

Director's Message:

Welcome to the third issue of the EEO Advocate, a periodic newsletter directed to the union activist who represents members raising discrimination complaints. This newsletter not only examines the latest trends in EEO law, but also connects these developments to the responsibilities of AFGE representatives. I hope you find the information contained in this newsletter helpful. If you are an EEO practitioner and want to suggest topics for future issues, please do not hesitate to let me know at eeo@afge.org. Many of the articles in the EEO Advocate will require more elaboration than is possible to include in a short newsletter, and in those instances we will ask you to continue your full examination of those subjects in a more developed paper posted on the AFGE web site. Good luck in your EEO representation.

Andrea E. Brooks, National Vice President for Women and Fair Practices

FOCUS on the SUPREME COURT

It's Unanimous: Supreme Court Clarifies Employee's Burden in Mixed-Motive Employment Discrimination Cases! **Desert Palace, Inc. v. Costa** **123 S. Ct. 2148 (2003)**

The Supreme Court's recent unanimous holding in Desert Palace could make it easier for employees to prove discrimination for mixed-motive employment discrimination cases, especially in those courts that have previously required "direct evidence" of unlawful discrimination. Note: An employment discrimination plaintiff may establish a case of discrimination by using one of three alternative methods: 1) presenting evidence of discriminatory intent; 2) meeting the three-pronged test set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); or 3) through statistical proof of a pattern and practice of discrimination.

These three alternative methods are frequently labeled as 1) a "mixed-motive" case; 2) "circumstantial evidence" or the presumption method; or 3) "statistical evidence."

Desert Palace is of great importance to the employment discrimination community because it is now settled that employees could collect damages if they establish a mixed-motive case through only circumstantial evidence that their employer discriminated against them based on one of the protected classifications under Title VII. The issue before the Supreme Court was whether an employee must present direct evidence of discrimination in order to obtain a mixed-motive jury instruction under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991 (1991 Act). The Supreme Court, in a unanimous decision, reversed a lower court and held that the employee does not need to submit direct evidence in "mixed-motive" cases.

Under Title VII of the Civil Rights Act of 1964, an employer cannot discriminate against an individual because of that individual's race, color, religion, sex, or national origin. The plaintiff must prove that one of these characteristics was the motivating factor for why an employer made an employee suffer an aggrieved action. In the opinion written by Justice Clarence Thomas, the Supreme Court ruled that when defendants establish legitimate reasons for their employment actions, plaintiffs do not have to produce "direct" evidence of discrimination to reach a jury.

The Background

In the case before the Court, Ms. Catharina Costa sued her employer, Caesar's Palace Hotel & Casino, after the hotel terminated her from her job as a warehouse worker and heavy equipment operator. Ms. Costa was the only woman performing her job and a member of her local Teamsters bargaining unit. The employer

asserted that it terminated Costa because she fought with a male employee and had a prior disciplinary record of problems on the job. Desert Rose only suspended the male employee for 5-days because he had a clean disciplinary record. Ms. Costa, however, claimed that as the only female at the job, she had been “singled out” for disciplinary actions, subjected to numerous “sex-based slurs,” stalked by her supervisor, and treated less favorably than her male counterparts in the assignment of overtime.

The lower court verdict

The District Court found Costa’s evidence sufficient to challenge her employer’s claimed legitimate reasons for her termination and gave the jury a “mixed-motive” instruction. A “mixed motive” instruction applies to cases in which employers take both lawful and unlawful factors (such as a person’s sex, race, color, national origin, disability, age, or reprisal for past EEO claims) into account when making employment decisions. As a result of the judge’s jury instruction, the jury awarded Costa over \$364,000 in back-pay, compensatory damages and punitive damages. The U.S. Court of Appeals for the Ninth Circuit initially vacated the decision, finding that Costa had not presented “substantial evidence of conduct or statements by the employer directly reflecting discriminatory animus.” A full court panel later reinstated the verdict, however, holding that Costa’s evidence was sufficient to warrant a mixed-motive jury charge.

By affirming the judge only decision, the Supreme Court resolved a long-standing conflict between the circuit courts of appeals generated by the Supreme Court’s 1989 plurality decision in Price Waterhouse v. Hopkins, 490 U.S. 228. Some circuits, relying on Justice Sandra Day O’Connor’s concurring opinion in Price Waterhouse, required plaintiffs to produce “direct evidence” of their employers’ discriminatory motivations to secure mixed-motive jury instructions. Although these circuit courts often differed on the precise definition of “direct evidence,” they agreed that they should impose a higher burden of proof to mixed-motive plaintiffs. In Price Waterhouse, Justice O’Connor wrote that plaintiffs should be required to produce direct evidence that an illegitimate consideration was a “substantial factor” in the employment decision. On the other hand, the plurality of four justices ruled that plaintiffs

should only be required to prove that an impermissible consideration was a “motivating factor.”

In Desert Palace, however, the Supreme Court looked directly to the Civil Rights Act of 1991, which was enacted in part to resolve the Price Waterhouse plurality decision. Section 107 of the 1991 Act states that the employee succeeds at the first stage of the litigation if she “demonstrates that race, color, religion, sex, or national origin was a *motivating factor*” (emphasis supplied) for the employment decision, even if other legitimate factors also were taken into account. Justice Thomas found that the use of the word “demonstrates” indicated that direct evidence was not required to get the issue to a jury: “On its face, the statute does not mention, much less require, that a plaintiff make a heightened showing through direct evidence.”

Furthermore, the Desert Palace Court noted that Congress explicitly defined the word “demonstrates” as meeting “the burdens of production and persuasion.” Justice Thomas concluded that Congress’ failure to include in its definition any requirement of direct evidence was “significant” because Congress is often explicit when it imposes heightened proof requirements in other circumstances. The Desert Palace Court concluded that given the “utility of circumstantial evidence in discrimination cases,” there was no reason to depart from the general rule of civil litigation which allows plaintiffs to prove their cases using either direct or circumstantial evidence.

What does this mean for you?

Bottom line: plaintiffs have a better chance now of getting their cases to the jury in the federal courts. For federal employees who bring cases in front of an Administrative Judge in EEOC, there is no immediate change in the current process because juries are not involved and because the EEOC was not requiring direct evidence in mixed-motive cases. But, given the evolving law and inherent confusion in analyzing employment discrimination cases, especially in those situations where there is both evidence of a supervisor’s prejudice and evidence of a legitimate reason for the challenged employment action, the Desert Palace decision provides welcome clarity.

FOCUS on the SUPREME COURT

Affirmative Action Lives!
Grutter v. Bollinger No. 02-241

On June 23, 2003, the Supreme Court issued its opinions in what had come to be known in civil rights circles as the “Michigan Cases.” These two cases (Grutter v. Bollinger and Gratz v. Bollinger) would decide the fate of affirmative action in higher education and had become the most highly anticipated Supreme Court event in nearly a generation. The Michigan cases are not directly related to EEO issues and are not meant to have an impact outside the world of higher education. The disposition in these cases (beyond being of interest in the general world of civil rights) could, however, potentially have an impact at the workplace. The issue at hand (in the Grutter case) is whether the use of race as a factor in student admissions by the University of Michigan Law School is unlawful.

The University of Michigan Law School seeks a “mix of students with varying backgrounds and experiences who will respect and learn from each other.” In other words, diversity is not only a priority, but also educationally beneficial. In crafting their admissions policy, the Law School took pains to remain within the guidelines established in Regents of Univ. of Cal. v. Bakke, the last Supreme Court case to address Affirmative Action in higher education. Regents of Univ. of Cal. v. Bakke, 438 US 265 (1978). Following Justice Powell’s opinion, the Law School reaffirmed its commitment to racial and ethnic diversity, setting a goal of admitting a “critical mass” of historically disadvantaged racial and ethnic groups. The “critical mass” was not an identifiable number of students and was deemed necessary in order to maximize the educational benefits of diversity. Without a “critical mass” of minority students, tokenism would prevent meaningful interaction and stall the educational benefits of diversity. The Law School strove to reach this goal through individualized consideration of all applicants. There would be no formulas, quotas or separate tracks.

Ms. Barbara Grutter, a white woman denied admission at the Law School, alleged that race was a “predominant” factor in admissions and that the Law School had no compelling interest justifying its usage of race in admissions. The Law School argued that there was a compelling

interest in assembling a diverse student body. It was left to the Supreme Court to apply the “strict scrutiny test” and determine whether or not diversity in education is a compelling governmental interest and whether or not the Law School’s use of race in its admissions process was narrowly tailored to achieve that interest.

The Supreme Court (in an opinion authored by Justice O’Connor) held that the educational benefit that flows from a diverse student body is a compelling state interest that can justify the use of race in university admissions. The court granted a significant amount of deference to the Law School’s judgment that diversity was essential to its educational mission. Diversity was held to be necessary because cross-racial understanding helps to break down racial stereotypes and leads to more enlightening classroom discussion. The Court pointed to numerous amici briefs filed in support of diversity and the educational and commercial benefits it provides. The Law School had determined that a “critical mass” of under-represented minorities is necessary in order to further the compelling interest of garnering the educational benefits of a diverse student body. Justices, O’Connor, Stevens, Souter, Ginsburg and Breyer agreed with the Law School’s reasoning.

Although it was established that diversity was a compelling interest, it remained to determine whether the Law School’s utilization of race in its admissions process was narrowly tailored to achieve the educational benefits of diversity. In order for the Law School’s admissions process to be “narrowly tailored” it could not use a quota system, nor could it insulate underrepresented minorities from competition with other applicants. The admissions process could only consider race or ethnicity as a “plus” factor amongst many other applicant factors.

The Supreme Court held that the Law School’s admissions program “bears the hallmarks of a narrowly tailored plan.” Of utmost concern to the Court was that the Law School used “individualized consideration,” employing race and ethnicity in a flexible and non-mechanical fashion. Instead of a quota with fixed percentages, the Court found the Law School’s program to be fluid enough to attain the goal of a “critical mass” of underrepresented minority

students, while evaluating each and every applicant as an individual.

The Supreme Court put an informal twenty-five year deadline on their decision in the Grutter case. Given the overwhelming importance of race in our society, however, one has to wonder if twenty-five years will be enough time to eradicate the institutional problems that make affirmative action necessary in the first place? As Justice Ginsburg makes clear in her dissenting opinion in Gratz v. Bollinger, American society is still shouldered with glaring inequalities. While other Supreme Court justices briefly mentioned societal inequalities, if not entirely ignoring them, Justice Ginsburg wove societal considerations into the fabric of her decision. The fact that Justice Ginsburg acted alone reflects the conservatism of the Supreme Court, and is a tragedy.

***Is All Harassment
Illegal Discrimination?
When is “Hostile Environment” Unlawful
Discrimination?***

If you *liked* the turkey baster, you’ll *love* the discrimination *based-er*. Just as we squirt ample amounts of basting liquid on our roasts—bathing, and re-bathing them in the essence of their flavor, we must saturate our EEO complaints with the notion that the ill-treatment our clients experience is *based on* (or motivated by) their status in protected EEO classifications. (Insert groans here!)

When it comes to Title VII protections, few issues are more crucial to the essence and flavor of a good EEO claim than giving a Judge reason to believe the Agency’s conduct was based on hostility toward an EEO classification. After all, *discrimination* itself is not illegal under Title VII— only discrimination *based on* race, color, national origin, age, sex, religion and disability... is illegal. The distinction is a significant one, for the want of which, many cases have fallen by the wayside.

This phenomenon is nowhere better demonstrated than in the realm of sex harassment created by virtue of a hostile work environment. The basic elements of an actionable hostile work environment are that it be: (1) unwelcome, (2) severely or pervasive,

and (3) *based on* sex. The prevalence of sex discrimination in the workplace has made “sexual harassment,” among other things, a household term. Like any household term, it has lost its legal significance to those who use it in conversation.

This isn’t anyone’s fault, really, as the phrase itself certainly implies something physical or maybe pornographic—“sexual” harassment. The word sex, just as it describes bedroom activity, also serves as the same word to describe the physical characteristics common to men or women. Sex is an act, a verb, as well as an adjective. People *have* sex together, but people also have *a* sex (male or female).

Word games become significant to Title VII EEO advocates, because harassment does not inherently rise to the level of a winning EEO claim until it is *based on* sex, or to put it another way, a “victim of...harassment must show that [they were] harassed *because [of sex].*” *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000).

Thus, slaps on the backside or comments about one’s appearance do not alone prove sex discrimination. The Supreme Court explains that sex harassment is determined, in essence, by “whether members of one sex are exposed to...conditions...which members of the other sex are not.” *Oncale*, 523 U.S. at 80 (Quoting *Harris*, 510 U.S. at 25) (GINSBURG, J., concurring).

In this sense, the phrase “sexual harassment” is misleading. Harassment that is sexual content does not inherently violate Title VII EEO laws, unless the treatment is discriminatorily applied to one sex. “There is a significant distinction between harassment that is sexual in content and harassment that is sexually motivated, and Title VII is only concerned with the latter.” *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 80 (1998).

The evolving law since the *Oncale* case, clearly articulates that the content of the harassment does not alone render it a violation of federal civil rights laws. The law requires that the harassment be: (1) unwelcome, (2) severe and pervasive, (3) based on sex. Only then, do victims recover damages. The content of the harassment speaks to points (1) and (2). But grabs of the rump, unwelcome compliments, or

raunchy conversation are not inherently based on hostility toward a sex. Though they are definitely *sexual*, we still must demonstrate that those grabs and comments are directed at us because of discrimination against our sex. If the opposite sex is subject to that treatment as well, it is a difficult claim to make.

The Fourth Circuit court explains: “[t]itle VII does not provide relief against the... harasser who ‘treat[s] both sexes the same (albeit badly),’” *Lack v. Wal-Mart Stores, Inc.*, 240 F.3d 255, 262 (4th Cir. 2001). As long as the harassment itself is “equal opportunity,” meaning that both men and women are subject to the same treatment, then the law does not favor victory. *Id.*

The evolving law has come to recognize that people of the same sex can harass each other. *Oncale*, at 79. It is entirely possible for a woman to be hostile to the presence of other women in the workplace, and for a man to be hostile toward men. The evolving law since *Oncale* is coming to understand that the sexual orientation of the harasser is also largely irrelevant except as context, because the standard is not whether they were motivated by sexual desire, but rather, whether they were motivated by a disrespect of a sex, be it male or female, their own, or the opposite.

Take the most unwelcome, severely offensive and pervasive management turkey you can find, and baste s/he in a disregard for one sex, and you may have a EEO winning case... or dinner.

A Word About Zero Tolerance...

The equal opportunity harasser who insults and disrespects both men and women with the same frequency and content “might” not be the subject of a winning EEO case or lawsuit; however, they may well still be fired from their jobs.

Many offices have zero-tolerance policies for certain behaviors. All government offices have some sort of civil conduct responsibility. In the sexuality context, a zero-tolerance policies on asking employees for dates may render someone fired. In that same context, calling both a male and a female colleague a “bitch” or grabbing their bottoms may well result in discipline, even a removal. Such conduct clearly violates workplace policies, even though falling short of a federal civil rights violation.

So spread the word, folks: we’ve got to prove the unique experience of discrimination toward one sex (be it male or female) to win at the EEOC, but we’ve merely got to partake in insulting or disrespectful behaviors to get suspended or fired. The scope of behaviors that may result in termination may even include seemingly harmless things like dating or discussions between friends when zero-tolerance policies include them. Check with your union representatives for any zero-tolerance policies in your workplace before you find yourself on the next bus home.

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