).

### **Global and International Developments**

#### ***L'Oreal Subsidiary Found Guilty of Systemic Race Discrimination***

L'Oreal's Garnier division and its recruitment agency, Ajilon, a subsidiary of Adecco, were found guilty of racism in limiting employment to young, white females for a 2000 shampoo product promotion. Using a code ("bleu-blanc-rouge") signifying the colors of the French flag, Garnier instructed Ajilon to exclude Asian, Arab and

black women. Each company was fined €30,000 and an ex-employee of Adecco was given a three-month suspended sentence. This is the first time a major company has been found guilty of race discrimination in France. Garnier is appealing the ruling to the Cour de Cassation, France's highest court of appeal. The case had been brought by the French group SOS Racisme; its 2006 civil suit against Garnier had been dismissed. President Sarkozy's new justice minister, Rachida Dati, the first woman of North African origin to hold a ministerial post, has directed prosecutors' offices to set up special departments to deal with race discrimination.

#### ***China Bans Job Discrimination***

The new national Employee Protection Law was adopted by the standing committee of the National People's Congress and will allow job applicants to sue employers for discrimination based on race, ethnicity, gender, religious belief, age or physical disability. As of the end of 2005, China had 760 million persons in its workforce and more than 13 million job seekers entering the job market each year.

#### **Legislative and Policy Pipeline**

##### ***Ledbetter Fair Pay Act Passes in the U.S. House of Representatives***

The Ledbetter Fair Pay Act (HR 2831) is designed to overturn the May 29, 2007 U.S. Supreme Court decision that limited the time workers have to file claims for pay discrimination to six months. The Senate version (S 1843) is pending. President Bush has stated that he will veto the measure if passed by both houses of Congress.

##### ***Revised EEO-1 Reports Deadline Looming***

The deadline for filing revised EEO-1 reports with the EEOC is September 30, 2007. Among other things, the form contains new race and ethnicity categories:

- "Black" is now "Black or African-American;"
- "Hispanic" is now "Hispanic or Latino;"
- "Asian Pacific Islander" is divided into "Asian" and "Native Hawaiian or Other Pacific Islander;" and
- a new category entitled "Two or More Races."

There are also two new sub-categories under "Officials and Managers":

- "Executive/Senior Level Officials and Managers" and
- "First/Mid-Level Officials and Managers."

Employers are not required to resurvey employees for the 2007 filing. However, it is recommended that employers update job titles and descriptions and any EEO-1 tracking software to reflect the new changes.

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