# THINK YOU KNOW HOW FAR YOU HAVE TO GO FOR YOUR EMPLOYEES? THINK AGAIN.

Two recent decisions have surprised both employers and legal analysts evaluating what measures employers must take under the law.

In one case, the Seventh Circuit Court of Appeals concluded, in *Ekstrand v. School District of Somerset,* that a teacher suffering from "seasonal affected disorder" has a "disability" under the American with Disabilities Act and that a school district had to accommodate that disability by moving the teacher to a room with natural light. The appellate court reversed the lower court's dismissal of the teacher's failure-to-accommodate claim, concluding that, after the teacher had informed the district that natural light was the "key" to improvement in her seasonal affective disorder, the school district was obligated to provide her with a room allowing natural light unless it would impose an undue hardship on the district to do so.

Elsewhere, the Indiana Court of Appeals recently determined, in PS2, LLC v. Childers, that an obese worker who suffered a back injury on the job was entitled to workers' compensation not only for the cost of the back surgery to remedy the injury, but also for the $20,000 to $25,000 cost of lap-band surgery to reduce the employee's weight in order to promote the success of the back surgery. Despite the fact that the employee was obese (340 pounds) before the accident, the court upheld the state workers' compensation boards' decision to require the weight-loss surgery because the obesity was a "pre-existing medical/health condition" that "combine[d] with the accident at work to create a single injury" for which the employee was "entitled to treatment."

These cases are just two recent examples of continuing developments providing that, what may seem to be reasonable limits of how far employers must go to cover costs or provide reasonable accommodations to their employees related to their jobs, may not actually encompass the expansive obligations of employers under the law.

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# WORKPLACE DIVERSITY: DEFINING SUCCESS GOES BEYOND NUMBERS

It has been over 40 years since Congress passed Title VII of the Civil Rights Act of 1964 ("Title VII") prohibiting workplace discrimination on the basis of race, color, religion, gender, and national origin. Since the passage of Title VII, employers have developed diversity and affirmative action programs to open the American workplace to historically excluded

demographic groups (i.e., African-Americans, Hispanics, Asians, and women). Many employers recognize the value of a diverse workforce and the positive effect it can have on the overall performance of their company, however, many companies still measure the success of their diversity programs by the totals on their EEO-1 reports. Employers that measure the success of their diversity programs this way often lack a true understanding of the difference between affirmative action and diversity. These same employers also run the risk of violating the antidiscrimination provisions of Title VII by confusing the concepts of diversity and equal treatment. Although affirmative action and diversity are related concepts, they each have different origins and legal connotations; a distinction that all employers must understand in today's demographically changing society.

## AFFIRMATIVE ACTION – Addressing Past Inequities

The origins of affirmative action can be traced back to President Franklin D. Roosevelt when he issued Executive Order 8802 on June 25, 1941 to address concerns by African-Americans that they had not been given a fair opportunity to bid for government defense contracts following the devastating economic effects of the Great Depression. Although Executive Order 8802 did not provide for any enforcement authority, it did create the Fair Employment Practices Committee to promote the integration of workers into the defense industry regardless of race, creed, color or national origin. Successive presidential administrations continued to address the issue of affirmative action in government contracts, however, it was President Kennedy, with the issuance of Executive Order 10925 in 1961, who for the first time, required government contractors to take "affirmative action" to ensure nondiscrimination. In 1965, President Johnson continued the contract compliance requirements found in President Kennedy's Executive Order 10925 with the signing of Executive Order 11246. President Johnson's Executive Order 11246 also resulted in the creation of what is now known as the Office of Federal Contract Compliance Programs ("OFCCP") that is administered by the U.S. Department of Labor. Affirmative action has, for the most part, been created to permit "those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity." Beyond the contract compliance requirements mandated by the OFCCP or other government regulations, affirmative action under Title VII has also been required as part of (1) a court order after a finding of discrimination or (2) negotiated as a remedy in a consent decree. Consequently, affirmative action is mainly viewed as a government initiated, legally driven policy to deal with racism, sexism, and the other "isms" that have found their way into the American workplace premised upon the concept that everyone shall be treated the same regardless of their race, sex, religion or national origin.

## DIVERSITY – Recognizing the Difference from Affirmative Action

Diversity, on the other hand, is a "business management concept under which employers voluntarily promote an inclusive workplace" by recognizing that employees bring to the

workplace unique perspectives that provide a competitive advantage in an increasingly global economy. The U.S. Supreme Court has recognized that the benefits of diversity "are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints." However, the spectrum of diversity management varies among employers. Some employers embrace diversity with an affirmative action-like model by promoting programs that stress equal opportunity and fair treatment for all employees in compliance with the various equal employment opportunity laws. Success of diversity under this model is measured by recruitment and retention of individuals within various minority groups and is focused on treating everyone the same rather than recognizing the differences between individuals. While achieving the laudable goal of eliminating discrimination in the workplace, diversity under this model falls critically short in recognizing and utilizing the cultural experiences that members from different demographic groups can offer to the overall success of a business. Other employers promote diversity by matching the demographics of their workforce with the demographics of a particular market segment or customer base. The best example of this type of diversity model was utilized by Pepsi in the 1940's when, through the vision of Pepsi's president, Walter S. Mack, and the courageous and precedent-setting work of Edward F. Boyd, Pepsi hired a team of African-American salespeople to tap the full potential of what was then called "the Negro market," valued at $10 billion at the time. This African-American sales staff marketed and sold Pepsi products directly to the African-American community with tremendous success when other competitors ignored this significant market segment, and, instead, directed their marketing and sales efforts to the mainstream. Today, companies still utilize this type of diversity model, drawing upon the experiences and perspectives of a defined demographic group to sell or market to the same or similar group. Many employers correctly recognize that it makes good business sense to make sure that the demographics of their own employees and leaders match that of the customers they serve. However, utilization of this type of diversity model can create a hidden liability under Title VII for employers when the diversity program itself either mandates assignment of a specified protected group to a particular geographical area or the program creates barriers or impediments to advancement by pigeon-holing employees within an organization. A recent example of the liability that an employer may face with this type of diversity model can be found in a class lawsuit against Walgreens alleging that Walgreens assigned managers, management trainees, and pharmacists to low-performing stores and stores in African-American communities because of their race. The employees in this case alleged, among other things, that Walgreens denied promotions to qualified African-American employees within the retail and pharmacy management career path, and to district and corporate positions as well as discriminated against these same employees by denying them the ability to earn comparable compensation when measured with similarly situated white employees assigned to retail stores located in other neighborhoods and communities. In denying any liability whatsoever, Walgreens settled this lawsuit by agreeing to pay $20 million to resolve

all claims amongst an estimated 10,000 class members. The case against Walgreens illustrates that while an employer may be able to claim that a specific demographic group of employees are well represented within its ranks, achieving diversity by assigning a certain demographic group to serve a niche or defined customer base can cause such employees within the group to feel undervalued and exploited while at the same time exposing the company to significant liability for violating the requirements of Title VII. Companies that utilize this type of diversity model, while capable of boasting the employment of a diverse workforce, typically fail to recognize how the unique skills and perspectives of a diverse workforce can be integrated into the overall operation and success of the company.

## EEOC's E-RACE INITIATIVE – A Reason to Achieve Diversity

Given the dramatic and anticipated changes in the demographics of today's workforce together with the U.S. Equal Employment Opportunity Commission's ("EEOC") recognition that color discrimination in employment appears to be on the rise the EEOC launched, earlier this year, a national enforcement initiative known as the E-RACE (Eradicating Racism And Colorism from Employment) initiative. The EEOC has labeled its E-RACE initiative as an "outreach, education, and enforcement campaign" to bring a fresh, 21st century approach to combating racism in the workplace. The EEOC, through this national initiative, will focus its enforcement resources more closely on how employers' policies and practices affects the hiring and advancement of individuals within protected demographic groups. The EEOC's E-RACE initiative, although it represents an enforcement policy and not a change or mandate with regard to Title VII or other current EEO laws, will nonetheless require all employers to adopt strategies to increase the number of minority employees they hire, and also, and perhaps more importantly, will require employers to define more precisely as to how they will promote and advance minority employees within their companies. Employers that decide to ignore the EEOC's current emphasis and enforcement efforts related to race discrimination will subject themselves not only to closer EEOC scrutiny and potentially costly litigation, but will also represent employers that most likely fail to recognize the true benefits of diversity.

## SUCCESSFUL DIVERSITY – A Step Beyond Simple EEO Compliance

The significant demographic changes that the U.S. workforce will experience in the next 10 to 12 years will require many employers to embrace diversity in a different light. Employers that equate the concept of diversity with affirmative action will often view diversity as only a means to comply with the various state and federal anti-discrimination employment laws. This limited viewpoint of diversity is usually self-defeating for the employer as it rarely addresses the prejudices and biases that exist in the workplace nor is it designed to get people to work together. These employers try very hard to treat everyone the same regardless of their background, but never attempt to understand the differences between people that makes each individual unique and how those differences can add value to the business of the company. Employers that adopt this viewpoint of diversity often "nicely wrap"

their diversity program in a list of “best practices” that are designed to avoid liability rather than develop policies and programs that promote the integration of skills and talents from a wide variety of backgrounds. Successful diversity programs, on the other hand, are created upon the premise that having a diverse workforce is a business asset rather than a legal mandate initiated to avoid legal liability. That is, diversity is valued because it is something that benefits the company by allowing it to draw upon a diverse group of individuals that brings a variety of work styles and values to the workplace. Employers with this understanding of diversity adhere to a diverse workforce because they have concluded that having a diverse workforce makes their company stronger, more profitable and more competitive where employees with different perspectives, ideas and values are integrated into how a company approaches the way it conducts its business. These companies also recognize the importance of having a workforce that reflects the racial, ethnic and gender diversity of the company’s customers.

## KEYS TO ACHIEVING DIVERSITY

A successful diversity program, on whatever level, begins with a clear and well-articulated mission statement where diversity is identified as a key component to the mission and goals of the company as a successful competitor in the marketplace. Achieving diversity requires proper management training that stresses that a variety of opinions and perspectives as to how to conduct work is a valued asset to the company. Diversity further requires, obviously, a program to recruit and hire individuals from diverse demographic groups, but also requires a program that mentors these individuals in a manner that allows these individuals to advance upward within the company. Finally, diversity requires an understanding that it is not a euphemism for affirmative action, but rather represents a way to conduct business and to interact with the people that we work with focused on valuing the differences between us. The Supreme Court of the United States has recognized, although never directly holding, that diversity and non-remedial diversity programs are valued within our society to promote and advance the goals of Title VII. Companies that do not strive to achieve diversity in the coming years and do not in-fact attain diversity will be in the cross-hairs of the EEOC through the agency’s E-RACE enforcement initiative. In short, it will be within these companies that prejudices and stereotypical preconceptions will still exist between individuals from different demographic groups. These prejudices and stereotypical preconceptions will emerge in the workplace in the form of different types of unlawful discrimination. Employers, in order to avoid liability and achieve diversity, will have to develop the answers to the following five questions. First, how does my company define diversity? Second, once my company has defined diversity, what plan does my company have to achieve it? Third, what efforts is my company going to make to develop a diverse management team in order to be a successful competitor in a diverse marketplace? Fourth, what plan does my company have to integrate and mentor individuals from different demographic groups that comprise our workforce that allows for the upward mobility of these individuals within the company? Finally, how will my

company allow and foster the exchange of information, ideas and values between different demographic groups to promote the success of the company?

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# “MANAGING AND EMBRACING WORKPLACE DIVERSITY” WEBINAR – JUNE 30, 2009

Today’s workplace is becoming significantly more diverse. It is predicted by 2020, the number of African-Americans, Hispanics, and Asians in the U.S. labor force will increase by 42 million while at the same time the number of Caucasians will only increase by 10 million. This demographic change in the U.S. labor force will create interesting challenges for employers especially as to how your company defines and addresses diversity in the workplace.

Oftentimes, employers confuse the concepts of affirmative action and diversity. These concepts are not same. Diversity is a business management concept under which an employer promotes an inclusive workplace by recognizing that employees bring to the workplace unique perspectives that provide a competitive advantage in an increasingly global economy. The U.S. Supreme Court has recognized that the benefits of diversity “are not theoretical but real, as major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints.”

However, in trying to achieve diversity, there are many traps for the unwary. The EEOC will continue to focus its enforcement resources more closely on how employers’ policies and practices affect the hiring and advancement of individuals within protected demographic groups. Given the EEOC’s enforcement initiatives, employers must take a closer look at its hiring and advancement policies and practices to make sure that they are achieving their diversity objectives and have not created unintended barriers to individuals based upon any protected characteristic.
The Illinois Chamber of Commerce together with O’Neil Cannon will present this important webinar regarding workplace diversity and what employers need to understand about diversity to achieve competitive success.

LEARN:

- About the Changing Demographics of the U.S. Labor Force
- About the Difference between Affirmative Action and Diversity
- A New Understanding for Diversity
- About the EEOC’s E-RACE Initiative
- What is Cultural Competence

- Best Practices for Achieving Workplace Diversity

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# ATTORNEY JOSEPH E. GUMINA JOINS OCHD

Milwaukee, WI (August, 2008) – Joseph E. Gumina joined the Milwaukee law firm O'Neil Cannon to lead their labor and employment practice. He brings with him extensive experience representing management in a vast array of employment and labor matters. Attorney Gumina is licensed to practice law in the states of Illinois and Wisconsin and has represented clients in litigation matters in both state and federal courts, including the federal district courts in Illinois, Indiana, and Wisconsin.

Attorney Gumina has significant experience as a seasoned litigator having tried cases to juries in both federal and state courts achieving resounding success for his clients. He has also represented the interests of his clients in other parts of the country, including Florida, Indiana, Kentucky, Michigan, Minnesota, Mississippi, Nebraska, Ohio, New York, and Utah.

OCHD is a full-service legal practice with offices in Milwaukee, Port Washington and Sheboygan. Founded in 1973, the firm focuses its practice on corporate law, estate and succession planning, real estate and construction, municipal and civil litigation.