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Briefly

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SUPREME COURT FINDS USE OF TERM "BOY" Shows Discrimination

Bill Seale

"The speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage."

In a recent case involving two African-American plaintiffs who sought promotions, the U.S. Supreme Court finds the use of the term "boy" in referring to the plaintiffs, may show evidence of discriminatory animus. Ash v. Tyson Foods, Inc., 97 FEP Cases 641 (February 21, 2006). The Court reverses a lower court ruling which held that the use of "boy" when modified by racial classification like "black" or "white" is evidence of discriminatory intent, but that the use of "boy" alone is not evidence of discrimination. The Supreme Court states that it is true that the disputed word would not always be evidence of racial animus, but it is not always benign. "The speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage." Insofar as a lower court held that modifier or qualifications are necessary in all incidences to render the disputed term probative of bias, the lower court's decision was deemed erroneous.

The two plaintiffs attempted to fill shift manager positions, but two white males were selected instead. The plaintiffs had introduced evidence that their qualifications were superior to those of the two successful applicants, while part of the employer's defense was that the plant with the openings had performance problems and plaintiffs already worked there in a supervisory capacity. Although the Court did not directly address the proper standard in evaluating relative qualifications in promotion cases, the Supreme Court did reject the lower court statement that pretext could only be established through comparing qualifications when "disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face." Instead, the Supreme Court suggested that a more appropriate standard might be to find evidence of pretext if "a reasonable employer would have found the plaintiff to be significantly better qualified for the job."

Editor's Note *- So-called anecdotal evidence can get an employer in a lot of trouble. That is, the use of racial (or other discriminatory) terms in describing the claimant or group of employees, may suggest proof of discriminatory intent. The cases are giving increasing attention to whether potentially neutral words are in effect evidence of discrimination. Even using a term like "you people" might be argued by a plaintiff to suggest a reference to a racial group. Therefore, managers and supervisors must be carefully trained and reminded to use non-controversial terms in referring to employees.*

NEW EEO-1 FORMS Effective In 2007

Mark Travis

The document encourages employers to ask employees to voluntarily report their ethnicity and race for the first time.

The EEOC in November approved a final revision to its major employer reporting form, the EEO-1. Private employers having 100 or more employees and some federal government contractors with 50 or more employees are required to file the EEO-1 annually. The report calls for a workforce breakdown by job category and by race, ethnicity, and sex. The new format will be required for the first time in 2007, which is due September 30, 2007. Employers should use the current format for their 2006 EEO-1 submissions, according to the EEOC.

Continued on page 4

KNOW YOUR ATTORNEY

Marty Conway

Marty Conway is an Associate in the Morristown, Tennessee office of the firm, which he joined in 2004. His practice areas include an emphasis on workers' compensation defense and employment law, including employment discrimination, unemployment claims and FMLA and ADA compliance for employers. Before joining the firm, Conway practiced civil and criminal litigation in Memphis, Tennessee. He received his Bachelor of Arts degree from Mississippi State University in 1993 and his Master of Arts degree in English from Adelphi University in New York in 1995. Conway earned his law degree from Brooklyn Law School in Brooklyn, New York, in 1999. He is a member of the Hamblen County Bar Association. Conway is a member of the Board of Directors of the Lakeway Area Habitat for Humanity and is a member of the Morristown Rotary Club. He is also active in the Hamblen County Young Republicans. He is a past president of the Mississippi State University Alumni Association in Memphis.

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OFCCP ISSUES RULES ON Internet Applicants

Employers with government contracts now have specific rules to follow when it comes to collecting information on internet applicants. On October 7, the OFCCP issued final rules that define an internet applicant and specify exactly what data an employer must gather and keep when employment applications are received by internet. The final rules go into effect on February 6, 2006, but the OFCCP has indicated that federal contractors will be granted a 90-day grace period to update their internal systems to comply with the requirements of the new rule. The new rule is the first written standard on the definition of internet application for the purpose of enforcement of affirmative action requirements for federal contractors under Executive Order 11246.

Gary Wright

...employers who use search functions to hunt for jobs... will have to retain information about the search, the date of the search, the criteria used and the names of the individuals that were produced during the search.

In general, OFCCP requires federal contractors to obtain - where possible - gender, race, and ethnicity data on applicants and employees. The final rule finds what internet applicants' data federal contractors have to save. Under the new definition of an internet applicant, an individual must meet the following four criteria:

1. The person expresses interest in employment through the internet or related technologies.
2. The person is considered by the contractor for employment in a particular position.
3. The person's expression of interest indicates that he possesses the basic qualifications for the job.
4. The person at no point in the selection process, prior to receiving a job offer, removes himself from further consideration or indicates no further interest in the post.

When these four criteria are met, an individual is officially regarded as an applicant and the employer must meet specific data collection and record keeping requirements. The new guidelines go on to require companies to ask internet applicants who meet the basic qualifications of a job to identify their race and gender, just as they are currently obligated to collect for other types of applicants. Federal contractors solicit this information from applicants through an "invitation to self- identify" disseminated to applicants.

Another new requirement is that employers who use search functions to hunt for jobs, such as one for a mechanic, will have to retain information about the search, the date of the search, the criteria used and the names of the individuals that were produced during the search. The new provision requires employers to keep on file for two years the resume of anyone considered for employment.

According to a February study, the internet has become the top source for employment leads, accounting for 51% of new hires in the U.S. as a whole. An on-line survey of hiring practices at 73 U.S. companies reveal that among new employees who are hired by the web, most use the employers' own corporate websites, while newspaper classified

Continued on page 3

OFCCP ISSUES RULES ON INTERNET APPLICANTS
continued from page 2

advertisements are the source of only 5% of new hires. Employers reported in the Booze Allen Hamilton survey that they find the highest quality candidates and receive the highest return on their investment from their own corporate websites and from employee referrals, which provide 19% of new hires. Other successful non-internet sources of new hires are search firms (10%) and campus recruiting (8%). Respondents reported the lowest value from newspaper advertising and job fairs.

Editor's Note *- The final rules on internet applicants are getting mixed reviews by employers. On the one hand, the new rule technically narrows the pool of applicants on whom employers must keep data. That is, contractors no longer have to collect data on every applicant who expresses interest in a job on the internet, just those who meet the company's basic requirements. On the other hand, the data creates a refined pool of applicants so that plaintiffs' attorneys will have access to better evidence that can be used to prove hiring discrimination claims. That is, an employer's own data will show that the applicant met the basic requirements of the job. Employers will have to show a legitimate and non-discriminatory basis for the selection, should a legal claim arise. Note that the new rule requirements apply to government contractors only, not to all employers regulated by the EEOC.*

EEOC INSIDER EXPLAINS Agency Procedures

Jeff Jones

The catagories are "A," "B" and "C."....The vast majority of charges are "B charges."

In a recent audio conference, a former General Counsel of the EEOC, Don Livingston, offered some insights as to the agency's practices.

Most of the EEOC offices require charging parties to make an appointment for a face-to-face meeting with an agency representative, but charges are accepted over the phone or by mail. A charge is not always just a completed charge form, but rather the results of the EEOC's investigation of a charging party's complaint. This includes a "charge intake questionnaire" which is a document the EEOC investigator uses to conduct the investigation. When the investigation is concluded, the investigator advises the charging party regarding whether he or she feels an official charge is warranted, but the

Continued on page 4

OFCCP WANTS TO ELIMINATE Equal Opportunity Survey

Celeste Watson

...it was "only slightly better than chance" and produced high percentages of both false positives and false negatives.

The Clinton Administration in 2000 implemented an equal opportunity survey, requiring that non-construction contractor establishments designated by OFCCP annually complete a survey regarding personnel activities, compensation and tenure data, and the contractor's affirmative action program. The preamble to the 2000 rule said the survey was intended to help OFCCP focus its resources on contractors that are most likely to be out of compliance, and improve contractor self-awareness and encourage self-evaluations. In 2002, OFCCP hired a consulting firm to study whether the data from the EO survey could be used to develop a model to effectively identify contractors that are engaged in systemic discrimination. The report from the consulting firm released during 2005 showed that only 22 of the 125 potential predictor variables derived from the EO survey data had some association with systemic discrimination and that only four variables, when used in combination, were related to the presence or absence of systemic discrimination. Further, even using the predictive power of a model using the four variables, it was "only slightly better than chance" and produced high percentages of both false positives and false negatives. Further, the data on two of the variables already was provided by contractors on the EEO-1 form. OFCCP has now concluded that the EO survey misdirects valuable enforcement resources and does not meet any of the objectives set out, while imposing a substantial burden on contractors. OFCCP therefore proposes to eliminate the EEO survey, through a notice of proposed rule making dated January 20, 2006.

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NEW EEO-1 FORMS EFFECTIVE IN 2007 continued from page 1

The individual reports are confidential and are used by the EEOC to investigate charges of discrimination and to provide information about the employment status of minorities and women. The EEOC shares the data with the OFCCP, state and local equal employment agencies, and several other federal agencies.

The proposed changes to the EEO-1 were generally well-received by employers, but certain civil rights groups expressed opposition to a couple of items. One concern was the new category which asks for those with "two or more races, not Hispanic or Latino." Some civil rights groups also did not like the new, two-question format, initially asking employees about ethnicity. Only those employees who do not identify as Hispanic or Latino would then be asked about their race.

The EEOC did not adopt the position of some civil rights groups which encouraged the EEOC to require racial data for Hispanics, observing that "only a small percentage" of Hispanics identified themselves as a racial minority in the 2000 census.

Another change in the revision is the two new categories of officials and managers. The reporting category of officials and managers will be divided into two subgroups: Executives/Senior Level Officials and Managers and First/Mid-Level Officials and Managers. Still another change encourages self-identification to complete the survey. The document encourages employers to ask employees to voluntarily report their ethnicity and race for the first time. The EEOC adds that "employers may use employment records or visual observation . . . only when employees decline to self-identify."

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EEOC INSIDER EXPLAINS AGENCY PROCEDURES continued from page 3

charging party makes the final decision. Thus, the investigator may prepare the official charge, which in some ways can represent the investigator's opinion, and the charging party signs and swears to the charge.

The investigator then may prioritize the charge. The categories are "A," "B" and "C." "C charges" are those that lack merit and are dismissed without asking the employer for a response. "A charges" are those that the agency feels could lead to important litigation, and "B charges" are in the middle. "A charges" go through a priority investigation unit, while "B charges" get less significant investigation. The vast majority of charges are "B charges."

The EEOC then determines whether the charge has merit, and issues either a finding of "cause" or "can't tell" which often still is referred to by the term "no cause."

Individuals sometimes ask to withdraw a charge for various reasons. The reasons might include a change of intention, a direct settlement with the employer, or coercion by the employer. If the EEOC suspects that coercion is a reason for the request, or perceives that there may be other employees affected by the alleged discrimination, it may refuse to allow the charge to be withdrawn, and may initiate a more thorough investigation.

The combined risks to an employer for an EEOC suit on a charge or a "cause" determination are somewhere around 20%.

Livingston also offers some practical advice. He suggests that employers take measures to prevent retaliation against the charging party, and that he often sends out a polite note to the charging employee, assuring him or her there will be no effect on her or her job, explaining the process for reporting any suspected retaliation, and suggesting the charge is best handled by limiting its publicity. He also cautions about any interviewing of the charging party as part of the investigation, because it might be difficult to do so in a way that the employee does not feel it is retaliatory. He does emphasize the necessity for employers to do their own thorough investigation of the charge.